

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 21 July 2021

Language: English

Classification: Public

Public Redacted Version of
Thaçi Defence Submissions on Detention Review

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Detention of an accused prior to a conviction interferes with the right to liberty.¹ As such, it must be the exception rather than the rule, and strictly limited to what is necessary.² The KSC statutory regime establishes a presumption in favour of an accused being at liberty. Arrest and detention are justified only when established criteria, set out in Article 41(6) of the KSC Law,³ are satisfied. The requirement that the Pre-Trial Judge examine, every two months,⁴ whether the reasons for detention still exist, reflects the exceptional nature of pre-trial detention, and how quickly the circumstances previously accepted as justifying detention can change.

2. Since the Pre-Trial Judge's 22 January 2021 decision that the conditions for detention had been met,⁵ the circumstances of these proceedings, and of Mr Taçi, have altered significantly. Having voluntarily resigned from the Office of President on 5 November 2020 and surrendered to KSC custody,⁶ Mr Taçi has now spent nearly eight months in prison. The original SPO claim that it would be able to meet its disclosure obligations to allow the trial to start in the summer of 2021,⁷ has been exposed as a monumental misrepresentation (or miscalculation) on its part, with the pace of SPO disclosure likely to delay the trial until mid-2022. During this eight-month

¹ KSC-BC-2020-06/IA004/F00005, Separate Concurring Opinion of Judge Kai Ambos, para. 3 ("Ambos Separate Opinion").

² ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20-169, Second Order on Disclosure and Related Matters, 2 October 2020, para. 10: "it is an established principle of international human rights law that the detention of a suspect prior to conviction is exceptional in nature and must be strictly limited to what is necessary"; See also ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-321, Decision on Application for Interim Release, 16 December 2008, para. 31: "the fundamental principle that deprivation of liberty should be an exception and not a rule".

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

⁴ KSC Law, Article 41(10).

⁵ KSC-BC-2020-06/F00177, Decision on Hashim Taçi's Application for Interim Release, 22 January 2021 ("First Decision"), para. 51.

⁶ KSC-BC-2020-06/F00065/Red, Report on the Arrest and Transfer of Hashim Taçi to the Detention Facilities, 8 November 2020, paras. 3-7.

⁷ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020 ("SPO Submissions"), para. 14.

period, the scope of political support for Mr Thaçi and his influence in Kosovo have largely evaporated, with the February 2021 elections putting the former President in the weakest position of his political career. Concurrently, the Pre-Trial Judge has established what may easily be described as the broadest witness protection regime established before a Kosovan or international court. Most significantly, since the First Decision, the defence for Mr Thaçi (“the Defence”) has now received written guarantees from two states, [REDACTED] (“Third States”), one of which is a contributing state, to facilitate the interim release of Mr Thaçi into their respective territories.

3. In these circumstances, the conditions for Mr Thaçi’s detention are no longer met. As such, pursuant to Article 41(10) of the KSC Law, Rules 56(4) and 57(2) of the KSC Rules,⁸ and the Pre-Trial Judge’s decisions varying the time limit for filing the present submissions,⁹ the Defence asks the Pre-Trial Judge to: (i) seek the views of the Governments of [REDACTED] on the release of Mr Thaçi into their respective territories; and (ii) order Mr Thaçi’s interim release in one of these Third States on such conditions considered appropriate.

4. These submissions are classified as confidential pursuant to Rule 82(3) of the KSC Rules, given that they contain the names of Third States, which should not currently be provided to the public. A redacted version will be filed in due course.

⁸ Rules of Procedure and Evidence before the Kosovo Specialist Chambers (adopted on 17 March 2017, revised on 29 May 2017, amended on 29 and 30 April 2020) (“KSC Rules”).

⁹ KSC-BC-2020-06/F00292, Decision on Thaçi Request for Extension of Time Limit, 12 May 2021, para. 8; KSC-BC-2020-06/F00327, Decision on Thaçi Additional Request for Extension of Time Limit, 28 May 2021, para. 11.

II. APPLICABLE LAW

5. Pursuant to Articles 41(6)(a) and (b) of the KSC Law, detention requires a grounded suspicion that an accused committed a crime within the KSC's jurisdiction; and articulable grounds to believe that the person (i) is a flight risk; (ii) will destroy, hide, change or forge evidence of a crime, or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat the criminal offence, complete an attempted crime or commit a crime which they have threatened to commit.

6. Following an appeal by Mr Thaçi against the First Decision,¹⁰ the Appeals Panel accepted the Defence's position that detention cannot be justified on the basis of **any** possibility of a risk materialising.¹¹ Rather, the risk must be 'real', with the standard requiring less than certainty, but more than mere possibility.¹² The Appeals Panel confirmed that '[t]he question posed by Article 41(6)(b) of the Law is whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the law exist.'¹³

III. SUBMISSIONS

7. Rule 57(2) requires the Pre-Trial Judge to review a detention decision every two months, or at any time upon request by the Accused or the SPO, or *proprio motu*, where a change in circumstances has occurred. As such, the requirement of a "change in

¹⁰ KSC-BC-2020-06/IA004/F00005, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 ("Appeal Decision").

¹¹ See, e.g., KSC-BC-2020-06/IA004/F00004, Thaçi Defence Reply to "SPO Response to Thaçi Defence Appeal of Decision against 'Decision on Hashim Thaçi's Application for Interim Release'", 22 February 2021, para. 49; Appeal Decision, paras. 21-24.

¹² See, e.g., KSC-BC-2020-06/IA004/F00001, Thaçi Defence appeal against the "Decision on Hashim Thaçi's Application for Interim Release" With Public Annexes 1 and 2, 3 February 2021 ("Appeal"), para. 12 and the authorities cited therein; Appeal Decision, para. 22.

¹³ Appeal Decision, para. 24.

circumstances” is linked by the KSC Rules to a *proprio motu* review on the part of the Pre-Trial Judge, and not to his periodic review.¹⁴ Regardless, should the Pre-Trial Judge require such a change, the circumstances relevant to Mr Thaçi’s detention have altered significantly since the First Decision.

A. UNDUE DELAY ON THE PART OF THE SPO

8. Rule 56(2) of the KSC Rules requires the Pre-Trial Judge to ensure that a person “is not detained for an unreasonable period prior to the opening of the case”. Where the undue delay has been caused by the SPO, the Pre-Trial Judge “may release the person under conditions as deemed appropriate”. Unlike at the ICC, where release is triggered by “**inexcusable** delay by the Prosecutor” after which the Court “shall **consider** releasing the person”,¹⁵ Rule 56(2) puts a positive obligation on the Pre-Trial Judge to ensure the person is not detained for an unreasonable period prior to trial for any reason.

9. The imperative of avoiding the operation of Rule 56(2) likely motivated the SPO’s unrealistic predictions as to when it would be trial ready in this case.¹⁶ The SPO initially submitted, on 13 November 2020, that it anticipated “being in a position to **provide complete witness and exhibit lists**, and to have fulfilled related Rule 102(1)(b) disclosure, by **31 May 2021**”. It also asserted that it anticipated “providing the Defence with detailed notice of evidence material to it, pursuant to Article 21(6)11 and **Rule 102(3), by 30 April 2021.**”¹⁷

¹⁴ See, e.g., KSC, *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00068, Second Decision on Review of Detention, 25 January 2021, paras. 8-10.

¹⁵ ICC Statute, Article 60(4) (emphasis added).

¹⁶ SPO Submissions, para. 14.

¹⁷ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, paras. 2, 15.

10. On the basis of these (manifestly unrealistic) estimates, on 23 November 2020, the Pre-Trial Judge set a disclosure calendar in his 'Framework Decision on Disclosure of Evidence and Related Matters'. In particular, he ordered the SPO to complete the disclosure of all material falling under **Rule 102(1)(b)** of the Rules by **Monday, 31 May 2021** and provide the Defence with a detailed notice of evidence under **Rule 102(3)** by **Friday, 30 April 2021**.¹⁸ Thereafter, the SPO sought repeated extensions to meet these deadlines and repeatedly reconsidered its estimates as to a trial start date.

11. During the second status conference of 17 December 2020, the SPO submitted that it now anticipated that it would be able to file its **pre-trial brief and related materials** in **early July**, with trial starting in **September 2021**.¹⁹ The SPO reiterated such submissions during the third status conference, on 8 February 2021.²⁰

12. On 22 March 2021, the SPO again modified this estimate, and said that it envisaged being in a position to submit its **Rule 95(4) material** (being the SPO Pre-Trial Brief and witness and exhibit lists) by the second week of **September 2021**, with trial to begin in **December 2021**.²¹ It further asked that its deadline to provide the Defence with detailed notice under **Rule 102(3)** be adjusted to **25 June 2021**.²² By an oral order of 24 March 2021, the Pre-Trial Judge granted this extension of time.²³ Then,

¹⁸ KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020 ("Framework Decision"), paras. 99(e) and (f).

¹⁹ KSC-BC-2020-06, Transcript of Status Conference, 17 December 2020, p. 199.

²⁰ KSC-BC-2020-06/F00191, Prosecution submissions for third status conference, 8 February 2021, paras. 14, 17.

²¹ KSC-BC-2020-06/F00235, Prosecution submissions for fourth status conference and request for adjustment of time limits, 22 March 2021 ("SPO Submissions for Fourth Status Conference"), para. 7; KSC-BC-2020-06, Transcript of status conference, 24 March 2021 ("Transcript of Fourth Status Conference"), p. 363.

²² SPO Submissions for Fourth Status Conference, para. 11.

²³ Transcript of Fourth Status Conference, Fourth Oral Order, p. 390.

on 18 May 2021, the SPO submitted that it now anticipated “being in a position to submit its **Rule 95(4) material by mid-October 2021.**”²⁴

13. On 18 June 2021, the SPO filed a fresh request for an extension of the time limit to provide its **Rule 102(3) notice**, asking that it be extended until **30 July 2021.**²⁵ On 24 June 2021, the Pre-Trial Judge granted this request.²⁶ In addition, the Pre-Trial Judge previously ordered the SPO, over its objections, to apply a case-specific categorisation, in addition to the Standard Categories, for each batch of material disclosed under Rule 102(1)(b) of the Rules, and extended the SPO deadline for disclosure of such material, from 31 May 2021 to **23 July 2021.**²⁷ Each delay in disclosure by the SPO necessarily puts back the start date of the trial, and the length of time Mr Thaçi is imprisoned without a finding of guilt.

14. None of the delayed materials are peripheral or of minor importance; these are central trial documents crucial for defence preparation. Their delay cannot be attributed to the Defence, and is due entirely to the internal functioning of the SPO. The SPO’s initial estimates – that the trial would start in the summer of 2021 – demonstrate that this timeframe was considered reasonable and attainable. Incredibly, when the Defence suggested in March 2021 that a reasonable timeframe for the commencement of the trial would be in 18 months time,²⁸ the SPO insisted that it had “repeatedly and vigorously opposed such a delay in the interests of maintaining

²⁴ KSC-BC-2020-06/F00314, Prosecution submissions for fifth status conference, 18 May 2021, para. 10 (Emphasis added). *See also* KSC-BC-2020-06, Transcript of Status Conference, 19 May 2021, pp. 420-421 (“Transcript of Fifth Status Conference”).

²⁵ KSC-BC-2020-06/F00356, Prosecution request for extension of time limit to provide its Rule 102(3) notice, 18 June 2021, para. 1.

²⁶ KSC-BC-2020-06/F00370, Decision on Prosecution Request for Extension of Time Limit to Provide its Rule 102(3) Notice, 24 June 2021, para. 16.

²⁷ KSC-BC-2020-06/F00218, Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, 12 March 2021, paras. 9, 22.

²⁸ KSC-BC-2020-06/F00217, Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution, 12 March 2021, paras. 21-22.

the expeditious conduct of proceedings”.²⁹ Of course, the SPO was correct to claim that a mid-2022 start date would interfere with Mr Thaçi’s rights. However, it now appears inevitable.

15. This situation is compounded by the SPO’s failure to conclude its investigations. Despite having sought and supported the incarceration of Mr Thaçi for nearly eight months, the SPO maintains that its investigations are on-going, and will continue for an unspecified period.³⁰ In addition to the obvious incompatibility of rolling SPO investigations with Mr Thaçi’s right “to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him”,³¹ it is impossible to see how this practice will not lead to further delay, whether through a constantly shifting case which the Defence will then be entitled to re-investigate, or simply through the delayed disclosure of incriminating material that will also prolong the process of Defence preparation for trial.³²

16. The practical reality of the SPO’s rolling investigations, and continued inability to meet its disclosure obligations, is that the trial date will likely be delayed by another year and Mr Thaçi’s pre-trial detention extended to the point of being even more unreasonable. This undue delay has been caused by the SPO, warranting the accused’s interim release under Rule 56(2) of the KSC Rules.

B. THE CHANGE IN MR THAÇI’S “INFLUENCE AND AUTHORITY”

²⁹ KSC-BC-2020-06/F00260, Prosecution response to preliminary motions concerning the status of the Kosovo Specialist Chambers and allegations of rights violations, 23 April 2021, para. 41.

³⁰ Transcript of Fifth Status Conference, p. 421, lines 14-23.

³¹ KSC Law, Article 21(4)(a); ECHR, Article 6(3)(a).

³² See, e.g. ICC, *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-859, Decision on the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 16 August 2013, paras. 41-42; ICCPR, Article 14(3)(c).

17. Mr Thaçi's purported influence and authority over vast networks of loyal supporters was a central plank of the First Decision. The Pre-Trial Judge took into account "Mr Thaçi's influence and authority" in assessing both his risk of flight,³³ and risk of obstruction.³⁴ Specifically, the Pre-Trial Judge found that Mr Thaçi's position as founding member of the KLA, the KLA Commander-in-Chief, and more recently as Prime Minister and then President of Kosovo, "cannot be ignored" in assessing the risk that "individuals supporting him" may be "willing to give him access to resources and/or help him abscond",³⁵ and "may trigger the mobilisation of a vast network of supporters to influence witnesses or interfere with the proceedings".³⁶ Similarly, Mr Thaçi's "past and recent influential positions" were considered to be "an important factor" when assessing the risk of obstruction.³⁷ The Appeals Panel accepted that in relying on Mr Thaçi's influence over former subordinates, the Pre-Trial Chamber was acting reasonably.³⁸

18. Mr Thaçi's purported influence and authority are no longer reflective of the present political realities in Kosovo. Since Mr Thaçi's resignation in November 2020, the political landscape in Kosovo has shifted. The February 2021 elections in Kosovo (in which record voter turnout was recorded)³⁹ resulted in Mr Thaçi's long-time political adversary gaining 50.28% of the vote, and 58 parliamentary seats.⁴⁰ Mr Thaçi's

³³ First Decision, para. 31.

³⁴ First Decision, paras. 38, 57.

³⁵ First Decision, para. 31.

³⁶ First Decision, para. 38.

³⁷ First Decision, para. 38.

³⁸ Appeal Decision, para. 50: It was reasonable for the Pre-Trial Judge to consider that Mr Thaçi, "who was President of Kosovo until he recently resigned, undoubtedly continued to exercise a certain degree of influence over his former subordinates despite his recent resignation".

³⁹ Kosovo Central Election Commission, 'Rezultatet Përfundimtare Nga Qnr - Statistikat e Përgjithshme', 2021, available at: <https://www.kqz-ks.org/wp-content/uploads/2021/03/1.Statistikat-e-pergjithshme-1.pdf>.

⁴⁰ Kosovo Central Election Commission, 'Rezultatet Përfundimtare Nga Qnr - Rezultatet e Kandidatëve (Lista Prfundimtare e Kandidatëve)', 2021, available at: <https://www.kqz-ks.org/wp-content/uploads/2021/03/3.Ndarja-e-uleseve-ne-Kuvend-Subjektet-dhe-kandidatet-e-zgjedhur-1.pdf>.

former party received 17.009% of the vote, and 19 parliamentary seats.⁴¹ No longer even a viable opposition force, this gap has reduced Mr Thaçi's former political party to one of marginal relevance, and demonstrated in the clearest possible terms that he no longer enjoys the influence, popularity, or support which the Pre-Trial Judge found gave rise to both a risk of flight, and a risk of obstruction.

19. The members of the alleged "vast network" of supporters and former subordinates referenced in the First Decision,⁴² have evidently shifted with the political winds. As has the likelihood of any alleged "vast network" acting "with the aim of obstructing the progress of the SPO investigation and the conduct of criminal proceedings",⁴³ or "helping him abscond".⁴⁴

20. The new Government, led by a Prime Minister and President who built their political careers on their opposition to Mr Thaçi,⁴⁵ is systematically removing officials appointed while Mr Thaçi was in office from the political and institutional landscape. In December 2020, the Kosovo Intelligence Agency Chief was dismissed,⁴⁶ followed in March 2021 by the Secretary-General of the Office of the President.⁴⁷ In May 2021, the Minister of Justice suspended the Director-General of the Kosovo Correctional Service,⁴⁸ the Minister of Foreign Affairs relieved twelve politically appointed Kosovo

⁴¹ *Ibid.*

⁴² First Decision, para. 38.

⁴³ First Decision, para. 38.

⁴⁴ First Decision, para. 31.

⁴⁵ See, Facebook post of Mr Albin Kurti dated 9 January 2019, available at:

<https://www.facebook.com/albini2017/posts/531852760647946>. See also *Ekonomia Online*, 'Kurti çon në Prokurori marrëveshjen Thaçi-NATO për mosfutjen e FSK-së në veri', 20 May 2021, available at: <https://ekonomiaonline.com/politike/kurti-con-ne-prokurori-marreveshjen-thaci-nato-per-mosfutjen-e-fsk-se-ne-veri/>.

⁴⁶ *Balkan Insight*, 'Kosovo Fires Intelligence Chief Over 'Raid on President's Safe'', 18 December 2020, available at: <https://balkaninsight.com/2020/12/18/kosovo-fires-intelligence-chief-over-raid-on-presidents-safe/>.

⁴⁷ *Insajderi*, 'Shkarkohet Sekretari I Presidencës Së Kosovës', available at: <https://insajderi.com/shkarkohetsekretariipresidences-se-kosoves/>.

⁴⁸ *Kosova Press*, 'Pezullohet nga detyra Nehat Thaçi', May 2021, available at: <https://kosovapress.com/pezullohet-nga-detyra-nehat-thaci/>.

Ambassadors from duty around the world,⁴⁹ and the Kosovo Assembly dismissed the members of the Kosovo Privatization Agency, responsible for the management and privatization of socially-owned enterprises. In June 2021, the Media Commission of the Kosovo Assembly recommended the dismissal of the Board of the Radio and Television of Kosovo, the country's only public broadcasting service,⁵⁰ following which the President dismissed a Supreme Court Judge as Chair of the Central Elections Commission.⁵¹ These are only some examples of what has been a wholesale purge of officials who were appointed while Mr Thaçi's was in office, from public life.

21. In these circumstances, to continue to rely on the purported "influence and authority" of Mr Thaçi, in the absence of any contemporaneous evidence of this alleged influence, would be to treat political popularity as a static concept. This is a manifestly unreasonable approach and divorced from the reality in Kosovo. Having lost his political footing, and having had all his assets frozen,⁵² the insistence that Mr Thaçi still commands undying loyalty from alleged "vast networks" is to ascribe a weight to an apparent cult of personality, which is outdated, and cannot be reconciled with modern Kosovo's ability to make its own free and democratic political choices. It cannot be that because an accused once enjoyed political support, influence or loyalty, he should always be considered as doing so, particularly when this flies in the face of the election results that reflect the will of the population in question, and when

⁴⁹ Koha, 'Ambasadorët e emëruar politikisht të shkarkuar sot [emrat]', 19 May 2021, available at: <https://www.koha.net/arberi/271737/shkarkohen-te-gjithe-ambasadoret-e-emeluar-politikisht/>.

⁵⁰ Koha, 'Rekomandimi për shkarkimin e Bordit të RTK-së shkon në Kuvend', 22 June 2021, available at: <https://www.koha.net/arberi/276784/pdk-ja-dhe-ldk-ja-kunder-shkarkimit-te-bordit-te-rtk-se/>.

⁵¹ DW, 'Kosovë: Shkarkohet kryetarja e KQZ-së Valdete Daka', 14 June 2021, available at: <https://www.dw.com/sq/kosov%C3%AB-shkarkohet-kryetarja-e-kqz-s%C3%AB-valdete-daka/a-57892318>.

⁵² KSC-BC-2020-06/F00036/COR/CONF/RED1, Confidential Redacted Version of Corrected Version of Order for the Identification, Tracing, and/or Freezing of [REDACTED] Assets of Hashim Thaçi, 2 November 2020, paras. 13 and 18; KSC-BC-2020-06/F00036/COR/CONF/RED2, Confidential Redacted Version of Corrected Version of Order for the Identification, Tracing, and/or Freezing of [REDACTED] Assets of Hashim Thaçi, 2 November 2020, paras. 13 and 18.'

those who used to support him have also been systematically removed from the political and institutional landscape.

22. Regardless, even should the Pre-Trial Judge consider that Mr Thaçi continues to enjoy any measure of residual “influence and authority”, this is entirely eliminated by the guarantees from Third States, discussed below, which eliminate any real risk of obstruction or flight.

C. THE PROTECTIVE MEASURES REGIME

23. The Thaçi Defence has consistently opposed the scope and nature of the protective measures requested in the present case.⁵³ As it stands, the witness protection regime encompasses the following:

- The delayed disclosure of the identity of **8** witnesses until the filing of the SPO lists of witnesses and exhibits, the date for which has not been set yet;
- The delayed disclosure of the identity of **60** witnesses until 30 days before trial;
- The delayed disclosure of the identity of **17** witnesses until 30 days before their testimony;
- The delayed disclosure of the identity of **4** witnesses until the identity of either W04390 or W04391 is revealed to the Defence;
- The withholding of the identity of **1** witness from Mr Thaçi, and disclosed only to Defence Counsel only 30 days before the witness' testimony;

⁵³ KSC-BC-2020-06/F00129, Thaçi Defence Response to “Request for Protective Measures”, KSC-BC-2020-06/F00094, dated 19 November 2020 with confidential Annex 13”, 8 December 2020; KSC-BC-2020-06/F00156, Defence Request on behalf of Mr Thaçi for Certification to Appeal the “Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor’s Request for Protective Measures”, 21 December 2020; KSC-BC-2020-06/F00184, Thaçi Defence Response to “Confidential Redacted Version of Renewed request for protective measures”, 1 February 2021; KSC-BC-2020-06/F00204, Thaçi Defence Response to “Confidential redacted version of Third request for protective measures”, 22 February 2021; KSC-BC-2020-06/F00254, Thaçi Defence Response to “Confidential redacted version of ‘Fifth request for protective measures’, KSC-BC-2020-06/F00242 dated 6 April 2021”, 19 April 2021; KSC-BC-2020-06/F00363, Thaçi Defence Response to Seventh Request for Protective Measures, 21 June 2021.

- 2 witnesses will remain anonymous, their identity being withheld from the Defence; and
- 17 witnesses will benefit from in-court protective measures only, (noting that all witnesses listed above also benefit from in-court protective measures).

24. In total, the Pre-Trial Judge has authorised the delayed disclosure of the identity of 90 witnesses and granted full anonymity for 2 others, representing almost half of the SPO's 200 anticipated witnesses. In the SPO's Seventh Request for protective measures, which is still pending, the SPO has asked for the delayed disclosure of the identity of 14 additional witnesses.⁵⁴ As such, the protective measures regime in these proceedings is extremely broad and exceeds in scope prior witness protection regimes put in place in Kosovo or international courts.

25. The protective measures regime necessarily impacts on Mr Thaçi's ability to prepare his defence. The Framework Decision accepts that the process of creating a witness protection regime is one of balance; the rights of the accused to know the case against him, balanced against the protection of witnesses and other persons at risk.⁵⁵ Whether or not the balance has been correctly struck in the present case, it is undeniable that the Pre-Trial Judge has been willing to limit Mr Thaçi's ability to prepare for his defence, on the basis of a belief that the measures **will indeed reduce the risk to participating witnesses**. If they did not, the encroachment on Mr Thaçi's rights would never have been warranted.

26. As such, this reduced risk must necessarily also be relevant to Mr Thaçi's ability to obstruct the proceedings. While the Defence position remains consistent – that Mr Thaçi has neither obstructed nor would ever attempt to obstruct the proceedings – it

⁵⁴ KSC-BC-2020-06/F00339/CONF/RED, Confidential redacted version of 'Seventh request for protective measures', KSC-BC- 2020-06/F00339, dated 4 June 2021, 10 June 2021, para. 1(c)(d)(e).

⁵⁵ Framework Decision, para. 46.

must be the case that a comprehensive and broad-ranging protective measures regime further undermines any such risk, meaning that there is no sufficiently real possibility of interference with these witnesses. The issuance of protective measures “stands explicitly as a safeguard of the relevant categories of witnesses” and is therefore a relevant consideration in determining whether an accused should be released.⁵⁶

27. As regards witnesses who fall outside the protective measures regime, they have not been granted protective measures because no demonstration can be made of any objectively justifiable risks against them, further undermining the need to keep Mr Thaçi detained.

D. INTERIM RELEASE IS CONSISTENT WITH THE RIGHTS OF THE ACCUSED

28. Mr Thaçi is presumed innocent. While this presumption is not “determinative in assessing whether provisional release should be granted”,⁵⁷ the European Court of Human Rights (“ECtHR”) has recognised an obligation on Judges to weigh whether any “genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty”.⁵⁸ The Court has held that, in this context, the presumption of innocence essentially “requires” provisional release once an accused’s continuing detention “ceases to be reasonable”.⁵⁹ Mr Thaçi’s presumption of innocence is also relevant to any suggestion that the on-going piecemeal disclosure would increase his incentive to flee, which demonstrates a pre-judgement of the SPO evidence in a manner incompatible with the presumption, which must underpin these proceedings.

⁵⁶ SCSL, *Prosecutor v. Sesay*, SCSL-04-15-PT, Decision on Application of Issa Sesay for Provisional Release, 31 March 2004, para. 54.

⁵⁷ ICTY, *Prosecutor v. Milutinovic et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006, para. 12.

⁵⁸ ECtHR, *Zohlandt v. The Netherlands*, 69491/16, Fourth Section, Judgment, 9 February 2021, para. 51; ECtHR, *Buzadji v. The Republic of Moldova*, 23755/07, Grand Chamber, Judgment, 5 July 2016, para. 90 (“*Buzadji Judgment*”).

⁵⁹ *Buzadji Judgment*, para. 89.

29. Also central to Mr Thaçi's fair trial is the right to adequate time and facilities for the preparation of his defence.⁶⁰ General Comment 13 on "Equality Before the Courts and a Fair and Public Hearing", provides that "facilities" in this context "must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel."⁶¹

30. Mr Thaçi's current detention conditions do not allow for the full exercise of this right. Travel to and from The Netherlands remains limited by the COVID-19 pandemic, restricting Mr Thaçi's access to his counsel. He is currently authorised to meet with two people at a time.⁶² In Mr Thaçi's case, one must be an interpreter, meaning that "engaging and communicating" in the form of team discussions is not possible. Legal visits take place through plexiglas, meaning that documents cannot be shown or exchanged, limiting Mr Thaçi's ability to give instructions and meaningfully discuss evidence. In order to try to circumvent these obstacles, the Defence was permitted to include an interpreter via phone. This did not work, because of poor sound quality. While these restrictions are scheduled to alter in July 2021, the changeable nature of the COVID-19 pandemic means that there are no guarantees that any relaxation of measures will stay in place. Putting aside COVID-19 related obstacles, it cannot seriously be maintained that, in a case of this magnitude and with as much at stake for the accused, it does not severely undermine the Defence's ability to adequately prepare when the team has such limited and fettered access to the accused.

⁶⁰ KSC Law, Article 21(4)(c); ICCPR, Article 14(3)(b); ECHR, Article 6(3)(b).

⁶¹ OHCHR, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law, 13 April 1984, para. 9.

⁶² KSC-BC-2020-06/F00063, Submission of the Registrar Pursuant to Rule 23(2) on COVID-19 Risk Mitigation Measures, 8 November 2020, para. 23; KSC-BC-2020-06/F00353, Update to Submission of the Registrar Pursuant to Rule 23(2) on COVID-19 Risk Mitigation Measures, 16 June 2021, paras. 13-15.

31. Interim release of Mr Thaçi would circumvent these obstacles, and provide Mr Thaçi with a meaningful opportunity to “engage and communicate with counsel” as mandated by his right to adequate time and facilities for the preparation of his defence, and ensure full compliance with the presumption of innocence.

E. THIRD PARTY STATE GUARANTEES

32. The Constitutional Court has held that, to fully comply with constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained.⁶³ Interim release to a Third State, (with conditions as deemed appropriate), rather than detention in The Hague, is one such more lenient measure.

33. The KSC statutory regime also anticipates release of the accused to Third States. Article 41(11) provides that, if released, a person may be transported to and released in another State that agrees to accept them. Rule 56(4) notes requirements for such release, including that the Third State must consent to the release of the Accused into that State, and the Panel shall hear the Third State to which the detained person seeks to be released. Article 41(12) then provides that, in addition to detention on remand, various measures may be ordered to ensure the presence of the accused, to prevent reoffending or ensure successful conduct of criminal proceedings, including: bail, house detention, promise not to leave residence, and attendance at police station or other venue.

34. The majority of the Appeals Panel dismissed the Defence’s grounds of appeal relating to the risk of Mr Thaçi obstructing the progress of criminal proceedings, and

⁶³ KSC-CC-PR-2020-09/F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020, para. 70.

the alleged erroneous assessment of the proposed conditions for his release.⁶⁴ In particular, the majority noted that the proposal for house arrest and communications monitoring in a Third State was too vague and general; this absence of detail meant it was not unreasonable for the Pre-Trial Judge to consider the proposal would not be sufficient to address the risk of obstruction.⁶⁵ His Honour Judge Ambos agreed that the Defence's proposed Third State option was too vague, but stated that an offer from a Third State, 'if concretely made and supported by guarantees, including from the respective Third State, may shift the balance in favour of conditional release and must therefore be seriously considered by the Pre-Trial Judge or competent Panel.'⁶⁶

35. On 5 May 2021, the Defence obtained the written guarantee of the Government of [REDACTED] for the interim release of Mr Thiçi on its territory.⁶⁷ On 14 June 2021, the Defence obtained a written guarantee from the Government of [REDACTED] dated 3 June 2021, for the interim release of Mr Thiçi on its territory.⁶⁸ Both Third States guarantee to cooperate fully in ensuring the return of Mr Thiçi as and when required by the KSC.

36. Evidently, these guarantees from Third States eliminate any risk that Mr Thiçi "will repeat the criminal offence, complete an attempted crime or commit a crime which [he has] threatened to commit." Moreover, through these written assurances, the Third States essentially guarantee that they would arrest Mr Thiçi if required to ensure his appearance before the Court. Whether a State would do so must be assessed on the balance of probabilities, and with reference to the general level of cooperation by the State with the court.⁶⁹ At the ICTY, where the accused had held a senior position

⁶⁴ Appeal Decision, paras. 77 and 89-90.

⁶⁵ Appeal Decision, para. 89.

⁶⁶ Ambos Separate Opinion, para. 5(ii).

⁶⁷ Confidential Annex A.

⁶⁸ Confidential Annex B.

⁶⁹ ICTY, *Prosecutor v Milutinovic et al.*, IT-99-37-PT, Decision on Second Application for Provisional Release, 14 April 2005, para. 20.

in the State offering the guarantee, a Trial Chamber was entitled to consider whether there was evidence to suggest that the accused “by virtue of a prior senior position, may have any information that would provide a disincentive for the State authority providing a guarantee on behalf of the accused to enforce that guarantee”.⁷⁰ In this case, Mr Thaçi is offering guarantees from Third States, rather than Kosovo. There is no indication of any disincentive on the part the Governments in question to enforce the guarantees being provided. These guarantees therefore adequately mitigate the risk of flight.

37. The Third State guarantees also adequately mitigate the risk of Mr Thaçi obstructing KSC proceedings, or engaging in or contributing to crimes. For example, the written guarantee from the Government of [REDACTED] details its ability to “supervise and enforce” a non-exhaustive list of comprehensive measures including prohibition on any public or political activity, restricting and/or controlling and monitoring any contact, communications (telecommunications and internet), as well as physical movement.⁷¹ As such, this guarantee from the Government of [REDACTED] sets out a communication monitoring framework which could easily mirror that of the KSC’s detention facilities, which is deemed sufficient to effectively restrict and monitor Mr Thaçi’s communications.

38. Similarly, the written guarantee from the Government of [REDACTED], a contributing state to the Court, makes specific reference to “the risk of flight and the risk of interference to witnesses” before formally accepting to accommodate Mr Thaçi, and undertaking to assist the KSC in carrying out its mandate to the fullest extent possible in accordance with [REDACTED] law.⁷² In such circumstances, the risk of Mr

⁷⁰ ICTY, *Prosecutor v. Stanisić*, IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mico Stanisić’s Provisional Release, 17 October 2005, para. 19.

⁷¹ Confidential Annex A.

⁷² Confidential Annex B.

Thaçi obstructing KSC proceedings, or engaging in or contributing to crimes, should also be considered to be adequately reduced.

39. These state guarantees are further bolstered by an undertaking on the part of Mr Thaçi to comply with any conditions imposed by the Pre-Trial Judge.

IV. CONCLUSION

40. Since the Pre-Trial Judge's First Decision, the Appeals Panel has clarified that the risks of flight and obstruction offered in support of continued incarceration of accused must be "real", and more than mere possibility.⁷³ Repeated references to Mr Thaçi's position as a founding member of the KLA, or as the former KLA Commander-in-Chief, as giving rise to vast networks of clandestine supporters who would agree to act illegally and commit crimes to support Mr Thaçi's flight or facilitate obstruction are outdated; they have no evidential basis, precisely because they are wildly out of step with the realities on the ground. If these "vast networks" were still in place, this would have been reflected at the February 2021 ballot box. The dissipation of Mr Thaçi's stature and influence, must be considered together with the extensive witness protection regime now in place. This regime must be effective in mitigating the risk of obstruction, in order to warrant the encroachment on Mr Thaçi's right to know the case against him.

41. Nor can pre-trial detention continue indefinitely when the SPO's own repeated inability to meet disclosure deadlines has pushed the trial start date at least a year past its own original estimates, particularly when the new likely timeframe was previously characterised by the SPO itself as interfering with Mr Thaçi's right to expeditious proceedings.

⁷³ See, e.g. Appeal, para. 12 and the authorities cited therein; Appeal Decision, para. 22.

42. Even putting these changed circumstances aside, the offers from Third States, supported by written guarantees, shift the balance in favour of interim release.⁷⁴ These guarantees are sufficient to address the risk of flight and obstruction, and mean that the conditions for Mr Thaçi's detention are no longer met. For these reasons, the Defence respectfully requests that the Pre-Trial Judge:

SEEK the views of the Governments of [REDACTED] on the interim release of Mr Thaçi into their respective territories; and

ORDER Mr Thaçi's interim release in one of these Third States on such conditions as considered appropriate.

Word count: 5866

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Wednesday, 21 July 2021

At Tampa, United States

⁷⁴ Ambos Separate Opinion, para. 5(ii).