

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

**Before:** **The President of the Specialist Chambers**  
Judge Ekaterina Trendafilova

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 6 September 2021

**Language:** English

**Classification:** Public

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**Thaçi Defence Application for the disqualification of Judge Emilio Gatti from the Court of Appeals Panel adjudicating Mr Thaçi's appeals on provisional release and jurisdiction, annulment of the Decisions of the President Nos. KSC-BC-2020-06/IA010/F00005 and KSC-BC-2020-06/IA009/F00015 , dated 26 August 2021 and 30 August 2021, respectively, and the reinstatement of the Court of Appeals Panel appointed by the President by Decision KSC-BC-2020-06/IA004/F00002, dated 4 February 2021, to rule on Mr Thaçi's appeals on provisional release and jurisdiction**

**With Confidential Annex 1 and Public Annex 2**

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## INTRODUCTION

1. The Defence of Mr. Taçi (“Defence”) requests the disqualification of Judge Emilio Gatti, Judge of the Appeals Panel of the Kosovo Specialist Chambers (“KSC”), from the Appeals Panel adjudicating Mr Taçi’s appeals on jurisdiction<sup>1</sup> and provisional release,<sup>2</sup> pursuant to Article 33(1)(c) of the Law,<sup>3</sup> and Rule 20 of the Rules.<sup>4</sup>

2. Article 6(1) of the European Convention on Human Rights (“ECHR”) guarantees Mr. Taçi an independent and impartial tribunal established by law in the determination of his civil rights or obligations, or any criminal charge against him. The European Court of Human Rights (“ECtHR”) has established that this right includes the right to be tried by a tribunal that enjoys “internal judicial independence.”<sup>5</sup> This means that the judges of a judicial panel must be appointed by an authority that is itself seen as independent and impartial in appointing the judges. The aforementioned safeguards for ensuring the independence and impartiality of the judges are enshrined in – *inter alia* – Article 33(1) of the KSC Law, which ensures that the judges assigned to a case are protected from undue influence by the President of the KSC until they issue the judgment in the case to which they have been assigned.

3. The Defence in this application does not assert that Judge Gatti is personally, subjectively biased. Rather, as set forth below, the Defence asserts that a reasonable doubt may exist as to Judge Gatti’s independence and impartiality because of his appointment by the President, about whose impartiality there is reasonable doubt

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<sup>1</sup> KSC-BC-2020-06/IA009/F00012, Taçi Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021.

<sup>2</sup> KSC-BC-2020-06/ IA010/F00004, Taçi Defence Appeal against Decision on Review of Detention of Hashim Taçi, 16 August 2021.

<sup>3</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office.

<sup>4</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers.

<sup>5</sup> *Infra*, paras. 13-18.

because of certain *ex parte* communications between her and the Specialist Prosecutor about Mr. Thaçi's pending provisional release application.

4. On 7 December 2020, the President and Specialist Prosecutor of the KSC appeared together at a diplomatic briefing which was not disclosed to the Defence ("December Briefing"). During the diplomatic briefing, the Specialist Prosecutor made *ex parte* submissions in the presence of Judge Trendafilova about Mr. Thaçi's provisional release. Mr. Smith made several false allegations, including that "**any release of Thaci will harm the process as witnesses will be intimidated and threatened by him and his loyal people, by damaging the process and threatening the witnesses.**"<sup>6</sup> [*Emphasis added*].

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

6. Judge Trendafilova is reported to have told the assembled diplomats that "**she has been informed by Specialist Prosecutor Jack Smith that he will present the reasons why Thaçi should not be released on bail and then the responsible Judge**

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<sup>6</sup> See Confidential Annex 1.

**will take a decision on the matter.**” [*Emphasis added*]. The nature and extent of such *ex parte* communications between Judge Trendafilova and the Specialist Prosecutor about Mr. Thaçi’s provisional release has never been disclosed.

7. His Honour Judge Kai Ambos formed part of the Court of Appeals Panel, which was established by the President pursuant to Article 33(1)(c) of the KSC Law, and which in April 2021 adjudicated Mr Thaçi’s first interlocutory appeal in this case, related to interim release. As set forth below, under Article 33(1)(c) of the KSC Law, the Court of Appeals Panel to which Judge Ambos was appointed was to remain intact until it issues its judgment on the appeal of the parties in connection with the merits of the present case, which would conclude the appellate proceedings in this case. Judge Ambos wrote a separate concurring opinion which specifically addressed the question of State Guarantees, opining that “the existence of a *Third State* that may receive and, if necessary, monitor a released suspect or accused may constitute an important, perhaps decisive offer within the framework of conditional release.” His Honor wrote that “such an offer, if concretely made and supported by guarantees, including from the respective Third State, may shift the balance in favour of conditional release and must therefore be seriously considered by the Pre-Trial Judge or competent Panel.”<sup>7</sup>

8. On 23 July 2021, the Pre-Trial Judge decided that conditions warranting Mr Thaçi’s ongoing detention were still in place, and ordered Mr Thaçi’s ongoing detention.<sup>8</sup> This was despite Mr Thaçi’s submissions being supported by two Third State Guarantees, including from a contributing state to the Court, which were entirely

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<sup>7</sup> KSC-BC-2020-06/IA004/F00005, Separate Concurring Opinion of Judge Kai Ambos, para. 5(ii) (emphasis added).

<sup>8</sup> KSC-BC-2020-06/F00417, Decision on Review of Detention of Hashim Thaçi, 23 July 2021, paras. 46, 56, 64.

disregarded. Mr. Thaçi, intending to appeal, filed a request before the President of the Court seeking a variation of the timeframe within which to do so.<sup>9</sup>

9. In assigning Mr Thaçi's extension of time request to a Court of Appeals Panel, the President removed Judge Ambos, replacing him with Judge Emilio Gatti, without offering any reasons for doing so and in clear violation of Article 33(1)(c) of the KSC Law. The other two Judges remained the same.<sup>10</sup> It turned out that the aforementioned decision of the President was not a result of Judge Ambos' unavailability. Namely, the Defence learned subsequently that the President appointed Judge Ambos to another Court of Appeals Panel on 27 August 2021.<sup>11</sup> The Defence submits that the President lacked legal authority to replace Judge Ambos with Judge Gatti, which raises further reasonable doubts about her independence and impartiality on the question of provisional release of Mr. Thaçi.

10. In this circumstance, there are two possibilities. Either the President's removal of Judge Ambos from the Court of Appeals Panel was linked to his previously expressed openness to the prospect of interim release of Mr Thaçi, or it was not. The relevant question under the jurisprudence of the ECtHR is not whether the President or Judge Gatti *actually* lack independence or impartiality, which is a burden that the Defence need not prove. Rather, the test is whether a reasonable observer would apprehend a reasonable doubt that such a lack of impartiality exists. The President's *ex parte* communications with the Specialist Prosecutor, including her presence at diplomatic briefings where Mr. Smith made submissions on the merits of Mr. Thaçi's pending provisional release application, would cause a reasonable observer to

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

<sup>10</sup> KSC-BC-2020-06/IA010/F00002, Decision Assigning a Court of Appeals Panel to Consider Request Regarding Time Limits, 29 July 2021, para. 5.

<sup>11</sup> KSC-BC-2018-01/IA001/F00001, Decision Assigning a Court of Appeals Panel, dated 27 August 2021.

question whether the removal of Judge Ambos was deliberate, which is sufficient to establish grounds for disqualification under the ECHR. Under the ECtHR's jurisprudence, this taint extends to Judge Gatti.

## I. APPLICABLE LAW

11. The independence and impartiality of the Judges of the KSC is a core principle of the Court, guaranteed by the Constitution of Kosovo,<sup>12</sup> the Law and the Rules, in accordance with international standards of due process.<sup>13</sup>

12. Mr. Thaçi has a right to an independent and impartial tribunal established by law, which is guaranteed to him by Article 31(2) of the Constitution, Article 6(1) of the ECHR, Article 10 of the Universal Declaration of Human Rights ("UDHR") and Article 14 of the International Covenant on Civil and Political rights ("ICCPR"). The ECHR, UDHR, and ICCPR are binding legal authority on the KSC, as mandated by Article 3(2)(e) of the Law and Article 22 of the Constitution. In the event of any conflict between these international instruments and any laws of Kosovo, Article 22 of the Constitution makes clear that the provisions of these international instruments must prevail over the provisions of Kosovo law (including the Law).

13. The ECtHR's interpretation of the ECHR is also binding on the KSC pursuant to Article 53 of the Constitution, which states, "[h]uman rights and fundamental

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<sup>12</sup> See Article 31(2), KSC Law.

<sup>13</sup> Article 3 of the KSC Law provides that the Specialist Chambers "shall adjudicate and function in accordance with [...] e. international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution."

freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”

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

However, judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This **internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court.** The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant’s doubts as to the (independence and) impartiality of a court **may be said to have been objectively justified.**<sup>14</sup>

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

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<sup>14</sup> ECtHR, *Parlov-Tkalčić v Croatia*, 24810/06, Judgment, 22 December 2009, para. 86. Emphasis added.

<sup>15</sup> ECtHR, *Daktaras v Lithuania*, 65518/01, Judgment, 6 September 2005 (“*Daktaras*”), paras. 17-35.

any legitimate doubt as to the absence of inappropriate pressure.”<sup>16</sup> The ECtHR found that this resulted in a violation of Article 6(1) of the ECHR.

16. Importantly, the ECtHR in *Daktaras* concluded that the Supreme Court itself could not be viewed as impartial because it had been appointed by a president who could not be seen as impartial.

17. Similarly, in *Moiseyev v Russia*, the applicant had been indicted for treason. At trial, the president of the court replaced all the judges of the chamber hearing the case no less than three times. Even though there was no evidence of any personal bias on the part of the appointed judges, the ECtHR considered this to be a violation of Article 6 of the ECHR because the applicant was justified in the impression that the judges had been replaced because they intended to decide differently from what the president had in mind.<sup>17</sup> The ECtHR in *Moiseyev* concluded: “the applicant’s doubts as to the independence and impartiality of the trial court may be said to have been objectively justified on account of the repeated and frequent replacements of members of the trial bench in his criminal case, which were carried out for unascertainable reasons and were not circumscribed by any procedural safeguards.”

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

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<sup>16</sup> *Id.*, paras. 31, 36.

<sup>17</sup> ECtHR, *Moiseyev v Russia*, 2329/05, Judgment, 14 May 2009 (“*Moiseyev*”), paras. 181-185.



is not seen as objectively independent and impartial is himself appointed in violation of Article 6(1) of the ECHR.

19. The jurisprudence of international courts and tribunals is of little value to the KSC on the question of judicial disqualification because international tribunals are not bound by the ECHR, unlike the KSC. For example, the ICTY expressly concluded that it was not bound by the ECHR or the jurisprudence of the ECtHR.<sup>18</sup>

20. Unlike the ICTY, in the event of a conflict between the jurisprudence of the ICTY (and other international courts and tribunals) and the ECtHR, the KSC is obliged, pursuant to Articles 22 and 53 of the Constitution and Article 3(2)(e) of the Law, to follow the jurisprudence of the ECtHR. Accordingly, the KSC must look to the jurisprudence of the ECtHR and not the jurisprudence of international courts and tribunals in resolving judicial disqualification applications.

21. The aforementioned safeguards are also enshrined in the KSC Law. Article 30(3) of the KSC Law provides that “[i]f assigned from the Roster to [...] appeal [...] court phase of a case [...] in accordance with Article 33, 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.” Also, and more importantly, according to Article 33(1)(c) of the KSC Law, the President shall assign judges from the Roster to “[a] Court of Appeals Panel, as soon as a motion for an interlocutory

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

appeal in relation to a decision of a Pre-Trial Judge or a Trial Panel by right under Article 45(1) is filed, leave to appeal is granted for an interlocutory appeal under Article 45(2) or a notice of appeal in relation to a judgement of a Trial Panel is filed in accordance with Article 46." Under Article 33(1)(c) of the Law, "[t]he assignments of Court of Appeals Panel judges shall elapse on the day after the Court of Appeal Panel renders its judgement, unless the Court of Appeals Panel is concurrently involved in other proceedings, in which case the judges' assignments shall elapse when those proceedings are completed." The importance of ensuring the independence of the assigned judges during their term of assignment is reinforced by Article 31(3) of the KSC Law, according to which the prohibition for a judge to engage in any occupation of a professional nature commences immediately after their assignment pursuant to Article 30(3) of the KSC Law.

22. Rule 20 of the Rules specifies the conditions for disqualification of judges.

## II. SUBMISSIONS

### A. TIMING OF THE PRESENT REQUEST

23. Rule 20(3) requires a Party to apply for disqualification of a Judge immediately, but no later than ten days after the grounds on which the application are based become known to the Party.

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

25. This application is timely filed for purposes of Rule 20(3) of the Rules. Judge Gatti was appointed in two decisions dated 26 August and 30 August 2021, and this

application is filed both “immediately” and in any event within 10 days of the first order.<sup>19</sup> The President is requested to refer this application to a Panel of three judges to determine whether Judge Gatti should be disqualified, pursuant to Rule 20(3).

## B. THE IMPUGNED CONDUCT

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

27. Notes of this meeting have been circulated (“December Minutes”).<sup>20</sup> The author of these notes is unknown. Significantly, the President states without elaboration that the December Minutes, “inaccurately attribute[ ] entire passages to the President’s presentation and incorrectly reflects what was said,” but only does so “at times.”<sup>21</sup> Notably, those “times” do not appear to include the specific quotes attributed to her and the Specialist Prosecutor that are relied on in this submission, the accuracy of which are not disputed by the President in her decision on the Defence’s Application requesting that she recuse herself from appointing the Appeals Panel hearing the provisional release appeal (the “Recusal Decision”).<sup>22</sup>

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<sup>19</sup> Judge Gatti was appointed by the President to the Appeals Panel to adjudicate the Defence’s motion for extension of time to file its appeal of the denial of provisional release, filed on 28 July 2021. The President replaced Judge Ambos with Judge Gatti the next day, on 29 July 2021, and the new Appeals Panel granted the request for extension of time 24 hours later on 30 July 2021. As a practical matter, the Defence did not have time to file a challenge to Judge Gatti because of the timing of the Appeals Panel’s decision, coming almost immediately after its appointment. Moreover, the Defence does not argue that the President’s *ex parte* communications with the Specialist Prosecutor create an appearance of a lack of impartiality to adjudicate requests for extension of time. Accordingly, the issue of Judge Gatti’s appointment to adjudicate the provisional release appeal only became ripe with his appointment of 26 August 2021 to adjudicate the merits of the provisional release appeal.

<sup>20</sup> See Confidential Annex 1.

<sup>21</sup> KSC-BC-2020-06/F00440, Decision on Application for the Recusal of the President, 24 August 2021, para. 19.

<sup>22</sup> *Id.*

28. The December Minutes demonstrate that the President and Specialist Prosecutor made statements regarding witness interference, and provisional release, to the assembled members of the diplomatic community, and in front of each other. To avoid any possible allegations of misinterpretation, the Defence hereby extracts in full those sections of the December Minutes, which relate to the questions of witness interference, and provisional release. Again, neither the President nor the Specialist Prosecutor have disputed the accuracy of these specific quotes:

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

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

‘Asked if the Court will be allowed to hold proceedings outside The Hague, she said [...] [t]he decision to hold proceedings in the territory where the alleged crimes were committed, however, requires complex consideration of the situation in the country, position of witnesses and overall impact on the proceedings.’ [page 2, emphasis added]

‘She said referring to the case of Thaçi that **she has been informed by Specialist Prosecutor Jack Smith that he will present the reasons why Thaçi should not be released on bail and then the responsible Judge will take a decision on the matter.** She said that such a decision will be based on the KSC Law and the constitution of Kosovo that includes also the European and international conventions [...].’ [page 3, emphasis added]

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

‘He said that he has been confronted from his first days with attempts to obstruct the Specialist Chambers and Prosecutors Office and their work, mainly by Thaçi, Veseli and people loyal to them in Kosovo’s government and outside. This is the reason why he was forced in June to make a statement to show to the people of Kosovo and the international community the continuous and well-orchestrated efforts by Thaci to hinder the work and administration of justice. [...]’

He said the public support given to Specialist Chambers by Ambassadors in Kosovo has helped the court, because witnesses are appearing to the Specialist

Chambers realizing the commitment the international community has towards the Specialist Chambers. Now witnesses who were under immense pressure by Thaci and his loyal people are having confidence more in the work and ability of Specialist Chambers to serve justice to the victims.' [page 3, emphasis added]

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

'He said the strategy of the lawyers of Thaci is to delay the trial and get bail based on this, and any release of Thaci will harm the process as witnesses will be intimidated and threatened by him and his loyal people, by damaging the process and threatening the witnesses. He said that the list of witnesses will be kept secret. [...]. He said 37 relocation requests have been made [...].' [page 4, emphasis added]

29. On 11 February 2021, a further diplomatic briefing was held between the President and EU diplomats in The Hague ("February Briefing").<sup>23</sup> Again, notes were taken, and circulated ("February Minutes"). The author of the notes is unknown. Again, the President has never said that the February Minutes were faked, forged, or inaccurate. The Office of the President stated only that the February Briefing was confidential, and that "the [briefing] transcript had been circulated accidentally and was intended for the internal use of diplomatic missions".<sup>24</sup>

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

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

'[...] [T]he efforts to undermine our institutions has not ceased and will likely increase [...]. More specifically, attempts could be made to amend the Law to

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<sup>23</sup> Euronews Article 'Kosovo could try to move war crimes court to Pristina, judge warns', first published 15 February 2021, updated 23 February 2021, containing notes from diplomatic briefing on 11 February 2021, Public Annex 2.

<sup>24</sup> *Ibid.*

allow for pardons for those who are convicted by the KSC or to move either the seat of the KSC or the archives to Kosovo, or both.

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

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

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

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

34. As the ECtHR has made clear, the president of a court has a vital role in assigning judges, which has a direct impact on the right of an accused person to an independent and impartial tribunal under Article 6(1) of the Convention. *Ex parte* communications between a prosecutor and the president of a court who will assign judges thus constitute an improper interference with the accused's fundamental rights as guaranteed by the ECHR.

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

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

36. The President's receipt of *ex parte* submissions from Mr. Smith and her own statements both affect, and appear to affect, her impartiality on the question of Mr. Thaçi's provisional release. Having been part of a presentation by the Specialist Prosecutor to the Court's sponsors in which Mr. Thaçi's release was linked to harm to individuals, a reasonable observer would question whether the President still had an



open mind on this question, particularly in light of her further allegation of a campaign of destabilisation of the Court itself, involving Mr Thaçi's prior Counsel.<sup>25</sup> As such, any objective observer or bystander would apprehend an appearance of judicial bias and impropriety, and a lack of impartiality that cannot be restored.<sup>26</sup>

37. The appearance of lack of impartiality by the President also taints Judge Gatti's appointment to the Appeals Panel. As noted above, the ECtHR has established in *Daktaras* and *Moiseyev* that a judge appointed by a president who is not seen as objectively independent and impartial is himself appointed in violation of Article 6(1) of the ECHR.

38. This conclusion is further reinforced by the fact that the President removed Judge Ambos from the Appeals Panel in this case, without legal authority to do so and without any explanation. The Law requires Judge Ambos to remain on the Appeals Panel in this case until a final judgment is delivered by the Appeals Panel in the present case.

39. The purpose of Article 30(1) of the KSC Law is rather clear. Firstly, it seeks to provide a random and independent case assignment system, whereby the President's decision on the assignment of judges is made before she knows the opinions of the judges on the specific issues of a certain case that may come before them. Secondly, it ensures that the judges are not vulnerable to influence by the President in cases when the latter, when disapproving certain rulings on their part, simply takes them off the case. As such, Articles 30(1) and 33(1)(c) of the Law reflect the ECHR guarantees on the independence and impartiality of the assigned judges, elaborated above.

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<sup>25</sup> December Minutes, p. 2.

<sup>26</sup> SCSL, *Prosecutor v. Issa Hassan Sesay*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para. 15.



40. The President's appointment of a new Appeals Panel in this case just to replace Judge Ambos with Judge Gatti violates Article 30(3) and Article 33(1) of the Law.<sup>27</sup> This legal provision is clear that assignments from the Roster are made on the basis of different procedural phases of a case, i.e. Trial Court, Appellate Court, Supreme Court and Constitutional Court procedural phases to which a case may be subjected on ongoing basis. So, according to Article 30(3) and Article 33(1)(c) of the Law, judges appointed to an Appeals Panel on a specific case shall continue to serve on that Appeals Panel until a judgment on the merits of a case has been rendered in that case by that Appeals Panel, namely as long as the case is still eligible to reach the procedural phase for which the respective Appeals Panel is responsible. As a result of this, Article 30(3) of the Law contains a rather long default duration of the appointment of judges by the President.

41. Articles 30(3) and 33(1) of the Law do not state that the President shall appoint a judge or a panel of judges after each procedural decision rendered by that judge or a panel within a procedural phase of a case, as the President claims.<sup>28</sup> In fact, such a reading of the aforementioned legal provisions is contrary to the very principles these provisions enshrine. If the President's reading of Articles 30(3) and 33(1) of the KSC Law prevail, the President would effectively be vested with arbitrary authority to discipline judicial decision-making by taking off the case judges of whose rulings she does not approve. More importantly, the President's incorrect reading of Articles 30(3) and 33(1) of the Law is selective and targets only Judge Ambos. Namely, she does not apply the same standard to the Pre-Trial Judge. In this respect, acting in accordance with Article 33(1)(a) of the KSC Law, the President did not issue any specific decision(s) (re)appointing the Pre-Trial Judge after each decision on interim release or, for that matter, specifically assigning him to rule on preliminary motions in this case

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<sup>27</sup> KSC-BC-2020-06/F00440, Decision on Application for the Recusal of the President, 24 August 2021, at para. 30.

<sup>28</sup> Recusal Decision, para. 30.

or any other specific matters on which he has decided. Similarly, there is no need, under Article 30(3), in conjunction with Article 33(1)(c) of the KSC Law, for the President to (re)appoint an Appeals Panel for hearing an appeal in the same case against a decision that was rendered by a Pre-Trial Judge who himself was not explicitly (re)appointed to rule on interim release.

42. The decision to replace Judge Ambos thus stands in contrast to the President's treatment of the Pre-Trial Judge. In a different briefing on 11 February 2021, the President is reported to have told assembled diplomats that, "I assigned one Pre-Trial Judge, Judge Nicolas Guillou, to deal simultaneously with all three cases at the pre-trial phase. This will ensure consistency in the jurisprudence and predictability of the practices before the KSC and it will also ensure the sound management of the court's budget."<sup>29</sup>

43. Judge Ambos' opinion that Third State Guarantees could provide a path to Mr. Thaçi's release, puts him at direct odds with the *ex parte* submissions made by Mr. Smith to the President in front of the Court's international sponsors. As such, a reasonable observer would apprehend bias in the President's decision to remove only Judge Ambos as a judge of the Court of Appeals Panel that will hear Mr. Thaçi's second appeal on provisional release and his appeal on jurisdiction, and to have done so without legal authority under the Law or the Rules.

44. The nature of the application requires immediate injunctive relief, preventing an unlawfully appointed Appeals Panel from ruling on Mr. Thaçi's appeals on interim release and jurisdiction.

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<sup>29</sup> Public Annex 2.

### III. CONCLUSION AND RELIEF SOUGHT

45. For the above reasons, the Defence:

**REQUESTS** the President to assign the present request for disqualification to the Vice-President, pursuant to Rule 20(6) of the Rules, as this request may be deemed to “concern” the President;

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

**REQUESTS** the disqualification of Judge Emilio Gatti, Judge of the Kosovo Specialist Chambers, from the Appeals Panel in this case, pursuant to Article 33(1)(c) of the KSC Law, and Rule 169 of the Rules; and

**REQUESTS** the President to assign the present request for reconsideration and annulment of Decision of the President KSC-BC-2020-06/IA010/F00005, dated 26 August 2021, for the assignment of a Court of Appeals Panel to adjudicate Mr. Thaçi’s Interim Release Appeal, and annulment of the Decision of the President KSC-BC-2020-06/IA009/F00015, dated 30 August 2021, for the assignment of a Court of Appeals Panel to adjudicate Mr. Thaçi’s Jurisdiction Appeal, and reinstatement of the Decision of the President KSC-BC-2020-06/IA004/F00002, dated 4 February 2021, for the Assignment of the Court of Appeals in the present case to the Vice-President, pursuant to Rule 20(6) of the Rules, as this request may be deemed to “concern” the President;

**REQUESTS** annulment of the Decision of the President KSC-BC-2020-06/IA010/F00005, dated 26 August 2021 for the assignment of a Court of Appeals Panel to adjudicate Mr. Thaçi’s Interim Release Appeal, and the

annulment of the Decision of the President KSC-BC-2020-06/IA009/F00015, dated 30 August 2021 for the assignment of a Court of Appeals Panel to adjudicate Mr. Taçi's Jurisdiction Appeal, and reinstatement of the Decision of the President KSC-BC-2020-06/IA004/F00002, dated 4 February 2021, for the Assignment of the Court of Appeals in the present case, which shall rule on all appeals in the present case, including the Interim Release Appeal and Jurisdiction Appeal pursuant to Article 30(3), Article 33(1)(c) of the KSC Law, and Rule 169 of the Rules.

**REQUESTS** the Three-Member Panel of Judges and/or the Vice-President, respectively, to grant injunctive relief, suspending the proceedings for the adjudication of the appeals of Mr. Taçi on interim release and jurisdiction by the Court of Appeals Panel unlawfully appointed by the President's Decisions Nos. KSC-BC-2020-06/IA010/F00005 and KSC-BC-2020-06/IA009/F00015, dated 26 and 30 August 2021, respectively, until a final decision is reached with respect to the present application.

**[Word count: 5995 words]**

Respectfully submitted,

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

**Gregory W. Kehoe**

**Counsel for Hashim Taçi**

Monday, 6 September 2021

At Tampa, United States