



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,  
and Jakup Krasniqi**

**Before:** Pre-Trial Judge

Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 26 May 2022

**Language:** English

**Classification:** Confidential

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**Public Redacted Version of Decision on Periodic Review of Detention of Hashim  
Thaçi**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hashim Thaçi**

Gregory Kehoe

**Counsel for Victims**

Simon Laws

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Rexhep Selimi**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagenda

THE PRE-TRIAL JUDGE,<sup>1</sup> pursuant to Article 41(6), (10) and (12) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 56(2) and 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 5 November 2020, further to the confirmation of an indictment ("Confirmation Decision"),<sup>2</sup> Hashim Thaçi ("Mr Thaçi" or "Accused") was arrested pursuant to a decision and an arrest warrant issued by the Pre-Trial Judge.<sup>3</sup>

2. On 22 January 2021, the Pre-Trial Judge rejected Mr Thaçi's application for interim release ("First Detention Decision").<sup>4</sup>

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<sup>1</sup> KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

<sup>2</sup> KSC-BC-2020-06, F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*. A confidential redacted version was filed on 19 November 2020, F00026/CONF/RED. A public redacted version was filed on 30 November 2020, F00026/RED. The Specialist Prosecutor submitted the confirmed indictment in F00034, Specialist Prosecutor, *Submission of confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential; F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public; F00134, Specialist Prosecutor, *Lesser Redacted Version of Redacted Indictment*, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020, confidential. A further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED/A01) and public redacted (F00455/RED/A01) versions. On 17 January 2022, the SPO submitted a confidential, corrected, and lesser redacted version of the Confirmed Indictment, F00647/A01. A confirmed amended indictment was filed on 29 April 2022 ("Confirmed Indictment"), strictly confidential and *ex parte* (F00789/A01), with confidential redacted (F00789/A02) and public redacted (F00789/A05) versions.

<sup>3</sup> KSC-BC-2020-06, F00051, Registrar, *Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4)*, 5 November 2020, public; F00027/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders*, 26 October 2020, public; F00027/A01/RED, Pre-Trial Judge, *Public Redacted Version of Arrest Warrant for Hashim Thaçi*, 26 October 2020, public.

<sup>4</sup> KSC-BC-2020-06, F00177, Pre-Trial Judge, *Decision on Hashim Thaçi's Application for Interim Release*, 22 January 2021, confidential. A public redacted version was filed on the same day, F00177/RED.

3. On 30 April 2021, the Court of Appeals denied Mr Thaçi's appeal against the First Detention Decision ("First Court of Appeals Decision").<sup>5</sup>
4. On 23 July 2021, the Pre-Trial Judge ordered Mr Thaçi's continued detention ("Second Detention Decision").<sup>6</sup>
5. On 27 October 2021, the Court of Appeals denied Mr Thaçi's appeal against the Second Detention Decision ("Second Court of Appeals Decision").<sup>7</sup>
6. On 14 December 2021, the Pre-Trial Judge ordered Mr Thaçi's continued detention ("Third Detention Decision").<sup>8</sup>
7. On 16 December 2021, further to a request by Mr Thaçi,<sup>9</sup> who waived the right to have his detention reviewed before the expiry of the two-month time limit set out in Article 41(10) of the Law and Rule 57(2) of the Rules, the Pre-Trial Judge varied the time-limit for Mr Thaçi to provide submissions on his continued detention by no later than ten days after the notification of the decision of the Court of Appeals on his appeal against the Third Detention Decision, with the response and reply to be submitted in accordance with Rule 76 of the Rules.<sup>10</sup>
8. On 10 January 2022, the Defence for Mr Thaçi ("Defence") appealed against the Third Detention Decision.<sup>11</sup>

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<sup>5</sup> KSC-BC-2020-06, IA004/F00005, Court of Appeals Panel, *Decision on Hashim Thaçi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential. A public redacted version was filed on the same day, IA004/F00005/RED.

<sup>6</sup> KSC-BC-2020-06, F00417, Pre-Trial Judge, *Decision on Review of Detention of Hashim Thaçi*, 23 July 2021, confidential. A public redacted version was filed on the same day, F00417/RED.

<sup>7</sup> KSC-BC-2020-06, IA010/F00008, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 27 October 2021, confidential. A public redacted version was issued on the same day, IA010/F00008/RED.

<sup>8</sup> KSC-BC-2020-06, F00624, Pre-Trial Judge, *Decision on Review of Detention of Hashim Thaçi*, 14 December 2021, confidential. A public redacted version was filed on 25 January 2022, F00624/RED.

<sup>9</sup> KSC-BC-2020-06, Transcript of Hearing, 15 December 2021, public, p. 764, lines 7-11.

<sup>10</sup> KSC-BC-2020-06, F00629, Pre-Trial Judge, *Decision on Thaçi Request for Extension of Time Limit*, 16 December 2021, public, paras 8, 9(b).

<sup>11</sup> KSC-BC-2020-06, IA017/F00004, Specialist Counsel, *Appeal Against the Decision on Review of Detention of Hashim Thaçi*, 10 January 2022, confidential. A public redacted version was filed on 12 April 2022, IA017/F00004/RED.

9. On 5 April 2022, the Court of Appeals denied Mr Thaçi's appeal against the Third Detention Decision ("Third Court of Appeals Decision").<sup>12</sup>

10. On 19 April 2022, the Defence filed its submissions on the review of Mr Thaçi's detention ("Request").<sup>13</sup> On 29 April 2022, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response").<sup>14</sup> On 6 May 2022, the Defence replied to the Response ("Reply").<sup>15</sup>

## II. SUBMISSIONS

11. The Defence submits that Mr Thaçi is not a flight risk and that his detention has become disproportionate.<sup>16</sup> Accordingly, it requests the Pre-Trial Judge to order Mr Thaçi's immediate interim release to Kosovo, [REDACTED] on the conditions deemed necessary and appropriate, until 30 days prior to the start of the trial.<sup>17</sup> The Defence further requests the Pre-Trial Judge to convene a hearing for these purposes.<sup>18</sup>

12. The SPO responds that nothing in the Request, nor any change in circumstances, merits altering Mr Thaçi's current conditions of detention.<sup>19</sup> Thus, it requests the Pre-Trial Judge to deny the relief requested by the Defence.<sup>20</sup>

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<sup>12</sup> KSC-BC-2020-06, IA017/F00011, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 5 April 2022, confidential. A public redacted version was issued on the same day, IA017/F00011/RED.

<sup>13</sup> KSC-BC-2020-06, F00769, Specialist Counsel, *Thaçi Defence Submissions on Third Detention Review*, 19 April 2022, confidential.

<sup>14</sup> KSC-BC-2020-06, F00786, Specialist Prosecutor, *Prosecution Response to Hashim Thaçi's Submissions on Third Detention Review*, 29 April 2022, confidential. A public redacted version was filed on 23 May 2022, F00786/RED.

<sup>15</sup> KSC-BC-2020-06, F00797, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to Hashim Thaçi's Submissions on Third Detention Review*, 6 May 2022, confidential.

<sup>16</sup> Request, paras 1-7, 9-26.

<sup>17</sup> Request, paras 6-7, 27-35, 39.

<sup>18</sup> Request, paras 8, 31, 36-39.

<sup>19</sup> Response, para. 1.

<sup>20</sup> Response, para. 39.

13. The Defence replies that the automatic review of the necessity of detention is not strictly limited to whether or not a change of circumstances occurred in the case, and that the SPO bears the burden of demonstrating that the Accused's pre-trial detention remains necessary at the current stage of the proceedings.<sup>21</sup> The Defence further specifies that it maintains its requests.<sup>22</sup>

### III. APPLICABLE LAW

14. Article 41(6) of the Law provides that the Specialist Chambers ("SC") shall only order the detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC, and there are articulable grounds to believe that the person: (i) is a flight risk; (ii) will destroy, hide, change or forge evidence of a crime, or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

15. Article 41(10) of the Law and Rule 57(2) of the Rules provide that, until a judgment is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated.

16. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the accused, to prevent reoffending or ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition

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<sup>21</sup> Reply, para. 1.

<sup>22</sup> Reply, para. 14.

on approaching specific places or persons, attendance at police station or other venue, and diversion.

17. Pursuant to Rule 56(2) of the Rules, the Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case and, in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.

#### IV. DISCUSSION

##### A. REQUEST FOR AN ORAL HEARING

18. The Defence requests an oral hearing to be convened to hear: (i) the Director of the Kosovo Police, Chief Detention Officer of the SC Detention Facilities, and other relevant Registry members to coordinate how the proposed conditions can be implemented, pursuant to Articles 39(13) and 53(1) of the Law; and/or (ii) the views of the Governments of [REDACTED] on the interim release of Mr Thaçi into their respective territories.<sup>23</sup> According to the Defence, in light of the changed circumstances outlined in the Request, and in particular the fact that Mr Thaçi's continued detention can no longer be considered proportionate, the Defence submits that an oral hearing would allow the Pre-Trial Judge to comply with his duty to actively seek, "*proprio motu*, to inquire and evaluate all reasonable conditions that could be imposed on an accused", and always "consider more lenient measures when deciding whether a person should be detained".<sup>24</sup>

19. The SPO responds that the Defence fails to justify the need for oral argument on this matter.<sup>25</sup> According to the SPO, the Pre-Trial Judge has all the necessary information to rule on the Request.<sup>26</sup>

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<sup>23</sup> Request, paras 8, 31, 36-39.

<sup>24</sup> Request, paras 8, 37-38.

<sup>25</sup> Response, para. 37.

<sup>26</sup> Response, para. 37.

20. It is recalled that, as found by the Court of Appeals, there is no general obligation to hold an oral hearing on a detention related issue, as the Pre-Trial Judge may decide in exercising his discretion that a hearing is unnecessary when the information before him is sufficient to enable him to reach an informed decision.<sup>27</sup> The Pre-Trial Judge further recalls that the Kosovo Police have been approached on several occasions to provide information regarding the possibility of enforcing conditions of house arrest.<sup>28</sup> The Kosovo Police eventually provided detailed observations on this question and the Defence has been permitted to provide submissions on those observations.<sup>29</sup> Having analysed the available information, the Pre-Trial Judge determined - and the Court of Appeals confirmed - that the proposed conditions remain insufficient to adequately mitigate the risks under Article 41(6)(b)(ii)-(iii) of the Law in relation to Mr Thaçi.<sup>30</sup>

21. In the Request, the Defence proposes additional conditions that are either variations of conditions previously considered – namely: (i) restricting family contact during house arrest to [REDACTED]; (ii) ending house arrest 30 days prior to the commencement of trial; (iii) requiring the monitoring of visitors' telephones and restricting the pre-approved visitors permitted to visit Mr Thaçi during house arrest to a set number; and (iv) ordering the same measures in place in the SC Detention Facilities to avoid the memorisation of written messages to evade auditory monitoring techniques – or pertain to the involvement of the Registry – namely: (i) active monitoring and after-the-fact listening of Mr Thaçi's visits; and (ii) supervision of house arrest by SC Detention Facilities staff – and/or EULEX. These additional conditions are sufficiently detailed and do not give rise to the need for further oral or written submissions. In addition, as will be elaborated below, the Pre-Trial Judge is not of the view that Mr Thaçi's continued detention

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<sup>27</sup> Third Court of Appeals Decision, para. 59.

<sup>28</sup> Third Detention Decision, paras 8, 88; Third Court of Appeals Decision, para. 61.

<sup>29</sup> Third Detention Decision, paras 6, 9, 10, 12, 56, 61-66, 88; Third Court of Appeals Decision, para. 61.

<sup>30</sup> Third Detention Decision, paras 71-87, 89-90; Third Court of Appeals Decision, paras 26-38, 41-48, 51-56.

can no longer be considered proportionate and, as result, it cannot be said that a change of circumstances has occurred on this basis.<sup>31</sup>

22. In these circumstances, the Pre-Trial Judge is satisfied that all the information required to review Mr Thaçi's continued detention has been placed on the record and, thus, the request for an oral hearing with the Kosovo Police is rejected.

23. As to the request for an oral hearing with representatives of the Governments of [REDACTED], it is recalled that the Court of Appeals has found that the SC legal framework does not require an oral hearing if an applicant seeks to supplement government guarantees with oral assurances and that consultations, including at an oral hearing, with a Third State are compulsory only when the panel intends to grant interim release or envisages the possibility thereof.<sup>32</sup> The Court of Appeals has further confirmed the Pre-Trial Judge's discretion with regard to Third States' guarantees.<sup>33</sup> The Pre-Trial Judge observes that the Defence has not provided any new proposals in connection with its request for the conditional release of Mr Thaçi to [REDACTED], but merely reiterates its proposals that have been previously considered and rejected. In addition, as indicated above, the Pre-Trial Judge is not persuaded that Mr Thaçi's continued detention can no longer be considered proportionate.<sup>34</sup> There are also no other intervening developments regarding this matter.

24. For these reasons, the Pre-Trial Judge finds that there is no need to seek the views of the Governments of [REDACTED] regarding Mr Thaçi's interim release into their respective territories. It follows that the request for an oral hearing with these States is rejected.

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<sup>31</sup> See paras 78-81 below.

<sup>32</sup> Third Court of Appeals Decision, para. 59.

<sup>33</sup> Third Court of Appeals Decision, para. 61.

<sup>34</sup> See paras 78-81 below.



## B. APPLICABLE STANDARD

25. The Defence avers that protracted pre-trial incarceration is an exception, and that the recognised presumption in favour of pre-trial release flows from the presumption of innocence.<sup>35</sup> It adds that prolonged pre-trial incarceration clashes with the right to liberty as a fundamental human right, which can be curtailed only if the alternative measures provided under Article 41(12) of the Law are deemed insufficient to eliminate or mitigate identified risks, which must themselves be real, with the standard requiring more than mere possibility.<sup>36</sup> The Defence also contends that detention must be proportionate, and it impacts on the physical and mental health of detainees, and consistently extends to detainees' families.<sup>37</sup> In the view of the Defence, the Pre-Trial Judge, as part of the automatic review of detention under the statutory framework of the SC must actively seek, *proprio motu*, to inquire and evaluate all reasonable conditions that could be imposed on an accused, and always consider more lenient measures.<sup>38</sup>

26. The SPO responds that the Pre-Trial Judge will consider both whether there has been any change in circumstances, and assess whether he is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.<sup>39</sup> It adds that the Pre-Trial Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention nor to entertain submissions that merely repeat arguments that have already been addressed in previous decisions.<sup>40</sup>

27. The Defence replies that the automatic review of the necessity of detention is not strictly limited to whether or not a change of circumstances occurred.<sup>41</sup> It

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<sup>35</sup> Request, para. 2.

<sup>36</sup> Request, para. 3.

<sup>37</sup> Request, para. 4.

<sup>38</sup> Request, para. 5.

<sup>39</sup> Response, para. 2.

<sup>40</sup> Response, para. 2.

<sup>41</sup> Reply, para. 1.

further avers that the SPO bears the burden of demonstrating that the Accused's pre-trial detention remains necessary at the current stage of the proceedings.<sup>42</sup>

28. As established in previous detention decisions, the Pre-Trial Judge recalls that he has an obligation, under Article 41(10) of the Law, to examine whether the reasons for detention on remand still exist, including the grounds set out in Article 41(6) of the Law, namely whether: (i) there is a grounded suspicion that the person has committed the crime(s); and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law has been fulfilled.<sup>43</sup> The duty to determine whether the circumstances underpinning detention still exist imposes on the competent panel the task to, *proprio motu*, assess whether it is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.<sup>44</sup> Although the automatic review every two-months under Rule 57(2) of the Rules is not strictly limited to whether or not a change of circumstances occurred, such a change can nonetheless be determinative and shall be taken into consideration if raised by a Party or *proprio motu*.<sup>45</sup> A Panel may refer to findings in prior decisions if it is satisfied that the evidence or information underpinning those decisions still supports the findings made at the time of the review.<sup>46</sup> It is neither required to make findings on the factors already decided upon in the initial ruling on detention nor to entertain submissions that merely repeat arguments that have already been

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<sup>42</sup> Reply, para. 1.

<sup>43</sup> KSC-BC-2020-07, IA002/F00005, Court of Appeals, *Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention ("Haradinaj Detention Appeal")*, 9 February 2021, public, para. 55.

<sup>44</sup> KSC-BC-2020-06, IA006/F00005, Court of Appeals, *Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention ("Krasniqi Detention Appeal")*, 1 October 2021, confidential, para. 15 (a public redacted version was issued on the same day, IA006/F00005/RED); Second Court of Appeals Decision, para. 18.

<sup>45</sup> *Krasniqi Detention Appeal*, para. 16; Second Court of Appeals Decision, para. 19.

<sup>46</sup> KSC-BC-2020-04, IA003/F00005, Court of Appeals, *Decision on Pjetër Shala's Appeal Against Decision on Review of Detention*, 11 February 2022, confidential ("*Shala Detention Appeal*"), para. 18. A public redacted version was issued on the same day, IA003/F00005/RED.

addressed in previous decisions.<sup>47</sup> The SPO bears the burden of establishing that the detention of the Accused is necessary.<sup>48</sup>

### C. GROUNDED SUSPICION

29. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires at the outset a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.<sup>49</sup>

30. The Defence has not made any submissions regarding this criterion in the Request or the Reply. In the Response, the SPO avers that there remains a grounded suspicion that Mr Thaçi has committed a crime within the jurisdiction of the SC.<sup>50</sup> According to the SPO, the Confirmation Decision determined that there is a suspicion that Mr Thaçi is liable for crimes against humanity and war crimes as identified in Articles 13, 14 and 16 of the Law to a standard that exceeds that required for detention of grounded suspicion, and nothing has occurred since that time that would detract from this determination.<sup>51</sup>

31. The Pre-Trial Judge recalls that, in the Confirmation Decision, it was determined that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Thaçi is criminally liable for a number of crimes against humanity (persecution, imprisonment, other inhumane acts, torture, murder and enforced disappearance) and war crimes (arbitrary detention, cruel treatment,

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<sup>47</sup> *Haradinaj Detention Appeal*, para. 55; *Krasniqi Detention Appeal*, para. 17; Second Court of Appeals Decision, para. 20.

<sup>48</sup> First Detention Decision, para. 19, with further references. Similarly, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, [Judgment](#), 28 November 2017 ("*Merabishvili v. Georgia* [GC]"), para. 234.

<sup>49</sup> Similarly ECtHR, [Merabishvili v. Georgia \[GC\]](#), para. 222.

<sup>50</sup> Response, para. 3.

<sup>51</sup> Response, para. 3.

torture and murder) under Articles 13, 14(1)(c) and 16(1)(a) of the Law.<sup>52</sup> Moreover, the Pre-Trial Judge recalls that a well-grounded suspicion has also been established with regard to the new charges brought by the SPO against Mr Thaçi with the requested amendments to the indictment.<sup>53</sup> These findings were made on the basis of a standard exceeding the grounded suspicion threshold required for the purposes of Article 41(6)(a) of the Law.<sup>54</sup>

32. Accordingly, the Pre-Trial Judge finds that there continues to be a grounded suspicion that Mr Thaçi has committed crimes within the subject-matter jurisdiction of the SC for the purposes of Article 41(6)(a) and (10) of the Law.

#### D. NECESSITY OF DETENTION

33. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be articulable in the sense that they must be specified in detail.<sup>55</sup> The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"<sup>56</sup> that any of the risks under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.<sup>57</sup> In other words, the standard to be applied is less than

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<sup>52</sup> Confirmation Decision, para. 521(a); Second Detention Decision, para. 20; Third Detention Decision, para. 30.

<sup>53</sup> KSC-BC-2020-06, F00777, Pre-Trial Judge, *Decision on the Confirmation of Amendments to the Indictment*, 22 April 2022, strictly confidential and *ex parte*, para. 183. A confidential redacted version (F00777/CONF/RED), a public redacted version (F00777/RED) and a confidential lesser redacted version (F00777/CONF/RED2) were filed, respectively, on 22 April 2022, 6 May 2022 and 16 May 2022. The requested amendments are detailed at para. 11.

<sup>54</sup> See for instance KSC-BC-2020-06, IA008/F00004, Court of Appeals, *Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, 1 October 2021, confidential ("*Veseli Detention Appeal*"), para. 21. A public redacted version was issued on the same day, IA008/F00004/RED.

<sup>55</sup> First Detention Decision, para. 20; First Court of Appeals Decision, paras 23-24; Second Detention Decision, para. 22; Third Detention Decision, para. 32.

<sup>56</sup> See *chapeau* of Article 41(6)(b) of the Law.

<sup>57</sup> First Detention Decision, para. 20, with further references; see also KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, public, para. 17, with further references.

certainty, but more than a mere possibility of a risk materialising.<sup>58</sup> When deciding on whether a person should be released or detained, the Pre-Trial Judge must consider alternative measures to prevent the risks in Article 41(6)(b) of the Law.<sup>59</sup>

## 1. Risk of Flight

34. The Defence submits that Mr Thaçi is not a flight risk as the Pre-Trial Judge's finding that he has gained increased insight into the evidence underpinning the charges against him is no longer sound.<sup>60</sup> The Defence refers to the disclosure of an increasing volume of exculpatory material, including interviews with and a statement from the former Head of the Organisation for Security and Co-Operation in Europe Mission in Kosovo, Ambassador Daan Everts ("Mr Everts"), who, *inter alia*, stated that the criminal activities post-June 1999 were committed by individuals who sought a chance to gain personal benefit and was not part of an organized campaign from the Albanian leadership.<sup>61</sup> The Defence adds that, as part of its investigations, it obtained a letter that had been sent by an Assistant Secretary of Legislative Affairs to United States ("US") Senator Mitch McConnell that includes a statement that "there is no political structure in Kosovo or effective command and control of the [Kosovo Liberation Army ("KLA")]" and a US Central Intelligence Agency Report noting that "[t]he [KLA] was not involved in terrorist activities - defined as premeditated, politically motivated violence perpetrated

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<sup>58</sup> First Court of Appeals Decision, para. 22; Second Detention Decision, para. 22; Third Detention Decision, para. 32.

<sup>59</sup> As regards the obligation to consider "alternative measures", see KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, 26 April 2017, public, para. 114. See also ECtHR, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, [Judgment](#), 5 July 2016 ("*Buzadji v. the Republic of Moldova* [GC]"), para. 87 *in fine*; ECtHR, *Idalov v. Russia* [GC], no. 5826/03, [Judgment](#), 22 May 2012, para. 140 *in fine*.

<sup>60</sup> Request, paras 9-11.

<sup>61</sup> Request, paras 12-14.

against non-combatant targets".<sup>62</sup> Lastly, according to the Defence, Mr Thaçi cooperated and complied with SC orders even when he thought the case against him was much more extensive than the one now charged seeing as the press release issued by the SPO prior to Mr Thaçi's resignation left the impression that Mr Thaçi was a direct participant in the commission of 100 murders considering that Joint Criminal Enterprise was not explicitly foreseen in the Law.<sup>63</sup>

35. The SPO responds that, since the Third Detention Decision, nothing has transpired that would decrease the support for an affirmative finding that Mr Thaçi is a flight risk.<sup>64</sup> It adds that, since that decision, the SPO has filed the Pre-Trial Brief, and removed protective measures from a number of witnesses, as well as continued disclosure, all of which increases the risk of Mr Thaçi's flight.<sup>65</sup> According to the SPO, Mr Thaçi continues to wield influence and authority that could aid him in absconding on the basis of his past and recent influential positions.<sup>66</sup> Furthermore, the SPO avers that the Defence's argument regarding exculpatory material only addresses the enhancement of the risk of flight, not the underlying knowledge of the crimes charged and possible sentence.<sup>67</sup> The SPO is also of the view that mere numbers of documents that the SPO is obligated to disclose under Rule 103 of the Rules say nothing about the effectiveness, merit, veracity, authenticity, or weight of any of that material in actually satisfying a defence.<sup>68</sup> It also contends that the documents related to Mr Everts contain a mix of both incriminatory and exculpatory information.<sup>69</sup> Lastly, as to the Defence's argument concerning Mr Thaçi's prior cooperation, the SPO submits that the press release referred to by the Defence fails to even approach the level of specificity

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<sup>62</sup> Request, para. 15.

<sup>63</sup> Request, paras 16-18.

<sup>64</sup> Response, para. 6.

<sup>65</sup> Response, paras 6, 12.

<sup>66</sup> Response, para. 8.

<sup>67</sup> Response, para. 10.

<sup>68</sup> Response, para. 11.

<sup>69</sup> Response, para. 11.

and information that Mr Thaçi currently possesses about the case against him and that his surrender also predates the Specialist Chamber of the Constitutional Court's decision that rejected amendments to the Constitution of Kosovo that arguably could have terminated some or all charges against him.<sup>70</sup>

36. The Defence replies that nothing is conceded in respect of its objections to the Pre-Trial Judge's continued reliance on the apparent network of supporters in Kosovo who would facilitate Mr Thaçi's flight.<sup>71</sup> The Defence further submits that the SPO downplays its 2020 press release and does not dispute that the case now presented is far less broad in scope and severity than alleged at the time that Mr Thaçi took the decision to surrender.<sup>72</sup> Lastly, the Defence avers that, contrary to the SPO's contention, the constitutional amendment in question would not have resulted in the dismissal of charges against Mr Thaçi, but sought to remove the five-year limitation to the SC's temporal mandate.<sup>73</sup>

37. The Pre-Trial Judge recalls that it has been previously determined that there is a risk that Mr Thaçi will abscond on the basis of his influence and authority stemming from past and recent positions he held, which he might use to call upon the support of former subordinates and persons affiliated with the KLA War Veteran Association and/or persons sympathetic to the KLA, who may be willing to give him access to resources and/or help him abscond, securing access to relevant information, and obtaining funds and means to travel to several countries beyond the reach of the SC.<sup>74</sup> In the absence of any intervening developments, these findings continue to hold true at present. The Defence's generic references

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<sup>70</sup> Response, para. 13.

<sup>71</sup> Reply, para. 2.

<sup>72</sup> Reply, para. 3.

<sup>73</sup> Reply, para. 4.

<sup>74</sup> First Detention Decision, paras 31, 33; First Court of Appeals Decision, para. 50; Second Detention Decision, paras 27-30; Second Court of Appeals Decision, para. 35; Third Detention Decision, paras 35-36.

to its existing objections are unsupported and, in any event, the Pre-Trial Judge is not required to revisit previously adjudicated arguments.<sup>75</sup>

38. It is also recalled that it has been established that Mr Thaçi's knowledge of the charges against him and the possibility of a serious sentence in the event of a conviction increases his risk of flight.<sup>76</sup> Furthermore, the Pre-Trial Judge observes that, since the Third Detention Decision, the SPO submitted its Pre-Trial Brief, continued disclosing evidentiary materials to the Defence, and lifted certain protective measures.<sup>77</sup> Therefore, while disclosure does not in and of itself justify denying provisional release,<sup>78</sup> Mr Thaçi's progressively evolving insight into the case against him, viewed together with his influence and authority, his knowledge of the charges against him and the possibility of a serious sentence, further increases the risk of flight.

39. In this regard, the Pre-Trial Judge considers that the Defence's arguments regarding the disclosure of exculpatory material are misguided. The Defence challenges the strength of the SPO's case under the guise of the risk of flight.<sup>79</sup> However, the Pre-Trial Judge recalls that the Court of Appeals has found that, under the framework of Article 41(6) of the Law and the determination of applications for interim release or reviews of detention, neither the Pre-Trial Judge nor the Court of Appeals can be expected to examine the merits of the case and the overall evidence submitted by the SPO in preparation for the trial.<sup>80</sup> For the

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<sup>75</sup> *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17; *Shala* Detention Appeal, para. 18.

<sup>76</sup> First Detention Decision, para. 31; Second Detention Decision, para. 31; Third Detention Decision, para. 37.

<sup>77</sup> Response, para. 6.

<sup>78</sup> Second Court of Appeals Decision, para. 38.

<sup>79</sup> See for instance Request, para. 13 ("The Everts Statement contains numerous similarly exonerating statements, which call into question Mr Thaçi's ability to prevent and punish crimes, and his *mens rea* for the crimes as charged"); para. 15 ("These documents are exculpatory, calling into question the SPO's case that there was a joint criminal enterprise to gain and exercise control over Kosovo by committing violence and removing opponents").

<sup>80</sup> *Veseli* Detention Appeal, para. 23.



purposes of the review of detention, evidentiary matters are only taken into account in relation to the evaluation whether there is a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC.

40. Even if the materials highlighted by the Defence would be relevant for evaluating the risk of flight, the Pre-Trial Judge observes that: (i) the Defence refers to Mr Everts' view of KLA activities after June 1999, which does not cover the entire temporal scope of the charges against Mr Thaçi seeing as the alleged crimes would have commenced from at least March 1998;<sup>81</sup> (ii) Mr Everts' statement contains exculpatory and incriminating elements;<sup>82</sup> and (iii) the limited amount of materials highlighted by the Defence are not determinative in relation to the charges levelled against Mr Thaçi in view of the significant body of materials underpinning the well-grounded suspicion that Mr Thaçi is criminally liable for a number of crimes. In these circumstances, the Pre-Trial Judge is not persuaded that the Defence has demonstrated that the disclosure of Rule 103 materials affects the finding that Mr Thaçi's evolving insight into the case against him increases the risk of flight.

41. In any event, the Pre-Trial Judge recalls that, as set out above, the conclusion that Mr Thaçi poses a flight risk primarily arises out of his continued authority and influence, in conjunction with his awareness of the charges against him and the possibility of a serious sentence, while the disclosure process increases this risk. Thus, while the latter consideration strengthens the conclusion that Mr Thaçi is a flight risk, it is not determinative for this purpose. It follows that, even if it would be accepted *arguendo* that the disclosure of exculpatory material does not establish that Mr Thaçi's evolving insight into the case against him increases the risk of flight, the primary factors underpinning this conclusion remain unaffected.

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<sup>81</sup> Confirmed Indictment, para. 16.

<sup>82</sup> [REDACTED].

Accordingly, the Defence's arguments in relation to the disclosure of exculpatory material are incapable of producing an adjustment of that finding.

42. As to the Defence's argument that Mr Thaçi surrendered when he thought that the case against him was much more extensive, the Pre-Trial Judge considers that the Defence's submission that the SPO's press release left the impression that Mr Thaçi was a direct participant in the commission of 100 murders is speculative. The words "criminally responsible" used in the press release may, namely, entail various modes of liability. It is also recalled that it has already been determined that the use of Joint Criminal Enterprise as a mode of liability was foreseeable and accessible to Mr Thaçi at the time the alleged crimes were committed.<sup>83</sup> In any event, a press release cannot be compared to the level of detail provided by the Confirmed Indictment. It also cannot be said that alleged criminal responsibility pursuant to Joint Criminal Enterprise is not a serious charge and may not attract a significant penalty in the event of a conviction. Therefore, the Defence's argument does not affect the finding that, following his surrender, Mr Thaçi discovered the true extent of the case once in custody.

43. On this basis, and notwithstanding the counter-balancing factors identified in the First Detention Decision,<sup>84</sup> the Pre-Trial Judge finds that the risk of flight in relation to Mr Thaçi continues to exist.

## **2. Risk of Obstructing the Progress of SC Proceedings**

44. The Defence has not made submissions regarding this articulable ground in the Request or the Reply. In the Response, the SPO submits that Mr Thaçi

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<sup>83</sup> KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers*, 22 July 2021, public, para. 201.

<sup>84</sup> First Detention Decision, para. 32.

continues to present a risk of obstructing proceedings.<sup>85</sup> It avers that there has been no change in any of the factors previously established by the Pre-Trial Judge.<sup>86</sup>

45. The Pre-Trial Judge recalls that it has been previously found that Mr Thaçi: (i) attempted to undermine the SC and offered benefits to persons summoned by the SPO; (ii) [REDACTED]; and (iii) continues to have authority and influence in Kosovo.<sup>87</sup> It has also been determined that the inherently high risk of intimidation or interference for witnesses and/or their family members cannot be effectively mitigated by relying only on protective measures.<sup>88</sup> In this regard, the Pre-Trial Judge further finds that the submission of the Pre-Trial Brief, the lifting of protective measures and continued disclosure of materials further increase the risk of obstruction.<sup>89</sup> Lastly, it is recalled that that there is a persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo,<sup>90</sup> which, even though not determinative in and of itself, provides the context against which the findings pertaining specifically to Mr Thaçi must be considered.<sup>91</sup>

46. Accordingly, the Pre-Trial Judge concludes that, within the overall context of a persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo, the risk that Mr Thaçi will obstruct the progress of SC proceedings continues to exist.

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<sup>85</sup> Response, para. 14.

<sup>86</sup> Response, para. 14.

<sup>87</sup> First Detention Decision, paras 38-42; First Court of Appeals Decision, paras 45-77; Second Detention Decision, paras 36-38; Second Court of Appeals Decision, paras 34-36; Third Detention Decision, paras 42-43.

<sup>88</sup> Second Detention Decision, para. 38; Third Detention Decision, para. 44.

<sup>89</sup> See also Second Detention Decision, para. 39; Second Court of Appeals Decision, para. 40; Third Detention Decision, para. 45.

<sup>90</sup> See also KSC-BC-2020-07, F00611/RED, Trial Panel II, *Public Redacted Version of the Trial Judgment*, 18 May 2022, public, paras 576-579.

<sup>91</sup> First Detention Decision, para. 43; Second Detention Decision, para. 40; Third Detention Decision, para. 46.

### 3. Risk of Committing Further Crimes

47. The Defence has not made submissions regarding this articulable ground in the Request or the Reply. In the Response, the SPO submits that there has been no change in any of the factors previously established by the Pre-Trial Judge and that Mr Thaçi's knowledge of the case against him has only increased.<sup>92</sup>

48. The Pre-Trial Judge recalls that, even though the existence of a risk of obstruction does not automatically translate into a risk of committing further crimes, the factors underpinning the former are of relevance to the assessment of the latter in the circumstances of the present case.<sup>93</sup> It is further recalled that it suffices that an Accused instigates or assists others to commit such crimes, or contributes in any other way to their commission.<sup>94</sup>

49. Turning to the facts under consideration, the Pre-Trial Judge recalls that, besides the prevailing climate of witness intimidation, Mr Thaçi has: (i) [REDACTED]; (ii) attempted to undermine the SC and offered benefits to persons summoned by the SPO; (iii) a position of influence in Kosovo which could allow him to elicit the support of sympathisers; and (iv) an increased account of the SPO's case against him as a result of the submission of the SPO's Pre-Trial Brief, the lifting of protective measures, and the ongoing disclosure of materials.<sup>95</sup>

50. On this basis, the Pre-Trial Judge considers that, taking all factors together, there is a risk that Mr Thaçi will, under any form of responsibility, commit crimes similar to the underlying acts charged against those perceived as being opposed to the KLA, including witnesses who have provided or could provide evidence in the case and/or are due to appear before the SC.

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<sup>92</sup> Response, paras 16-17.

<sup>93</sup> First Detention Decision, para. 48; Second Detention Decision, para. 43; Third Detention Decision, para. 50.

<sup>94</sup> First Detention Decision, paras 24, 48; Second Detention Decision, para. 43; Third Detention Decision, para. 50.

<sup>95</sup> See para. 45 above.

51. Accordingly, the Pre-Trial Judge concludes that the risk that Mr Thaçi will commit further crimes continues to exist.

#### **4. Conclusion**

52. The Pre-Trial Judge concludes that the risks that Mr Thaçi will abscond, obstruct the progress of SC proceedings, or commit further crimes against those perceived as being opposed to the KLA, including witnesses who have provided or could provide evidence in the case and/or are due to appear before the SC, continue to exist. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by any conditions for his release.

#### **E. CONDITIONAL RELEASE**

##### **1. Submissions**

53. The Defence requests Mr Thaçi's release into Kosovo, or into either of the two Third Party States, [REDACTED].<sup>96</sup>

54. In this regard, the Defence asks the Pre-Trial Judge to order that a framework for restrictions and monitoring equivalent to that in place at the SC Detention Facilities be implemented in the context of house arrest in Kosovo.<sup>97</sup> First, the Defence avers that family contact during house arrest can be strictly limited to [REDACTED] there is no indication that any confidential information has passed between them, and that Mr Thaçi further agrees to be re-incarcerated 30 days prior to the commencement of trial, being the time at which protected witness' identities will be disclosed to the Defence.<sup>98</sup> Second, the Defence contends that the monitoring of visitors' phones should be made a precondition of entry to visit

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<sup>96</sup> Request, paras 6-7.

<sup>97</sup> Request, para. 28.

<sup>98</sup> Request, para. 28(i).

Mr Thaçi, the pre-approved visitors permitted to visit Mr Thaçi during house arrest should be restricted to a set number, and active monitoring and after-the-fact listening of Mr Thaçi's visits with pre-approved visitors should be ordered.<sup>99</sup> Third, in relation to written messages, the Defence submits that the same measures in place in the SC Detention Facilities to avoid the memorisation of written messages to evade auditory monitoring techniques should be ordered.<sup>100</sup> Lastly, the Defence asks that SC Detention Facilities staff supervise Mr Thaçi's house arrest, either exclusively or in combination with Kosovo Police officers, and that they be required to immediately raise concerns by phone with the Chief Detention Officer<sup>101</sup> (collectively "Additional Conditions"). Moreover, in the view of the Defence, courts and human rights bodies have established that any perceived or actual increase in resources cannot be invoked to deny the use of SC Detention Facilities staff to supervise house arrest.<sup>102</sup>

55. In the alternative, the Defence reiterates its proposal that Mr Thaçi be released into the territory of [REDACTED], under the conditions deemed necessary by the Pre-Trial Judge, pursuant to Article 41(11) of the Law and Rule 56(4) of the Rules.<sup>103</sup> In the view of the Defence, this would circumvent the Pre-Trial Judge's concerns regarding the Kosovo Police, and would not require the deployment of SC Detention Facilities staff.<sup>104</sup> The Defence also asserts that two judges of the Court of Appeals have emphasised the need for the Pre-Trial Judge to consider and assess guarantees provided by Third Party States prior to determining whether these guarantees minimise or eliminate the remaining risk.<sup>105</sup>

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<sup>99</sup> Request, para. 28(ii).

<sup>100</sup> Request, para. 28(iii).

<sup>101</sup> Request, paras 28(iv), 29.

<sup>102</sup> Request, para. 30.

<sup>103</sup> Request, paras 32-33.

<sup>104</sup> Request, para. 32.

<sup>105</sup> Request, paras 34-35.

56. The SPO responds that neither of the Defence's proposals sufficiently mitigate the potential risks, and therefore both should be rejected.<sup>106</sup>

57. As to the proposed house arrest in Kosovo, the SPO is of the view that the proposed conditions are not the equivalent of those at the SC Detention Facilities, and cannot sufficiently mitigate the risks.<sup>107</sup> It adds that house arrest in Kosovo is not an option on the basis of the assessments that the Pre-Trial Judge and the Court of Appeals have made concerning the viability of such an approach generally and in context.<sup>108</sup> In addition, the SPO contends that limiting family contact to [REDACTED] would not be equivalent to conditions at the SC Detention Facilities, [REDACTED].<sup>109</sup> The SPO also avers that the Court of Appeals has confirmed that the Pre-Trial Judge's finding that no additional measures, which could be reasonably considered, could sufficiently mitigate the identified risks of obstruction and commission of further crimes, whereas the Defence's new suggestions are all foreseeable extensions of previous ones.<sup>110</sup> In addition, the SPO contends that Mr Thaçi's undertaking to be placed back in detention 30 days prior to the commencement of trial would be of little protection to other witnesses who the SPO is relying on and whose identities are not withheld from the Accused.<sup>111</sup> In regards to phone monitoring, [REDACTED].<sup>112</sup> As to the use of written messages and the dispatch of SC Detention Facilities staff, the SPO maintains that: (i) this would exceed the reasonable limits of measures facilitating house arrest; (ii) the SC Detention Facilities staff would be separated from the support of the Detention Facilities; and (iii) there is no human rights requirement to spend exorbitant resources to facilitate house arrest.<sup>113</sup>

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<sup>106</sup> Response, para. 21.

<sup>107</sup> Response, para. 22.

<sup>108</sup> Response, paras 23-27.

<sup>109</sup> Response, para. 28.

<sup>110</sup> Response, para. 29.

<sup>111</sup> Response, para. 30.

<sup>112</sup> Response, para. 31.

<sup>113</sup> Response, paras 32-35.

58. With regard to provisional release into [REDACTED], the SPO asserts that there have been no intervening events that would merit reconsideration of the Pre-Trial Judge's rejection of this proposal in a previous decision and there is no requirement to address previously adjudicated arguments.<sup>114</sup>

59. The Defence replies that lack of resources, or an unwillingness to spend them, cannot be a basis for denying the fundamental rights of accused, all other conditions having been met.<sup>115</sup> It adds that the SPO does not provide any kind of estimate of the resources required and that the SPO fails to consider that the resources would be largely re-deployed.<sup>116</sup> The Defence is also of the view that the SPO's unsubstantiated objections are inconsistent with the SC's status as an extraordinary court, where the accused have been incarcerated in a country separated from their families.<sup>117</sup> The Defence further contends that the SPO fails to challenge the Defence's submissions about the unlikelihood of [REDACTED] engaging in obstruction or harassment of witnesses, which renders the need for [REDACTED] inconsistent with the right of the accused to family life.<sup>118</sup> In addition, according to the Defence, the monitoring of visitors' phones could be done by the Registry or SC Detention Facilities staff virtually or via audio recording of the visits, [REDACTED].<sup>119</sup> The Defence additionally avers that the suggestion that measures would not be commensurate with the SC Detention Facilities because the SC Detention Facilities staff would be "separated" from the support of the Detention Facilities themselves is neither substantiated nor explained and, regardless, the Pre-Trial Judge can also rely on the European Gendarmerie Force.<sup>120</sup> The Defence also asserts that the SPO's assertion that re-

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<sup>114</sup> Response, para. 36.

<sup>115</sup> Reply, para. 5.

<sup>116</sup> Reply, para. 6.

<sup>117</sup> Reply, para. 7.

<sup>118</sup> Reply, para. 8.

<sup>119</sup> Reply, para. 9.

<sup>120</sup> Reply, para. 10.



incarcerating Mr Thaçi 30 days prior to the start of trial is of “little protection” cannot be reconciled with the specific measure of withholding certain witnesses’ identities having been sought by the SPO and granted by the Pre-Trial Judge.<sup>121</sup> Lastly, the Defence contends that the SPO’s submissions about Mr Thaçi’s apparent intention to harass witnesses is undermined significantly by the recent revelations that the Serbian intelligence services have ordered the assassination of Mr Dick Marty.<sup>122</sup>

## 2. Discussion

60. As regards the risk of flight, the Pre-Trial Judge considers that, as previously established, this risk can be sufficiently mitigated on the basis of Mr Thaçi’s commitment to remain in house arrest, either in Kosovo or in a Third State with a cooperation agreement with the SC, and to abide by any condition imposed by the Pre-Trial Judge, including any of the following conditions: (i) surrender of international travel documents; (ii) prohibition of approaching certain places or persons; (iii) attendance of proceedings by video-link; and (iv) prohibition of the use of media or political activity.<sup>123</sup>

61. Turning to the risks of obstructing the progress of SC proceedings and committing further crimes, the Pre-Trial Judge notes, at the outset, that, in the context of the arguments set out in the Reply in relation to conditional release, the Defence challenges the finding that the risks under Article 41(6)(b)(ii)-(iii) of the Law continue to exist when submitting that Mr Thaçi’s apparent intention to harass witnesses is undermined by the revelations that the Serbian intelligence services have ordered the assassination of Mr Dick Marty. However, this

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<sup>121</sup> Reply, para. 11.

<sup>122</sup> Reply, para. 12.

<sup>123</sup> First Detention Decision, paras 52, 56; Second Detention Decision, para. 50; Third Detention Decision, para. 70.

argument is unrelated to the question of conditional release. In any event, the reporting regarding the alleged assassination plot is unverified and the Defence fails to explicate how such a plot could lead to the conclusion that there is no risk that Mr Thaçi would obstruct the progress of SC proceedings or commit further crimes since those findings are based on considerations independent from the alleged plot.<sup>124</sup> Therefore, the Pre-Trial Judge will assess whether the Additional Conditions sufficiently mitigate the identified risks in connection with the Defence's request to order house arrest in Kosovo.

62. Commencing with the final Additional Condition, namely dispatching SC Detention Facilities staff to oversee Mr Thaçi's house arrest in Kosovo, the Pre-Trial Judge recalls that the Court of Appeals has specified that it was reasonable for the Pre-Trial Judge not to have considered this measure given the significant resources that would be required for the implementation of the conditions of release, the limited number of Registry officers, and the fact that their main functions are at the seat of the SC in the Host State.<sup>125</sup> Indeed, in light of the limited number of SC Detention Facilities staff, the resources required to adequately mitigate the serious risks that Mr Thaçi will obstruct the progress of SC proceedings and/or commit further crimes, in the context of the persistent climate intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo and the corruption affecting the criminal justice sector in Kosovo,<sup>126</sup> would render such a measure unreasonable. The Pre-Trial Judge does not agree with the Defence that this measure only involves a mere redeployment of resources. The reason is that additional resources would be required to ensure that any SC Detention Facilities staff that would be dispatched to Kosovo are adequately replaced. Furthermore, the Pre-Trial Judge notes that

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<sup>124</sup> See also KSC-BC-2020-07, F00610, Trial Panel II, *Decision on the Defence Requests for Permission to Make Further Submissions on Disclosure*, 17 May 2022, public, para. 16.

<sup>125</sup> Third Court of Appeals Decision, para. 47.

<sup>126</sup> Third Detention Decision, para. 84.

the human rights jurisprudence invoked by the Defence does not concern house arrest in lieu of pre-trial detention,<sup>127</sup> but rather the humane treatment of persons deprived of their liberty and the need to conduct proceedings without undue delay. Accordingly, the findings of human rights bodies related to budgetary or logistical challenges do not extend to the present circumstances, in which it is requested that, even though Mr Thaçi's rights are fully respected at the SC Detention Facilities, significant resources are spent to facilitate house arrest to attempt to sufficiently mitigate the established risks that Mr Thaçi, if released, will obstruct the progress of SC proceedings and/or commit further crimes.

63. In any event, the Pre-Trial Judge is not persuaded that the dispatch of SC Detention Facilities staff to oversee Mr Thaçi's house arrest in Kosovo would adequately mitigate the aforementioned risks. This is because, as found by the Court of Appeals, the functions of SC Detention Facilities staff are exercised at the seat of the SC in the Host State.<sup>128</sup> As a result, in the event of a violation of the conditions of house arrest, the required coordination with the Chief Detention Officer and the measures to be adopted in response would necessarily be delayed as a result of the physical distance between the location of house arrest and the Host State. What is more, it is unavoidable that measures to be adopted in relation to any violation of the conditions of house arrest in a location outside the SC Detention Facilities could not be implemented in accordance with the operational practice applicable at the SC Detention Facilities. Furthermore, SC Detention Facilities staff would have to operate outside of the high-security environment of the SC Detention Facilities.<sup>129</sup> These considerations, viewed in combination, would undermine the timeliness and efficiency of the measures in response to any violation of the conditions of Mr Thaçi's house arrest. This is all the more so in view of the context in which the house arrest must be considered,

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<sup>127</sup> Request, footnotes 55-57.

<sup>128</sup> Third Court of Appeals Decision, para. 47.

<sup>129</sup> Third Detention Decision, para. 77.

namely the climate of witness interference and the corruption affecting the justice sector in Kosovo.<sup>130</sup> The dispatch of SC Detention Facilities staff would also not address the fact that, as specified below, [REDACTED].

64. The Defence also asserts that the Pre-Trial Judge can rely on the European Gendarmerie Force. However, similarly to the dispatch of SC Detention Facilities staff, the involvement of the European Gendarmerie Force would not address the risks, as identified below, [REDACTED]. Therefore, and even admitting the practical feasibility of such an involvement, the Pre-Trial Judge considers that such a measure would not sufficiently minimise the identified risks.

65. Having found that the dispatch of SC Detention Facilities staff is neither a reasonable nor an adequate measure for the present purpose and that it is not possible to rely on the European Gendarmerie Force, the Kosovo Police would have to enforce the conditions of Mr Thaçi's house arrest. [REDACTED].<sup>131</sup> In the absence of any intervening developments, the Pre-Trial Judge finds that this finding continues to hold true at present.

66. With regard to the first Additional Condition, the Pre-Trial Judge recalls that, irrespective of the institution exercising oversight over the conditions of Mr Thaçi's house arrest, it has been found that: (i) the communications between Mr Thaçi and his family members [REDACTED]; and (ii) Mr Thaçi could ask a family member to pass on a message orally or to use a device belonging to a third person to do so, or that he could transmit covert messages for the purposes of obstructing SC proceedings or committing further crimes.<sup>132</sup> The Pre-Trial Judge considers that these findings do not require to be adjusted in view of the Defence's proposal to restrict the list of family members permitted to live with Mr Thaçi and its suggestions that it is extremely unlikely that [REDACTED] would engage in

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<sup>130</sup> Third Detention Decision, para. 84.

<sup>131</sup> [REDACTED].

<sup>132</sup> Third Detention Decision, paras 74-75; Third Court of Appeals Decision, paras 28-29.

passing on information and that there is no indication that any confidential information has been exchanged between them thus far. In this regard, the Pre-Trial Judge considers that, while it is possible for Mr Thaçi to have unmonitored communications at the SC Detention Facilities, these are strictly limited considering that detainees are only allowed unmonitored “private visits” for certain close family members and within limited time periods, [REDACTED].<sup>133</sup> Therefore, the [REDACTED] is, [REDACTED], not comparable to the limited, yet regular, visits Mr Thaçi receives [REDACTED] at the SC Detention Facilities.<sup>134</sup> It follows that restricting the list of family members permitted to live with Mr Thaçi would not adequately mitigate the identified risks.

67. As to the Defence’s reliance on the right to family life,<sup>135</sup> the Pre-Trial Judge recalls that it has been repeatedly found that all conditions for the pre-trial detention of Mr Thaçi arising from the Law have been established and that there are no conditions that can adequately mitigate the existing risks. In addition, the very reason for establishing the SC was that criminal proceedings against (high-ranking) former KLA members could not be conducted in Kosovo and, as a result, these proceedings were relocated in accordance with the applicable procedure.<sup>136</sup> This means that any alleged interference with Mr Thaçi’s right to family life in the form of restrictions regarding the frequency and duration of family visits or other communications was, pursuant to Article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), in accordance with the law and pursued the legitimate aim of, *inter alia*, the prevention of crime and the protection of the rights and freedoms of others. The Pre-Trial Judge further

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<sup>133</sup> Third Detention Decision, para. 75; Third Court of Appeals Decision, para. 29.

<sup>134</sup> *Similarly, see* KSC-BC-2020-06, IA015/F00005, Court of Appeals, *Decision on Rexhep Selimi’s Appeal against Decision on Remanded Detention Review and Periodic Review of Detention*, 25 March 2022, confidential, para. 37, footnote 90. A public redacted version was issued on the same day, IA015/F00005/RED.

<sup>135</sup> Reply, paras 7-8.

<sup>136</sup> Third Detention Decision, para. 84; Third Court of Appeals Decision, para. 46.

considers that, at the SC Detention Facilities, Mr Thaçi remains fully entitled to receive visits in person from his family members and to communicate with them in other ways. Having regard to the fact that the SC is enabling or assisting Mr Thaçi in maintaining contact with his close family,<sup>137</sup> the Pre-Trial Judge considers that any alleged interference with Mr Thaçi's right to family life was, so far, proportionate to the legitimate aims pursued. It follows that the visiting regime in place at the SC Detention Facilities complies with Article 8 of the ECHR and, therefore, it has not been established that a deviation from the aforementioned findings is required on this basis.

68. Lastly, as to Mr Thaçi's agreement to be re-incarcerated 30 days prior to the commencement of trial following the expiry of the protective measures authorised in the present case, the Pre-Trial Judge recalls that it has determined that the inherently high risk of intimidation or interference for witnesses and/or their family members cannot be effectively mitigated by relying only on protective measures.<sup>138</sup> Considering that the existence of protective measures cannot sufficiently alleviate the identified risks, Mr Thaçi's aforementioned agreement constitutes, by the same token, an inadequate measure for this purpose.

69. Turning to the second Additional Condition, the Pre-Trial Judge, commencing with the possibility of virtual monitoring of visits between Mr Thaçi and pre-approved visitors by the Registry, considers that such monitoring does not offer a degree of protection sufficiently approaching the safeguards provided by live monitoring at the SC Detention Facilities. This is because of: (i) the possibility of a deliberate interference with the technical equipment; (ii) the fact that [REDACTED] virtual monitoring vis-à-vis live monitoring [REDACTED]; and (iii) the possibility of a technical malfunction, especially in view of the distance between the location of house arrest and the Host State. In addition, recalling that

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<sup>137</sup> See, among many others, ECtHR, *Khoroshenko v. Russia* [GC], no. 41418/04, [Judgment](#), para. 106.

<sup>138</sup> Second Detention Decision, para. 38; Third Detention Decision, para. 44.

it has been found that the dispatch of SC Detention Facilities staff is neither a reasonable nor an adequate measure for the present purpose, any breach of the conditions of house arrest occurring during such a visit, would have to be reported by the Registry to EULEX or the Kosovo Police so that remedial action may be taken. [REDACTED]. In any event, the virtual monitoring of visits between Mr Thaçi and pre-approved visitors by the SC Registry would not remedy the fact that, as set out above, [REDACTED]. As to the proposal regarding the obligatory monitoring of the mobile telephones of the persons visiting Mr Thaçi, it is recalled that it has been found that, [REDACTED].<sup>139</sup> In view of these shortcomings, restricting the number of pre-approved visitors is also inadequate. Accordingly, the Defence's second Additional Condition cannot sufficiently mitigate the identified risks.

70. The Pre-Trial Judge is further of the view that the third Additional Condition is necessarily insufficient to mitigate the identified risks in view of the fact that it has been established that [REDACTED].

71. With regard to potential additional measures, and recalling that the obligation for the Pre-Trial Judge to inquire and evaluate, *proprio motu*, all reasonable conditions and not just those raised by the Defence, is not limitless,<sup>140</sup> the Pre-Trial Judge considers that, on the basis of the available information, no additional measures, which could be reasonably considered, could sufficiently mitigate the identified risks.

72. The Pre-Trial Judge recalls that the measures in place at the SC Detention Facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes.<sup>141</sup>

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<sup>139</sup> Third Detention Decision, para. 79.

<sup>140</sup> Third Court of Appeals Decision, para. 51.

<sup>141</sup> Third Detention Decision, para. 81.

Moreover, they offer a controlled environment where a potential breach of confidentiality could be more easily identified and/or prevented.<sup>142</sup> Recalling that it is within the Pre-Trial Judge's discretion to compare the conditions proposed by the Defence with the conditions in the SC Detention Facilities,<sup>143</sup> the Pre-Trial Judge remains persuaded that it is only through the communication monitoring framework applicable at the SC Detention Facilities that Mr Thaçi's communications can be restricted in a manner to sufficiently mitigate the aforementioned risks. Accordingly, the Pre-Trial Judge finds that the Additional Conditions and any other conditions imposed by the Pre-Trial Judge are insufficient to mitigate the risk of Mr Thaçi obstructing the progress of SC proceedings or committing further crimes.

73. Insofar as the Defence reiterates its proposal that Mr Thaçi be released into the territories of [REDACTED], the Pre-Trial Judge recalls the finding that no additional conditions, including those proposed by [REDACTED] or any other conditions that might be implemented either in [REDACTED], could sufficiently address the risks posed by Mr Thaçi.<sup>144</sup> Seeing as the Defence does not raise any new arguments in this regard, the Pre-Trial Judge, recalling that there is no obligation to revisit arguments already adjudicated in the context of previous detention decisions and noting the absence of any intervening developments regarding this question, finds that the aforementioned conclusion continues to hold true for the purposes of the present decision.

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<sup>142</sup> Third Court of Appeals Decision, para. 31.

<sup>143</sup> Third Court of Appeals Decision, para. 27.

<sup>144</sup> Second Detention Decision, para. 55; Second Court of Appeals Decision, para. 65; Third Detention Decision, para. 91.



## F. PROPORTIONALITY OF DETENTION

### 1. Submissions

74. According to the Defence, Mr Thaçi's detention can no longer be considered proportionate.<sup>145</sup> It submits that the time taken by the SPO to meet its Rule 102(3) disclosure obligations is delaying the proceedings.<sup>146</sup> The Defence adds that there will be a tipping point at which continued detention stops being reasonable on the basis that: (i) Mr Thaçi, who voluntarily paved the way for his own surrender, has already been incarcerated for 17 months; (ii) the possibility of a lengthy custodial sentence in the event of a conviction can only carry limited weight given that Mr Thaçi benefits from the presumption of innocence; and (iii) incomplete SPO disclosure points to the pre-trial process continuing for months to come and, once disclosure is completed, the Defence must still be given time for its review.<sup>147</sup> The Defence is also of the view that Rule 56(2) of the Rules obliges the Pre-Trial Judge to act in advance of the detention becoming unreasonable and the fact that the trial will not begin in the coming period is relevant to the Pre-Trial Judge's obligation to anticipate detention becoming illegal.<sup>148</sup>

75. The SPO responds that, taking all factors into consideration, Mr Thaçi's detention continues to be reasonable.<sup>149</sup> Besides the findings set out in the Third Court of Appeals Decision in connection with the proportionality of Mr Thaçi's continued detention, the SPO refers to the filing of the Pre-Trial Brief and the ongoing disclosure since the Third Detention Decision.<sup>150</sup> The SPO adds that a great deal of the time necessary to process documents for disclosure is related to

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<sup>145</sup> Request, paras 7, 26.

<sup>146</sup> Request, paras 19-21.

<sup>147</sup> Request, paras 22-23, 25.

<sup>148</sup> Request, para. 24.

<sup>149</sup> Response, para. 19.

<sup>150</sup> Response, para. 19.

the very concerns around witness interference and intimidation that the Pre-Trial Judge and the Court of Appeals have held compel detention.<sup>151</sup>

76. The Defence replies that: (i) the SPO continues to disclose its Rule 102(2)(b) [sic] material intermittently and on a disorganised basis; (ii) the Defence has been disclosed only a limited amount of Rule 103 material, in comparison with the volume of incriminating material; and (iii) the Defence also awaits the disclosure of a significant number of items pursuant to Rule 102(3) of the Rules.<sup>152</sup>

## 2. Discussion

77. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention – as reflected in Rule 56(2) of the Rules.<sup>153</sup> The duration of time in detention pending trial is a factor that needs to be considered along with the degree of the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention “stops being reasonable” and the individual needs to be released.<sup>154</sup> However, the question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features.<sup>155</sup>

78. Mr Thaçi was arrested on 5 November 2020 and, as a result, he has been detained for more than eighteen months at the time of the present review of his

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<sup>151</sup> Response, para. 20.

<sup>152</sup> Reply, para. 13.

<sup>153</sup> KSC-BC-2020-07, IA001/F00005, Court of Appeals, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

<sup>154</sup> Similarly KSC-BC-2020-06, IA002/F00005/RED, Court of Appeals, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 69.

<sup>155</sup> ECtHR, [Buzadji v. the Republic of Moldova \[GC\]](#), para. 90.

detention. Accordingly, the Pre-Trial Judge will assess whether this period of time is reasonable in the specific circumstances relating to Mr Thaçi.

79. The Pre-Trial Judge recalls that the charges levelled against Mr Thaçi are of the utmost gravity and a serious sentence could be imposed in the event of a conviction.<sup>156</sup> Mr Thaçi's right to be presumed innocent does not detract from the relevance of these considerations for the purposes of the present decision. It is further recalled that the proceedings against Mr Thaçi are complex in view of the facts that: (i) the purported crimes extended over a lengthy period of time (from at least March 1998 through September 1999), covered a significant geographical area (numerous locations throughout Kosovo and different districts in northern Albania) and involved scores of victims; (ii) the SPO preliminarily indicated that it intends to rely upon a significant number of witnesses; and (iii) the protective measures required to be implemented in relation to witnesses, victims and others at risk on account of the testimony to be provided by witnesses are extensive.<sup>157</sup> Lastly, as determined above, the risks that Mr Thaçi, if released, will obstruct the progress of SC proceedings or commit further crimes continue to exist, and these risks cannot be sufficiently mitigated by means of less restrictive measures.<sup>158</sup>

80. The Pre-Trial Judge further observes that, following the Third Detention Decision, substantial procedural steps have been completed with a view to transmitting the case to trial in the future. In particular: (i) the SPO's Pre-Trial Brief as well as the chart according to Rule 109(c) of the Rules have been filed;<sup>159</sup> (ii) the SPO completed its disclosure under Rule 102(1)(b) of the Rules;<sup>160</sup> (iii) the

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<sup>156</sup> Third Detention Decision, para. 97; Third Court of Appeals Decision, paras 66, 69-70.

<sup>157</sup> Third Detention Decision, para. 98; Third Court of Appeals Decision, paras 66, 69-70.

<sup>158</sup> See paras 61-71 above.

<sup>159</sup> KSC-BC-2020-06, F00709, Specialist Prosecutor, *Prosecution Submission of Corrected Pre-Trial Brief and Related Request*, 24 February 2022, public, Annexes 1 and 3, strictly confidential and *ex parte*, and Annex 2, confidential; F00663, Specialist Prosecutor, *Prosecution Submission of Rule 109(c) Chart*, 28 January 2022, public, with Annex 1, strictly confidential and *ex parte* and Annex 2, confidential redacted.

<sup>160</sup> KSC-BC-2020-06, F00670, Specialist Prosecutor, *Prosecution Notice of Rule 102(1)(b) Disclosure and Related Requests*, 31 January 2022, strictly confidential and *ex parte*, para. 1, with Annexes 1-9, strictly

SPO completed its review of the Rule 103 material in its possession at the date of 31 January 2022;<sup>161</sup> (iv) the SPO shall complete its review of Rule 103 material that was obtained after 31 January 2022 and to file protective measure requests or disclose such material by 30 June 2022;<sup>162</sup> (v) the SPO, in relation to currently pending Defence requests for the disclosure of Rule 102(3) material shall finalise its processing of these requests, request protective measures or submit materiality challenges, and disclose all material not subject to protective measures requests or materiality challenges by 30 September 2022;<sup>163</sup> (vi) the Pre-Trial Judge ordered the Defence to file its pre-trial brief by 21 October 2022 with a view to transmitting the case in the following weeks to the trial panel;<sup>164</sup> and (vii) discussions on ways to streamline the case are ongoing.<sup>165</sup> In view of these developments, the Pre-Trial Judge is not persuaded that the continued detention of Mr Thaçi has become unreasonable on account of the disclosure process.

81. On this basis, the Pre-Trial Judge concludes that, for the purposes of the periodic review of the detention of Mr Thaçi pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, the time Mr Thaçi has spent in pre-trial detention is not disproportionate. Furthermore, any discussion regarding the expected total length of Mr Thaçi's pre-trial detention remains premature and speculative. In this context, the Pre-Trial Judge observes that, while no start date of the trial has been established at this point in time, Mr Thaçi's detention shall be reviewed every two

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confidential and *ex parte*. A confidential redacted version was filed on the same day, F00670/CONF/RED; *see also* Transcript of Hearing, 24 March 2022, public, p. 1067, line 24 to p. 1068, line 13.

<sup>161</sup> KSC-BC-2020-06, Transcript of Hearing ("20 May 2022 Transcript"), 20 May 2022, public, p. 1224, line 23 to p. 1226, line 16.

<sup>162</sup> 20 May 2022 Transcript, p. 1323, lines 10-14.

<sup>163</sup> 20 May 2022 Transcript, p. 1323, lines 18-24.

<sup>164</sup> 20 May 2022 Transcript, p. 1324, lines 3-5.

<sup>165</sup> *See, for example*, 20 May 2022 Transcript, p. 1299, line 16 to p. 1319, line 11; KSC-BC-2020-06, F00810, Krasniqi Defence, *Krasniqi Defence Proposal for Streamlining the Case*, 20 May 2022, confidential.

months or as soon as a change in circumstances arises pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules.<sup>166</sup>

## V. DISPOSITION

82. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **REJECTS** the Defence's request for an oral hearing;
- b) **ORDERS** Mr Thaçi's continued detention;
- c) **ORDERS** the Defence, if it wishes to do so, to file submissions on the next review of Mr Thaçi's detention by no later than **Wednesday, 29 June 2022**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- d) **ORDERS** the SPO, should the Defence decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of Mr Thaçi's detention by no later than **Wednesday, 6 July 2022**, and the Defence, if it wishes to do so, to file their submissions by no later than **Monday, 18 July 2022**; and
- e) **ORDERS** the Defence to submit public redacted versions of the Request and the Reply by no later than **Friday, 3 June 2022**.



**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Thursday, 26 May 2022

At The Hague, The Netherlands.

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<sup>166</sup> Third Detention Decision, para. 101; Third Court of Appeals Decision, paras 67-68.