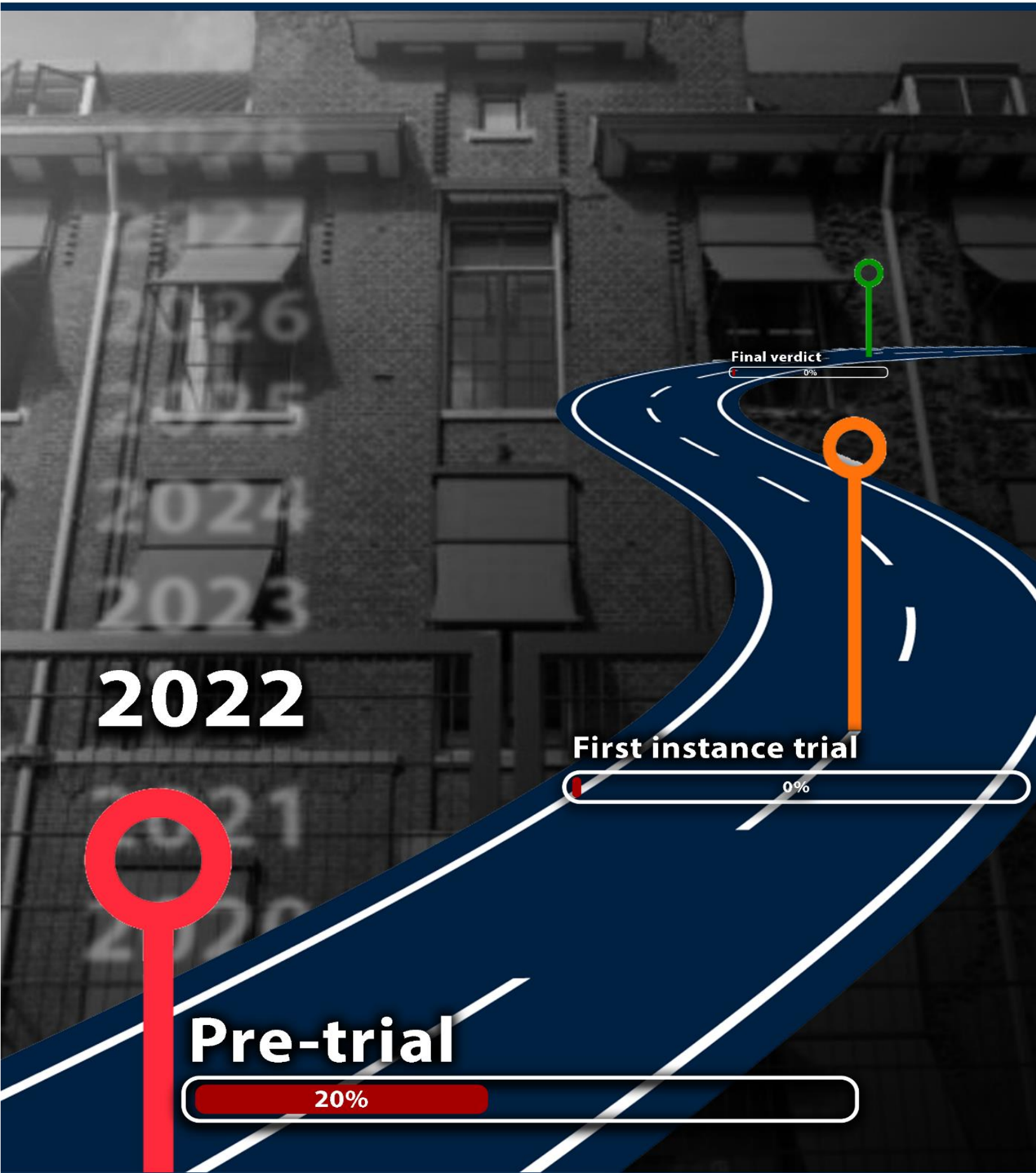




Special Trials



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ABOUT KLI

KLI, Kosovo Law Institute, is a non-governmental and non-profit organization of public policy, a think tank specialized in the justice sector.

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LIST OF ACRONYMS

KLI	Kosovo Law Institute
KSC	Kosovo Specialist Chambers
SPO	Specialist Prosecutor's Office
SITF	Special Investigation Task Force
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
OVL-KLA	Organization of War Veterans of the Kosovo Liberation Army
OSCE	Organization for Security and Co-operation in Europe

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1. Executive summary

16 years after the end of the war in Kosovo, on 3 April 2015, the Assembly of Kosovo adopted Constitutional amendment no. 24 and Law No. 05/L-053, with the purpose of establishing and functionalizing the Kosovo Specialist Chambers in The Hague (KSC) and Specialist Prosecutor's Office (SPO).

This court, although established almost seven years ago, has shown no efficiency in carrying out its mission. Not until three years after the establishment of SPO did the first activity take place, when at the end of 2018 the first summons for interview was sent against former-commander of the Llapi Operating Zone, Mustafa, known as Commander Remi. Almost five years after the establishment of the Special Court, the first indictments were confirmed and the first arrests were made. So far, almost seven years after its establishment, in one case where the charges are related to criminal offenses of obstruction of the administration of justice, the verdict has been announced in the first instance, while another case is in the trial phase. Meanwhile, two cases have not yet entered the trial phase and are in the pre-trial phase.

As of March 2021, no arrests have been made and no information has been provided on whether new indictments have been filed or whether any other criminal proceedings are expected to be initiated. Considering that these institutions are part of the legal system of the Republic of Kosovo, KLI estimates that the transparency and accountability of KSC and SPO should be implemented accurately, respecting the confidentiality of

the procedure and without compromising the development of criminal proceedings.

In the comparison made between the International Criminal Tribunal for the former Yugoslavia and the Kosovo Specialist Chambers in The Hague, there is a large disproportion in time taken by these two institutions. While the first indictment was filed in the first year after its establishment, it took the SPO almost five years from its inception to file the first indictments, not counting the time since the establishment of the Special Investigation Task Force (SITF) which operated within the Special Prosecution of the Republic of Kosovo since 2011. While in the Specialist Chamber the first trial started on September 15, 2021, 6 years after its establishment, the International Criminal Tribunal for the former Yugoslavia from 1996 to 2004, within an eight-year period completed 32 first instance cases.

In addition to inefficiency, the work of the SPO has been followed by serious irregularities, such as the order addressed to Mahir Hasani. With this order, he was summoned for an interview as a suspect and was ordered to submit certain documents. Failure to comply with the order would be considered "disobedience". This order was issued against Hasani in violation of Article 30, paragraph 6 of the Constitution¹, as well as Article 6, paragraph 2 of the European Convention on Human Rights (ECHR).

¹ Article 30 of the Constitution of the Republic of Kosovo stipulates the minimum rights that every accused enjoys, including the right not to be forced to testify against himself or to admit his guilt.

The SPO then made a selective announcement regarding the filing of the indictment against Thaçi and others. This public announcement was made in violation of the Rules of Procedure and Evidence, approved by the Specialist Chambers.

The biggest scandal was the leak of confidential documents, which contained the names of current witnesses or potential witnesses, as well as other confidential data.

Such a leak of documents represents a violation of the security of witnesses themselves to testify in court proceedings before this court, consequently affecting the proper conduct of the proceedings. At the same time, such a scandal could potentially erode public confidence in the integrity of this court, including the confidence of witnesses that this court can protect the confidentiality of the proceedings, in accordance with the guarantees set out in the constitutional amendment and the Law on Specialist Chambers.

In addition to the above issues, numerous redactions in indictments, delays in obtaining evidence, the discovery of multiple evidence at once, allegations of indisclosure of exculpatory evidence and delays in translations, are some of the shortcomings that KLI has identified during the systematic monitoring of cases that are in process at the Kosovo Specialist Chambers in The Hague. According to the basic principles of the defendant in a criminal proceeding, the right of access to the case files at any stage of the criminal proceedings is a precondition for equality of arms and is essential for a fair and impartial

process. At the same time, the basic right of the defendants is to possess all the case files that will be used by the prosecution in a language that they understand and speak.

KSC judges must be guardians of equality of the parties in the proceedings, as well as ensure that all the rights of the defendants are strictly respected.

During monitoring, KLI noticed technical omissions by KSC, as a result of which confidential information was released and also noticed improper application of technical protection measures for witnesses. There should be no omissions from this court that could compromise the safety of witnesses and undermine the judicial process.

On the other hand, the transmission of trials has been accompanied by technical problems, which have caused obstacles in the development of court proceedings, as well as violated the principle of publicity and transparency.

2. Establishment of the Specialist Chamber



In late 2010, journalist Paul Lewis published excerpts from the report compiled by Swiss senator to the Council of Europe Dick Marty, with the title “Kosovo Prime Minister leads in human organ and arms trafficking” says the Council of Europe report.

This report described former Prime Minister Hashim Thaçi as the leader of an Albanian criminal group that trafficked heroin, weapons and human organs. The report spoke of the existence of the so-called Yellow House in Albania, where the organs of Serb prisoners were allegedly removed.²

The General Assembly of the Council of Europe, on January 7, 2011, approved the above-mentioned report of the Special Rapporteur, Dick Marty, in which suspicions were raised about the commission of war crimes during 1998-2000.

² “History of Specialist Chambers- from the Marty report to the attempts of nullification”, *Koha.net* (14 January 2019), at: <https://www.koha.net/arberi/139656/historia-e-speciales-ndash-nga-raporti-i-martyt-deri-tek-perpjekjaper-zhberje/>

Since in 2014 the Task Force concluded that there is sufficient evidence that could lead to the filing of indictments against potential suspects, the need arose to establish an institution that would investigate, prosecute and judge these claims.

In April 2014, the then President of Kosovo, Atifete Jahjaga, and the EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, exchanged letters regarding the establishment of "specialist chambers", while in November 2014 formed a planning team for the Court.³

After the talks and negotiations that took place between the representatives from Kosovo and the international community, on August 3, 2015, the Assembly of Kosovo approved the constitutional amendment no. 24, which added Article 162 to the Constitution of Kosovo, on the establishment of Specialist Chambers, as well as the Law on Specialist Chambers and the Specialist Prosecutor’s Office.

The new Article 162 of the Constitution, in the first paragraph, stipulates that: “In order to fulfill its international obligations regarding the Report of the Parliamentary Assembly of the Council of Europe, Document 12462, dated 7 January 2011, the Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor’s Office. The organization, functioning and jurisdiction of the Specialist Chambers and

³ Law no. 04 / L-274 on the ratification of the international agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo.

the Specialist Prosecutor's Office are regulated by this article and a special law.”

The Law on Specialist Chambers and Specialist Prosecutor's Office, adopted August 3, 2015, as the substantive jurisdiction of the Specialist Chambers determines the jurisdiction over the crimes provided for in Articles 12 to 16 of the Law relating to the Report of the Assembly of the Council of Europe. The Specialist Chambers also have jurisdiction over the offenses set forth in Chapter XXXII, Articles 384-386, 388, 390-407, and Chapter XXXIII, Articles 409-411, 415, 417, 419, 421, and Chapter XXXIV, Articles 423-424 of the Criminal Code No.04 / L-082 of the Republic of Kosovo, when they relate to official procedures and their officials.

While, as temporal jurisdiction, the Law defines the criminal offenses within the subject jurisdiction which were committed between the period January 1, 1998 and December 31, 2000. Meanwhile, regarding the territorial jurisdiction, the Law stipulates that “[in] accordance with the territorial jurisdiction of the courts of Kosovo according to the applicable criminal laws that were in force between the period January 1, 1998 and December 31, 2000 the Specialist Chambers have jurisdiction over criminal offenses that fall under their substantive jurisdiction which have begun or been committed in Kosovo.” The Assembly has also adopted the Law on Legal Protection and Financial Support of Potential Accused Persons in Trials at Specialist Chambers.

In January 2016, the Interim Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands was adopted.⁴

Whereas, in February 2016, the Agreement with the Host State between the Netherlands and Kosovo was approved.⁵

The Kosovo Specialist Chambers in The Hague are courts within the judicial system of the Republic of Kosovo, which have the same structure as other courts. It consists of three instances, the Basic Court, the Court of Appeals, the Supreme Court, and the Constitutional Chamber. This court is mainly funded by the EU and employs only international staff. After the Rules of Procedure and Evidence were reviewed by the Specialist Chamber of the Constitutional Court in June 2017, the way was opened for this court to conduct criminal proceedings. Regarding this regulation, the judges during their fifth plenary session on April 29 and 30, approved 30 amendments, which on May 26, 2020, by the Specialist Chamber of the Constitutional Court were deemed to be in accordance with Chapter II of the Constitution. The amendments in question entered into force on June 2, 2020.

⁴ Interim Agreement between the Low Countries (Netherlands) and Kosovo, 26 January 2016, at: https://www.scp-ks.org/sites/default/files/public/trb-2016-12_0.pdf

⁵ Agreement with the Host state between the Low Countries (Netherlands) and Kosovo, 15 February 2016, at: https://www.scp-ks.org/sites/default/files/public/bwbv0006581-geldend_van_15-02-2016_tm_heden_zichtdatum_30-11-2016.pdf

After the adoption of the constitutional amendment and the above-mentioned laws, on December 22, 2017, in the Assembly of the Republic of Kosovo, an attempt was made to dissolve the Specialist Chamber, which had provoked the reaction of the international diplomatic community in Kosovo.⁶

Regarding this attempt, KLI had reacted through a legal analysis entitled "Games with the Specialist Chamber". In this analysis, KLI had assessed that the initiative for the dissolution of the Specialist Chamber seriously violates the international obligations of Kosovo, contradicts international values and principles related to the rule of law to which Kosovo is committed and severely disputes the international legal subjectivity of the State of Kosovo because it poses a serious concern of weakening the country's international subjectivity.⁷

Whereas, in August 2020, the former President of the Republic of Kosovo, Hashim Thaçi, had proposed amendments no. 26 and no. 27 of the Constitution of the Republic of Kosovo.

He had proposed deleting and rewording paragraph 13 of Article 162, which states that the mandate of the Specialist Chambers will last for a period of five years. Based in his proposal, the mandate of the Specialist

Chambers and Special Prosecutor's Office will last until the announcement of the end of the mandate is made by the Council of the European Union, in consultation with the Government of the Republic of Kosovo.

On September 18, 2020, in accordance with Articles 144 (3) and 162 (3) of the Constitution, the then Speaker of the Assembly of Kosovo, Vjosa Osmani-Sadriu, forwarded the proposed constitutional amendments to the President of the Specialist Chambers for their preliminary evaluation from this Chamber.

On 26 November 2020, the Specialist Chamber of the Court confirmed that the mandate of the Specialist Chambers and the Specialist Prosecutor's Office has continued and will continue until the Council of the European Union announces the end of their mandate. Among other things, it is said that the proposed constitutional amendments reduce the rights and freedoms guaranteed by Chapter II of the Constitution.⁸

3. First activities of the Specialist Chambers and the illegal notification of the indictment against Thaçi and others

At the end of 2018, the former commander of the Llap Operational Zone, Rustem Mustafa, known as Commander "Remi" was summoned to be interviewed on January 14,

⁶ "Failed attempt to repeal the Specialist Chambers". *Radio Evropa e Lirë* (22 December 2017), at: <https://www.evropaelire.org/a/28933864.html>

⁷ "Games with the Specialist Chambers", KLI (December 2017) Page 5, at: <https://kli-ks.org/wp-content/uploads/2017/12/1.-Analize-e-shkurte-ligjore-Iniciativa-per-shfuqizimin-e-Gjykates-Speciale-25.12.2017.pdf>

⁸ Judgment on the reference to the proposed amendments to the Constitution of Kosovo, no. KSC-CC2020-11. November 26, 2020.

2019 by the SPO in The Hague. In terms of interviews, this summons marked the first activity of the Specialist Chambers and the Specialist Prosecutor's Office.

Later, the summons was accepted by the former chairman of the KLA Military Court Sokol Dobruna, the former KLA commander from the Drenica area Sami Lushtaku, the former KLA commander-in-chief Sylejman Selimi, the former KLA commander from Dukagjini Ramush Haradinaj, the former KLA commander from the Nerodime Zone Shukri Buja, the former Chief of Staff of the KLA General Staff Azem Sylja, Kadri Veseli, Rexhep Selimi and many others. Former Minister of Justice, Abelard Tahiri was also summoned for an interview⁹

On June 24, 2020, approximately five years after the establishment of this Chamber, the SPO made a public announcement that an indictment had been filed against the then President of the Republic of Kosovo, Hashim Thaçi, the chairman of the Democratic Party of Kosovo (PDK), Kadri Veseli and several others, for crimes against humanity and war crimes. This announcement took place three days before the meeting in Washington between the Kosovar and Serbian sides.

According to the announcement, on April 24, 2020, the SPO filed a ten-point indictment with the Kosovo Specialist Chambers (KSC), accusing Hashim Thaçi,

Kadri Veseli and others of a range of crimes against humanity and war crimes, including illegal murder, forced disappearance of persons, persecution and torture.

The Indictment alleges that Hashim Thaçi, Kadri Veseli and other suspects are criminally responsible for approximately 100 illegal killings. The crimes presented in the indictment include hundreds of identified Kosovo Albanian, Serb, and Roma victims and political opponents. The indictment is just one criminal indictment which is the result of a long investigation and proves the determination of the SPO that it can prove all the charges without reasonable doubt. "A KSC pre-trial judge is reviewing the indictment to decide whether to confirm the charges", the statement said.

According to the Specialist Prosecutor, the publication of this notification is necessary, due to, as stated in the notification, the repeated attempts of Hashim Thaçi and Kadri Veseli to obstruct and sabotage the work of KSC.

"It is believed that Mr. Thaçi and Mr. Veseli secretly launched a campaign to repeal the law created by the Court and otherwise obstructed the work of the Court in an attempt to evade justice. Through these actions, Mr. Thaçi and Mr. Veseli has put their personal interests above the victims of their crimes, the rule of law and the people of Kosovo," the statement said.¹⁰

⁹ Pergega S. Thaqi M. Kadriu M. "Amnesty for War Crimes in Kosovo", *KLI* (September 2020), Page 58, at:<https://kli-ks.org/amnistia-e-krimeve-te-luftes-ne-kosove/>

¹⁰ "Specialist Chamber files and indictment against Hashim Thaçi, Kadri Veseli and other persons, accused of about 100 illegal murders", *Betimi për Drejtësi* (24 June 2020), at:<https://betimiperdrejtesi.com/specialjangrite->

Prosecutor filed the revised indictment for confirmation in accordance with the order of the Pre-Trial Judge. On October 26, 2020, the Pre-Trial Judge upheld the revised indictment against the four defendants and issued arrest warrants and orders for their transfer to The Hague.

Regarding this press release, KLI initially estimates that the same press release represents a selective approach of this institution, as in the same is mentioned only the name of Mr. Thaçi and Mr. Veseli, and not the name of the other defendants involved in the same indictment. On the other hand, the publication of this notice represents a violation of the rules of work, approved precisely by the Specialist Chambers. Rule 88 of the Rules of Procedure and Evidence before the Specialist Chambers of Kosovo, stipulates that the indictment is made public after the confirmation of the same by the Court.

In this regard, this rule states that “(1) Subject to paragraph (2) upon confirmation by the pre-trial judge, the indictment shall be made public. (2) In special circumstances, if before the confirmation of the indictment the Specialist Prosecutor presents valid reasons related to security, to prevent the escape of the defendant, disruption of the procedures or social unrest, the pre-trial judge may, inter alia, order the temporary non-disclosure of the indictment, documents or information related to the indictment until a second order.

However, the indictment shall be made public, if necessary edited, no later than the first appearance of the defendant before the court. (3) “Notwithstanding paragraph (2), the Specialist Prosecutor may disclose the

aktakuze-kunder-hashim-thacit-kadri-veselit-e-personave-tjere-akuzohen-per-rreth-100-vrasje-tepaligishme/).

indictment or part of it to the authorities of a third State or to another entity, if he deems it necessary for the investigation or prosecution.”

4. First arrests and indictments

Former member of the Kosovo Liberation Army (KLA), Salih Mustafa was the first to be arrested by the SPO.

The indictment against him was confirmed on June 12, 2020, whereas his arrest took place on September 24, 2020, and then he was transferred to the detention facility in The Hague.

On September 24, 2020, the indictment against Mustafa was also made public. He is accused of arbitrary detention, cruel treatment, torture and illegal murders.¹¹ He has pleaded not guilty and his trial began on September 15, 2021.

Former leaders of the Organization of War Veterans (OVL-KLA), Hysni Gucati and Nasim Haradinaj, were arrested on September 25, 2020 in Kosovo. Their arrest was made by EULEX special units by order of the SPO, based on an arrest warrant and transfer order issued by a KSC judge.

The indictment against them was confirmed on 11 December 2020. They are charged on the basis of individual criminal responsibility (Article 16 (3) of the Law) for: Criminal offenses against the

¹¹“ After the confirmation of the indictment by the Special Court, Salih Mustafa got arrested” ,Betimi për Drejtësi (24 September 2020), at: <https://betimiperdrejtesi.com/pas-konfirmimit-te-aktakuzes-nga-gjykata-speciale-arrestohet-salih-mustafa/>.

administration of justice and public administration (intimidation during criminal proceedings, retaliation and breach of confidentiality procedure, according to Article 15 (2) of the Law and Articles 387, 388 (1) and 392 (1) - (3) of the Criminal Code of Kosovo, Law No. 06 / L-074 (2019), and Criminal Offenses against public order (obstruction of official persons in the performance of official duties, according to Article 15 (2) of the Law and Article 401 (1) - (3) and (5) of the Criminal Code of Kosovo, Law No. 06 / L-074 (2019)).¹² For the same, the trial ended in the first instance and the verdict was convicting, where each was sentenced to 4 and a half years of effective imprisonment and a fine of 100 euros.

The former President of the Republic of Kosovo, Hashim Thaçi, was arrested on November 5, 2020 in Kosovo and immediately that day was transferred to The Hague. Also, at the same day Kadri Veseli, Rexhep Selimi were arrested and transferred to The Hague. Whereas on November 4, Jakup Krasniqi was arrested. The indictment against them was confirmed on October 26, 2020.

Thaçi, Veseli, Selimi and Krasniqi are charged with individual criminal responsibility (Article 16 (1) (a) of the Law) and with criminal responsibility as superiors (Article 16 (1) (c) of the Law) for: Crimes against humanity (persecution,

imprisonment, other inhuman acts, torture, murder and enforced disappearance of persons, pursuant to Article 13 of the Law); and War Crimes (Illegal or arbitrary arrest and detention, cruel treatment, torture, and murder, pursuant to Article 14 of the Law).¹³ Whereas, on 29 April, the Specialist Prosecutors Office submitted an amended indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, with allegations that they committed war crimes and crimes against humanity also in Gjilan, Budakovo and Semetishta.

The latest detainee is the former KLA member Pjetër Shala who was stationed in Kukës, Albania. He was arrested on March 16, 2021 in Belgium. The indictment against him was confirmed on June 12, 2020. He is charged with individual criminal responsibility in various forms of war crimes such as arbitrary detention, cruel treatment, torture and murder.¹⁴

5. Prolongation in filing indictments and at the beginning of trials

Regarding the allegations comprised in the Report of the Parliamentary Assembly of the Council of Europe, the Special Investigative Task Force (SITF) conducted criminal investigations until September 2016.

¹³ Case information sheet: https://www.scp-ks.org/sites/default/files/public/cis_thaci_et_al_alb.pdf.

¹⁴ "Pjetër Shala transferred to the detention facility of the Kosovo Specialist Chambers in The Hague", *Betimi për Drejtësi* (April 15, 2020), at: <https://betimiperdrejtesi.com/pjeter-shala-transferohet-ne-objektin-e-paraburgimit-te-dhomave-te-specializuar-te-kosoves-ne-hage/>.

¹² "The first appearances as accused of Gucati and Haradinaj are expected to be held today in The Hague", *Betimi për Drejtësi* (December 18, 2020), at: <https://betimiperdrejtesi.com/sot-pritet-te-mbahen-paraqitjet-e-para-si-te-akuzuar-ne-hage-per-gucatin-e-haradinajn/>.

Subsequently, the mandate and the staff of this task force passed to the SPO, based in the provisions of the Law on Specialist Chambers and the Office of the Specialist Prosecutor.

Pursuant to Article 37 (1) of the Law on Specialist Chambers and the Office of the Specialist Prosecutor, evidence gathered during criminal proceedings or investigations within the substantive jurisdiction of the Specialist Chambers prior to their establishment by any national or international law enforcement authority or agency, or the conduct of criminal investigations, including the Kosovo State Prosecutor, Kosovo police authorities, the International Criminal Tribunal for the former Yugoslavia (ICTY), EULEX Kosovo or the Special Investigative Task Force (SITF) may be admissible before the Specialist Chambers. This article stipulates that their admissibility is decided by certain panels in accordance with international standards for the collection of evidence and Article 22 of the Constitution.

It took almost five years for the SPO to file the first indictments before the Specialist Chambers. The first two announcements that the Specialist Prosecutor intended to initiate criminal proceedings were made on 14 February 2020 in the cases of Salih Mustafa and Pjetër Shala, where the indictment against them was confirmed on 12 June. Meanwhile, the third announcement was made on April 23, 2020, in the case of Hashim Thaçi and others, whose indictment was confirmed on October 26, 2020.

On the other hand, the first trial before this Court started on September 15, 2021 against Salih Mustafa about 6 years after the establishment of these chambers.

To highlight the inefficiency and delay in filing indictments, as well as the commencement of trials, KLI analyzed the work of the International Criminal Tribunal for the former Yugoslavia, which was established on May 25, 1993, by the United Nations to prosecute persons who committed crimes during the war in Yugoslavia.

The first indictment in this court was filed on November 7, 1994 against Dragan Nikolic. Whereas, this court started the first trial on May 7, 1996.¹⁵ From 1996 to 2004, this court for a period of eight (8) years completed 32 cases in the first instance.¹⁶

If a time comparison is made in the actions of the prosecution and the court, between the former Hague Tribunal and the KSC, there is an enormous difference in the actions taken, especially in the case of indictments, where the SPO needed almost five years to file the first indictment. (Excluding the fact that the SITF has been in operation since 2011, the evidence of which may be admissible even before the KSC.) An enormous difference constitutes also the fact

¹⁵“ Timeline,”United Nations, International Criminal Tribunal for the former Yugoslavia, at: <https://www.icty.org/en/features/timeline>.

¹⁶“ Judgement List,” United Nations, International Criminal Tribunal for the former Yugoslavia, at: [https://www.icty.org/en/cases/judgement-list](https://www.icty.org/en/cases/judgement-list;);

Note: This calculation made by KLI did not include the decisions of the Court of Appeals and the cases returned for retrial, for which a judgment was rendered within this time period.

that the former Hague Tribunal within eight years of its establishment has completed 32 cases in the first instance, while KSC has started the first trial after six years of its establishment.

We recall here the fact that the former Hague Tribunal has also encountered difficulties as it has depended on the will of the states in terms of cooperation with them, since these states have not had the obligation to cooperate and respond to their requests. Whereas, the Assembly of the Republic of Kosovo by legislation has delegated the competencies to the Specialist Prosecutor's Office and the Specialist Chambers for investigation, criminal prosecution and trial of these cases, where the Republic of Kosovo Institutions are obliged to respond to the requests of the prosecutions and court.

KLI raises the concern regarding the delays in taking actions by the SPO and KSC. Recalling the fact that Article 6 of the ECHR states that *"every person has the right to have his case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal."* KLI considers that the prolongation of investigations for individuals, the filing of late indictments, as well as the continuation of investigations after the filing of indictments and the delays in the beginning of trials as violations of the rights guaranteed to defendants by the Constitution, while the continuation of investigations against them after the filing of the indictment creates legal uncertainty for these individuals.

In its response to KLI, the court says that it became operational in judicial terms in 2017 and that the first trial began in 2021, one year after the first indictment was made public. According to them, so far there has been no finding, neither by any panel nor by the Ombudsman, regarding any delay in court proceedings. However, they did not

give a concrete answer on how long the trials are expected to last, but they only provided information on the status of cases pending before this court.

Regarding the predictability of how long the investigation in these cases will take, this court has said that any decision in this regard is taken by the pre-trial judge. Meanwhile, when asked how much legal uncertainty is being created to the parties in the procedure by the length of the investigation process for the cases in which the indictment was already filed, this court said that they could not comment on aspects that are the subject of the ongoing proceedings.¹⁷

Although, the SPO has not returned an answer as to why it took almost five years from the establishment to file the first indictment and how long these investigations and trials are expected to last. They did not respond to the question of KLI as to how much uncertainty is being created to the parties by the length of the investigation process after the filing of the indictment. They have said that they want the cases they have in the pre-trial procedure to proceed faster in trials.¹⁸

¹⁷ Court Response to KLI, March 1, 2022.

¹⁸ SPO response to KLI, 23 February 2022.

6. Analysis of cases in process before KSC

6.1. Commander Cali's Case: War Crimes charges in Zllash



Salih Mustafa, known as Commander Cali, is the first to be arrested by the Specialist Chambers, as well as the first defendant to stand trial in The Hague.

He is charged under various forms of criminal liability: arbitrary detention, cruel treatment, torture and murder defined as war crimes committed in the context of, or in connection with, the non-international armed conflict in Kosovo.

On June 12, 2020, the pre-trial judge, Nicolas Guillou, confirmed the indictment against Mustafa and he also issued the arrest warrant and the transfer order to the detention facility.

Based on the Specialist Chambers press release, on the occasion of the publication of the indictment against Mustafa, the confirmed indictment states that approximately between April 1, 1999 and April 19, 1999, in a detention facility in Zllash, Kosovo, the crimes of arbitrary detention, cruel treatment and torture were committed against at least six persons. The indictment also alleges that around 19 April 1999, and around the end of April 1999, a detainee was killed at that location.

On 19 June 2020, the Specialist Prosecutor submitted the confirmed indictment with redactions, as authorized by the pre-trial judge. He was arrested on September 24, 2020 in Pristina (Kosovo) and transferred to The Hague on the same day and has been in detention ever since. On September 28, 2020, Mustafa made his first appearance before the pre-trial judge, where he decided not to declare anything related to his liability regarding the indictment. On 28 October, in his further appearance, he pleaded not guilty to all counts of the indictment. In his case, five conferences were held on the progress of the case. Afterward, another conference was held to prepare for the trial.

On February 22, 2021, the SPO submitted the final version of the preliminary file, whereas the defense submitted it on May 6, 2021.

On April 30, 2021, the pre-trial judge had approved the requests of the five victims and accepted them as victims participating in the trial. On May 7, 2021, the pre-trial judge handed over the case file to the trial panel. On May 21, 2021, the trial panel had approved the requests of the other four victims and had accepted them as victims participating in the procedure. There are currently 8 participating victims, as part of a single group (Group 1). The court also extended the deadline for victims to apply until the Specialist Prosecutor's case was closed.

In the case of Salih Mustafa, the pre-trial procedure lasted 11 months and 22 days.¹⁹

The trial against him has started on September 15, 2021. In this session, the SPO and the victim's advocate gave the opening statement. During the presentation of the case by the prosecution, 13 witnesses were heard, a large part of them under protective measures, such as distortion of voice and face. On February 4, 2022, the prosecution closed its case and then Salih Mustafa's defense filed a motion to drop the charges, yet such a motion was rejected by the court.

Eventually, the preparatory conferences on defense were held on March 8 and 9, 2022, which aimed to facilitate court proceedings.

In this case, the presentation of defense evidence was processed, where on 22 March their opening statement²⁰ was given and the hearing of the defense witnesses continued. In his case, it was foreseen that Salih Mustafa to give an unsown statement, however the same changed his mind and did not make a statement in the court.²¹ On 26 May 2022, the Defence of Salih Mustafa notified about the official closure of its case.

Diversely, in this case, the trial panel, chaired by Mappie Veldt-Foglia, on February 4, 2022, rendered a decision stating that if Salih Mustafa is found guilty, the victims will not be referred to the courts of Kosovo for compensation, but will to issue an indemnity order. This is because the Court has concluded that the domestic courts do not provide a realistic approach regarding the victims of the crimes for which charges are brought in this court case, regarding the claims for compensation.²²

The confirmed indictment states that approximately between April 1, 1999 and April 19, 1999, in a detention facility in Zllash (Kosovo) the crimes of arbitrary detention, cruel treatment and torture were committed against at least six persons. Furthermore, the indictment also alleges that around 19 April 1999, and around the end of April 1999, a detainee was killed at that location.

¹⁹ The case of Salih Mustafa, at: <https://www.scp-ks.org/sq/cases/salih-mustafa/sq>

²⁰ "Attorney: Salih Mustafa has never detained, mistreated or killed any person, nor ordered anyone to do so", *Betimi për Drejtësi* (22 March 2022), at: <https://betimiperdrejtesi.com/avokati-salih-mustafa-nuk-ka-ndaluar-maltretuar-e-vrare-asnjehere-asnje-person-as-nuk-ka-urdheruar-dike-per-nje-gje-te-tille/>

²¹ "Salih Mustafa changes his mind, will not make a court statement", *Betimi për Drejtësi* (19 May 2022), at: <https://betimiperdrejtesi.com/salih-mustafa-nderron-mendje-nuk-do-te-beje-deklarate-ne-gjykatore/>

²² "Court says if Salih Mustafa is found guilty, victims will not be referred to Kosovo courts for compensation", *Betimi për Drejtësi* (7 February 2022), at: <https://betimiperdrejtesi.com/gjykata-thote-se-nese-salih-mustafa-shpallet-fajtor-viktimat-nuk-do-te-referohen-ne-gjykatat-e-kosoves-per-zhdemtim/>

6.2. The case against Gucati and Haradinaj

Confidential documents brought by "Rrufeja" to the OVL-KLA



As president and vice-president of the Organization of War Veterans of Kosovo Liberation Army (OVL-KLA) War Veterans Organization, Hysni Gucati and Nasim Haradinaj are facing charges of obstructing the administration of justice at the KSC.

Specifically, they are being accused of obstructing officials from performing their official duties, intimidating witnesses, retaliating and violating the confidentiality of proceedings.

Gucati and Haradinaj were arrested on September 25, 2020. Gucati was transferred on the same day of arrest to the detention facility in The Hague while Haradinaj was transferred a day later.

Haradinaj made his first appearance as a suspect on September 29, 2020, while Gucati on October 1, 2020.

In this case, the initial indictment was confirmed on December 11, 2020, and was made public on December 14, 2020. Whereas, the corrected indictment was submitted on July 5, 2021, while the indictment with fewer redactions was submitted on October 4, 2021.

After the indictment was filed, Gucati had his first appearance on December 18, 2020, where he pleaded not guilty. On the same day, Haradinaj decided to declare within 30 days, but in the next appearance he did not do so, thus, the pre-trial judge declared on his behalf as not guilty.

During 2021, six conferences were held on the progress of the case.

On August 27, 2021, the SPO submitted the redacted version of the pre-trial brief. Gucati's defense submitted it on September 2, while Haradinaj's defense submitted its "temporary" pre-trial brief file on July 12, 2021.

On 23 June 2021, the panel of the Court of Appeals had partially upheld the appeals filed by Gucati and Haradinaj over the alleged deficiencies in the indictment form and ordered the SPO to submit a corrected version of the indictment, which was submitted on 5 July 2021. On 16 July 2021, the pre-trial judge handed over the case file to the trial panel, which then held two preparatory conferences for the trial, as well as an ex parte preparatory conference with the SPO.

On July 26, 2021, Haradinaj's defense had requested the dismissal of the President of the Specialist Chambers Ekaterina Trendafilova from exercising any judicial, administrative or case management function in the case at hand, on the grounds that President Trendafilova's statements at a confidential diplomatic conference undermine its independent and impartial

judicial decision-making and representation of the Kosovo Specialist Chambers.²³

The defense also requested the dismissal of the Vice President, Charles L. Smith II, regarding his conduct in a high-level judicial office at the European Union Rule of Law Mission in Kosovo (EULEX), citing alleged abuses of judicial authority and exercising political pressure.²⁴ These defense claims were dismissed by Trendafilova.²⁵

In this case, the pre-trial procedure lasted 12 months and two days.²⁶

The trial of Gucati and Haradinaj began on October 7, 2021, and is the second trial taking place in Hague. Both defendants have been in detention since their arrest.

The Specialist Chambers have asked the Kosovo Police to provide information to this Court by November 26, regarding the authority and ability of the Police to restrict the movements of individuals who may be subject to temporary release.

In November 2021, the trial panel, presided by Judge Charles L Smith II, continued the

²³ "Haradinaj's defense demands the dismissal of the Chief of the Specialist Chambers, due to some of her confidential statements", *Betimi për Drejtësi* (2 August 2021), at: <https://betimiperdrejtesi.com/mbrojtja-e-haradinajt-kerkon-te-perjashtohet-shefja-e-gjykates-speciales-shkak-disa-deklarata-konfidenciale-te-saj/>

²⁵ The decision of Ekaterina Trendafilova, 6 August 2021, at: <https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e980744248/Vendim%20mbi%20k%C3%ABrkes%C3%ABn%20p%C3%ABr%20vet%C3%ABt%C3%ABrheqjen%20ose%20heqjen%20e%20gjykat%C3%ABsve.pdf>

²⁶ The case of Hysni Gucati dhe Nasim Haradinaj, at: <https://www.scp-ks.org/sq/cases/hysni-gucati-nasim-haradinaj/sq>

detention of Gucati and Haradinaj until another decision, after receiving information requested by the Kosovo Police.

On November 10, 2021, the SPO notified the trial panel that it had closed its case in the Gucati & Haradinaj's case. Four witnesses were heard during the presentation of the prosecution evidence.

Following the conclusion of the prosecution case, the defense attorneys have announced that they intend to seek the dismissal of at least five charges filed in the indictment.

However, the Court rejected the motions submitted by the two defense teams to drop the charges against the defendants, pursuant to Rule 130 of the Rules of Procedure and Evidence of the KSC.

After that, the defense of Gucati and Haradinaj presented their introductory statements and also the defense witnesses were heard in court. Gucati's defense began presenting its evidence on December 2, 2021, while Haradinaj's defense presented them on December 15, 2021. In this regard, six witnesses have testified for Gucati's defense and four witnesses for Haradinaj's defense. Moreover, 12 witnesses testified in writing for Gucati's defense, while six testified for Haradinaj's defense.

Both defense teams completed their evidence submissions on 2 February 2022.²⁷

The closing statements by the prosecution and the defense were made between 14 and 17 March. During these hearings, the

²⁷ Ibid.

prosecution proposal was also discussed. The prosecution requested that the defendants be sentenced to six years in prison and a fine of 100 euros, while the defense has opposed such a proposal. The defense has requested the release of Gucati and Haradinaj.²⁸

With respect to this case, the trial lasted 31 days. Whereas on 18 May, two of the accused were given a guilty verdict, where they were sentenced to 4 years and a half effective imprisonment and a fine of 100 euro, for criminal offences relating to obstruction of the administration of justice.

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6.3. The case against former President Thaçi and others



The news that an indictment was filed against the President of the Republic of Kosovo, Hashim Thaçi and the president of the Democratic Party of Kosovo (PDK), Kadri Veseli and some others, for crimes

²⁸ “Gucati says that he will continue to fight for the rights of his people until the last day of his life”, *Betimi për Drejtësi* (March 17, 2022), at: <https://betimiperdrejtesi.com/gucati-thote-se-do-te-vazhdoje-te-luftoje-per-te-drejtat-e-popullit-te-tij-deri-ne-diten-e-fundit-te-jetes/>

²⁹ “The decision in the case of Gucati and Haradinaj is announced within 90 days after the end of the trial”, *Betimi për Drejtësi* (March 21, 2022), at: <https://betimiperdrejtesi.com/vendimi-ne-rastin-gucati-dhe-haradinaj-shqiptohet-brenda-90-ditesh-pas-perfundimit-te-gjykimit/>

against humanity and war crimes, was announced on June 24, 2020 through a press release from the SPO.

According to the press release, on April 24, 2020, the SPO filed an indictment with the KSC with ten charges for review. In this indictment, Hashim Thaçi, Kadri Veseli and others were charged with a series of crimes against humanity and war crimes, including illegal murders, enforced disappearance of persons, persecution and torture.

On 24 July 2020, the Specialist Prosecutor filed the revised indictment for confirmation in accordance with the order of the Pre-Trial Judge.

On October 26, 2020, the Pre-Trial Judge upheld the revised indictment against the four defendants and issued arrest warrants and orders for their transfer.

The four defendants are charged with individual criminal responsibility (Article 16 (1) (a) of the Law) and with criminal responsibility as superiors (Article 16 (1) (c) of the Law) for: crimes against humanity (persecution, imprisonment, other inhumane acts, torture, murders and enforced disappearance of persons under Article 13 of the Law) and war crimes (unlawful or arbitrary arrest and detention, cruel treatment, torture, and murders under Article 14) of Law).

The first to be arrested after his house was raided was Jakup Krasniqi, on November 4 and on the same day was transferred to The Hague detention facility. A day later, Thaçi, Veseli and Selimi were transferred to The Hague as well.

On November 9, in their first appearances, Jakup Krasniqi and Hashim Thaçi pleaded not guilty to the charges against them. The same was stated by Veseli in his appearance before the court on November 10, as well as Selimi on November 11.

On April 21, 2021, the pre-trial judge approved the claims of the nine victims and accepted them as victims participating in the trial. Whereas, on 10 December 2021, the pre-trial judge approved the claims of the other eleven applicants as part of the same group. On 25 May 2022, pre-Trial judge Guillou issued a third decision on victims' participation in the Thaci et al. case. Twelve new applicants were admitted to the proceedings as participating victims.

The Pre-Trial Judge, on 22 July 2021, through two decisions, partially upheld the defense motions and ordered the SPO to correct and amend the indictment. The decisions excluded the responsibility of the joint criminal enterprise III for crimes with a specific purpose. The SPO submitted the amended indictment on September 3, 2021.

This case is still in the pre-trial stage, despite the SPO statement that the trial will start in September 2020. The SPO office has announced that will not be able to submit the pre-trial brief in this case until December 17. The request of the SPO for an extension of the deadline for submission of the preliminary file was approved by the pre-trial judge. The judge at the conference on the progress of the case, issued an oral order that the submission of this file has be done by this date).

The submission of the SPO's pre-trial brief as strictly confidential was made on December 17, 2021.

In a request filed on August 16, 2021, Thaçi's defense had requested that Trendafilova be dismissed from the Appellate Panel that would deal with the defense's appeal against the decision to extend his detention. His attorney, Dastid Pallaska, for "Betimi per Drejtesi" broadcasting program "Specialist Chamber Marathon", had said that one of the main reasons for this request is the publications in the international media that Trëndafilova has discussed the issue of detention of Mr. Thaçi in the presence of foreign diplomats and the Specialist Prosecutor, which is a communication prohibited by law.

According to him, the other reason for seeking exclusion was the removal of one of the judges of the Appellate Panel who would handle their appeal regarding detention. Pallaska considers that the reason why Trendafilova has changed the judges is completely illegal.

"Even though, according to the Law on Specialist Chambers, the mandate of the trial panels appointed by the president to deal with a certain case at different instances is four years, unless the whole procedure before those trial panels ends earlier, respectively these trial panels consist of the moment when they enter the procedure for the first time because the court does not have permanent judges", he said.

According to Pallaska, the judges are appointed in different trial panels and in

different instances based on a list of the court and exactly in this form consists the degree of this court.

He further stated that in the case of Thaçi's first complaint, Judge Kai Ambos was part of the panel and he has written a separate conciliatory opinion, saying that the existence of a concrete guarantee from a third state changes the analysis in favor of release from detention.

According to him, the defense had provided these guarantees and submitted them to the pre-trial judge, but they were ignored and then when the complaint was filed in the Appeal, Judge Kai Ambos was removed from the panel without any explanation and has been replaced by another member.

"The worst part is that when this appeal was decided, the complaint was rejected in its entirety, but the other judge Nina Jorgensen, who was also part of the first panel, voted against and shared her opinion, which means that if at the initial panel would have been the same composition of the judges including Judge Kai Ambos, then there would have been a possibility for the appeal to be upheld. It is very clear that the change in the panel has had a direct impact on the final decision regarding the complaint for the detention release of Mr. Thaçi", said Pallaska.

Attorney Pallaska stated the concern related to the fact that Trendafilova has decided on her own for the request that they had submitted despite the fact that according to the legal framework she is obliged not to be involved in this case.

As stated by Pallaska, the legal framework affirms that in this case, the panel that would have handled this request, should have been appointed by Trendafilova's deputy. He considers this action of hers a pure conflict of interest.³⁰

On the other hand, the Specialist Chambers has confirmed that the defense arguments were rejected by the two decisions mentioned above, the one of August 24 and September 17, 2021. According to them, the judges are not "removed" or "replaced" from the panels and that a new panel is assigned for each appeal. *"Judges are appointed to the Roster of International Judges and are not permanently allocated to Panels. Judges are assigned to proceedings or phases of proceedings by the President only where needed by virtue of Article 33 of the Law and in accordance with criteria set out in the Rules on Assignment. The Judges' assignment ends with the pronouncement of the Panel on the specific subject matter"*, it is said in their response.

According to the court, Judge Emilio Gatti was appointed to the panel in compliance with the regulation for the appointment of judges. In this line, they pointed out paragraph 30 and 31 of the Trendafilova Decision on the defense's request of 24 August.

³⁰ "Pallaska explains why they had applied for the dismissal of Trendafilova from appointing the Appellate Panel that would handle their complaint", *Betimi për Drejtësi* (March 19, 2022) at: <https://betimiperdrejtesi.com/pallaska-tregon-pse-kishin-bere-kerkese-per-perjashtimin-e-trendafiloves-nga-caktimi-i-panelit-te-apelit-qe-do-te-trajtonte-ankesen-e-tyre/>)

Giving answer to our question addressed to the court on why the president did not delegate her powers to the vice-president of the court, but decided on her own regarding the request for her dismissal, and if this presents a conflict of interest, the Court said that these answers can be found in paragraphs 14 to on 17 of the decision of the Court president on 17 September 2021.

In the decision for exclusion, it is stated that the President has determined that according to the Law and the Regulation, she cannot be withdrawn or disqualified according to rule 20 of the Regulation from exercising her administrative duties. According to this decision of the President, neither the law nor the Rules of Procedure provide for the disqualification or exclusion of the President from exercising her administrative functions.

“Consequently, the President is not able, as provided by Article 32 (4) of the Law, to exercise her administrative functions in this regard. “Indeed, Article 33 (6) of the law specifically provides for the President's continued competence to appoint a panel of judges, even in circumstances where she has been disqualified from exercising her judicial functions in a case”, is stated in the decision.³¹

In October 2021, this panel of the Court of Appeals ruled on the defense appeals of

Kadri Veseli, Rexhep Selimi and Jakup Krasniqi against the decisions of the pre-trial judge to review their detention.

This panel approved a ground of appeal for the three and remanded the matter to the pre-trial judge for further assessment of whether the measures proposed by the detainees or any other condition that the pre-trial judge identifies as necessary could reduce the identified risks and be effectively enforced by the Kosovo Police.

According to the decisions, the panel finds that if the pre-trial judge considers, and as he did in fact, that the response from the Kosovo Police was not sufficiently satisfactory, then he should have asked the Director of Kosovo Police to obtain the detailed response that he found absent, especially since he was expressly invited to do so by the defense and the response of the Director implies the ability of the Kosovo Police to enforce the conditions.³²

Following these decisions, the pre-trial judge ordered the Kosovo Police to provide information regarding its powers and capacities, inter alia, to enforce the conditions relating to the (possible) temporary release of the three aforementioned.³³

³¹ “The Specialist Chambers says that the arguments of Thaçi's defense for the exclusion of Trendafilova were dismissed by decisions ”, *Betimi për Drejtësi* (March 19, 2022), at: <https://betimiperdrejtesi.com/gjykata-speciale-thote-se-argumentet-e-mbrojtjes-se-thacit-per-perjashtim-te-trendafiloves-u-hodhen-poshte-me-vendime/>

³² “The Panel of the Court of Appeals partially approves the appeals of Veseli, Selimi and Krasniqi regarding detention ”, *Betimi për Drejtësi* (5 October 2021), at: <https://betimiperdrejtesi.com/paneli-i-gjykates-se-apelit-miraton-pjeserisht-apelet-e-veselit-selimit-dhe-krasniqit-lidhur-me-paraburgimin/>.

³³ “The Kosovo Police is ordered give a response regarding the possible temporary release of Veseli, Selimi and Krasniqi, *Betimi për Drejtësi* (October 11, 2021), at: <https://betimiperdrejtesi.com/urdherohet->

Even after the response of the Kosovo Police, the court has decided to extend the detention for Veseli, Selimi and Krasniqi. According to pre-trial judge, the risks of them obstructing court proceedings and committing further crimes can be mitigated through the monitoring framework in the Specialist Chambers detention facility.³⁴

Furthermore, in the last conference on the progress of the case held on December 15, 2021, Thaçi's attorney confirmed that his detention was extended despite the guarantees of the Kosovo Police. He also criticized the comments of the prosecution regarding the fact that the Kosovo Police cannot be trusted.³⁵

During many conferences in this case there have been major confrontations between the prosecution and the defense regarding excessive redactions, delays in obtaining evidence and delays in translations. However, the biggest accusation against the prosecution came on February 4, 2022 from Thaçi's defense. According to the defense, the prosecution has withheld exculpatory evidence, including an exculpatory

[policia-e-kosoves-te-njoftojte-lidhur-me-lirimin-e-mundshem-te-perkohshem-te-veselit-selimit-e-krasniqit/](#).

³⁴ "The court says that the possible risks that Veseli, Krasniqi and Selimi could obstruct its proceedings can be mitigated with the monitoring framework in detention facility", *Betimi për Drejtësi* (December 9, 2021), at: <https://betimiperdrejtesi.com/gjykata-thote-se-rreziket-qe-veseli-krasniqi-e-selimi-te-pengojne-procedurat-e-saj-mund-te-zbuten-me-kornizen-e-monitorimit-ne-paraburgim/>

³⁵ "Court extends the detention for Thaçi and others, the defense requires a public hearing ", *Betimi për Drejtësi* (December 15, 2021), at: <https://betimiperdrejtesi.com/thacit-dhe-te-tjereve-u-vazhdohet-paraburgimi-mbrojtja-kerkon-seance-degjimore-publike/>

statement from former OSCE Ambassador Dan Everts.

Meanwhile, the prosecution has repeatedly mentioned that it is fulfilling its obligation of disclosing evidence. Prosecutor Claire Lawson responded to the defense's accusation of hiding exculpatory evidence by stating that now she understands the defense's statement and this hindered her ability to respond concretely to this material from the 170 involved in rule issuance package 103.

Further, the defense has repeatedly demanded the SPO to close its investigations, while on February 4, 2022, the prosecution has said that they will continue to investigate in compliance with their mandate. In this regard, the pre-trial judge had said that the SPO investigations should have been completed for the most part before the case goes to the trial and the general investigations cannot continue until the end of the trial. Concerning the investigation was also discussed at the session held on March 24, 2022.³⁶

The defense has repeatedly addressed the court with various motions, while recently the defense of former President Hashim Thaçi has referred to the panel of the Constitutional Chamber, for violation of the fundamental right for an independent and impartial court established by law and the

³⁶ "Thaçi's attorney: There are witnesses who do not know that they are on the list of prosecution witnesses", *Betimi për Drejtësi* (March 24, 2022), at: <https://betimiperdrejtesi.com/mbrojtesi-i-thacit-ka-deshmitare-qe-nuk-e-dine-se-jane-ne-listen-e-deshmitareve-te-prokurorisve/>

right to a reasoned opinion.³⁷ Moreover, the defense of Jakup Krasniqi, addressed the Specialist Chamber of the Constitutional Court with the claim that the Office of the Specialist Prosecutor (SPO) has violated Krasniqi's individual rights guaranteed by the Constitution, accusing him of basic and extended forms of Joint Criminal Enterprise (JCE).³⁸ On the other hand, Kadri Veseli's defense has requested a referral to the Constitutional Chamber for the objection of the jurisdiction of the Specialist Chambers of Kosovo (KSC).³⁹ The Panel found the referrals premature and therefore declared them inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law and Rule 14(f) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court.⁴⁰

In a weekly press brief held by KSC, after the decision Constitutional Court, the Chief of Information and Communication with the

³⁷ "The defense addresses the Constitutional Chamber with a reference for the violation of Thaçi's rights", *Betimi për Drejtësi* (March 2, 2022), at: <https://betimiperdrejtesi.com/mbrojta-i-drejtohet-dhomes-kushtetuese-me-referim-per-shkeljen-e-te-drejtave-te-thacit/>

³⁸ "The defense notifies the Constitutional Court that the accusation of Krasniqi, based on the basic and / or extended forms of the JCE, violates his constitutional rights ", *Betimi për Drejtësi* (March 2, 2022), at: <https://betimiperdrejtesi.com/mbrojta-i-thote-kushtetueses-se-akuzimi-i-krasniqit-ne-baze-te-formave-themelore-dhe-ose-te-zgjeruara-te-npk-se-canon-te-drejtat-e-tij-kushtetuese>

³⁹ "Kadri Veseli's defense requests a referral to the Constitutional Chamber regarding the objection to the jurisdiction of the KSC ", *Betimi për Drejtësi* (March 2, 2022) at: <https://betimiperdrejtesi.com/mbrojta-e-kadri-veselit-i-kerkon-dhomes-kushtetuese-referim-lidhur-me-kundershtimin-e-juridiksionit-te-dhsk-se/>

⁴⁰ Statement of Kosovo Specialist Chambers, June 14, 2022.

Public, Angela Griep, said that the Chamber has rejected Thaçi's appeal regarding the composition of the panel of the Court of Appeals, scheduled to review his appeals regarding detention. .

"And confirmed the reasoning of President Trendafilova from previous decisions that judges are not appointed to the permanent panels for interim appeals with a court case, but are assigned to an appeal for each interim appeal separately and that this is a practice rooted in the Chambers of Specialized ", declared Griep.⁴¹

In addition, on March 22, 2022, the Court of Appeals dismissed the appeals of the defense of Hashim Thaçi and Kadri Veseli submitted on February 21, 2022, against the decision of the pre-trial judge of December 23, 2021, which partially allowed SPO to amend the indictment in this case.⁴²

Diversely, on 29 April 2022, the Specialist Prosecutors Office submitted an amended indictment, which was confirmed by the pre-trial judge.

Prosecution claims that four of the accused also committed war crimes in Gjilan, Budakovo and Semetishta. In the published

⁴¹ " KSC explains the reasons why the Specialist Chamber of the Constitutional Court rejected the requests of Thaçi, Veseli and Krasniqi" (16 June 2022), at: <https://betimiperdrejtesi.com/dhsk-tregon-arsyet-pse-dhoma-kushtetuese-hodhi-poshte-kerkesat-e-thacit-veselit-e-krasniqit/>

⁴² "The Court dismisses the appeals of Thaçi and Veseli against the decision by which the SPO was partially allowed to change the indictment ", *Betimi për Drejtësi* (March 23, 2022)" at: <https://betimiperdrejtesi.com/refuzohen-ankesat-e-thacit-e-veselit-ndaj-vendimit-me-te-cilin-zps-u-lejua-pjeserisht-qe-ta-ndryshoj-aktakuzen/>

annex with regards to the crimes that are alleged to have occurred in Semetishta and Budakovo, Prosecution listed crimes such as illegal and arbitrary arrests and detainment, cruel or inhuman treatment, torture and murder. Whereas, as crimes against humanity, they listed imprisonment, other inhumane acts, torture, murder, enforced disappearance of persons and persecution.

For crimes that are alleged to have occurred in Gjilan, such as war crimes, they listed illegal and arbitrary arrests and detainment, cruel or inhuman treatment, torture and murder. While, crimes against humanity, they listed imprisonment, other inhumane acts, torture, murder and persecution.⁴³ The four defendants have pleaded not guilty to these charges as well.

Meanwhile, at the last conference, the pre-trial judge issued an order, according to which, the Defense teams must submit their pre-trial briefs by Friday, October 21, 2022.

This case is still at the preliminary stage and the four defendants continue to be in the detention facility of the Kosovo Specialist Chambers in The Hague.

6.4. Commander Wolf's Case: War Crimes charges at the metal factory in Kukes



On February 14, 2020, after the announcement by the Specialist Prosecutor that he intended to initiate criminal proceedings against Pjetër Shala, the President of the Court Ekaterina Trendafilova appointed Nicolas Guillou as the pre-trial judge.⁴⁴

On June 12, 2020, the pre-trial judge confirmed the indictment against Shala and issued the arrest warrant for him as well as the transfer order to the detention facility of the Specialist Chambers.

Meanwhile, on 19 June 2020, the Specialist Prosecutor submitted the confirmed indictment with redactions, as authorized by the pre-trial judge. The indictment against Shala was made public on April 15, 2021. He is charged with individual criminal liability in various forms for war crimes such as arbitrary detention, cruel treatment, torture and murder.

⁴³ “Thaçi’s defense demands that the identities of 69 witnesses be made known six months before and not 30 days before the trial”. *Betimi për Drejtësi* (20 May 2022), at: <https://betimiperdrejtesi.com/mbrojtja-e-thacit-kerkon-te-behet-i-ditur-identiteti-i-69-deshmitareve-gjashte-muaj-perpara-e-jo-30-dite-para-gjykimit/>)

⁴⁴ Case information sheet. Kosovo Specialist Chambers in The Hague, at: https://www.scp-ks.org/sites/default/files/public/cis_shala-alb.pdf)

Shala was arrested on 16 March 2021 by Belgian authorities and transferred to The Hague on 15 April 2021.

According to the indictment, the crimes for which Shala is charged were committed between approximately 17 May 1999 and 5 June 1999, against persons detained at the metal factory in Kukës (Albania), allegedly used by the KLA.

On April 19, 2021, Shala had his first appearance before the pre-trial judge, where he pleaded not guilty to all counts of the indictment.

His case is still in the preliminary procedure, where conferences are being held on the progress of the case. Meanwhile, on January 28, 2022, the SPO submitted the preliminary file as strictly confidential.

At the hearing held on March 4, 2022, the pre-trial judge Nicolas Guillou issued an order by which the preliminary date for handing of the court file was set for May 31, 2022, while he has said that for any request that has to do with this deadline, there must be binding circumstances.⁴⁵

Since the day of his arrest, Shala has been remanded in custody and during the two-month review periods of his detention, his request for release has been denied.

In addition, on October 20, 2021, the pre-trial judge considered that the confirmed

indictment in this case should be amended in order to provide the required level of concreteness and clarity. In this regard, the Court partially approved the defense motion and ordered the SPO to file a revised version of the indictment by November 1, 2021. The revised indictment was submitted to the court by the prosecution.

7. Lack of transparency regarding new indictments

In 2020, the first four indictments became known to the public by the Kosovo Specialist Chambers. Since 2020, KSC and SPO have not announced any possible intentions to initiate further proceedings before the court and whether any other indictment has been filed by the prosecution. With regard to the already confirmed indictments, this Court had previously provided information on the abovementioned issues.⁴⁶

KLI has addressed the SPO asking for information if any other indictment has been filed after 2020, and, if so, whether it has been confirmed or dismissed. In the response of the SPO to KLI, it was stated

⁴⁵ “The case of Pjetër Shala, the judge says that May 31 is the preliminary date for handing of the court file”. *Betimi për Drejtësi* (March 4, 2022), at: <https://betimiperdrejtesi.com/rasti-pjeter-shala-gjykatesi-thote-se-31-maji-eshte-data-paraprake-per-kalimin-e-dosjes-gjyqesore/>

⁴⁶ Note: On February 24, 2020 and February 28, 2020, on the official website of the Kosovo Specialist Chambers in The Hague, announcements were made regarding the intention of the Specialist Prosecutor to initiate proceedings before this court, as well as announcements for the appointment of a preliminary judge. ^[1] “Specialist Prosecutor formally notifies of intent to initiate proceedings S”. February 24, 2020 [HTTPS://WWW.SCP-KS.ORG/EN/SPECIALIST-PROSECUTOR-FORMALLY-NOTIFIES-INTENT-INITIATE-PROCEEDINGS](https://www.scp-ks.org/en/specialist-prosecutor-formally-notifies-intent-initiate-proceedings) ^[2] “Specialist prosecutor initiates additional proceedings” February 28, 2020 [HTTPS://WWW.SCP-KS.ORG/EN/SPECIALIST-PROSECUTOR-INITIATES-ADDITIONAL-PROCEEDINGS](https://www.scp-ks.org/en/specialist-prosecutor-initiates-additional-proceedings).

that the SPO can not provide such information and does not discuss these issues.⁴⁷ Meanwhile, in a response of 23 February 2022, they have stated that they do not provide information regarding the investigations and have not responded to the questions whether a new indictment has been filed and how long will it take to start with the other criminal proceedings.⁴⁸

On the contrary, the Court, in a response to KLI, have stated that if other indictments are filed and confirmed, they will be available on their website once made public. " *In previous cases, the President's decision assigning a Pre-Trial Judge to review an indictment was a public filing and indictments were made public after their confirmation.*" stated in their response.

According to the response, KSC has been very transparent about its procedures and it is committed to informing and communicating with the public in Kosovo about court proceedings, in an efficient, transparent and timely manner.⁴⁹

8. File leaks scandal of the Specialist Prosecutor's Office (SPO)



At a conference held in Pristina, on September 7, 2021, the President of the Specialist Chambers of Kosovo, Ekaterina Trendafilova had stated that witness protection was one of the main reasons for establishing these Chambers.⁵⁰

However, a year before this statement, in September 2020, all public attention was directed to the headquarters of the Organization of War Veterans of the Kosovo Liberation Army (OVL-KLA).

An unidentified person, who later took the epithet "Rrufeja", on various dates in September, had left three packages of documents at the headquarters of this organization, which were alleged to be documents of the Kosovo Specialist Chambers.

⁴⁷ Response of the SPO spokesman Christopher Bennet, September 27, 2021.

⁴⁸ Response of the SPO spokesman Christopher Bennet, February 22, 2022.

⁴⁹ Court response for KLI, March 1, 2022.

⁵⁰ "Trendafilova states that witness protection has been one of the reasons why the decision to create the Specialist Chambers was made", *Betimi për Drejtësi* (September 7, 2021), at: <https://betimiperdrejtesi.com/trendafilova-thote-se-mbrojtja-e-deshmitareve-ka-gene-nje-nga-arsyet-se-pse-eshte-marre-vendimi-per-krijimin-e-speciales/>.

These packages contained confidential information including the identity, addresses and other personal data of witnesses or potential SPO witnesses. The submission of these documents was accompanied by three conferences organized by the leaders of OVL-KLA, for which the SPO investigators raided the headquarters of this organization and arrested its former leaders for obstructing the administration of justice.

It is not yet known how these confidential documents were leaked.

The only time there was a public statement regarding this case, was on the occasion the Special Prosecutor gave an introductory statement to the Gucati & Haradinaj trial, Jack Smith had stated that they are actively investigating the case and that when collecting evidence, responsible individuals will be arrested and brought before the court. He added that this is a confidential investigation and cannot give details.

KLI addressed questions to the SPO regarding this issue. They were asked to give a response on how these documents were leaked, whether any SPO employee was involved in their leak, whether investigations are underway and whether an indictment is expected to be filed. Also, they were asked if they consider that the safety of witnesses has been compromised by the leak of these documents and has the reliability of the SPO been damaged to witnesses or potential witnesses, as well as the citizens of the Republic of Kosovo? However, the prosecution did not provide any answer to these questions, only stating that they could

not provide information about their investigations.⁵¹

The allegation that these documents belonged to this prosecution and contained information on the identity of witnesses and potential witnesses was confirmed during the trial of Gucati and Haradinaj from two SPO employees while giving their testimonies.

Moreover, at the hearing held on 19 October, witness Zdenka Pumper, an SPO investigator confirmed that the documents seized by the OVL-KLA contained information about witnesses and that there were witnesses who were afraid of the leak.⁵²

The other witness, Miro Jukic, who also is an employee at this prosecution, had confirmed during his testimony that the documents contained the identity of witnesses and that many of them were scared. He had further stated that they had to displace two people from Kosovo, and provide protective measures to 20 up to 30 people. At the same time, in his statement, he declared that many witnesses were angry with the leak of information, and that there

⁵¹ SPO response to KLI, February 23, 2022.

⁵² “Pumper: One of the witnesses was afraid for his life and that of his family. He asked me to tell the court that I could not find him”, *Betimi për Drejtësi* (October 19, 2021), at: <https://betimiperdrejtesi.com/pumper-njeri-nga-deshmitaret-kishte-frike-per-jeten-e-tij-dhe-te-familjes-me-kerkoi-ti-thoja-gjykates-se-nuk-e-gjeta-dot/>.

have been some of them who have asked not to be contacted anymore.⁵³

KLI considers such a leak of documents as a violation of the security of witnesses to testify in court proceedings before this court, consequently affecting the fair conduct of the proceedings. At the same time, such a scandal has undermined the public and the witnesses trust in this Court.

In terms of increasing accountability, the SPO should inform the public on how the confidential documents were leaked and what actions have been undertaken so far to shed light on this case and bring those responsible to justice. Given that the leakage of these documents jeopardizes the safety of witnesses and all court proceedings, an accountable and transparent approach by the SPO regarding the actions taken is more than necessary.

9. SPO unlawful order against Mahir Hasani

Mahir Hasani was contacted on December 20, 2018 by the SPO, where the following documents were submitted: the summons to appear in The Hague on February 11, 2019 for interrogation and the order to submit certain documents and data.

⁵³ “The witness says that there is no reason to believe that any SPO official was involved in submitting the information to the OVL-KLA”, *Betimi për Drejtësi* (October 28, 2021), at: https://betimiperdrejtesi.com/deshmitari-thote-se-nuk-ka-arsye-te-besoje-se-ndonje-zyrtar-i-zps-se-u-perfshi-ne-dorezimin-e-informacionit-te-ovl-uck/?fbclid=IëAR0tSNLtKppU8S4IJ7lzMhDkC-5addQoIZfRezYI2ERU0CSqq_4LIEexzgI.

Si edhe elaborohet në pjesën e këtij Peticioni që adreson pjesën materiale, Parashtruesi pretendon se duke lëshuar Urdhërin, ZPS i ka cenuar të drejta që atij i garantohen me Kushtetutë dhe KEDNJ. Specifikisht, Urdhëri pretendon se Parashtruesi është i detyruar të veprojë si në vijim:

Në përputhje me Nenet 35(2), 42 dhe 53(1) të Ligjit nr. 05/L-053 për Dhomat e Specializuara dhe Zyrën e Prokurorit të Specializuar, JENI I DETYRUAR TË PARAQITNI në Zyrën e Prokurorit të Specializuar në Satumusstraat 9 në Hagë, Holandë, në datën 11 shkurt 2019, në orën 09:00 të dhënat, shënimet, dokumentet, dhe informacionin e mëposhtëm:

Të gjitha dokumentet, të dhënat dhe shënimet e çdo lloji tjetër informacioni të çdo tipi që posedoni, të cilat kanë lidhje, kanë qenë krijuar, dërguar nga Ushtria Çlirimtare e Kosovës, ose i janë dërguar asaj në çdo nivel të strukture së saj. Këto përfshijnë ndër të tjera: shënimet dhe procesverbalet e mbledhjeve dhe takimeve e çdo lloji tjetër të dhënash lidhur me to, ditare, fletore me shënime dhe fotografi, regjistra, komunikime, vendime, urdhëra, udhëzime raporte, dosje me të dhëna të personelit, politika, dokumente protokoli, rregullore. Të gjitha dokumentet, shënimet dhe të dhënat dhe çdo lloji tjetër informacioni të çdo tipi, përfshirë këtu ditare, fletore me shënime e fotografi që lidhen me vendndodhjen tuaj fizike e gjeografike dhe vërejtjet tuaja gjatë periudhës 1 janar 1998 deri, dhe duke përfshirë, datën 31 dhjetor 2000.

A part of the request addressed to the Constitutional Court of the Kosovo Specialist Chambers in The Hague from the defense of Mahir Hasani

Regarding the second document that was submitted to Hasan, his defense addressed the Constitutional Court of the Specialist Chambers of Kosovo in The Hague. Through the Referral, the defense alleged that the SPO order violated the rights guaranteed by Articles 30.6 and 31.5 of the Constitution and Article 6.2 of the ECHR. Specifically, the Referral alleged that the enforcement of this Order violates these provisions because it is contrary to the principle of presumption of innocence, which includes the right not to incriminate oneself and the right of the defendant not to bear the burden of proof regarding his innocence.

The defense asked the Constitutional Court to impose an interim measure for the suspension of the Order until a merit based decision of this case. At the same time, it was requested that the Referral be declared admissible and to be found that the order

violates Hasan's constitutional rights and annul it.⁵⁴

On 25 January 2019, the Specialist Prosecutor submitted the response to the request of the defense. The SPO alleged that the Applicant had not exhausted all legal remedies, therefore the Referral was inadmissible. The Specialist Prosecutor also claimed regarding the Applicant's allegation that the SPO could file an indictment against him and use the documents and information obtained pursuant to the Order was highly speculative. According to the SPO, even if this were to happen, the case would have to go through many levels of judicial review and the Applicant could apply for the exclusion of the challenged material from the evidence.

On February 7, 2019, a panel of the Constitutional Court composed of Judges Ann Power-Forde, Vidar Stensland and Roland Dekkers, affirmed the Request for Interim Measures filed by Hasan's defense and suspended the SPO order.⁵⁵

On the other hand, on February 15, 2019, the SPO notified the Constitutional Court that it had withdrawn the order against

Hasan, thus requesting the dismissal of Hasan's request.

This announcement states that on February 11, 2019, as requested, Mr. Mahir Hasani appeared for interrogation by the SPO. "Consequently and taking into account the ongoing investigations of the SPO, the materials required by the Order for production of documents and data of 20 December 2018 ('Order to provide certain documents and information'), are no longer required. The SPO notifies the Applicant and the Panel of the Specialist Chamber of the Constitutional Court ('Panel') of the withdrawal of the Order to provide certain documents and information", it was stated in this notification.

In its decision of 20 February 2019, the Constitutional Court declared inadmissible the Referral regarding the Order of the Specialist Prosecutor's Office of 20 December 2018.

"By submitting the notice of withdrawal of the Order, the Specialist Prosecutor on his own free will, withdrew the Order. This measure has in fact restored the Applicant to the situation he was before the Order was issued. In these circumstances, the Chamber concludes that there are no longer any objective reasons for the Applicant to proceed further with the Referral. The Chamber is convinced that upon withdrawal of the Order, the challenged circumstances by the Applicant no longer stand. Also, the Chamber is convinced that the consequences of any possible violation of the Applicant's constitutional rights as a result of the issued

⁵⁴ Petition of Mr. Mahir Hasani for ascertaining the violation of his fundamental rights by the SPO through the issuance of order VIY689 of 20 December 2018 to submit documents and data and the request for interim measures, at: https://repository.scp-ks.org/details.php?doc_id=091ec6e980120e65&doc_type=stl_filing&lang=eng

⁵⁵ Order on Request of Mahir Hasani for Interim Measure, February 7, 2019, at: <https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e9801246c6/Order%20on%20Request%20of%20Mahir%20Hasani%20for%20Interim%20Measure.pdf>

order have been avoided ", it was stated in this decision.⁵⁶

KLI considers that such an order of the SPO is contrary to the Constitution of the Republic of Kosovo, which provides in Article 30 (6) that the defendant has the right not to be forced to testify against himself or to admit his guilt, as elements of the general principle of the presumption of innocence, guaranteed by the Constitution and the ECHR.

KLI reminds the SPO that in criminal proceedings before the Specialist Chamber, the burden of proof falls on the prosecution and not on the suspect or consequently the accused. The suspect has the right to remain silent and not incriminate himself. The defendant cannot be obliged to take any action that may be incriminating and present evidence, as it is up to the prosecution to prove its allegations.

The European Court of Human Rights (ECHR) in the case of *Heaney and McGuinness v. Ireland* found that the right not to incriminate oneself presupposes that the prosecution in a criminal case should try to prove the allegation against the suspect without relying on evidence provided

through coercive methods or pressure against the will of the accused.⁵⁷

In addition, in the case of *Saunders v. the United Kingdom*, the ECtHR found that although not specifically mentioned in Article 6 of the Convention, the right to remain silent and the right not to incriminate oneself are internationally accepted standards in criminal proceedings and are in the genesis of the principle of due process under Article 6 of the Convention.⁵⁸

The presumption of innocence is violated even in cases when the burden of proof passes from the prosecution to the defense, as foreseen by *Telfner v Austria*.⁵⁹

⁵⁶ Decision on the Referral of Mahir Hasani regarding the Prosecution Order of December 20, 2018, February 20, 2019, at: <https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e9801246cd/Vendim%20mbi%20Referimin%20e%20Mahir%20Hasanit%20n%C3%AB%20lidhje%20me%20Urdhrin%20e%20Prokuroris%C3%AB%20t%C3%AB%2020%20dhjetorit%202018.pdf>

⁵⁷ *Heaney and McGuinness v. Ireland*, app no 34720/97, (ECtHR, December 21, 2000)

⁵⁸ *Saunders v. United Kingdom*, app no 19187/91, (ECtHR, December 17, 1996)

⁵⁹ *Telfner v. Austria*, app no 33501/96, (ECtHR, March 20, 2001)

10. Other findings of KLI during the systematic monitoring of the Specialist Court

Excessive redactions in indictments, delays in disclosure of evidence, extracting many pieces of evidence at once, lack of sub-categorizations of extracted materials and delays in translations are only some of the shortcomings that KLI has identified during the systematic monitoring of four ongoing cases in KSC.

In the case of *Thaçi and others*, it is concerning the fact that the defense still do not have an indictment with fewer redactions.⁶⁰ KLI considers that an indictment with multiple redactions affects the defense investigations, as well as the submission or not of the alibi by the accused.

Through a submission addressed to the pre-trial judge regarding the third conference on the progress of the case against Hashim *Thaçi and others*, the SPO had anticipated the beginning of the trial in the summer of 2021.

Nevertheless, it has been the same prosecution who had not submitted the pre-trial brief until December 17, 2021, which contains the evidence that the prosecution intends to use to prove the crimes which it assumes to have occurred.

⁶⁰ “Hashim *Thaçi's* defense claims that the prosecution has made the investigation more difficult with the numerous redactions in the indictment”, *Betimi për Drejtësi* (September 14, 2021), at: <https://betimiperdrejtesi.com/mbrojtja-e-hashim-thacit-thote-se-prokuroria-ua-ka-veshtiresuar-hetimet-me-redaktimet-e-shumta-ne-aktakuze/>.

KLI found that the SPO constantly asked for an extension of the deadline for evidence extraction on this case. Such actions constitute an idle approach of said prosecution in rapport to the Principle of Equality of Arms in the procedure.⁶¹ The fact that the defense has not yet been presented with all of the evidence, that the prosecution considers incriminating or the proof that might potentially be exonerating, complicates and damages the position of an accused in a criminal procedure conducted against him, and also puts the prosecution in a favorable position, which is what KLI considers is a violation to the Principle of Equality of Arms, an equality of the parties which cannot be achieved if when faced with the prosecution, the defense is constantly in an unfavorable position.

Meanwhile, regarding the claims of the defense of former President *Thaçi* that the prosecution has kept things hidden from the defense and the court, KLI reminds the prosecutions that the moment they have knowledge, control or possession of exculpatory evidence, they are obligated to notify the defense and that such principles

⁶¹ “SPO say they have made progress in extracting materials in the case of *Thaçi and others*, defenders oppose and criticize”, *Betimi për Drejtësi* (May 19th 2021), in: <https://betimiperdrejtesi.com/zps-thote-se-kane-bere-progres-ne-nxjerrjen-e-materialeve-ne-rastin-e-thacit-e-te-tjereve-mbrojtjesit-e-kundershtojne-dhe-kritikojne/>; “The former KLA defense leaders and the SPO discuss reference numbers related to transcripts of interviews or statements and audio recordings of interviews”, *Betimi për Drejtësi* (March 24th 2021), in: <https://betimiperdrejtesi.com/mbrojtja-e-ish-krereve-te-uck-se-dhe-zps-ja-diskutojne-per-numrat-e-references-lidhur-me-transkriptet-e-intervistave-apo-deklaratave-dhe-per-audioincizimet-e-intervistave/>.

are part of the concept of a fair and impartial trial.

Also, KLI would like to remind that the equality of the parties in a criminal procedure is a founding characteristic of the right to a fair process and the prosecutor and defendant have equal rights and obligations. The right to access case records in any phase of the criminal procedure is a precondition to the equality of the parties and it is an essential part of the fair and impartial process.

Law on Specialist Chambers and Specialist Prosecutor's Office, has determined that the official languages are: Albanian, Serbian and English.

Regardless of the fact that the working language in all cases is the English language, KLI finds the delays in translations to be upsetting and a violation of the defendant's rights, adding the fact that some of the accused have not been handed all the material, translated in the Albanian language.

The accused have the fundamental right that all the evidence, proof and records that may be used against them by the prosecution, to possess said materials in the language the accused speak and understand, and gain knowledge on the whole case that the prosecution built against them. In this way, the same have eases in preparing their defense and also in having an effective defense, a right that derives from The Constitution, and the many international convention that find direct implementation.

The inability of the accused to possess all of the case records in the Albanian language, is a blatant violation of their rights and it limits them from preparing to oppose the claims of the prosecuting authority, respectively, to prepare their defense in an effective manner.

Concerns over the delays in translations, or not handing over all of the translated records were raised by the defense of Salih Mustafa, Hysni Gucati and Nasim Haradinaj, respectively, before their trial started. During the conferences over the course of the case, such concerns were presented by Thaqi's defense and others.⁶²

Under the CoE guide to the implementation of Article 6 of the European Convention on Human Rights highlights that the *"The right to a fair hearing incorporates the principle of equality of arms. This means that everyone who is a party to proceedings must*

⁶² "SPO and Gucati and Haradinaj defense discuss the agreement, points of law, facts as well as translation" *Betimi për Drejtësi* (April 30, 2021), at: <https://betimiperdrejtesi.com/zps-dhe-mbrojtja-e-gucatit-dhe-haradinaj-diskutojne-per-marreveshjen-per-pikat-e-ligjit-dhe-faktit-si-dhe-perkthimet/>; "Salih Mustafa defense complains over the lack of translation for some of the materials in the Albanian language", *Betimi për Drejtësi* (February 1, 2021), at: <https://betimiperdrejtesi.com/mbrojtja-e-salih-mustafes-ankohet-per-mosperkthimin-e-disa-materialeve-ne-gjuhen-shqipe/>; "SPO and defense debate over the investigation, Thaqi and Veseli lawyers state their client's rights are being violated", *Betimi për Drejtësi* (May 19, 2021), at: <https://betimiperdrejtesi.com/zps-dhe-mbrojtja-debatojne-lidhur-me-hetimet-avokatet-e-thacit-e-veselit-thone-se-klienteve-te-tyre-po-u-shkelen-te-drejtat/>; "Thaqi's defense and the SPO's prosecution debate over the extraction of materials." *Betimi për Drejtësi*. (March 24, 2021), at: <https://betimiperdrejtesi.com/mbrojtja-e-thacit-dhe-prokurorja-e-zps-se-debatojne-lidhur-me-nxjerrjen-e-materialeve/>

have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage vis-à-vis his/her opponent. A fair balance must be struck between the parties.²⁴⁸ The right to a fair hearing also incorporates the right to adversarial proceedings, which means in principle the opportunity for parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed. In this context particular importance is to be attached to the appearance of the fair administration of justice.”⁶³

Under comment 32 of the Human Rights Committee that functions under the United Nations, Article 14 of the International Covenant on Civil and Political Rights, pertaining the right to equality before courts and tribunals and the right to a fair trial. States the right to equality before the courts and tribunals ensures the equality of arms. This means that the same procedural rights must be given to all parties, except in cases when differences are based on the law, and may be justified on objective and reasonable basis, added that no other disadvantages or injustices are brought to the defendant.

Further, stating that subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing. This provision is an important

element of the guarantee of a fair trial and an application of the principle of equality of arms).

Also comment 32 states that “Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defense.⁶⁴

KLI finds the justification of the SPO on limited resources affecting the preparation of the preliminary documents, as well as the extraction of translated materials to be unreasonable. Such practices, as delays on hearing commencements and delays on the extraction of materials to the defendant, is damaging to the latter. Also, KLI would remind the SPO that the judges must be guardians to the equality of the parties at procedure, and ensure that all rights guaranteed by the Constitution and international conventions are implemented.

In a written answer by the Specialist Chambers, that states that the defense may raise concerns that are in agreement with the legal framework of the court. According to them it is important that the public is aware that court documents may be redacted for the protection of the witnesses, victims, or other participating parties at trial. Rules on

⁶³ Nuala Mole and Catharina Harby, “The right to a fair trial A guide to the implementation of Article 6 of the European Convention on Human Rights, (Council of Europe, 2001): pp. 41, at: <https://rm.coe.int/handbook-3/16806fc13a>.

⁶⁴ UN. Human Rights Committee (90th sess. : 2007 : Geneva), "General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial", para. 32, at: <https://digitallibrary.un.org/record/606075?ln=en#record-files-collapse-header>.

Procedure and Evidence Before the KSC, as well as Kosovo's Criminal Procedure Code, affirm that the judge orders measures, under which the "redaction" of identifying data on court documents.

Moreover, they state that it is important that the public is aware that the requests over the approval of protective measures, are reviewed by the judge or trial panel, case after case, and that those are not implemented automatically. Requests for protective measures are submitted by a party, and the other party is given the opportunity to present arguments and present its stance before the judge rules in regards to it.

Pertaining the redacted documents, according to the officials of the Specialist Chambers, it is important to know that in addition to the public redacted versions, often there are confidential redacted versions, with the information presented to the defense and is not made public. According to them, it must be said that many aspects that are confidential in one phase, are usually made public later on. In the frame of the Principle to a Public Trial, the confidential submissions, are reviewed regularly and as soon as the reason that justifies their classification ceases to exist, they are reclassified as public, or their redacted public versions are issued.

Specialist Chambers officials state that all rights to a fair trial that are guaranteed by the Constitution of Kosovo and the international standards, are also guaranteed during the court procedures of the Kosovo Specialist Chambers. *"It is for the Judges of*

the relevant Panels to decide on any arguments raised in relation to the right to equality of arms if and when raised," says the answer of the Specialist Chambers.

The Specialist Chambers was asked by KLI, if the prosecution delays over the extraction of materials, delays in translations, excessive redaction of documents, cause the delay and the prolonging of the preliminary procedure. According to them, the question assumes that there is a delay, whereas it is for the judge or judges handling a given case to make any such an assessment. They stated that "so far there has been no finding by a Panel of any delay in the proceedings".

On the question over the Specialists Chambers stance pertaining Thaqi's defense, claim, that exculpatory evidence are withheld from the Court and the defense, and if the defense's claims stand, the Specialist Chambers say that These are issues for the competent Panel to address. The Panel addresses this matter in accordance with the Law and the Rules. For this reason they say that they cannot comment on matters that have not yet been decided in ongoing proceedings.

Pertaining the translations, the Special Chambers state that the documents and submissions are translated as soon as possible, and that since the beginning of year 2021, more than 13,000 pages were translated. According to the officials of this court, some documents are given priority for the sake of work efficiency, and the law and regulation determine the documents that must be translated in a language the accused understands.

Also, they state that the Judges, the Defense and the Prosecution may note which documents must be translated in advance.

“Defence teams supported through the KSC legal aid scheme also have funds available for translation/interpretation costs. In all of the cases, the accused have received the documents required by law so far in a language they understand, in this case Albanian. This includes translations of the relevant arrest warrant, indictment and Rule 86(3)(b) outline. In cases where disclosure is ongoing, translation of disclosed materials is also ongoing,” says the Chambers answer.

According to them, the official languages of the Specialist Chambers and the SPO are: Albanian, Serbian, and English, the KSC translates the documents and submissions in these languages as possible.

They state that all judicial cases currently in the KSC, like the defense as well as the prosecution have asked the working language to be English, which is also provided by the Law. According to them, the court’s public documents of each case, is published immediately, as soon as it is made public in its original language, which is usually the working language for that judicial case. After which is said, the translations are made available as soon as they are ready.

Pertaining the translation, the Special Chambers states, that no panel has issued a decision which was found to be a violation to the defendant’s rights. According to them, the accused can raise this issue before the

relevant panel, which will assess this right within the legal framework of KSC.

Pertaining the prosecutions declaration, that in the summer of 2021, the trial against Thaqi and others might commence, and soon thereafter, not handing their preliminary file up until December 17th 2021, over this issue the court has stated that they cannot comment on ongoing judicial procedures.

This court states that since September of 2020, 95 public hearings have been held, which have been broadcasted on the internet in the the courts three languages, Albanian, Serbian and English. At the same time, the Judge of the Preliminary Procedure, the Trial Panel and the Appeal Panel have issued more than 800 decisions and judicial orders. They also state that since September 2021, when the trials started, the special unit of the Administrative Office, charged with handling the witnesses protection, has ensured the timely and safe appearances of 27 witnesses.⁶⁵

Whilst, KLI values the publishing of the documents that this court conducts through its official page, as well as updating news and information, answering in a timely manner, moreover, the institutions public communications teams’ approach, however, KLI raises concerns over not publishing sufficient documents in the Albanian language.

KLI reminds this court that the official languages in addition to the English language, are the Albanian and Serbian languages. And reminds them also that the

⁶⁵ The Courts answer to KLI, March 1, 2022.

greater interest in criminal cases that are conducted before this court, alert the Kosovan public opinion and the fact that transparency before the citizens of the Republic of Kosovo pertaining the developments of this court must be high.

Pertaining the transparency and accountability by the Special Chambers, state that they have been transparent over the procedures, and are committed to inform and communicate with the public in Kosovo, pertaining the judicial processes, in an efficient, transparent and timely manner. This court states that in regards to transparency, every week, the spokesperson of the Special Chambers holds a weekly press briefing over the judicial processes, translated in Albanian and Serbian, where the interested journalists may participate in such weekly briefings in The Hague, or remotely through Zoom. Also, they try to inform the public with informing video clips on aspects such as protective measures for witnesses, the role of the Ombudsman and victim's participations.

This court states that in the Albanian version of their internet page, the Albanian speaking public may see the courts calendar, follow hearings, find laws and other founding documents, read the latest news and enter the pages of judicial cases, where the pertaining summaries for each case is found, and also learn on the participation of the victim or the protection of witnesses.

Whereas, they confirm the existence non-translated documents. They state that the basis of the data pertaining the judicial submissions will be found in the document

that haven't been translated. The reason that all the submissions have not yet been translated, is because the parties in all judicial cases have chosen English as a working language. This is stated in the Law, which was approved by the Kosovo Assembly.

Further stating that for the purpose of transparency, public documents are presented in in the internet page as soon as they become available, whereas, the translations are published as soon as they are finalized.⁶⁶

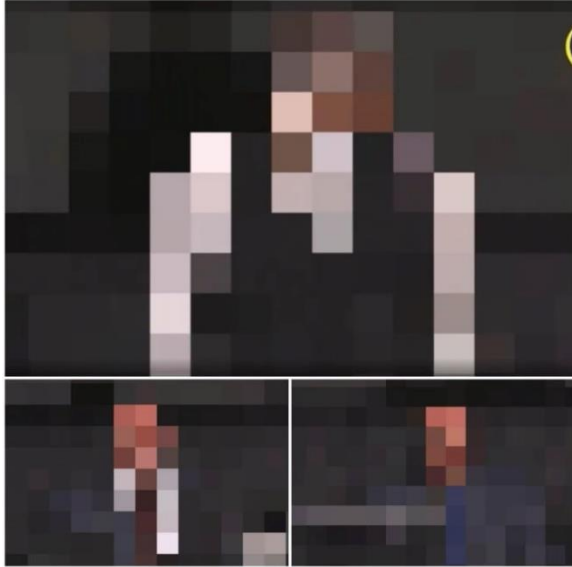
During the monitoring of the Kosovo Specialist Chambers in The Hague, KLI has noticed the technical problems that have already started in this court.

One of the main problems that KLI noticed, and for which has immediately reacted publicly, was the excessive voice modification of the first protected witness on trial for war crimes, against Salih Mustafa.

For the protection of this witness's identity, coded WW03593, so that the same cannot be identified, the vision was blurry and the voice modified.

However, the excessive voice modification made the witness' statements almost incomprehensible.

⁶⁶ Ibid.



For as long as the hearings were open, KLI found that the wider public must be able to hear the witness's full statements. In this direction, according to KLI the witnesses' identity regardless to the other protective measures, may be ensured even without such voice modifications, on such a substantial level, so that the meaning gets lost.⁶⁷

Another problem, KLI found, is the fact that the witnesses are often posed questions, for which a "yes" or "no" answer is required. During the broadcasted hearings the witness' answer is not heard, and the public cannot understand if the witnesses are denying or affirming what they are asked.

There are also cases where the complete statements of the accused cannot be heard.

⁶⁷ "KLI reacts over the incomprehensible witness statements in Special Chambers", *Kosovo Law Institute*(September 20, 2021), at" <https://kli-ks.org/ikd-reagon-ndaj-pakuptueshmerise-se-deklaratave-te-deshmitareve-ne-dhomat-e-specializuar/>

KLI addressed the aforementioned topics, to the Specialist Chambers, and a significant improvement has been noticed in witnesses voice modification, where regardless of such modifications the statements are clearly heard.

Whereas, pertaining the incomprehensibility of the witnesses' answers when denying or affirming something, KSC has informed KLI that they would address this problem, however the same problem continues to be encountered.

Also, KLI assesses that a practice must be set in which the witnesses answer questions, after the translation to said question, posed by the prosecutor, or judge. In so that the translators manage in translating from the English language to the Albanian, and then succeed in broadcasting the witness's answers in the Albanian language. In so doing gives the Kosovar opinion awareness to all statements made by the parties in procedure.

All these problems make it difficult for the public, on open hearings, to be informed over the developments of the KSC, and also to the medias accurate reporting.

Pertaining other technical problems, which include microphone malfunctions, causing obstacles in translation, the translators were unable to hear the discussion in the hearing. The courts technical team, must test all the microphones and voice accessibility to the translator, beforehand.

In order to protect the identity of the protected witnesses and the confidentiality of their statements, apart from the

aforementioned measures taken by the court, other measures such as a 45 minute later broadcast of the hearing, is done in order to redact the confidential information. The option of transitioning to a private hearing, when the judge considers a confidential information has been given, or might cause the discovery of the witness's identity, a switch beside the presiding judge causes the statements in court not to be heard by the translators or be publicly broadcasted.

Further, as a measure reminding the parties of a private or public hearing, the green light appears for a public hearing, whereas, the red implies a private hearing.

Also, on October 4th the trial panel issued an order after the hearing, that the public broadcasted hearing, public transcript, the audio-visual recordings, remove a part, which they assessed holds confidential information. Which among other, order persons, media, organizations, which have in possession all the transcript, or even the part containing said confidential information, not to disclose it to other persons, or media organizations. The failure in doing so, would initiate criminal procedures.⁶⁸

Such orders have been issued even after October 4th, pertaining the concessions in other hearings.

KLI finds such concessions are intolerable and must not happen, due to the risk they

pose on the protection of the witnesses' identities, for whom such measures have been approved. The KSC President and the Specialist Prosecution's statements, on the key reasons for the foundation of this court and its placement in Hague was the protection of witnesses. KLI considers it scandalous that this court makes such concessions, which might compromise the safety of the witnesses and the judicial process.

According to KLI, all employees having the obligation of supervising the implementation of such protective measures and technical aspects have failed in fulfilling their duty, and must be subject to disciplinary procedures, such actions must be in accordance with the legal framework in force.

The Specialist Chambers state that they do not disclose confidential information. According to them, in rare cases where, after the broadcasting of a public hearing, the judges might decide on a part that must be redacted from the transcript and the ones following the court hearing are informed on the made redactions by order of the court. According to them, the legal basis for these orders relies on Article 15 of the Law on Specialist Chambers and Specialist Prosecutor's Office.⁶⁹ Other problems that KLI considers affects the speedy process of cases, on those for which the trial has started, but even those in the preliminary phase, is the fact that this court has only one courtroom. KLI considers that the moment the cases in the preliminary phase start trial,

⁶⁸ The Order of trial panel, October 4, 2021, at: https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e980a21d3a/Post%20Session%20Redaction%20Order%20of%204%20October%202021.pdf?fbclid=IwAR33gEAc0VqjkfVStH_VpH97bZo2JIoE-0CS8YLj0AzRZjN3BeEG4wTSgzQ)

⁶⁹The Chambers answer to KLI, March 1st 2022.

but even on the initiation of new cases before this court, this logistical problem might be one of the key reasons for the delays and the prolonging's of trials before this court.



In the frame of the program on communication and awareness, on September 7th, the President Ekaterina Trendafilova held a conference in Pristina, and on the next day on September 8th in North Mitrovica. KLI senior researcher, Gzim Shala has asked the former on the political message holding one conference in Pristina and the other in North Mitrovica and if this implies that the Specialist Chambers is making distinctions, by dividing its work presentation by ethnic lines.

He added that this has never happened in Kosovo. According to him, even before, when the Specialist Chambers in Kosovo was discussed, there were joint panels between Albanians and Serbians, and these panels were not divided by cities or ethnic lines.

Trendafilova did not give concrete answers pertaining to this question. Among other, she stated that she was not a politician and the case of organizing informing events is left to the professionals.

According to her, she is no soldier, and if the people in Mitrovica wish to meet, she goes and never asks why, for its her duty and she must be accessible.

Angela Griep, Chief of Information and Public Communications, said, the meetings are held all around Kosovo, so that they meet as many people as possible in order to expand their communication.

According to her, there are people who could not join the conference in Pristina, however they had the opportunity to join in Mitrovica, as during this conference there are people who attend from Mitrovica.

After this, Trendafilova states that they will hold a joint meeting the next time.⁷⁰

⁷⁰ “Trendafilova has no answer on the question pertaining the organization of the divided conferences in Prishtina and North Mitrovica” *Betimi për Drejtësi*, (September 7, 2020), at : <https://betimiperdrejtesi.com/trendafilova-nuk-ka-pergjigje-ne-pyetjen-e-arsyes-se-organizimit-te-konferencave-te-ndara-ne-prishtine-dhe-tjetren-ne-mitrovicen-e-veriut/>

11. Recommendations

- KLI recommends the KSC and the SPO, to strictly implement transparency and accountability towards the citizens of the Republic of Kosovo.
- KLI recommends the KSC eliminate all technical problems which are the cause of obstacles of judicial procedures before this court.
- For the sake of transparency and the Principle of Publicity, all technical problems must be avoided, pertaining the witnesses' answers in indirect questions, the witnesses/accused partial statements on the Albanian language and problems in translations.
- KSC should take disciplinary measures for all employees, which had the obligation to oversee the implementation of the protective/technical measures, and in failing to do so risked the witness's safety in the judicial process.
- KSC must secure another courtroom, for such a logistical problem does not justify in any way the delay and prolonging of trials before this court, as well as waiting for another panel to vacate the courtroom in order to schedule hearings on other court cases.
- KLI calls on the SPO and KSC to respect the Principle of Equality of

Arms and reminds that access to case records is a precondition to the equality of parties and imperative to a fair trial, as is guaranteed by the Constitution of the Republic of Kosovo and various different international acts, which find direct implementation.

- The SPO and KSO must respect the right of the defendants to have an effective defense, therefore, it is recommended that a faster disclosure of the complete evidence, whether incriminating or exculpatory and submit translated materials in the language the accused speak and understand. KLI recommends that the whole process of extracting the materials be done in a reasonable time, without delays that might cause a violation to the defendant's rights.
- KSC should publish documents in the three official languages on the official page of the Chamber.
- SPO should not undertake illegal actions or orders, such as in the case of Mahir Hasani and act accordingly to the law and Constitution.
- In raising accountability, the SPO must inform the public on how the leak of confidential documents came to be, and the actions taken on shedding light on the case and bringing those responsible to justice.

