



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

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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I. INTRODUCTION

1. Pursuant to the Order,¹ the Specialist Prosecutor's Office ('SPO') hereby files further submissions. Consistent with the Arrest Warrant Request,² (i) the Specialist Chambers ('SC') have authority to issue and enforce an arrest warrant and transfer order against Hashim THAÇI; and (ii) Mr THAÇI's arrest and detention is necessary. No alternative measure adequately mitigates concrete risks that he will flee, obstruct proceedings, interfere with witnesses and victims, and commit further crimes.

II. SUBMISSIONS

A. THE SC HAVE AUTHORITY TO ARREST MR THAÇI

2. As set out below, pursuant to the plain language of controlling provisions of the Constitution³ and Law,⁴ the SC have authority to issue and enforce an arrest warrant and transfer order against Mr THAÇI. Such a finding does not require the Pre-Trial Judge to invalidate the Immunities Decision,⁵ which was issued prior to amendment of the Constitution and is inapplicable to the SC. Any finding to the contrary would lead to an absurd result. Indeed, were the SC to find that it does not have the authority to arrest and detain Mr THAÇI, then a summons to appear, or other related conditions, would ultimately also be unenforceable.

¹ Order to the Specialist Prosecutor for Further Submissions, 12 October 2020, KSC-BC-2020-06/F00020, Strictly Confidential and *Ex Parte* ('Order').

² Request for arrest warrants and related orders, 28 May 2020, KSC-BC-2020-06/F00005, Strictly Confidential and *Ex Parte* ('Arrest Warrant Request').

³ Constitution of the Republic of Kosovo ('Constitution').

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

⁵ Kosovo, Constitutional Court, Case No. KO-98/11, Judgment Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo, 20 September 2011 ('Immunities Decision').

(i) The Constitution and Law expressly provide authority to arrest Mr THAÇI

3. Article 16(1)(b), which reflects customary international law,⁶ provides for the SC's jurisdiction over, *inter alia*, heads of state or government, such as Mr THAÇI.⁷ Pursuant to Article 41 of the Law and Article 162(8) of the Constitution,⁸ 'any persons accused of crimes before the Specialist Chambers may be detained on remand and transferred to the Specialist Chambers sitting outside the territory of Kosovo.'⁹ Article 162 of the Constitution is expressly stated to apply '[n]otwithstanding any provision in this Constitution', and therefore the plain language of Article 162(8) is controlling in this matter.

4. The SC's powers to, as necessary, exercise its jurisdiction through arrest and detention must also be (i) read together with Article 16(1)(b);¹⁰ and (ii) interpreted in light of the obligation on all states to effectively prevent, investigate, and prosecute serious violations of international law, including the crimes against humanity and war crimes alleged in this case.¹¹ Fair and effective proceedings must be organised in a manner that

⁶ Article 16(1)(b) closely mirrors the language of other courts concerning the inapplicability of head of state immunity in the investigation and prosecution of international crimes and should therefore be interpreted consistently. See ICC, Appeals Chamber, *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019 ('*Al-Bashir* Appeal Decision'), paras 103-119 and the sources cited therein. See also para.4 below (concerning the obligation on all states to effectively prevent, investigate, and prosecute serious violations of international law).

⁷ See also Constitution, Articles 89, 162(1) (providing that the organisation, functioning, and jurisdiction of the Specialist Chambers and SPO shall be regulated by Article 162 of the Constitution and 'by a specific law'); KSC-BC-2020-06/F00020, para.7; Immunities Decision, para.122.

⁸ See also Article 39(3); Constitution, Article 162(4).

⁹ Emphasis added. The Kosovo Constitutional Court has found that this provision is compatible with Chapters II-III of the Constitution. See Kosovo, Constitutional Court, Case No.KO26/15, Judgment on Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, 15 April 2015, paras 89-90.

¹⁰ See, *similarly*, *Al-Bashir* Appeal Decision, para.122.

¹¹ ECtHR, Grand Chamber, *El-Masri v. The Former Yugoslav Republic of Macedonia*, No.39630/09, Judgment, 13 December 2012 ('*El-Masri* Judgment'), para.192; ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005 (reprinted with corrections in 2009), Rule 158. See also Council of Europe, Guidelines

does not unjustifiably threaten the rights of witnesses and victims, including to life, liberty, and security, or the interests of the public and victims that crimes are ‘properly prosecuted’.¹² To ensure fair and effective proceedings in this case,¹³ arrest and detention are necessary powers¹⁴ to address concrete risks of Mr THAÇI’s flight, obstruction of proceedings, interference with witnesses and victims, and commission of further crimes.¹⁵

5. If Mr THAÇI were immune from arrest or detention, the SC’s ability to exercise its jurisdiction would depend on the voluntary cooperation of a person with the incentives, motives, means, and opportunity to interfere with the administration of justice. This absurd result would undermine the SC’s mandate¹⁶ and reduce Article 16(1)(b) to a theoretical concept subject to Mr THAÇI’s whims.¹⁷

on Eradicating impunity for serious human rights violations, 2011 (‘CoE Guidelines’), p.5, Article V; *Al-Bashir* Appeal Decision, para.123 and the sources cited therein.

¹² ECtHR, *Doorson v. The Netherlands*, No.20524/92, Judgment, 26 March 1996, para.70; ECtHR, *Schatschaschwili v. Germany*, No.9154/10, Judgment, 17 April 2014, para.70.

¹³ Effective and fair investigations and prosecutions must:

- (i) be capable of leading to the identification and punishment of those responsible and reasonable steps must be taken to secure relevant evidence (*see* Articles 35, 38, 39(3); ECtHR, *Jordan v. UK*, No.24746/94, Judgment, 4 May 2001, para.107; ECtHR, Grand Chamber, *Öneryildiz v. Turkey*, No.48939/99, Judgment, 30 November 2004, paras 95-96; CoE Guidelines, Articles VI, VIII); and
- (ii) provide, at all stages of the proceedings, necessary protection measures for the physical and psychological integrity of, *inter alia*, victims and witnesses, including to ensure that they are not intimidated, subject to reprisals, or dissuaded by other means from participating in the proceedings (*see* Articles 23, 35(2)(f), 39(11), 40(6)(f); CoE Guidelines, Article VII(6). *See also* ECtHR, *Opuz v. Turkey*, No.33401/02, Judgment, 9 June 2009, paras 159-162 (concerning the obligation to take measures designed to ensure that victims are not subjected to further victimisation through ill-treatment and physical and psychological violence); ECtHR, Grand Chamber, *Osman v. UK*, No.23452/94, Judgment, 28 November 1998, paras 115-116 (concerning the authorities’ obligation, if they know of real and immediate risk to life and security, ‘to take measures within the scope of their powers, which, judged reasonably, might [be] expected to avoid that risk’)).

¹⁴ Constitution, Article 162(4) (the SC and SPO ‘shall have full legal and juridical personality and shall have all the necessary powers and mandate for their operation, judicial co-operation, assistance, witness protection, security, [and] detention [...]’); Article 39(3). As to the fundamental nature of arrest powers, *see, similarly, Al-Bashir* Appeal Decision, para.190.

¹⁵ Article 41(6). *See also* Arrest Warrant Request, KSC-BC-2020-06/F00005, Sections II-III; Section II(B) below.

¹⁶ Article 1(2).

¹⁷ *See, similarly, Al-Bashir* Appeal Decision, paras 122, 124.

(ii) The Immunities Decision does not apply

6. The Immunities Decision does not apply here, for several reasons. First, as it was issued in 2011, it precedes adoption of Article 162 of the Constitution in 2015 and therefore does not address or impact on the SC's express authority under the Constitution and Law to arrest and detain Mr THAÇI. Second, knowledge of the Immunities Decision is fairly attributable to the legislators who enacted Article 162 of the Constitution, and their failure to create the exception the Immunities Decision contemplates may be read as a rejection of it. Third, Article 162 of the Constitution was expressly stated to apply notwithstanding any other constitutional provision, thereby erasing any doubt on the matter. For all of these reasons, the Immunities Decision does not apply and a finding that the SC has authority to arrest and detain Mr THAÇI does not necessitate any invalidation of it.

7. Further, it is noted that the reasoning in the Immunities Decision relating to the President's arrest and detention is not grounded in the language of the Constitution, and is inconsistent and flawed.

8. As found in the Immunities Decision, Article 91(1) of the Constitution acknowledges that a President may be convicted of a serious crime, which 'must inevitably follow a criminal investigation and trial'.¹⁸ As required by Chapter II of the Constitution and the European Convention on Human Rights, such investigations and trials must be effective and fair, balancing the rights of accused with the interests and rights of victims, witnesses, and the public.¹⁹ In some circumstances – like those in the instant case, where, amongst other things, very grave crimes are at issue – arrest and detention are a necessary and proportional means of ensuring fair and effective investigations and proceedings.²⁰ The Immunities Decision was therefore in error insofar

¹⁸ Immunities Decision, para.122.

¹⁹ See Section II(A)(i) above.

²⁰ See Section II(A)(i) above.

as it found that the President could be investigated and tried, but not arrested or detained, as such findings are potentially incompatible and a categorical bar to arrest or detention of the President is unconstitutional.

9. Indeed, while the Constitution does address the question of functional immunity of the President,²¹ nowhere is immunity from arrest and detention provided for in respect of crimes falling outside the scope of the President's functional immunity.²² The Immunities Decision was simply, and erroneously, founded on an assertion that 'the President must be permanently available to execute the functions of the institutions and with matters of state'.²³ This reasoning ignores Article 90(2) of the Constitution, which provides for circumstances where there is no voluntary transfer of power and the appointment of an Acting President.²⁴ Other provisions provide for the President's dismissal²⁵ or voluntary transfer of power to an Acting President.²⁶ The Kosovo Constitutional Court has also indicated that Article 90 of the Constitution should be interpreted so that certain, important powers of an absent President may be exercised by the Acting President, including in times of emergency and in relation to the proper and orderly running of the state.²⁷ While Article 90(3) of the Constitution does provide that

²¹ Constitution, Article 89.

²² Notably, other provisions of the Constitution regulate the arrest and detention of Assembly members (Article 75(2)) and judges (Article 107(3)). This suggests that if the drafters had intended to regulate arrest and detention of the President or grant him/her immunity therefrom, they would have included express provisions doing so.

²³ Immunities Decision, para.125.

²⁴ While Article 90(2) of the Constitution refers to consultation with 'the medical consultants team', it does not limit the circumstances in which the President may be temporarily unavailable. Insofar as Article 9(2) of Law No.03/L-094 on the President of the Republic of Kosovo appears to limit such circumstances, it cannot be interpreted in a manner that contradicts the plain language of the Constitution.

²⁵ Constitution, Article 91.

²⁶ Constitution, Article 90(1).

²⁷ Kosovo, Constitutional Court, Case Nos.K.O.29/12 and K.O.48/12, Judgment on Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, 20 July 2012, paras 160-171.

the position of Acting President may not be exercised for more than six months, Mr THAÇI's term of office is, in any event, due to expire within that time frame.

B. MR THAÇI'S ARREST AND DETENTION IS NECESSARY

10. For the reasons given in the Arrest Warrant Request, there is grounded suspicion that Mr THAÇI committed crimes within the SC's jurisdiction and that his arrest and detention are necessary to address risks of flight, obstruction of proceedings, interference with witnesses and victims, and commission of further crimes.²⁸ No alternative measures adequately address the risks. Indeed, as also noted above, were the SC to find that it does not have the authority to arrest and detain Mr THAÇI, then a summons to appear, or other related conditions, would ultimately also be unenforceable.

11. While certain, general information concerning the submitted, unconfirmed indictment has been publicly announced, Mr THAÇI's incentives to flee, obstruct proceedings, and commit further crimes will drastically increase once he is informed of the confirmed indictment and the details of the confirmed charges, which may entail a sentence of life imprisonment.²⁹ These incentives will further increase as the proceedings progress and Mr THAÇI learns the scope of the evidence against him. In addition to strong incentives, Mr THAÇI also has the opportunity and means to flee, obstruct proceedings, interfere with witnesses and victims, and commit further crimes.

12. Due to his past and current positions, Mr THAÇI wields enormous influence over former KLA members and Kosovo in general, has access to significant funds,³⁰ and has the means and opportunity to travel legally or illegally to countries with no obligation to transfer him to the SC.³¹

²⁸ Arrest Warrant Request, KSC-BC-2020-06/F00005, Sections II-III.

²⁹ Arrest Warrant Request, KSC-BC-2020-06/F00005, para.31.

³⁰ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 4, 32, 34-35.

³¹ Arrest Warrant Request, KSC-BC-2020-06/F00005, para.33.

13. Mr THAÇI has the ability to manipulate government bodies and obstruct proceedings, and to mobilise support bases, including former subordinates and groups like the Kosovo Liberation Army War Veterans Association ('KLA WVA').³² Indeed, former KLA members and members of the KLA WVA have actively opposed the SC and prior attempts to prosecute former KLA members accused of war crimes.³³ These activities have continued since the filing of the Arrest Warrant Request.³⁴ This support network has resulted in persons perceived as being against the KLA and/or Hashim THAÇI being subjected to severe backlash, including threats to their lives and security.³⁵

14. Persons loyal to Mr THAÇI have also overseen corrupt government pay-outs to potential SPO witnesses.³⁶ Through these same persons, Mr THAÇI has actively sought and obtained information concerning, and taken other measures to obstruct, the SPO's investigations and influence witnesses.³⁷ Mr THAÇI has a long record of hostility to accountability for crimes committed during the war. Indeed, he is accused of committing crimes through a joint criminal enterprise targeting real or perceived opponents to the KLA and failing to investigate his subordinates' crimes against opponents.³⁸

15. Finally, the following factors also increase the concrete risks of Mr THAÇI's liberty: (i) the complexity of the investigations and upcoming proceedings;³⁹ (ii) the endemic climate of severe witness interference and intimidation in previous

³² Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 4-5. [REDACTED].

³³ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 5-10, 35.

³⁴ Decision on Request for Arrest Warrants and Transfer Orders, 24 September 2020, KSC-BC-2020-07/F00012, paras 21-24.

³⁵ As an example, the [REDACTED] drew attention to the case of [REDACTED]. [REDACTED] has been receiving death threats [REDACTED] in relation to his alleged criticism of Hashim THAÇI. *See* [REDACTED]. *See also* Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 5, 7.

³⁶ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 10-11.

³⁷ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 7, 12-17.

³⁸ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 6, 40.

³⁹ Arrest Warrant Request, KSC-BC-2020-06/F00005, para.34.

investigations and trials involving former KLA members;⁴⁰ and (iii) the existing situation in Kosovo, where the consequences of the war are still felt and the process of normalisation of relations among ethnic and political groups is still ongoing.⁴¹

16. In the above circumstances, detention and the resulting ability to monitor and as necessary, limit⁴² Mr THAÇI's contacts with alleged JCE members and accomplices, victims, witnesses, and his wide network of supporters, including influential persons already actively engaged in efforts to obstruct official SPO/SC proceedings, is necessary to mitigate risks of flight, obstruction of proceedings, interference with witnesses, and commission of further crimes.⁴³ No alternative measures adequately address these risks. Mr THAÇI's past compliance with a summons for a suspect interview⁴⁴ hardly guarantees that he will comply with a summons to appear as an accused for a trial at which he faces a possible sentence of life imprisonment. Even assuming *arguendo* that a summons to appear could address the risk of flight at this stage, grave and concrete risks of obstruction, interference with witnesses and victims, and further crimes would not be mitigated by a summons to appear. Additional conditions imposed in connection with the summons would also ultimately be inadequate, due to the absence of any adequate guarantees of compliance therewith, and, in any event, unenforceable were the SC to find it does not have the authority to arrest and detain Mr THAÇI.

17. Accordingly, balancing the rights and interests of victims, witnesses, and the public with those of Mr THAÇI, detention is a necessary and proportional component of

⁴⁰ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 18-26, 34-35, 40.

⁴¹ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 36-37.

⁴² Registry Practice Direction on Detainees: Visits and Communications, KSC-BD-09/Rev1/2020, 23 September 2020, Articles 4.2, 6-8, 17.

⁴³ Arrest Warrant Request, KSC-BC-2020-06/F00005, paras 33, 38, 40. *See, similarly*, ICC, Appeals Chamber, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on [...]", 26 October 2012, para.80.

⁴⁴ Order, KSC-BC-2020-06/F00020, para.10(b) (requesting submissions concerning the possibility of the SPO requesting, in the alternative, a summons for Mr THAÇI to appear).

effective and fair proceedings in this case. Imposition of inadequate alternative measures may imperil the security and well-being of victims and witnesses, and threaten the proper administration of justice.⁴⁵

III. CLASSIFICATION

18. Pursuant to Rule 82(4) of the Rules,⁴⁶ this filing is strictly confidential and *ex parte*.

IV. RELIEF REQUESTED

19. For the foregoing reasons, the Pre-Trial Judge should:

- a. find that the SC have authority to issue and enforce an arrest warrant against Mr THAÇI; and
- b. issue a warrant for the arrest and order for the transfer of Mr THAÇI, in the terms set out in Sections III and VIII of the Arrest Warrant Request.

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Jack Smith
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Wednesday, 18 November 2020
At The Hague, the Netherlands.

⁴⁵ *El-Masri* Judgment, para.192 (effective investigations and prosecutions of serious human rights violations are 'essential in maintaining adherence to the rule of law and in preventing the appearance of collusion in or tolerance of unlawful acts').

⁴⁶ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').