



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

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

Filing Participant: Specialist Prosecutor

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**Public redacted version of Prosecution response to Application for Interim
Release on behalf of Mr Hashim Thaçi**

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. The THAÇI Release Request¹ should be rejected, and Mr THAÇI ('THAÇI') should remain in detention. As found in the Arrest Warrant Decision,² the criteria for detention under Article 41(6) of the Law³ are satisfied. Those criteria continue to be met and, as discussed below, subsequently discovered information only underscores the seriousness of the risks presented. No alternative measures are sufficient to address these risks.

II. SUBMISSIONS

A. THE APPLICABLE LEGAL FRAMEWORK IN PROPER CONTEXT

2. The Pre-Trial Judge must be satisfied⁴ that: (i) there is a grounded suspicion that THAÇI has committed a crime within the jurisdiction of the Specialist Chambers ('KSC'); and (ii) there are articulable grounds to believe that: (1) there is a risk of flight; (2) THAÇI will obstruct the progress of the criminal proceedings, including by influencing witnesses, victims or accomplices; or (3) the seriousness of the crime, or the manner or circumstances in which it was committed and THAÇI's personal characteristics, past conduct, the environment and conditions in which he lives or other personal circumstances indicate a risk that he will repeat the criminal offence,

¹ Application for Interim Release on behalf of Mr Hashim Thaçi, KSC-BC-2020-06/F00120, 4 December 2020, Confidential ('THAÇI Release Request').

² Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027, 26 October 2020 ('Arrest Warrant Decision'). *See also* Confidential Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, KSC-BC-2020-06/F00005/CONF/RED, 15 November 2020 ('Arrest Warrant Application').

³ 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.

⁴ Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public, ('Appeals Decision'), para.51.

complete an attempted crime or commit a crime which he has threatened to commit.⁵

If these conditions are met, the person shall continue to be detained.⁶

3. The THAÇI Defence places great reliance on the language of Article 41(6),⁷ but its reading is incomplete. Although the Law includes the terms 'is' and 'will' when describing the Article 41(6) criteria, these terms are surrounded by language making it clear that certainty is not remotely required. The Pre-Trial Judge need not conclude that THAÇI 'will' obstruct the investigation, but rather that 'there are articulable grounds to believe' this. Equally, it is not necessary to establish that THAÇI 'will flee' or 'will commit' further crimes, but that there are articulable grounds to believe there is a *risk* of these. As recently confirmed by the Court of Appeals, the relevant assessment is as to the possibility—as opposed to the inevitability—of such future occurrences.⁸

4. On 26 October 2020, the Pre-Trial Judge found the Article 41(6) criteria to be met and THAÇI's detention to be necessary. Pursuant to the THAÇI Release Request and Rule 57(2),⁹ the matter now to be addressed is a review of that decision.¹⁰

B. THE ARTICLE 41(6) RISKS ARE ESTABLISHED

5. For the reasons set out in the Confirmation Decision,¹¹ there is a well-grounded suspicion that THAÇI committed multiple crimes within the jurisdiction of the KSC.

⁵ Article 41(6)(b)(i)-(iii).

⁶ Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.51.

⁷ THAÇI Release Request, KSC-BC-2020-06/F00120, paras 12-13.

⁸ Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.67; Arrest Warrant Decision, para.27.

⁹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

¹⁰ See similarly, Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 37-38.

¹¹ Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, 26 October 2020, Strictly Confidential and *Ex Parte* ('Confirmation Decision').

6. Further, and although just one would suffice, all three Article 41(6)(b) risks are present and no conditions sufficiently mitigate them. The THAÇI Defence's flawed series of attacks on the grounds alleged in the Arrest Warrant Application attempt to compartmentalise each piece of evidence, frequently arguing that an instance of particular conduct was not itself criminal, or that the evidence in question, standing alone, is insufficient to support detention. The point missed is that, when considering all the evidence together, it amply demonstrates the considerable risks that Hashim THAÇI at liberty presents.

7. Equally, the oft-repeated characterisation that the SPO 'rel[ies] primarily on' generalised allegations not specific to THAÇI,¹² is not only inaccurate (as will be discussed in detail below), but proceeds from a flawed premise, namely that evidence of context or the actions of others cannot inform a proper, individualised assessment of the risks posed by an accused. On the contrary, an accused's position or contacts may be considered when determining the likelihood of his returning for trial, threatening witnesses if released or committing further crimes.¹³ Extensive and active support networks can also increase the risk that an accused would use the resources of a support network to flee.¹⁴ Relatedly, where multiple accused have common circumstances, discussing such circumstances together—as done, where relevant, in the Arrest Warrant Application and Arrest Warrant Decision—remains compatible with an individualised assessment.

¹² THAÇI Release Request, KSC-BC-2020-06/F00120, paras 17-19, 30, and 42.

¹³ Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.63 (finding no error in reliance upon a person's position as indicating contacts and a network that 'could create the risk that Gucati may obstruct the proceedings or that he may commit further offences'); ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Judgment on the Appeal of Mr. Lubanga Dyilo Against the Decision of Pre-Trial Chamber 1 Entitled "*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*", 13 February 2007, paras 136-37.

¹⁴ ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-180-Red, Decision on the "*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*", 13 July 2012, para.62.

8. Risks posed by one accused can increase due to his personal actions or to circumstances equally applicable to him and all co-accused. In particular, as acknowledged by the THAÇI Defence,¹⁵ it is entirely proper to consider ‘the known problem of witness intimidation in criminal cases involving former KLA members in Kosovo’, as long as this is not the sole consideration. This persistent climate of witness intimidation, while undeniably a significant concern, is by no means the only circumstance alleged in support of detention.

1. Risk of flight

9. It has been established that a risk of flight exists because: (a) convictions of senior KLA in other cases create an incentive to flee; (b) THAÇI’s current and former positions allow for mobilisation of supporters; (c) of THAÇI’s access to significant funds; (d) of THAÇI’s ability to travel to places with no obligation to transfer him; and (e) the incentive to flee would increase once THAÇI was informed of the confirmed charges in full.¹⁶

10. THAÇI is charged with war crimes and crimes against humanity across over 40 detention sites, including murder and torture. The crimes charged against THAÇI can entail a sentence of life-long imprisonment.¹⁷ This prospect contributes to a persistent risk of flight that will only increase as THAÇI learns the full scope of the evidence against him.¹⁸ It is not ‘misplaced’ to rely on the gravity of the charges or the severity of the potential penalties.¹⁹ As the Court of Appeals recently emphasised: ‘the nature of the offence as well as the severity of the penalty are important factors to

¹⁵ THAÇI Release Request, KSC-BC-2020-06/F00120, para.20.

¹⁶ Arrest Warrant Decision, KSC-BC-2020-06/F00027, para.28. *See also* Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 31-33 (incorporated by reference).

¹⁷ Article 44(1).

¹⁸ Arrest Warrant Decision, KSC-BC-2020-06/F00027, para.28.

¹⁹ *Contra* THAÇI Release Request, KSC-BC-2020-06/F00120, para.40.

consider when deciding whether detention is necessary in the circumstances of a particular case.’²⁰ The ECtHR Grand Chamber also recognises them as relevant in assessing the risk an accused might abscond,²¹ and they are particularly pertinent in cases alleging war crimes and crimes against humanity, like this one.²²

11. THAČI’s connections to Kosovo²³ do not change the reality that, as a Kosovo institution, the KSC can only seek binding cooperation to surrender him from Kosovo or a country which recognises Kosovo and has an extradition agreement with it (or other enabling legislation).²⁴ There are only a limited number of countries with such agreements.²⁵ This situation is markedly different from other jurisdictions and other institutions such as the former ICTY, which could seek broader binding cooperation on the basis of its powers derived from the United Nations Security Council.²⁶ THAČI can travel to over 180 countries and potentially place himself permanently beyond the reach of the KSC. His status as a ‘well-known international figure’ is precisely what makes him more likely to successfully evade justice if released.²⁷ Hissène HABRÉ, Radovan KARADŽIĆ, and Charles TAYLOR are all examples of well-known international figures who used their resources to travel to new countries and evade justice for years.

²⁰ Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.72.

²¹ ECtHR (Grand Chamber), *Idalov v. Russia*, 5826/03, 22 May 2012, para.145.

²² The ECtHR has found that, in cases concerning war crimes against the civilian population, detention may be justified and extended solely on the gravity of the charges, and attached particular significance to the seriousness of the crime at issue and the nature and gravity of the charges. *See* ECtHR, *Šuput v. Croatia*, 49905/07, Judgment, 31 May 2011, paras 101-110; ECtHR, *Getoš-Magdić v. Croatia*, 56305/08, Judgment, 2 December 2010, paras 80-91.

²³ THAČI Release Request, KSC-BC-2020-06/F00120, para.34.

²⁴ Article 55(2); Rule 208.

²⁵ Including Albania, Austria, Belgium, Croatia, the Czech Republic, Germany, Hungary, Italy, Macedonia, Turkey, the United Kingdom, and the United States. Most of these countries have entered into extradition agreements with Kosovo itself. Others have formally agreed with Kosovo on the continued application of extradition agreements reached with the Federal Republic of Yugoslavia.

²⁶ United Nations Security Council, S/RES/827 (1993), Resolution 827, 25 May 1993, para.4.

²⁷ *Contra* THAČI Release Request, KSC-BC-2020-06/F00120, para.34.

12. THAÇI's voluntary appearance at SPO interviews and conduct after being named as an indicted person hardly negate the flight risk, and such facts were available to the Pre-Trial Judge at the time of the Arrest Warrant Decision.

13. Similarly, THAÇI's surrender²⁸ does not merit significant weight. He was informed that any other course of action would result in his immediate arrest within 24 hours, and was doubtless aware that a significant SPO operation was underway in Kosovo at that time, with assistance from EULEX and the Kosovo Police. In short, he had no choice but to surrender. THAÇI's public calls for peace and unity are welcome, but he also made them fully cognizant of his need and intention to seek interim release. Of course, permanently maintaining the same deployment on the ground in Kosovo is impossible, so a provisionally released accused—especially one of THAÇI's stature, resources, and connections—would have an opportunity to escape that he did not have when he surrendered.

2. Risk of obstructing the investigation

14. It has been established that a risk of obstructing the investigation exists because: (a) THAÇI's former and current positions allow for mobilisation of a vast support network; (b) THAÇI has publicly attacked the KSC and attempted to delegitimize it; (c) THAÇI has made efforts to interfere with potential SPO witnesses; and (d) there is a prevailing climate in Kosovo of intimidation of witnesses who testify against KLA members.²⁹ As outlined below, further factors supporting the existence of this risk have been revealed.

(a) Support network and the climate of intimidation

²⁸ THAÇI Release Request, KSC-BC-2020-06/F00120, paras 38-39.

²⁹ Arrest Warrant Decision, KSC-BC-2020-06/F00027, para.29. *See also* Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 34-38 (incorporated by reference).

15. In September 2020, collections of SITF/SPO-related materials were provided without authorisation to the KLA War Veterans Association ('KLA WVA'), which then distributed or otherwise made them available to the public. There is evidence that these documents were delivered as part of a campaign to intimidate witnesses, and the KLA WVA head and deputy have since been arrested for violating the secrecy of proceedings and intimidating/retaliating against potential witnesses.³⁰

16. The KLA WVA has long been a particularly active network of supporters hostile to the SPO's investigation.³¹ There is a significant risk the KLA WVA and others will continue such activities, and a prime potential source of leaks is material to be disclosed to the Accused. What the KLA WVA has already done has intimidated or frightened several of the SPO's potential witnesses. Such actions demonstrate—again—that conducting legal proceedings in The Hague or 'offering a comprehensive witness protection program' are best seen not as a panacea for mitigating interference risks so much as a concrete reflection of the deadly seriousness of the problem.³²

17. By virtue of his past role as a senior KLA leader—indeed, as KLA Commander in Chief—Hashim THAÇI is in a position of particular influence over this network. By trying to reframe the issue as whether the SPO has presented evidence that THAÇI himself specifically directed the actions of the KLA WVA, the THAÇI Defence fails to acknowledge that the existence of such networks creates risks that extend to THAÇI individually.³³

³⁰ See generally *Prosecutor v. Gucati and Haradinaj*, Redacted indictment, KSC-BC-2020-07/F00075, 14 December 2020 (confirmed 11 December 2020).

³¹ Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 4-5.

³² *Contra* THAÇI Release Request, KSC-BC-2020-06/F00120, para.21. See also *Obstructing the Investigation – Too Many Obstacles, Too Little Evidence*, in Sense Agency, ICTY: The Kosovo Case, 1998-1999, available at <https://kosovo.sense-agency.com/>; Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 21-22.

³³ THAÇI Release Request, KSC-BC-2020-06/F00120, para.18.

(b) Attempts to undermine the KSC

18. THAÇI does not have to politically support the KSC, and it is reasonably expected that he would be critical of any decision to indict him. But his statements and conduct³⁴ take on special meaning, coming from a political leader of Kosovo with influence over the country's full military and intelligence apparatus. Whether or not such statements are a lawful assertion of free speech is beside the point.³⁵ The point is that such statements contextualise his actions to undermine the KSC, some of which are discussed below.

19. The THAÇI Defence's lengthy submissions on THAÇI's support of the KSC/SPO, painting the picture that his 'efforts and contributions' to establish the KSC were acts of selflessness 'detrimental to his political career',³⁶ ignore the efforts he has undertaken to undermine it in more recent years, when being indicted became a serious threat and later, a reality.³⁷

20. Most recently, THAÇI's proposed constitutional amendments purporting to 'clarify' the temporal limit were found by the Constitutional Court to be unwarranted and diminished the rights and freedoms guaranteed under the Constitution.³⁸ Such steps hardly demonstrate support for the KSC's work. But even more telling is the stark contrast between THAÇI's public proclamations of support and his unpublicised manoeuvres.

³⁴ Arrest Warrant Application, KSC-BC-2020-06/F00005, para.7.

³⁵ *Contra* THAÇI Release Request, KSC-BC-2020-06/F00120, para.23.

³⁶ *See* THAÇI Release Request, KSC-BC-2020-06/F00120, paras 25-29.

³⁷ Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 7, 10-17; Kosovo 2.0, Leonora Aliu, "The Snake" Raises its Head for the Special Court, 12 October 2017, available at <https://kosovotwopointzero.com/en/snake-raises-head-special-court/>.

³⁸ Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00015, 26 November 2020.

21. Two examples illustrate the point. First, writing an official, non-public letter to the United States Secretary of State to propose critical reforms to an institution in the midst of an advanced criminal investigation into the highest-ranking members of the KLA is no simple expression of 'legitimate concerns'.³⁹ It is flatly inaccurate to describe the letter as evincing THAÇI's 'support for the KSC'—as made plain by Secretary Pompeo's response stating that '[t]he abrogation or undermining in any way of the Specialist Chambers or the Specialist Prosecutor's Office work, structure or seat would seriously harm Kosovo's credibility in the world'.⁴⁰ It is also disingenuous to characterise such a letter—sent 12 days after THAÇI himself was summonsed as a suspect by the SPO—as an ordinary exercise of his 'constitutional duties as President'.

22. Second, in autumn 2018, THAÇI privately asked [REDACTED]. It was a request that [REDACTED] promptly rejected. According to [REDACTED], THAÇI prefaced his request by expressing contempt for the KSC.⁴¹ These accounts are far more probative of THAÇI's current intent and motives than his role in establishing the KSC several years ago, when doing so elevated his standing with international partners and the prospect of actually being indicted must have seemed remote at best.

(c) Pardons

23. THAÇI's pardons of former KLA members Shpresim UKA and Bekim SYLAJ on his last day as President further illuminate the interference risk. Both UKA and SYLAJ were convicted of murder and attempted murder during the KSC's jurisdictional timeframe.⁴² THAÇI pardoned both in an order signed 4 November

³⁹ Arrest Warrant Application, KSC-BC-2020-06/F00005/CONF/RED, para.7; Euronews, Thaci sent secret letter to Mike Pompeo demanding the SPO not be mono-ethnic, 1 December 2020, available at <https://euronews.al/en/kosovo/2020/12/01/thaci-sends-secret-letter-to-mike-pompeo-demands-that-the-spo-not-be-mono-ethnic>. *Contra* THAÇI Release Request, KSC-BC-2020-06/F00120, para.24.

⁴⁰ Arrest Warrant Application, KSC-BC-2020-06/F00005/RED/A02, pp.3-4.

⁴¹ Declaration of SPO Investigator, Annex 2.1.

⁴² *Prosecutor v. Sadik Abazi et al.*, P 592/11, Trial Verdict, 17 December 2012.

2020, exceeding the recommended reduction by the government's pardoning commission.⁴³ On the date THAÇI signed the order, Jakup KRASNIQI's ongoing arrest operation was national news as of early that morning. On the afternoon of that same day, THAÇI was informed he had to surrender to the KSC. THAÇI's substantial sentence reduction of two SHIK⁴⁴ members for the murder and attempted murder of purported Serbian collaborators, in essentially his last act as president, signals his support for those who engage in retribution against perceived traitors. Equally telling is the fact that Shpresim UKA is specifically implicated in attempts to interfere with witnesses in prior trials.⁴⁵

(d) Interference in current proceedings

24. As for THAÇI's interference in the current proceedings, the Defence provides a series of implausible explanations for the acts and conduct alleged in the Arrest Warrant Application and relied on in the Arrest Warrant Decision.

25. THAÇI has played a role in offering benefits to multiple witnesses contemporaneous with their being summonsed by the SPO, including Rustem MUSTAFA, Syljeman SELIMI, and another person.⁴⁶

26. With respect to Rustem MUSTAFA, the THAÇI Defence suggests that the 'alleged venality' of it is that the hiring was kept quiet for months before being made public, deflecting responsibility to the publication schedule of the Anti-Corruption Agency.⁴⁷ This misses the point, although it in fact was an unmistakable decision to

⁴³ Annex 1 (English Translation of decree of pardon, pardon commission recommendation, and related media articles).

⁴⁴ Provisional Government of Kosovo Ministry of Intelligence Services and/or Intelligence Service ('SHIK').

⁴⁵ [REDACTED].

⁴⁶ Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 15, 17.

⁴⁷ THAÇI Release Request, KSC-BC-2020-06/F00120, paras.55-56.

not publicise MUSTAFA's hiring—after all, THAÇI had the year before very publicly awarded him the Jubilary Presidential Medal.⁴⁸ The core corrupt act is that THAÇI hired MUSTAFA in the first place, offering a salary of 18,000 euros per year barely a month after his SPO interview.

27. [REDACTED]. [REDACTED].⁴⁹ [REDACTED].⁵⁰ [REDACTED].⁵¹
[REDACTED].⁵²

28. In a further incident, THAÇI reportedly appointed Haxhi SHALA's son as consul general in Prague the same month the SPO interviewed SHALA as a suspect.⁵³

29. With respect to Sylejman SELIMI, the THAÇI Defence has responded summarily that Mr THAÇI had nothing to do with it. This denial is not credible. The notion that the office of the Prime Minister is utterly beyond THAÇI's influence as President is belied by common sense and the pattern of other witnesses offered assistance from THAÇI, his office, and/or those acting on his behalf.

30. Any one of these instances would be troubling. But when multiple potential witnesses receive such offers contemporaneous with their SPO summonses, a powerful inference arises that THAÇI and his network are targeting these people for assistance.

⁴⁸ See BIRN, Taulant Osmani, Kosovo President Secretly Appoints War Crimes Convict as Adviser, 6 June 2019, at <https://balkaninsight.com/2019/06/06/kosovo-president-secretly-appoints-war-crimes-convict-as-adviser/>.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED]; [REDACTED].

⁵² [REDACTED].

⁵³ KoSsev, Thaci requested for the son of an MP interrogated by the SPO to be appointed consul in Prague, 25 November 2020, available at <https://kossev.info/thaci-requested-for-the-son-of-an-mp-interrogated-by-the-spo-to-be-appointed-counsel-in-prague/>.

31. The Defence's arguments regarding the activities of the Division for Coordinating the Process of Legal Protection and Financial Support for Potential Accused Persons in Trials before the Specialist Chambers are equally weak.

32. The THAÇI Defence begins by demolishing the straw man that Driton LAJCI was appointed by or at the behest of THAÇI,⁵⁴ but no such allegation had been made.⁵⁵ Rather, the information provided clearly demonstrates the influence and control that THAÇI and VESELI have over LAJCI and his former boss, Abelard TAHIRI.⁵⁶

33. The THAÇI Defence's answer to the pressure THAÇI exerted on LAJCI in relation to [REDACTED] is that whatever demand he made on LAJCI is not in itself improper, and that he did not specify the precise manner in which assistance was to be given.⁵⁷ The position is plainly disingenuous in light of all the evidence.

34. Finally, the Defence claims that [REDACTED],⁵⁸ in relation to [REDACTED] is 'no evidence that that Mr Thaçi 'bid' Lajçi to do anything improper [...]'.⁵⁹ The argument yet again misses the main point. The point is not whether any individual act is itself criminal or 'improper'. It is the pattern of conduct demonstrating an unmistakable intent to 'obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices'.

⁵⁴ THAÇI Release Request, KSC-BC-2020-06/F00120, para.46.

⁵⁵ See Arrest Warrant Application, KSC-BC-2020-06/F00005, para.10.

⁵⁶ Arrest Warrant Application, KSC-BC-2020-06/F00005/A01; Arrest Warrant Application, KSC-BC-2020-06/F00005, para.10.

⁵⁷ THAÇI Release Request, KSC-BC-2020-06/F00120, para.47.

⁵⁸ Arrest Warrant Application, KSC-BC-2020-06/F00005, para.13(c). Incidentally, the THACI Defence argues difficulties with the level of redaction in paragraphs 12-13 of the Arrest Warrant Application. THAÇI Release Request, KSC-BC-2020-06/F00120, para.44. Neither paragraph's text has any redactions, and those applied to the footnotes do not obscure the core information relied upon.

⁵⁹ THAÇI Release Request, KSC-BC-2020-06/F00120, para.48.

35. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].
[REDACTED]. [REDACTED]⁶⁰

36. [REDACTED].⁶¹ [REDACTED]. [REDACTED].

37. Finally, as to THAÇI's arguments on his approach to [REDACTED], only in a vacuum could anyone conclude that THAÇI dispatching [REDACTED] and [REDACTED] to reach out to [REDACTED] (after it was made public that he would be traveling to The Hague to be interviewed) 'reveals only that Mr Thaçi wished to make contact' with him.⁶² Even [REDACTED] himself recognised the nature of the advance.⁶³ Moreover, THAÇI omits entirely from his account that after [REDACTED]'s interview, [REDACTED] inquired about the recording of [REDACTED]'s interview and the content of it—not for himself, but on behalf of THAÇI.⁶⁴ [REDACTED] refused to share any information. THAÇI's claim that this evidence has nothing to do with attempted witness interference goes beyond straining credulity.

3. Risk of committing further crimes

38. It has been previously established that a risk of committing further crimes exists because: (a) the nature of the joint criminal enterprise charge concerned targeting opponents of the accused; (b) of THAÇI's attempts to obstruct the proceedings; and (c) there is a prevailing climate in Kosovo of intimidation of witnesses who testify against KLA members.⁶⁵

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² THAÇI Release Request, KSC-BC-2020-06/F00120, para.53.

⁶³ [REDACTED]. *See also* [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ Arrest Warrant Decision, KSC-BC-2020-06/F00027, para.30. *See also* Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 39-40 (incorporated by reference).

39. In relation to Article 41(6)(b)(iii), THAÇI has argued that ‘repeat the criminal offense’ must be interpreted to carry with it the contextual elements of war crimes and crimes against humanity.⁶⁶ But it had to be plain to the drafters that any armed conflict or attack against the civilian population from the jurisdictional period would have ceased by the time of an accused’s arrest some 15-20 years later. The more logical interpretation of the provision is that there must be a risk of the accused repeating the underlying criminal acts. In the present case those include murder, torture, and cruel treatment, and therefore a conclusion that ‘there is a risk that Mr Thaçi may resort to physical violence or threats of physical violence against those perceived as being opposed to the KLA, including victims and witnesses’⁶⁷ is squarely within the scope of Article 41(6)(b)(iii).⁶⁸

40. The heart of the joint criminal enterprise in this case is the targeting of perceived opponents of the KLA.⁶⁹ For these former KLA leaders, these methods persist.⁷⁰

41. The Defence attempts to rely upon the fact that the alleged offences were committed 20 years ago, coupled with excessive delays in investigating the case, as factors that should be considered.⁷¹ That there is a well-grounded suspicion that

⁶⁶ THAÇI Release Request, KSC-BC-2020-06/F00120, paras 58-59.

⁶⁷ Arrest Warrant Decision, para.29.

⁶⁸ See Arrest Warrant Application, KSC-BC-2020-06/F00005/CONF/RED, para.40.

⁶⁹ Confirmed Indictment, KSC-BC-2020-06/F00034/A01, 30 October 2020, para.32.

⁷⁰ To reference a prominent example from 2020 involving former KLA commander Sami LUSHTAKU: on 11 April 2020, lawyer Gazmend HALILAJ posted on Facebook that Sami LUSHTAKU is behind the misuse of 1.4 million German marks during the war. LUSHTAKU then called HALILAJ on the phone, asking him to remove the writing while cursing and threatening him. Three days later, and with the intent to avenge Sami LUSHTAKU, his cousin Ibrahim LUSHTAKU and Xhelal ZEQRIRI allegedly crashed into HALILAJ’s car on the afternoon of 14 April 2020 and then shot at HALILAJ as he fled from his car. They did not hit him. Sami LUSHTAKU plead guilty for committing criminal harassment against HALILAJ on 28 October 2020 and was fined 2000 euros. Ibrahim LUSHTAKU and Xhelal ZEQRIRI have been charged with attempted murder, and their case remains pending. See Annex 1.

⁷¹ THAÇI Release Request, KSC-BC-2020-06/F00120, paras 60-61.

THAÇI committed a wide range of war crimes and crimes against humanity⁷² is a serious indicator, amongst others, of the risk that he is willing to commit further violent acts, even many years later. The alleged delays it took to investigate THAÇI are more illustrative of the institutional difficulties in investigating the KLA than any reflection of THAÇI's peaceful character.⁷³

C. NO CONDITIONS SUFFICIENTLY MITIGATE THESE RISKS

42. The Defence presents a list of conditions which could be applied in the event of his release, further stating that the KSC has a proven police authority in Kosovo and offering for THAÇI to live in a third state if necessary.⁷⁴ No combination of the conditions proposed comes close to mitigating the array of risks THAÇI poses if released.⁷⁵ Detention is the only means by which they can be adequately managed, with the communications monitoring framework of the KSC Detention Centre being particularly important to ensure that no confidential information disclosed to THAÇI is disseminated to the outside world.⁷⁶

43. The KSC/SPO does not have the resources to adequately monitor provisionally released accused in Kosovo. EULEX's monitoring mandate does not extend to monitoring conditions of release, nor does it have the resources to do so. Regardless of where located if released, THAÇI has the means and network to realise each of the risks foreseen in Article 41(6)(b).

⁷² Confirmation Decision, KSC-BC-2020-06/F00026, paras 474, 478, 482, 491.

⁷³ Being nominated for a Nobel Peace Prize should also not carry disproportionate weight in the assessment. THAÇI Release Request, KSC-BC-2020-06/F00120, para.61. Several unsavoury individuals share the same distinction.

⁷⁴ THAÇI Release Request, KSC-BC-2020-06/F00120, paras 62-63.

⁷⁵ Decision on Application for Bail, KSC-BC-2020-07/F00059, 27 October 2020, para.21. *See also* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.51.

⁷⁶ *See especially* Articles 4.2, 6-8 and 17 of the Registry Practice Direction on Detainees – Visits and Communications, KSC-BD-09/Rev1/2020, 23 September 2020.

44. The Kosovo Police have been of assistance to the SPO when called upon, particularly in the recent arrests of the Accused. But there are good reasons to believe that the Kosovo authorities are limited in their ability to monitor an accused of THAÇI's stature, resources, and authority in a case like this one.

45. *Remzi SHALA*.⁷⁷ A war crimes indictment was filed against former KLA commander Remzi SHALA on 19 October 2016. The trial opened on 12 May 2017. During the portion of SHALA's trial conducted in 2018, he was granted provisional release on the condition that he appear in court when summoned. The last court session in 2018 was held on 16 November 2018, and SHALA was released during the court adjournment on the condition that he be present at the scheduled continuation of the trial on 9 January 2019. SHALA did not appear in court that day, nor did he inform the court of his intended absence. The competent domestic authorities were unable to apprehend SHALA, so an international warrant was issued for his arrest. SHALA was not arrested until 24 May 2019, and he was placed in detention on remand from that point forward.

46. *Sami LUSHTAKU*. Sami LUSHTAKU, former Drenica Zone commander in the KLA, was tried alongside named JCE members Sabit GECI and Syljeman SELIMI in the *Drenica* case. Before that trial commenced, LUSHTAKU was being treated at the University Clinical Centre in Priština/Prishtinë in lieu of detention on remand.⁷⁸ In May 2014, he and two other detainees escaped from the hospital for a two-day period. During the summer after LUSHTAKU's 2015 conviction in his main case, he, Sylejman

⁷⁷ Humanitarian Law Center Kosovo, HLC Kosovo Annual Report 2019: War Crimes Trials—Still at the Beginning, 2020, p.414; Humanitarian Law Center Kosovo, War Crimes: A discouraging Transition, 2019, p.297; Humanitarian Law Center Kosovo, HLC Kosovo Annual Report 2017: War Crimes Trials – What Comes Next?, March 2018, p.402 ('HLC 2018 Report').

⁷⁸ Humanitarian Law Center Kosovo, HLC Kosovo Report 2014: High-Profile Trials: Justice Delayed, 2014, p.325, available at <https://www.hlc-kosovo.org/wp-content/uploads/2018/07/Pages-from-Kosovo-report-2014-layout-ENG.pdf>.

SELIMI, and another of those convicted used false medical excuses to be placed in private apartments within the Priština/Prishtinë Medical Centre so as to avoid serving time in detention.⁷⁹ On 21 August 2015, LUSHTAKU escaped the hospital for several hours to go to his house in Priština/Prishtinë.⁸⁰ On 22 September 2015, EULEX Police re-arrested LUSHTAKU after he escaped correctional custody for a third time. Indictments were filed against LUSHTAKU and twenty-three others concerned in these three escapes. In April 2020, LUSHTAKU was acquitted in relation to the May 2014 escape and convicted for the others.

47. *Sabit GECI*. Sabit GECI was also detained in a hospital following his 2011 conviction,⁸¹ and evidently had enormous authority over the conditions of his imprisonment. [REDACTED] reveal that he could come and go whenever he wanted.⁸² In one particularly telling 10 March 2012 exchange, a [REDACTED] reported GECI saying the following in response to a question about the behaviour of his guards:

Good, very good...imagine one night was another new guard and he was scared that I may escape through the window ... (offending the guard due to his way of thinking for S.G) ... if I really would like to escape I could do it at any time and I would order the guard to escort me, and just because of him thinking for me this way, I did went out to have dinner near here at "[REDACTED]" and didn't came back for four hours, I did it in purpose...⁸³

48. These prominent examples demonstrate the lack of capacity to effectively monitor release conditions of former KLA leaders.

D. THE ADDITIONAL RELIEF SOUGHT IS UNNECESSARY

⁷⁹ U.S. Department of State, '2015 Country Reports on Human Rights Practices – Kosovo', 13 April 2016, available at <https://www.refworld.org/docid/5716124d15.html>.

⁸⁰ *HLC 2018 Report*, p.389.

⁸¹ *Sabit Geci et al.*, 45/2010, Trial Verdict, 29 July 2011.

⁸² Annex 2.8.

⁸³ [REDACTED] (Annex 2.8).

49. The Defence requests: (i) a lesser redacted version of the Arrest Warrant Application; (ii) disclosure of any additional materials not yet disclosed in support of its arguments; and (iii) an oral hearing.⁸⁴

50. As to the lesser redacted version of the Arrest Warrant Application, certain redactions have already been lifted following recent authorisation from the Pre-Trial Judge.⁸⁵ This includes the specific redactions highlighted by the THAÇI Defence.⁸⁶ No judicial ruling is required on this point—the SPO is maintaining review over the necessity of redactions applied.

51. The SPO is also providing all new materials cited in the present filing, subject to any applicable restrictions. This request is likewise moot.

52. As to an oral hearing, the Pre-Trial Judge has enough information to resolve this request on the written filings alone. Unlike at other international courts, oral detention hearings are not mandated by the KSC statutory scheme.⁸⁷ Between the Arrest Warrant Application and the present response, the SPO has submitted two detailed filings justifying the Accused's detention. Given that there is a right to reply to new issues arising in this response,⁸⁸ the THAÇI Defence will also have two written submission opportunities.

III. CLASSIFICATION

53. The present submission is filed confidentially in accordance with Rule 82(4). A public redacted version will be filed.

⁸⁴ THAÇI Release Request, KSC-BC-2020-06/F00120, paras 65-70.

⁸⁵ THAÇI Release Request, KSC-BC-2020-06/F00120, paras 66-67.

⁸⁶ [REDACTED].

⁸⁷ *In contrast to* Rule 118(3) of the ICC RPE (the Pre-Trial Chamber must hold a detention hearing once every year).

⁸⁸ Rule 76.

IV. RELIEF REQUESTED

54. For the foregoing reasons, the relief sought by the THAÇI Defence should be rejected in full.

Word count: 5,380



Jack Smith

Specialist Prosecutor

Monday, 21 December 2020
At The Hague, the Netherlands.