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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
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Thaçi Defence Request for Reconsideration of the 24 August 2021 Decision on Application for the Recusal of the President

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I. INTRODUCTION

1. The Defence of Mr Thaçi respectfully requests reconsideration of the 24 August 2021 Decision on Application for the Recusal of the President (the "Recusal Decision"),[1] pursuant to Rule 79 of the Rules of Procedure and Evidence ("Rules"). The Defence submits that the Recusal Decision contains several clear errors of reasoning that establish exceptional circumstances which justify reconsideration of the Recusal Decision, not only to vindicate Mr. Thaçi's fundamental rights but also to ensure that the Recusal Decision does not set a precedent that prevents the Specialist Chambers from complying with its obligations under the European Convention on Human Rights ("ECHR").

2. The Defence requests reconsideration of the following findings:

i. That "the President cannot recuse herself or be disqualified from exercising her assignment duties as the Defence requests, under Rule 20 of the Rules";

ii. That the standard for assessing the independence and impartiality of the President is the subjective standard, without regard to the objective standard;

iii. That it was "unreasonable and without merit" to suggest that the statements attributed to the President and the Specialist Prosecutor at the "diplomatic briefing" could affect impartiality of the President and the Appointed Court of Appeals Panel in the eyes of an objective observer;

iv. That it is "misleading" to state that the Specialist Prosecutor made *ex parte* communications to the President; and

[1] KSC-BC-2020-06/F00440, Decision on Application for the Recusal of the President, 24 August 2021.

v. That the Application for the Recusal of the President ("Recusal Application")[2] was not timely.

II. BACKGROUND

3. On 23 July 2021, the Pre-Trial Judge issued his decision on Mr. Thaçi's request for review of detention, and ordered Mr. Thaçi's continued detention ("Detention Decision").[3]

4. On 28 July 2021, the Defence filed a request for extension of time to appeal the Detention Decision ("Extension of Time Request").[4]

5. On 29 July 2021, the President assigned a Court of Appeals Panel to decide on the Extension of Time Request ("Assignment Decision"), assigning Judges Michele Picard, Emilio Gatti and Nina Jorgensen ("Appointed Court of Appeals Panel"). The President specifically stated that the assignment was limited to the purpose of "decid[ing] on the [Extension of Time] Request."[5]

6. On 6 August 2021, the President issued a Decision in the *Haradinaj* case, denying a Defence application to disqualify her and the Vice-President ("Haradinaj Decision").[6]

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[2] KSC-BC-2020-06/F00434, 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, 16 August 2021.
[3] KSC-BC-2020-06/F00417, Decision on Review of Detention of Hashim Thaçi, 23 July 2021, para. 64(a).
[4] 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.
[5] KSC-BC-2020-06/IA010/F00002, Decision Assigning a Court of Appeals Panel to Consider Request Regarding Time Limits, 29 July 2021, para. 5.
[6] KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021, para. 36.

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7. On 16 August 2021, the Defence of Mr. Thaçi filed its appeal against the Detention Decision ("Detention Appeal"),[7] and also filed the Recusal Application.

8. On 24 August 2021, the President issued the Recusal Decision, denying the Recusal Application in all respects.

9. On 26 August 2021, the President assigned Judges Picard, Gatti and Jorgensen to decide the Detention Appeal ("Detention Appeal Assignment Decision").[8]

III. APPLICABLE LAW

10. Rule 79 of the Rules affords the power to reconsider decisions, and provides in relevant part:

> (1) In exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by a Party or, where applicable, Victims' Counsel, or *proprio motu* after hearing the Parties, reconsider its own decisions.

IV. MR. THACI'S RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

11. Central to the President's decisions in both the Recusal Decision and the Haradinaj Decision is her conclusion that the President, "cannot recuse herself or be disqualified,"[9] from exercising her administrative capacity (as opposed to her judicial capacity), even if the President were to conclude that she was not independent or impartial in a particular case. The President makes this conclusion clear when she cites Article 33(6) of the Law on the Kosovo Specialist Chambers ("the Law") for the proposition that "even when the President is disqualified from hearing a matter or has

[7] KSC-BC-2020-06/IA010/F00004, Thaçi Defence Appeal against Decision on Review of Detention of Hashim Thaçi, 16 August 2021.
[8] KSC-BC-2020-06/IA010/F00005, Decision Assigning a Court of Appeals Panel, 26 August 2021, para. 5.
[9] Recusal Decision, para. 15.

other reasons not to sit on the Supreme Court Panel, the President retains her authority to assign a Judge to replace her on that Panel."[10]

12. The Defence submits that the President's conclusion, namely that she cannot recuse herself or be disqualified from exercising her administrative duties, is contrary to the Constitution of Kosovo ("Constitution"), the Law, and the ECHR, and should therefore be reconsidered on the basis that it constitutes a clear error of reasoning. Mr. Thaçi has a right to an independent and impartial tribunal established by law, which is guaranteed to him by Article 31(2) of the Constitution, Article 6(1) of the ECHR, Article 10 of the Universal Declaration of Human Rights ("UDHR") and Article 14 of the International Covenant on Civil and Political rights ("ICCPR"). The ECHR, UDHR, and ICCPR are binding legal authority on the Kosovo Specialist Chambers ("KSC"), as mandated by Article 3.2(e) of the Law and Article 22 of the Constitution. In the event of any conflict between these international instruments and any laws of Kosovo, Article 22 of the Constitution makes clear that the provisions of these international instruments must prevail over the provisions of Kosovo law (including the Law).

13. The jurisprudence of the European Court of Human Rights ("ECtHR") in interpreting the ECHR is also binding on the KSC pursuant to Article 53 of the Constitution, which states, "[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

14. Importantly, the ECtHR has consistently held that the right to an "independent and impartial tribunal established by law" includes a fundamental right to "internal judicial independence." In *Parlov-Tkalčić v Croatia*, the ECtHR stated:

> However, judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This **internal judicial**

[10] Recusal Decision, para. 15.

> **independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court**. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court **may be said to have been objectively justified**.[11]

15. The ECtHR has thus ruled that if a President of a Court, in the exercise of his administrative functions, exhibits a legitimate doubt of a lack of impartiality in appointing judges to a judicial panel, this constitutes a violation of the fundamental rights of the Accused under Article 6(1) of the ECHR. For example, in *Daktaras* v *Lithuania*, the president of the criminal division of the Supreme Court expressed the view that the Supreme Court should overturn a lower court ruling that favoured the Accused. He then proceeded to appoint the three judges of the Supreme Court who would hear the case, as well as the judge-rapporteur.[12] The three-judge panel of the Supreme Court subsequently overturned the lower court ruling, as had been requested by the president who had appointed the panel. The ECtHR found that there was "no evidence" that the appointed judges had a personal bias, but that "it cannot be said that, from an objective standpoint, there are sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure."[13] The ECtHR found that this resulted in a violation of Article 6(1) of the ECHR.

16. Similarly, in *Moiseyev v Russia*, the applicant had been indicted for treason. At trial, the president of the court replaced all the judges of the chamber hearing the case no less than three times. Even though there was no evidence of any personal bias on the part of the appointed judges, the ECtHR considered this to be a violation of Article 6 of the ECHR because the applicant was justified in the impression that the judges

[11] ECtHR, *Parlov-Tkalčić v Croatia,* 24810/06, Judgment, 22 December 2009, para. 86. Emphasis added.
[12] ECtHR, *Daktaras* v *Lithuania,* 65518/01, Judgment, 6 September 2005 ("*Daktaras*"), paras. 17-35.
[13] *Id.*, paras. 31, 36.

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had been replaced because they intended to decide differently from what the president had in mind.[14]

17. The jurisprudence of the ECtHR is therefore clear: a president of a court, while acting in his or her administrative (non-judicial) capacity, must be objectively seen as independent and impartial in the appointment of judicial panels, otherwise the fundamental rights of the Accused under Article 6(1) of the ECHR are violated.

V. FINDINGS FOR RECONSIDERATION

18. The Defence respectfully submits that five findings set out below constitute clear errors of reasoning, and that reconsideration is necessary to avoid injustice.

1. "The President cannot recuse herself or be disqualified from exercising her assignment duties as the Defence requests, under Rule 20 of the Rules"

19. In dismissing both the Recusal Application and the Haradinaj Application, the President concluded that she cannot be disqualified (and cannot recuse herself) from her administrative role of assigning judges to judicial panels, even if she concluded that her independence and impartiality could be questioned:

- "The President cannot recuse herself or be disqualified from exercising her assignment duties as the Defence requests, under Rule 20 of the Rules";[15]
- "[T]he President may recuse herself if deemed necessary pursuant to Rule 20 of the Rules only insofar as it relates to her judicial functions, rather than her administrative functions. In other words, if the President were to 'sit on a case'";[16]
- "In other words, neither the Law nor the Rules foresee disqualification by a party of the President exercising his or her administrative authority, let alone the issuance of prospective administrative decisions or orders. Accordingly, the

[14] ECtHR, *Moiseyev* v *Russia*, 2329/05, Judgment, 14 May 2009 ("*Moiseyev*"), paras. 181-185.
[15] Recusal Decision, para. 15.
[16] Recusal Decision, para. 14.

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> Defence request for disqualification from exercising any future administrative duties as President in this case is hereby dismissed."[17]

20. The President's interpretation of the Law and the Rules puts the KSC at odds with its obligations under the ECHR. The ECtHR rulings above establish that judicial panels can only be established independently and impartially if they are established by presidents who, acting in their administrative capacity, are objectively seen as independent and impartial. If the presidents are objectively not so seen, the court violates the Accused's right to an independent and impartial tribunal under Article 6(1) of the ECHR.

21. The President's conclusion that the Law and the Rules prevent her from recusing herself or being disqualified, even where she is objectively not independent or impartial, would mean that the KSC does not have the ability to remedy a clear violation of Article 6(1) of the ECHR. Such an interpretation of the Law and the Rules is erroneous, warranting reconsideration.

22. Both the Law and the Rules foresee the replacement of the President in her administrative role in the event of the President's "inability to act." Article 32(4) of the Law states that the Vice-President shall assume the duties of the President in the latter's "inability to act." Rule 14 states that if "neither the President nor the Vice-President are able to carry out their functions, subject to Article 32(4) of the Law, the most senior Judge shall assume those functions pursuant to Rule 16(2)."

23. If the President is objectively not independent or impartial in the appointment of judicial panels, she stands in violation of Article 6(1) of the ECHR and is therefore both "unable to act" for purposes of Article 32(4) of the Law, and unable to "carry out [her] functions" for purposes of Rule 14. The legal framework therefore exists for the

[17] Haradinaj Decision, para. 22.

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President to recuse herself or be disqualified, if necessary to ensure the rights of the Accused under Article 6(1) of the ECHR.

24. The President has taken the position that Rule 20 "is confined to the disqualification of a judge sitting on a case, who will be determining the innocence or guilt of an accused."[18] The President concludes that the plain language of the Rule "does not accommodate any other disqualification scenario beyond that of a judge sitting on a case, such as disqualification of a President carrying out his or her administrative functions. In other words, neither the Law nor the Rules foresee disqualification by a party of the President exercising his or her administrative authority, let alone the issuance of prospective administrative decisions or orders."

25. To support this restrictive interpretation, the President cites exclusively to *Karadžić* and *Krajišnik*.[19] But the jurisprudence of the ICTY and other international courts and tribunals is of little value given the ICTY's express declaration that it was not bound by the ECHR or the jurisprudence of the ECtHR.[20]

26. Unlike the ICTY, in the event of a conflict between the jurisprudence of the ICTY (and other international courts and tribunals) and the ECtHR, the KSC is obliged pursuant to Articles 22 and 53 of the Constitution and Article 3(2)(e) of the Law to follow the jurisprudence of the ECtHR. The President's reliance on *Karadžić* and

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[18] Haradinaj Decision, para. 22.
[19] Haradinaj Decision, footnotes 28, 29.
[20] See ICTY, *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 159 ("The Appeals Chamber is not bound by the findings of regional or international courts and as such is not bound by the ECtHR jurisprudence"); *Prosecutor v. Zejnil Delalic et al*., IT-96-21-A, Judgement, 20 February 2001, para. 24 ("[a]lthough the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion"); see also ICTR, *Jean-Bosco Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, 3 November 1999, para. 40 ("Regional human rights treaties, such as the [ECHR] and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal.").

Krajišnik, in contradiction to the jurisprudence of the ECtHR cited above, was a clear error of reasoning.

27. Similarly, in the event of conflict between any provision of the Law or Rules and the jurisprudence of ECtHR, the jurisprudence of the ECtHR must prevail pursuant to Articles 22 and 53 of the Constitution. The President concluded that Article 33(6) of the Law allows her to retain her authority to assign a judge to replace her on a Supreme Court Panel even when she is disqualified from hearing the matter.[21] However, if the President's disqualification results from a need to avoid a violation of Article 6(1) ECHR due to the objective appearance of a lack of independence or impartiality, the Constitution demands that the requirements of the ECHR take precedence over Article 33(6) of the Law.

28. For the foregoing reasons, the President's conclusion on the application of Rule 20 is based on a clear error of reasoning. The Defence requests that the President reconsider the Recusal Decision to avoid injustice, and find that she can recuse herself or be disqualified from her administrative functions pursuant to Article 32(4) of the Law and Rule 14 (or other provisions of the Law and Rules as appropriate), if it is necessary to protect the rights of the Accused under the ECHR, the Constitution, Article 1 of the Law, and other relevant international human rights instruments.

2. The test for assessing the independence and impartiality of the President is the subjective standard, without regard to the objective standard

29. In assessing whether a tribunal is independent and impartial, the ECtHR has established two standards. In *Daktaras*, the ECtHR explained the two standards as follows:

[21] Recusal Decision, para. 15.

> The Court recalls that there are two aspects to the requirement of impartiality in Article 6 § 1 of the Convention. First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, meaning it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see *Academy Trading Ltd and Others v. Greece*, no. 30342/96, § 43, 4 April 2000, unreported).
> […]
> Under the objective test, it must be determined whether there are ascertainable facts, which may nevertheless raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.[22]

30. The ECtHR explained in *Moiseyev* that under the objective standard, "the tribunal must also be impartial from an objective viewpoint, meaning it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality."[23]

31. In the Recusal Application, the Defence did not argue that the President or the Appointed Court of Appeals Panel held personal prejudices or biases such that they were not subjectively impartial. Rather, the Defence cited the objective standard, noting that an "objective observer or bystander would apprehend an appearance of bias."[24]

32. Nevertheless, the President made two clear errors of reasoning in applying the correct standards, which warrant reconsideration. First, she erroneously found that the Defence "questions the integrity of the President and the Judges." The Defence did not do so.

[22] *Daktaras*, paras. 30, 32.
[23] *Moiseyev*, para. 174. Emphasis added.
[24] Recusal Application, paras 16, 42.

33. Second, the President appears only to have applied the subjective, but not also the objective standard, in assessing whether she and the Appointed Court of Appeals Panel could be seen as independent and impartial.[25] The Recusal Decision in two places emphasizes that the impartiality of judges "is presumed" and "cannot easily be rebutted,"[26] citing the ECtHR's Judgment in *Indra v. Slovakia*.[27] But as *Indira* makes clear, this "presumption of impartiality" applies only to the subjective standard. Indeed, *Indira* was a case where the ECtHR ruled that the subjective impartiality of the judge in question was not in doubt, but that the ECtHR nevertheless needed to assess the judge's impartiality under the objective standard.[28]

34. The ECtHR stated that, "[u]nder the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may <u>raise doubts</u> as to his impartiality. In this respect even appearances may be of a certain importance."[29] The ECtHR concluded that the applicant had, under the objective standard, "raised legitimate fears" that the judge "would not approach his case with the requisite impartiality."[30] Accordingly, *Indira* supports the Defence's position that the Defence need not rebut the presumption of the subjective impartiality of the President and the Appointed Court of Appeals Panel in order to prevail on the Recusal Application. Rather, *Indira* holds that the Defence need only establish that "there are ascertainable facts which may raise doubts as to [their] impartiality."

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[25] Recusal Decision, para. 27.
[26] Recusal Decision, paras. 26-27.
[27] Recusal Decision, fn. 29. The Defence notes that the President also cited ICTY jurisprudence in the same footnote. However, as noted above, ICTY jurisprudence is not binding on the KSC, unlike the jurisprudence of the ECtHR. Moreover, as noted above, the ICTY was not bound by the ECHR or the jurisprudence of the ECtHR, so the ICTY's interpretations of the requirements of the guarantee of an independent and impartial tribunal are less persuasive.
[28] ECtHR, *Case of Indira v. Slovakia*, 46845/99, Judgment, 1 February 2005 ("*Indira*"), para. 49.
[29] *Indira*, para 49. Emphasis added.
[30] *Indira,* para 53.

35. Accordingly, the Defence submits that the President committed a clear error of reasoning in only applying the subjective standard to assess the merits of the Recusal Application, and requests that the President reconsider the Recusal Application in light of the objective standard, in order to avoid injustice.

3. It was "unreasonable and without merit" to suggest that the statements attributed to the President and the Specialist Prosecutor at the "diplomatic briefing" could affect the impartiality of the President and the Appointed Court of Appeals Panel in the eyes of an objective observer

36. The President concluded that the "suggestion by the Defence that the comments made by the Specialist Prosecutor in the presence of the President during this meeting affect her impartiality or that of the judges of the KSC is unreasonable and without merit."[31] This conclusion is clearly erroneous for the following reasons.

First, the President appears to have applied only the subjective standard in making this assessment, without regard to the objective standard. As made clear in *Moiseyev,* the question is whether the *ex parte* submissions made by the Specialist Prosecutor to the President about Mr. Thaçi's pending provisional release application in front of the Court's sponsors may raise a "legitimate doubt" about the ability of the President and the Appointed Court of Appeals Panel to be impartial. The Defence does not have to prove that the President or the Appointed Court of Appeals Panel were actually biased in order to prevail on the Recusal Application.

37. The President downplays the importance of the Specialist Prosecutor's *ex parte* submissions at the briefing of 7 December 2020 ("December Briefing") by noting that "[a]ppearances before diplomatic missions during which the Principals provide

[31] Recusal Decision, para. 23.

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updates on matters relevant to each organ are a routine practice at other institutions, which are similarly financed by international or regional bodies and/or States."[32] However, the December Briefing cannot be compared to the briefings provided by other international institutions.

38. Unlike other international institutions, the Principals of the KSC are not legally required to provide any briefing to diplomatic missions of countries other than Kosovo. In contrast, the principals of the ICTY are required to provide annual reports and semi-annual briefings to the entities that created it (the U.N. Security Council and General Assembly), pursuant to Article 34 of the Statute of the ICTY and Security Council Resolution 1534. Likewise, the principals of the ICTR and the International Residual Mechanism ("MICT") must provide reports and semi-annual briefings to the U.N. Security Council and General Assembly pursuant to Article 32 of the ICTR Statute and MICT Statute, and Security Council Resolution 1534. The President of the Special Tribunal for Lebanon ("STL") must submit an annual report to the U.N. Secretary General pursuant to Article 10 of the Statute of the STL.

39. In contrast, nothing in the Law or the Rules requires the Principals of the KSC to deliver an annual report, or briefings, to diplomatic missions. The ICTY, ICTR, MICT and STL all report directly to the organs that lawfully created them. In the case of the KSC, the organ that created the KSC is the Parliament of Kosovo. Accordingly, if the Principals of the KSC wish to deliver annual reports even though they are under no legal obligation to do so, it is unclear why they are not delivering them to the Parliament of Kosovo. For example, one would not expect the president of the Supreme Court of Poland to deliver his annual report to the US Ambassador rather than the parliament of Poland, simply because the United States provides funding for judicial reform in Poland. The President's reliance on Article 4(3) of the Law as a legal

[32] Recusal Decision, para. 24.

basis to provide briefings to third countries on the work of the KSC is clearly misplaced,[33] because Article 4(3) makes no mention of annual reports, let alone delivery of annual reports to representatives of third countries instead of the Kosovo Parliament.

40. Second, the ICTY, ICTR, MICT and STL all deliver their annual reports in full transparency. The reports of the ICTY, ICTR and MICT have always been live-streamed for the entire world to see, with the text of all remarks available in writing to the general public shortly thereafter. Here, the December Briefing was delivered without transparency, to the exclusion of the general public and the Defence. Even more troubling is the President's statement in the Recusal Decision that "a transcript does not exist" of the December Briefing, and therefore "the veracity of the contents of the purported summary cannot be verified."[34] It is unclear why the KSC's Principals did not record in writing the remarks made by the Principals at the KSC's annual briefing, but this practice stands in stark contrast to the full transparency afforded by the ICTY, ICTR, MICT and STL, and the public availability of all remarks delivered at their annual (or semi-annual) briefings.

41. Third, the Defence notes that the President states without elaboration that the summary of the December Briefing upon which the Defence relies, "inaccurately attributes entire passages to the President's presentation and incorrectly reflects what was said," but only does so "at times."[35] Notably, those "times" do not appear to include the specific quotes attributed to her and the Specialist Prosecutor (which were cited in the Recusal Application), the accuracy of which are not disputed by the

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[33] Haradinaj Decision, para. 20.
[34] Recusal Decision, para. 19.
[35] Recusal Decision, para. 19.

President in the Recusal Decision. The President is effectively testifying about the December Briefing while also judging in her own disqualification.

42. Accordingly, it was a clear error of reasoning for the President to conclude that the nature of the December Briefing, and the remarks made by the President and the Specialist Prosecutor at that meeting, did not raise at least an objectively reasonable doubt about the President's ability to remain impartial on the question of Mr. Thaçi's provisional release application. Reconsideration is therefore warranted to avoid injustice.

43. As an aside, the Defence notes that the December Briefing was conducted via videoconference.[36] Because the President states that the "purported summary … cannot be verified" because "a transcript does not exist" of the December Briefing,[37] the Defence understands the President to be asserting that she is unable to verify the accuracy of the summary of the December Briefing upon which the Defence relies because that the KSC did not keep a recording of the videoconference either. If this is not the case, and the KSC is in possession of a video recording of the December Briefing, the Defence requests that the President clarify this point on the record.

4. It was "misleading" to state that the Specialist Prosecutor made *ex parte* communications to the President

44. The President concluded that it is "unreasonable and without merit" to assert that reasonable doubt could exist to an objective observer about her impartiality. She reached this conclusion, in part, because "the assertion that the Specialist Prosecutor made '*ex parte* communications' to the President is misleading."[38] The President based

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[36] KSC & SPO, '2020 Report', 2021 ("2020 Report"), p. 33, available at: https://www.scp-ks.org/sites/default/files/public/content/ksc_online_annual_report2020-eng.pdf.
[37] Recusal Decision, para. 19.
[38] Recusal Decision, para. 25.

this conclusion upon her finding that the "update provided by the Specialist Prosecutor was not directed to the President, nor was it meant to elicit any response or action on her part; it was an update by the Specialist Prosecutor to the members of the diplomatic community at a meeting where she too was present, along with the Registrar."[39]

45. The Specialist Prosecutor's arguments against Mr. Thaçi's pending provisional release application, made in the presence of the President and without the knowledge of the Defence, clearly constituted prohibited *ex parte* communications. Article 11 of the KSC's Code of Professional Conduct prohibits "making contact" with a judge about the merits of a case, "except as appropriate within the context of the proceedings." It makes no exceptions if that contact on the merits was "not directed" to the judge or if it was not "meant to elicit any response or action" on the judge's part, particularly where (as here) the lawyer is aware of the presence of the judge and that the opposing party is not present.

46. Furthermore, the Specialist Prosecutor is a member of the New York Bar, and is therefore on notice of what constitutes prohibited *ex parte* communications with a judge. Rule 3.5 of the New York Rules of Professional Conduct states that a lawyer shall not:

> (2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter **with a judge or official of a tribunal or an employee thereof before whom the matter is pending**, except:
>
> (i) in the course of official proceedings in the matter;
>
> (ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;
>
> (iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

[39] *Id.*

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> (iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts[.]

47. The President was clearly a "[J]udge or official of a tribunal or an employee thereof before whom the matter [was] pending" at the time of the December Briefing, who was in a position to influence "internal judicial independence" of judicial panels and thus to impact Mr. Thaçi's rights under Article 6(1) of the ECHR. The Specialist Prosecutor was thus prohibited from "communicating" with the President about the merits of Mr. Thaçi's provisional release application, regardless of whether he "directed" the comments to her or "meant to elicit any response or action" on her part. The "communication" by the Specialist Prosecutor was clearly not inadvertent: he was aware that the President would be present at the December Briefing, that she was present, and that the Defence was not present. He nevertheless chose to communicate his arguments in her presence.

48. The Specialist Prosecutor's arguments during the December Briefing against Mr. Thaçi's pending provisional release application constituted prohibited *ex parte* communications under the KSC's Code of Professional Conduct and the New York Rules of Professional Conduct. The President committed a clear error of reasoning when she, without citation to any legal authority, asserted that such *ex parte* communications are permitted if the party making them does not "direct" the comments at the judge, or intend to "elicit any response or action on her part." Moreover, the President committed a clear error in making conclusions about the Specialist Prosecutor's intent when making the *ex parte* communications, without holding an evidentiary hearing or otherwise disclosing how she was able to reach conclusions about the Specialist Prosecutor's intent and state of mind.

49. International prosecutors from the ICTY, ICTR, STL, MICT and others have been delivering annual or semi-annual reports to the bodies that established them for over

twenty years.[40] Their remarks are all available in the public domain. None of these international prosecutors ever argued the merits of a matter which was *sub judice* before their courts. The Specialist Prosecutor did so here, and he did so with the general public and the Defence excluded. By "making contact" with the President and "communicating" with her about the merits of the pending provisional release application outside the context of the proceedings, the Specialist Prosecutor made prohibited *ex parte* communications with the President which could raise a reasonable doubt as to the President's ability to be impartial in assigning judges to a Court of Appeal Panel adjudicating an appeal by Mr. Thaçi of the denial of his provisional release.

50. The President's conclusion to the contrary constitutes a clear error of reasoning, and the Defence respectfully requests that the President reconsider her Recusal Decision to avoid injustice.

5. The Recusal Application was timely

51. The President noted that Rule 20(3) of the Rules requires that a request for disqualification should be filed "immediately," and not later than (10) days after the grounds on which the application is based become known to the party." The President concluded that the Defence was aware of the grounds for the Recusal Application "for several months." As a result, the President found that the Recusal Application was not timely because the "arguments proffered by the Defence are directed at the President's supposed 'removal' of a particular Judge from the Court of Appeals Panel," which occurred 18 days before the Recusal Application was filed. The President concluded that the Recusal Application was therefore "out of time" and "could be dismissed."

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[40] See, for example, the *Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda,"* 24 November 2000, available at: https://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-international-criminal-tribunals-former.

52. The Defence recognizes and appreciates that the President did not dismiss the Recusal Application and issued a substantive ruling. Nevertheless, in the interests of development of the KSC's procedural jurisprudence at this early stage of the KSC's work, the Defence seeks reconsideration of the finding that the Recusal Application was not timely.

53. The Recusal Application was clear that the Defence was asking the President to recuse herself from the "specific task of assigning a Court of Appeals Panel to adjudicate Mr. Thaçi's appeal on provisional release,"[41] based on evidence that *ex parte* communications had taken place between the President and Specialist Prosecutor on the pending provisional release application. The Defence did not ask the President to recuse herself generally from the case in its entirety.

54. Accordingly, because the President did not become seized of the Detention Appeal until it was filed by the Defence on 16 August, the Defence could not have asked the President to recuse herself from the decision appointing a Court of Appeals Panel to hear the substance of the Detention Appeal. Article 33(c) of the Law makes clear that the President had no authority to appoint an Appeals Panel until the Detention Appeal was filed. She could not recuse herself from the task of assigning a Court of Appeals Panel to hear an appeal that had not been filed. Any application for recusal prior to the filing of the Detention Appeal would have been premature.

55. The Defence did not challenge the Assignment Decision assigning the Appeals Panel to hear the request for extension of time, nor the President's decision not to appoint Judge Ambos to that Panel. Rather, the Defence's argument was that the December Briefing disqualified the President from involvement in the merits of the

[41] Recusal Application, para. 17.

Detention Appeal. The earliest the Defence could move to seek recusal of the President from assigning judges to hear the merits of the Detention Appeal was when the President was seized of the matter under Article 33(c) of the Law, when the Defence filed the Detention Appeal on 16 August 2021.

56. In light of Article 33(c) of the Law, the Defence requests that the President reconsider whether the Recusal Application was timely, as her conclusion is based on a clear error of reasoning.

VI. CONCLUSION AND RELIEF SOUGHT

57. For the above reasons, the Defence:

REQUESTS the President to reconsider the Recusal Decision and the Detention Appeal Assignment Decision; and

REQUESTS the recusal or disqualification 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 Detention Appeal, pursuant to Article 37(4) and Article 33(1)(c) of the KSC Law, and Rule 14 and Rule 169 of the Rules.

[**Word count: 5,991**]

Respectfully submitted,

Gregory W. Kehoe

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At Tampa, United States