



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: Court of Appeals Panel
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Response to Thaçi Defence Appeal of Detention Decision

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I. Introduction

1. With regard to Article 41 of the Law¹ and Rules 57 and 170 of the Rules,² the SPO responds to the THAÇI Appeal³ against the Decision⁴ rejecting the THAÇI Release Request.⁵

2. The Court of Appeals Panel ('Panel') should deny the THAÇI Appeal in its entirety. As set out in detail below, in the Decision: (a) the correct legal standards were applied; (b) the assessment was properly individualised; (c) other specific risk factors were weighed correctly; and (d) no conditions sufficiently mitigate the risks identified. Faced with an abundance of evidence demonstrating the risks posed by the Accused, the Defence merely repeats piecemeal and unpersuasive prior arguments without demonstrating any discernible error in the findings.

II. Procedural background

3. On 28 May 2020, the SPO filed the Arrest Warrant Application.⁶

¹ 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.

² 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.

³ Public Redacted Version of Thaçi Defence appeal against the "Decision on Hashim Thaçi's Application for Interim Release", KSC-BC-2020-06/IA004-F00001/RED, 3 February 2021 (with two annexes) (THAÇI Appeal).

⁴ Public Redacted of Decision on Hashim Thaçi's Application for Interim Release, KSC-BC-2020-06/F00177/RED, 22 January 2021 (public version notified 26 January 2021) ('Decision').

⁵ Public Redacted Version of Application for Interim Release on Behalf of Mr Hashim Thaçi, KSC-BC-2020-06/F00120/RED, 4 December 2020 (public version notified 7 December 2020) ('THAÇI Release Request').

⁶ Public 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/ RED, 17 November 2020 ('Arrest Warrant Application').

4. On 26 October 2020, the PTJ confirmed a ten-count indictment against the Accused which charged him with a range of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.⁷
5. That same day, the Arrest Warrant Application was granted.⁸ The Accused went into custody on 5 November 2020 and was transferred to the seat of the KSC in The Hague.
6. On 4 December 2020, the Accused filed the THAÇI Release Request, after which came the SPO Release Response⁹ and THAÇI Release Reply.¹⁰
7. On 22 January 2021, the PTJ rendered the Decision. The PTJ concluded that there is a risk that the Accused will abscond, obstruct the progress of KSC proceedings or commit further crimes against those who allege that KLA members committed crimes, including witnesses who provided or could provide evidence in the case and/or are due to appear before the KSC. The PTJ further concluded that no conditions would sufficiently mitigate the risks of the Accused obstructing KSC proceedings or committing further crimes.
8. On 3 February 2021, the Accused filed the THAÇI Appeal against the Decision.

⁷ Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (public version notified 30 November 2020).

⁸ Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020 (public version notified 26 November 2020) ('Arrest Warrant Decision').

⁹ Public Redacted Version of Prosecution response to Application for Interim Release on behalf of Mr Hashim Thaçi, KSC-BC-2020-06/F00149/RED, 16 December 2020 (with annex; public version notified 21 December 2020) ('SPO Release Response').

¹⁰ Public Redacted Version of Reply to Specialist Prosecutor's Response Opposing the Application for Interim Release on behalf of Mr Hashim Thaçi, KSC-BC-2020-06/F00165/RED, 7 January 2021 (public version notified 25 January 2021) ('THAÇI Release Reply').

III. Standard of review

9. When rendering discretionary decisions, like provisional release decisions, the weight given to relevant considerations may depend on numerous factors.¹¹ Because of the fact-specific nature of provisional release decisions, the lower level panel is better placed to assess these factors.¹² Accordingly, the Panel must not intervene unless the appellant demonstrates the existence of a discernible error in that the Decision was based on an error of law, error of fact, or abuse of discretion.¹³ A mere disagreement with the conclusions that the first instance panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.¹⁴

10. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.¹⁵ An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.¹⁶

11. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.¹⁷ In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.¹⁸

¹¹ *Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public ('*Gucati Appeals Decision*'), paras 44, 49.

¹² *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.49.

¹³ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras 14, 49; *Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, Public ('*Haradinaj Appeals Decision*'), para.14.

¹⁴ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.64.

¹⁵ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.12.

¹⁶ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.12.

¹⁷ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.13.

¹⁸ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.13.

12. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.¹⁹

IV. Submissions

A. THE CORRECT LEGAL STANDARDS WERE APPLIED

13. This section addresses Ground 1.1 of the THAÇI Appeal. It also sets out why Ground 1.4 should be dismissed, with further arguments arising from that ground addressed in Section C below.

14. Article 41(6)(b) of the Law requires there to be 'articulable grounds to believe' that the risks identified in Article 41(6)(b)(i)-(iii) are established. The PTJ held that the grounds must be 'articulable' in the sense that they must be specified in detail, meaning that specific reasoning and concrete grounds are required in deciding to continue detention.²⁰ The PTJ further concluded that specific articulable grounds must support the 'belief' that the risks under Article 41(6)(b)(i)-(iii) exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.²¹

15. This Panel has already concluded that an interim release inquiry involves a risk assessment.²² In particular, the Panel concluded that determining the necessity of detention revolves around the 'possibility, not the inevitability, of a future occurrence'.²³ This was not an idle reference to something less than certainty being required; the Panel

¹⁹ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.14. *Haradinaj Appeals Decision*, KSC-BC-2020-07/IA002/F00005, para.14.

²⁰ *Decision*, KSC-BC-2020-06/F00177/RED, para.20.

²¹ *Decision*, KSC-BC-2020-06/F00177/RED, para.20.

²² *See Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras 51, 63, 67, 69.

²³ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.67.

framed the relevant determination in these exact words and favourably cited ICC jurisprudence using that same language.²⁴

16. Proposing additional or different thresholds of what the PTJ must find does not advance the matter.²⁵ In particular, the Panel has previously dismissed arguments that any risk posed by the Accused be 'real and identifiable'.²⁶ The degree of certainty indicated follows naturally from the 'articulable grounds to believe' language in Article 41(6)(b). This interpretation has already been settled by the Panel, and the PTJ did not articulate an inconsistent or incorrect legal standard.

17. Instead, the Defence submissions misrepresent the PTJ's findings. At no point did the PTJ say that the risks have to be completely extinguished, or that mitigation is insufficient.²⁷ Rather, the PTJ held that (i) the grounds must be 'articulable' in the sense that they must be specified in detail, meaning that specific reasoning and concrete grounds are required in deciding to continue detention; and (ii) continued detention must be the only means of mitigating those risks.²⁸ Specific words relied upon by the Defence are removed from their proper context in the Decision,²⁹ where they form part of the precise balancing of risk exercise that the Defence claims was not done.³⁰ To assert that the PTJ's overall assessment did not evaluate or weigh the likelihood of the risks materialising is simply inaccurate.³¹ Indeed, in respect of the Article 41(6)(b)(iii) risk, the

²⁴ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.67, citing ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-283, Judgment on the Appeal of Mr Callixte Mbarushimana Against the Decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", 14 July 2011, para.60.

²⁵ *Contra THAÇI Appeal*, KSC-BC-2020-06/IA004-F00001/RED, paras 10-12, 46 ('real risk', or further requiring the risk to be 'imminent' in the Article 41(6)(b)(iii) context).

²⁶ *Haradinaj Appeals Decision*, KSC-BC-2020-07/IA002/F00005, para.64 and fn.119.

²⁷ *Contra THAÇI Appeal*, KSC-BC-2020-06/IA004-F00001/RED, paras 14-15.

²⁸ Decision, KSC-BC-2020-06/F00177/RED, para.20.

²⁹ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 11, 14.

³⁰ Decision, KSC-BC-2020-06/F00177/RED, paras 32, 49.

³¹ *Contra THAÇI Appeal*, KSC-BC-2020-06/IA004-F00001/RED, para.13.

PTJ expressly framed the relevant inquiry and finding as a ‘likelihood’ that the Accused, if released, will, under any form of responsibility, contribute to future crimes.³² Throughout the Decision, the PTJ consistently identified factors militating both for and against continued detention. In particular, the PTJ’s conclusion that the Accused’s proposed conditions sufficiently mitigated the current risk of flight is clear proof that such an assessment was made.³³

18. Finally, the PTJ’s finding that Article 41(6)(b)(iii) encompasses future crimes which are ‘similar’, but need not be ‘identical’, to the underlying crimes charged contains no error.³⁴ It was plain to the drafters in 2015 that any armed conflict or attack against the civilian population from the jurisdictional period had already ceased, and would not be applicable to an accused’s arrest some 15-20 years after the mandate period. Consequently, the interpretation proposed by the Defence, which seeks to confine the applicability of this detention ground to identical crimes,³⁵ is nonsensical. It defies rational scrutiny to suggest that the drafters would have deliberately included a provision which they knew could have no application to the core international crimes which form the foundation of the institutional mandate.³⁶ For, if the international crimes

³² Decision, KSC-BC-2020-06/F00177/RED, paras 23, 48.

³³ See Decision, KSC-BC-2020-06/F00177/RED, para.56.

³⁴ *Contra* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 42-46. Preliminarily the Defence argues that the PTJ ‘fails to explain the rationale or legal authority’ behind its interpretation. THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.43. Such submissions betray a fundamental misunderstanding of how errors of law are evaluated on appeal. Lower level panels do not have to substantiate its applicable law in the same way as with factual and discretionary determinations. This is because, unlike with factual and discretionary determinations—where the lower level panel is given considerable deference on its reasoned findings—the Appeals Panel is as well-suited as the lower level panel to pronounce on purely legal issues. If the lower level panel stated the law correctly, alleged errors of law must be dismissed. See, for example, ICC, *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses”, ICC-01/04-02/06-1330, 20 May 2016, paras 15-16.

³⁵ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.42.

³⁶ The consequence of the Defence’s logic would be the position that the drafters deliberately sought to ensure that a wider range of grounds for detention were available in respect of those charged with offences against the administration of justice, than for those charged with core international crimes.

charged had to be ‘identical’ to qualify under Article 41(6)(b)(iii), this provision would effectively be rendered a nullity in all core crimes cases. The Defence places undue emphasis on one article (‘the’) in the phrase ‘the criminal offence’³⁷ to the exclusion of all other principles of interpretation.³⁸ The only plausible interpretation of the provision – as acknowledged in the Defence’s fall-back position³⁹ - is that a perfect overlap between offences is not required. As such, the correct enquiry is for the PTJ to assess the likelihood that the Accused, if released, will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged.⁴⁰

19. Moreover, Article 41(6)(b)(iii) sets out three categories of future crimes in relation to which a relevant risk may arise. The THAÇI Appeal focuses exclusively on the first of those categories, being the risk that an accused will ‘repeat the criminal offence’.⁴¹ However, the PTJ was not specifically addressing only that category of future crime when articulating the principle in question,⁴² nor was the relevant portion of the reasoning so confined.⁴³

20. Indeed, the specific factors giving rise to the Article 41(6)(b) risks in respect of the Accused—as described in the Decision—implicate more than one of the categories of potential future crimes.⁴⁴ In particular, the PTJ found a ‘pattern’ of behaviour on the part

³⁷ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.42.

³⁸ Including the object and purpose of the provision. The Accused’s interpretation betrays the surplusage canon of statutory interpretation, whereby no provision should be needlessly given an interpretation that causes it to have no consequence. Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson Reuters 2012), chapter 26.

³⁹ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 45-50.

⁴⁰ Decision, KSC-BC-2020-06/F00177/RED, para.23.

⁴¹ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.42.

⁴² Decision, KSC-BC-2020-06/F00177/RED, para.23 (referring globally to the ‘third ground’ of Article 41(6)(b)).

⁴³ Decision, KSC-BC-2020-06/F00177/RED, paras 48-49.

⁴⁴ Notably the PTJ’s conclusion was framed as a finding that there is a risk the Accused ‘will commit further crimes’ (Decision, KSC-BC-2020-06/F00177/RED, para.50).

of the Accused⁴⁵ in light of ‘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’.⁴⁶ As such, the Accused’s recent conduct should reasonably be interpreted as an attempt to incite or instigate crimes against such persons,⁴⁷ and/or a threat indicating his intent to commit future crimes.⁴⁸

21. Finally, the Defence submission that the PTJ failed to consider the ‘imminence’ of foreseen crimes⁴⁹ is transparently without foundation. The Law contains no such threshold and, in any event, the PTJ made a clear finding that the risk relates to witnesses and potential witnesses in these current and ongoing proceedings.⁵⁰

B. THE ASSESSMENT WAS PROPERLY INDIVIDUALISED

22. This section addresses certain general arguments raised in Grounds 1.2 and 1.3 of the THAÇI Appeal, the remainder of which are addressed in Section C below.

23. It is not disputed that the PTJ’s assessment must be undertaken on an individual basis in light of the personal circumstances of each Accused.⁵¹ Within this individualised assessment, and with reference to a wide array of jurisprudence, the PTJ distinguished individual and contextual risk factors as follows:

[F]actors may be 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, his or her age, (past) position(s), occupation, family ties, health condition, assets, conduct and statements,

⁴⁵ Decision, KSC-BC-2020-06/F00177/RED, para.49.

⁴⁶ Decision, KSC-BC-2020-06/F00177/RED, para.48.

⁴⁷ Article 41(6)(b)(iii) (‘complete an attempted crime’).

⁴⁸ Article 41(6)(b)(iii) (‘commit a crime which he or she has threatened to commit’).

⁴⁹ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.46.

⁵⁰ Decision, KSC-BC-2020-06/F00177/RED, para.48.

⁵¹ Decision, KSC-BC-2020-06/F00177/RED, para.21.

international contacts and ties, and existence of support networks that may facilitate the materialisation of a risk. Relevant factors may also be contextual, such as the environment and conditions in which the Accused lives, or the particular stage of the ongoing proceedings.

24. This distinction is meaningful, as contextual risk factors alone are not sufficient to justify a risk necessary to continue detention.⁵²

25. The gravity of the charges and the potential penalties which may be imposed are individual risk factors. Such considerations are particular to the individual charged, and were therefore correctly considered as individual risk factors. The PTJ relied upon the crimes charged and/or material facts underlying them to establish all three of the Article 41(6)(b) risks.⁵³ As the Panel has held, they are important factors to consider when determining whether detention is necessary in the circumstances of a specific case.⁵⁴

26. The political profile of the Accused and his prior posts are likewise individual considerations relied upon by the PTJ in his assessment. The PTJ correctly placed significant weight on the Accused's former influential leadership positions in the KLA and government of Kosovo when considering all three risks.⁵⁵ THAÇI was a founding member of the KLA. He was the head of the KLA Political and Operational Directorates and, by the end of March 1999, was the Prime Minister of the Provisional Government of Kosovo. He was previously the Prime Minister and Minister of Foreign Affairs of Kosovo. At the time of his arrest, he was President of the country.

27. An Accused's available support networks is also a risk factor particular to the individual. In respect of each of the Article 41(6)(b) risks,⁵⁶ the PTJ concluded that the Accused had access to and could mobilise a network of supporters, including former subordinates and persons affiliated with the KLA WVA. It was entirely reasonable for the

⁵² Decision, KSC-BC-2020-06/F00177/RED, para.21.

⁵³ Decision, KSC-BC-2020-06/F00177/RED, paras 31, 38, 48.

⁵⁴ *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.72.

⁵⁵ Decision, KSC-BC-2020-06/F00177/RED, paras 31, 38, 48.

⁵⁶ Decision, KSC-BC-2020-06/F00177/RED, paras 31, 38, 48.

PTJ to conclude that this risk supported the necessity of continued detention in light of the ample evidence of such a support network, the active interference which they have already undertaken,⁵⁷ and, as noted by the PTJ, the Accused's particular access and influence over them by virtue of his profile and specific prior positions of authority.

28. Each of the findings outlined above are findings of risk on factors individual and specific to the Accused, and which, taken together, would in themselves be more than sufficient to support the necessity of the Accused's detention. However, as discussed in Section C below, the Decision was further supported, not only by contextual factors such as the climate of interference, but by multiple further indicators of risk which were also individual and specific to the Accused.

29. Relatedly, throughout Grounds 1.2-1.3, the Defence repeatedly argues that there is insufficient evidence of a link between the Accused's acts/conduct and the risk factors identified by the PTJ.⁵⁸ However, there is no requirement that every factor considered in a risk assessment relate directly to the Accused's own acts and conduct. 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 the Accused.⁵⁹ The PTJ's finding in relation to the incidents challenged was that they indicate the Accused's influence, authority, and control.⁶⁰ These were correct and reasonable conclusions, especially in conjunction with the further pattern of incidents clearly stemming from the Accused's own acts and conduct.⁶¹ These findings contain no discernible error.

⁵⁷ The publication of confidential SPO documents by the KLA WVA in particular demonstrates the motivation and capability of this support network and its direct link to the present proceedings.

⁵⁸ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, Ground 1.2: para.23, Grounds 1.3: 30, 38.

⁵⁹ Decision, KSC-BC-2020-06/F00177/RED, para.39.

⁶⁰ Decision, KSC-BC-2020-06/F00177/RED, paras 31, 41.

⁶¹ Decision, KSC-BC-2020-06/F00177/RED, para.40.

C. OTHER SPECIFIC RISK FACTORS WERE WEIGHED CORRECTLY

30. The additional specific risk factors challenged by the Accused are addressed below. This section responds to all remaining arguments in Grounds 1.2-1.4 of the THAÇI Appeal; as well as part of Ground 2.

31. Preliminarily, it must be noted that the PTJ concluded that the Accused's current risk of flight is mitigated by his proposed conditions. As such any alleged errors on this basis have no chance of changing the outcome of a Decision⁶² and should be summarily dismissed. The SPO only engages with the Accused's flight risk arguments to the extent they apply to the reasoning on the Article 41(6)(b)(ii)-(iii) risks.

32. Also notable is the Defence's insistence on a lack of 'concrete grounds' for the PTJ's findings.⁶³ In light of the veritable surfeit of evidence demonstrating the risks posed by the Accused, this is nothing more than rhetoric. Indeed, many of the Defence challenges to factors relied upon simply repeat arguments rejected by the PTJ without identifying any discernible error in the finding.⁶⁴ Moreover, they fail to appreciate that the relevant assessment is whether, taken together, the factors in question establish the existence of the Article 41(6)(b) risks.

1. Appointments of SPO interviewees, disproportionate legal assistance, and Driton LAJÇI

33. There is significant evidence that, when THAÇI was President of Kosovo, the Kosovo government offered several persons benefits or disproportionate legal assistance contemporaneous with the SPO summoning them for interviews.⁶⁵ This included three

⁶² THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 16-28.

⁶³ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 16, 18, 22-23, 30, 38, 41, 47.

⁶⁴ Paragraphs 37, 40, 45, 47-48 below.

⁶⁵ SPO Release Response, KSC-BC-2020-06/F00149/RED, paras 24-37.

named members of the joint criminal enterprise ultimately charged: Lahi BRAHIMAJ, Syljeman SELIMI, and Rrustem ('Remi') MUSTAFA.

34. It was entirely reasonable for the PTJ to rely on these instances.⁶⁶ THAÇI's summary denials that he had anything to do with them are not credible, and certainly do not amount to the evidence having been 'comprehensively rebutted'.⁶⁷ The notion that relevant officials were utterly beyond THAÇI's influence, as President or otherwise, is belied by common sense and the pattern of other witnesses offered assistance from THAÇI, his office, and/or those acting on his behalf.⁶⁸

35. As regards the assistance payment to Lahi BRAHIMAJ, it was entirely fair and reasonable for the PTJ to rely upon this as part of a scheme of benefits offered to persons summonsed by the SPO.⁶⁹ The Defence's arguments on this point—adopted entirely from those of a co-accused—fail to demonstrate any discernible error in the finding in question.⁷⁰

36. As concerns Driton LAJÇI, it was not required for the PTJ to conclude the Accused specifically directed him to do something improper,⁷¹ though [REDACTED].⁷² This includes: (i) [REDACTED];⁷³ and (ii) [REDACTED].⁷⁴ The actual finding made by the PTJ

⁶⁶ Decision, KSC-BC-2020-06/F00177/RED, para.41.

⁶⁷ *Contra* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.36.

⁶⁸ *See* SPO Release Response, KSC-BC-2020-06/F00149/RED, paras 24-30.

⁶⁹ Decision, KSC-BC-2020-06/F00177/RED, para.41.

⁷⁰ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.36 (in reference to Kadri VESELI's appellate arguments on this point). *See also* Response to Veseli Defence Appeal of Detention Decision, KSC-BC-2020-06/IA001-F00003, paras 40-41 (incorporated by reference).

⁷¹ *Contra* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.37.

⁷² SPO Release Response, KSC-BC-2020-06/F00149/RED, paras 31-34, *further citing* Arrest Warrant Application, KSC-BC-2020-06/F00005, paras 10, 13.

⁷³ *See* SPO Release Response, KSC-BC-2020-06/F00149/RED, para.32, *citing* Annex 1 of the Arrest Warrant Application, KSC-BC-2020-06/F00005/A01. *See also* Annex 1 of the Prosecution response to Application for Interim Release on behalf of Mr Kadri Veseli, KSC-BC-2020-06/F00161/A01, 4 January 2021, pp.2-7.

⁷⁴ SPO Release Response, KSC-BC-2020-06/F00149/RED, para.34, *citing* Arrest Warrant Application, KSC-BC-2020-06/F00005, para.13, *further citing* [REDACTED].

in relation to [REDACTED] is that such actions indicate, at a minimum, the Accused's influence and control.⁷⁵ There is no discernible error in reaching this conclusion.

37. THAÇI's explanations for why these incidents should not be given weight were considered and dismissed by the PTJ.⁷⁶ In the THAÇI Appeal, the Accused simply cross-refers to his past arguments, without more.⁷⁷ In doing so, he merely disagrees with the PTJ's conclusions and identifies no discernible error.

2. Protective measures

38. Contrary to Defence submissions, it is apparent that the PTJ carefully considered issues surrounding witness security and protection, including the extent to which various measures could mitigate the risk of witness interference. In particular, the PTJ noted the context of the general, well-established, and ongoing culture of witness intimidation in Kosovo.⁷⁸ The adequacy—or inadequacy—of various safeguards formed part of the parties' submissions, and the PTJ cited to these submissions as part of his considerations of the relevance and weight to give to that factor.⁷⁹ Indeed, to conclude that the PTJ did not consider the availability of such measures defies rational scrutiny, noting [REDACTED].⁸⁰

3. Pre-Surrender Conduct and Personal Circumstances

⁷⁵ Decision, KSC-BC-2020-06/F00177/RED, para.41.

⁷⁶ Decision, KSC-BC-2020-06/F00177/RED, paras 35, 41.

⁷⁷ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 35-36.

⁷⁸ Decision, KSC-BC-2020-06/F00177/RED, para.43.

⁷⁹ Decision, KSC-BC-2020-06/F00177/RED, para.43, fn.86, citing SPO Release Response, KSC-BC-2020-06/F00149/RED, para.16 ('[w]hat 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 is best seen not as a panacea for mitigating interference risks so much as a concrete reflection of the deadly seriousness of the problem'). *Contra* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.56.

⁸⁰ [REDACTED].

39. THAÇI repeatedly argues that the PTJ failed to consider the entirety of the evidence presented on his pre-surrender conduct⁸¹ and that his personal circumstances were not given sufficient weight.⁸²

40. As THAÇI himself notes, the PTJ did indeed take these into consideration and explained why they failed to sufficiently mitigate the risks found.⁸³ The PTJ expressly relied upon 'Mr Thaçi's cooperation with the SPO and the SC, as well as his efforts to establish these institutions',⁸⁴ and placed 'particular weight' on THAÇI's resignation when the indictment against him was confirmed.⁸⁵ The PTJ also explicitly considered the lack of evidence of criminality on the part of THAÇI in the years since the indictment time period, the Accused's public calls for peace and reconciliation, and the 'written assurances provided by the Defence' of prominent figures speaking for his character.⁸⁶ THAÇI merely repeats his unsuccessful arguments before the PTJ, and advances nothing more than a disagreement with the PTJ's conclusions.

41. THAÇI's arguments are likewise unpersuasive as concerns the aspects of his pre-surrender conduct militating in favour of his detention. The full context of these incidents is explained elsewhere,⁸⁷ but the Defence fails in attempting to explain away any of them:⁸⁸

- (i) *The letter to the former United States Secretary of State.* THAÇI wrote an official, non-public letter to the then United States Secretary of State to make critical and obstructive changes to the KSC in the midst of the SPO's advanced

⁸¹ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 27, 31-34, 39, 48, 50.

⁸² THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 50.

⁸³ Decision, KSC-BC-2020-06/F00177/RED, para.49, noted in THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.50.

⁸⁴ See Decision, KSC-BC-2020-06/F00177/RED, paras 32, 42.

⁸⁵ See Decision, KSC-BC-2020-06/F00177/RED, paras 32, 42.

⁸⁶ Decision, KSC-BC-2020-06/F00177/RED, para.49.

⁸⁷ SPO Release Response, KSC-BC-2020-06/F00149/RED, paras 21-23.

⁸⁸ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 31-34.

criminal investigation into the highest-ranking members of the KLA. As noted by the PTJ, he did so 12 days after being summonsed for a suspect interview by the SPO. The timing of this letter is self-evidently relevant to obstructing KSC proceedings.

- (ii) *THAÇI's interactions with [REDACTED].* The incident involving [REDACTED]. [REDACTED].⁸⁹
- (iii) *The pardons of two persons guilty of murdering collaborators.* THAÇI spent essentially his last act as President exceeding the pardoning board's recommendation to reduce sentences of Bekim SYLAJ and Shpresim UKA (both former KLA and SHIK⁹⁰ members), the latter of whom is implicated in attempts to interfere with witnesses in prior KLA trials.⁹¹

42. These incidents were used by the PTJ 'to show a pattern of consistently undermining the SC, especially when assessed together with other factors'.⁹² The Defence's arguments in relation to them involve a piecemeal analysis of the evidence which fails to acknowledge how these and other instances combine together to establish the Article 41(6)(b) risks.

43. Moreover, the PTJ obviously never concluded that writing a letter, [REDACTED], or issuing pardons were similar to the underlying acts charged for purposes of the Article 41(6)(b)(iii) risk.⁹³ Rather, these incidents—along with other factors—established a risk THAÇI would repeat crimes similar to those charged. These other factors included 'the attempts to interfere with the proceedings' and were considered 'together with Mr Thaçi's prominent position in Kosovo and internationally, and in light of a prevalent

⁸⁹ SPO Release Response, KSC-BC-2020-06/F00149/RED, para.22 (citing [REDACTED]).

⁹⁰ Kosovo Intelligence Service ('SHIK').

⁹¹ SPO Release Response, KSC-BC-2020-06/F00149/RED, para.23, *also citing to* [REDACTED].

⁹² Decision, KSC-BC-2020-06/F00177/RED, para.40.

⁹³ *See* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.48.

practice of witness intimidation and interference in proceedings against former KLA members'.⁹⁴ THAÇI's arguments conflate the individual facts underlying the risk assessment (which do not need to be similar to the underlying acts charged) with the legal finding that there is a risk of repeating offences (which do). In so doing, the Defence simply misrepresents the reasoning in the Decision.

44. In reference to paragraph 42 of the Decision, THAÇI further suggests that his influence and control established through his official capacity is irrelevant because he is no longer the President of Kosovo.⁹⁵ But this very paragraph in the Decision explains why this is not so. In this paragraph, the PTJ explained how THAÇI's public activities as President 'co-exist' with the pattern of incidents establishing THAÇI's degree of influence and control. THAÇI's formal office was never the sole basis for the PTJ's conclusions, but was considered with many other factors. It was not unreasonable for the PTJ to conclude that this influence and control would still be relevant after THAÇI's resignation.

45. As addressed above, the PTJ considered the Accused's pre-surrender conduct concerning the KSC. Through these arguments, THAÇI again disagrees with the PTJ's conclusions, but fails to identify a discernible error of any kind.

4. Progressive Disclosure

46. The PTJ committed no discernible error in relying upon the fact that the Accused 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 KSC. THAÇI had significantly more specificity as to the case against him at the time of the Decision than he did upon the SPO's announcement that an indictment was filed against him in June 2020.⁹⁶ In particular, by the time of the

⁹⁴ Decision, KSC-BC-2020-06/F00177/RED, para.48.

⁹⁵ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, para.39.

⁹⁶ *Contra* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 18, 20.

Decision THAÇI had been disclosed the extensive indictment supporting materials pursuant to Rule 102(1)(a) of the Rules.

47. Whether or not the necessity of detention increases because the Accused is progressively informed of the evidence against him is first and foremost a matter for the lower level panel to determine in the exercise of its discretion.⁹⁷ By virtue of his detailed understanding of the evidence following the confirmation process, the PTJ is best able to assess how additional disclosure impacts the incentives of the Accused and, correspondingly, the Article 41(6)(b) risks. In the present case, the Accused being progressively informed of the witnesses against him was found, in light of all other relevant factors, as a consideration which bore on the risk of interference.⁹⁸ There is no discernible error in this assessment;⁹⁹ the Accused merely disagrees with how the PTJ's discretion was applied.

5. [REDACTED]

48. The Accused merely disagrees with the weight given to [REDACTED] and identifies no discernible error in the PTJ's reliance upon it.¹⁰⁰ It is in fact the Accused who fails to appreciate the import of [REDACTED].

⁹⁷ See ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para.15 (in the context of the Accused progressively hearing the evidence against him during trial).

⁹⁸ Decision, KSC-BC-2020-06/F00177/RED, para.31.

⁹⁹ To the contrary, the ICC Appeals Chamber expressly endorsed relying on this factor in the same manner. See ICC, *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 the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012 ('Gbagbo Appeals Judgment'), para.65 (citations removed: '[...] the Appeals Chamber notes that the Pre-Trial Chamber found that the disclosure of evidence "amplified" the risk to the investigation and the court proceedings in case of Mr Gbagbo's release. In the view of the Appeals Chamber, this finding cannot be faulted. Disclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute [governing risk of interference at the ICC] it may be a relevant factor.').

¹⁰⁰ *Contra* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001, para.37.

49. [REDACTED].¹⁰¹ [REDACTED].¹⁰²

50. Indeed, it was [REDACTED].¹⁰³ The PTJ was right to rely upon the [REDACTED] and committed no discernible error in considering it.

D. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED

51. Finally, the remainder of Ground 2 of the THAÇI Appeal is meritless as it is premised on a distortion of the PTJ's findings.

52. The PTJ considered that none of the proposed conditions, nor any additional limitations that could be imposed by him, could restrict the Accused's ability to communicate, through any non-public means, with his community or support network.¹⁰⁴ The PTJ found the risks to be such that they can only be effectively managed through the fully controlled environment that detention alone can provide.¹⁰⁵ There was no discernible error in these findings.

53. The PTJ expressly considered whether any alternatives short of detention could mitigate the risks identified.¹⁰⁶ Being detained in a Third State does not impact the reach of THAÇI's words, and further attempts to propose conditions restricting phone calls and public statements¹⁰⁷ fail to appreciate the reality behind the PTJ's considerations. The primary way the Accused is going to be able to either interfere or commit further crimes is to get messages out to his former subordinates and supporters. When considering THAÇI's prior posts, interference efforts, the climate of intimidation, and other factors

¹⁰¹ SPO Release Response, KSC-BC-2020-06/F00149, para.35.

¹⁰² *Contra* THAÇI Appeal, KSC-BC-2020-06/IA004-F00001, para.37. [REDACTED]. [REDACTED]. See Annex 2.4-2.7 of the SPO Release Response, KSC-BC-2020-06/F00149/A02.

¹⁰³ Decision, KSC-BC-2020-06/F00177, para.41.

¹⁰⁴ Decision, KSC-BC-2020-06/F00177/RED, para.57.

¹⁰⁵ Decision, KSC-BC-2020-06/F00177/RED, para.57.

¹⁰⁶ Decision, KSC-BC-2020-06/F00177/RED, para.57.

¹⁰⁷ THAÇI Appeal, KSC-BC-2020-06/IA004-F00001/RED, paras 53-55.

identified, THAÇI's potential to have private conversations becomes an unmanageable risk.

V. Conclusion

54. For the foregoing reasons, the Panel should deny the THAÇI Appeal in its entirety.

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Jack Smith
Specialist Prosecutor

Friday, 19 February 2021
At The Hague, the Netherlands.