

In: KSC-BC-2013-12
Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Thaçi Response to Prosecution Submissions on Review of Detention of Hashim Thaçi

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I. INTRODUCTION

1. Pursuant to Article 41 of the Law¹ and Rule 57 of the Rules², the Defence for Mr Hashim Thaçi (the “Defence”) hereby files this response to the recent SPO submissions on the review of the detention of Mr Thaçi.³ The Pre-Trial Judge (“PTJ”) invited the Defence to file a response, if it so wished, by 28 January 2025,⁴ which the Defence does herein. The Defence requests the PTJ to find that Mr Thaçi’s continued detention is not justified at this time based on the risk of flight pursuant to Article 40(6)(b)(i).

II. PROCEDURAL BACKGROUND

2. On 29 November 2024, the PTJ partly confirmed an indictment against Messrs Thaçi, Smakaj, Kilaj, Fazliu and Kuçi in a strictly confidential and *ex parte* Decision.⁵

3. On the same day, the PTJ ordered Mr Thaçi’s arrest and detention at the KSC Detention Facilities in the Hague.⁶

4. On 2 December 2024, the SPO filed the indictment as confirmed (“Indictment”).⁷

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

³ KSC-BC-2023-12/F00124, Prosecution Submissions on Review of Detention of Hashim Thaçi, 21 January 2025 (“SPO Submissions”).

⁴ KSC-BC-2013-12, Transcript (Initial Appearance of Hashim Thaçi), 8 December 2024, Page 18 Line 11 to Page 19 Line 15 (“Oral Order”).

⁵ KSC-BC-2023-12/F00036, Decision on the Confirmation of the Indictment, 29 November 2024, strictly confidential and *ex parte* (“Confirmation Decision”). It was reclassified as confidential on 13 December 2024.

⁶ KSC-BC-2023-12/F00037/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Related Matters, 29 November 2024 (“Decision on Arrest and Transfer”). The public redacted version was filed on 19 December 2024.

⁷ KSC-BC-2023-12/F00040, Submission of Confirmed Indictment, with Annex 1, 2 December 2024.

5. On 5 December 2024, Mr Thaçi was served with the Indictment⁸ at the KSC Detention Facilities.

6. On 8 December 2024, Mr Thaçi had his initial appearance before the Pre-Trial Judge.⁹

7. At that hearing, the PTJ issued an Oral Order confirming Mr Thaçi's detention. The Defence refrained from making any substantial submissions on the matter considering that it was "academic exercise". This was because (as stated by Counsel), Mr Thaçi was already remanded into custody in Case 06, therefore any application for provisional release would be moot at that stage.¹⁰ However, the Defence observed that in her Decision on Arrest and Transfer, the PTJ had found that Mr Thaçi was a flight risk, a fact that had never been found by the Panel in Case 06, who had remanded him in custody on that case.¹¹

8. In her Oral Order, the PTJ invited the Defence to file submissions on the next regular review of detention by 15 January 2025, should it wish. The Defence did not file any submissions. Should the Defence not make submissions in that time limit, the PTJ ordered the SPO to file its submissions by 21 January 2025 and the Defence to respond, if it so wished, by 28 January 2025.

III. APPLICABLE LAW

⁸ KSC-BC-2023-12/F00059, Decision Setting the Date for Initial Appearances and Related Matters, 6 December 2024, para. 4.

⁹ KSC-BC-2023-12, Transcript (Initial Appearance of Hashim Thaçi), 8 December 2024.

¹⁰ KSC-BC-2023-12, Transcript (Initial Appearance of Hashim Thaçi), 8 December 2024, pp. 15-16, 18. The Defence reserved their position to make submissions in due course.

¹¹ KSC-BC-2023-12, Transcript (Initial Appearance of Hashim Thaçi), 8 December 2024, pp. 15-16.

9. The KSC statutory regime establishes a presumption in favour of an accused being at liberty. Arrest and detention are justified only when established criteria, set out in Article 41(6) of the Law, are satisfied.

10. Pursuant to Articles 41(6)(a) and (b) of the Law, detention requires a grounded suspicion that an accused committed a crime within the KSC's jurisdiction; and 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 they have threatened to commit.

11. Following an appeal by Mr. Thaçi, the Appeals Panel accepted¹² the Defence's position that detention cannot be justified on the basis of **any** possibility of a risk materialising.¹³ Rather, the risk must be 'real', with the standard requiring less than certainty, but more than mere possibility.¹⁴

12. The requirement that the PTJ examine, every two months,¹⁵ whether the reasons for detention still exist, reflects the exceptional nature of pre-trial detention, and how quickly the circumstances previously accepted as justifying detention can change.

¹² KSC-BC-2020-06/IA004/F00005, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 ("Appeal Decision").

¹³ See, e.g., KSC-BC-2020-06/IA004/F00004, Thaçi Defence Reply to "SPO Response to Thaçi Defence Appeal of Decision against 'Decision on Hashim Thaçi's Application for Interim Release'", 22 February 2021, para. 49; Appeal Decision, paras. 21-24.

¹⁴ See, e.g. KSC-BC-2020-06/IA004/F00001, Thaçi Defence appeal against the "Decision on Hashim Thaçi's Application for Interim Release" With Public Annexes 1 and 2, 3 February 2021 ("Appeal"), para. 12 and the authorities cited therein; Appeal Decision, para. 22. See also, Appeal Decision, para. 24.

¹⁵ KSC Law, Article 41(10).

IV. SUBMISSIONS

13. In light of its concerns about the fragmentation of the trial record and inconsistent judicial decisions being made in Cases 06 and 12 *on the same facts*, the Defence restricts its submissions in this response to the SPO's submissions on Mr Thaçi's risk of flight pursuant to Article 41(6)(b)(i), where the PTJ in Case 12 and the Trial Panel in Case 06 have reached opposite findings on the same factual circumstances.

14. At the outset, the Defence notes that in the SPO Submissions, the SPO largely repeats (with approval) the findings of the PTJ in her Decision on Arrest and Transfer.¹⁶

15. First, the SPO relies on the PTJ's consideration that the gravity of the offences charged in Case 12 and the potential sentence they attract provide a motive for Mr Thaçi to evade justice.¹⁷ In this regard, the Defence recalls Trial Panel II's findings in Case 06 on 13 December 2024 (thus after his initial appearance in Case 12) that:

Regarding the SPO's argument that the risk of flight is heightened given that Mr Thaçi is now aware that the SPO has gathered evidence against him of obstruction, the Panel notes that Mr Thaçi already faces charges relating to core international crimes, and the new evidence which allegedly relates to obstruction does not constitute a significant change in circumstances justifying a different finding on risk of flight. The Panel notes that the SPO has previously made this argument in respect of Mr Thaçi, and the Panel has already rejected it.¹⁸

16. The Defence submits that the Panel in Case 06 was correct and that Mr Thaçi already faces charges in respect of core international crimes that, if convicted, could

¹⁶ SPO Submissions, para. 14, 16.

¹⁷ SPO Submissions, para. 14, 16.

¹⁸ KSC-BC-2020-06/F02781, Decision on Periodic Review of Detention of Hashim Thaçi, 13 December 2024, para. 15 ("Case 06 Detention Review Decision").

attract a greater custodial sentence than the charges in the instant case. Therefore, the Defence rejects the SPO submission that the gravity of the offences in the instant case and their potential sentence establish a real risk of flight, in circumstances where the Trial Panel in Case 06 has already considered that they do not.

17. Second, it is important to recall that Mr Thaçi has pleaded not guilty to the charges in Case 12¹⁹ and that the fact that an indictment has been confirmed should not be confused with a conviction on the same when assessing flight risk. Therefore the SPO submission (echoing the PTJ's finding) that the nature of the confirmed charges underlines that Mr Thaçi has demonstrated *mala fide* intentions towards the laws and rules of the KSC should be rejected in order that the presumption of innocence be preserved.²⁰

18. Third, as stated by the PTJ in her Decision on Arrest and Transfer, Mr Thaçi's current detention in Case 06 "is part of his personal circumstances" in the context of Case 12 and can have a bearing on the assessment of the risks under Article 41(6)(b)(i) of the Law.²¹ This, the Defence submits is a matter of common sense. Accordingly, unless Mr Thaçi ceases being detained in Case 06, the SPO's submission, (agreeing with the PTJ's finding) that Mr Thaçi has the means and opportunity to flee by travelling freely beyond the reach of the SPO is nonsensical, as he was already in custody in Case 06 at the date of his arrest and remand into custody in Case 12. As long as he continues to be remanded in custody in Case 06 'fleeing' is not a realistic concern in Case 12.²²

¹⁹ KSC-BC-2020-06-F00103, Thaçi Defence Notice of Mr Hashim Thaçi's Plea With Public Annex 1, 6 January 2025.

²⁰ SPO Submissions, para. 14.

²¹ Decision on Arrest and Transfer, para. 45.

²² Case 06 Detention Review Decision.

19. Fourth, the SPO's agreement with the PTJ's finding that Mr Thaçi has the means to evade justice in light of his previous political positions, which he can leverage to flee, again belies the reality, as stated above, that he is remanded in custody in Case 06 and thus not at liberty to do such a thing.²³ To this end it is also worth recalling that the Trial Panel in Case 06 noted:

the Panel has **credited** Mr Thaçi with cooperation because when he was informed of his arrest warrant, he resigned from the position of President of Kosovo and subjected himself voluntarily to the jurisdiction of the SC.²⁴ (emphasis added).

20. Further, the Defence notes that the SPO's arguments that relate to Mr Thaçi's previous roles in the KLA as being factors that indicate a risk of flight²⁵ are highly problematic as they are central matters in issue in Case 06. The Defence submits that the SPO and PTJ should refrain from discussing them in the context of this case, as to do so would potentially cause Mr Thaçi prejudice in Case 06. As submitted at the initial appearance, the Defence is concerned that the PTJ made findings of fact in relation to central matters in issue in Case 06 (such as Mr Thaçi's role in the KLA) in the context of assessing his flight risk in Case 12.²⁶ Accordingly, the Defence is not going to address these arguments here as this is not the proper forum.

21. Finally, the Defence notes that the SPO submission that the risk of flight increases in accordance with an accused's increased knowledge of the case and evidence against him²⁷ has already been rejected in principle as an unpersuasive argument in Case 06.²⁸ The Defence sees no reason why the same argument should be persuasive in Case 12.

²³ SPO Submissions, para. 14, 16.

²⁴ Case 06 Detention Review Decision, para. 16.

²⁵ SPO Submissions, para. 14, 16.

²⁶ Decision on Arrest and Transfer, para. 48; KSC-BC-2023-12, Transcript (Initial Appearance of Hashim Thaçi), 8 December 2024, pp. 15-16.

²⁷ SPO Submissions, para. 15.

²⁸ Case 06 Detention Review Decision, para. 14

22. The Defence notes that the PTJ assessed the risks under Article 41(6)(b)(i) of the Law independently from the competent panel in Case 06.²⁹ However, it is important that in so doing, the trial record in both cases doesn't become fragmented and inconsistent decisions rendered by different benches on the same facts and circumstances as Case 12 progresses.

23. For these reasons, the Defence submits that the SPO's submissions that Mr Thaçi's risk of flight is a sufficiently real possibility should be rejected.

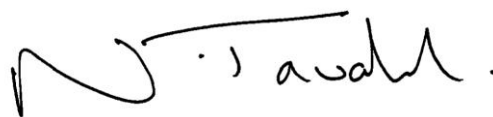
V. CONCLUSIONS

24. Accordingly, the Defence respectfully requests that in her review of Mr Thaçi's detention, the PTJ :

- FIND that Mr Thaçi's continued detention is not justified at this time based on the risk of flight pursuant to Article 40(6)(b)(i).

[Word count: 1975 words]

Respectfully submitted,



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Tuesday, 28 January 2025

At The Hague, The Netherlands

²⁹ Decision on Arrest and Transfer, para. 45