



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

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

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 6 October 2021

**Language:** English

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**Prosecution response to Hashim Thaçi's request for certification to appeal the  
'Decision on Motions Challenging the Legality of the SC and SPO and Alleging  
Violations of Certain Constitutional Rights of the Accused'**

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## I. INTRODUCTION

1. The Request<sup>1</sup> should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law<sup>2</sup> and Rule 77 of the Rules.<sup>3</sup> Thaçi has not carried his burden to show that any of the eight issues he raises merit appeal at this stage in the litigation.<sup>4</sup>

## II. PROCEDURAL HISTORY

2. On 4 November 2020, the Specialist Prosecutor's Officer ('SPO') submitted a public corrected version of the confirmed Indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (collectively, 'Accused').<sup>5</sup>

3. On 12 March 2021, Thaçi filed two preliminary motions seeking to dismiss the Indictment due to lack of jurisdiction, raising challenges to the legality of the Kosovo Specialist Chambers ('KSC'), and alleging violations of his rights.<sup>6</sup> On 15 March 2021, Selimi and Veseli similarly filed motions raising challenges to the legality of the KSC and alleging violations of their rights.<sup>7</sup>

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<sup>1</sup> Thaçi Defence Request for Certification to Appeal the 'Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused', KSC-BC-2020-06/F00473, 17 September 2021 ('Request').

<sup>2</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>4</sup> Request, KSC-BC-2020-06/F00473, para.10 ('Issues').

<sup>5</sup> Submission of corrected and public redacted versions of confirmed Indictment and related requests, KSC-BC-2020-06/F00045/A03, 4 November 2020 ('Indictment').

<sup>6</sup> Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, KSC-BC-2020-06/F00216, 12 March 2021; Motion Challenging Jurisdiction on the Basis of Violations of fundamental rights enshrined in the Constitution, KSC-BC-2020-06/F00217, 12 March 2021.

<sup>7</sup> Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction-Discrimination, KSC-BC-2020-06/F00219, 15 March 2021; Preliminary Motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the Basis of Violations of the Constitution, KSC-BC-2020-06/F00224, 15 March 2021.

4. On 23 April 2021, the SPO submitted two responses to the submissions,<sup>8</sup> and on 14 and 17 May 2021, Thaçi, Selimi, and Veseli filed replies.<sup>9</sup>
5. On 31 August 2021, the Pre-Trial Judge issued the 'Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused' ('Decision').<sup>10</sup>
6. On 17 September 2021, the Thaçi Defence filed the Request, raising the eight issues addressed below. Veseli also filed a request for leave to appeal the Decision on the same day.<sup>11</sup>
7. On 24 September 2021, the SPO requested an extension of time to respond to the leave to appeal requests.<sup>12</sup> On 24 September 2021, the Pre-Trial Judge granted the SPO an extension until 6 October 2021 to file the responses.<sup>13</sup>

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<sup>8</sup> Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigative Deadline, and Temporal Mandate, KSC-BC-2020-06/F00259, 23 April 2021; Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations, KSC-BC-2020-06/F00260, 23 April 2021.

<sup>9</sup> Thaçi Defence Reply to 'Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate', KSC-BC-2020-06/F00304, 14 May 2021; Selimi Defence Reply to 'Prosecution Response to Preliminary Motions Concerning the Status of the Kosovo Specialist Chambers and Allegations of Rights Violations', KSC-BC-2020-06/F00307, 14 May 2021; Veseli Defence Reply to Prosecution Response to Preliminary Motion Challenging Jurisdiction on the Basis of Violations of the Constitution, KSC-BC-2020-06/F00308, 17 May 2021.

<sup>10</sup> Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, KSC-BC-2020-06/F00450, 31 August 2021.

<sup>11</sup> Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on the Basis of Violations of the Constitution (KSC-BC-2020-06/F00450), KSC-BC-2020-06/F00474, 17 September 2021.

<sup>12</sup> Request for Extension of Time Limit to Respond to Leave to Appeal Requests on Decision KSC-BC-2020-06/F00450, KSC-BC-2020-06/F00488, 24 September 2021.

<sup>13</sup> Decision on Prosecution Request for Extension of Time Limit to Respond to Leave to Appeal Requests on Decision KSC-BC-2020-06/F00450, KSC-BC-2020-06/F00490, 24 September 2021.

### III. THAÇI FAILS TO MEET THE REQUIREMENTS FOR GRANTING LEAVE TO APPEAL

#### A. APPLICABLE LAW

8. Outside of the limited circumstances—not applicable here—where interlocutory appeals are of right,<sup>14</sup> '[i]nterlocutory appeals, interrupting the continuity of the proceedings, are the exception.'<sup>15</sup> Indeed, a recent decision observed the 'restrictive nature of this remedy.'<sup>16</sup> Read together, Article 45(2) and Rule 77(2) set out the requirements applicable to granting a request for leave to appeal. Those are:

- a. that the matter is an 'appealable issue';
- b. that the decision involves an issue that would significantly affect:
  - i. the fair and expeditious conduct of the proceedings; or
  - ii. the outcome of the trial; and
- c. that, in the opinion of the relevant judicial body, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>17</sup>

9. The burden is on the applicant to establish the existence of these requirements.<sup>18</sup> Consistent with this burden, where an applicant materially misrepresents the challenged decision, the request will be denied.<sup>19</sup> Moreover, the prongs identified at (a) through (c)

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<sup>14</sup> See Article 45(2).

<sup>15</sup> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.9 ('Thaçi Decision').

<sup>16</sup> Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.11 ('F00180 Decision').

<sup>17</sup> See Thaçi Decision, KSC-BC-2020-06/F00172, para.10.

<sup>18</sup> See, e.g., ICC, Situation in Uganda, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on Prosecutors application for warrants of arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005, paras 20-21.

<sup>19</sup> See, e.g., F00180 Decision, KSC-BC-2018-01/F00184, para.24.

above are cumulative.<sup>20</sup> An applicant's failure to substantiate any one of them will be fatal to the request.

10. For purposes of prong (a), an 'appealable issue' is an identifiable topic or subject the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.<sup>21</sup> An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.<sup>22</sup> Where a party requesting leave to appeal claims error in a decision but does not identify what should have been done differently, the issue will not be considered sufficiently discrete and specific to merit appeal.<sup>23</sup>

11. For purposes of prong (b), the 'fair and expeditious conduct of proceedings' is generally understood as referencing the norms of fair trial, of which conducting a trial within a reasonable time is but one element.<sup>24</sup> In considering whether an issue affects the outcome of proceedings, 'it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case.'<sup>25</sup> Even where an issue satisfying either of these possibilities is present, if the impact is not 'significant' it will not qualify for interlocutory appeal.<sup>26</sup> Speculative or unidentified impacts on fair trial rights will not be sufficient to meet this requirement.<sup>27</sup>

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<sup>20</sup> Prong (b) may be satisfied on either of the two bases indicated.

<sup>21</sup> Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.12.

<sup>22</sup> Thaçi Decision, KSC-BC-2020-06/F00172, para.11.

<sup>23</sup> Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14 ('Krasniqi Decision').

<sup>24</sup> Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.14 ('Case 07 Decision').

<sup>25</sup> Case 07 Decision, KSC-BC-2020-07/F00169, para.15.

<sup>26</sup> Thaçi Decision, KSC-BC-2020-06/F00172, para.11.

<sup>27</sup> Krasniqi Decision, KSC-BC-2020-06/F00479, para.25.

12. The final prong, prong (c) above, 'requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial thereby moving the proceedings forward along the right course.'<sup>28</sup>

13. As described below, none of the issues Thaçi raises meets these requirements. As a threshold matter, however, the SPO observes that Thaçi's arguments in support of his requests for leave to appeal are cursory, and for certain prongs of the test only address the Issues in groups and in broad and conclusory statements. Although the SPO responds to each issue individually, it would be reasonable for the Pre-Trial Judge to consider how Thaçi's decision to not provide specific, detailed arguments geared to each issue impacts his ability to meet his burden to demonstrate that the Issues should be granted leave to appeal.

#### B. THAÇI HAS NOT MET HIS BURDEN ON THE FIRST ISSUE

14. The first issue Thaçi raises ('First Issue') is:

Whether the Pre-Trial Judge's finding that the KSC and SPO's temporal mandate has *not* expired is undermined by its failure to consider, or provide any or sufficient reasoning in relation to (i) the Assembly's legislative intent; (ii) the proposed Constitutional Amendment No. 26; (iii) the Article 162(14) notification being applicable to the minimum temporal mandate; and (iv) that the delegation of sovereignty under Article 20 of the Constitution must not be indefinite, uncertain and unilateral.<sup>29</sup>

15. The First Issue does not merit leave to appeal. First this is not an appealable issue because it is not sufficiently precise or specific for multiple reasons. It merely queries whether the Decision was 'undermined' without stating that it was erroneous; it fails to pinpoint whether it is arguing that the Pre-Trial Judge 'failed to consider' the listed authorities, whether he did not provide sufficient reasoning in regard to them, or whether

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<sup>28</sup> Case 07 Decision, KSC-BC-2020-07/F00169, para.17 (internal quotations omitted).

<sup>29</sup> Request, KSC-BC-2020-06/F00473, p.4 (emphasis in original, citations omitted).

he did not provide any reasoning in regard to them; and, given the Decision, it does not explain how any of the referenced authorities would lead to the result that the ‘temporal mandate has expired’.<sup>30</sup> The issue as phrased is therefore too nebulous to meet Thaçi’s burden of demonstrating an appealable issue. It is entirely within Thaçi’s control to frame the issue in a concrete manner, and so to instead do so in a way that does not precisely identify the source of the error, nor explain the reasoning behind how the alleged error would affect the underlying Decision or the fairness of proceedings, does not merit appeal.

16. Second, the First Issue misrepresents the Decision, by – for example - including in its allegations that the Pre-Trial Judge failed to consider Thaçi’s argument concerning Article 162(14), whereas the Decision notes this exact argument of Thaçi’s,<sup>31</sup> and provides analysis of Article 162(14).<sup>32</sup> It is therefore a misrepresentation that the Pre-Trial Judge did not consider this argument, and whether the consideration is ‘sufficient’ is a matter of opinion that is also not appealable.

17. Third, because Thaçi does not claim that the authorities he references render the Decision erroneous, but merely seeks additional analysis in the Decision, this issue cannot have a significant impact on the fairness or outcome of proceedings. Moreover, given that the Pre-Trial Judge’s decision on the matter relies upon and is in line with the authoritative pronouncements of the Specialist Chamber of the Constitutional Court (‘SCCC’), referral to the Court of Appeals Panel would not materially advance the proceedings. As a result, any possible mistakes do not need to be remedied now by the Court of Appeals Panel.

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<sup>30</sup> Request, KSC-BC-2020-06/F00473, para.14.

<sup>31</sup> Decision, KSC-BC-2020-06/F00450, para.62 (‘Mr Thaçi argues that the notification, to which Article 162(14) of the Constitution refers, only applies to the minimum temporal mandate’).

<sup>32</sup> Decision, KSC-BC-2020-06/F00450, paras 65, 66.

### C. THAÇI HAS NOT MET HIS BURDEN ON THE SECOND ISSUE

18. The second issue Thaçi raises ('Second Issue') is:

Whether the Pre-Trial Judge erred in concluding that the question of the KSC's temporal mandate had been "decided upon by the SCCC" in the absence of any or sufficient reasoning, and in a manner inconsistent with Articles 113(7) and 144(3) of the Constitution, which the Pre-Trial Judge failed entirely to consider.<sup>33</sup>

19. This issue does not merit leave to appeal. The Second Issue is not sufficiently precise or specific to be an appealable issue. Thaçi does not clarify whether his argument is that there was no reasoning on this point, or (in his view) insufficient reasoning. Nor does he clarify exactly how he believes the decision is inconsistent with Articles 113(7) and 144(3) of the Constitution.

20. The Second Issue also does not constitute an appealable issue because it misrepresents the Decision in two respects. First, by asserting an absence or insufficiency of reasoning in circumstances where the Decision clearly explains the basis for its reliance upon the SCCC's pronouncement.<sup>34</sup> Second, by alleging the Pre-Trial Judge 'failed entirely to consider' two Articles of the Kosovo Constitution. Solely because the Pre-Trial Judge did not cite the provisions by name does not mean that he 'failed entirely' to consider them. He may have merely found them unnecessary to address explicitly in the context of his decision (as would be reasonable in a situation where they are inapplicable).

21. In addition, the Second Issue does not raise an issue that could have significant effect on the fairness or the outcome of the proceedings. It does not contend that the ultimate result of the Decision was incorrect, only that it was incorrect not to have provided more reasoning, and to have referred to the SCCC's views concerning the temporal mandate of the KSC. Granting leave to appeal only to potentially have additional reasoning included in the Decision would only unnecessarily delay, and not advance, the proceedings.

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<sup>33</sup> Request, KSC-BC-2020-06/F00473, p.5 (internal citation omitted).

<sup>34</sup> Decision, KSC-BC-2020-06/F00450, paras 65-67.



## D. THAÇI HAS NOT MET HIS BURDEN ON THE THIRD ISSUE

## 22. The third issue Thaçi raises ('Third Issue') is:

On the question of whether the SPO investigation had a legal or constitutional basis, whether the Pre-Trial Judge erred in incorrectly basing his finding on whether Article 159(1) of the KCPC had been *expressly incorporated* into the KSC Law, rather than being properly guided by the question of the applicability of the KCPC when the KSC Law and Rules are silent, and having ignored Defence submissions on the Exchange of Letters.<sup>35</sup>

23. The Third Issue does not merit leave to appeal. Thaçi misrepresents the Decision in at least three ways. First, Thaçi states that 'on the question of whether the SPO had a legal or constitutional basis' the Pre-Trial Judge erred in 'basing his finding on whether Article 159(1) of the KCPC had been expressly incorporated into the KSC Law.'<sup>36</sup> But the Pre-Trial Judge did not base his finding on that one issue. As demonstrated even by the paragraphs that Thaçi himself cites to,<sup>37</sup> the Pre-Trial Judge considered many sources of authority in determining that the SPO investigation had a legal and constitutional basis. As just one example, the Pre-Trial Judge also considered whether KCPC Article 159 should inform KSC proceedings through the operation of Article 19(2).<sup>38</sup>

24. Second, the Third Issue states that the Pre-Trial Judge 'ignored Defence submissions on the Exchange of Letters', citing to paragraph 57 and footnote 74 of his preliminary motion.<sup>39</sup> In addition to the fact that simply because an argument was not addressed explicitly in a decision does not mean it was 'ignored', neither the cited paragraph nor the footnote raise the Exchange of Letters in regard to the issue of the applicability of the KCPC to the KSC Law, but instead were part of an argument about when an investigation should be considered to have commenced. By claiming that he raised arguments in

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<sup>35</sup> Request, KSC-BC-2020-06/F00473, p.5 (emphasis in original, internal citations omitted).

<sup>36</sup> Request, KSC-BC-2020-06/F00473, p.5 (emphasis and internal citation omitted).

<sup>37</sup> Request, KSC-BC-2020-06/F00473, fn.15 (citing Decision, KSC-BC-2020-06/F00450, paras 73-77).

<sup>38</sup> Decision, KSC-BC-2020-06/F00450, para.74.

<sup>39</sup> Request, KSC-BC-2020-06/F00473, p.5 and fn.16, citing F00216, para.57 and fn.74.

relation to the Third Issue (which he did not in fact raise) and that they were then 'ignored', Thaçi misrepresents the Decision.

25. Third, Thaçi premises this issue on a counterfactual, *i.e.*, whether the Pre-Trial Judge should be 'guided by the question of the applicability of the KCPC when the KSC Law and Rules are silent'. However, the KSC Law and Rules are not silent. As the Decision notes, the KSC Law and Rules are explicit about issues such as the fact that the Law operates as *lex specialis* and that provisions of Kosovo law apply only insofar as they have been expressly incorporated.<sup>40</sup> In this way, Thaçi both misrepresents the Decision and presents a hypothetical question that does not merit leave to appeal.

26. In addition, Thaçi does not argue that the outcome of the Decision was incorrect, only that the process in reaching the Decision was incorrect, and so has not shown that the Third Issue would have a significant impact on the fairness or outcome of the proceedings.

#### E. THAÇI HAS NOT MET HIS BURDEN ON THE FOURTH ISSUE

27. The fourth issue Thaçi raises ('Fourth Issue') is:

Whether the Pre-Trial Judge erred by simply dismissing the Defence submissions as to why the KSC Law creates an "extraordinary court" on the basis of an earlier finding that the KSC were established by law, thereby failing to address the substance of the Defence arguments.<sup>41</sup>

28. The Fourth Issue does not merit leave to appeal. The Fourth Issue does not constitute an appealable issue because it misrepresents the Decision. Thaçi states that the Pre-Trial Judge 'simply' dismissed his argument that the KSC Law creates an 'extraordinary court' on the basis of an earlier finding that the KSC were established by law. The Pre-Trial Judge did rely on that earlier decision to find that the KSC were not an extraordinary court, but also relied on the fact that 'its independence and impartiality have not been

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<sup>40</sup> See Decision, KSC-BC-2020-06/F00450, para.73.

<sup>41</sup> Request, KSC-BC-2020-06/F00473, p.5 (internal citations omitted).

called into question, either by, *inter alia*, the procedures surrounding the appointment of Judges or the SC's reliance on a separate law.'<sup>42</sup> Thaçi therefore misrepresents the Decision.

29. The Fourth Issue is also not an appealable issue because it is not sufficiently precise. Thaçi does not explain how the Decision does not resolve Thaçi's arguments, and thus this issue appears to be merely a difference of opinion. Moreover, Thaçi does not explain how additional analysis in the Decision would have a significant impact on the fairness or outcome of the proceedings, and thus granting leave to appeal on this issue would merely unnecessarily delay the proceedings.

#### F. THAÇI HAS NOT MET HIS BURDEN ON THE FIFTH ISSUE

30. The fifth issue Thaçi raises ('Fifth Issue') is:

Whether the Pre-Trial Judge erred by failing to engage with or provide sufficient reasoning in relation to the issues raised by the Defence as regards Mr Thaçi's right to be tried by an independent and impartial tribunal, having erroneously relied on inapplicable ECtHR jurisprudence, and by failing entirely to consider whether "**taken cumulatively**, these features lead to the inescapable conclusion that the KSC *structurally* fail to satisfy Article 6(1) of the ECHR requirements".<sup>43</sup>

31. The Fifth Issue does not merit leave to appeal. First, the Fifth Issue is not an appealable issue because it is insufficiently precise. Thaçi does not state concretely whether his claim is that the Pre-Trial Judge did not engage with the referenced arguments sufficiently, or whether he did not do so at all. Thaçi also does not specify to what 'issues raised by the Defence as regards Mr Thaçi's right to be tried by an independent and impartial tribunal' he is referring. In addition, the imprecision of the Fifth Issue is compounded by the inclusion within it of two other claims of error

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<sup>42</sup> Decision, KSC-BC-2020-06/F00450, para.113.

<sup>43</sup> Request, KSC-BC-2020-06/F00473, p.5 (emphasis in original, internal citations omitted).

concerning reliance on ECtHR jurisprudence, and allegations of not considering cumulative impact. As a result, this issue is utterly unclear as to its intended purpose.

32. Moreover, the Fifth Issue does not qualify as an appealable issue because it misrepresents the Decision by stating that the Pre-Trial Judge ‘fail[ed] entirely’ to consider whether various issues Thaçi raised ‘cumulatively’ cause the KSC to violate ECHR Article 6(1). But the Pre-Trial Judge engaged multiple times with Thaçi’s as well as other Accused’s arguments concerning Article 6(1), and there is no basis to believe that that consideration did not include the impacts of those arguments in the aggregate as well.

33. In addition, Thaçi does not explain how providing additional reasoning would have a significant impact on the fairness or outcome of proceedings.

#### G. THAÇI HAS NOT MET HIS BURDEN ON THE SIXTH ISSUE

34. The sixth issue Thaçi raises (‘Sixth Issue’) is:

Whether it was open to a reasonable Pre-Trial Judge to find that the requirement of independence and impartiality does not operate to constrain interference with the Specialist Prosecutor, particularly given that this contravenes Articles 109(1) and (2) of the Constitution.<sup>44</sup>

35. The Sixth Issue does not merit appeal. First, this does not constitute an appealable issue because it does not identify a sufficiently precise issue. Thaçi provides no explanation regarding his newly introduced argument in relation to Articles 109(1) and (2) of the Constitution, nor on what basis he believes it would not be ‘open’ to the Pre-Trial Judge to reach the conclusion in question. Second, the Sixth Issue is framed in a manner which misrepresents the question that was at issue in the Decision, and upon which the Pre-Trial Judge pronounced. The relevant question was the independence and impartiality of the KSC for the purposes of Article 6(1) of the ECHR, not a question as to

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<sup>44</sup> Request, KSC-BC-2020-06/F00473, p.5 (internal citation omitted).

whether the Specialist Prosecutor or other prosecution offices may have a separately founded obligation of independence.

36. Third, Thaçi does not identify how resolution of this issue would impact the fairness of the proceedings or their outcome. The only argument he provides on this point is to state in a conclusory way that it would ‘necessarily’ have such an impact.<sup>45</sup> This is not sufficient to create an appealable issue.

#### H. THAÇI HAS NOT MET HIS BURDEN ON THE SEVENTH ISSUE

37. The seventh issue Thaçi raises (‘Seventh Issue’) is:

As regards the right to be tried within a reasonable time, whether the Pre-Trial Judge erred in finding that the relevant period began only on 17 November 2019, having adopted a mistakenly restrictive interpretation of the relevant ECtHR caselaw.<sup>46</sup>

38. The Seventh Issue does not merit leave to appeal. First, the Seventh Issue is not an appealable issue because it is not sufficiently precise. Thaçi states that the Pre-Trial Judge ‘adopted a mistakenly restrictive interpretation of the relevant ECtHR caselaw’, but does not explain how the interpretation was erroneous. Moreover, Thaçi does not explain how this would have a significant impact on the fairness or outcome of proceedings, except to say it would ‘self-evidently significantly affect the fair and expeditious conduct of the proceedings.’<sup>47</sup> This is not sufficient to meet Thaçi’s burden.

#### I. THAÇI HAS NOT MET HIS BURDEN ON THE EIGHTH ISSUE

39. The eighth issue Thaçi raises (‘Eighth Issue’) is:

Whether the Pre-Trial Judge erred in assessing the violation Mr Thaçi’s [sic] presumption of innocence with respect to the Marty Report itself, thereby failing to engage with the Defence submissions that the violation stems from the KSC defining itself with respect to

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<sup>45</sup> Request, KSC-BC-2020-06/F00473, para.15.

<sup>46</sup> Request, KSC-BC-2020-06/F00473, p.6 (internal citation omitted).

<sup>47</sup> Request, KSC-BC-2020-06/F00473, para.16.

a report which condemns the accused, and the benediction of the report by the KSC and SPO.<sup>48</sup>

40. The Eighth Issue does not merit leave to appeal. First, the Eighth Issue is not an appealable issue because Thaçi misrepresents the Decision. Thaçi states that the Pre-Trial Judge did not engage with his arguments about the Marty Report contained at paragraphs 34 and 35 of his preliminary motion.<sup>49</sup> Paragraph 34 contains an argument concerning the placement of the Marty Report on the KSC website as a ‘Foundational Document’ — an argument the Decision explicitly addressed and found lacking.<sup>50</sup>

41. Moreover, this presents an abstract question as to whether the KSC ‘defin[es] itself’ in relation to the Marty Report, and whether the KSC and/or SPO have given the report their ‘benediction’. Such an issue is not sufficiently precise to merit leave to appeal.

42. Thaçi also does not explain how this issue would have a significant impact on the fairness or outcome of the proceedings, except to say such an impact is ‘self-evident[.]’<sup>51</sup> This is not sufficient to carry his burden.

#### IV. CONCLUSION AND RELIEF REQUESTED

43. For the foregoing reasons, the SPO respectfully request that the Pre-Trial Judge reject the Request in full.

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<sup>48</sup> Request, KSC-BC-2020-06/F00473, p.6 (internal citation omitted).

<sup>49</sup> Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution, KSC-BC-2020-06/F00217, paras 34-35.

<sup>50</sup> Decision, KSC-BC-2020-06/F00450, para.141

<sup>51</sup> Request, KSC-BC-2020-06/F00473, para.16.

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**Jack Smith**

**Specialist Prosecutor**

Wednesday, 6 October 2021

At The Hague, the Netherlands.