



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 22 January 2021

Language: English

Classification: Public

Public Redacted Version of
Decision on Hashim Thaçi's Application for Interim Release

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 41(2), (6) and (12) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 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, Hashim Thaçi ("Mr Thaçi" or "Accused") was arrested pursuant to a decision ("Decision on Arrest and Detention")² and an arrest warrant issued by the Pre-Trial Judge ("Arrest Warrant"),³ and further to the confirmation of the indictment against him.⁴
2. On 4 December 2020, the Defence for Mr Thaçi ("Thaçi Defence" or "Defence") filed an application for interim release ("Request"), including a request for an oral hearing to address the Request.⁵
3. On 16 December 2020, the Pre-Trial Judge rejected the request for an oral hearing.⁶

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

² KSC-BC-2020-06, F00027/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on Request for Arrest Warrants and Transfer Orders*, 26 October 2020, public.

³ KSC-BC-2020-06, F00027/A01/RED, Pre-Trial Judge, *Public Redacted Version of Arrest Warrant for Hashim Thaçi*, 26 October 2020, public.

⁴ KSC-BC-2020-06, F00026/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi* ("Confirmation Decision"), 26 October 2020, public.

⁵ KSC-BC-2020-06, F00120/RED, Defence for Mr Thaçi, *Public Redacted Version of Application for Interim Release on Behalf of Mr Hashim Thaçi*, 4 December 2020, public.

⁶ KSC-BC-2020-06, F00150, Pre-Trial Judge, *Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions*, 16 December 2020, public, para. 30(a).

4. On 16 December 2020, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response").⁷
5. On 17 December 2020, the Accused requested an extension of time limit to reply and waived his right to have detention reviewed within two months.⁸
6. On 5 January 2021, following a request from the Thaçi Defence,⁹ the Pre-Trial Judge authorised a word limit of 6,000 words for all Defence replies.¹⁰
7. On 7 January 2020, further to an order extending the time limit for replies,¹¹ the Defence replied to the Response ("Reply").¹²

II. SUBMISSIONS

8. The Defence submits that Mr Thaçi's conditional release is merited on a proper application of the legal test under Article 41(6)(b) of the Law and in light of his conduct in the last 22 years, his efforts in establishing the Specialist Chambers ("SC") and the SPO, and his cooperation with the SPO and compliance with SC orders.¹³ The Defence further submits that Mr Thaçi is willing to comply with any conditions that the Pre-Trial Judge may consider necessary to impose pursuant to Article 41(12) of the Law, including being released in a Third State with a cooperation agreement with the SC.¹⁴

⁷ KSC-BC-2020-06, F00149/RED, Specialist Prosecutor, *Public Redacted Version of Prosecution Response to Application for Interim Release on Behalf of Mr Hashim Thaçi*, 21 December 2020, public. The confidential version of the Response (F00149) includes Annex 1, public, and Annex 2, confidential.

⁸ KSC-BC-2020-06, Transcript, 17 December 2020, public, p. 225, line 16 to p. 226, line 10.

⁹ KSC-BC-2020-06, F00158, Defence for Mr Thaçi, *Thaçi Defence Application for an Extension of the Word Limit*, 4 January 2021, public.

¹⁰ KSC-BC-2020-06, F00162, Pre-Trial Judge, *Decision on Thaçi Defence Request for Extension of the Reply Word Limit*, 5 January 2021, public, para. 12(a)-(b).

¹¹ KSC-BC-2020-06, F00155, Pre-Trial Judge, *Decision on Defence Requests to Vary Time Limits*, 18 December 2020, public, para. 23.

¹² KSC-BC-2020-06, F00165, Defence for Mr Thaçi, *Reply to the Specialist Prosecutor's Response Opposing the Application for Interim Release on Behalf of Mr Hashim Thaçi*, 7 January 2020, confidential, with Annex 1, confidential, and Annexes 2-3, strictly confidential and *ex parte*.

¹³ Request, paras 3, 15-61.

¹⁴ Request, paras 62-64.

Moreover, the Defence avers that the restrictions imposed as a result of the COVID-19 pandemic, to which the SPO was not subject when preparing the case against Mr Thaçi, should be considered when deciding on the Request.¹⁵ Lastly, the Defence requests: (i) a lesser redacted version of the SPO request for the Arrest Warrant (“Arrest Warrant Request”),¹⁶ in order to be able to make meaningful submissions;¹⁷ and (ii) disclosure of any outstanding material on which the SPO intends to rely upon in support of the continued detention of Mr Thaçi.¹⁸

9. The SPO opposes the Request, on the basis that the risks under Article 41(6)(b) of the Law, as previously found by the Pre-Trial Judge, continue to exist.¹⁹ The SPO contends that, pursuant to the Request, the matter now to be address is a review of the Decision on Arrest and Detention.²⁰ The SPO also submits that subsequently discovered information underscores the seriousness of the risks presented.²¹ The SPO further contends that only detention at the SC detention facilities is sufficient to address these risks.²² Lastly, the SPO submits that a lesser redacted version of the Arrest Warrant Request has been provided to the Defence in the meantime, addressing the specific redactions flagged by the Defence,²³ and that all material relied upon by the SPO, including for the purpose of the Response, has been provided to the Defence, subject to necessary restrictions.²⁴

10. The Defence replies that nothing in the Response alters the Defence’s position that

¹⁵ Request, para. 64.

¹⁶ KSC-BC-2020-06, F00005/RED, Specialist Prosecutor, *Public Redacted Version of ‘Request for Arrest Warrants and Related Orders, Filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020, public.*

¹⁷ Request, paras 66, 71.

¹⁸ Request, paras 69, 71,

¹⁹ Response, paras 1, 5-41.

²⁰ Response, para. 4.

²¹ Response, paras 1, 35-37.

²² Response, paras 1, 42-48.

²³ Response, para. 50.

²⁴ Response, para. 51.

the criteria under Article 41(6)(b) of the Law remain unsatisfied.²⁵ The Defence submits that it is wrong to characterise the Request as a mere review of the original Decision on Arrest and Detention, and that it is for the SPO to establish that the criteria for arrest and continued detention are established.²⁶ Accordingly, the Defence submits that the Pre-Trial Judge shall decide *de novo* whether these conditions are met, as he hears the submissions of the Defence for the first time.²⁷ The Defence thereafter rejects each argument raised by the SPO in its Response regarding the existence of the risks.²⁸ As regards conditional release, the Defence submits that the SPO's concerns with regard to the monitoring ability of the Kosovo authorities are readily addressed by the Defence's proposal that Mr Thaçi be released to a Third State, together with the assurances provided by the Defence with regard to the Accused's commitment to respect any condition that may be imposed upon him.²⁹

III. APPLICABLE LAW

11. Article 41(2) of the Law provides that any person deprived of his or her liberty by arrest or detention shall be entitled to challenge the lawfulness of his or her arrest and such challenge shall be decided speedily by the SC.

12. Article 41(6) of the Law provides that the SC shall only order the arrest and 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: (i) the person is a flight risk; (ii) the person will destroy, hide, change or forge evidence or specific circumstances indicate that he or she will obstruct the progress of criminal proceedings; or (iii) the seriousness of the crime, or the manner

²⁵ Reply, para. 2.

²⁶ Reply, para. 6.

²⁷ Reply, para. 7.

²⁸ Reply, paras 15-53.

²⁹ Reply, paras 53-54; Annexes 1-3 to the Reply.

or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that the person will repeat the criminal offence, complete an attempted crime, or commit a crime which the person has attempted to commit.

13. Pursuant to Rule 57(2) of the Rules, after the assignment of a Pre-Trial Judge and until a judgment is final, the Panel seized with a case shall review a decision on detention upon the expiry of two months from the last ruling on detention or at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred.

14. 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 to ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion. Pursuant to Rule 56(5) of the Rules, a Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the detained person.

IV. DISCUSSION

A. APPLICABLE STANDARDS

15. The Defence submits that Article 41 of the Law establishes a clear presumption in favour of an Accused being at liberty,³⁰ and that paragraph (6)(b)(i)-(iii) of the same provision employs the word “will” rather than “may” when speaking about the risks that warrant detention.³¹ The Defence further submits that the SPO, when seeking the

³⁰ Request, para. 12.

³¹ Request, para. 13.

Arrest Warrant, relied primarily on generalised and unsubstantiated assertions which fail to link the Accused to any wrongdoing.³²

16. The SPO responds that Article 41(6)(b) of the Law does not require certainty when establishing the risks foreseen therein.³³ The SPO asserts that the Pre-Trial Judge need not conclude that the Accused “will” flee, “will” obstruct the investigation or “will” commit further crimes, but that there are articulable grounds to believe that there is a risk of these.³⁴ The SPO also submits that evidence of context, the actions of others or circumstances common to more than one Accused is relevant and remains compatible with an individualised assessment.³⁵

17. The Defence replies that the risks envisaged in Article 41(6)(b) of the Law must be “real risk[s]” rather than being “fanciful or a mere possibility”.³⁶ The Defence also submits that Article 41(6)(b) of the Law requires a showing of certainty (as indicated by the word “will”) rather than a showing of possibility (“may”).³⁷

18. The Pre-Trial Judge recalls that while the Arrest Warrant, pursuant to Article 41(6) of the Law, was issued *ex parte*, without participation of the Defence, Article 41(2) of the Law provides the detained person with an early opportunity to challenge the lawfulness of his or her arrest, including the grounds set out in Article 41(6) of the Law. Accordingly, the Pre-Trial Judge is called upon to inquire anew into the existence of facts justifying detention in light of the arguments advanced by the Parties.³⁸ In this

³² Request, para. 17.

³³ Response, para. 3.

³⁴ Response, para. 3.

³⁵ Response, paras 7-8.

³⁶ Reply, paras 9-13.

³⁷ Reply, para. 14.

³⁸ KSC-BC-2020-07, F00058, Single Judge, *Decision on Request for Immediate Release of Nasim Haradinaj* (“*Haradinaj* First Decision on Detention”), 27 October 2020, public, paras 12-13.

context, it is noted that any request for provisional release must be considered in the context of the detained person's right to be presumed innocent.³⁹

19. The SPO bears the burden of establishing that the detention of the Accused is necessary.⁴⁰

20. As regards the evidentiary threshold under Article 41(6)(b) of the Law, the Pre-Trial Judge recalls that, once the standard in Article 41(6)(a) of the Law is met, the grounds that allow deprivation of liberty must be *articulable* in the sense that they must be specified in detail.⁴¹ In this regard, Article 41(6)(b) of the Law echoes the principle that continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person's right to liberty.⁴² Accordingly, a Panel must rely on specific reasoning and concrete grounds in deciding to continue detention;⁴³ *i.e.* it must find that there are specific, concrete grounds to believe that the Accused poses public interest risks that can only be mitigated through continued detention. The Pre-Trial Judge further recalls that, on

³⁹ 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 the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* ("SCCC 26 April 2017 Judgment"), 26 April 2017, para. 113. Similarly, ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2151-Red, Appeals Chamber, [Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 6 January 2012 Entitled "Decision on the Defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'"](#), 5 March 2012, para. 40.

⁴⁰ SCCC 26 April 2017 Judgment, para. 115. Similarly, for example, ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-208, Appeals Chamber, [Judgment on the Appeal of Mr Laurent Gbagbo Against the Decision of Trial Chamber I of 8 July 2015 Entitled "Ninth Decision on the Review of Mr Laurent Gbagbo's Detention Pursuant to Article 60\(3\) of the Statute"](#), 8 September 2015, para. 36; *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Appeals Chamber, [Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 28 July 2010 Entitled "Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence"](#), 19 November 2010, para. 51; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-330, Pre-Trial Chamber I, [Decision on the Powers of the Pre-Trial Chamber to Review Proprio Motu the Pre-Trial Detention of Germain Katanga](#), 18 March 2008, p. 7.

⁴¹ Article 19.1.30 of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 defines "articulable" as: "the party offering the information or evidence must specify in detail the information or evidence being relied upon".

⁴² SCCC 26 April 2017 Judgment, para. 113

⁴³ SCCC 26 April 2017 Judgment, para. 115.

the basis of the available evidence, the specific articulable grounds must support the “belief”⁴⁴ that the risks under any of the three limbs of Article 41(6)(b) of the Law exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.⁴⁵ In simple terms, while suspicion simpliciter is not enough, certainty is not required.

21. As regards the nature of the assessment under Article 41(6)(b) of the Law, the Pre-Trial Judge recalls that, while the evaluation involves an element of discretion,⁴⁶ it must be based on the facts of the case and must be undertaken on an individual basis in light of the personal circumstances of each Accused.⁴⁷ Accordingly, the same factors, when applied to another case, in relation to another Accused, may result in a different conclusion by the Pre-Trial Judge or may be considered irrelevant.⁴⁸ When assessing the relevant factors, the Pre-Trial Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.⁴⁹ These factors may be

⁴⁴ See chapeau of Article 41(6)(b) of the Law.

⁴⁵ KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention* (“Gucati Appeal Decision”), 9 December 2020, public, paras 63, 67. See also *Haradinaj* First Decision on Detention, para. 18. Similarly, ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-558, Appeals Chamber, *Judgment on the Appeal of Mr Aimé Kilolo Musamba Against the Decision of Pre-Trial Chamber II of 14 March 2014, Entitled “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”* (“Bemba et al. Appeal Judgment”), 11 July 2014, paras 107, 117; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-572, Appeals Chamber, *Judgment in the Appeal by Mathieu Ngudjolo of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release* (“Katanga Appeal Judgment”), 9 June 2008, para. 21; *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”* (“Lubanga Appeal Judgment”), 13 February 2007, para. 137.

⁴⁶ Gucati Appeal Decision, para. 49. Similarly, ICTY, *Prosecutor v Popović et al.*, IT-05-88-AR65.2, Appeals Chamber, *Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release* (“Borovčanin Appeal Decision”), 30 June 2006, public, para. 5.

⁴⁷ Similarly, ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR65.5, Appeals Chamber, *Decision on Prosecution’s Consolidated Appeal against Decision to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić* (“Prlić et al. Appeal Decision”), 11 March 2008, para. 7; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-AR65.1, Appeals Chamber, *Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release* (“Lukić Appeal Decision”), 16 April 2007, para. 7; ICC, *Bemba et al. Appeal Judgment*, para. 111.

⁴⁸ Similarly, ICTY, *Borovčanin Appeal Decision*, para. 15.

⁴⁹ Gucati Appeal Decision, para. 61; Similarly, ICTY, *Prosecutor v. Šainović and Ojdanić*, IT-99-37-AR65, Appeals Chamber, *Decision on Provisional Release* (“Šainović and Ojdanić Appeal Decision”), 30 October 2002, para. 6; *Prlić et al. Appeal Decision*, para. 7; *Lukić Appeal Decision*, para. 7; *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-323, Appeals Chamber, *Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo*

individual, such as the nature and scope of the crimes allegedly committed by the Accused and the potential punishment that he or she is facing,⁵⁰ his or her age, (past) position(s), occupation, family ties, health condition, assets, conduct and statements,⁵¹ international contacts and ties,⁵² and the existence of support networks of the Accused that may facilitate the materialisation of a risk.⁵³ Relevant factors may also be contextual, such as the environment and conditions in which the Accused lives,⁵⁴ or the particular stage of the ongoing proceedings.⁵⁵ In any event, contextual factors alone are not sufficient to demonstrate a risk. Any relevant factor may support one or more grounds under Article 41(6)(b) of the Law.⁵⁶ Lastly, the Pre-Trial Judge must consider the relevant factors not only as they exist at the time of the decision, but also, as much as it can be foreseen, at the time the Accused is expected to return for trial, if released.⁵⁷

Against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”, 16 December 2008, para. 55; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-970, Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled “Decision on ‘Mr Bemba’s Request for provisional release’*, 29 May 2015, para. 27; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-969, Appeals Chamber, *Judgment on the appeals against Pre-Trial Chamber II’s decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification*, 29 May 2015, para. 45.

⁵⁰ *Gucati* Appeal Decision, para. 72. Similarly, ICTY, *Borovčanin Appeal Decision*, paras 9, 14-15; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Appeals Chamber, *Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”* (“Gbagbo Appeal Judgment”), 26 October 2012, para. 54; *Prosecutor v. Bemba*, ICC-01/05-01/08-323, Appeals Chamber, *Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”*, 16 December 2008, para. 55.

⁵¹ See, ECtHR, *Gábor Nagy v. Hungary*, Application No. 73999/14, *Judgment*, 11 April 2017, para. 70; *Yegorychev v. Russia*, Application No. 8026/04, *Judgment*, 17 May 2016, para. 54; *Aleksandr Novikov v. Russia*, Application No. 7087/04, *Judgment*, 11 July 2013, para. 46. Similarly, ICTY, *Šainović and Ojdanić Appeal Decision*, paras 6-7, 9-10; ICC, *Bemba et al. Appeal Judgment*, para. 111.

⁵² Similarly, ICC, *Lubanga Appeal Judgment*, paras 136-137.

⁵³ *Gucati* Appeal Decision, para. 63. Similarly, 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.

⁵⁴ See Article 41(6)(b)(iii) of the Law.

⁵⁵ Similarly, ICTY, *Prlić et al. Appeal Decision*, paras 19-20.

⁵⁶ Similarly, ICC, *Gbagbo Appeal Judgment*, para. 63.

⁵⁷ Similarly, ICTY, *Šainović and Ojdanić Appeal Decision*, paras 6-7; *Prlić et al. Appeal Decision*, para. 7; *Lukić Appeal Decision*, para. 7.

22. Three articulable grounds are listed in Article 41(6)(b) of the Law:

- (i) the risk of flight;
- (ii) the risk of destroying, hiding, changing or forging evidence or obstructing the progress of the proceedings by influencing witnesses, victims or accomplices;
- (iii) the risk of repeating the criminal offence, completing an attempted crime or committing a crime which the Accused has threatened to commit.

23. In relation to the third ground, the Pre-Trial Judge holds that the future crime need not be identical to those included in the charges or occurring in the same (possibly no longer existing) context as the one for which the Accused is prosecuted. Rather, on the basis of available information, the Pre-Trial Judge must assess whether there is a likelihood that the Accused, if released, will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged. The crimes predicted to be committed in the future need not be specified in detail.⁵⁸

24. In relation to the second and third grounds, the Pre-Trial Judge emphasises that the risks may materialise as a result of the Accused's acts or omissions, but do not require physical execution on his or her part.

25. Furthermore, the three grounds are in the alternative, the existence of one ground suffices to determine the necessity of detention of the Accused.⁵⁹

26. Lastly, the Pre-Trial Judge may refer to previous decisions and material or evidence already before him, without this affecting the *de novo* character of the present decision.⁶⁰

⁵⁸ Similarly, ICC, [Bemba et al. Appeal Judgment](#), para. 116; [Gbagbo Appeal Judgment](#), para. 70.

⁵⁹ Similarly, ICC, [Lubanga Appeal Judgment](#), para. 139; [Katanga Appeal Judgment](#), para. 20; *Prosecutor v. Bemba*, ICC-01/05-01/08-321, Pre-Trial Chamber III, [Decision on Application for Interim Release](#), 16 December 2008, para. 35.

⁶⁰ Similarly, ICC, [Bemba et al. Appeal Judgment](#), para. 60; [Gbagbo Appeal Judgment](#), paras 27, 69.

B. NECESSITY OF DETENTION

27. The Pre-Trial Judge notes that the Defence bases the Request solely on the second limb of Article 41(6) of the Law.⁶¹ The Pre-Trial Judge will therefore assess the Request only against the risks under Article 41(6)(b) of the Law.

1. Risk of Flight

28. The Defence submits that Mr Thaçi is not a flight risk due to his: (i) settled family life and connections to Kosovo; (ii) past actions, including efforts to establish the SC and SPO as well as cooperation with the SPO; and (iii) status as an internationally known figure.⁶² The Defence further submits that the seriousness of the charges and the expectation of a lengthy sentence cannot be used, in the abstract, as factors justifying detention, given that all Accused before the SC, if convicted, are likely to face lengthy sentences.⁶³

29. The SPO responds that the prospect of a lengthy, potentially life-long sentence for the crimes charged, contributes to a persistent risk of flight, which increases as Mr Thaçi learns the full extent of the case against him.⁶⁴ Moreover, in the SPO's submission, Mr Thaçi's connections to Kosovo, his ability to travel to several countries beyond the reach of the SC, resources and his well-known status at the international level are further factors that contribute to the risk of flight.⁶⁵ The SPO further submits that Mr Thaçi's compliance with the Arrest Warrant merits no weight, as he had no choice but to surrender at the time.⁶⁶

⁶¹ Request, para. 2.

⁶² Request, paras 34-41.

⁶³ Request, para. 40.

⁶⁴ Response, para. 10

⁶⁵ Response, paras 11, 13.

⁶⁶ Response, para. 13.

30. The Defence replies to the arguments of the SPO, opposing them.⁶⁷ In particular, the Defence contends that detention cannot be justified and extended solely on the basis of the gravity of the charges and the severity of the potential penalties.⁶⁸ The Defence further submits that the SPO's concerns over the limited number of countries from whom the SC can seek cooperation is met by the Defence's proposal to release Mr Thaçi to a State that has such an agreement.⁶⁹

31. As regards the risk of flight, the Pre-Trial Judge considers that the nature and extent of the crimes charged, as progressively informed through disclosure of the full evidentiary record against the Accused, as well as the severity of a potential sentence, constitute important factors incentivising Mr Thaçi to abscond, should he be released. In the present case, the Pre-Trial Judge recalls that Mr Thaçi is charged with 10 counts of war crimes and crimes against humanity and that the factual scope of the charges against him embraces over 40 locations across Kosovo and Northern Albania spanning over the course of one year and a half.⁷⁰ If convicted for some or all the crimes charged, Mr Thaçi may receive a lengthy sentence, including life imprisonment, pursuant to Article 44(1) of the Law. Moreover, Mr Thaçi's influence and authority as founding member of the Kosovo Liberation Army ("KLA"), member of the KLA General Staff, KLA Commander-in-Chief,⁷¹ and more recently as Prime Minister and then President of Kosovo,⁷² cannot be ignored in assessing the risk that individuals supporting him, including former subordinates and persons affiliated with the KLA War Veterans Association ("KLA WVA"), may be willing to give him access to resources and/or help him abscond.

⁶⁷ Reply, paras 18-24.

⁶⁸ Reply, para. 18

⁶⁹ Reply, para. 19.

⁷⁰ KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, paras 172-173 and pp. 52-66.

⁷¹ Confirmation Decision, para. 455.

⁷² KSC-BC-2020-06, F00027/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders*, 26 October 2020, public, para. 28.

32. That being said, the Pre-Trial Judge also finds that Mr Thaçi's cooperation with the SPO and the SC, as well as his efforts to establish these institutions, are relevant factors. Particular weight should be given to the fact that, once informed of the Arrest Warrant, Mr Thaçi resigned from the position of President, thereby renouncing any potential immunity attached to that position.⁷³ Nevertheless, the Pre-Trial Judge considers that these instances of cooperation and compliance, while potentially diminishing the risk of flight, do not eliminate it, as for the most part they predate the subsequent knowledge of the scope of the case and the evidence against Mr Thaçi.

33. In light of the foregoing, the Pre-Trial Judge considers that Mr Thaçi's ability to travel to several countries beyond the reach of the SC and his access to resources, when seen in light of the nature and extent of the charges and the severity of a potential sentence, outweigh the circumstances highlighted by the Defence.

34. Therefore, the Pre-Trial Judge finds that a risk of flight exists in relation to Mr Thaçi.

2. Risk of Obstructing the Progress of SC Proceedings

35. The Defence submits that Mr Thaçi does not pose a risk of obstructing the progress of criminal proceedings and that the instances of obstruction relied upon by the SPO when seeking the Arrest Warrant are misleading, based on generalisations and speculations, and do not implicate Mr Thaçi in any way.⁷⁴

36. The SPO responds that the pattern of obstruction of criminal proceedings previously found in the Arrest Warrant, as well as newly discovered information, prove that this risk continues to exist.⁷⁵

⁷³ Request, paras 36, 38-39

⁷⁴ Request, paras 42-56.

⁷⁵ Response, paras 14-37.

37. The Defence replies to the arguments of the SPO, opposing them.⁷⁶

38. As regards the risk to obstruct SC proceedings, the Pre-Trial Judge considers that Mr Thaçi's past and recent influential positions, as recalled in paragraph 31 above, are an important factor when assessing this risk. In the view of the Pre-Trial Judge, the influence, direct or indirect, deriving from Mr Thaçi's public stature, may trigger the mobilisation of a vast network of supporters, including former subordinates and persons affiliated with the KLA WVA, with the aim of obstructing the progress of the SPO investigation and the conduct of criminal proceedings.⁷⁷ The Pre-Trial Judge considers that this is even more so at the current stage of the proceedings, where Mr Thaçi is progressively informed of the evidence underpinning the charges against him, including the identity of witnesses who provided or could provide evidence in the case and/or are due to appear before the SC.

39. The Pre-Trial Judge notes the Parties' discussion on certain allegations of Mr Thaçi's attempts to undermine the SC and the SPO and to interfere with investigations and proceedings. While the Accused's involvement in a given incident may be indicative of his future intentions, the Pre-Trial Judge must determine first and foremost whether, taken together, these instances reveal a risk of obstruction of the progress of the proceedings by Mr Thaçi.

40. Regarding the attempts to undermine the SC, the Pre-Trial Judge considers as relevant: (i) Mr Thaçi's letter to the United States Secretary of State ("Letter"); (ii) the request made to [REDACTED]; and (iii) the reductions of sentences for former KLA members.⁷⁸ In particular, the Pre-Trial Judge notes the timing of the Letter (namely a few days after Mr Thaçi was summonsed as a suspect by the SPO)⁷⁹ as well as the timing of the reduction of sentences, which occurred shortly before Mr Thaçi resigned

⁷⁶ Reply, paras 25-45.

⁷⁷ Response, paras 15-17.

⁷⁸ Response, paras 21-23 ; Annex 1 to the Response.

⁷⁹ Response, para. 21.

as President of Kosovo and exceeded, however slightly, the recommendations of the governmental commission dealing with the matter.⁸⁰ When weighed together, the Pre-Trial Judge finds that these three factors militate in favour of a risk of obstruction, as they show a pattern of consistently undermining the SC, especially when assessed together with other factors addressed below. In addition, the Pre-Trial Judge does not consider that the request allegedly made to [REDACTED], or other factors put forward by the SPO, should be subject to the Parties' questioning of the source(s) of such information, as purported by the Defence.⁸¹ The issue before the Pre-Trial Judge is to decide on the detention or release of the Accused, not to determine his guilt or innocence in relation to the instances relied upon by the SPO to that effect.

41. Regarding the alleged attempts to interfere in the proceedings, the Pre-Trial Judge considers as relevant the scheme of benefits offered to persons summonsed by the SPO or their family members,⁸² and the attempts to gain insight into or to influence the evidence given by these persons during their SPO interviews, [REDACTED].⁸³ The Pre-Trial Judge finds that this pattern of incidents, and their timing in relation to the SPO interviews, reveal, at a minimum, a degree of influence and control that Mr Thaçi has. The Pre-Trial Judge further considers that [REDACTED], [REDACTED], further demonstrates such degree of influence and control.⁸⁴ Accordingly, taken together, these factors further contribute to a risk of obstruction of the progress of the proceedings by Mr Thaçi.

42. The Pre-Trial Judge further considers that Mr Thaçi's public activities⁸⁵ in support of the SC and the SPO do not negate, in these circumstances, the above-mentioned pattern but coexist with it, thus creating a stark contrast between the public activities

⁸⁰ Response, para. 23.

⁸¹ Reply, para. 28.

⁸² Response, paras 25-30.

⁸³ Response, paras 31-37.

⁸⁴ Response, para. 35.

⁸⁵ Request, paras 25-32; Reply, para. 29.

undertaken by Mr Thaçi *in* his official capacity and the framework of influence and control established *through* his official capacity.

43. Lastly, the Pre-Trial Judge considers that the above findings must be placed in the context of a general, well-established, and ongoing climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.⁸⁶ While this factor alone is not determinative of a risk of obstruction of the criminal proceedings, it constitutes a framework that must be taken into due consideration by the Pre-Trial Judge, along with the other factors addressed above, and in light of Mr Thaçi's prominent position in Kosovo and internationally.

44. The Pre-Trial Judge accordingly finds that there is a risk that Mr Thaçi will obstruct the progress of SC proceedings.

3. Risk of Committing Further Crimes

45. The Defence submits that there is no risk that Mr Thaçi will repeat the criminal offences, complete an attempted crime or commit a crime which he has threatened to commit.⁸⁷ The Defence contends that the wording of Article 41(6)(b)(iii) of the Law must necessarily refer to the crimes with which the Accused is charged.⁸⁸

46. The SPO responds that there is still a risk that Mr Thaçi will commit further crimes on the basis of: (i) the nature of the joint criminal enterprise with which Mr Thaçi is charged, which concerned the targeting of opponents of the Accused; (ii) Mr Thaçi's attempts to obstruct the progress of the criminal proceedings; and (iii) the prevailing climate of witness intimidation in Kosovo.⁸⁹ The SPO also submits that the more logical interpretation of Article 41(6)(b)(iii) of the Law is that there must be a risk of

⁸⁶ Response, paras 8, 15-17. *See also* Decision on Arrest and Detention, para. 41.

⁸⁷ Request, paras 57-61

⁸⁸ Request, para. 59.

⁸⁹ Response, para. 38.

the Accused repeating the criminal conduct underlying the crimes charged, as it is impossible to repeat crimes committed 20 years ago.⁹⁰

47. The Defence replies that Article 41(6)(b)(iii) of the Law should be given its ordinary, natural and obvious meaning, as advanced in the Request.⁹¹ The Defence further submits that there is neither evidence that Mr Thaçi has committed any crime such as murder, torture and cruel treatment in the past, nor is there an imminent risk that he will commit any such offences.⁹² The Defence contends that the public behaviour and speeches by Mr Thaçi over the years demonstrate his commitment to reconciliation, as exemplified by certain public events in which Mr Thaçi participated.⁹³

48. As regards the risk of committing further crimes, the Pre-Trial Judge recalls his above finding that there is a risk that Mr Thaçi will obstruct SC proceedings.⁹⁴ While the existence of a risk of obstruction does not automatically translate into a risk of committing further crimes, in the present case the factors underpinning the former are of relevance to the assessment of the latter. In this regard, the Pre-Trial Judge considers that the course of conduct aimed at undermining the SC and SPO and the attempts to interfere with the proceedings must be considered together with Mr Thaçi's prominent position in Kosovo and internationally, and in light of a prevalent practice of witness intimidation and interference in proceedings against former KLA members.⁹⁵ These factors, altogether, show that there is a likelihood that Mr Thaçi will, under any form of responsibility, engage in or contribute to crimes, similar to the underlying acts charged, against those perceived as being opposed to the KLA, including witnesses who provided or could provide evidence in the case and/or are

⁹⁰ Response, paras 39, 41.

⁹¹ Reply, para. 46.

⁹² Reply, para. 46.

⁹³ Reply, paras 47-52.

⁹⁴ See *supra* paras 38-44.

⁹⁵ See *supra* para. 43.

due to appear before the SC. Such contribution need not materialise in Mr Thaçi physically executing such crimes. It suffices that Mr Thaçi, through his statements and actions, either public or private, may instigate or assist individuals in his support network to commit such crimes or may contribute in any other way to their commission.

49. The Pre-Trial Judge considers that the lack of evidence of criminality in the intervening years and Mr Thaçi's public calls for peace and reconciliation⁹⁶ do not negate the above-mentioned pattern, especially with Mr Thaçi being progressively informed in the coming months of the evidence underpinning the charges against him, including the identity of witnesses who provided or could provide evidence in the case and/or are due to appear before the SC. Likewise, the Pre-Trial Judge considers that the written assurances provided by the Defence,⁹⁷ while potentially mitigating this risk, fail to negate it, when weighed against the pattern of conduct found above.

50. The Pre-Trial Judge accordingly finds that there is a risk that Mr Thaçi will commit further crimes.

4. Conclusion

51. The Pre-Trial Judge concludes that there is a risk 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 provided or could provide evidence in the case and/or are due to appear before the SC. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by the conditions proposed by the Defence.

⁹⁶ Request, paras 57, 61; Reply, paras 46-47.

⁹⁷ Reply, para. 53; Annexes 1-3 to the Reply.

C. PROPOSED CONDITIONS

52. The Defence submits that Mr Thaçi is willing to adhere to any condition, singularly or in combination, which may be imposed pursuant to Article 41(12) of the Law, including house arrest; surrender of international travel documents; prohibition of approaching certain places or persons; attendance of proceedings by video-link; prohibition of the use of media or political activity.⁹⁸ The Defence further proposes that Mr Thaçi reside outside Kosovo, subject to any condition as deemed appropriate (altogether “Proposed Conditions”).⁹⁹

53. The SPO responds that no combination of the Proposed Conditions comes close to mitigating the risks posed by Mr Thaçi, if released.¹⁰⁰ The SPO contends that detention at the SC detention facilities, including the communications monitoring framework applicable therein, is the only means by which these risks can be managed.¹⁰¹ In the SPO’s submissions, regardless of whether Mr Thaçi was released in Kosovo or a Third State, he has the means and network to realise each of the risks under Article 41(6)(b) of the Law. Neither the SPO, EULEX, nor the Kosovo police have the means and resources to adequately monitor an Accused of the stature, authority and resources of Mr Thaçi.¹⁰²

54. The Defence replies that the SPO’s concerns as regard the ability to monitor Mr Thaçi, if released with conditions, are addressed by the Defence’s proposal to release him to a Third State, which has a cooperation agreement with Kosovo.¹⁰³

55. At the outset, the Pre-Trial Judge acknowledges the objective impact of the COVID-19 pandemic on the overall conduct of the proceedings, including on the

⁹⁸ Request, para. 62.

⁹⁹ Request, para. 63.

¹⁰⁰ Response, para. 42.

¹⁰¹ Response, para. 42.

¹⁰² Response, paras 43-48.

¹⁰³ Reply, para. 54.

Defence, in this and other cases.¹⁰⁴ The Pre-Trial Judge, however, considers that such constraints, regardless of whether they were faced by the SPO when preparing the case, are of no relevance for assessing the existence of the risks under Article 41(6)(b) of the Law and whether the Proposed Conditions may mitigate any of them. The current pandemic does not negate or mitigate, *per se*, any of the risks under Article 41(6)(b) of the Law.

56. As regards the risk of flight, the Pre-Trial Judge considers that the Proposed Conditions, including in particular house arrest in a Third State with a cooperation agreement with the SC, could mitigate the risk of flight, as the possible assistance of any support network which could be further mobilised upon Mr Thaçi's release would be considerably less efficient, if not absent, depending on the Third State in question.

57. As regards the risk of obstructing the progress of SC proceedings or committing further crimes, the Pre-Trial Judge considers that none of the Proposed Conditions, nor any additional limitations imposed by the Pre-Trial Judge, could restrict Mr Thaçi's ability to communicate, through any non-public means, with his community or support network. It is through such communication that Mr Thaçi could instigate, assist or otherwise engage others in intimidating or harming those perceived as being opposed to the KLA. Restricting Mr Thaçi's movements or public activity would not limit his ability to communicate privately, from his home or place of residence in a Third State. Crucially, prohibiting Mr Thaçi from contacting witnesses, persons connected to the case or, for that matter, any person in Kosovo can neither be enforced nor monitored, whether such bar refers to in-person contacts or communication through electronic devices. The same holds true should release be effectuated in a Third State with a cooperation framework with the SC. Given the stature of Mr Thaçi and the authority and influence he can exercise, directly or

¹⁰⁴ Request, para. 64.

indirectly, over former subordinates and supporters, it is only through the communication monitoring framework applicable at the SC detention facilities that Mr Thaçi's communications can be effectively restricted and monitored, thereby mitigating the risks of him obstructing SC proceedings or engaging in or contributing to crimes.

58. The Pre-Trial Judge accordingly finds that the Proposed Conditions, including any additional limitations imposed by the Pre-Trial Judge, would insufficiently mitigate the risks of obstructing SC proceedings or committing further crimes.

D. ADDITIONAL DISCLOSURE REQUESTS

59. The Pre-Trial Judge notes that a lesser redacted version of the Arrest Warrant Request has been provided to the Defence.¹⁰⁵ The Pre-Trial Judge also takes note of the SPO submissions that it has disclosed all material relied upon for the purposes of the present Request. Accordingly, the Defence concerns are addressed and its requests in this respect are moot.

E. CLASSIFICATION


60. The Pre-Trial Judge notes that the Defence filed its Reply confidentially only, while the Request and the Response were also submitted in public redacted versions. Pursuant to Rule 82 of the Rules, the Pre-Trial Judge considers it appropriate to order the Defence to file a public redacted version of its Reply.

¹⁰⁵ KSC-BC-2020-06, F00005/CONF/RED2, Specialist Prosecutor, *Second Confidential Redacted Version of 'Request for Arrest Warrants and Related Orders' filing KSC-BC-2020-06-F00005 dated 28 May 2020*, 15 December 2020, confidential.

V. DISPOSITION

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

- a) **REJECTS** the Request;
- b) **DIMISSES** the additional disclosure requests from the Defence as moot; and
- c) **ORDERS** the Defence to file a public redacted version of its Reply by Friday 29 January 2021.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 22 January 2021
At The Hague, the Netherlands.