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In:	**KSC-BC-2020-06**
	The 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 Counsel for Hashim Thaçi
Date:	7 May 2021
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Thaçi Defence Reply to "SPO Response to Thaçi Defence Appeal of Decision against 'Decision on Hashim Thaçi's Application for Interim Release'"

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I. INTRODUCTION

1. The Defence of Mr Hashim Thaçi ("Defence") hereby replies[1] to the SPO Response to Thaçi Defence Appeal of Detention Decision ("Response"),[2] in which the Defence has appealed against the PTJ's dismissal of Mr Thaçi's application for interim release ("Decision").[3]

2. While this reply is limited to addressing new issues arising from the Response, the Defence maintains its original submissions in full. The absence of a specific submission in reply to any aspect of the Response is not indicative of a concession as to the validity of the SPO submission.

II. SUBMISSIONS IN REPLY

A. GROUND 1: ERRORS IN FINDING THAT THE ARTICLE 41(6)(b) CRITERIA WERE MET

(i) Ground 1.1: Error in relation to the evaluation of risk

3. A significant point of departure between the Defence and SPO is whether the PTJ properly articulated and applied the correct legal standard for the evaluation of risk in determining whether the Article 41(6)(b) criteria were met. The Defence, of course, acknowledges that this Panel has decided that determining the necessity of detention revolves around the assessment of "possibility, not the inevitability, of a future occurrence".[4] It cannot be the position, however, that rejecting "inevitability" as the proper standard leads automatically to the other end of the spectrum, namely

[1] Rule 170(1), Rules of Procedure and Evidence.
[2] IA004/F00003, Response to Thaçi Defence Appeal of Detention Decision, 15 February 2021.
[3] KSC-BC-2020-06/F00177, Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021.
[4] Response, para. 15, citing *Gucati* Appeals Decision, para. 67.

that **any** possibility of risk is sufficient, no matter how slight. By simply repeating the "possibility not inevitability" language, the SPO and PTJ fall into the same error, being a failure to engage with and articulate the measure of risk that properly satisfies the "possibility" threshold.

4. Helpfully, however, the "possibility, not the inevitability" language is not new. While the Panel has relied on a 2011 appellate decision in *Mbarushimana*,[5] that decision itself drew the "possibility, not the inevitability" language from its source; a 2008 Appeals Chamber decision in *Katanga & Ngudjolo*.[6] In applying this standard in *Katanga*, the ICC Appeals Chamber found that detention was justified because the risk that the accused would evade justice became a "*distinct* possibility; a possibility rising in proportion to the consequences that a conviction may entail", and that "[t]he possibility of his absconding remains *visible*."[7]

5. Adopting the same language with no attempt to calibrate or put into context its meaning, other than "suspicion simpliciter" not being enough,[8] reduces the original standard to the point of being meaningless. Detention would be justified by **any** kind of possibility of a future occurrence, even if negligible. The SPO's submission that "the PTJ did not articulate an inconsistent or incorrect legal standard"[9] fails to engage with the identified error. In failing to explain appropriately where the "possibility" threshold lies, the PTJ's assessment encompasses a threshold so low it cannot be reconciled with the severity of interference to the right to liberty.

[5] *Gucati* Appeals Decision, para.67, fn.123.
[6] ICC, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-572, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of PreTrial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008.
[7] Ibid, paras. 21-24 (emphasis added). *See further*, F00165, Reply to Specialist Prosecutor's Response Opposing the Application for Interim Release on behalf of Mr Hashim Thaçi, 7 January 2021, paras. 10-11.
[8] Decision, para. 20.
[9] Response, para. 16.

6. Moreover, in asserting that the Panel has previously dismissed arguments that the risk posed by the accused be "real and identifiable", the SPO overstates the position. It was not the case in *Haradinaj* that the Panel held that the "real and identifiable" was an incorrect threshold. Rather, it dismissed the accused's bald submissions on this point, in a footnote, on the basis that they had not been substantiated. In the present case, the defence *has* substantiated its submission that the risk must be "a real risk and more than being a fanciful or mere possibility" with reference to the international jurisprudence.[10]

(ii) Ground 1.2: Errors in finding a risk of flight

7. The SPO asserts that it was "entirely reasonable" for the PTJ to conclude that Mr Thaçi could mobilise a network of supporters "including former subordinates and persons affiliated with the KLAWVA".[11] The problem with this conclusion, identified on appeal, is the complete lack of evidence that Mr Thaçi enjoys any influence or control over KLAWVA, let alone over the vague category of "persons affiliated" with it. The PTJ was required to identify "concrete grounds" to support his finding, such as prior examples of supporters' interference on which the findings of flight risk were grounded in other cases.[12] In the absence of such concrete grounds, the PTJ in this case resorted to pure conjecture. This remains an error, regardless of the SPO's characterisation of it as entirely reasonable.

8. Mr Thaçi's "profile and specific *prior* positions of authority",[13] without more, do not translate into grounds that can be relied upon to support a finding of risk of

[10] See, e.g. F00165, Reply to Specialist Prosecutor's Response Opposing the Application for Interim Release on behalf of Mr Hashim Thaçi, 7 January 2021, para. 9 ("Defence Reply"); IA004/F00001, Thaçi Defence appeal against the "Decision on Hashim Thaçi's Application for Interim Release", 3 February 2021, para. 12 ("Appeal").
[11] Response, para. 27.
[12] Appeal, para. 24.
[13] Response, para. 27 (emphasis added).

flight in 2021.[14] And while every identified risk factor need not necessarily "relate directly" to Mr Thaçi's own acts and conduct,[15] there must be *some* connection to the accused in order for a risk of obstruction to arise. Factors relied upon by the PTJ were unrelated to Mr Thaçi, and could not be properly relied upon to support continued detention. The SPO is correct that the PTJ found that the challenged incidents were relevant to the Accused's "influence and authority and control".[16] What is omitted and not addressed is that Mr Thaçi, when President, enjoyed such "influence and authority and control" to a far greater extent, but did not exercise it to interfere in these proceedings. In fact, he did the opposite.

9. As regards the PTJ's error in relying on Mr Thaçi being "progressively informed" of the case through disclosure, the SPO's self-serving starting point that it has now provided Mr Thaçi with "significantly more specificity" as to the case against him is disputed, particularly given Mr Thaçi's absence from large swathes of the indictment and supporting material. Regardless, it cannot be the position that the mere fact of the SPO's purported compliance with its statutory disclosure obligations, in the absence of more, can properly be held against Mr Thaçi in assessing his risk of flight. The SPO also misrepresents the *Milutinović et al* decision relied on;[17] the Appeals Chamber in that case directly linked its deference to the Trial Chamber's assessment of incentives to the Trial Chamber having "heard first-hand evidence" against the accused, which is not the present position.

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[14] *Prosecutor v.Prlić et al.*, IT-04-74-PT, Order on Provisional Release of Jadranko Prlić, 30 July 2004, para.30: "even if the accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully."

[15] Response, para. 29.

[16] Response, para. 29.

[17] Response, fn. 97, citing *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.

(iii) Ground 1.3: Errors in finding a risk of obstruction

10. The SPO is wrong to assert that, "at no point did the PTJ require the risks to have been completely extinguished".[18] The PTJ did so, explicitly and repeatedly. The Decision is framed in terms of absolutisms, rejecting measures or circumstances raised by the Defence on the basis that they did not "eliminate" or "negate" all risk.[19] Indeed, the sole reference to the "likelihood" in respect of the Article 41(6)(b)(iii) risk,[20] is then qualified by the PTJ requiring in the very next paragraph that the lack of evidence of criminality and Mr Thaçi's public calls for peace would need to "negate" the risks identified. [21]

11. As regards the PTJ's reliance on alleged requests, legal assistance and appointments in support of its finding of a risk of obstruction,[22] the question is not whether "the relevant officials were utterly beyond [Mr] Thaçi's influence",[23] but whether there was evidence that Mr Thaçi was involved in these incidents or exerted any such influence. Put simply, there was none. [REDACTED].[24] The PTJ simply fails to provide any rational basis or explanation for preferring the SPO's theory to the unambiguous and direct evidence of Mr Lajci himself.[25]

12. Moreover, there is no indication that the PTJ had regard to issues surrounding witness protection and security, let alone considered the extent to which they could mitigate the risk of witness interference. The SPO can point to nothing in the language of the Decision to demonstrate otherwise, but rather relies on the PTJ's

[18] Response, para. 17.
[19] See, e.g. Decision paras. 42, 49.
[20] Response, para. 18.
[21] Decision para. 49.
[22] Decision, para. 41.
[23] Response, para. 44.
[24] [REDACTED].
[25] Response, para. 36.

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issuance of a 50+ page decision within a week of Mr Thaçi's request for release,[26] and accordingly appears to be submitting that the PTJ presumably had these issues in his mind. This cannot be sufficient. No sensible suggestion can be made that issuing a decision on interim release some six weeks after issuing a decision on protective measures is a substitute for a reasoned decision as to why the exceptionally extensive protective measures regime has no impact on the risk of witness interference, which it plainly does. The reality is that the PTJ simply failed to take this highly material factor into account, when considering risk.

13. Moreover, the Defence is not required to "explain away" letters, requests, or reductions in sentence, rather the PTJ was obliged to give a reasoned opinion as to why this pre-surrender conduct could support a finding of a risk of obstruction. The SPO's *post-hoc* attempts to ascribe a malign interpretation to these incidents do not circumvent the PTJ's error. Rather than engage with the Defence submissions as to the limited (and entirely lawful[27]) nature of the commutations, the SPO merely repeats that the pardons "show a pattern of consistently undermining the SC".[28] Absent the purpose of the KSC being the criminalisation of the KLA itself (which is not being asserted in the present filing), no such link can reasonably be made.

14. As regards the seized material, the Defence is not merely disagreeing with the weight ascribed to Mr Thaçi's alleged possession of the item, the error identified was a specific one, being the failure of the PTJ to consider the way in which it came into his possession.[29] Rather than demonstrating that then-President Thaçi had "control and influence to get such information", his possession of the seized material, at its highest, only goes as far as him being able (at that time) to receive material that he was permitted to receive and which is not improper.

[26] Response, para. 48.
[27] Reply, para.30; Appeal, para. 34
[28] Response, para. 42.
[29] Appeal, para. 38(d), citing Reply, paras. 37-41.

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(iv) Ground 1.4: Errors in finding a risk of committing further crimes

15. The PTJ did **not** find that Mr Thaçi's conduct could amount to either completing an attempted crime, or committing a crime he had threatened to commit; being the second and third "categories of future crimes" in Article 41(6)(b)(iii).[30] Nor was such a finding open to the PTJ, given the lack of any evidence of an attempt by Mr Thaçi to commit any offences, or a threat to do so. In attacking the Defence submissions on the basis of an alleged failure to address two categories of future crimes, which were not addressed by the PTJ himself, the SPO is bringing meritless arguments that fail to engage with the Defence appeal.

16. Similarly, the SPO submission that the KSC Law contains no "imminence" threshold[31] circumvents the error properly raised. The Defence never asserted that a requirement of imminence for the commission of further offences is explicit in the KSC Law. Rather, the Defence drew the PTJ's attention to the ECtHR's recent reaffirmations of this requirement under Article 5(1)(c) of the ECHR, whereby that Court held that "[p]reventive detention cannot reasonably be considered necessary unless a proper balance is struck between the importance in a democratic society of preventing an *imminent* risk of an offence being committed and the importance of the right to liberty."[32] [emphasis added]. As for the KSC Law itself, the Defence recalls that Articles 3(2)(e), 12 and 19(2) refer to the relevance of ECtHR law in the proper interpretation of matters before the KSC. Rather than being "transparently without foundation",[33] the Defence submissions on imminence are properly before the Panel.

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[30] Response, paras. 19, 20.
[31] Response, para. 21.
[32] Defence Reply, para. 13, citing *I.S. v. Switzerland*, Judgment, Application No. 60202/15, 6 October 2020 at para 56 citing *S., V. and A. v. Denmark*, Judgment, Application Nos. 35553/12, 36678/12 and 36711/12, 22 October 2018 at para. 161.
[33] Response, para. 21.

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17. The SPO and Defence are also divided on the question of whether the PTJ gave proper consideration to Mr Thaçi's relevant personal characteristics, circumstances and conduct as required under Article 41(6)(b)(iii). The SPO is wrong to assert that the Defence accepted that the PTJ took these personal circumstances into consideration;[34] plainly he did not. A single reference to the so-called "written assurances"[35] cannot meet the PTJ's obligation to consider Mr Thaçi's "personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances". The SPO is also wrong to claim that the PTJ characterised these written assurances as "speaking for [Mr Thaçi's] character".[36] The PTJ in no way grappled with their contents, his two lines of reasoning do nothing more than dismiss their impact on risk.[37]

18. This was manifestly insufficient. The so-called "written assurances" were of course much more than that. A joint letter from the respective Presidents of the Kosovo Islamic Community, the Kosovo Jewish Community, the Kosovo Protestant Evangelical Church, and the Kosovo Bishop of the Pristina Diocese speaks to Mr Thaçi's invaluable role in the promotion of religious tolerance in Kosovo, having treated "all the religious communities with the utmost respect for their beliefs, values and traditions". With reference to his high moral character and trustworthiness, these religious leaders note their lack of surprise by Mr Thaçi's resignation and surrender to the SPO, which they considered consistent with his character.[38] This is powerful evidence that a reasonable Judge would have considered as diminishing the risk posed by Mr Thaçi, and which was wholly absent from the PTJ's consideration despite its impact on all three limbs of Article 41(6)(b).

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[34] Response, para. 40.
[35] Decision, para. 49.
[36] Response, para. 40.
[37] Decision, para. 49.
[38] F00165/A01, Reply, Annex 1.

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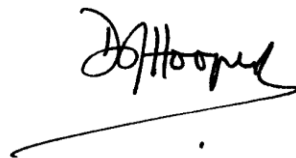
B. GROUND TWO: ERROR IN THE ASSESSMENT OF THE PROPOSED CONDITIONS

19. As regards the question of whether conditions could sufficiently mitigate the risk of obstruction, the PTJ and SPO both start from the position that Mr Thaçi will deploy clandestine means to contact his "community or support network". Neither the PTJ nor the SPO point to any evidence that Mr Thaçi has done so in the past, or would do so if released. Regardless, it is hardly without precedent for an Accused released on bail to have his or her communications monitored, limited, or entirely prohibited, thereby reducing or eliminating the prospect of getting messages to "former subordinates or supporters".[39] The PTJ's failure to consider such straightforward and routinely imposed restrictions, despite their use in jurisdictions around the world, which would have addressed his concern and provided a proportionate alternative to detention, was an error.

[Word count: 2619 words]

Respectfully submitted,



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7 May 2021

At London, United Kingdom

[39] Response, para. 53.