

In: KSC-BC-2020-06
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: The President of the Specialist Chambers
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 16 August 2021

Language: English

Classification: Confidential

Thaçi Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release

With Confidential Annex 1 and Public Annex 2

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence of Mr Thaçi seeks the recusal of Judge Ekaterina Trendafilova, President of the Kosovo Specialist Chambers (“KSC”), from the specific judicial task of assigning a Court of Appeals Panel to adjudicate Mr Thaçi’s appeal on provisional release, pursuant to Article 33(1)(c) of the KSC Law, and Rule 169 of the Rules.

2. On 7 December 2020, the President and Specialist Prosecutor of the KSC appeared together at a diplomatic briefing which was not disclosed to the Defence (“December Briefing”). During the diplomatic briefing, Specialist Prosecutor Jack Smith made *ex parte* submissions in the presence of Judge Trendafilova about Mr. Thaçi’s provisional release. Mr. Smith made several false allegations, including that **“any release of Thaci will harm the process as witnesses will be intimidated and threatened by him and his loyal people, by damaging the process and threatening the witnesses.”**¹

3. Mr. Smith’s motivations in making these false allegations against Mr. Thaçi are self-evident. Aware that Mr. Thaçi was not given notice of, or access to, the diplomatic briefing, Mr. Smith used the opportunity to set the expectation in the diplomatic community that, if Mr. Thaçi were to be granted provisional release, witnesses would suffer harm. In making these statements to diplomats (who represent the Specialist Chamber’s sponsors and financial backers) in the presence of Judge Trendafilova, Mr. Smith was also sending a message to Judge Trendafilova and to all of the judges of the Specialist Chambers: if you dare grant provisional release to Mr. Thaçi, the KSC’s international sponsors will hold you personally responsible for any difficulties encountered by any witness, even if Mr. Smith cannot provide any evidence that Mr. Thaçi interfered with witnesses.

¹ See Confidential Annex 1.

4. Judge Trendafilova is reported to have told the assembled diplomats that “**she has been informed by Specialist Prosecutor Jack Smith that he will present the reasons why Thaçi should not be released on bail and then the responsible Judge will take a decision on the matter.**” The nature and extent of such communications between Judge Trendafilova and Mr. Smith about Mr. Thaçi’s provisional release has never been disclosed.

5. The KSC have had accused persons in detention in The Hague since 24 September 2020.² Mr. Thaçi had filed an application for provisional release on 4 December 2020. Thus, when the December Briefing took place, Mr. Smith and Judge Trendafilova were discussing Mr. Thaçi’s provisional release with diplomats while Mr. Thaçi’s provisional release application was pending before the Pre-Trial Judge.

6. Following Mr. Smith’s comments at the December Briefing, every provisional release application by every defendant at the KSC has been denied.

7. His Honour Judge Kai Ambos formed part of the Court of Appeals Panel which adjudicated Mr Thaçi’s appeal on interim release in April 2021. Judge Ambos wrote a separate concurring opinion which specifically addressed the question of State Guarantees, opining that “the existence of a *Third State* that may receive and, if necessary, monitor a released suspect or accused may constitute an important, perhaps decisive offer within the framework of conditional release.” His Honour wrote that “such an offer, if concretely made and supported by guarantees, including from the respective Third State, may shift the balance in favour of conditional release

² Specialist Chambers Press Release, ‘Arrest and Transfer of Salih Mustafa’, 24 September 2020, available at: <https://www.scp-ks.org/en/arrest-and-transfer-salih-mustafa>.

and must therefore be seriously considered by the Pre-Trial Judge or competent Panel.”³

8. On 23 July 2021, the Pre-Trial Judge decided that conditions warranting Mr Thaçi’s ongoing detention were still in place, and ordered Mr Thaçi’s ongoing detention.⁴ This was despite Mr Thaçi’s submissions being supported by two Third State Guarantees, including from a contributing state to the Court. Mr. Thaçi, intending to appeal, filed a request before the President of the Court, Her Honour Judge Ekaterina Trendafilova, seeking a variation of the timeframe within which to do so.⁵

9. In assigning Mr Thaçi’s extension of time request to a Court of Appeals Panel, the President removed Judge Ambos, replacing him with Judge Emilio Gatti. The other two Judges remained the same.⁶ The decision to replace Judge Ambos stands in contrast to President Trendafilova’s policy with respect to the Pre-Trial Judge. In a different briefing on 11 February 2021, Judge Trendafilova is reported to have told assembled diplomats that, “I assigned one Pre-Trial Judge, Judge Nicolas Guillou, to deal simultaneously with all three cases at the pre-trial phase. This will ensure consistency in the jurisprudence and predictability of the practices before the KSC and it will also ensure the sound management of the court’s budget.”⁷

³ KSC-BC-2020-06/IA004/F00005, Separate Concurring Opinion of Judge Kai Ambos, para. 5(ii) (emphasis added).

⁴ KSC-BC-2020-06/F00417, Decision on Review of Detention of Hashim Thaçi, 23 July 2021, paras. 46, 56, 64.

⁵ KSC-BC-2020-06/IA010/F00001, Thaçi Defence Request for an Extension of the Time Limit to Submit its Appeal against the Pre-Trial Judge’s Decision on Review of Detention of Hashim Thaçi, 28 July 2021, paras. 2, 4, 9.

⁶ KSC-BC-2020-06/IA010/F00002, Decision Assigning a Court of Appeals Panel to Consider Request Regarding Time Limits, 29 July 2021, para. 5.

⁷ See Public Annex 2; Euronews, ‘Kosovo could try to move war crimes court to Pristina, judge warns’, first published 15 February 2021, updated 23 February 2021, available at: <https://www.euronews.com/2021/02/15/kosovo-could-try-to-move-war-crimes-court-to-pristina-judge-warns> (“Euronews Article from 15 February”).

10. In this circumstance, there are two possibilities. Either the President's removal of Judge Ambos from the Court of Appeals Panel was linked to his previously expressed openness to the prospect of interim release of Mr Thaçi, or it was not. The relevant question is whether a reasonable observer would believe that it was. The President's *ex parte* communications with the Specialist Prosecutor, including her presence at diplomatic briefings where Mr. Smith made submissions on the merits of Mr. Thaçi's pending provisional release application, would cause a reasonable observer to believe that the removal of Judge Ambos was deliberate.

11. *Ex parte* communications on the substance of the issues under adjudication, or that may otherwise colour the decider of fact's assessment of an issue, are antithetical to the fairness of the proceedings. This is the position both domestically, and before the international criminal courts.⁸ The Code of Conduct for United States Judges, for example, prohibits *ex parte* communications except when specifically authorized by law and, even then, only if there is prompt *post facto* notification of the communication to the other party:⁹

a judge should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.

12. In *Strothers v. Strothers*,¹⁰ the judge in a divorce proceeding conducted an *ex parte* discussion with the husband's attorney regarding the husband's misuse of trust fund money and whether those funds should be considered marital assets. The *ex parte*

⁸ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, 2 June 2010, para. 137.

⁹ Code of Conduct for United States Judges, Canon 3(A)(4), available at: <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

¹⁰ *Strothers v. Strothers*, 30 Mass. App. Ct. 188, 192 (1991).

communication also involved how much child support the husband could afford to pay for his daughter. Because the wife was not present during the communications at issue, and the award of child support was the exact figure given by the husband's counsel during the *ex parte* communication, the *ex parte* communication "may have influenced the court's action." The appellate court therefore vacated the decision and remanded back to the lower court.

13. In *Haluck v. Ricoh Elec., Inc.*,¹¹ after plaintiff's attorney objected to admission of a video, the judge announced he would watch the video during the lunch hour. He then watched the video along with defendant's counsel without notifying plaintiff's counsel that defendant's counsel would be present or inviting her to join them. After watching the video with defendant's counsel, the judge overruled plaintiff's objections to admission of the video. The appellate court ruled that the viewing of the video without plaintiff's counsel present was an improper *ex parte* communication because it dealt with a substantive matter in the case. The appellate court therefore reversed and remanded to a different judge.

14. Canadian courts insist in the context of criminal proceedings that:

Counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case [...] this rule is virtually absolute in order to preserve the confidence of the public in the impartiality of the judiciary and thereby in the administration of justice because *ex parte* communication between judge and counsel will almost invariably raise a reasonable apprehension of bias.¹²

15. The existence of some other legitimate purpose offers no justification for the *ex parte* communication if it touches upon the substance of the matter pending before the

¹¹ *Haluck v. Ricoh Elec., Inc.*, 60 Cal. Rptr. 3d 542, 545 (Cal. Ct. App. 2007).

¹² *R. v. Deleary*, 2007 Carswell Ont 9870, 246 C.C.C. (3d) 382, 84 W.C.B. (2d) 568 at para. 22.

judge.¹³ England,¹⁴ South Africa,¹⁵ New Zealand,¹⁶ Singapore,¹⁷ and Italy,¹⁸ all reflect the same prohibition on *ex parte* communications in adversarial proceedings. The ECtHR has held that depriving one party of access to all the submissions of the other party violates the principle of equality of arms.¹⁹

16. Mr. Smith’s *ex parte* communications with Judge Trendafilova have placed her in a similar position as those in *Strothers* and *Haluck*. Moreover, when the December Briefing took place, both Mr. Smith and Judge Trendafilova were evidently aware that: (1) Mr. Thaçi’s application for provisional release was pending before the Pre-Trial Judge, and (2) that Judge Trendafilova would have the power to assign—and remove—the judges who would rule on any appeal of that application. Accordingly, that Judge Trendafilova had not been assigned to a chamber in the underlying case, or that she is only playing an “administrative or case management role,”²⁰ is of little consequence: Judge Trendafilova has at all times held the power to influence the outcome of the application, including through removal of judges who may express a willingness to entertain provisional release under certain conditions. Mr. Smith’s *ex parte* submissions to her – made in the presence of diplomats in order to reinforce the consequences to judges and the KSC if they were to rule in Mr. Thaçi’s favor – has in the eyes of an objective observer tainted Judge Trendafilova’s participation in the context of Mr. Thaçi’s provisional release applications.

¹³ See e.g. *Haller*, (5th Cir 1969) 409 F.2d 857 (1969), p. 859: “it is improper for the prosecutor to convey information or to discuss any matter relating to the merits of the case or sentence with the judge in the absence of counsel”; *State v. Lotter*, 586 N.W.2d 591 (1998), pp. 609-610.

¹⁴ *R. v. Agar*, 90 Cr.App.R. 318, CA; *R. v. Preston* [1994] 2 A.C. 130, HL; *Edwards and Lewis v. U.K.* (2005) 40 E.H.R.R. 24.

¹⁵ Rule 55 (3), Magistrates’ Court Act; <http://www.saflii.org/za/cases/ZARMC/2011/1.pdf>, p.62.

¹⁶ Guidelines for Judicial Conduct, section (G)(a).

¹⁷ The Subordinate Courts of the Republic of Singapore Practice Directions, Section 21.

¹⁸ Article 13 of the ethical code of the National Judges’ Association.

<http://www.associazionemagistrati.it/codice-etico>. See also Article 3.11 of the “Bologna and Milan Global Code of Judicial Ethics”.

¹⁹ ECtHR, *Lanz v. Austria*, 24430/94, Judgment, 31 January 2002, paras. 62-63.

²⁰ *Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021 (“Decision on Disqualification”), para. 18.

17. As such, for the reasons set out below, Mr Thaçi files the present request for the recusal of President Trendafilova from the specific task of assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release, pursuant to Article 33(1)(c) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rule 169 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").

II. APPLICABLE LAW

18. The independence and impartiality of the Judges of the KSC is a core principle of the Court, guaranteed by the KSC Law, the Rules, and the Constitution of Kosovo,²¹ in accordance with international standards of due process.²²

19. Indeed, the right to a fair and public trial by an independent and impartial tribunal is a fundamental principle of international human rights law, enshrined in Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR"), Article 10 of the Universal Declaration of Human Rights, the United Nations Basic Principles on the Independence of the Judiciary,²³ Article 6(1) of the European Convention on Human Rights ("ECHR"), Article 7(d) of the African Charter on Human and Peoples' Rights, and Article 8(1) of the American Convention on Human Rights. The Human Rights Committee has unambiguously held that "the right to be

²¹ See Article 31(2), KSC Law.

²² Article 3 of the KSC Law provides that the Specialist Chambers "shall adjudicate and function in accordance with [...] e. international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution."

²³ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

tried by an independent and impartial tribunal is an absolute right that may suffer no exception".²⁴ The independence and impartiality of judges is also required by the statutes of all the regional and international criminal jurisdictions.²⁵

20. Before the KSC, Article 1(2) of the KSC Law provides that "Specialist Chambers within the Kosovo justice system [...] are necessary [...] to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo [...]" (emphasis added). Pursuant to Article 6(1) and (4), "A roster of independent international judges shall be established [...]" and "the Judges on the roster shall endeavour not to undertake any activity which could compromise the President of the Specialist Chambers' ability to assign them to exercise functions as a Judge in the Specialist Chambers" (emphasis added).

21. Article 27(1) requires that judges of the Specialist Chambers "be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices. (emphasis added). Thus, before taking up their duties under this Law, Article 36 of the KSC Law requires that the President of the Specialist Chambers and the judges "shall each make a solemn declaration/undertaking that they will exercise their functions independently, impartially and conscientiously" (emphasis added).

22. Rule 20 of the Rules specifies the conditions of recusal or disqualification of judges:

(1) A Judge shall not sit in any case in which he or she has a personal interest or has or has had any involvement which may affect or may appear to affect his or her impartiality, judicial independence or the integrity of the proceedings. The grounds for recusal or disqualification may include:

²⁴ UNHRC, Communication No. 263/1987, M. Gonzalez del Río v. Peru (Views adopted on 28 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 20, para. 5.2.

²⁵ See, e.g., Article 40, Rome Statute.

(a) personal interest in the case, including a spousal, parental or other immediate family interest, a personal, professional or subordinate relationship, with any of the Parties or Victims' Counsel, or situations that may reasonably be perceived as giving rise to conflict of interest; [...]

(d) any other reason which could reasonably appear to affect the Judge's impartiality

[...]

(3) A Party may apply to the President for the disqualification of a Judge immediately, but no later than ten (10) days after the grounds on which the application is based become known to the Party. A Judge whose disqualification is sought may recuse himself or herself after being notified of the application for disqualification. If the President considers that the request is vexatious, misconceived, frivolous or lacking in substance, he or she shall summarily dismiss it as soon as possible. In any other case, the President shall assign a Panel of three Judges to determine whether the Judge should be disqualified.

[...]

(6) If the application concerns the President, the Vice-President shall assume the President's responsibilities under this Rule. (emphasis added)

23. The Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers (the "Code"), in its preamble, recognises that "the independence and impartiality of Judges is fundamental to the protection of the rights of the accused and to ensuring public confidence in a fair and transparent judicial process." Article 3(c) states, "Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence and respect for their judicial office."

24. Article 4 of the Code, relates to impartiality, and provides:

(1) Judges shall exercise their functions impartially and ensure the appearance of impartiality.

(2) Judges shall avoid any conflict of interest, as well as any situation which might reasonably be perceived as giving rise to a conflict of interest.

25. Article 9 relates to public expression and recalls that:

(1) Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.

(2) While Judges are free to participate in public debate on matters pertaining to legal subjects, including academic publications, the judiciary or the administration of justice,

they shall not comment on pending cases, shall ensure that nothing in their conduct evidences disrespect for the views of another Judge or staff member and shall avoid expressing views which may undermine the standing and integrity of the Specialist Chambers.

(3) When exercising their freedom of expression, Judges shall avoid public statements or comments that may undermine the authority of the Specialist Chambers or give rise to reasonable doubt about their impartiality.

III. SUBMISSIONS

A. TIMING OF THE PRESENT REQUEST

26. Rule 20(2) requires a Party to apply for disqualification of a Judge immediately, but no later than ten days after the grounds on which the application are based become known to the Party.

27. The existence of the minutes of diplomatic briefings is a matter of public record, and knowledge. Unsurprisingly, it has received significant press coverage, and the minutes themselves have been circulated widely.

28. The present request for recusal is timely, despite the information having been previously available, because the President can only be asked to recuse herself from fulfilling a judicial role as provided for in Rule 20(1) when she is “serving in [a] judicial capacity in the case”.²⁶ The President’s judicial capacity in the present case commenced with the filing of Mr. Taçi’s appeal on provisional release, which was filed simultaneously with the present request.

29. As the President herself referenced in her Decision on Disqualification, an appearance of bias is case-specific. A finding on the appearance of bias in one case does not automatically disqualify a judge from other cases. It must be shown that the

²⁶ Decision on Disqualification, para. 23.

prior actions of the judge, which allegedly reveal an unacceptable appearance of bias had an impact on his/her impartiality in the case under consideration.²⁷ For the reasons set out below, the President's prior *ex parte* communications with the Specialist Prosecutor on the provisional release of Mr Thaçi give rise to the present request, which only became relevant with today's appeal.

B. THE IMPUGNED CONDUCT

30. On 7 December 2020, a briefing was held by the President, the Specialist Prosecutor, and the Registrar of the Specialist Chambers, with diplomatic missions in Kosovo, in the absence of, and without the knowledge of, any of the accused or their counsel.

31. Notes of this meeting have been circulated ("December Minutes").²⁸ The author of these notes is unknown. Significantly, in response to a request for disqualification on the basis of their contents,²⁹ the President did not submit that the notes were faked, forged, or even inaccurate.³⁰ Her sole response was that the *Haradinaj* Request for Disqualification was "grounded exclusively on their **misinterpretation** of comments made at a routine diplomatic briefing and drawn from an unnamed source's summary notes".³¹ Notably, the President did not explain why she believes the notes to have been misinterpreted.

²⁷ Decision on Disqualification, para. 31, fn. 40, citing ICTY, *Prosecutor v. Mićo Stanišić et al.*, Case No. IT-08-91-A, Judgment, 30 June 2016, paras 32-33.

²⁸ Confidential Annex 1.

²⁹ KSC-BC-2020-07/F00268/RED, Public Redacted Version of Application for Recusal of the President of the Specialist Chambers, Judge Ekterina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II, 28 July 2021 ("*Haradinaj* Request for Disqualification").

³⁰ Decision on Disqualification, para. 20.

³¹ Decision on Disqualification, para. 20.

32. The notes demonstrate that the President and Specialist Prosecutor made statements regarding witness interference, and provisional release, to the assembled members of the diplomatic community, and in front of each other. To avoid any possible allegations of misinterpretation, the Defence hereby extracts in full those sections of the December Minutes, which relate to the questions of witness interference, and provisional release:

(i) **President (Judge Ekaterina Trendafilova)**

'In 2011, the European Union established a Special Investigative Task Force (SITF) to collect evidence related to these allegations. After three years, the Chief Prosecutor of the SITF, Clint Williamson, announced that the evidence obtained was of sufficient weight to file an indictment. In order to address these allegations, there had to be an adequate institution for proper judicial proceedings meeting the international standards of fair trial and the other rights of accused persons, as well as ensuring the security of witnesses.' [page 1, emphasis added]

'Asked if the Court will be allowed to hold proceedings outside The Hague, she said the question was addressed in the Exchange of Letters and later reflected in the Law on Specialist Chambers and Specialist Prosecutor's Office, which provides that the seat of the KSC may be equally in Kosovo and in The Hague. The decision to hold proceedings in the territory where the alleged crimes were committed, however, requires complex consideration of the situation in the country, position of witnesses and overall impact on the proceedings.' [page 2, emphasis added]

'She said referring to the case of Thaçi that **she has been informed by Specialist Prosecutor Jack Smith that he will present the reasons why Thaçi should not be released on bail and then the responsible Judge will take a decision on the matter.** She said that such a decision will be based on the KSC Law and the constitution of Kosovo that includes also the European and international conventions, although Kosovo is not a member of the Council of Europe, thus presenting an interesting and complex legal framework in consideration for this issue.' [page 3, emphasis added]

(ii) **Specialist Prosecutor (Jack Smith)**

'He said that he has been confronted from his first days with attempts to obstruct the Specialist Chambers and Prosecutors Office and their work, mainly by Thaçi, Veseli and people loyal to them in Kosovo's government and outside.

This is the reason why he was forced in June to make a statement to show to the people of Kosovo and the international community the continuous and well-orchestrated efforts by Thaci to hinder the work and administration of justice.

Asked what did Thaci do, he said he was very clear in his statement and he

thanked EU and other countries for making statements that eliminated the obstructions by Thaci.

He said the public support given to Specialist Chambers by Ambassadors in Kosovo has helped the court, because witnesses are appearing to the Specialist Chambers realizing the commitment the international community has towards the Specialist Chambers. Now witnesses who were under immense pressure by Thaci and his loyal people are having confidence more in the work and ability of Specialist Chambers to serve justice to the victims.' [page 3, emphasis added]

'He said that Gucati and Haradinaj have been part of a continuous operation to intimidate the witnesses and that he is convinced both Gucati and Haradinaj acted in coordination with Thaci and Veseli and he is investigating if any link can be proved, although he said environment in Kosovo is difficult to conduct the investigations.' [page 3, emphasis added]

'He said the strategy of the lawyers of Thaci is to delay the trial and get bail based on this, and any release of Thaci will harm the process as witnesses will be intimidated and threatened by him and his loyal people, by damaging the process and threatening the witnesses. He said that the list of witnesses will be kept secret. He asked for countries to agree to relocation agreements with the Specialist Chambers, he said they have already some, but more are needed. He said 37 relocation requests have been made and urged the Ambassadors to pressure their capitals to react faster to this.' [page 4, emphasis added]

33. On 11 February 2021, a further diplomatic briefing was held between the President and EU diplomats in The Hague ("February Briefing").³² Again, notes were taken, and circulated ("February Minutes"). The author of the notes is unknown. Again, the President has never said that the February Minutes were faked, forged, or inaccurate. The Office of the President stated only that the February Briefing was confidential, and that "the [briefing] transcript had been circulated accidentally and was intended for the internal use of diplomatic missions".³³

34. Again, to avoid any suggestion of misinterpretation, the Defence hereby extracts in full those sections of the February Minutes, which relate to the questions of witness interference, and provisional release:

³² Public Annex 2.

³³ Euronews Article from 15 February.

(i) **President (Judge Ekaterina Trendafilova)**

‘While I am pleased to inform that the cases are proceeding in an efficient and expeditious manner, the KSC and the Specialist Prosecutor’s Office (SPO) continue to face a number of challenges. As I previously updated you, the efforts to undermine our institutions has not ceased and will likely increase, in different forms, as the judicial proceedings progress. [...] Similarly, calls have been made to gather signatures to amend the Law on Specialist Chambers and Specialist Prosecutor’s Office, which while legally not possible, could have very problematic consequences if pursued by the Kosovo government. More specifically, attempts could be made to amend the Law to allow for pardons for those who are convicted by the KSC or to move either the seat of the KSC or the archives to Kosovo, or both.

This certainly will put at stake the life, safety and security of people who have or will be willing to cooperate with us. Such changes would, certainly, have a chilling effect on witnesses, who may no longer want to appear, thus making it impossible for the Specialist Prosecutor to continue with his cases. [page 3, emphasis added]

‘Next, the need for comprehensive cooperation agreements with States for the protection of witnesses and, where necessary, the relocation of their families has also been brought to the forefront by the increase in judicial activity and the progression of proceedings. Without these agreements, it will be very difficult if not impossible in some cases to ensure that testimony can be given freely and without any fear. Cooperation is also crucial where States might be approached with requests for the freezing of assets and proceeds as well as for the transfer of persons from the territory of States to the seat of the KSC/SPO.’ [page 3]

35. The December Minutes and February Minutes give an important insight into the communications between the President and the Specialist Prosecutor about the provisional release of Mr. Thaçi. In the December Briefing, the President said that “**she has been informed by Specialist Prosecutor Jack Smith that he will present the reasons why Thaçi should not be released on bail**”, demonstrating that she has engaged in *ex parte* communication on the question of Mr Thaçi’s provisional release.

36. Following this intervention by the President, the Specialist Prosecutor is then recorded as saying that “**the strategy of the lawyers of Thaci is to delay the trial and get bail based on this, and any release of Thaci will harm the process as witnesses will be intimidated and threatened by him and his loyal people, by damaging the process and threatening the witnesses**”.

37. As such, the President was recorded as being present when the Specialist Prosecutor told members of the diplomatic community that provisional release of Mr Thaçi would be a threat to the trial process, and that it will result in witnesses being intimidated and threatened. There is no record in the December Minutes that the President distanced herself from the comments of the Specialist Prosecutor, or gave any indication that this was inappropriate or improper for a Judge to be present while a party to the proceedings makes inflammatory *ex parte* comments which pre-judge an issue in which she will necessarily be involved, even if only through the selection – and removal – of judges who will decide the issue.

C. THE PRESIDENT'S RESPONSE TO THE REVELATION OF THE IMPUGNED CONDUCT

38. The December and February Minutes are inherently and internally credible documents. Regardless, had they been faked, or if they recorded statements that were not accurate, this would have been a very easy thing to establish. Immediately upon their circulation in the media, the Presidency could have issued a statement saying that their contents were untrue. The participants could have been deposed, or given statements, demonstrating that what was recorded in the Minutes did not reflect either the content of the meetings or the statements of the speakers.

39. The responses from the President have been very careful not to challenge or call into question the substance or contents of the Minutes themselves. Rather, they have been characterised as “confidential” documents,³⁴ which should not have been circulated, with the *Haradinaj* Defence accused—without explanation—of “misinterpreting” their contents.³⁵ This gives rise to the inevitable conclusion that their contents are indeed accurate, the impact of which is discussed below.

³⁴ Euronews Article from 15 February.

³⁵ Decision on Disqualification, para. 20.

D. THE IMPUGNED CONDUCT GIVES RISE TO AN UNACCEPTABLE APPEARANCE OF BIAS

40. International and domestic courts applying the same standards, have consistently found that while there is a strong presumption of impartiality attached to a Judge, an unacceptable appearance of bias exists where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. What is of decisive importance, is whether the manner in which the court “infringed the applicant’s right to a fair trial”. In this respect “even appearances may be of a certain importance.”³⁶ It is for the party alleging bias to adduce reliable and sufficient evidence to rebut that presumption, for no Judge may be disqualified on the basis of sweeping or abstract allegations that are neither substantiated nor detailed.³⁷

41. In the present case, the President is recorded as having engaged in *ex parte* conversations with the Specialist Prosecutor about Mr Thaçi’s interim release. She did not distance herself from his comments made in her presence, that Mr Thaçi had worked in coordination with other accused to intimidate witnesses, and that his release would mean witnesses would be threatened and intimidated. Mr. Smith made these submissions in front of representatives of the international community, thus intentionally signalling to Judge Trendafilova that provisional release of Mr. Thaçi would not be well received by the countries that sponsor the court, including through its financing. By allowing Mr. Smith to make submissions to her on substantive issues in a pending case, the President has given “rise to reasonable doubt about [her] impartiality.”

42. The President’s receipt of *ex parte* submissions from Mr. Smith and her own statements both affect, and appear to affect, her impartiality on the question of Mr

³⁶ ECtHR, *Incal v. Turkey*, 41/1997/825/1031, Judgment, 9 June 1998, Reports 1998-IV, pp. 1572-1573, para. 71.

³⁷ Decision on Disqualification, para. 31.

Thaçi's provisional release. Having been part of a presentation by the Specialist Prosecutor to the Court's sponsors in which Mr Thaçi's release was linked to harm to individuals, a reasonable observer would question whether the President still had an open mind on this question, particularly in light of her further allegation of a campaign of destabilisation of the Court itself, involving Mr Thaçi's prior Counsel.³⁸ As such, any objective observer or bystander would apprehend an appearance of judicial bias and impropriety, and a lack of impartiality that cannot be restored.³⁹

43. Judge Ambos' opinion that Third State Guarantees could provide a path to Mr Thaçi's release, puts him at direct odds with the *ex parte* submissions made by Mr. Smith to the President in front of the Court's international sponsors. As such, a reasonable observer would apprehend bias in the President's decision to remove only Judge Ambos as a judge of the Court of Appeals Panel that will hear Mr. Thaçi's second appeal on provisional release.

IV. CONCLUSION AND RELIEF SOUGHT

44. For the above reasons, the Defence:

REQUESTS the President to assign the present request for recusal to the Vice-President, pursuant to Rule 20(6) of the Rules;

REQUESTS the Vice-President to assign a Panel of three Judges to adjudicate the request for recusal, pursuant to Rule 20(3) of the Rules; and

³⁸ December Minutes, p. 2.

³⁹ *Prosecutor v. Issa Hassan Sesay*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para. 15.

REQUESTS the recusal of Judge Ekaterina Trendafilova, President of the Kosovo Specialist Chambers, from the specific judicial task of assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release, pursuant to Article 33(1)(c) of the KSC Law, and Rule 169 of the Rules.

[Word count: 5,682 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 16 August 2021

At Tampa, United States