

**In:** KSC-CC-2022-15

**Before:** President

Judge Ekaterina Trendafilova

**Registrar:** Dr Fidelma Donlon

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

**Date:** 28 February 2022

**Language:** English

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**Referral to the Constitutional Court Panel on the violation of Mr Thaçi's  
fundamental rights to an independent and impartial tribunal established by law,  
and to a reasoned opinion**

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## I. INTRODUCTION

1. The establishment of the Kosovo Specialist Chambers (“KSC”) represents an unprecedented and extraordinary concession by Kosovo as a sovereign state; the creation of a specialised chamber from which the participation of its nationals are excluded.

2. The impetus for the creation of the KSC was the allegations set out in the Council of Europe’s Report of 7 January 2011, on inhuman treatment of people and illicit trafficking in human organs.<sup>1</sup> Despite being later revealed as wholly unsubstantiated,<sup>2</sup> the Marty Report allegations were specific and precise. The Marty Report addressed two accusations, “inhumane treatment of people” and “illicit trafficking of human organs,” which were alleged to have taken place in detention facilities in Northern Albania: *Cahan, Kukës, Bicaj* (vicinity), *Burrel, Rripe, Durrës* and *Fushë Krujë*.<sup>3</sup>

3. The Marty Report’s temporal scope focused on acts “alleged to have occurred for the most part from the summer of 1999 onwards,”<sup>4</sup> being after the end of the armed conflict in Kosovo. Accordingly, the crimes identified in the Marty Report were characterized as “organized crime,”<sup>5</sup> rather than war crimes or crimes against humanity.

4. On 3 August 2015, the Assembly of Kosovo adopted Amendment No. 24 to the Constitution of Kosovo (“Constitution”), providing the constitutional basis for

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<sup>1</sup> Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report: Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Doc. 12462, 7 January 2011 (“Marty Report”).

<sup>2</sup> See, e.g., UN Document S/2014/558, Annex II, *Statement of the Chief Prosecutor of the Special Investigative Task Force*, 29 July 2014, p. 20/26.

<sup>3</sup> Marty Report, para. 96, page 18.

<sup>4</sup> Marty Report, para. 4, page 6.

<sup>5</sup> Marty Report, paras. 10, 11, 37-92, 156-167 and Resolution 1782 of the Parliamentary Assembly of the Council of Europe, 25 January 2011 (“Council of Europe Resolution”), paras. 5, 11 and 19.

the establishment of the KSC and the SPO through new Article 162. Significantly, the Assembly linked the jurisdiction of the new “specialist” court back to the allegations contained in the Marty Report. Namely, Article 162(1) of the Constitution states that Kosovo may establish the KSC and the SPO to “comply with its international obligations in relation to the [Marty Report].”

5. This limitation on the KSC’s subject matter jurisdiction was then reinforced in the KSC Law,<sup>6</sup> which provides in Article 1(2) that the KSC and SPO “are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, [...] and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the [Marty Report] and which have been the subject of criminal investigation by the Special Investigative Task Force.” Article 6(1) of the KSC Law then provides that the “[KSC] shall have jurisdiction over crimes set out in Articles 12-16 which relate to the [Marty Report].” No scope was provided for the prosecution of crimes that fell outside the Marty Report allegations, or arising from subsequent investigations.

6. The Indictment in the present case<sup>7</sup> makes no reference to illicit trafficking in human organs, or to organized crime. In fact, it bears no meaningful resemblance to the Marty Report at all, with the SPO evidently having reached the conclusion that the Marty Report allegations would be unable to form the basis of a successful prosecution. As such, rather than acting within the bounds of its clearly delineated and limited mandate, the SPO has treated the KSC as a blank canvas from which to engineer a completely different case, accusing the defendants of war crimes and

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<sup>6</sup> Law No. 05/L-053 on the Specialist Chambers and the Specialist Prosecutor’s Office (“KSC Law”).

<sup>7</sup> KSC-BC-2020-06/F00647/A01, Confidential Lesser Redacted Version of ‘Indictment’, KSC-BC-2020-06/F00455/A01, dated 3 September 2021, 17 January 2022 (“Indictment”).

crimes against humanity spanning the 1998-1999 Kosovo conflict, built from recycled UNMIK, EULEX and ICTY cases.

7. As such, the Indictment in the present case exceeds the subject matter jurisdiction of the KSC, which was designed to exclude the very allegations revived by the SPO. Mr Thaçi brought a timely challenge to the SPO's erroneous approach to jurisdiction, filing a preliminary motion alleging, *inter alia*, that the Indictment exceeds the subject matter jurisdiction of the KSC and defeats its *raison d'être*.<sup>8</sup> In dismissing the Preliminary Motion, the Pre-Trial Judge made a number of errors, which were raised on appeal, thereby exhausting all remedies provided by law at the KSC.<sup>9</sup> The resulting Court of Appeals Panel decision<sup>10</sup> was also manifestly flawed. Significantly, it violated Mr Thaçi's individual rights and freedoms guaranteed by the Constitution; namely his right to a reasoned opinion and his right to an impartial and independent tribunal established by law.

8. On the basis of these violations, Mr. Thaçi hereby files the present referral pursuant to Article 113(7) of the Constitution and Article 49(3) of the KSC Law.

## II. PROCEDURAL BACKGROUND

9. On 26 October 2020, the Pre-Trial Judge confirmed the indictment against Mr Thaçi.<sup>11</sup> On 30 October 2020, the SPO submitted the confirmed indictment. On 17 January 2022, the SPO submitted the operative Indictment in the present case.

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<sup>8</sup> KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021 ("Preliminary Motion").

<sup>9</sup> KSC-BC-2020-06/IA009/F00012, Thaçi Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 27 August 2021 ("Appeal").

<sup>10</sup> KSC-BC-2020-06/IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("Appeals Panel Decision").

<sup>11</sup> KSC-BC-2020-06/F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020).

10. On 5 November 2020, Mr Hashim Thaçi was arrested pursuant to a decision and an arrest warrant issued by the Pre-Trial Judge.<sup>12</sup>

11. On 12 March 2021, the Defence filed the Preliminary Motion challenging the jurisdiction of the Specialist Chambers in relation to, *inter alia*, the fact that the charges exceeded the KSC's subject matter jurisdiction.

12. On 23 April 2021, the SPO filed three responses to the Accused's jurisdiction motions concerning respectively, and *inter alia*: (i) the Marty Report; (ii) the applicability of customary international law; and (iii) the applicability of joint criminal enterprise.<sup>13</sup> On 14 May 2021, the Defence replied to the SPO's responses.<sup>14</sup>

13. On 22 July 2021, the Pre-Trial Judge issued the Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, rejecting the Preliminary Motion.<sup>15</sup>

14. On 27 August 2021, the Defence filed its Appeal.

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<sup>12</sup> KSC-BC-2020-06/F00051, Registrar, Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020; KSC-BC-2020-06/F00027/A01/RED, Pre-Trial Judge, Public Redacted Version of Arrest Warrant for Hashim Thaçi, 26 October 2020.

<sup>13</sup> KSC-BC-2020-06/F00259, Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate, 23 April 2021; KSC-BC-2020-06/F00262, Prosecution response to preliminary motion concerning applicability of customary international law, 23 April 2021; KSC-BC-2020-06/F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021.

<sup>14</sup> KSC-BC-2020-06/F00304, Thaçi Defence Reply to "Prosecution response to preliminary motions concerning Council of Europe Report, investigation deadline, and temporal mandate", 14 May 2021; KSC-BC-2020-06/F00306, Thaçi Defence Reply to "Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE)", 14 May 2021.

<sup>15</sup> KSC-BC-2020-06/F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021 ("Pre-Trial Judge Decision").

15. On 23 December 2021, a Panel of the Court of Appeals Chamber issued its Decision.<sup>16</sup> The decision was notified on the same day.

### III. APPLICABLE LAW

16. Pursuant to Article 113(7) of the Constitution, “[i]ndividuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

17. Article 49(3) of the KSC Law in turn provides:

“In accordance with Article 113(7) of the Constitution, individuals, including the accused and victims, are authorised to make referrals to the Specialist Chamber of the Constitutional Court in relation to alleged violations by the Specialist Chambers or Specialist Prosecutor’s Office of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all remedies provided by law.”

18. Pursuant to Rule 20(1) of the Rules of Procedure for the Specialist Chamber of The Constitutional Court (RPSCCC):

“Any individual, including the accused and the victims, alleging a violation by the Specialist Chambers or by the Specialist Prosecutor’s Office of their individual rights and freedoms as guaranteed under the Constitution may lodge a referral before the Specialist Chamber of the Constitutional Court if: (a) all effective remedies provided by law against the alleged violation have been exhausted; and (b) the referral is filed within two (2) months from the date of the notification of the final ruling concerning the alleged violation.”

19. Rule 20(2) RPSCCC provides that “the two-month time limit provided for in paragraph (1)(b) starts to run on the first working day after the notification of the final ruling. Where it expires on a Saturday, a Sunday or a Specialist Chambers’ official holiday, Rule 6(3) shall apply.”

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<sup>16</sup> See, Appeals Panel Decision.

20. Rule 6(3) RPSCCC in turn provides that “[w]here a time limit [...] expires on a Saturday, a Sunday or a Specialist Chambers’ official holiday, it shall be extended to the first working day thereafter”.

#### IV. VIOLATION OF THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

##### A. APPLICABLE LAW

21. The European Court of Human Rights (“ECtHR”) has consistently held<sup>17</sup> that the right to a tribunal established by law in Article 6(1) of the European Convention on Human Rights (“Convention”) extends to laws “on the establishment of the judicial organs.”<sup>18</sup> The ECtHR held that “if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not ‘established by law’ within the meaning of Article 6(1)”.<sup>19</sup> The ECtHR has also recognized its duty – when petitioned under this component of Article 6(1) of the Convention – to “[examine] whether reasonable grounds [exist] for the authorities to establish jurisdiction.”<sup>20</sup>

22. The term “established by law” in Article 6(1) of the Convention requires that courts operate under, and adhere to, the law passed by a Parliament under which they have been established. This requirement ensures that courts do not depend on the discretion of the Executive, and prevents a situation whereby the courts’ organization is left to the discretion of judicial authorities.<sup>21</sup> While some latitude

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<sup>17</sup> See, e.g., ECtHR, *Coëme and others v. Belgium*, Application Nos. [32492/96](#), [32547/96](#), [32548/96](#), [33209/96](#) and [33210/96](#), Second Section, Judgment, 22 June 2000 (“*Coëme* Judgment”), paras. 99, 107–108.

<sup>18</sup> ECtHR, *Lavents v. Latvia*, Application No. [58442/00](#), First Section, Judgment, 28 November 2002 (“*Lavents* Judgment”), para. 114.

<sup>19</sup> ECtHR, *Jorgic v. Germany*, Application No. [74613/01](#), Fifth Section, Judgment, 12 July 2007, para. 64.

<sup>20</sup> *Lavents* Judgment, para. 65.

<sup>21</sup> *Coëme* Judgment, para. 98.

exists for courts to interpret the relevant national law, the ECtHR has held that the courts themselves do not have the authority to compensate for the lack of a relevant law.<sup>22</sup>

23. Specifically, the ECtHR's Grand Chamber held that "according to its settled case-law, the phrase 'established by law' covers not only the legal basis for the very existence of a 'tribunal' but also the compliance by the court or tribunal with the particular rules that govern it and the composition of the bench in each case."<sup>23</sup> In this respect, the Grand Chamber confirmed the ECtHR's position that the requirement of a "tribunal established by law" shall be interpreted to mean a "tribunal in accordance with the law."<sup>24</sup> According to the Grand Chamber, "the scope of application of the requirement of a 'tribunal established by law' may, therefore, not be confined to instances where a judicial body lacked the competence to act as a court or tribunal under domestic law."<sup>25</sup>

24. The Grand Chamber reiterated that the "established by law" requirement in Article 6(1) of the Convention reflects "the principle of the rule of law and seeks to protect the judiciary against unlawful external influence, from the executive in particular [...], although it cannot be excluded that such unlawful interference may also emanate from the legislature or from within the judiciary itself."<sup>26</sup> With respect to the latter, "judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within [requiring judges to be] free from directives or pressures from the fellow judges or those who have

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<sup>22</sup> *Ibid.*

<sup>23</sup> ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Application No. [26374/18](#), Grand Chamber, Judgment, 1 December 2020 ("*Guðmundur Judgment*"), para. 223.

<sup>24</sup> *Ibid.*, para. 229.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, para. 225.



administrative responsibilities in the court such as the president of the court or the president of a division in the court.”<sup>27</sup>

25. In this respect, the ECtHR held that “[t]he absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, *vis-à-vis* their judicial superiors, may lead the [ECtHR] 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>28</sup> The Grand Chamber has also recalled the “very close interrelationship” between the right to a “tribunal established by law” and the guarantees of “independence” and “impartiality”.<sup>29</sup> The Grand Chamber held that “while they each serve specific purposes as distinct fair-trial guarantees, the [ECtHR] discerns a common thread running through the institutional requirements of Article 6(1), in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers.”<sup>30</sup>

## B. STATEMENT OF VIOLATION – SUBJECT MATTER JURISDICTION

26. The KSC are bound by the ECtHR jurisprudence set out above.<sup>31</sup> Accordingly, the KSC’s subject matter jurisdiction has been precisely and exhaustively regulated by law. Given its specialized character, and the existence of other international, hybrid and domestic courts with overlapping jurisdiction,<sup>32</sup> Article 6(1) of the KSC

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<sup>27</sup> ECtHR, *Parlov-Tkalčić v. Croatia*, Application No. [24810/06](#), First Section, Judgment, 22 December 2009 (“*Parlov-Tkalčić Judgment*”), para. 86. See also, ECtHR, *Daktaras v. Lithuania*, Application No. [42095/98](#), Third Section, Judgment, 10 October 2000 (“*Daktaras Judgment*”), paras. 35-36 and ECtHR, *Moiseyev v. Russia*, Application No. [62936/00](#), First Section, Judgment, 9 October 2008 (“*Moiseyev Judgment*”), para. 182.

<sup>28</sup> *Parlov-Tkalčić Judgment*, para. 86. See also, *Daktaras Judgment*, paras. 36 and 38; *Moiseyev Judgment*, para. 184.

<sup>29</sup> *Guðmundur Judgment*, para. 231.

<sup>30</sup> *Guðmundur Judgment*, para. 233.

<sup>31</sup> Articles 22(2) and 31(2) of the KSC Law, in connection with Article 52, Constitution.

<sup>32</sup> International Judges were first introduced in Kosovo on the basis of [UNMIK Regulation 2000/64](#), and [UNMIK Regulation 2001/2](#), as these instruments were amended and supplemented over time. On the basis of these instruments, citing concerns regarding independence and impartiality of local

Law includes a unique feature. Namely, by referencing the Marty Report, the KSC Law also identifies the specific crimes that fall within the KSC's subject matter jurisdiction.

27. Specifically, Article 6(1) of the KSC Law provides that the subject matter jurisdiction of the KSC is limited to allegations "related to" the Marty Report. Article 6(1) of the KSC Law therefore represents the delimitation of the boundaries of the KSC's subject matter jurisdiction, as defined in Article 162(1) of the Constitution, which provides that Kosovo may establish the KSC "[t]o comply with its international obligations in relation to the [Marty Report]."

28. In its Preliminary Motion, the Defence explained how the charges in the Indictment exceed the subject matter jurisdiction of the KSC. Namely, that apart from allegations in relation to two detention centers in Albania, the charges are otherwise unrelated to the Marty Report.<sup>33</sup> The Pre-Trial Judge's dismissal of this argument was based primarily on an unnecessary linguistic analysis of the phrases "related to" and "in relation to" in Article 6(1) of the KSC Law and Article 162(1) of the Constitution.<sup>34</sup> On the basis of this linguistic analysis, the Pre-Trial Judge held that only "a correlation between the charges brought against an individual and the [Marty] Report must exist", and that "charges brought against an individual in the

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judges, international judges and prosecutors took over cases deemed sensitive, including those related to war crimes and crimes against humanity. After the declaration of independence, EULEX operated under the [Law No. 03/L-053](#) on the "Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, as amended and supplemented over time. Article 3(1) of this law provides that "EULEX judges assigned to criminal proceedings will have the jurisdiction and competence over any case investigated or prosecuted by the [Special Prosecutor's Office of the Republic of Kosovo]." Article 5(1) of the [Law No. 03/L-052](#) on the Special Prosecutor's Office of the Republic of Kosovo gives the Special Prosecutor's Office of the Republic of Kosovo exclusive jurisdiction to investigate and prosecute a number of specific cases, including "war crimes" and "crimes against humanity."

<sup>33</sup> Preliminary Motion, para. 35.

<sup>34</sup> Pre-Trial Judge Decision, paras. 107 – 112.

exercise of the jurisdiction of the [K]SC must be sufficiently connected to the [Marty] Report.”<sup>35</sup>

29. In doing so, the Pre-Trial Judge engineered a new legal test, which departs from the unequivocal language of Article 6(1) of the KSC Law and Article 162(1) of the Constitution. Importantly, the Pre-Trial Judge then failed to engage in an assessment of whether the charges in the Indictment, in fact, exceed the respective jurisdictional threshold.<sup>36</sup> Then, by disregarding the purpose and legislative history of Amendment No. 24, the Pre-Trial Judge concluded that if the purpose of the legislator had been to limit the subject jurisdiction of the KSC to the contents of the Marty Report, this would have been done in more explicit terms.<sup>37</sup>

30. Ironically, in his demand for greater specificity as to the limitation of the KSC’s subject matter jurisdiction, the Pre-Trial Judge ignored the most important feature of Article 6(1) of the KSC Law: its explicit reference to the Marty Report as the ultimate limitation to KSC’s subject matter jurisdiction. In this respect, the Pre-Trial Judge not only ignored the legal significance of this reference, but then detached the Marty Report from Article 6(1) of the KSC Law altogether. This is evident from the Pre-Trial Judge’s treatment of the Marty Report and the “jurisdictional prerequisites under Articles 6 to 9 and 12 to 16 of the KSC Law” as two distinct pillars for ascertaining the outer limits of the KSC’s jurisdiction.<sup>38</sup>

31. On the basis of this and other errors, the Defence filed an appeal. The Appeal Panel Decision confirmed the Pre-Trial Judge’s finding that the scope of the KSC’s

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<sup>35</sup> *Ibid*, para. 111.

<sup>36</sup> *Ibid*.

<sup>37</sup> Pre-Trial Judge Decision, para. 113.

<sup>38</sup> Pre-Trial Judge Decision, para. 111. Consequently, if such a connection can be established and the jurisdictional prerequisites under Articles 6 to 9 and 12 to 16 of the KSC Law have been fulfilled, the KSC may, in the exercise of its jurisdiction, conduct proceedings regarding charges exceeding the allegations explicitly discussed in the Marty Report.

subject matter jurisdiction should center on a linguistic interpretation of the phrases “in relation to” and “related to”, which precede the reference to the Marty Report in Article 162(1) of the Constitution and Article 6(1) of the KSC Law.<sup>39</sup> Then, contrary to the Pre-Trial Judge’s finding that the charges must be “sufficiently connected” to the Marty Report, and without offering any compelling reason for doing so, the Appeals Panel considered that a “mere ‘relation’ between these charges and the Report would suffice to meet the jurisdictional requirement under Article 6(1) of the Law.”<sup>40</sup> This conclusion was only possible after the Appeals Panel improperly removed the Marty Report from the jurisdictional ambit of the KSC provided under Articles 6 to 9 of the KSC Law. The Appeals Panel then concluded that – when read in combination – the jurisdictional limbs of the KSC under Article 6 to 9 of the KSC Law, are broader than the majority of the allegations of the Marty Report. This analysis is flawed and contradictory, for the reasons set out below.

32. First, as is clear from the Appeals Panel’s reasoning, the jurisdictional limbs of the KSC in Articles 6 to 9 of the KSC Law must be satisfied cumulatively in order for the KSC to assert its jurisdiction over a particular charge. Cumulative satisfaction means that the thresholds of **each** jurisdictional limb must be met, including the most narrow. As a result, jurisdictional limbs of broader character cannot be invoked to circumvent the failure of a charge to meet the narrowest jurisdictional limb.

33. This is because the different limbs that form the KSC’s jurisdiction, do not stand alone. Being cumulative they are – figuratively speaking – laid out in the form of a funnel, whereby the temporal, territorial and personal jurisdictional bases are on the top, and the subject matter jurisdiction is at the bottom. As such, while the temporal, territorial and personal jurisdiction of the KSC may be wider, these limbs are insufficient for the KSC to exercise its jurisdiction over a particular charge. The

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<sup>39</sup> Appeals Panel Decision, para. 66.

<sup>40</sup> *Ibid.*

impugned conduct alleged must **also** fall within the KSC's subject matter jurisdiction, provided by Article 6(1) of the KSC Law, in connection with Article 1(2) of the KSC Law and Article 162(1) of the Constitution.

34. As such, the Appeals Panel was wrong to legitimize the detachment of the Marty Report from Article 6(1) of the KSC Law. The Appeal Panel Decision distilled three separate jurisdictional pillars of the KSC: (i) jurisdictional parameters under Articles 6 to 9 and 17 of the KSC Law; (ii) jurisdictional parameters under Articles 13 and 14 of the KSC Law; and (iii) the relation to the Marty Report.<sup>41</sup> In doing so, the Appeals Panel sought to diminish the importance of the Marty Report for the purpose of ascertaining the KSC's jurisdiction.

35. This was an error. The Marty Report is not a jurisdictional requirement in and of itself. It forms part of, and represents the most important aspect of, the subject matter jurisdiction of the KSC under Article 6(1) of the KSC Law. Its removal from the ambit of Article 6(1) of the KSC Law resulted in a considerable (and impermissible) expansion of the KSC's subject matter jurisdiction, in a manner inconsistent with Article 162(1) of the Constitution and Article 6(1) of the KSC Law. The result is that the KSC fails to meet the requirements of a tribunal established by law within the meaning of Article 6(1) of the Convention and Article 31(2) of the Constitution. As such, Mr. Thaçi's right to be tried by a tribunal established by law has been violated.

36. While dismissing the Defence submission that the Marty Report is the narrowest and, thus the most important of the KSC's jurisdictional limbs, the Appeals Panel held that if the legislative intent of the KSC Law was to confine the subject matter jurisdiction of the KSC to the Marty Report, "this would have been

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<sup>41</sup> *Ibid.*

unequivocally reflected in the wording of the provisions of the Law dealing with the Specialist Chambers' jurisdiction."<sup>42</sup> In effect, therefore, the Appeals Panel is suggesting that limiting the subject matter jurisdiction of the KSC with reference to the Marty Report could only have been achieved by transposing the content of the Marty Report into the KSC Law. Namely, the Appeals Panel held that "none of the provisions under Articles 6 to 9 of the KSC Law narrow the Specialist Chambers' jurisdiction only to acts committed from the summer of 1999 onwards, to acts committed in Albania or with a cross-border element, and/or to offences of inhumane treatment and organ trafficking."<sup>43</sup> According to the Appeals Panel, transposing the content of the Marty Report into the KSC Law was possible given that the Assembly passed the KSC Law with full knowledge of the Marty Report.<sup>44</sup>

37. These are not reasonable conclusions. The Appeals Panel went to great lengths to exclude the Marty Report from the analysis of the KSC's jurisdictional limits, but failed to find a credible basis to do so. The suggestion that the drafters were required to explicitly transpose the Marty Report allegations into the KSC Law is manifestly unreasonable, giving rise to the appearance that the Appeals Panel was concerned only with retroactively justifying the enormous jurisdictional overreach of the Indictment.

38. The Appeal Panel Decision also distorts the Defence submissions on the KCC Judgment,<sup>45</sup> and its legal significance for determining the effect of the Marty Report on the KSC's subject matter jurisdiction.<sup>46</sup> Firstly, the Defence did not argue that the KCC pronounced on the limits of the KSC's jurisdiction. To the contrary, the Defence

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<sup>42</sup> Appeals Panel Decision, para. 67.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> KCC, AGJ 788/15, Judgment in Case No. KO26/15 - Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, 15 April 2015 ("KCC Judgment").

<sup>46</sup> Appeals Panel Decision, para. 69.

underlined that, in its constitutional assessment, the KCC Judgment concluded that the KSC, as sought to be established by Article 162(1) of the Constitution, fulfills the independence and impartiality requirements because there is an actual need for its establishment, and because its jurisdiction is of a specialized nature.<sup>47</sup> The KCC reached this conclusion only after examining the KSC's subject matter jurisdiction provided in the proposed Article 162(1) of the Constitution and the Marty Report.

39. As such, the conclusion of the Appeals Panel - that the KCC Judgment's reference to the specific criminal allegations of the Marty Report is nothing more than general description of the Marty Report - is baseless.<sup>48</sup> It would have been impossible for the KCC to perform its analysis of whether the KSC is a specialized court without assessing its proposed subject matter jurisdiction, as provided in Article 162(1) of the Constitution. Indeed, this is why the outer limits of KSC jurisdiction have been delineated by a constitutional provision as opposed to their confinement being regulated simply by a law.

40. In downplaying the significance of the KCC Judgment, the Appeals Panel referred to the Council of Europe's Parliamentary Assembly Resolution, adopted following the publication of the Marty Report.<sup>49</sup> While its reasoning is not entirely clear, it appears that the Appeals Panel suggested that the Council of Europe Resolution is somehow binding on Kosovo. The Council of Europe Resolution has no such binding force given that, among other reasons, Kosovo is not a member of the Council of Europe.

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<sup>47</sup> KCC Judgment, paras. 51 – 54.

<sup>48</sup> Appeals Panel Decision, para. 69.

<sup>49</sup> Appeals Panel Decision, para. 70, citing the Council of Europe Parliamentary Assembly, Resolution 1782(2011), Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo, 25 January 2011 ("Council of Europe Resolution").

41. Notwithstanding this, the plain language of the Council of Europe Resolution demonstrates that it was never envisaged that Kosovo could or would create the KSC as a specialized court. Namely, according to the Council of Europe Resolution, Kosovo is invited “to co-operate unreservedly with EULEX and/or any other international judicial body mandated to conduct follow-up investigations and in the framework of any other procedures intended to find out the truth about crimes linked to the conflict in Kosovo, irrespective of the known or assumed origin of the suspects and the victims.”<sup>50</sup> This invitation is addressed to Kosovo in light of the broad and general mandate of EULEX to investigate, prosecute and adjudicate any and all crimes linked to the conflict in Kosovo pursuant to, *inter alia*, the then-applicable law.<sup>51</sup> Therefore, this invitation cannot be interpreted as creating an expectation for Kosovo to establish a specialized court with jurisdiction to adjudicate crimes linked to the Kosovo conflict. The Appeals Panel’s invocation of the Council of Europe Resolution in this context is therefore entirely misplaced.

42. Finally, the Appeal Panel Decision fails to address the fundamental question of the legal significance and consequence of the reference to the Marty Report in Article 6(1) of the KSC Law and Article 162(1) of the Constitution. The Appeal Panel Decision does not explain, much less justify, why the KSC itself elevated the Marty Report to the level of a “Foundational Document”,<sup>52</sup> when its content has apparently no limitation on the Court’s own subject matter jurisdiction. It would have been unnecessary for the Marty Report to be referenced in Article 6(1) of the KSC Law if the purpose of this provision was to confer on the KSC broad jurisdiction for any and all war crimes and crimes against humanity linked to the Kosovo conflict. Indeed, employing the negative interpretation method of the Appeals Panel, if the

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<sup>50</sup> Council of Europe Resolution, para. 19.6.

<sup>51</sup> Law No. 03/L-053 on the “Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo,” Article 3.

<sup>52</sup> See, KSC & SPO, ‘FOUNDATIONAL DOCUMENTS’, 2021, available at: <https://www.scp-ks.org/en/documents/foundational-documents>.



legislative intent of the KSC Law was to establish a specialized court with broad jurisdiction over all crimes linked to the Kosovo conflict, Article 162(1) of the Constitution and Article 6(1) of the KSC Law would not have contained any reference to the Marty Report.

43. In reality, the Marty Report is at the center of Article 6(1) of the KSC Law, not only because it was the *raison d'être* for the KSC's creation and establishment, but because it functions as a clear limitation on the Court's jurisdictional reach. The fact that the Indictment in the present case has been drafted with utter disregard for the statutory limitations imposed by the Constitution and confirmed in the legislation establishing the KSC, results from the fact that the Marty Report turned out to be a work of fiction and propaganda, unable to survive any independent prosecutorial or judicial scrutiny. This does not mean, however, that the KSC and SPO were entitled to make the monumental leap from a Report concerning post-war allegations of trafficking of human organs in Albania, to an Indictment containing broad allegations of war crimes and crimes against humanity throughout Kosovo during the entirety of the conflict, thereby expanding the Court's jurisdictional scope beyond all recognition.

44. The errors of the Pre-Trial Judge and Appeals Panel, cited above, were committed in a misplaced attempt to retroactively justify the KSC and SPO's decision to drastically depart from the Court's clear jurisdictional limitations. In condoning this abandonment of its own jurisdictional limits, the Appeal Panel Decision violated Mr Thaçi's right to be tried by an independent and impartial tribunal established by law, as required by Article 6(1) of the Convention and Article 31(2) of the Constitution. It should accordingly be quashed.

C. STATEMENT OF VIOLATION – ASSIGNMENT OF THE APPEALS PANEL

45. In addition to the violation outlined above, the Appeals Panel that rendered the Appeal Panel Decision was constituted in violation of the procedural guarantees that seek to ensure the KSC's adherence to the independence and impartiality requirements under Article 6(1) of the Convention and Article 31(2) of the Constitution.

46. In accordance with the ECtHR jurisprudence outlined above, Article 30(3) of the KSC Law provides that, "[i]f assigned from the Roster to hear a pre-trial, trial, court of appeal or supreme court phase of a case or to hear a constitutional referral in accordance with Article 33, 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." Article 33(1)(c) of the KSC Law provides that "[t]he assignments of Court of Appeals Panel judges shall elapse on the day after the Court of Appeal Panel renders its judgement [...]," which marks the end of an appellate phase for a case.

47. This legal provision is clear; assignments from the Roster are made on the basis of different procedural phases of a case: i.e. trial court, appellate court, and supreme court procedural phases of a case. Therefore, according to Articles 30(3) and 33(1)(c) of the KSC 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 by that Appeals Panel. As a result, Article 30(3) of the KSC Law mandates the appointment of judges for a significant length of time.

48. The duration of KSC judges' appointment for a complete procedural phase is of a particular importance, given that the KSC judges are engaged pursuant to zero-hour contracts. This explains why the prohibition on KSC judges not engaging in

any other professional occupations commences only **after** their appointment, pursuant to Article 33(3) of the KSC Law. Namely, according to Article 31(3) of the KSC Law “[j]udges shall not engage in any other occupation of a professional nature” only “[i]f assigned pursuant to Article 33(3)” of the KSC Law.

49. Contrary to this explicit regime, the KSC President appointed an Appeals Panel in the present case,<sup>53</sup> but then changed its composition. As such, the Appeals Panel appointed in the present case, is not the one that issued the Appeal Panel Decision. When challenged by the Defence, the President has held that the judges’ assignment ends with the pronouncement of the Panel on the specific subject matter *sub judice*, rather than the Judges being “removed” as the Defence asserts.”<sup>54</sup> This represents an erroneous application of Article 30(3) of the KSC Law, in violation of Article 6(1) of the Convention and Article 31(2) of the Constitution.

50. Reading Article 30(3) this way imbues the President with the authority to correct and/or influence the decision-making of judges appointed to different panels upon review of their decisions. This removes the institutional safeguards ensuring the independence and impartiality of KSC judges, in violation of Article 6(1) of the Convention and Article 31(2) of the Constitution. As such, this error further undermines the Appeals Panel Decision, providing yet another basis for its reversal.

## V. VIOLATION OF THE RIGHT TO A REASONED OPINION

### A. APPLICABLE LAW

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<sup>53</sup> KSC-BC-2020-06/IA004/F00002, Decision Assigning a Court of Appeals Panel, 4 February 2021, para. 6, appointing Judge Michèle Picard, Judge Kai Ambos, Judge Nina Jørgensen as the Court of Appeals Panel to decide on interlocutory appeals filed by Messrs Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakub Krasniqi against decisions issued by the Pre-Trial Judge rejecting their requests for interim release (“Original Court of Appeals Panel Assignment”).

<sup>54</sup> KSC-BC-2020-06/F00440, Decision on Application for the Recusal of the President, 24 August 2021, para. 30.

51. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.<sup>55</sup> Article 6(1) of the Convention accordingly obliges courts to give reasons for their findings and judgments.

52. The ECtHR has developed a consistent body of jurisprudence, reflecting an established principle that “judgments of courts and tribunals should adequately state the reasons on which they are based”.<sup>56</sup> This principle reflects the overriding obligation on authorities to justify their activities through the giving of reasoned decisions, which also serve to “demonstrate to the parties that they have been heard”.<sup>57</sup>

53. What is meant by a “reasoned decision” has also been explored and explained by the ECtHR. While the Article 6(1) obligation should not be understood as requiring a court to give a detailed answer to every argument, particularly given the diversity of submissions that litigants may bring before courts, and the differences between states with regard to statutory provisions, customary rules, and the presentation of drafting of judgments,<sup>58</sup> a court’s reasoning must still be sufficient to adequately explain the reasons on which decisions are based. The ECtHR has accordingly found a violation of Article 6(1) when “the applicant’s requests were shot down with little or no motivation whatsoever”,<sup>59</sup> or when obvious discrepancies were “not at all or not sufficiently addressed”.<sup>60</sup>

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<sup>55</sup> ECtHR, *Hirvisaari v. Finland*, Application No. [49684/99](#), Fourth Section, Judgment, 27 September 2001 (“*Hirvisaari Judgment*”), para. 30.

<sup>56</sup> ECtHR, *Suominen v. Finland* Application No. [37801/97](#), Fourth Section, Judgment, 1 July 2003 (“*Suominen Judgment*”), para. 34; ECtHR, *Ruiz Torija v. Spain*, Application No. [18390/91](#), Court (Chamber), Judgment 9 December 1994 (“*Ruiz Torija Judgment*”), para. 29.

<sup>57</sup> ECtHR, *Ajdaric v. Croatia* Application No. [20883/09](#), First Section, Judgment, 12 December 2011 (“*Ajdaric Judgment*”), para. 46; *Suominen Judgment*, para. 37.

<sup>58</sup> ECtHR, *Hiro Balani v. Spain* Application No. [A18064/91](#), Court (Chamber), Judgment, 9 December 1994, para. 27; *Ruiz Torija Judgment*, para. 29.

<sup>59</sup> ECtHR, *Carmel Saliba v. Malta*, Application No. [24221/13](#), Fourth Section, Judgment, 29 November 2016, paras. 79-80.

<sup>60</sup> *Ajdaric Judgment*, para. 51.

54. While reasoned opinions aim to ensure that the affected person can properly exercise their right of appeal, this does not mean that the obligation is limited to first instance or trial courts. The Article 6(1) requirement to give a reasoned decision applies equally to appellate courts.<sup>61</sup>

55. A court's obligation to provide a reasoned judgment has been widely recognized as a fundamental right of any accused person; the Inter-American Court of Human Rights,<sup>62</sup> the International Court of Justice,<sup>63</sup> as well as the international criminal courts and tribunals,<sup>64</sup> have all recognized the right of an accused to a reasoned opinion as one of the requisite elements of a fair trial, requiring that courts indicate with sufficient clarity the basis for their decisions.

## B. STATEMENT OF VIOLATION

56. The Defence raised three grounds of appeal in relation to the Marty Report before the Appeals Panel. In Ground 1, the Defence argued that the Pre-Trial Judge's approach to jurisdiction circumvented the findings of the KCC, and rendered the KSC an extraordinary court, prohibited under Article 103(7) of the Constitution.

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<sup>61</sup> ECtHR, *Tatishvili v. Russia*, Application No. [1509/02](#), First Section, Judgment, 22 February 2007, paras. 62-63;

<sup>62</sup> IACtHR, *J. v. Peru*, Judgment, 27 November 2013, para. 224: "the obligation to provide the reasoning for decisions is a guarantee related to the conscientious administration of justice that guarantees the individual the right to be tried for the reasons established by law... [the reasoning] should show that the arguments of the parties have been duly taken into account and that all the evidence has been analyzed."

<sup>63</sup> ICJ, Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 12 July 1973, paras. 92, 95.

<sup>64</sup> See, e.g., ICTY, *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Judgment, 8 March 2006, para. 96; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Judgement, 12 June 2002, para. 41; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, para. 20; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, para. 108.

57. The constitutionality of the proposed Amendment No. 24, through which the KSC was incorporated into Kosovo's legal and constitutional order, was assessed by the KCC. As part of this assessment, the KCC considered whether the potential Court would constitute an "extraordinary court", which would have been prohibited under Article 103(7) of the Constitution. Significantly, the KCC held that in order for a court not to be considered as extraordinary (and thus prohibited), "there needs to be a necessity for its establishment."<sup>65</sup> As to this requirement of "necessity", the KCC elaborated that, in this case, the need for the KSC derives from the "requirement for the Republic of Kosovo to comply with its international obligations." The international obligations in question, were identified as those which "stem from the Report [...], which outlines a number of highly specific criminal allegations and recommends them for investigation and prosecution."<sup>66</sup>

58. Ground 1 of the Defence Appeal examined the KCC reasoning in significant detail, before analysing the Pre-Trial Judge's attempt to circumvent it.<sup>67</sup> Namely, the Pre-Trial Judge found that the KCC's identification of "a number of highly specific criminal allegations" outlined by Marty Report, "does not exclude allegations arising from the Report **exceeding** organ trafficking and inhumane treatment allegedly committed in detention centers in Albania."<sup>68</sup>

59. With reference to the KCC's reasoning, the Defence argued on appeal that should the Pre-Trial Judge's position be accepted, this means that the KSC was *not* established solely for adjudicating the highly specific criminal allegations contained in the Marty Report. As such, it is just another domestic court exercising jurisdiction over war crimes and crimes against humanity alleged during and after the Kosovo

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<sup>65</sup> Appeal, para. 14, citing KCC Judgment, para. 45 (emphasis added).

<sup>66</sup> Appeal, para. 15, citing KCC Judgment, paras. 50-51 (emphasis added).

<sup>67</sup> Appeal, paras. 13-23.

<sup>68</sup> Appeal, citing the Pre-Trial Judge Decision, para. 118.

conflict. The effect being that the KSC loses its specialized nature, and the necessity for its establishment accordingly evaporates. As such, it is a court of general jurisdiction, and not a specialized court, under Article 102(1) of the Kosovo Constitution, because it does not address a clearly defined need. On this basis, the KSC is an extraordinary court prohibited under Article 103(7) of the Constitution.

60. The Appeal Panel Decision fails to address the substance of the Defence submissions made in Ground 1, or give a reasoned opinion for its apparent dismissal, thereby violating Mr Thaçi's right to a reasoned opinion.

61. Specifically, the Appeal Panel Decision addresses the KCC Judgment at paragraphs 68 to 72, finding that the value of this judgment is limited to determining whether the constitutional amendment "diminished any of the rights and freedoms guaranteed by Chapters II and III of the Constitution of Kosovo", and that it is not a pronouncement on jurisdiction. The Appeals Panel then stated that the KSC's jurisdiction is not limited by the fact that the Specialist Chambers were established as a result of Kosovo's international obligations "stemming from" the Marty Report, before finding that "the fact that the contours of the Specialist Chambers' jurisdiction are delineated by Articles 6 to 9 of the Law rather than by the specific allegations contained in the Report does not have the effect of removing their "specialised" character within the meaning of Article 103(7) of the Constitution of Kosovo."

62. What the Appeals Panel **failed** to address, are the specific Defence submissions on the extraordinary nature of the KSC, in light of the KCC Judgment and the Pre-Trial Chamber's own position. In essence, the Appeals Panel disassociated the Defence submissions regarding the KCC Judgment from its arguments concerning the extraordinary nature of the Court, which were fundamentally linked in the Appeal.

63. It is clear that the Article 6(1) obligation does not require a court to give “a detailed answer to every argument”<sup>69</sup> raised by a party. However, this is not a case of the Appeals Panel not giving a detailed answer to an argument; it failed entirely to address the substance of the Defence submissions. Nor was this a peripheral or unimportant argument; it comprised one of three Grounds raised before the Appeals Panel on the question of jurisdiction. The ECtHR requires that a court’s reasoning, while not necessarily required to be detailed on every point, must still be sufficient to adequately explain the reasons on which decisions are based. The Appeals Panel failed to meet this standard.

64. By sidestepping Ground 1 of the Defence Appeal, and failing to adjudicate whether the Pre-Trial Judge’s approach to jurisdiction rendered the KSC a prohibited extraordinary court under Article 103(7) of the Constitution, the Appeals Panel violated Mr. Thaçi’s right to a reasoned opinion, warranting a reversal of the finding.

## **VI. STATEMENT CONFIRMING COMPLIANCE WITH EXHAUSTION OF REMEDIES AND TIME LIMIT FOR THE REFERRAL**

65. The issues raised herein relating to the KSC’s jurisdiction and the Martyr Report were raised in the Preliminary Motion before the Pre-Trial Judge, and then adjudicated in the Pre-Trial Judge Decision. An appeal was then filed before the Court of Appeals Panel, resulting in the Appeal Panel Decision. As such, the remedies available at the KSC have been exhausted, warranting the filing of the present referral.

66. As regards the improper assignment of the Appeals Panel, the Defence has also exhausted available remedies before the KSC. The Defence first filed a request to

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<sup>69</sup> *Hirvisaari* Judgment, para. 31; *Suominen* Judgment, para. 34.



recuse the President from appointing an Appeals Panel.<sup>70</sup> Following a denial of that request,<sup>71</sup> the Defence filed a Request for reconsideration of the recusal decision.<sup>72</sup> Concurrently with the recusal process, and following the erroneous assignment of the new Appeals Panel, the Defence filed an application for the disqualification of Judge Emilio Gatti, given that his appointment by the President violated Articles 30(3) and 33(1) of the KSC Law.<sup>73</sup> Both the request for recusal and request for disqualification were denied.<sup>74</sup> As such, avenues for remedies for this error were exhausted before the KSC, warranting the inclusion of this issue in the present referral.

67. The present request is also timely. Pursuant to Rule 20(2) of the KSC Rules, the two-month time limit starts running on the first working day after the notification of the final ruling. The Defence was notified of the Appeal Panel Decision on 23 December 2021. Both 24 and 27 December 2021 were KSC Official Holidays. Therefore, the first working day after notification of the decision is 28 December 2021. Two months<sup>75</sup> from this date is 28 February 2022.

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<sup>70</sup> KSC-BC-2020-06/F00434, Thaçi Defence Application for the Recusal of the President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Mr Thaçi's appeal on provisional release, 16 August 2021.

<sup>71</sup> KSC-BC-2020-06/F00440, Decision on Application for the Recusal of the President, 24 August 2021.

<sup>72</sup> KSC-BC-2020-06/F00449, Thaçi Defence Request for Reconsideration of the 24 August 2021 Decision on Application for the Recusal of the President, 31 August 2021.

<sup>73</sup> KSC-BC-2020-06/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>74</sup> KSC-BC-2020-06/F00476, Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel, 17 September 2021.

<sup>75</sup> Note that there is no further definition of what constitutes 'months'. The date has therefore been calculated as 2 months from the specific date, rather than 8 weeks.

**VII. RELIEF REQUESTED**

68. On the basis of the above submissions, the Defence respectfully requests that the Constitutional Panel grant the relief as set out in the Additional Submissions.

**DECLARE** that the Appeal Panel’s Decision violates Article 6(1) of the Convention and Article 31(2) of the Constitution;

**QUASH** the findings of the Appeal Panel’s Decision which are impugned herein; and

**REMAND** the Appeal for reconsideration before the Appeals Panel assigned pursuant to the Original Court of Appeals Panel Assignment.

**Word count: 7807 words**

Respectfully submitted,



**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Monday, 28 February 2022

At Tampa, United States of America