



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**File number:** KSC-BC-2020-06

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

**Registrar:** Fidelma Donlon

**Date:** 17 September 2021

**Language:** English

**Classification:** Public

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**Decision on Applications for Reconsideration and  
Disqualification of a Judge from a Court of Appeals Panel**

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**THE PRESIDENT** of the Specialist Chambers (“President”), noting Articles 30(3) and 33(1)(c) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), Rules 20 and 79 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules” and “KSC”, respectively) and Rules 4 and 5 of the Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges (“Rules on Assignment”), herewith renders this decision on Mr Hashim Thaçi’s request for: (i) reconsideration of the 24 August 2021 Decision on the Application for the Recusal of the President (“First Application”);<sup>1</sup> and (ii) *inter alia*, the disqualification of Judge Emilio Gatti from the Court of Appeals Panels that was assigned to adjudicate Mr Thaçi’s appeals on provisional release and jurisdiction (“Second Application”).<sup>2</sup>

## I. PROCEDURAL BACKGROUND

1. On 23 July 2021, the Pre-Trial Judge, *inter alia*, ordered Mr Thaçi’s continued detention,<sup>3</sup> against which the Defence filed an appeal on 16 August 2021 (“Detention Appeal”).<sup>4</sup>
2. On the same day, the Defence filed an application for the recusal/disqualification of the President from assigning a Court of Appeals Panel to adjudicate the Detention

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<sup>1</sup> F00449, Thaçi’s Defence Request for Reconsideration of the 24 August 2021 Decision on Application for the Recusal of the President, 31 August 2021.

<sup>2</sup> F00457, 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, 6 September 2021.

<sup>3</sup> F00417/RED, Public Redacted Version of Decision on Review of Detention of Hashim Thaçi, 23 July 2021, para. 64.

<sup>4</sup> IA010/F00004, Thaçi Defence Appeal against Decision on Review of Detention of Hashim Thaçi, 16 August 2021.

Appeal (“16 August 2021 Application”),<sup>5</sup> which was dismissed on 24 August 2021 (“Disqualification Decision”).<sup>6</sup>

3. On 26 August 2021, the President assigned Judges Michèle Picard, Emilio Gatti and Nina Jørgensen to decide on the Detention Appeal (“Assignment Decision”).<sup>7</sup>

4. On 30 August 2021, the President assigned Judges Michèle Picard, Emilio Gatti and Nina Jørgensen to adjudicate Mr Taçi’s appeal of the Pre-Trial Judge’s decision on his motion challenging, *inter alia*, the jurisdiction of the Specialist Chambers.<sup>8</sup>

5. On 31 August 2021, the Defence filed the First Application.<sup>9</sup>

6. On 6 September 2021, the Defence filed the Second Application.<sup>10</sup>

## II. DISCUSSION

### A. FIRST APPLICATION

7. The Defence requests reconsideration of the following findings in the Disqualification Decision:

- i.* That the President cannot recuse herself or be disqualified from exercising her assignment duties as the Defence requests, under Rule 20 of the Rules;
- ii.* That the standard for assessing the independence and impartiality of the President is the subjective standard, without regard to the objective standard;
- iii.* That it was “unreasonable and without merit” to suggest that the statements attributed to the President and the Specialist Prosecutor at the “diplomatic briefing” could affect impartiality of the President and the Appointed Court of Appeals Panel in the eyes of an objective observer;
- iv.* That it is “misleading” to state that the Specialist Prosecutor made *ex parte* communications to the President; and

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<sup>5</sup> F00434, Taçi’s Defence Application for the Recusal of the President Ekaterina Trendafilova from Assigning a Court of Appeals Panel to adjudicate Mr Taçi’s appeal on provisional release with confidential Annex 1 and Public Annex 2, 16 August 2021.

<sup>6</sup> F00440, Decision on Application for the Recusal of the President, 24 August 2021.

<sup>7</sup> IA010/F00005, Decision Assigning a Court of Appeals Panel, 26 August 2021.

<sup>8</sup> IA009/F00015, Decision Assigning a Court of Appeals Panel, 30 August 2021. See also IA009/F00012, Taçi Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021.

<sup>9</sup> First Application.

<sup>10</sup> Second Application.

- v. That the Application for the Recusal of the President (“Recusal Application”) was not timely.<sup>11</sup>

8. The Defence accordingly requests the following relief:

[T]he President to reconsider the Recusal Decision and the Detention Appeal Assignment Decision; and

[T]he recusal or disqualification of Judge Ekaterina Trendafilova, President of the Kosovo Specialist Chambers, from the specific judicial task of assigning a Court of Appeals Panel to adjudicate Mr Thaçi’s Detention Appeal, pursuant to Article 37(4) and Article 33(1)(c) of the KSC Law, and Rule 14 and Rule 169 of the Rules.<sup>12</sup>

**1. Reconsideration of Disqualification Decision**

9. At the outset, the President recalls that a request for reconsideration pursuant to Rule 79 of the Rules applies to decisions issued by “a Panel”. A Panel within the meaning of Rule 2 of the Rules refers to one or more Judges assigned by the President pursuant to Articles 25(1) and 33 of the Law. As a general matter, decisions issued by the President in the exercise of her judicial administration role, including the assignment of Panels, are therefore not subject to reconsideration within the meaning of Rule 79 of the Rules.<sup>13</sup> Nevertheless, the President has the inherent authority to reconsider her decisions in exceptionally limited circumstances.

10. The President observes a growing tendency to file applications based on the same arguments and the same relief sought. Accordingly, future applications for reconsideration based on the same or unrelated facts and circumstances may be dismissed given that neither the Law nor the Rules provide for the reconsideration of administrative decisions issued by the President.

11. Turning to the standard for reconsideration, it should be recalled that for an

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<sup>11</sup> First Application, para. 2.

<sup>12</sup> First Application, para. 57.

<sup>13</sup> Cf. STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, Decision on Defence Motion for Reconsideration and Rescission of Order Composing the Trial Chamber, 4 October 2013, paras 10-12, 15; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Order on the Request to the President on the Composition of the Bench of the Appeals Chamber, 12 February 1999.

application for reconsideration pursuant to Rule 79 of the Rules to succeed, the moving party or participant must demonstrate the existence of a clear error of reasoning or that reconsideration is necessary to avoid injustice. New facts, circumstances or arguments may be considered in this assessment provided that the moving party show how they relate to reconsideration.<sup>14</sup>

12. The President further recalls that reconsideration of decisions may only take place in exceptional circumstances.<sup>15</sup> Given its exceptional character, reconsideration may not be invoked as an ordinary remedy (such as “a second appellate route”)<sup>16</sup> to redress imperfections in a decision or to circumvent the unfavourable consequences of a ruling.<sup>17</sup> Hence, mere disagreement with the outcome or with the reasoning of a decision is not sufficient for that decision to be reconsidered.<sup>18</sup>

13. Guided by the above principles, the President will address the contested findings of the Disqualification Decision as specified in paragraphs 11 and 12.

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<sup>14</sup> *Specialist Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021 (“*Gucati and Haradinaj* Decision on Reconsideration”), para. 4. See also ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1813, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, 10 February 2015, para. 19; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18.

<sup>15</sup> See Rule 79 of the Rules.

<sup>16</sup> ICTY, *Prosecutor v. Delić*, IT-04-83-PT, Decision on the Prosecution motion for reconsideration, 23 August 2006, p. 5.

<sup>17</sup> STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Decision on Defence Request for Reconsideration of the Decision to hold Trials in Absentia, Trial Chamber II, 21 October 2020, para. 19 (“21 October 2020 *Ayyash* Decision”); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/R176bis, Decision on Defence requests for reconsideration of the Appeals Chamber’s decision of 16 February 2011, 18 July 2012 (“18 July 2021 *Ayyash* Decision”), paras 22-23.

<sup>18</sup> *Gucati and Haradinaj* Decision on Reconsideration, para. 4. See also 21 October 2020 *Ayyash* Decision, para. 18; ICC, *Prosecutor v. Gbagbo and Goudé*, ICC-02/11-01/15 OA 14, Decision on counsel for Mr Gbagbo’s request for reconsideration of the ‘Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute’ and on the review of the conditions on the release of Mr Gbagbo and Mr Blé Goudé, 28 May 2020, para. 59; 18 July 2021 *Ayyash* Decision.

*(a) Contested finding (i) – the President’s recusal or disqualification pursuant to Rule 20*

14. In the Disqualification Decision, the President determined based on the Law and the Rules that she cannot recuse herself or be disqualified under Rule 20 of the Rules from exercising her administrative duties.<sup>19</sup> The Defence disagrees with this finding, arguing that the President’s decision in this respect is based on a clear error of reasoning and is contrary to the Constitution of Kosovo, the Law and the European Convention on Human Rights (“ECHR”).<sup>20</sup>

15. The Defence contends that Article 32(4) of the Law in fact foresees a situation whereby the President can be replaced in the event of her “inability to act”.<sup>21</sup> It submits that a restrictive interpretation of Rule 20 of the Rules and the conclusion that neither the Law nor the Rules foresee disqualification by a party of the President exercising his or her administrative authority would mean that the KSC does not have the ability to remedy a clear violation of Article 6(1) of the ECHR, namely the right to an independent and impartial tribunal.<sup>22</sup>

16. It is recalled that neither the Law nor the Rules provide for the recusal or disqualification of the President from exercising her administrative functions.<sup>23</sup> Accordingly, the President is not unable, as foreseen by Article 32(4) of the Law, to exercise her administrative functions in this respect. Indeed, Article 33(6) of the Law specifically provides for the President continued ability to assign a Panel, even in circumstances where she has been disqualified from exercising her judicial functions in a case.

17. The Defence contends that the President relied “exclusively” on one case of the

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<sup>19</sup> Disqualification Decision, para. 15.

<sup>20</sup> First Application, paras 20-21, 28.

<sup>21</sup> See First Application, para. 22.

<sup>22</sup> First Application, paras 21, 24, 28.

<sup>23</sup> See Article 33(6) of the Law; Rule 20(1) of the Rules.

International Criminal Tribunal for the former Yugoslavia to support her “restrictive” interpretation of the KSC’s legal framework.<sup>24</sup> Not only is this argument misleading, as the President has cited to a substantial amount of case law in this respect,<sup>25</sup> but it also fails to account for the express language of the Law and the Rules. Indeed, it is the very existence of this provision within the KSC’s legal framework that the Defence takes issue with. As previously stated, Rule 20(1) of the Rules clearly provides for the disqualification only of “a Judge sitting in a case”, and Article 33(6) of the Law further demonstrates that the President shall continue to act in her administrative capacity, even where she is disqualified from her judicial duties.<sup>26</sup>

18. Other than simply disagreeing with the express language of the KSC’s legal framework, the Defence has failed to demonstrate that the President erred in the application of the relevant legal texts. It is recalled that the mere disagreement with the wording of the legal framework and the President’s application thereof falls short of meeting the standard warranting reconsideration.

19. Moreover, the fact that the KSC’s legal framework does not provide for the disqualification of the President in the exercise of her judicial administrative role does not mean that there are no other remedies available. Indeed, Rule 20(1) of the Rules provides for the disqualification of a Judge sitting in a case. If the Defence considers that there is an appearance of bias with respect to a Judge assigned to a Panel, it is free to raise this in accordance with the applicable Rules. Moreover, Judges, once assigned to a Panel, may only be substituted under very specific and limited circumstances,<sup>27</sup> so as to ensure their objective independence and impartiality. These are but a few examples of the safeguards in place within the KSC’s legal framework in line with the requirements under Article 6(1) of the ECHR and relevant case-law, referred to by the

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<sup>24</sup> First Application, para. 25.

<sup>25</sup> Disqualification Decision, para. 16, referring to the *Gucati and Haradinaj* Disqualification Decision, fn. 29.

<sup>26</sup> See also Disqualification Decision, paras 14-15.

<sup>27</sup> See Rule 5 of the Rules on Assignment.



Defence. Accordingly, there is no “conflict”, as the Defence suggests,<sup>28</sup> between the KSC’s legal framework and Article 6(1) of the ECHR.

20. More specifically, the President notes that the *Parlov-Tkalčić* case of the European Court of Human Rights (“ECtHR”) upon which the Defence relies does not contradict the President’s findings in the Disqualification Decision.<sup>29</sup> To the contrary, there are, as demonstrated above, sufficient safeguards securing the independence of Judges within the judiciary of the KSC, consistent with the established requirements as articulated in the *Parlov-Tkalčić* case.<sup>30</sup>

21. Similarly, the *Daktaras* and the *Moiseyev* cases to which the Defence cite are inapposite.<sup>31</sup> Contrary to the situation presented in the *Daktaras* case, the President never expressed a view on the outcome of the proceedings in any case before the Specialist Chambers. Similarly, the President has not, as was the case in *Moiseyev*, removed or replaced Judges on the Panel before disposing of the matter, for which they were assigned, let alone on multiple occasions.<sup>32</sup> Accordingly, these cases do not support the Defence’s argument that the President erred in her reasoning.

22. The Defence submission that the President erred in finding that she cannot be recused or disqualified pursuant to Rule 20 of the Rules is therefore dismissed. Indeed, the Defence itself recognises that the finding that the President cannot be recused or disqualified pursuant to Rule 20 of the Rules “is central” to the Disqualification Decision.<sup>33</sup> Accordingly, and since the Defence failed to demonstrate an error on the part of the President with respect to her application of the Law and the Rules, the

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<sup>28</sup> First Application, paras 20-21, 23, 26-28.

<sup>29</sup> First Application, para. 14, citing ECtHR, *Parlov-Tkalčić v. Croatia*, Application No. 24810/06, Judgment, 22 December 2009 (“*Parlov-Tkalčić* case”).

<sup>30</sup> See *Parlov-Tkalčić* case, para. 86.

<sup>31</sup> First Application, paras 15-16, citing ECtHR, *Daktaras v. Lithuania*, Application No. 65518/01, Judgment, 6 September 2005 (“*Daktaras* case”); ECtHR, *Moiseyev v. Russia*, Application No. 2329/05, Judgment, 14 May 2009 (“*Moiseyev* case”).

<sup>32</sup> *Infra*, paras 47-49.

<sup>33</sup> First Application, para. 11.



President could dismiss the First Application on this basis alone.

23. Nevertheless, and for the sake of transparency, the President will address the remainder of the Defence's allegations in turn.

*(b) Contested findings (ii-iii) – independence and impartiality*

24. Given the overlap between contested findings (ii) and (iii), the President will address the submissions in relation thereto together. The Defence generally argues that in assessing whether she and the Judges of the Court of Appeals Panel could be seen as independent and impartial, the President appears only to have applied the subjective limb of the test set forth by the ECtHR in this assessment, while disregarding the objective standard.<sup>34</sup> The Defence contends that this renders her reasoning erroneous.<sup>35</sup> These contentions stand to be corrected.

25. In the Disqualification Decision the President reiterated the findings she made in the *Haradinaj and Gucati* Disqualification Decision that the presumption of impartiality cannot be easily rebutted.<sup>36</sup> The President noted in the *Haradinaj and Gucati* Disqualification Decision that “[as] consistently found by various international and other judicial institutions applying the same standards, an unacceptable appearance of bias exists where the circumstances would lead *a reasonable observer*, properly informed, to reasonably apprehend bias” (emphasis added).<sup>37</sup> Consequently, the President took into consideration not only the subjective but equally the objective standard.

26. Among the relevant case law on which the President drew is the *Indra* case.<sup>38</sup>

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<sup>34</sup> First Application, paras 29-34.

<sup>35</sup> First Application, para. 35.

<sup>36</sup> See Disqualification Decision, para. 17, citing *Haradinaj and Gucati* Disqualification Decision, para. 31.

<sup>37</sup> *Haradinaj and Gucati* Disqualification Decision, para. 31.

<sup>38</sup> Disqualification Decision, fn. 29, citing ECtHR, *Case of Indra v. Slovakia*, Application No. 46845/99, Judgment, 1 February 2005 (“*Indra* case”). The Defence has referred to this case as “*Indira*”. See First Application, paras 33-34; fn. 28.

The President recalls the ECtHR findings in this case that “in deciding whether there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important, *but not decisive*. What is decisive is whether this fear can be held to be *objectively justified* [...]” (emphasis added).<sup>39</sup>

27. Contrary to the Defence allegations, the reference to paragraph 49 of the *Indra* case clearly demonstrates that the President based her assessment on both limbs of the test discussed in that case, that is the subjective and the objective standard.<sup>40</sup> Thus, based both on the subjective and the objective standard, the President came to the conclusion that the Defence allegations were not objectively justified and thus had no merit.

28. Next, and contrary to the Defence’s submissions, the President did not “downplay the importance of the Specialist Prosecutor’s” statements at the December 2020 diplomatic meeting.<sup>41</sup> Indeed there is nothing to “downplay” in this respect. Rather, the President set forth the extent to which the Defence’s arguments were nothing more than speculations that do not reflect what occurred.<sup>42</sup>

29. Further, there are no “ascertainable facts”,<sup>43</sup> as the Defence appears to suggest, that would lead an objective observer to conclude that there is any legitimate doubt as to the impartiality of the President or the Judges on the Roster of International Judges. As set forth above, the “facts” to which the Defence refer are based on unsubstantiated allegations from which unreasonable conclusions, couched as “facts”, are drawn.

30. Other than reiterating the same allegations, the Defence fails to demonstrate how the President erred in her reasoning. In light of the above, the Defence fails to

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<sup>39</sup> See *Indra* case, para. 49.

<sup>40</sup> Disqualification Decision, fn. 29, referring to the *Indra* case, para. 49.

<sup>41</sup> First Application, para. 37.

<sup>42</sup> Disqualification Decision, paras 19-20, 24-26.

<sup>43</sup> First Application, para. 30.

meet the threshold required for reconsideration in this respect. Accordingly, the Defence request regarding contested findings (ii) and (iii) is thus dismissed.

*(c) Contested finding (iv) – the Specialist Prosecutor’s alleged ex parte communications*

31. The Defence argues that the President’s finding that “it is unreasonable and without merit” to assert that the comments made by the Specialist Prosecutor in the President’s presence were *ex parte*, is incorrect.<sup>44</sup> According to the Defence, the Specialist Prosecutor’s comments regarding Mr Taçi’s pending provisional release application “in the presence of the President and without the knowledge of the Defence, clearly constituted prohibited *ex parte* communications”.<sup>45</sup>

32. The President observes that the core of the Defence arguments reiterate what has been reflected in the 16 August 2021 Application. These arguments have been addressed and dismissed in the Disqualification Decision.<sup>46</sup> Thus, the Defence arguments here are no more than a mere disagreement with the reasoning and conclusions arrived at in the Disqualification Decision, without presenting new relevant facts or arguments.<sup>47</sup> The Defence fails to show a clear error of reasoning or prejudice that may occasion injustice. Accordingly, the Defence request on contested finding (iv) is dismissed.

*(d) Contested finding (v) – Timing of the application*

33. Although the Defence admits that the President pronounced on the merits of the Recusal Application, despite finding that it is out of time, it seeks reconsideration of this ruling alleging a clear error of reasoning.<sup>48</sup>

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<sup>44</sup> First Application, para. 44.

<sup>45</sup> First Application, para. 45.

<sup>46</sup> See Disqualification Decision, paras 23-28.

<sup>47</sup> First Application, paras 36-49.

<sup>48</sup> First Application, paras 51-52.

34. The Defence request for reconsideration of the President's findings on the timing not only constitutes a mere disagreement with these findings but also lacks legitimate interest. The President's ruling does not occasion any prejudice to the Defence which would require seeking a remedy. As the Defence itself admits, despite the conclusion that it is out of time, the President considered the merits of the Recusal Application.<sup>49</sup> The Defence request on contested finding (v) is therefore dismissed.

*(e) Conclusion*

35. In light of the foregoing, the President dismisses the Defence request for reconsideration of the Disqualification Decision. Consequently, the finding that the President cannot recuse herself or be disqualified from her judicial administration functions under Rule 20 of the Rules, including the assignment of Panels, stands. It follows that the related request for the President's recusal or disqualification from assigning a Court of Appeals Panel to decide on the Detention Appeal as a consequence becomes moot and should accordingly be dismissed.

## **2. Reconsideration of the Assignment Decision**

36. The Defence submits that the Assignment Decision was issued in violation of the Kosovo Constitution, the Law and the ECHR.<sup>50</sup> Specifically, the Defence contends that the President must be objectively seen as independent and impartial in the assignment of Panels, otherwise the rights of the accused under Article 6(1) of the ECHR are violated.<sup>51</sup> Accordingly, the Defence requests reconsideration of the Assignment Decision.<sup>52</sup>

37. The President recalls that she may only reconsider her decisions in

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<sup>49</sup> First Application, para. 52.

<sup>50</sup> First Application, para. 12.

<sup>51</sup> First Application, para. 17.

<sup>52</sup> First Application, para. 57.

exceptionally limited circumstances.<sup>53</sup> The President's ability to reconsider an assignment decision constituting a Panel is even more restricted and is confined only to assignment decisions issued *ultra vires*. Indeed, the Rules on Assignment do not provide for the reconsideration of such decisions and for good reason. If the President were to have an unfettered ability to reconsider the assignment of Judges, this could lead to the very situation the Defence is ostensibly seeking to avoid, namely arbitrariness and judicial uncertainty when it comes to the assignment of Judges to Panels.<sup>54</sup>

38. The President recalls that she cannot be recused or disqualified from exercising her administrative functions.<sup>55</sup> As noted above, there are sufficient safeguards in place within the KSC legal framework to secure the objective independence of Judges, consistent with the ECtHR jurisprudence relied upon by the Defence.<sup>56</sup> The Assignment Decision was issued in accordance with the KSC's legal framework and it therefore follows that the Defence request for reconsideration of the Assignment Decision must also be dismissed.

## B. SECOND APPLICATION

39. In the Second Application, the Defence requests:

[T]he 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;

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

[T]he 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

[T]he 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. Taçi'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. Taçi's Jurisdiction Appeal, and

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<sup>53</sup> *Supra*, para. 9.

<sup>54</sup> *Cf. Parlov-Tkalčić case*, para. 86.

<sup>55</sup> *Supra*, paras 16-17.

<sup>56</sup> *Supra*, paras 19-21.

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;

[A]nnulment 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. 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, 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.

[T]he 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. Thaçi 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.<sup>57</sup>

40. The Defence does not allege personal subjective bias on the part of Judge Gatti, but asserts that reasonable doubt may exist as to his independence and impartiality by virtue of his assignment by the President.<sup>58</sup> The Defence contends that the President allegedly lacks impartiality due to her participation in diplomatic briefings to which the Registrar and the Specialist Prosecutor were also invited, and her alleged “*ex parte* communications” with the Specialist Prosecutor during such diplomatic briefings.<sup>59</sup>

41. The Defence submits in this respect that the President should have retained the composition of the Court of Appeals Panel that was assigned to an interlocutory appeal on 4 February 2021 in accordance with the Law<sup>60</sup> and whose assignment elapsed on 30 April 2020, when the Appeals Panel disposed of the appeal for which it was assigned.<sup>61</sup> The Defence wishes to have this specific composition reinstated.<sup>62</sup> The

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<sup>57</sup> Second Application, para. 45.

<sup>58</sup> Second Application, para. 3.

<sup>59</sup> Second Application, para. 3.

<sup>60</sup> Second Application, paras 7-9, 40-41. See also IA004/F00002, Decision Assigning a Court of Appeals Panel, 4 February 2021.

<sup>61</sup> IA004/F00005/RED, Public Redacted Version of Decision on Hashim Thaçi’s Appeal against Decision on Interim Release, 30 April 2021.

<sup>62</sup> Second Application, paras 40-41, 45.

President recalls that she cannot be disqualified from exercising her administrative functions and thus retains the authority to assign a Court of Appeals Panel. The Defence's request for assignment of the Second Application to the Vice-President is therefore without legal basis and is hereby dismissed. The related request that the Vice-President assign a Panel of three Judges to adjudicate the Second Applications is thereby rendered moot and is thus dismissed.

42. The President next turns to the Defence's third request, namely for Judge Emilio Gatti's disqualification from the Court of Appeals Panel assigned to consider the Detention Appeal.

43. The President notes that the substance of the submissions underpinning the Defence's request for Judge Gatti's disqualification manifest another attempt by the Defence, under the guise of different reliefs sought and procedural avenues, to re-litigate matters previously decided upon until the desired outcome is achieved.<sup>63</sup>

44. Nonetheless, the President shall consider the request for the disqualification of Judge Gatti from the Court of Appeals Panel in accordance with Rule 20(3) of the Rules, as he is a Judge "sitting in a case" within the meaning of that Rule. It should be noted that the allegations against Judge Gatti are based not on his alleged subjective bias, but on his mere assignment by the President.<sup>64</sup>

45. The President reiterates in this respect that, contrary to the case-law relied upon by the Defence, no views were expressed or instructions provided in relation to the outcome of proceedings before either the Basic Court Panel or the Court of Appeals Panel in this case,<sup>65</sup> nor was a Judge "removed" or otherwise "replaced" on the Court of Appeals Panel.<sup>66</sup> Similarly, and as acknowledged by the Defence,<sup>67</sup> Judge Gatti has

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<sup>63</sup> See Second Application, para. 43.

<sup>64</sup> See generally Second Application.

<sup>65</sup> See Second Application, para. 15, citing the *Daktaras* case.

<sup>66</sup> See Second Application, para. 17, citing the *Moiseyev* case. See also *infra*, paras 47-49.

<sup>67</sup> See Second Application, para. 3.



not expressed any views in relation to any case before the KSC. The assignment of Judge Gatti to the Court of Appeals Panel was made in accordance with the Law and the Rules on Assignment.

46. Moreover, and as noted in the *Moiseyev* case, “the assignment of a case to a particular judge [...] falls within the margin of appreciation enjoyed by the domestic authorities in such matters”.<sup>68</sup> In the present case, the President is the responsible authority to assign Judges to Panels in accordance with the Law and the Rules on Assignment. Even though the President is afforded a margin of discretion by the Rules on Assignment, the legal framework contains sufficient safeguards to ensure the objective independence and impartiality of each and every Judge assigned, thereby preventing any arbitrariness. The Defence claim on this point should not be sustained any further.

47. The President next turns to the allegations that the President violated Articles 30(3) and 33(1) of the Law by “replacing” Judges with each other.<sup>69</sup> The President recalls that the legal framework of the KSC contemplates the assignment of a Court of Appeals Panels when an interlocutory appeal is filed.<sup>70</sup> A combined reading of Articles 30(3) and 33(1)(c) of the Law demonstrates that the assignment of the Court of Appeals Panel lapses once that matter has been disposed of. An interlocutory appeal is a discrete “phase of the proceedings” in accordance with Article 30(3) of the Law, which is completed upon the disposal of the decision during that phase.

48. Interlocutory appeals as a phase within the meaning of Article 30(3) of the Law is further supported by the fact that each interlocutory appeal is assigned a distinct suffix within the Basic Court file number and the Judges of that Panel are no longer seised with proceedings once a decision has been issued in relation to that

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<sup>68</sup> *Moiseyev* case, para. 176.

<sup>69</sup> Second Application, paras 40-41.

<sup>70</sup> See Article 33(1)(c) of the Law. See also Rule 169 of the Rules.

interlocutory appeal's phase of the proceedings.<sup>71</sup> Finally, this is consistent with the very foundation upon which the KSC is built, namely an efficient institution whereby its Judges are on a Roster and are assigned by the President to matters as they arise.<sup>72</sup>

49. While, both the Rules and the Rules on Assignment provide for specific situation(s) where Judges may be replaced prior to the elapse of their assignment(s),<sup>73</sup> these circumstances do not apply to the present case. Such narrow exceptions to the substitution of Judges already assigned to Panels are indeed necessary as a means to safeguard the independence and impartiality of Judges.

50. As the President explained previously, she has established a practice of assigning the same four Judges in varying compositions to Court of Appeals Panels in this case, to which the Defence has not previously objected.<sup>74</sup> Indeed, the Defence appears only to object in cases where it wishes to have certain specific Judges assigned, which runs afoul to the very principle of impartiality that it is allegedly defending.

51. Accordingly, the President considers the request for Judge Gatti's disqualification to be lacking in substance and hereby summarily dismisses the Second Application in this respect.

52. In view of the findings above, the remainder of the relief sought by the Defence is dismissed.

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<sup>71</sup> Articles 7 and 21(2) of the Practice Direction on Files and Filings before the Kosovo Specialist Chambers ("Practice Direction"). Indeed, a new file number shall be created once a notice of appeal of judgment has been filed. See Article 8 of the Practice Direction.

<sup>72</sup> See Articles 26, 30 and 33 of the Law.

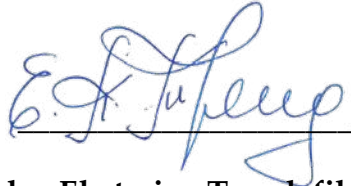
<sup>73</sup> See, e.g., Rules 19(4), 20(4) of the Rules and Rule 5 of the Rules on Assignment.

<sup>74</sup> See, e.g., IA005/F00005, Decision Assigning a Court of Appeals Panel, 7 June 2021, wherein the President assigned Judges Michèle Picard, Emilio Gatti and Kai Ambos.

### III. DISPOSITION

53. For the foregoing reasons, the President hereby

**DISMISSES** the First and the Second Application in their entirety.

A handwritten signature in blue ink, appearing to read 'E. Trendafilova', written over a horizontal line.

**Judge Ekaterina Trendafilova,  
President of the Specialist Chambers**

Dated this Friday, 17 September 2021  
At The Hague,  
The Netherlands