



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 31 August 2021

Language: English

Classification: Public

**Decision on Motions Challenging the Legality of the SC and SPO and Alleging
Violations of Certain Constitutional Rights of the Accused**

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagenda

TABLE OF CONTENTS

- I. PROCEDURAL BACKGROUND..... 2
- II. SUBMISSIONS 5
- III. APPLICABLE LAW 9
 - A. Preliminary Motions 9
 - B. Temporal Mandate of the SC..... 9
 - C. Lawfulness of the SPO Investigation..... 10
 - D. Right to be Tried by a Tribunal Established by Law 11
 - E. Right to an Independent and Impartial Tribunal 11
 - F. Right not to be Tried by an Extraordinary Court 14
 - G. Right to be Presumed Innocent and Tried within a Reasonable Time 15
 - H. Referral to the SCCC..... 15
- IV. DISCUSSION..... 15
 - A. Preliminary Matters 15
 - 1. **Whether the Defence Challenges fall within Rule 97(1)(a) of the Rules** 15
 - 2. **Request for a Public Hearing**..... 18
 - B. Challenges Related to the Legality of the SC and SPO 19
 - 1. **The Temporal Mandate of the SC**..... 19
 - 2. **The Lawfulness of the SPO Investigation** 22
 - C. Alleged Violations of Constitutional Rights..... 26
 - 1. **The Right to be Tried by a Tribunal Established by Law**..... 27
 - 2. **The Right to be Tried by an Independent and Impartial Tribunal** 31
 - 3. **The Right not to be Tried by an Extraordinary Court**..... 43
 - 4. **The Right to be Tried within a Reasonable Time** 44
 - 5. **The Right to be Presumed Innocent**..... 51
 - 6. **Conclusion**..... 55
 - D. Veseli Request for Referral to the SCCC 55
- V. DISPOSITION 56

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 31, 103, 116, and 162 of the Constitution of the Republic of Kosovo (“Constitution”), Articles 3, 19, 21, 25, 27, 28, 30, 31, 32, 33, 39, 49, and 63 of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 4, 21, 22, 47, 75 and 97 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 26 October 2020, the Pre-Trial Judge confirmed the indictment (“Confirmation Decision”) against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (“Mr Thaçi”, “Mr Veseli”, “Mr Selimi”, and “Mr Krasniqi”, respectively, and collectively referred to as the “Accused” or the “Defence”).²

2. On 30 October 2020, the Specialist Prosecutor submitted the indictment as confirmed (“Confirmed Indictment”),³ with redactions as authorised by the Pre-Trial Judge.⁴

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, confidential. A public redacted version was filed on 30 November 2020, F00026/RED.

³ KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. A further corrected confirmed indictment, correcting certain clerical errors, was submitted on 4 November 2020, in strictly confidential and *ex parte* (F00045/A01), confidential redacted (F00045/A02), and public redacted version (F00045/A03). A lesser redacted version of F00045/A02 was submitted on 11 December 2020, F00134, confidential.

⁴ Confirmation Decision, para. 521(c)-(d).

3. On 4 and 5 November 2020, upon order of the Pre-Trial Judge,⁵ the Accused were arrested⁶ and transferred to the detention facilities of the Specialist Chambers (“SC”) in The Hague, the Netherlands.⁷

4. On 12 March 2021, Mr Thaçi filed a motion seeking to dismiss the Confirmed Indictment due to lack of jurisdiction (“Thaçi Motion on Legality of the SC and SPO”)⁸ and filed a further motion setting forth challenges to the legality of the SC as well as alleging certain violations of his rights (“Thaçi Motion”).⁹

⁵ KSC-BC-2020-06, F00027, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders*, 26 October 2020, confidential, with Annexes 1-8, strictly confidential and *ex parte*. Corrected versions of Annexes 7 and 8 were filed on 28 October 2020, F00027/A07/COR and F00027/A08/COR. Public redacted versions of the annexes (F00027/A01/RED, F00027/A02/RED, F00027/A03/RED, F00027/A04/RED, F00027/A05/RED, F00027/A06/RED, F00027/A07/COR/RED, F00027/A08/COR/RED) and the decision (F00027/RED) were filed on 5 November 2020 and 26 November 2020, respectively.

⁶ KSC-BC-2020-06, F00044, Registrar, *Notification of Arrest of Jakup Krasniqi Pursuant to Rule 55(4)*, 4 November 2020, public; F00049, Registrar, *Notification of Arrest of Rexhep Selimi Pursuant to Rule 55(4)*, 5 November 2020, public; F00050, Registrar, *Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4)*, 5 November 2020, public; F00051, Registrar, *Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4)*, 5 November 2020, public.

⁷ KSC-BC-2020-06, F00048, Registrar, *Notification of Reception of Jakup Krasniqi in the Detention Facilities of the Specialist Chambers*, 4 November 2020, public, with Annex 1, public; F00053, Registrar, *Notification of Reception of Hashim Thaçi in the Detention Facilities of the Specialist Chambers and Appointment of Counsel*, 5 November 2020, public, with Annex 1, public, and Annex 2, confidential; F00054, Registrar, *Notification of Reception of Kadri Veseli in the Detention Facilities of the Specialist Chambers and Appointment of Counsel*, 5 November 2020, public, with Annex 1, public, and Annex 2, confidential; F00055, Registrar, *Notification of Reception of Rexhep Selimi in the Detention Facilities of the Specialist Chambers*, 5 November 2020, public, with Annex 1, public.

⁸ KSC-BC-2020-06, F00216, Defence for Mr Thaçi, *Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction*, 12 March 2021, public. This decision will address Mr Thaçi’s arguments regarding the temporal mandate of the SC and the lawfulness of the SPO’s investigation. Thaçi Motion on Legality of the SC and SPO, paras 44-59. Other arguments in this motion have been addressed by the Pre-Trial Judge in a decision rendered on 22 July 2021, *see* KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers* (“Decision on Jurisdictional Motions”), 22 July 2021, public.

⁹ KSC-BC-2020-06, F00217, Defence for Mr Thaçi, *Motion Challenging Jurisdiction on the Basis of Violation of Fundamental Rights Enshrined in the Constitution*, 12 March 2021, public.

5. On 15 March 2021, Mr Selimi¹⁰ and Mr Veseli¹¹ also filed motions raising challenges to the legality of the SC and alleging certain violations of their rights (“Selimi Motion” and “Veseli Motion”, respectively).

6. On 23 April 2021, in line with the deadline set by the Pre-Trial Judge,¹² the Specialist Prosecutor’s Office (“SPO”) submitted two separate consolidated responses pertinent to the submissions concerning, *inter alia*, the legality of the SC and alleging certain rights violations put forth by Mr Thaçi, Mr Selimi, and Mr Veseli.¹³

7. On 14 and 17 May 2021, in line with the respective deadlines set by the Pre-Trial Judge,¹⁴ Mr Thaçi,¹⁵ Mr Selimi,¹⁶ and Mr Veseli¹⁷ filed their replies.

¹⁰ KSC-BC-2020-06, F00219, Defence for Mr Selimi, *Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction – Discrimination*, 15 March 2021, public.

¹¹ KSC-BC-2020-06, F00224, Defence for Mr Veseli, *Preliminary Motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the Basis of Violations of the Constitution*, 15 March 2021, public. This Decision will address paragraphs 1-12, 20-21 of the Veseli Motion. Mr Veseli’s submissions on applicable law are addressed in the Decision on Jurisdictional Motions.

¹² KSC-BC-2020-06, Transcript (rev), 24 March 2021 (“24 March 2021 Transcript”), public, p. 391, lines 11-18.

¹³ KSC-BC-2020-06, F00259, Specialist Prosecutor, *Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigative Deadline, and Temporal Mandate* (“SPO Response F259”), 23 April 2021, public; F00260, Specialist Prosecutor, *Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations* (“SPO Response F260”), 23 April 2021, public. Submissions regarding subject matter jurisdiction and the CoE Report have been addressed in the Decision on Jurisdictional Motions, paras 107-142.

¹⁴ 24 March 2021 Transcript, page 391, lines 11-18; KSC-BC-2020-06, F00296, Pre-Trial Judge, *Decision on Veseli Defence Request for a Time Limit Variation*, 14 May 2021, public.

¹⁵ KSC-BC-2020-06, F00304, Defence for Mr Thaçi, *Thaçi Defence Reply to “Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate”* (“Thaçi Reply to F259”), 14 May 2021, public; F00305, Defence for Mr Thaçi, *Thaçi Defence Reply to “Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations”* (“Thaçi Reply to F260”), 14 May 2021, public.

¹⁶ KSC-BC-2020-06, F00307, Defence for Mr Selimi, *Selimi Defence Reply to “Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations”* (“Selimi Reply”), 14 May 2021, public.

¹⁷ KSC-BC-2020-06, F00308, Defence for Mr Veseli, *Veseli Defence Reply to Prosecution Response to Preliminary Motion Challenging Jurisdiction on the Basis of Violations of the Constitution* (“Veseli Reply”), 17 May 2021, public.

II. SUBMISSIONS

8. Mr Thaçi submits that the temporal mandate of the SC and SPO has expired,¹⁸ and the SPO had no constitutional or legal basis to conduct new and additional investigations as the permitted duration of such investigations has been used up by the Special Investigative Task Force (“SITF”).¹⁹ Mr Thaçi also submits that his right to a fair and impartial hearing within a reasonable time,²⁰ his right to be presumed innocent,²¹ as well as his right to be tried by an independent and impartial tribunal established by law²² have been violated.²³ Mr Thaçi argues that the gravity and cumulative nature of these violations result in a legal impediment to jurisdiction and require dismissal of the charges against him and his release.²⁴ Mr Thaçi asserts that the only available, effective remedy is refusal by the SC to exercise jurisdiction.²⁵

9. Mr Selimi submits that the structure and composition of SC personnel is in contradiction to the proper establishment and functioning of the SC as a Kosovo domestic court, thus exceeding the authority given by the Constitution and amounting to a violation of Article 14 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).²⁶ Mr Selimi further requests an oral hearing on these issues.²⁷

10. Mr Veseli submits that the Law is *ultra vires* and has fundamentally infringed the principle of legality by effectively turning the SC into a *de facto* extraordinary court as opposed to a specialised one in violation of Article 103(7) of the Constitution.²⁸

¹⁸ Thaçi Motion on Legality of the SC and SPO, paras 44-52.

¹⁹ Thaçi Motion on Legality of the SC and SPO, paras 53-59.

²⁰ Thaçi Motion, paras 7-14.

²¹ Thaçi Motion, paras 30-35.

²² Thaçi Motion, paras 36-51.

²³ Thaçi Motion, paras 1, 52-53.

²⁴ Thaçi Motion, para. 2.

²⁵ Thaçi Motion, para. 54.

²⁶ Selimi Motion, paras 2, 5-19.

²⁷ Selimi Motion, para. 20.

²⁸ Veseli Motion, paras 1-2, 5-20.

Mr Veseli argues that, while the Constitutional Court of Kosovo (“KCC”) has already considered whether the creation of the SC was in violation of Article 103(7) of the Constitution,²⁹ it did so prematurely because it did not assess the Law.³⁰ Mr Veseli submits that there are now cogent reasons to revisit the finding of the KCC and, accordingly, requests that the matter be referred to the Specialist Chamber of the Constitutional Court (“SCCC”).³¹

11. The SPO responds that Mr Thaçi’s submissions regarding the permitted period for conducting criminal investigations³² and the temporal mandate of the SC³³ are without merit as they rely on inapplicable legal provisions and ignore authoritative pronouncements of the SCCC.³⁴ The SPO submits that the Defence submissions should be rejected in full.³⁵

12. With respect to alleged violations of the rights of the Accused, such as the right to an independent and impartial tribunal established by law,³⁶ the right to be presumed innocent,³⁷ and the right to be tried within a reasonable time,³⁸ the SPO responds that no violations of applicable human rights norms have been demonstrated and Defence submissions in this regard should be rejected in full.³⁹ The SPO argues that, in any case, only exceptional cases of extremely serious human rights violations could ever justify a court setting aside its jurisdiction.⁴⁰ The SPO additionally argues that

²⁹ Kosovo Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo Proposed by the Government of the Republic of Kosovo and Referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318*, KO 26/15 (“KCC Judgment”), 15 April 2015.

³⁰ Veseli Motion, para. 3.

³¹ Veseli Motion, paras 4, 21.

³² SPO Response F259, paras 23-29.

³³ SPO Response F259, paras 30-32.

³⁴ SPO Response F259, para. 2.

³⁵ SPO Response F259, para. 33.

³⁶ SPO Response F260, paras 3-22.

³⁷ SPO Response F260, paras 29-33.

³⁸ SPO Response F260, paras 34-42.

³⁹ SPO Response F260, paras 1, 44.

⁴⁰ SPO Response F260, paras 26-28.

challenges to the legality of the SC do not constitute jurisdictional challenges within the meaning of Rule 97(1)(a) of the Rules and could be dismissed on that basis alone.⁴¹ The SPO further contends that Mr Selimi's submissions on the employment practices of the SC should be summarily dismissed as it is unclear the legal basis upon which the application is being made and/or the persons whose rights are at issue.⁴² The SPO also argues that Mr Selimi's request for an oral hearing should be denied as he has had sufficient opportunity to set out his arguments in writing.⁴³

13. Mr Thaçi replies that the SPO disregards the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 ("KCPC") when assessing the legal deadline for the conclusion of the criminal investigation.⁴⁴ As regards the temporal mandate of the SC, Mr Thaçi avers that the SCCC jurisprudence upon which the SPO relies is nothing more than *obiter dicta* and therefore the Pre-Trial Judge should make findings on this matter or refer the question of the temporal mandate of the SC to the SCCC.⁴⁵

14. As concerns the SPO's inadmissibility claim, Mr Thaçi replies that the SPO's position is not compatible with Article 6(1) of the ECHR.⁴⁶ Mr Thaçi further replies that, at the time of the ruling of the KCC, the Law was not subject to review,⁴⁷ the KCC defined "extraordinary court" without reliance on any authority,⁴⁸ and the SPO has misrepresented European Court of Human Rights ("ECtHR") case law concerning the right to be tried by an independent and impartial tribunal established by law.⁴⁹ Mr Thaçi further argues that the prior Specialist Prosecutor's removal from office was in violation of Article 35(5) of the Law.⁵⁰ Mr Thaçi additionally replies that the Council

⁴¹ SPO Response F260, para. 2.

⁴² SPO Response F260, paras 23-24.

⁴³ SPO Response F260, para. 43.

⁴⁴ Thaçi Reply to F259, paras 23-28.

⁴⁵ Thaçi Reply to F259, para. 29.

⁴⁶ Thaçi Reply to F260, para. 1.

⁴⁷ Thaçi Reply to F260, para. 2.

⁴⁸ Thaçi Reply to F260, para. 3.

⁴⁹ Thaçi Reply to F260, paras 4-6.

⁵⁰ Thaçi Reply to F260, paras 11-15.

of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 (“CoE Report”) cannot be treated in isolation and its endorsement by the SC and its representatives violates his right to be presumed innocent.⁵¹ Mr Thaçi argues that the “substantially affected” standard in relation to the right to be tried within a reasonable time encompasses events prior to the filing of charges and even before a formal investigation has begun.⁵² Mr Thaçi further asserts that the SPO has not met its burden with regard to explaining the length of proceedings and thus an assumption must be made that the elapsed time fails the standard of Article 6(1) of the ECHR.⁵³

15. Mr Selimi replies that his arguments regarding employment practices of the SC go directly to the issue of whether the SC are an independent and impartial tribunal established by law.⁵⁴ Mr Selimi further replies that his arguments are not raised on behalf of Kosovo Albanians, but rather implicate his personal rights.⁵⁵ Mr Selimi argues that the SC’s employment practices violate national Kosovo law as well as Articles 6 and 14 of the ECHR⁵⁶ and that the absence of judges and staff from Kosovo amount to a fundamental irregularity which compromises the fairness of proceedings.⁵⁷ Mr Selimi reiterates his request for an oral hearing and dismissal of the Confirmed Indictment.⁵⁸

16. Mr Veseli replies that a challenge to the legality of the SC necessarily entails a challenge to the jurisdiction of the court and falls within Rule 97(1)(a) of the Rules, which does not define jurisdictional challenges.⁵⁹ Mr Veseli nevertheless defers to the Pre-Trial Judge as to whether to consider his submissions as filed under Rule 75 or

⁵¹ Thaçi Reply to F260, paras 16-20.

⁵² Thaçi Reply to F260, paras 21-25.

⁵³ Thaçi Reply to F260, paras 26-28.

⁵⁴ Selimi Reply, paras 3-10.

⁵⁵ Selimi Reply, para. 11.

⁵⁶ Selimi Reply, paras 12-29.

⁵⁷ Selimi Reply, paras 29-30.

⁵⁸ Selimi Reply, paras 1, 31.

⁵⁹ Veseli Reply, para. 2.

Rule 97(1)(a) of the Rules.⁶⁰ In any case, the SCCC should consider the compatibility of the Law with the Constitution.⁶¹ Mr Veseli argues that the SC are a *de facto* extraordinary court as exemplified by the European Commission for Democracy through Law (“Venice Commission”) criteria and the parallels the SPO makes with other international courts is inapposite.⁶²

III. APPLICABLE LAW

A. PRELIMINARY MOTIONS

17. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall have the power to review an indictment, rule on any preliminary motions, including challenges to the indictment and jurisdiction, and make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

18. Pursuant to Rule 97(1) of the Rules, the Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which: (a) challenge the jurisdiction of the SC; (b) allege defects in the form of the indictment, and (c) seek severance of indictments.

B. TEMPORAL MANDATE OF THE SC

19. Pursuant to Article 116(1) of the Constitution, decisions of the KCC are binding on the judiciary and all persons and institutions of Kosovo.

20. Pursuant to Article 162(13) of the Constitution, the mandate of the SC and the SPO shall be for a period of five (5) years, unless notification of completion of the mandate in accordance with Law No. 04/L-274 occurs earlier.

⁶⁰ Veseli Reply, paras 3-4.

⁶¹ Veseli Reply, paras 5-14, 21.

⁶² Veseli Reply, paras 15-20.

21. Pursuant to Article 162(14) of the Constitution, in the absence of notification of completion of the mandate under paragraph (12), the mandate of the SC and the SPO shall continue until notification of completion is made in accordance with Law No. 04/L-274 and in consultation with the Government.

22. Pursuant to Article 49(1) of the Law, the SCCC shall be the final authority for the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the SC and the SPO.

C. LAWFULNESS OF THE SPO INVESTIGATION

23. Pursuant to Article 3(2)(b) and (c) of the Law, the SC shall adjudicate and function in accordance with, *inter alia*, the Law as the *lex specialis* and other provisions of Kosovo law as expressly incorporated and applied by the Law.

24. Pursuant to Article 3(4) of the Law, any other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into the Law shall not apply to the organisation, administration, functions or jurisdiction of the SC and SPO. The Law shall prevail over any and all contrary provisions of any other law or regulation.

25. Pursuant to Article 19(2) of the Law, the Rules shall reflect the highest standards of international human rights with a view to ensuring a fair and expeditious trial taking into account the nature, location and specificities of the proceedings to be heard by the SC. In determining its Rules, the SC shall be guided by the KCPC.

26. Pursuant to Rule 4 of the Rules, the Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the KCPC.

27. Pursuant to Rule 47(1) of the Rules, if the Specialist Prosecutor does not file an indictment with the SC pursuant to Article 38(4) of the Law within a reasonable time

after the person became a suspect and was notified thereof, the suspect may request the Specialist Prosecutor to terminate the investigation against him or her.

D. RIGHT TO BE TRIED BY A TRIBUNAL ESTABLISHED BY LAW

28. Pursuant to Article 103(7) of the Constitution, specialised courts may be established by law when necessary.

29. Pursuant to Article 162(1) of the Constitution, to comply with its international obligations in relation to the CoE Report, Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo. The organisation, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office shall be regulated by this Article and by a specific law.

E. RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

30. Pursuant to Article 162(10) of the Constitution, appointment and oversight of Judges and prosecutors and the oversight and administration of the Specialist Chambers and Specialist Prosecutor's Office shall be in accordance with a specific law.

31. Pursuant to Article 25(3) of the Law, the Rules on the Assignment of SC Judges from the Roster of International Judges ("Rules on Assignment")⁶³ shall be adopted by the SC Judges in Plenary as soon as possible after their appointment and their placement on the Roster of International Judges ("Roster").

32. Pursuant to Article 27(1) of the Law, the SC Judges shall be persons of high moral character, impartiality and integrity. They shall be independent in the performance of

⁶³ KSC-LD-2017-02, *Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judge* ("Rules on Assignment"), 21 March 2017, public.

their functions and shall not accept or seek instructions from any government or any other source.

33. Pursuant to Article 28 of the Law, an independent selection panel shall be responsible for the assessment of judicial candidates and selection for appointment of judges for the Roster, as well as for making recommendations for the appointment of the President and Vice-President of the SC ("Selection Panel"). The Selection Panel shall be composed of three international members, with at least two members being international judges with substantial international criminal experience. Following consideration of qualified candidates, the Selection Panel shall finalise a list containing the names of those they recommend for the position of Judge at the SC. The Selection Panel shall forward this list to the Head of European Union ("EU") Common Security and Defence Policy Mission ("Appointing Authority") as its recommendations for the appointment of SC Judges on the Roster. The Appointing Authority shall appoint the persons on the Selection Panel's List as SC Judges and place them on the Roster for the duration of the existence of the SC.

34. Pursuant to Article 30(3) of the Law, if assigned from the Roster to hear a pre-trial, trial, court of appeal or supreme court phase of a case or to hear a constitutional referral in accordance with Article 33 of the Law, the Judge shall be assigned for a term of four years or until the completion of the phase of the proceedings to which he or she is assigned, if that phase completes earlier.

35. Pursuant to Article 31(1) of the Law, the SC Judges shall be independent in the performance of their functions.

36. Pursuant to Article 31(4) of the Law, no Judge can be dismissed unless the other Judges, by absolute majority, find that he or she has ceased to fulfil the requirements of Articles 27 and 31 of the Law.

37. Pursuant to Article 32(1) and (4) of the Law, based on the recommendation of the Selection Panel, the Appointing Authority shall appoint a President and Vice-President of the SC from among the SC Judges to serve on a full-time basis.

38. Pursuant to Article 32(3) of the Law, the President of the SC shall be responsible for the judicial administration of the SC and other functions conferred upon him or her by this Law.

39. Pursuant to Article 33(1) of the Law, the President of the SC shall assign judges from the Roster in accordance with the Rules on Assignment of SC Judges.

40. Pursuant to Article 33(4) of the Law, having been assigned as Pre-Trial Judge or to a panel for a matter, a Judge may not sit on another panel at a different phase of the same matter.

41. Pursuant to Article 63(1) of the Law, the SC and the SPO shall have a budget which shall not come from the budget of Kosovo.

42. Pursuant to Rule 21(2) of the Rules, following the resignation or death of a Judge, or the notification of such medical conditions preventing a Judge from personally submitting his or her resignation, the President shall notify the Appointing Authority if the number of Judges on the Roster decreases below a level that would impede the operation of the SC.

43. Pursuant to Rule 22 of the Rules, dismissal from the Roster in accordance with Article 31(4) of the Law, any other disciplinary measure as well as the governing procedure shall be regulated in the Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers ("CoJE").⁶⁴

44. Pursuant to Rule 4 of the Rules on Assignment, the assignment of Judges shall be an objective and transparent process and shall ensure the efficient, effective and timely

⁶⁴ KSC-BD-01/COR2, *Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers*, 14 March 2017, public.

operation of the SC. Rule 4(2) of the Rules on Assignment further provides that the President shall be guided by objective criteria, such as experience, expertise, seniority, gender and geographical representation, as well as the individual preferences and availability of judges. Rule 4(3) of the Rules on Assignment further provides that previous activities of a Judge that might cast doubt on his or her impartiality or affect the integrity of the specific proceedings shall be taken into account.

45. Pursuant to Article 18(2) and (3) of the CoJE, the Disciplinary Board shall consist of three members, two of whom at least shall be from the judiciary. The third member may be a senior appointee of the EU. The President shall not be a member of the Board. The Disciplinary Board shall elect a chairperson. The Disciplinary Board shall conduct an inquiry into the allegations contained in the Complaint transmitted by the President.

46. Pursuant to Article 21 of the CoJE, where Judges have concluded that one or more allegations pursuant to Article 13 of the CoJE have been established, the Plenary shall decide by absolute majority of the Judges on the Roster permitted to vote on the dismissal of the Responding Judge from the Roster, in accordance with Article 31(4) of the Law. The dismissal from the Roster shall have immediate effect. The Responding Judge shall cease to be part of the SC, including with respect to any unfinished cases to which he or she was assigned.

F. RIGHT NOT TO BE TRIED BY AN EXTRAORDINARY COURT

47. Pursuant to Article 103(7) of the Constitution, no extraordinary court may ever be created.

G. RIGHT TO BE PRESUMED INNOCENT AND TRIED WITHIN A REASONABLE TIME

48. Pursuant to Article 31 of the Constitution and Article 21 of the Law, everyone, in the determination of a criminal charge against him or her, is entitled to, *inter alia*, be presumed innocent until proved guilty beyond reasonable doubt and to be tried within a reasonable time by an independent and impartial tribunal established by law.

H. REFERRAL TO THE SCCC

49. Pursuant to Article 49(4) of the Law, in accordance with Article 113(8) of the Constitution, a Pre-Trial Judge or Panel of the SC may refer questions of constitutional compatibility of a law to the SCCC when the Judge or Panel is uncertain as to the compatibility of the contested law with the Constitution and their decision in that case depends on the compatibility of the law at issue.

50. Pursuant to Rule 75(5) of the Rules, Parties and Victims' Counsel are not entitled to submit a motion for referral pursuant to Article 49(4) of the Law and motions filed to that effect shall not be considered. This shall not preclude the Panel from making a referral in accordance with Article 49(4) of the Law, or the Accused or Victims' Counsel from making a referral in accordance with Article 49(3) of the Law.

IV. DISCUSSION

A. PRELIMINARY MATTERS

1. Whether the Defence Challenges fall within Rule 97(1)(a) of the Rules

51. Before all else, it is necessary to determine the nature of the motions submitted by the Defence. The Defence has advanced certain constitutional issues as part of their litigation on preliminary motions linking them, expressly or implicitly, to the challenge to jurisdiction. According to Mr Thaçi, the violations of his fundamental

rights affected the integrity of the judicial process to such a degree warranting the refusal to exercise jurisdiction as the only means through which redress can be provided to the Accused.⁶⁵ Mr Selimi argues that due to the SC's discriminatory employment policy, the SC have no jurisdiction to adjudicate the charges against him, and requests that the indictment against him be dismissed.⁶⁶ Mr Veseli raises constitutional issues related to the SC's nature and applicable law and, while challenging the jurisdiction of the SC, requests that the matter be referred to the SCCC.⁶⁷ The SPO argues that challenges which relate to the legal basis or foundation of the SC do not constitute a jurisdictional challenge within the meaning of Rule 97(1)(a) of the Rules, and should therefore be dismissed on this basis alone.⁶⁸

52. Mr Thaçi replies that the SPO's inadmissibility claim is not compatible with the fact that the "established by law" or judicial independence requirements of Article 6(1) of the ECHR must be satisfied at every judicial instance and Rule 97(1)(a) of the Rules cannot usurp his fundamental right to an effective remedy.⁶⁹

53. Mr Veseli replies that a challenge to the legality of the SC is tantamount to a challenge to its jurisdiction inasmuch as Rule 97(1)(a) of the Rules does not provide any definition of what is meant by challenges to jurisdiction.⁷⁰

54. Article 39(1) of the Law stipulates that the Pre-Trial Judge can rule on *any* preliminary motions, including but not limited to challenges to the indictment and jurisdiction. Rule 97(1) and (3) of the Rules provides further specificity on the regime applicable to the most usual preliminary motions, namely to distinguish those preliminary motions where an appeal lies as of right (i.e. those challenging the jurisdiction of the SC) from those requiring certification before an appeal is granted.

⁶⁵ Thaçi Motion, paras 53-54.

⁶⁶ Selimi Motion, paras 2-3, 20(a) and (b).

⁶⁷ Veseli Motion, paras 1, 21. *See also* KSC-BC-2020-06, Transcript, 21 July 2021, public, p. 520, lines 6-15.

⁶⁸ SPO Response F260, para. 2.

⁶⁹ Thaçi Reply to F260, para. 1.

⁷⁰ Veseli Reply, para. 2.

Rule 97(1)(a) of the Rules does not define jurisdictional challenges. However, Articles 6 through 9 of the Law set out the traditional bases for jurisdiction: subject matter, temporal, territorial, and personal.⁷¹ Challenges related to the legality of the SC and the SPO or alleged violations of the Accused's constitutional rights do not fit into these four traditional categories of jurisdiction. While in some instances it has been found that a challenge to jurisdiction could encompass broader questions of an institution's legality,⁷² in other instances jurisdiction has been much more narrowly defined.⁷³ The Pre-Trial Judge considers that the Accused's challenges do not amount to questions of jurisdiction as they do not fall within the plain meaning of Articles 6 through 9 of the Law and therefore do not constitute jurisdictional challenges.

55. However, while the Pre-Trial Judge will not address the above-mentioned challenges within the rubric of Rule 97(1)(a) of the Rules, the Pre-Trial Judge will address the challenges set forth by the Parties pursuant to his power under Article 39(1) of the Law.

⁷¹ See also Confirmation Decision, para. 31.

⁷² ICTY, *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, [Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction](#), 2 October 1995, para. 6; ICTR, *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Trial Chamber, [Decision on the Defence Motion on Jurisdiction](#), 18 June 1997, para. 6.

⁷³ It is noted that narrower concept of jurisdiction at the ICTY and ICTR followed an amendment of the Rules which defined jurisdictional challenges. ICTR, *Nzirorera v. The Prosecutor*, ICTR-98-44-AR72, Appeals Chamber, [Decision Pursuant to Rule 72\(E\) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations](#), 10 June 2004, paras 9-10; ICTY, *Prosecutor v. Tolimir*, Appeals Chamber, IT-05-88/2-AR72.2, [Decision on Zdravko Tolimir's Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest](#), 12 March 2009, public, paras 11-12; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal](#), 7 December 2009, public, para. 8; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/FT/AC/AR90.1, Appeals Chamber, [Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal"](#), 24 October 2012, para. 18. In relation to rights violations falling outside the scope of jurisdictional challenge see ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-722, Appeals Chamber, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19\(2\)\(a\) of the Statute of 3 October 2006](#) ("Lubanga Appeal on Jurisdiction"), 14 December 2006, public, paras 21-22, 24.

56. The Pre-Trial Judge accordingly finds Mr Thaçi's, Mr Veseli's and Mr Selimi's challenges related to the legality of the SC and the SPO or their constitutional rights to be admissible.

2. Request for a Public Hearing

57. Mr Selimi requests the Pre-Trial Judge to schedule an oral hearing in order to grant the Defence the opportunity to be heard.⁷⁴ The SPO responds that Mr Selimi's request is completely unsubstantiated and shall be therefore dismissed.⁷⁵

58. The Pre-Trial Judge recalls that, while within the legal framework of the SC certain hearings on a given issue are strictly necessary, for instance initial appearances of suspects and status conferences on disclosure,⁷⁶ in other instances the holding of a hearing is discretionary.⁷⁷

59. The Pre-Trial Judge notes that Mr Selimi did not submit any specific observations in support of his application for an oral hearing. Having regard to the extensive and exhaustive written submissions provided by the Parties, the Pre-Trial Judge does not find it necessary to hold an oral hearing.

60. The Pre-Trial Judge accordingly dismisses Mr Selimi's request for an oral hearing.

⁷⁴ Selimi Motion, para. 20(c); Selimi Reply, para. 31(c).

⁷⁵ SPO Response F260, para. 43.

⁷⁶ Article 41(5) of the Law; Rule 92 of the Rules (initial appearances); Rule 96 of the Rules (status conferences).

⁷⁷ Rule 95(2)(d) of the Rules. KSC-BC-2020-06, F00178, Pre-Trial Judge, *Decision on Kadri Veseli's Application for Interim Release*, 22 January 2021, public, para. 62; F00150, Pre-Trial Judge, *Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions*, 16 December 2020, public, para. 18.

B. CHALLENGES RELATED TO THE LEGALITY OF THE SC AND SPO

1. The Temporal Mandate of the SC

61. Mr Thaçi submits that, pursuant to Article 162(13) of the Constitution, the maximum temporal mandate of the SC and SPO expired on 3 August 2020, five years after the adoption, by the Assembly of Kosovo, of Amendment no. 24 to the Constitution, which introduced Article 162 thereof.⁷⁸ As a result, all work carried out by the SC and SPO after that date, including the issuance of the Confirmed Indictment, is unconstitutional.⁷⁹

62. Mr Thaçi further recalls that the SCCC recently held that the amendment proposed in August 2020 diminished the rights and freedoms in Chapter II of the Constitution by failing to refer to the Exchange of Letters.⁸⁰ Mr Thaçi argues that should there be a conflict between the Exchange of Letters and the Constitution, the Constitution should prevail.⁸¹ He opposes a reading of Article 162(14) of the Constitution that provides for an indefinite and continuing mandate to the SC absent a notification of completion.⁸² Mr Thaçi argues that the notification, to which Article 162(14) of the Constitution refers, only applies to the minimum temporal mandate, while the maximum temporal mandate of the SC is set by Article 162(13) of the Constitution.⁸³ Finally, Mr Thaçi argues that the SC are entitled to review its own

⁷⁸ Thaçi Motion on Legality of the SC and SPO, paras 44-45.

⁷⁹ Thaçi Motion on Legality of the SC and SPO, para. 46.

⁸⁰ Thaçi Motion on Legality of the SC and SPO, para. 47, referring to KSC-CC-2020-11, F00015, SCCC, *Judgment on Referral of Proposed Amendments to the Constitution of Kosovo* ("Judgment on Referral"), 26 November 2020, public, para. 69. The President of Kosovo's and the High Representative's exchange of letters in 2014 were ratified by the Assembly of Kosovo. See Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission, 23 April 2014. These letters will be collectively referred to as "Exchange of Letters".

⁸¹ Thaçi Motion on Legality of the SC and SPO, para. 48.

⁸² Thaçi Motion on Legality of the SC and SPO, para. 49.

⁸³ Thaçi Motion on Legality of the SC and SPO, paras 50-51.

temporal mandate and should do so to comply with his right to be tried by a tribunal established by law.⁸⁴

63. The SPO responds that Mr Thaçi disregards the authoritative findings of the SCCC, which have established that the SC's mandate is not limited to five years and shall continue until the Council of the EU notifies Kosovo of its completion.⁸⁵ The SPO also refers to the wording of the Exchange of Letters, which specifies that the SC's mandate shall continue until the completion of proceedings.⁸⁶ The SPO asserts that it was the very amendment proposed by then President Thaçi which would have removed important safeguards concerning the continued "secure, independent, impartial, fair and effective" operation of the SC.⁸⁷

64. Mr Thaçi replies that the SCCC reasoning relied upon by the SPO is mere *obiter dictum*.⁸⁸ In support of his view, Mr Thaçi's points to the fact that the operative part the SCCC's judgment was silent on the matter and only considered, pursuant to Article 144(3) of the Constitution, whether any of the rights or freedoms in Chapter II of the Constitution had been diminished.⁸⁹ Mr Thaçi accordingly considers that the Pre-Trial Judge should address the question of the expiration of the SC's mandate or refer the matter to the SCCC.⁹⁰

65. The Pre-Trial Judge considers that the SCCC, in referring to then President Thaçi's argument that there was ambiguity in Article 162(13) and (14) of the Constitution, which would suggest the duration of the mandate of the SC was limited to a five-year period, stated that "it was unable to discern any such possible interpretation of those provisions".⁹¹ The SCCC then went on to determine in unequivocal terms that

⁸⁴ Thaçi Motion on Legality of the SC and SPO, paras 51-52.

⁸⁵ SPO Response F259, para. 30.

⁸⁶ SPO Response F259, para. 31.

⁸⁷ SPO Response F259, para. 32.

⁸⁸ Thaçi's Reply to F259, para. 29.

⁸⁹ Thaçi's Reply to F259, para. 29.

⁹⁰ Thaçi's Reply to F259, para. 30.

⁹¹ Judgment on Referral, para. 65.

Article 162(13) and (14) of the Constitution provides that, in case of no notification of completion, the SC's mandate shall continue beyond the initial five years until notification of completion.⁹² The SCCC also determined that the continuation of the mandate of the SC and SPO is in line with the Exchange of Letters, which specifies that completion of the SC's mandate continues until Kosovo is notified by the Council of the EU that investigations and proceedings resulting therefrom have been concluded.⁹³

66. As then President Thaçi referred to "ambiguity" in relation to the length of the SC's mandate as a basis for putting forward his proposed amendments to paragraphs 13 and 14 of Article 162 of the Constitution,⁹⁴ the SCCC assessment of the SC's mandate cannot be considered *obiter dictum*, but rather an essential step in determining the implications of Mr Thaçi's proposed amendments and whether these amendments diminished the fundamental rights and freedoms of persons involved in the proceedings.⁹⁵ In addition, the Pre-Trial Judge notes that the SCCC addressed the technical error in Article 162(14) of the Constitution, whereby reference is erroneously made to paragraph 12 as opposed to paragraph 13.⁹⁶

67. The Pre-Trial Judge recalls that decisions of the SCCC are binding, pursuant to Article 116(1) of the Constitution and Article 49(1) of the Law, without distinction as to the sections of such judgments. As the SCCC elaborated in detail on the temporal mandate of the SC, it is of little consequence that its conclusions were not repeated in the disposition of the relevant judgment. The Pre-Trial Judge therefore finds no basis for reassessing matters that have already been decided upon by the SCCC.

⁹² Judgment on Referral, para. 66.

⁹³ Judgment on Referral, para. 67.

⁹⁴ Judgment on Referral, paras 41-42, 65-67.

⁹⁵ Judgment on Referral, paras 68-69.

⁹⁶ Judgment on Referral, para. 70.

68. The Pre-Trial Judge accordingly dismisses challenges in relation to the temporal mandate of the SC.

2. The Lawfulness of the SPO Investigation

69. Mr Thaçi submits that the SPO's investigation into the CoE Report lacked any legal or constitutional basis, as the letter of Article 1(2) of the Law prevented the SPO from conducting new investigations.⁹⁷ More specifically, Mr Thaçi argues that, as long as neither the Law nor the Rules regulate the period within which an investigation can be carried out, pursuant to a combined reading of Articles 3(2)(c) and 19(2) of the Law and Rule 4 of the Rules, the deadlines set out in the KCPC shall apply.⁹⁸ Article 159 of the KCPC provides that an investigation shall be completed within two years and be automatically terminated in the absence of an indictment or a suspension.⁹⁹ Against this backdrop, Mr Thaçi avers that investigations related to the CoE Report were initiated by the SITF in 2011 and were governed, at the time, by the KCPC.¹⁰⁰ Mr Thaçi argues that, while the SITF declared in 2014 that it had enough evidence to support an indictment,¹⁰¹ an indictment was only submitted in 2020, nine years after the initiation of the investigation.¹⁰² Mr Thaçi accordingly asserts that no indictment has been filed within the two-year deadline laid down in the KCPC and consequently the SPO's "new" investigation should be declared unlawful and the charges based thereon dismissed.¹⁰³

70. The SPO responds that Mr Thaçi's reliance on the KCPC is misplaced insofar as Article 3 of the Law provides that provisions of Kosovo law do not apply unless they

⁹⁷ Thaçi Motion on Legality of the SC and SPO, para. 53.

⁹⁸ Thaçi Motion on Legality of the SC and SPO, paras 54-55.

⁹⁹ Thaçi Motion on Legality of the SC and SPO, para. 55.

¹⁰⁰ Thaçi Motion on Legality of the SC and SPO, para. 56.

¹⁰¹ Thaçi Motion on Legality of the SC and SPO, para. 57.

¹⁰² Thaçi Motion on Legality of the SC and SPO, para. 58.

¹⁰³ Thaçi Motion on Legality of the SC and SPO, para. 59.

have been expressly incorporated and adopted into the Law.¹⁰⁴ The SPO argues that, while the SC Judges were to be guided by the KCPC when adopting the Rules, Article 159 of the KCPC was never incorporated into the Rules.¹⁰⁵ Rather, Rule 47 of the Rules provides that investigations shall be concluded in a “reasonable time” from when a person became a suspect and was notified thereof, and this regime was found to be fully consistent with the ECHR as far as the termination of an investigation is concerned.¹⁰⁶

71. The SPO further avers that it has been granted extensive investigative and prosecutorial powers in the Law and in the Rules, which squarely contradicts the notion that the time to investigate on matters already investigated by the SITF has expired.¹⁰⁷ The SPO argues that, had it started a “new” investigation into the CoE Report, Article 159 of the KCPC would not, in any case, be violated as such an investigation would be “entirely new”.¹⁰⁸

72. Mr Thaçi replies that, at the time of the SITF investigation, the KCPC was the only legal instrument regulating a criminal investigation; the Rules, therefore, should be interpreted *a fortiori* in a manner consonant with it.¹⁰⁹ Mr Thaçi recalls that, while Article 104 of the KCPC provides that any investigation shall specify the date and time of the initiation of the investigation in order for a court to assess its compliance with Article 159 of the KCPC, the Law and the Rules are silent about the procedure by which an investigation is started and about its maximum duration.¹¹⁰ The SPO’s reference to the Rules upholding ECHR standards is therefore misplaced.¹¹¹ Lastly,

¹⁰⁴ SPO Response F259, paras 23-24.

¹⁰⁵ SPO Response F259, paras 24-25.

¹⁰⁶ SPO Response F259, para. 25.

¹⁰⁷ SPO Response F259, para. 28.

¹⁰⁸ SPO Response F259, para. 29.

¹⁰⁹ Thaçi Reply to F259, paras 23-24.

¹¹⁰ Thaçi Reply to F259, paras 24-26.

¹¹¹ Thaçi Reply to F259, para. 26.

Mr Thaçi reiterates that the SPO did not have legal authority to conduct an entirely new criminal investigation as this was time-barred.¹¹²

73. The Pre-Trial Judge recalls, at the outset, that Article 3(2)(b)-(c) and (4) of the Law unequivocally stipulates that the SC shall adjudicate and function in accordance with, *inter alia*, the Law as *lex specialis* and apply other provisions of Kosovo law insofar as they have been expressly incorporated and applied by the Law. Pursuant to Rule 4(1) of the Rules, the Rules must be construed in a manner consonant with the framework set out in Article 3 of the Law. Against this backdrop, the Pre-Trial Judge notes that Article 159(1) of the KCPC, invoked by Mr Thaçi to claim that the investigation led by the SPO be time-barred, has not been expressly incorporated in the Law or otherwise reproduced in the Rules.¹¹³

74. While the Pre-Trial Judge notes that Article 19(2) of the Law provides that, in adopting its Rules, the SC shall be guided by the KCPC, he is not persuaded by Mr Thaçi's argument that such a provision, read in conjunction with Article 3 of the Law and Rule 4 of the Rules, suggests that the provisions laid down in the KCPC, including Article 159(1), shall apply. In particular, the Pre-Trial Judge finds that Article 19(2) of the Law does not entail an obligation to incorporate the exact same standards from the KCPC into the Law as such an obligation would have had to be set forth in more express terms. According to the Pre-Trial Judge, the reference to "shall be guided" signifies that, while the Judges must take the KCPC into account in adopting the Rules, they are not bound by any specific provisions contained therein.¹¹⁴ Therefore, the Pre-Trial Judge finds that Article 159 of the KCPC is not applicable to

¹¹² Thaçi Reply to F259, para. 27.

¹¹³ *Similarly*, KSC-BC-2018-01, F00180/RED, Single Judge, *Public Redacted Version of Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi* ("Decision on Investigation against Mr Lajçi"), 23 July 2021, public, para. 16.

¹¹⁴ *Similarly*, Decision on Investigation against Mr Lajçi, para. 17.

the present case and the two-year deadline shall not apply to the investigations carried out by the SPO.

75. The Pre-Trial Judge further notes that the Rules do provide for a procedure to address any complaints regarding the excessive length of an investigation. In particular, Rule 47(1) of the Rules provides that, after a person becomes a suspect and is notified thereof, the suspect may complain of the alleged excessive length of an investigation by requesting the SPO to terminate the investigation against him or her. While the Rules do not provide a set time-limit for the maximum duration of the investigation, it is implicit that the assessment of the reasonableness of the length will be done on a case-by-case basis.¹¹⁵ Thus, Rule 47 of the Rules sets the standard against which Mr Thaçi's complaint as to the length of investigation would need to be assessed, if requested. Lastly, the Pre-Trial Judge recalls that Rule 47 of the Rules was upheld and found to be compliant with the Constitution by the SCCC.¹¹⁶

76. More generally, with regard to Mr Thaçi's argument that the SPO was not authorised to conduct investigations or to issue indictments on matters already investigated by the SITF, the Pre-Trial Judge notes that Article 35(2) of the Law provides that the SPO shall have the authority and responsibility, *inter alia*, to conduct criminal investigations and to take responsibility for new or pending criminal investigations within the subject matter of the SC. This entails, as a result of the express language of Article 35(2) of the Law, that the SPO shall not be prevented from conducting new investigations, or continuing pending ones into facts such as those underpinning Mr Thaçi's charges, even when the SITF has already conducted investigations in relation to similar facts, provided that provisions set forth in the Law and in the Rules to protect the Accused's rights to a fair trial, such as Rule 47 of the

¹¹⁵ *Similarly*, Decision on Investigation against Mr Lajçi, paras 27-28.

¹¹⁶ KSC-CC-PR-2017-01, F00004, SCCC, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* ("Judgment on Rules Adopted on 17 March 2017"), 26 April 2017, public, para. 107.

Rules, are complied with. To construe otherwise would make the express wording of Article 35(2) of the Law meaningless.

77. The Pre-Trial Judge accordingly finds that Mr Thaçi's argument concerning the lawfulness of the investigation shall be dismissed.

C. ALLEGED VIOLATIONS OF CONSTITUTIONAL RIGHTS

78. The Accused allege certain violations of their constitutional rights, namely the right to be tried by an independent and impartial tribunal established by law, the right to be tried in a reasonable time and the right to be presumed innocent. Article 162(2) of the Constitution provides that the SC and SPO shall uphold the protections enshrined in Chapter II of the Constitution, in particular subject to compliance with human rights standards. Pursuant to Article 55 of the Constitution and Article 2 of the Law, any limitations on fundamental rights and freedoms shall only be imposed to the extent necessary for the fulfilment of the vital purposes expressed in Article 2 of the Law. Furthermore, Article 54 of the Constitution provides that everyone enjoys the right to an effective legal remedy if it is found that a right guaranteed under the Constitution has been violated.

79. Mr Thaçi has requested that the Pre-Trial Judge decline to exercise jurisdiction as a result of alleged violations of his rights.¹¹⁷ The Pre-Trial Judge notes that declining to exercise jurisdiction in such instances is a matter of discretion.¹¹⁸ It is a process whereby a judge may decline to exercise jurisdiction when serious and egregious violations of an accused's rights would prove detrimental to a court's integrity.¹¹⁹

¹¹⁷ Thaçi Motion, paras 2, 54.

¹¹⁸ Similarly, ICC, [Lubanga Appeal on Jurisdiction](#), para. 28; ICTR, *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Appeals Chamber, [Decision](#) ("Barayagwiza Decision"), 3 November 1999, para. 74.

¹¹⁹ Similarly, ICC, [Lubanga Appeal on Jurisdiction](#), para. 30; ICTY, *Prosecutor v. Mićo Stanišić*, IT-08-91-A, Appeals Chamber, [Decision on Mićo Stanišić Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement](#), 2 April 2014, para. 35; ICTR, [Barayagwiza Decision](#), para. 74.

Thus, only exceptional cases of violations of human rights may justify declining to exercise jurisdiction.¹²⁰ In most cases, such a remedy would be disproportionate when compared to the prejudice suffered by an accused.¹²¹ This is particularly the case when higher interests inherent in proceedings against person accused of serious crimes under international law are at stake.¹²² In the sections that follow, the Pre-Trial Judge will first assess whether there has been any violation of the Accused's rights. Only once a violation of the Accused's rights has been found, will the question of setting aside jurisdiction be considered.

1. The Right to be Tried by a Tribunal Established by Law

80. Mr Taçi argues that the SC are not a tribunal "established by law" within the meaning of Article 6(1) of the ECHR.¹²³ In this regard, Mr Taçi points to the fact that the Law was never referred to the KCC for an examination of its compatibility with the Constitution and with the ECHR.¹²⁴

81. Mr Taçi submits that the SC have borrowed many of the features of other international or hybrid tribunals, which in turn have always benefited from a presumption of consistency with international standards; however, provisions of the Constitution call for a stricter scrutiny.¹²⁵ In this regard, the KCC's judgment of 15 April 2015 ("KCC Judgment") cannot be relied upon to defend the constitutionality of the SC as the latter only concerned Amendment no. 24 to the Constitution.¹²⁶

¹²⁰ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, Appeals Chamber, [Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement](#), 12 October 2009, paras 45, 46. Similarly, ICC, [Lubanga Appeal on Jurisdiction](#), paras 30-31.

¹²¹ ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Trial Chamber, [Decision on Oral Request of the Accused for Abuse of Process](#) ("Šešelj Decision"), 10 February 2010, para. 22.

¹²² ICTY, [Šešelj Decision](#), para. 22.

¹²³ Taçi Motion, paras 36-38.

¹²⁴ Taçi Motion, para. 39.

¹²⁵ Taçi Motion, paras 40-41.

¹²⁶ Taçi Motion, para. 41, referring to KCC Judgment.

Mr Thaçi argues that, insofar as the SC operate *de jure* and *de facto* independently and separately from Kosovo's court system, it overtly violates the Constitution and the prohibition on the establishment of extraordinary courts provided therein as well as Article 6(1) of the ECHR.¹²⁷

82. Mr Veseli submits that, while the KCC has already considered whether the creation of the SC was in violation of Article 103(7) of the Constitution, it did so prematurely because it did not assess the Law.¹²⁸ Mr Veseli submits that there is now cogent reason to revisit the finding of the KCC.¹²⁹

83. The SPO responds that the KCC found that the creation of the SC was compatible with Article 103(7) of the Constitution and that Mr Thaçi's and Mr Veseli's submissions raise no new issues in this regard and must therefore be rejected.¹³⁰ The SPO argues that it is irrelevant that the Law was not scrutinised by the KCC as all the contested features have been expressly addressed in documents which were before the KCC at the relevant time.¹³¹ The SPO argues that, inasmuch as the SC: (i) remain within the framework of the Kosovo justice system; (ii) are based upon law; and (iii) are necessary, it is compatible with Article 103(7) of the Constitution.¹³²

84. Mr Thaçi replies that the SPO ignores that the Law has not been scrutinised by the KCC and that the KCC did not make a ruling on the court that was ultimately established.¹³³

85. Mr Veseli replies that the KCC has not reviewed the Law.¹³⁴ He argues that the claim that Article 162 of the Constitution clearly envisaged a separate applicable law

¹²⁷ Thaçi Motion, paras 41-43.

¹²⁸ Veseli Motion, para. 3.

¹²⁹ Veseli Motion, paras 4, 21.

¹³⁰ SPO Response F260, para. 3.

¹³¹ SPO Response F260, paras 4-8.

¹³² SPO Response F260, paras 9-14, 18.

¹³³ Thaçi Reply to F260, paras 2-3.

¹³⁴ Veseli Reply, para. 5.

is false, as exemplified by the fact that Article 162(6) of the Constitution makes specific reference to rules of procedure and evidence, but not to the Law.¹³⁵ Mr Veseli maintains that the KCC simply made a *prima facie* assessment of what a specialised court would look like, which included the understanding that the SC would operate on the basis of domestic substantive criminal law.¹³⁶

86. The Pre-Trial Judge notes that the right to be tried by a tribunal established by law is an absolute right and cannot be limited.¹³⁷ Cognisant of this right, the KCC, in assessing Amendment no. 24 to the Constitution on the establishment of the SC, determined that the two formal requirements under Article 103(7) of the Constitution, namely that the creation of a specialised court: (i) be based upon the law; and (ii) be necessary, had been met.¹³⁸ In addressing the “based upon law” criteria, the KCC referred to ECtHR jurisprudence, noting that the “established by law” criteria in Article 6 of the ECHR exists to ensure that judicial organisation does not depend on the discretion of the Executive, but rather is regulated by a law emanating from Parliament.¹³⁹ The KCC found that the “established by law” criterion was satisfied by the fact that the proposed Amendment no. 24, now Article 162 of the Constitution, embedded the SC in the justice system of Kosovo, and required the adoption of a specific law by the Assembly of Kosovo which would regulate its organisation, functioning, and jurisdiction.¹⁴⁰ Thus, the KCC clearly envisaged that a specific law would be adopted. The Pre-Trial Judge notes in this regard that the Law was in fact adopted by the Assembly of Kosovo on 3 August 2015.

¹³⁵ Veseli Reply, paras 6-9.

¹³⁶ Veseli Reply, paras 10-14.

¹³⁷ Human Rights Committee, CCPR/C/GC/32, *General Comment No. 32* (“HRC General Comment No. 32”), 23 August 2007, para. 18.

¹³⁸ KCC Judgment, paras 45-53.

¹³⁹ KCC Judgment, paras 47-48, referring to ECtHR, *Fruni v. Slovakia*, no. 8014/07, [Judgment](#), 21 June 2011, para. 142; *Erdem v. Germany*, no. 38321/97, [Decision](#), 9 December 1999. See also, ECtHR, *Richert v. Poland*, no. 54809/07, [Judgment](#), 25 October 2011, para. 42.

¹⁴⁰ Article 162(1) of the Constitution; KCC Judgment, paras 46, 55.

87. As set out above, the “established by law” requirement, reflecting the principle of the rule of law, seeks to ensure that there is a legal basis for the establishment of the judiciary and protects the judiciary against unlawful external influence, particularly from the Executive.¹⁴¹ It is through this lens that the KCC assessed Amendment no. 24 and the establishment of the SC and emphasised that a specific law regulating its organisation, function, and jurisdiction would be adopted by the Assembly. The fact that the Law was adopted after the KCC’s decision does not undermine the KCC’s findings. This is particularly so as relevant features of the Law were, in general terms, before the KCC at the relevant time through the Exchange of Letters.¹⁴² In this regard, the Pre-Trial Judge notes that the Exchange of Letters contemplated the creation of a specialist court with: (i) dedicated separate judicial chambers; (ii) international staffing; (iii) its own statute and rules of procedure and evidence; (iv) involvement of the EU; and (v) an independent regime for the selection and appointment of Judges.¹⁴³ In addition, the specialised nature of the SC’s jurisdiction was explicitly provided for in Article 162(1) of the Constitution and recognised by the KCC as basis for establishing its necessity.¹⁴⁴ The Pre-Trial Judge notes that Article 6(1) of the ECHR does not require that the legislature set out in detail each and every detail of the functioning of a court as long as a framework for judicial organisation is established by law.¹⁴⁵

88. The Pre-Trial Judge accordingly finds that the SC are unequivocally based in law.

¹⁴¹ ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (“*Guðmundur Andri Ástráðsson v. Iceland* [GC]”), no. 26374/18, [Judgment](#), 1 December 2020, para. 236.

¹⁴² KCC Judgment, para. 38.

¹⁴³ Exchange of Letters, pp. 8-9.

¹⁴⁴ KCC Judgment, paras 51-53.

¹⁴⁵ ECmHR, *Zand v. Austria*, 7360/76, 12 October 1978, para. 69.

2. The Right to be Tried by an Independent and Impartial Tribunal

89. The Pre-Trial Judge will now consider whether certain aspects of the Law as put forward by Mr Thaçi, Mr Veseli, and Mr Selimi challenge the notion that the SC are an independent and impartial tribunal.

90. Mr Thaçi argues that the SC do not meet the requirements of independence and impartiality established in Article 6(1) of ECHR or other relevant international standards.¹⁴⁶ Mr Thaçi challenges the following features of the SC, which allegedly jeopardise its capacity to function autonomously: (i) funding and auditing arrangements involving “third contributing states” as well as use of seconded staff, including the Specialist Prosecutor; (ii) the lack of fixed terms for Judges and the “equivocal nature of legislative provisions” concerning the Selection Panel for the appointment of Judges; (iii) remuneration of Judges on the basis of the days they serve; (iv) the vagueness of the provisions governing the dismissal of SC Judges; (v) the discretion vested in the President of the SC in relation to the roster allocation of Judges; (vi) the involvement of the Head of EULEX in the appointment and dismissal of Judges as well as the administrative and financial arrangements of the SC; and (vii) the non-applicability of Kosovo domestic rules concerning the appointment, administration, and legal remedies against Judges and prosecutors.¹⁴⁷

91. Mr Veseli argues that the *de facto* extraordinary nature of the SC is evidenced by the fact that (i) it was set up to prosecute a defined set of cases;¹⁴⁸ (ii) its procedure for the appointment of Judges deviates from Chapter VII of the Constitution, as

¹⁴⁶ Thaçi Motion, paras 47, 49-51.

¹⁴⁷ Thaçi Motion, para. 48.

¹⁴⁸ Veseli Motion, paras 8-9. With respect to the Veseli Motion, the Pre-Trial Judge notes that Mr Veseli's challenges have been framed solely in the context of the purported establishment of an extraordinary court and with the view of seeking a referral to the SCCC; however, as the challenges relating to appointment of Judges and the SC's legal structure also touch upon the independence and impartiality of the SC, they will be dealt with in conjunction with the similar arguments presented by Mr Thaçi and Mr Selimi. Mr Veseli's challenges concerning the subject matter jurisdiction of the SC and his request for referral to the SCCC will be dealt with below.

exemplified by the fact that SC Judges have no formal connection with the judiciary of Kosovo;¹⁴⁹ and (iii) the SC have primacy over all other courts in Kosovo and deviates from the criminal procedure and applicable national laws of Kosovo.¹⁵⁰

92. Mr Selimi submits that the SC and SPO's employment practice, which prevents Kosovo Albanians from being employed within them, in addition to being discriminatory and unjust, is not provided for by the Law,¹⁵¹ starkly contrasts with the SC being attached to each level of the court system in Kosovo¹⁵² and is at odds with the practice of other hybrid and ad hoc tribunals.¹⁵³ Mr Selimi further argues that Articles 26 and 28 of the Law appear to be based on the presumption that only international judges can be independent.¹⁵⁴ In Mr Selimi's view, the SC's staffing practices amount to a fundamental denial of justice to the people of Kosovo and to the Accused, in direct violation of Article 7 of the Constitution¹⁵⁵ and Article 14 of the ECHR, which prohibits both direct and indirect discrimination.¹⁵⁶

93. The SPO responds that the Constitution, the Law, the Rules, the Rules on Assignment, and the CoJE provide a comprehensive framework for the nomination, appointment, dismissal, and tenure of Judges which circumscribe and avoid discretion in the SC's operation, guaranteeing its independence from external interference.¹⁵⁷ The SPO argues that the SCCC has already upheld the organisational framework and the existing delegation of authority to the SC President.¹⁵⁸ As far as the SC Judges are concerned, the SPO refers to Articles 27(1), 31(1), and 33(4) and (5)

¹⁴⁹ Veseli Motion, paras 10-11.

¹⁵⁰ Veseli Motion, paras 12-19.

¹⁵¹ Selimi Motion, paras 9, 13-14

¹⁵² Selimi Motion, para. 5.

¹⁵³ Selimi Motion, para. 11.

¹⁵⁴ Selimi Motion, para. 7.

¹⁵⁵ Selimi Motion, paras 14-16.

¹⁵⁶ Selimi Motion, paras 17-19.

¹⁵⁷ SPO Response F260, para. 14.

¹⁵⁸ SPO Response F260, para. 14, referring to Judgment on Rules Adopted on 17 March 2017, paras 33- 34.

of the Law which ensure that SC Judges are persons of high moral character, are impartial, have integrity and adjudicate their functions in accordance with the Constitution and international human rights law.¹⁵⁹ The SPO further contends that neither the funding arrangements, nor the involvement of EULEX, nor the practice of international secondments conflict with the requirements of independence, insofar as the regulatory framework outlined above guarantees freedom from external interference.¹⁶⁰ The SPO asserts that Mr Thaçi's claims regarding the Specialist Prosecutor are without merit and, in any case, requirements of independence and impartiality laid down in Article 6(1) of the ECHR do not pertain to specific party to the proceedings, but rather to the tribunal as whole.¹⁶¹

94. The SPO responds, with respect to Mr Veseli submissions, that the Venice Commission criteria do not alter its analysis.¹⁶² The SPO further responds that courts have been created with far more limited jurisdiction than the SC and thus the SC are not a unique or unprecedented institution in the history of modern criminal justice.¹⁶³ The SPO argues that the international staffing of the SC, separate appointment procedure for judges, and governance by its own statute and rules do not impact the SC's constitutionality.¹⁶⁴ The SPO further asserts that the SC's primacy over other Kosovo courts is simply reflective of its status as a specialised court.¹⁶⁵

95. Lastly, the SPO responds that Mr Selimi's challenges shall be summarily dismissed insofar as it is impossible to determine their relevance to the jurisdiction of the SC.¹⁶⁶ It argues, in particular, that Mr Selimi fails to indicate which rights under

¹⁵⁹ SPO Response F260, para. 16.

¹⁶⁰ SPO Response F260, paras 16-17.

¹⁶¹ SPO Response F260, para. 15.

¹⁶² SPO Response F260, para. 19.

¹⁶³ SPO Response F260, paras 19-20.

¹⁶⁴ SPO Response F260, para. 21.

¹⁶⁵ SPO Response F260, para. 21.

¹⁶⁶ SPO Response F260, para. 23.

the ECHR the alleged discrimination relates to and how such a discrimination affects the Accused and the SC's exercise of jurisdiction over him.¹⁶⁷

96. Mr Thaçi replies that the SPO failed to take into account the most recent and up-to-date ECtHR case-law and misunderstands and misrepresents ECtHR case-law cited by the Defence.¹⁶⁸ He argues that the fact that the ECtHR did not find a violation in the *Fruni* case cannot be interpreted as supporting the general proposition that specialised criminal courts are always compatible with the ECHR.¹⁶⁹ Mr Thaçi further asserts that removal of the prior Specialist Prosecutor signifies the limited functional independence in which he operated and amounts to a violation of Article 35(5) of the Law.¹⁷⁰

97. Mr Veseli replies that the SC directly violate Article 55 of the Constitution by giving it primacy over domestic criminal legislation.¹⁷¹ In assessing whether the SC are a specialised or extraordinary court, Mr Veseli maintains that regard should be given to the criteria adopted by the Venice Commission rather than the formal requirements of Article 103(7) of the Constitution.¹⁷² Mr Veseli also maintains that parallels made to hybrid international tribunals are inapposite.¹⁷³ Mr Veseli requests that the matter be urgently referred to the SCCC.¹⁷⁴

98. Mr Selimi replies that the claim under Article 14 of the ECHR is related to his right to a fair trial, and in particular to the "established by law" requirement enshrined in Article 6(1) of the ECHR, rather than a general claim of discrimination on behalf of

¹⁶⁷ SPO Response F260, paras 23-24.

¹⁶⁸ Thaçi Reply to F260, paras 4-10.

¹⁶⁹ Thaçi Reply to F260, para. 6.

¹⁷⁰ Thaçi Reply to F260, paras 12-15.

¹⁷¹ Veseli Reply, para. 5.

¹⁷² Veseli Reply, paras 16-18.

¹⁷³ Veseli Reply, paras 19-20.

¹⁷⁴ Veseli Reply, para. 21.

Kosovo Albanians.¹⁷⁵ Mr Selimi asserts that he has the right, under the Constitution, to be tried by a panel which also includes Judges from Kosovo and by a court which does not discriminate against Kosovo Albanians.¹⁷⁶ Mr Selimi submits that “appearances may also be of importance” and that the exclusion of all Kosovo Albanians from the SC concretely means that no members of his ethnic group are represented in any of the SC’s components, creating the potential for bias, be it conscious or subconscious and distancing the SC from Kosovo people and legal culture.¹⁷⁷

99. At the outset the Pre-Trial Judge notes that, under Article 6(1) of the ECHR, independence primarily means independence from the Executive and the Legislature, but also independence from the Parties.¹⁷⁸ Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways.¹⁷⁹ There are two methods for testing impartiality. Pursuant to the subjective approach, one must ascertain the personal conviction or interest of a given judge in a particular case.¹⁸⁰ Under the objective test for impartiality, it must be determined whether, irrespective of the personal conduct of any of the members of the court, there are ascertainable facts which may raise doubts as to the impartiality of that body.¹⁸¹ It has been held that “the objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings” and thus it must be “decided in

¹⁷⁵ Selimi Reply, paras 4-11, 13-27. The Pre-Trial Judge understands Mr Selimi’s submissions as challenging the SC’s staffing practices under the rubric of Article 6(1) of the ECHR. His submissions will accordingly be considered within this framework.

¹⁷⁶ Selimi Reply, para. 29.

¹⁷⁷ Selimi Reply, para. 30.

¹⁷⁸ See ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC] (“*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC]”), nos. 2312/08 and 34179/08, [Judgment](#), 18 July 2013, para. 49.

¹⁷⁹ ECtHR, *Kyprianou v. Cyprus* [GC], no. 73797/01 (“*Kyprianou v. Cyprus* [GC]”), [Judgment](#), 15 December 2005, para. 118; ECtHR, *Micallef v. Malta*, no. 17056/06, [Judgment](#), 15 October 2009, para. 93.

¹⁸⁰ ECtHR, *Kyprianou v. Cyprus* [GC], paras 118-119.

¹⁸¹ See ECtHR, *Bochan v. Ukraine* (“*Bochan v. Ukraine*”), no. 7577/02, [Judgment](#), 3 May 2007, para. 66.

each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal".¹⁸²

100. The Pre-Trial Judge notes that the Accused did not call into question the subjective impartiality of the Pre-Trial Judge or any other Judge of the SC. Accordingly, the Pre-Trial Judge considers it appropriate to examine the Accused's complaints from the standpoint of the requirements of independence and objective impartiality, which are closely linked and must be considered together.¹⁸³ In assessing the independence and impartiality of a court or tribunal, consideration must be given to, *inter alia*, the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures, and whether the body presents an appearance of independence.¹⁸⁴ The Pre-Trial Judge will accordingly assess the Accused's challenges within this rubric.

101. In assessing the independence and impartiality of the SC regard must be given to the comprehensive framework governing the SC.¹⁸⁵ At the top of this hierarchy is the Constitution, as the SC are bound to adjudicate and function in accordance thereof.¹⁸⁶ Accordingly, any argument that the SC operate wholly outside of applicable Kosovo law or are free of hierarchical constraints is a misrepresentation of the SC's legal framework. The fact that the SC have primacy over other courts in Kosovo does not affect this analysis as constraints are built into the SC's framework. The SC are bound to function in accordance with, *inter alia*, the Law as the *lex specialis* and

¹⁸² ECtHR, *Bahaettin Uzan v. Turkey* ("*Bahaettin Uzan v. Turkey*"), no. 30836/07, [Judgment](#), 24 November 2020, para. 57; *Ramos Nunes Carvalho e Sá v. Portugal* [GC], nos. 55391/13, 57728/13, 74041/13, [Judgment](#), 6 November 2018, para. 148.

¹⁸³ ECtHR, *Moiseyev v. Russia*, no. 62936/00, [Judgment](#), 9 October 2008, para. 175; *Bahaettin Uzan v. Turkey*, para. 58.

¹⁸⁴ Similarly ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], para. 49.

¹⁸⁵ The Pre-Trial Judge notes that this comprehensive framework includes relevant provisions of the Constitution and the Law, as well as the Rules, Rules on Assignment and the CoJE which supplement those provisions.

¹⁸⁶ Article 3(2)(a) of the Law.

international human rights law.¹⁸⁷ In these circumstances, and without any assertion of a violation of this framework, a strong presumption of independence and impartiality attaches.¹⁸⁸

102. As regards to the manner of appointment of Judges at the SC, Mr Thaçi cites the equivocal nature of the procedures in relation to the Selection Panel.¹⁸⁹ As concerns the Selection Panel, the Pre-Trial Judge considers that Article 28 of the Law clearly sets out the regime for the appointment of Judges to the Roster, including the: (i) role¹⁹⁰ and composition¹⁹¹ of the Selection Panel; (ii) means for finalising a list of suitable candidates;¹⁹² and (iii) role of the Appointing Authority for placing the selected Judges on the Roster.¹⁹³ Noting that the Law creates an independent body for the appointment of Judges, the Pre-Trial Judge finds that the SC's appointing mechanism separates the process of appointment from the Legislature and the Executive, thereby safeguarding its independence and impartiality.¹⁹⁴ The Pre-Trial Judge accordingly finds that the manner of appointment of Judges at the SC does not call into question the independence and impartiality of the SC.

103. As regards the length of appointment of Judges, the Pre-Trial Judge considers that no particular term of office has been specified as a necessary minimum,¹⁹⁵ but Judges should enjoy a certain stability, if only for specific period.¹⁹⁶ The Pre-Trial Judge

¹⁸⁷ Article 3(2)(e) of the Law.

¹⁸⁸ ECtHR, [Kyprianou v. Cyprus \[GC\]](#), para. 119.

¹⁸⁹ Thaçi Motion, para. 48(ii) and (v).

¹⁹⁰ Article 28(1) of the Law.

¹⁹¹ Article 28(2) of the Law.

¹⁹² Article 28(3) of the Law.

¹⁹³ Article 28(3) and (4) of the Law.

¹⁹⁴ UN Special Rapporteur Diego García-Sayán, *Report* (2018) UN DOC. A/HRC/38/38, 2 May 2018, paras 48, 66, 97-98. *See also*, ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, [Judgment](#), 30 November 2010, para. 49; [Campbell and Fell v. UK](#), para. 79; [Maktouf and Damjanović v. Bosnia and Herzegovina \[GC\]](#), para. 49.

¹⁹⁵ *See* ECtHR, [Campbell and Fell v. UK](#), para. 80; [Maktouf and Damjanović v. Bosnia and Herzegovina \[GC\]](#), paras 49, 51.

¹⁹⁶ ECtHR, *Sutter v. Switzerland*, 8209/78, Decision, 1 March 1979, para. 2; HRC General Comment No. 32, para. 19; UN Basic Principles on the Independence of the Judiciary, paras 11-12. *See also*, International Association of Judges, *The Universal Charter of Judges*, 17 November 1999, article 2-2.

notes that, at the SC, if assigned from the Roster to hear a case, the Judges are assigned for a term of four years or until completion of the phase of proceedings, if that phase completes earlier.¹⁹⁷ The Law also guarantees that a Judge's assignment shall only elapse when proceedings are completed.¹⁹⁸ Article 31(4) of the Law ensures that no Judge shall be dismissed unless he or she ceases to fulfil the requirements of independence and impartiality enshrined in Articles 27 and 31 of Law and only by vote of an absolute majority of Judges. Furthermore, the Pre-Trial Judge notes that, while a Judge's individual assignment may end, he or she remains on the Roster and available for further assignment.¹⁹⁹ Given that the Judges of the SC are protected against arbitrary dismissal, their assignments only elapse upon completion of proceedings without the need to fulfil additional criteria, and, considering that their fixed term assignments comport with the temporary nature of the SC, the Pre-Trial Judge finds that the term of assignment of SC Judges does not call into question the independence and impartiality of the SC.²⁰⁰

104. As regards the remuneration of Judges, the Pre-Trial Judge notes that SC Judges are remunerated upon assignment to a case or an appeal and for the duration of that case or appeal.²⁰¹ This remuneration scheme does not affect judicial independence as it is regulated by the Law, which was adopted before the Judges were appointed, and is not discretionary and therefore not subject to outside manipulation.²⁰² The Pre-Trial Judge accordingly finds that the SC's remuneration scheme does not call into question the independence and impartiality of the SC.

¹⁹⁷ Article 30(3) of the Law.

¹⁹⁸ Article 33(1)-(3) of the Law.

¹⁹⁹ Articles 28(4) and 33(1)-(3) of the Law.

²⁰⁰ See ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], para. 51.

²⁰¹ See Article 26(2) and (3) of the Law.

²⁰² See SCSL, *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), *Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)*, 13 March 2004, paras 37-38. Other tribunals have similar remuneration schemes. See e.g., IRMCT, UNSC Res. 1966, Statute of the International Residual Mechanism for Criminal Tribunals, 22 December 2010, article 8(4).

105. As regards the dismissal of Judges, Article 31(4) of the Law provides that no Judge can be dismissed unless he or she has ceased to fulfil the requirements of Articles 27 and 31 of the Law, and only after a vote of an absolute majority of Judges. Rule 22 of the Rules provides that dismissal from the Roster, in accordance with Article 31(4) of the Law, is regulated by the CoJE, and the CoJE in turn echoes Article 31(4) of the Law. The CoJE provides that, where Judges have concluded that one or more allegations of serious misconduct have been established, the Plenary of Judges shall decide by absolute majority whether dismissal is appropriate.²⁰³ Furthermore, Chapter 4 of the CoJE sets an extensive procedure for review of potential complaints against Judges which involves a Disciplinary Board made up of two external judges and a senior appointee of the EU. Far from opening up the SC to possible external pressures, use of an external arbiter, such as the Disciplinary Board, ensures that the process of reviewing complaints against a Judge remains neutral. In this context, the Pre-Trial considers that Article 31(4) of the Law and the associated rules and provisions of the CoJE cited above support a general rule of irremovability, leaving dismissal only possible with respect to serious grounds of misconduct and only after following the procedures clearly set out in Chapter 4 of the CoJE. The Pre-Trial Judge accordingly finds that the SC's framework in relation to the dismissal of Judges does not call into question the independence and impartiality of the SC.

106. As regards the SC President's role in Roster allocation, the Pre-Trial Judge considers that the SC President is endowed with the power to assign Judges from the Roster pursuant to Articles 32(3) and 33 of the Law. The Rules on Assignment were promulgated pursuant to Article 25(3) of the Law in order to guide the President in this area. In this regard, the Rules on Assignment list a number of criteria that the President shall consider before assigning a Judge; these criteria include: experience, expertise, seniority, gender, geographical representation, as well as the preferences

²⁰³ Article 21 of the CoJE.

and availability of Judges.²⁰⁴ It further provides that the previous activities of a Judge which might cast doubt on his or her impartiality or affect the integrity of the specific proceedings shall be taken into account.²⁰⁵ In addition, Article 33(4) of the Law provides further guidance with respect to the assignment of Judges by stipulating that a Judge, having been assigned as a Pre-Trial Judge or to a Panel, may not sit on another Panel at a different phase of the same matter. The Pre-Trial Judge considers that the framework for the assignment of Judges at the SC provides pre-established, general, and objective criteria which safeguard against assignments for improper motives.²⁰⁶ The Pre-Trial Judge further considers that, where these rules provide the President with discretion, such discretion is a necessary component to allow flexibility and the ability to account for circumstances as they present themselves. The Pre-Trial Judge accordingly finds that the SC's framework in relation to the SC President's role in the assignment of Judges does not call into question the independence and impartiality of the SC.²⁰⁷

107. As regards the involvement of representatives of the EU in the appointment and dismissal of Judges, the Pre-Trial Judge notes that the involvement of an international administrator in the administrative functioning of a court does not *per se* affect the independence and impartiality of said court.²⁰⁸ The SC's legal texts foresee two roles for an EU representative or entity in relation to the appointment or dismissal of Judges, namely as an appointing authority²⁰⁹ and as a member of a disciplinary

²⁰⁴ Rule 4 of the Rules on Assignment.

²⁰⁵ Rule 4(3) of the Rules on Assignment.

²⁰⁶ UN Basic Principles on the Independence of the Judiciary, Principle 10.

²⁰⁷ See also Judgment on Rules Adopted on 17 March 2017, paras 33-34.

²⁰⁸ See ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], paras 51-52.

²⁰⁹ Pursuant to Article 28(3) and (4) of the Law, the Head of the EU Common Security and Defence Policy, also known as the Appointing Authority, appoints the persons on the Selection Panel's List as SC Judges and places them on the Roster for the duration of the existence of the SC. Pursuant to Article 32(1) and (4) of the Law, the Appointing Authority also appoints the President and Vice-President of the SC based on the recommendations of the Selection Panel. Pursuant to Rule 21(2) of the Rules, following the resignation or death of a Judge, the President notifies the Appointing Authority.

board.²¹⁰ The Pre-Trial Judge considers that, in relation to the Appointing Authority, the role carried out with respect to the appointment and dismissal of Judges is minimal and mainly administrative as it relates to maintenance of the Roster. The vetting and selection of Judges has been left to the Selection Panel, which consists of three international members, two of whom must be judges. With regard to the Disciplinary Board, a senior appointee of the EU is but one of the external members of the Board and the involvement of external actors ensures the neutrality of the process by which complaints against Judges are heard. Against this backdrop, the Pre-Trial Judge finds no basis for calling into question the independence and impartiality of the SC.

108. As concerns Mr Thaçi's unsubstantiated claims regarding the departure of the former Specialist Prosecutor,²¹¹ the Pre-Trial Judge considers that the requirements of independence and impartiality under Article 6(1) of the ECHR apply to the entity hearing the criminal charge, i.e. the court, and not the Parties to the proceedings.²¹² As a consequence, any purported circumstances surrounding the departure of the former Specialist Prosecutor does not provide a basis for calling into question the independence and impartiality of the SC.

109. As regards the overall funding and auditing arrangements of the SC involving third contributing States, the Pre-Trial Judge notes that, on the matter of funding, care should be taken to ensure that funding is not subject to political fluctuations and that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget.²¹³ Thus, the notions of independence and impartiality do not prohibit use of voluntary contributions by different States or

²¹⁰ A Disciplinary Board, consisting of three members, one of which is a senior appointee of the EU, conducts an inquiry into allegations against judges which have been forwarded to it by the President of the SC, *see* Article 18 of the CoJE.

²¹¹ Thaçi Motion, para. 48, fn. 92.

²¹² ECtHR, *Kontalexis v. Greece*, no. 58000/08, [Judgment](#), 31 May 2011, para. 57; *Harde v. Iceland*, no. 66847/12, [Judgment](#), 23 November 2017, para. 94.

²¹³ Consultative Council of European Judges, Opinion No. 2, 23 November 2001, para. 5.

international organisations as long as budgetary decisions do not exert pressure on the judiciary. The Pre-Trial Judge notes that Mr Thaçi does not demonstrate how the funding arrangements of the SC impact its independence and impartiality. Far from calling into question the independence and impartiality of the SC, the Pre-Trial Judge finds that the current funding regime serves to provide the SC with continuous funding and separates the judicial activities of the SC from the Executive or the Legislature, thereby ensuring the independence and impartiality of the SC. The Pre-Trial Judge accordingly finds that the overall funding and auditing arrangements of the SC involving third contributing States do not call into question the independence and impartiality of the SC.

110. With respect to seconded and/or international staffing, the Pre-Trial Judge considers that the notion of independence is calibrated *vis-à-vis* the Executive, the Legislature, and the Parties.²¹⁴ This notion applies equally to Mr Selimi's argument that the SC's international staffing practices affect the independence and impartiality of the SC because it does not include Kosovo Albanians.²¹⁵ That being said, Mr Selimi has not shown further how the lack of Kosovo Albanians within the ranks of the judiciary undermines the independence and impartiality of the institution. Notably, Mr Selimi's arguments that international staffing purportedly deprives the SC from the "diverse culture, ethos and legal traditions of Kosovo" or is not conducive to "obtain justice from within" Kosovo, are a political consideration, but do not inform the SC's independence and impartiality. The Pre-Trial Judge accordingly finds that the seconded and/or international staffing does not call into question the independence and impartiality of the SC.

²¹⁴ See *supra* para. I.99.

²¹⁵ With respect to Mr Selimi's arguments that the SC's hiring practise are discriminatory as they exclude Kosovo Albanians, the Pre-Trial Judge notes that raising a discrimination claim pursuant to Article 14 of the ECHR is foreclosed to him as he is not seeking employment at the SC and therefore not directly affected by the measure complained of. See, *similarly*, ECtHR, *Roman Zakharov v. Russia* [GC], no. 47143/06, [Judgment](#), 4 December 2015, para. 164.

111. In light of the above, the Pre-Trial Judge dismisses Mr Thaçi's, Mr Veseli's, and Mr Selimi's challenges to the independence and impartiality of the SC.

3. The Right not to be Tried by an Extraordinary Court

112. The Pre-Trial Judge notes Mr Thaçi's, Mr Veseli's, and Mr Selimi's submissions that the Law as promulgated has *de jure* and *de facto* created an extraordinary court in violation of Article 103(7) of the Constitution and Article 6 of the ECHR.²¹⁶

113. The Pre-Trial Judge considers in this regard the close interrelationship between the requirements of "independence" and "impartiality" and the requirement that a tribunal be established by law.²¹⁷ The ECtHR has further held that "a judicial body which does not satisfy the requirements of independence – in particular from the Executive – and of impartiality may not even be characterised as a "tribunal" for the purposes of Article 6(1) of the ECHR.²¹⁸ Having found above that the SC are established by law²¹⁹ and that its independence and impartiality have not been called into question, either by, *inter alia*, the procedures surrounding the appointment of Judges or the SC's reliance on a separate law,²²⁰ the Pre-Trial Judge finds no basis in the assertion that the SC are *de facto* an extraordinary court in violation of Article 103(7) of the Constitution.²²¹

114. Furthermore, the Pre-Trial Judge considers that, contrary to Mr Veseli's submissions,²²² the jurisdiction of the SC is not confined to a single case, crime or perpetrator; rather, the SC were established to address war crimes and crimes against humanity relating to the CoE Report committed from 1 January 1998 to

²¹⁶ Thaçi Motion, paras 41-43; Veseli Motion, paras 1-2, 5-12, 20; Selimi Motion, paras 5-20.

²¹⁷ ECtHR, [Guðmundur Andri Ástráðsson v. Iceland \[GC\]](#), para. 231.

²¹⁸ ECtHR, [Guðmundur Andri Ástráðsson v. Iceland \[GC\]](#), para. 232.

²¹⁹ See *supra* paras I.86-I.88.

²²⁰ See *supra* paras I.99-I.111.

²²¹ See also KCC Judgment, paras 45-53.

²²² Veseli Motion, paras 8-9.

31 December 2000.²²³ The Pre-Trial Judge finds that, while the jurisdiction of the SC is not open ended, it is nevertheless general and abstract enough to accommodate a multiplicity of crimes and categories of perpetrators within the limits of its jurisdiction.²²⁴ The SC cannot therefore be said to constitute an extraordinary court by virtue of any singularity of purpose.

115. In light of the above, the Pre-Trial Judge concludes that the SC do not operate as a *de facto* extraordinary court, and accordingly, dismisses Mr Thaçi's, Mr Veseli's, and Mr Selimi's submissions in this regard.

4. The Right to be Tried within a Reasonable Time

116. Mr Thaçi submits that his fundamental human rights enshrined in Article 31(2) of the Constitution, as modelled after Article 6 of the ECHR, have been violated by reason of the excessive length of the criminal proceedings brought against him.²²⁵ In this regard, Mr Thaçi argues that, insofar as the concept of "charge" in Article 6(1) of the ECHR is to be understood in a "substantive" rather than a "formal" sense, he was "charged" as of 7 January 2011, the date of publication of the CoE Report.²²⁶ In particular, Mr Thaçi argues that, since that date, he has been living under a "black cloud" of public suspicion²²⁷ which "substantially" affected him for the purposes of establishing the existence of a charge. Accordingly, Mr Thaçi argues that proceedings

²²³ Article 162(1) of the Constitution; Articles 1(2), 6(1), 7, 9, and 13-15 of the Law.

²²⁴ Venice Commission, *Opinion on the Draft Law on Anti-Corruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (Concerning the Introduction of Mandatory Specialisation of Judges on the Consideration of Corruption and Corruption-Related Offences)* ("Opinion no. 896/2017"), Opinion no. 896/2017, 9 October 2017, paras 23-24. See also, Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania*, Opinion no. 824/2015, 14 March 2016, para. 63.

²²⁵ Thaçi Motion, paras 7-29.

²²⁶ Thaçi Motion, paras 11-14.

²²⁷ Thaçi Motion, para. 14.

against him have been pending for more than ten years, a period which is unreasonably long and runs counter to ECHR standards.²²⁸

117. Mr Thaçi further argues that, according to the ECtHR's case-law, it is not necessary for the criminal proceedings to be terminated in order to claim a violation of one's fundamental right to a trial within reasonable time.²²⁹ He argues that the reasonableness of the length of proceedings must be weighed against the complexity of the case, the conduct of the applicant and the relevant authorities, and rights of victims, in addition to what is at stake for the individual.²³⁰ Mr Thaçi also argues that, in assessing the reasonableness of a delay, one should also consider the significant period of time elapsed from the relevant events as well as any likely future delays.²³¹

118. In this regard, while acknowledging that his case might be qualified as a complex case, Mr Thaçi submits that EULEX has shown a lack of diligence that led it to establish the SC with a considerable delay.²³² Mr Thaçi argues that he could not be held responsible for such a delay as he had been unable to undertake any dilatory measures prior to his arrest, which occurred in November 2020.²³³ As concerns delays occasioned by the relevant authorities, Mr Thaçi asserts that he is currently not in a position to assess whether any delays are imputable to the prosecution.²³⁴ Finally, Mr Thaçi submits that he faces a substantial prison sentence and thus the stakes are inherently high.²³⁵

²²⁸ Thaçi Motion, paras 14, 20.

²²⁹ Thaçi Motion, para. 15.

²³⁰ Thaçi Motion, paras 18-29.

²³¹ Thaçi Motion, paras 19, 21-22.

²³² Thaçi Motion, paras 23-25.

²³³ Thaçi Motion, para. 26.

²³⁴ Thaçi Motion, para. 27.

²³⁵ Thaçi Motion, para. 29.

119. The SPO responds that only exceptional cases of extremely serious human rights violations could justify a court setting aside its jurisdiction.²³⁶ As this is not the case, the Pre-Trial Judge should not address the merits of Mr Thaçi's claims.²³⁷

120. In any event, the SPO argues that neither the publication of the CoE Report nor any further development amounted to "a charge" within the meaning of Article 6 of the ECHR.²³⁸ It contends that Mr Thaçi was "substantially affected" only on 17 November 2019, when he was served with an SPO summons to appear for an interview.²³⁹ The SPO submits in this regard that the CoE Report did not reflect a criminal investigation and only constitutes the view of a political body.²⁴⁰ The SPO further submits that, prior to 17 November 2019, no competent authority had taken any measure either officially notifying Mr Thaçi of a criminal allegation against him or otherwise substantially affecting him.²⁴¹ According to the SPO, an accused can complain of the unreasonable time only once a "judicial process" against him or her has been set in motion as Article 6 of the ECHR does not protect a person from public opinion or general suspicion.²⁴²

121. As far as the length of the proceedings is concerned, the SPO asserts that it has been entirely reasonable.²⁴³ It argues that Mr Thaçi's case concerns alleged war crimes and crimes against humanity allegedly perpetrated by multiple accused spanning over a long period of time.²⁴⁴ The SPO further argues that the large number of witnesses and pieces of evidence and the difficulties in collecting such evidentiary material further support a finding of reasonableness in relation to the length of

²³⁶ SPO Response F260, para. 26.

²³⁷ SPO Response F260, para. 27.

²³⁸ SPO Response F260, para. 34.

²³⁹ SPO Response F260, para. 34.

²⁴⁰ SPO Response F260, paras 35-36.

²⁴¹ SPO Response F260, para. 37.

²⁴² SPO Response F260, para. 38.

²⁴³ SPO Response F260, para. 39.

²⁴⁴ SPO Response F260, para. 40.

proceedings.²⁴⁵ Lastly, the SPO recalls that an indictment was submitted within few months of Mr Thaçi having been made aware of the criminal investigation against him.²⁴⁶

122. Mr Thaçi replies that the “competent authority” notion has no basis in the ECtHR case-law.²⁴⁷ Rather, ECtHR jurisprudence supports the view that a person might be “substantially affected” prior to the official filing of the charges.²⁴⁸ In this regard, Mr Thaçi argues that, in the CoE Report, he had been clearly identified as the “prime suspect”²⁴⁹ and he has been placed under general public suspicion from at least January 2011, the date of publication of the CoE Report.²⁵⁰ Lastly, Mr Thaçi reiterates that the SPO shall be held responsible for the excessive length of proceedings.²⁵¹

123. The Pre-Trial Judge recalls, at the outset, that Article 21 of the Law, like Article 6 of the ECHR, provides that, in the determination of a criminal charge, an accused shall be entitled, *inter alia*, to be tried within a reasonable time. In this regard, the Pre-Trial Judge notes the extensive case-law of the ECtHR which establishes that, in criminal matters, the “reasonable time” referred to in Article 6(1) of the ECHR begins to run as soon as a person is “charged”.²⁵² The ECtHR has specified that the concept of “charge” is a substantive, rather than a formal one.²⁵³ A “criminal charge” therefore exists from the moment that an individual is officially notified by the competent authority of an allegation that he or she has committed a criminal offence, or from the point at which his or her situation has been substantially affected by actions taken by the authorities

²⁴⁵ SPO Response F260, para. 40.

²⁴⁶ SPO Response F260, para. 40.

²⁴⁷ Thaçi Reply to F260, para. 22.

²⁴⁸ Thaçi Reply to F260, para. 23.

²⁴⁹ Thaçi Reply to F260, para. 24.

²⁵⁰ Thaçi Reply to F260, para. 25.

²⁵¹ Thaçi Reply to F260, paras 27-28.

²⁵² See, among others, ECtHR, *Neumeister v. Austria*, no. 1936/63, [Judgment](#), 27 June 1968, para. 18.

²⁵³ See, among others, ECtHR, *Adolf v. Austria*, no. 8269/78, [Judgment](#), 26 March 1982, para. 30.

as a result of a suspicion against him.²⁵⁴ Protections afforded by Article 6(1) of the ECHR, including the right to be tried within a reasonable time, are thus triggered from that moment.

124. The Pre-Trial Judge further notes that the ECtHR has on occasion found that a person was subject to a charge even before he or she had been officially charged, for example when a preliminary investigation had been opened and, although not under arrest, the suspect had officially learnt of the investigation or begun to be affected by it²⁵⁵ or when a suspect was questioned by the police.²⁵⁶

125. However, in applying the aforementioned principles to the present case, the Pre-Trial Judge does not agree with Mr Thaçi's main allegation that he was "substantially affected" as of 7 January 2011, when the CoE Report was released. In particular, the Pre-Trial Judge notes that the CoE Report is a report emanating from a non-judicial body and whose author, a member of the Parliamentary Assembly of the Council of Europe at the time, explicitly specified that he lacked the mandate and the necessary resources to conduct a criminal investigation.²⁵⁷ The Pre-Trial Judge finds that at that time, Mr Thaçi could not be considered to have been officially notified that he would be prosecuted²⁵⁸ as no criminal court had started proceedings against him, nor had Mr Thaçi been notified of any criminal investigation against him.²⁵⁹ Therefore,

²⁵⁴ ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, [Judgment](#), 13 September 2016, para. 249; *Liblik and Others v. Estonia*, nos. 173/15, 181/15, 374/15, 383/15, 386/15 and 388/15, [Judgment](#), 28 May 2019, para. 90.

²⁵⁵ ECtHR, *Eckle v. Germany*, no. 8130/78, [Judgment](#), 15 July 1982, para. 74; *see also Corigliano v. Italy*, no. 8304/1978, [Judgment](#), 10 December 1982, paras 34-35, where the Court considered as a starting date the date in which the judicial notification of the investigation was served on the applicant, and not the date on which the investigation had been started.

²⁵⁶ ECtHR, *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, [Judgment](#), 17 July 2014, para. 141; *Yankov and Others v. Bulgaria*, no. 4570/05, [Judgment](#), 23 September 2010, para. 23; *Aleksandr Zaichenko v. Russia*, no. 39660/02, [Judgment](#), 18 February 2010, paras 41-43.

²⁵⁷ Parliamentary Assembly of the Council of Europe, *Report on Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, Doc. 12462, 7 January 2011.

²⁵⁸ *See, similarly*, ECtHR, *Rezov v. Bulgaria*, no. 56337/00, [Judgment](#), 15 February 2007, paras 49-50.

²⁵⁹ *See* ECtHR, *Pedersen and Baadsgaard v. Denmark*, no. 49017/99, [Judgment](#), 17 December 2004, para. 44, where the applicants knew that they had been reported to the police but were informed that no decision had yet be taken as to possible charges against them.

it cannot be said that Mr Thaçi was “substantially affected”, for the purposes of the existence of a criminal charge, by the publication of the CoE Report.

126. On the contrary, the Pre-Trial Judge finds that the date on which Mr Thaçi was “substantially affected” by actions taken by the SC authorities as a result of a suspicion against him was 17 November 2019, the date on which a summons to appear for an interview with the SPO was served on him. On that date, Mr Thaçi officially learnt that the SPO was investigating crimes allegedly committed by him and was therefore “charged” within the meaning of Article 6(1) of ECHR. The Pre-Trial Judge notes, in this regard, that an official notification of the allegation that Mr Thaçi had committed a criminal offence shortly followed the above-mentioned summons, by means of the confirmation of the indictment, which was notified to Mr Thaçi on 19 November 2020.²⁶⁰

127. The period to be taken into consideration for the purposes of calculating the reasonableness of the length of proceedings, accordingly, began on 17 November 2019. Proceedings, which are still pending, have lasted for approximately one year and nine months.

128. The Pre-Trial Judge notes that the reasonableness of the length of proceedings must be assessed in light of the circumstances of the case and with reference to the following criteria: (i) the complexity of the case; (ii) the conduct of the applicant and of the relevant authorities; and (iii) what is at stake for the applicant.²⁶¹ The reasonableness of the period is dependent on a number of elements which must be considered together.²⁶²

²⁶⁰ See Confirmation Decision.

²⁶¹ See, among many other authorities, ECtHR, *Kalēja v. Latvia*, no. 22059/08, [Judgment](#), 5 October 2017, para. 42. See, similarly, Decision on Investigation against Mr Lajçi para. 28.

²⁶² Similarly, ICTR, *Prosecutor v. Bizimunguet al.*, ICTR-99-50-T, Trial Chamber II, [Decision on Prosper Mugiraneza’s Third Motion to Dismiss Indictment for Violation of his Right to a Trial without Undue Delay](#), 10 February 2009, para. 12 and fn. 18, with further references.

129. With regard to the complexity of the case, the Pre-Trial Judge recalls that Mr Thaçi is charged with a number of counts of crimes against humanity and war crimes in relation to events encompassing multiple locations in Kosovo and Albania over an extended period of time.²⁶³ In addition to that, the volume of evidence and the multiplicity of the legal issues involved,²⁶⁴ among others, render the case complex. As far as the conduct of the Parties is concerned, the Pre-Trial Judge recalls that he recently found that all required procedural steps relating to the pre-trial phase of the present case have been, are being, or will be completed with a view to transmitting the case for trial at a point in the foreseeable future and that the relevant time limits have been either met or extended for good cause on certain occasions.²⁶⁵ The Pre-Trial Judge is mindful that Mr Thaçi is in pre-trial detention and therefore “special diligence” is required by the authorities when dealing with his case.²⁶⁶ Moreover, the Pre-Trial Judge is aware that stakes are inherently high for Mr Thaçi, as he could be given a lengthy sentence, including life-long imprisonment, if convicted. Notwithstanding the stakes for Mr Thaçi, the Pre-Trial Judge finds that the length of the criminal proceedings against Mr Thaçi has been reasonable so far, and any discussion as to the expected total length of the proceedings remains premature and speculative at this stage.

130. In the light of the above, the Pre-Trial Judge concludes that Mr Thaçi’s right to be tried within a reasonable time has not been violated and, accordingly, dismisses Mr Thaçi’s argument concerning alleged violations of such right.

²⁶³ Confirmation Decision, para. 521(a).

²⁶⁴ As demonstrated, *for example*, by the Decision on Jurisdictional Motions.

²⁶⁵ KSC-BC-2020-06, F00417/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Hashim Thaçi*, 23 July 2021, public, para. 61.

²⁶⁶ ECtHR, *Abdoella v. the Netherlands*, no. 12728/87, [Judgment](#), 25 November 1992, para. 24.

5. The Right to be Presumed Innocent

131. Mr Thaçi submits that the SC's explicit endorsement of the CoE Report, which contains words and statements which clearly reflect the opinion that he was guilty before it had been proved according to law, is in clear violation of the presumption of innocence, as enshrined in Article 31(5) of the Constitution and Article 6(2) of the ECHR.²⁶⁷

132. Mr Thaçi explicitly refers to specific sections of the CoE Report²⁶⁸ and avers that the latter clearly condemns him as it contains no caveat or warning that its allegations have not been proven in a court nor that the people mentioned therein have not been given a chance to reply to them.²⁶⁹ Mr Thaçi asserts that the SC's "benediction" of the CoE Report as a "Foundational Document" runs counter to his right to be presumed innocent.²⁷⁰

133. The SPO responds that the CoE Report makes it clear that its task was not to conduct a criminal investigation, let alone to pronounce judgments of innocence or guilt.²⁷¹ Moreover, the SPO points out that the CoE Report contains several caveats which warn the reader that the allegations had not been subjected to criminal investigation.²⁷²

134. The SPO further recalls that the CoE Report forms part of the framework governing the SC's jurisdiction and there is nothing prejudicial in the SC referring to a document which is referenced in the Law.²⁷³ In any case, the SPO contends that the CoE Report was not a statement by a representative or authority of any State with jurisdiction in respect of the matter nor was Mr Thaçi subject to a criminal charge at

²⁶⁷ Thaçi Motion, paras 30-35.

²⁶⁸ Thaçi Motion, para. 32.

²⁶⁹ Thaçi Motion, para. 33.

²⁷⁰ Thaçi Motion, para. 34.

²⁷¹ SPO Response F260, para. 29.

²⁷² SPO Response F260, paras 30-31.

²⁷³ SPO Response F260, para. 32.

the time of its publication; thus, the guarantees provided for under Article 31(5) of the Constitution and Article 6(2) of the ECHR shall not apply.²⁷⁴

135. Mr Thaçi replies that the careful caveats mentioned by the SPO should be weighed against some “reckless” allegations contained in the CoE Report, which clearly depict him as guilty.²⁷⁵ As to the SPO’s argument that the CoE Report was not a statement by a representative or authority of any State with jurisdiction in respect of the matter, Mr Thaçi replies that it is not the CoE Report taken alone that violates his presumption of innocence but rather its alleged endorsement by the SC.²⁷⁶ In this regard, Mr Thaçi argues that the presumption of innocence applies to all statements made by a public authority.²⁷⁷

136. The Pre-Trial Judge recalls at the outset that the presumption of innocence is a fundamental element of the right to a fair criminal trial, protected, among others, by Article 6(2) of the ECHR and Article 31(5) of the Constitution, the latter of which is modelled after the former.²⁷⁸ The Pre-Trial Judge further recalls that the presumption of innocence will be violated, *inter alia*, if a statement of a public official concerning a person charged with a criminal offence reflects the opinion that he or she is guilty before he or she has been proved so according to law.²⁷⁹ In this regard the ECtHR has repeatedly found that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.²⁸⁰ The scope of the protection of the presumption of innocence therefore extends to all statements made by a public

²⁷⁴ SPO Response F260, para. 33.

²⁷⁵ Thaçi Reply to F260, para. 17.

²⁷⁶ Thaçi Reply to F260, paras 18-20.

²⁷⁷ Thaçi Reply to F260, para. 20.

²⁷⁸ See also KSC-BC-2020-06, Transcript, 19 May 2021, page 429, lines 11-14.

²⁷⁹ See, for example., ECtHR, *Allen v. the United Kingdom* [GC], no. 25424/09, [Judgment](#), 12 July 2013, para. 93; *Daktaras v. Lithuania*, no. 42095/98, [Judgment](#), 10 October 2000, para. 41.

²⁸⁰ See, among many others, ECtHR, *Alenet de Ribemont v. France*, no. 15175/89, [Judgment](#), 10 February 1995, para. 36.

authority regardless of whether they have been pronounced in the confines of the criminal trial, in a different public setting or in other parallel judicial proceedings.²⁸¹

137. Against this backdrop, the Pre-Trial Judge notes that the ECtHR has repeatedly stated that, as expressly provided in the article itself, the protection afforded by Article 6(2) of the ECHR and outlined above applies where a person is “charged with a criminal offence” within the autonomous meaning of Article 6 of the ECHR.²⁸² In the absence of a “criminal charge”,²⁸³ Article 6(2) of the ECHR has been found not to be applicable. This is particularly true when the protection of Article 6(2) of the ECHR is invoked against allegedly prejudicial statements made in close connection with criminal proceedings. Where no such proceedings are, or have been in existence, statements attributing criminal or other reprehensible conduct are rather relevant to considerations of protection against defamation and raising potential issues under Article 8 of the ECHR.²⁸⁴

138. In applying the aforementioned principles to the present case, the Pre-Trial Judge recalls his findings made above in the context of the length of proceedings that the date on which Mr Thaçi was substantially affected by actions taken by the authorities as a result of a suspicion against him, and therefore “charged” within the meaning of Article 6 of the ECHR, was 17 November 2019, the date on which a summons to appear for an interview with the SPO was served on him.²⁸⁵

139. With particular regard to the CoE Report, the Pre-Trial Judge notes that, at the time of its publication, in January 2011, the SC neither existed nor its establishment had commenced. Proceedings against Mr Thaçi were therefore not pending at that

²⁸¹ ECtHR, *Kemal Coşkun v. Turkey*, no. 45028/07, [Judgment](#), 28 March 2017, para. 42.

²⁸² See, among many others, ECtHR, *Larrañaga Arando v. Spain*, no. 73911/16, [Decision](#), 25 June 2019, para. 40, with further references.

²⁸³ See *supra* para. I.123 for the meaning of “charge” within the ECtHR case-law.

²⁸⁴ ECtHR, *Khodorkovskiy and Lebedev v. Russia (No. 2)*, nos. 51111/07 and 42757/07, [Judgment](#), 14 January 2020, para. 543; *Ismoilov and Others v. Russia*, no. 2947/06, [Judgment](#), 24 April 2008, para. 160; *Zollmann v. the United Kingdom*, no. 62902/00, [Decision](#), 27 November 2003, para. 1.

²⁸⁵ See *supra* para. I.126.

time and Mr Thaçi had not been otherwise “substantially affected”. As a result, the impugned statements were not covered by the guarantees enshrined in Article 6 of the ECHR.

140. Nor could it be said that the impugned statements have prejudged future criminal proceedings against Mr Thaçi and therefore shall be covered by the aforementioned guarantees. In this regard, the Pre-Trial Judge recalls that the CoE Report is a report prepared by a non-judicial body and that the task of its drafters was not to conduct a criminal investigation.²⁸⁶ As a confirmation of this, the CoE Report has not been used to underpin any of the criminal charges with which Mr Thaçi has ultimately been charged. On the contrary, the present charges stem from an independent and impartial criminal investigation.²⁸⁷

141. Lastly, the Pre-Trial Judge finds that neither the inclusion of the CoE Report among the “Foundational Documents” of the SC nor its reference in Articles 1 and 6 of the Law, which determine the subject matter jurisdiction of the SC, could amount to a violation of Mr Thaçi’s presumption of innocence insofar as no public authority, either judicial or investigative, nor any other public official connected to the SC or to its proceedings have ever made prejudicial statements against Mr Thaçi after the latter was criminally “charged”. The Pre-Trial Judge finds that there is nothing prejudicial in quoting a report that merely triggered the political impetus for the creation of a criminal court to adjudicate possible crimes.²⁸⁸

²⁸⁶ See *supra* para. I.125 and fn. 257.

²⁸⁷ See Confirmation Decision.

²⁸⁸ The Pre-Trial Judge notes that fact-finding missions and investigations are consistently being used to respond to situations of alleged serious violations of international humanitarian law and international human rights law and to promote accountability for such violations and counter impunity, *see, for example*, the list of [United Nations Human Rights Council-mandated Commission of Inquiries and Fact-Finding Missions & Other Bodies](#).

142. In light of the above, the Pre-Trial Judge finds that Mr Thaçi's right to be presumed innocent has not been violated and, accordingly, dismisses any argument concerning alleged violations of such right.

6. Conclusion

143. In light of the foregoing, the Pre-Trial Judge finds no violation of the Accused's constitutional rights and, accordingly, finds no basis for setting aside the SC's jurisdiction.

D. VESELI REQUEST FOR REFERRAL TO THE SCCC

144. As regards Mr Veseli's request that the matter of "whether the SC is competent to try criminal offences alleged [...] in a fair and impartial process, free from undue political influence, and based on Kosovo law, in compliance with Kosovo's Constitution" be referred to the SCCC, the Pre-Trial Judge notes that Rule 75(5) of the Rules provides that Parties and Victims' Counsel are not entitled to submit a motion for referral pursuant to Article 49(4) of the Law and motions to that effect shall not be considered. While a request to this effect is not at the Parties' disposal, nothing prevents them from prompting the Pre-Trial Judge to exercise his discretion and refer a question of constitutional compatibility to the SCCC. The Pre-Trial Judge notes in this regard that Rule 75(5) of the Rules enables a Judge or Panel to determine, *proprio motu*, whether a referral shall be made in accordance with Article 49(4) of the Law.

145. In the present circumstances, Mr Veseli does not point to a specific provision that is constitutionally incompatible, but rather points to the fact that the subject matter jurisdiction of the SC, its international staffing, procedure for the appointment of judges, and the SC's legal framework and primacy over other courts ("Selected Features") to contend that the SC are an extraordinary court in violation of

Article 103(7) of the Constitution.²⁸⁹ Mr Veseli further argues that the KCC never had the opportunity to review the Law and therefore cogent reasons now exist for review of the constitutional compatibility of the SC.²⁹⁰ However, for the reasons set out above,²⁹¹ the Pre-Trial Judge is not uncertain as to the constitutional compatibility of the Selected Features of the SC. The Pre-Trial Judge, therefore, declines to exercise his discretion to refer the matter to the SCCC and, therefore, rejects Mr Veseli's request for referral to the SCCC.

V. DISPOSITION

146. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REJECTS** the Thaçi Motion on the Legality of the SC and SPO insofar as it challenges the temporal mandate of the SC and the lawfulness of the SPO investigation;
- b. **REJECTS** the Thaçi Motion;
- c. **REJECTS** the Veseli Motion; and
- d. **REJECTS** the Selimi Motion.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Tuesday, 31 August 2021
At The Hague, the Netherlands.

²⁸⁹ Veseli Motion, paras 1-2, 5-12.

²⁹⁰ Veseli Motion, paras 3-4.

²⁹¹ *See supra* paras I.101-I.111, I.114.