In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**The President of the Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
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Public Redacted Version of

Thaçi Defence Appeal against Decision on Review of Detention of Hashim Thaçi

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I. INTRODUCTION

1. Mr Hashim Thaçi appeals as of right,[1] the Decision on Review of Detention of Hashim Thaçi, issued by the Pre-Trial Judge ("PTJ") on 23 July 2021,[2] which found that the reasons for detention continue to exist.

2. The Second Decision represents the first occasion on which a PTJ at the KSC has adjudicated a request for provisional release on the basis of Third State Guarantees, offered in support of an accused's release, and in full knowledge of the alleged risks previously found sufficient to warrant detention.

3. In addressing these Third State Guarantees, the PTJ made a series of discernible errors which, considered individually or cumulatively, invalidate the Second Decision. These, and other errors of fact and law, are raised in the following grounds of appeal:

(i) The PTJ misapplied the burden of proof for Article 41(10) review;

(ii) The PTJ erred in refusing to engage with the anticipated length of pre-trial detention;

(iii) The PTJ's findings on Mr Thaçi's influence and authority are so unfair and unreasonable as to constitute an abuse of discretion;

(iv) The PTJ erred in finding that disclosure increases Mr Thaçi's risks of flight, obstruction, and committing further crimes;

(v) The PTJ's approach to the assessment of Third State Guarantees was erroneous;

(vi) The PTJ erred in failing to seek the views of the proposed Third States; and

[1] Article 45(2), Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("KSC Law"); Rule 58(1), Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules").
[2] KSC-BC-2020-06/F00417, Decision on Review of Detention of Hashim Thaçi, 23 July 2021 ("Second Decision").

(vii) The PTJ erred in relying on his misunderstanding of the communication monitoring framework of the KSC Detention Facilities.

II. STANDARD OF REVIEW

4. The Court of Appeals Panel has determined that the standard of review applicable to interlocutory appeals is the standard provided for appeals against judgments, as specified in the KSC Law.[3]

5. In relation to an **error of law**, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision.[4] In relation to an **error of fact**, a party must demonstrate that no reasonable trier of fact could have made the impugned finding and only an error that has caused a miscarriage of justice will cause the Panel to overturn a decision.[5] In relation to **a discretionary decision**, a party must demonstrate that the lower level panel has committed a discernible error, in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[6]

[3] *Prosecutor v. Gucati*, KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeals Decision"), para.10.
[4] *Gucati* Appeals Decision, para. 12.
[5] *Gucati* Appeals Decision, para. 13.
[6] *Gucati* Appeals Decision, para. 14; *Prosecutor v. Haradinaj,* KSC-BC-2020-07/IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeals Decision"), para. 14: The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations...

III. GROUNDS OF APPEAL

A. THE PTJ MISAPPLIED THE BURDEN OF PROOF FOR ARTICLE 41(10) REVIEW

6. Article 41(10) of the Law requires that "[u]ntil judgement is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the PTJ or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated." Importantly, Article 41(10) does not authorise the PTJ to ***invite*** the Defence to file an application for this two monthly review of the decision on detention.

7. While the Defence has the right to make an application, *proprio motu* and outside of the regular Article 41(10) review, the PTJ's present practice of ***inviting*** the Defence to make an application for the review of detention under Article 41(10) places the accused in an unfavourable position, by effectively shifting the burden to the Defence to establish that the reasons for detention no longer exist. By considering that he "is not required to make findings on the factors already decided upon in the initial ruling on detention" but must simply "determine whether they still exist",[7] the PTJ appears to start from the assumption that his previous ruling is still valid and that the Defence must demonstrate that his previous reasoning should be reversed. This is incompatible with the recognition in the First Decision[8] that the SPO bears the burden of establishing that continued detention is necessary. While this same language is repeated in the Second Decision,[9] the practice before the PTJ is for the Defence to file submissions seeking to establish that the conditions warranting detention no longer

[7] Second Decision, para. 17.
[8] KSC-BC-2020-06/F00177, Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021 ("First Decision"), para. 19.
[9] Second Decision, para. 17.

exist. The SPO has the luxury to then simply respond. The Defence's challenge to this approach during the first status conference, was unsuccessful.[10]

8. This burden shift effectively allows the SPO to evade its obligation to establish, through contemporaneous evidence, that conditions for detention on remand still exist. Placing this burden on the Defence to show that they do not, is a legal error. The PTJ assessed all the material before it on the basis of an erroneous burden of proof. This legal error invalidates the Second Decision, warranting the intervention of the Court of Appeals Panel.

B. THE PTJ ERRED IN REFUSING TO ENGAGE WITH THE ANTICIPATED LENGTH OF PRE-TRIAL DETENTION

9. At the KSC, the PTJ must ensure that a person "is not detained for an unreasonable period prior to the opening of the case".[11] This obligation is absolute. Regardless of the cause of the delay, or who the parties believe to be responsible, once the period becomes unreasonable, the PTJ must act.

10. The KSC procedure therefore offers greater protection for an accused than at the ICC, where an ICC Pre-Trial Chamber's obligation arises only where the unreasonable period is **due to** inexcusable delay by the Prosecution.[12] At the KSC, the unreasonable period itself is enough, and requires the PTJ to act.

11. Whether the delay has become unreasonable is necessarily linked to how long the accused will be detained prior to the start of trial. A reasonable period of pre-trial detention will become unreasonable if it becomes apparent that the trial will not begin

[10] KSC-BC-2020-06, Draft Transcript, 18 November 2020, pp. 157-161.
[11] Rule 56(2), Rules.
[12] Article 60(4), Rome Statute: "The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor."

for an extended period. For this reason, ICTY Judges considered the probable length of pre-trial detention when deciding whether to exercise their discretion to release an accused.[13]

12. The PTJ has previously declined to consider the probable length of pre-trial detention of the accused in this case, calling this exercise "premature and speculative".[14] In April 2021, the Court of Appeals Panel found no error in this approach, finding that the PTJ did not err in diverging from ICTY practice at this stage of the proceedings. However, the Court of Appeals Panel explicitly linked its conclusion to the fact that "as is evident from the submissions underlying the Impugned Decision, the Parties **differed widely in their opinions on the likely start date of the trial,** and therefore the likely length of the pre-trial period."[15]

13. This is no longer the case.

14. In its Submissions on Detention Review, the Defence detailed the delays on the part of the SPO, concluding that "[t]he 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."[16]

[13] KSC-BC-2020-06/IA001/F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("Veseli Appeal Decision"), para. 59 and fn. 130, citing: "*Haradinaj et al*. Appeal Decision, para. 23; *Haradinaj et al*. Decision of 10 September 2010, paras 40-42; *Haradinaj et al*. Decision of 6 June 2005, para. 29; *Mrkšić* Decision, para. 48".
[14] *See, e.g.*, KSC-BC-2020-06/F00178, Decision on Kadri Veseli's Application for Interim Release, 22 January 2021, para. 61.
[15] Veseli Appeal Decision, para. 59.
[16] KSC-BC-2020-06/F00377, Thaçi Defence Submissions on Detention Review with Confidential Annexes A and B, 30 June 2021 ("Second Request"), para. 16.

15. This submission as to the anticipated delay went unchallenged. While in previous submissions in November 2020 and April 2021, the SPO "repeatedly and vigorously" contested the prospect of an additional year's delay,[17] the SPO Response to Mr Thaçi's Second Request was silent. The SPO is now apparently reconciled with the consequences of its inability to meet disclosure deadlines, and its need to conduct further investigations before being able to present its case.[18]

16. As such, the "widely differing opinions" on the likely trial start date no longer exist,[19] meaning that the PTJ had no basis on which to call any discussion as to the expected total length of Mr Thaçi's pre-trial detention "premature and speculative".[20] A concrete pre-trial timeframe now exists, and the PTJ was required to engage with the Defence submission that Mr Thaçi's pre-trial detention would now be extended to the point of being unreasonable, warranting his release under Rule 56(2).[21] His failure to do so was a discernible error, in that he exercised his discretion based on a patently incorrect conclusion of fact, and gave weight to extraneous or irrelevant considerations.[22] The Second Decision should be reversed.

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[17] 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 and fn. 125, citing "Prosecution submissions further to the status conference of 18 November 2020, KSC-BC-2020-06/F00097; Prosecution submissions for third status conference, KSC-BC-2020-06/F00191".

[18] The SPO has confirmed that it will not be able to submit its Rule 95(4) materials (i.e. Pre-Trial Brief and witness and exhibit lists) before mid-October and that this estimate may need to remain under review, including in light of the pending clearances and, potentially, the demands of further litigation on the preliminary motions in this case: KSC-BC-2020-06/F00398, Prosecution submissions for sixth status conference with confidential and ex parte Annex 1, 16 July 2021 ("SPO Submissions for Sixth Status Conference"), para. 10.

[19] KSC-BC-2020-06/IA006/F00001, Krasniqi Defence Appeal Against Decision on Review of Detention of Jakup Krasniqi, 7 July 2021, para. 49: "While the start date of trial is unknown, it is clear that the unrealistic earliest possible trial start date is mid-January 2022. The SPO did not demur from that assessment… Mr. Krasniqi will be imprisoned for at least 14 months and probably longer before the start of trial."; KSC-BC-2020-06/IA007/F00001, Appeal against Decision on Review of Detention of Rexhep Selimi, 8 July 2021, para. 51: "…the relevant information willingly provided by the SPO, both before the decision and since it was issued, fully reinforces the Defence's position that the trial will not start in this case until well into 2022."

[20] Second Decision, para. 62.

[21] Second Request, paras. 8-16.

[22] *Gucati* Appeals Decision, para. 14; *Haradinaj* Appeals Decision, para. 14.

C. THE PTJ'S FINDINGS ON MR THAÇI'S INFLUENCE AND AUTHORITY ARE SO UNFAIR AND UNREASONABLE AS TO CONSTITUTE AN ABUSE OF DISCRETION

17. In the First Decision, the PTJ's concerns over Mr Thaçi's "influence and authority" were explicitly linked to the real-time support he enjoyed in Kosovo. The PTJ held that "the influence, direct or indirect, deriving from Mr Thaçi's **public stature**, may trigger the mobilisation of a vast network of supporters, including former subordinates".[23] His "influence and authority" was found to stem from Mr Thaçi's "past and **recent** influential positions"[24] and the fact that he had **recently** resigned.[25]

18. Mr Thaçi's public stature has now diminished. The Second Request and Reply gave concrete and verifiable examples of why Mr Thaçi is now in the weakest position of his political career.[26] The reduction in his public stature is quantifiable. Hashim Thaçi could once win elections; today, his political party can no longer even attract enough support to become a viable opposition.[27]

19. Faced with this evidence, the PTJ moved the goalposts. Abandoning his former position that Mr Thaçi's "public stature" and "past and recent positions" may trigger a vast network of supporters, the PTJ narrowed his finding and concluded that Mr Thaçi "continues to play a significant role in Kosovo on the basis of the

[23] First Decision, para. 38.
[24] First Decision, para. 38.
[25] KSC-BC-2020-06/IA004/F00005, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 ("Thaçi Appeal Decision"), para. 50.
[26] Second Request, paras. 18-20; KSC-BC-2020-06/F00404, Thaçi Defence Reply to "Prosecution response to Thaçi Defence Submissions on Detention Review", 19 July 2021 ("Second Request Reply"), paras. 5-7.
[27] Second Request, paras. 18-19.

previous positions he occupied".[28] This finding is invalidated by the errors which underpin it.

20. First, the PTJ has no basis on which to find that Mr Thaçi continues to play a "significant role in Kosovo". The PTJ dismissed election results and political developments as being of no (or marginal) relevance to an assessment of Mr Thaçi's popularity and support. In any democratic society, election results are the only metric for assessing the standing of a politician or a political party in that society. Regardless, more problematic is the fact that the PTJ gave no other indication of how popularity and support should be quantified, or how he himself assessed it. This either constitutes a failure to give reasons, or means that a factual conclusion was reached without an evidentiary basis, which renders it invalid.

21. Similarly baseless, is the justification given for marginalising the relevance of the recent elections and political developments, namely that "supporters of Mr Thaçi do not necessarily have to be PDK voters", and that Mr Thaçi's support is drawn from his status as a former politician and high ranking KLA member.[29] The PTJ is not in a position to make a finding of fact about Mr Thaçi's position and level of command within the KLA, this being a matter in dispute. In any event, the logic is self-defeating; any state or political positions held by Mr Thaçi resulted from the electoral wins of the PDK in democratic elections.

22. Mr Thaçi's association with the KLA did not secure him – automatically and of itself – any position of influence or authority after the end of the conflict. This is

[28] Second Decision, paras. 30-31, 39.
[29] Second Decision, para. 30.

evidenced – *inter alia* – by the poor election results of the PDK in 2000[30] and 2001.[31] Mr Thaçi was neither coronated as monarch, nor established a dictatorship, but subjected himself and his political party to a democratic electoral process. This process yielded no results until 2007, when PDK secured the highest vote count and was entitled to propose Mr Thaçi as Prime Minister.[32] The election results of Mr Thaçi's former political party are the only way of assessing his alleged popularity and support. It has never, in fact, existed independently.

23. The PTJ's conclusion that Mr Thaçi once enjoyed influence and authority, and so will always enjoy influence and authority, regardless of what is being expressed by Kosovans at the ballot box, in the press, or in public, is so unfair and unreasonable as to constitute an abuse of discretion, requiring its reversal.

D. THE PTJ ERRED IN FINDING THAT DISCLOSURE INCREASES MR THAÇI'S RISKS OF FLIGHT, OBSTRUCTION, AND COMMITTING FURTHER CRIMES

24. In the First Decision, the PTJ held that "the nature and extent of the crimes charged" as well as "the severity of a potential sentence" constitute important factors incentivising Mr Thaçi to abscond, should he be released.[33] This language is repeated and adopted in the Second Decision.[34]

[30] *See* OMIK Department of Election Operations, Final Results – Municipal Elections 2000', 8 November 2000, available at: https://www.kqz-ks.org/wp-content/uploads/2018/04/1.-Rezultatet-e-subjekteve-sipas-komunave-2000-Komunale.pdf.
[31] *See* Central Election Commission, 'Certified Results – Election 2001', available at: https://www.kqz-ks.org/wp-content/uploads/2018/04/1.-Rezultatet-e-p%C3%ABrgjithshme-sipas-Subjekteve-2001-1.pdf.
[32] *See* Central Election Commission, 'Kosovo Assembly Elections', available at: https://www.kqz-ks.org/wp-content/uploads/2018/04/1.-Rezultatet-e-p%C3%ABrgjithshme-sipas-Subjekteve-2007.pdf.
[33] First Decision, para. 31.
[34] Second Decision, paras. 31, 39.

25. Since the First Decision, two counts in the Indictment have been dismissed, namely torture and persecution charged pursuant to an extended joint criminal enterprise. Pursuant to Article 41(10), which places an obligation on the PTJ to examine whether the reasons for continued detention exist, the failure to even reference this reduction in the charges was a failure to give weight to relevant factors, and an error.

26. The PTJ also held that, through the disclosure process, Mr Thaçi has gained increased insight into the evidence underpinning the charges against him. As a result, according to the PTJ, the risks that Mr Thaçi will abscond, obstruct the proceedings, and commit further crimes have all accordingly increased.[35]

27. In reaching this conclusion, the PTJ had before him concrete submissions about Mr Thaçi's actual state of mind about the disclosed SPO evidence, with which he did not engage, being that the disclosure contains "no credible evidence against Mr Thaçi to date",[36] and that Mr Thaçi faces "allegations dependant on a tenuous theory of derivative liability – joint criminal enterprise – for a disconnected set of purported crimes, for which he has seen no credible evidence."[37]

28. Also before the PTJ, was a wealth of objective and corroborated indicators of Mr Thaçi's knowledge of the case against him, and his prior reactions thereto. Namely, that when Mr Thaçi thought that he was facing the far more egregious and direct allegations of organ trafficking,[38] he did not flee. That Mr Thaçi voluntarily submitted to days of SPO interviews in December 2019,[39] January[40] and July 2020[41] (travelling to

[35] Second Decision, paras. 31, 39, 44.
[36] Second Request Reply, para. 10.
[37] Second Request Reply, para. 11.
[38] Second Request Reply, para. 11.
[39] [REDACTED].
[40] [REDACTED].
[41] [REDACTED].

The Hague to attend), in which he was informed of the case and type of evidence against him, and did not flee. That Mr Thaçi has known since the SPO Press Release in June 2020 that he faced a 10 count Indictment alleging responsibility for nearly 100 murders, and did not flee.[42] That when faced with a confirmed Indictment against him, Mr Thaçi voluntarily divested himself from the privileges and immunities of the Presidency, presented himself in The Hague, and did not flee. Significantly, the SPO himself stated in November 2020, that:[43]

> **there is no mystery for the Defence about the SPO's case** and its investigations and preparations can commence immediately. From the **detailed** indictment and the **early** disclosure, the Defence will be put on notice as to the case they will have to meet at trial. Moreover, unlike the cases at the ICTY, **this case encompasses many crimes that have already been litigated in Kosovo and the ICTY in well-publicised prosecutions that are certainly known to the Accused and their counsel**. Further, in the context of investigative interviews, all of the Accused in this case were put on notice months ago that they were suspects in the SPO's investigation...

29. Of course, in addition to having received further disclosure, Mr Thaçi is also now aware that the SPO is still investigating the case against him, and trying to gather additional evidence.[44] This can only mean that the SPO harbours doubts about its ability to establish the charges against him beyond reasonable doubt.[45] Given the SPO's position on the "endemic climate of severe witness interference, violence, and intimidation",[46] it would only continue investigating and speaking with witnesses if it considered this to be an absolute necessity. This knowledge undoubtedly

[42] SPO, 'Press Statement', 24 June 2020, available at: https://www.scp-ks.org/en/press-statement.
[43] KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 11.
[44] *See, e.g.*, KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, para. 3; KSC-BC-2020-06/F00191, Prosecution submissions for third status conference, 8 February 2021, paras 12-13; KSC-BC-2020-06/F00235, Prosecution submissions for fourth status conference and request for adjustment of time limits, para. 6; KSC-BC-2020-06/F00314, Prosecution submissions for fifth status conference, 18 May 2021, para. 9.
[45] *See, inter alia*, SPO Submissions for Sixth Status Conference, para. 9: "SPO investigations in fulfillment of its mandate are anticipated to continue for the foreseeable future. […]"
[46] *See, e.g.*, KSC-BC-2020-06/F00416/CONF/RED, Confidential Redacted Version of 'Ninth request for protective measures', KSC-BC-2020-06/F00416, dated 23 July 2021, 27 July 2021, para. 3.

undermines (or more likely cancels out entirely) the alleged increased concern the PTJ has attributed to Mr Thaçi as a result of having read the incomplete, heavily-redacted, and often incomprehensible SPO disclosure.

30. The PTJ was entitled to consider these submissions, evidence, and objective indicators of Mr Thaçi's lack of propensity to abscond, and nonetheless come to the reasoned conclusion that recent SPO disclosure was sufficient to cancel it out. He was not entitled to ignore it, and simply repeat the generic language appearing across all provisional release decisions that "greater insight into the SPO evidence" increases the risk of flight, the risk of obstruction, and the risk of committing further crimes. Particularly given the failure of the PTJ to refer to any evidence whatsoever in the disclosure that indicates "the strength of the SPO case". This amounts to a failure by the PTJ to give sufficient weight to relevant factors, or at least a manifest failure to give reasons.

31. Absconding from international justice spells the end of an accused's life as he knows it. It can mean the end to family life, the ability to return home, and translates to a life forever on the run. Mr Thaçi has indicated time and time again through concrete actions that he wants the charges against him to be adjudicated, that he will turn up, and contest them. In this context, the PTJ's inference that the recent SPO disclosure was enough to transform Mr Thaci from a person who voluntarily surrenders to a Court, to someone who would actively run from it, interfere with the proceedings, and commit crimes, represents a wholly erroneous evaluation of the evidence, leading to a conclusion that no reasonable trier of fact could have reached, occasioning a miscarriage of justice.[47]

[47] *Gucati* Appeals Decision, para. 13.

E. THE PTJ'S APPROACH TO THE ASSESSMENT OF THIRD STATE GUARANTEES WAS ERRONEOUS

32. In order to justify the interference with an accused's presumption of innocence and right to liberty, the Court of Appeals Panel requires the PTJ to be satisfied that the SPO had 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) exist.[48] Not **any** risk of flight or obstruction will warrant continued detention, the risks identified must be "sufficiently real".

33. The risks that an accused will flee, obstruct, or commit crimes when released are necessarily linked to the circumstances of this release. The level of risk which attaches to an accused who walks out of the prison and back into the victim community unrestricted by any conditions, will be different from the level of risk arising if the same accused is released into a Third State behind a wall of restrictive and enforceable conditions.

34. As such, the conditions of release, and the guarantees from Third States that underpin them, must form part of the Panel's assessment of whether a "sufficiently real" risk exists. It cannot be that the Panel considers only the SPO's submissions to find that "a risk exists", only then to look to the proposed conditions of release. This would circumvent the Court of Appeals Panel's safeguard that the risk must be "sufficiently real" before detention can be maintained. This assessment of risk can only happen by considering where, how, when and under what conditions the proposed release will occur.

[48] Thaçi Appeal Decision, para. 24 (emphasis added).

35. The PTJ got this completely wrong. Looking only to the SPO submissions, the PTJ, under a heading "Conclusion", found that the risks that Mr Thaçi will abscond, obstruct, or commit further crimes "continue to exist". Only then, did he move to the second step of assessing "whether these risks can be adequately addressed by any conditions for his release."[49] This was an error.

36. The conditions for release must form part of the equation, as shown by the decades of practice of international judges looking at proposed State Guarantees when assessing whether the risks of flight, interference, and obstruction were sufficient to warrant ongoing detention,[50] and assessing that, for example:

> having reviewed the submissions of the Prosecution with regard to the present provisional release application **and having regard to the guarantees from the Republic of Serbia** in which the government has undertaken to arrest the Accused for breach of any of the conditions of the provisional release, the Trial Chamber finds that the Accused Jovica Stanisic **will not pose a danger to any victims or witnesses if his present application for provisional release is granted.**[51]

37. In artificially removing the question of conditions of release from the assessment of risk, the PTJ committed an error of law, which infects the entirety of his reasoning, invalidates the Second Decision, and warrants the intervention of the Court of Appeals Panel. The PTJ assessed all the material before it through the wrong lens,

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[49] Second Decision, para. 46.

[50] *See, e.g.*, ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-1565-Red, Trial Chamber III, Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, 16 August 2011, paras. 57-61; ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-163, Pre-Trial Chamber I, Decision on the 'Defence Request for Interim Release', 19 May 2011, paras. 51, 56-59; ICTY, *Prosecutor v. Prlić et al*, IT-04-74-T, Trial Chamber III, Decision on Motion for Provisional Release of the Accused Milivoj Petkovic, 30 November 2011, paras. 30-39; ICTY, *Prosecutor v. Stanisić and Simatović*, IT-03-69-PT, Trial Chamber III, Decision on Provisional Release, 26 May 2008 ("*Stanisić* Decision"), paras. 54, 57; ICTY, *Prosector v. Rašević and Todović*, IT-97-25/1-PT, Trial Chamber II, Decision on Savo Todović's Application for Provisional Release, 22 July 2005, paras. 28-33, 41; ICTY, *Prosecutor v. Haradinaj et al*, IT-04-84-PT, Trial Chamber II, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, paras. 37-43, 46-48.

[51] *Stanisić* Decision, para. 54.

looking only to see whether the risk was sufficient to keep Mr Thaçi detained, rather than assessing risk in light of what release itself could potentially look like.

F. THE PTJ ERRED IN FAILING TO SEEK THE VIEWS OF THE PROPOSED THIRD STATES

38. The PTJ's blanket finding that "no additional conditions" exist that could sufficiently mitigate the identified risks,[52] is illustrative of the PTJ's conclusory reasoning and was made in ignorance of the conditions that could be put in place by the Third States, [REDACTED].

39. The PTJ was able to remain in the dark about potential conditions, having deliberately circumvented his obligation to hear the Third States into which Mr Thaçi sought to be released. He did this by drawing a non-existent link between Article 44(11) of the KSC Law and Rule 56(4) of the Rules, requiring them to be "read together", and finding that the use of the term "if released" in Article 44(1) limits consultations with Third States under Rule 56(4) to situations in which a Panel has already formed a view on provisional release.[53] This was a legal error.

40. Article 44(11) does indeed contain the term "if released", because it addresses precisely that; the options for the states into which a detained person can be released, if release has been ordered. The object of Article 44(11) is to preclude release into The Netherlands as the Host State, and provides that a detained person shall be released into either (i) the country in which they were originally detained; (ii) Kosovo; or (iii) if they do not have rights of residency in either of those places, in a country where they are ordinarily and/or lawfully resident, or to another State that agrees to accept them.

[52] Second Decision, para. 55.
[53] Second Decision, para. 53.

41. Rule 56(4) is a more specific provision governing the procedure for release into a Third State. After addressing consent, it contains the stand-alone phrase "[t]he Panel shall hear the Third State to which the detained person seeks to be released." There is nothing in the plain language of Rule 56(4) limiting the obligation to hear a Third State to cases where the Panel already intends or envisages granting provisional release. This would be illogical. The adjudication of a request for provisional release requires the Panel to assess the risks as against the conditions proposed to mitigate them; this requires hearing from the Third State into which the detained person seeks to be released.

42. Limiting the hearing of Third States to situations where provisional release has already been ordered or is anticipated undermines the very purpose of the consultation; namely, to find out what conditions are being proposed, what other conditions are possible, and allow a Panel to consider whether they sufficiently mitigate the risks identified before deciding whether the reasons for detention still exist. It is for this reason that Rule 56(4) identifies the Third State as being one into which the detainee "**seeks** to be released"; the question of whether he or she will be, is still up in the air.

43. In this context, the PTJ's resort to a "combined reading of the two provisions" is baffling. There is no reason they should be "read together", particularly when the more specific Rule 56(4) is clear on its face, and needs no resort to randomly selected norms of statutory interpretation.[54] If the drafters wanted to limit consultation with Third States to situations where release had already been ordered or was intended, this could have been easily achieved. Rule 56(4) would have also included the phrase "if released". It does not.

[54] Vienna Convention on the Law of Treaties 1969, Article 31.

44. The PTJ committed an error of law. He was required to hear the two identified Third States, and engage with them in good faith, in order to be in a position to properly weigh the risks identified against the guarantees offered, and the conditions available.

45. In this context –the deprivation of liberty of an accused who enjoys a presumption of innocence – the PTJ's references to the "excessive and unnecessary burden on a Panel" in seeking the views of two Third States is alarming, and demonstrates a failure on his part to appreciate the seriousness of indefinite pre-trial incarceration and its impact on the physical and mental well-being of detainees. The ICC jurisprudence cited in support makes no reference to the "burden" on the Chamber; this was the PTJ's own invention.[55]

46. The requirement placed by the Constitutional Court to "consider more lenient measures when deciding whether a person should be detained"[56] would undoubtedly require the PTJ to engage with these designated states. It cannot be that because continued incarceration is the less onerous option, it should simply be maintained. Incarceration does and should place a huge burden on the governing authority. This is consistent with the gravity of the interference with the detainee's rights, particularly in the pre-trial phase.

G. THE PTJ ERRED IN RELYING ON HIS MISUNDERSTANDING OF THE COMMUNICATION MONITORING FRAMEWORK OF THE KSC DETENTION FACILITIES

[55] Second Decision, fn. 102, citing "Ali Kushayb Appeals Judgment on Interim Release, para. 57".
[56] 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, 22 May 2020, para. 70.

47. The PTJ's blanket finding that there are **no conditions** that could sufficiently address the risks posed by Mr Thaçi outside of the KSC Detention Unit, is based on his own flawed understanding of the communication monitoring framework therein.

48. The PTJ found that **even if** Mr Thaçi's communications in [REDACTED] were limited to his immediate family and his defence team, this would not prevent him from passing on instructions to his family members or any other third parties who would be necessarily in contact with him at his assigned residence, with a view to intimidating witnesses.[57] Notably:

> In this regard, the PTJ notes that such messages could be passed on in several other ways, for example by asking someone to convey a message orally or to use a device belonging to a third person.[58]

49. In this, the PTJ passes into the realm of the absurd, with layer upon layer of speculation, and literally inventing scenarios which presume criminal conduct on the part of Mr Thaçi, his family members, and presumably including the security staff who would "necessarily be in contact with him at his assigned residence". These invented scenarios are made all the more offensive by the fact that they are based on the PTJ's misconception of the situation in the KSC Detention Facility, where Mr Thaçi meets with family members and his legal team in unsupervised visits, and regularly interacts with "other third parties", in which the imagined "messages" could also be conveyed, and illicit instructions could be passed. There is absolutely no indication that this is being done, despite the opportunity being regularly available.

50. It is simply untrue that Mr Thaçi's communications can only be restricted and monitored in a way to sufficiently mitigate the identified risks at the KSC detention facilities. The same framework could be replicated externally. The PTJ deliberately

[57] Second Decision, para. 55.
[58] Second Decision, para. 55.

declined the opportunity to find out how. In doing so, he set an unreasonably high standard for interim release, based on an error of fact, that has resulted in the unjustified ongoing incarceration of a pre-trial accused.

IV. CONCLUSION AND RELIEF SOUGHT

51. In his Separate Concurring Opinion to the Court of Appeals Panel's decision, His Honour Judge Ambos addressed directly the question of Third State Guarantees. Finding that guarantees, if framed in more precise and concrete terms "may then be a strong argument in favor of conditional release", His Honour urged their serious consideration by the PTJ when adjudicating future applications, noting that they may "shift the balance in favour of provisional release".[59] Of course, Judge Ambos' position endorses and reflects decades of practice before the international courts, where Third State Guarantees were seriously considered, weighed appropriately, and often found to be the decisive factor in the release of accused.

52. While characterised as "helpful" and potentially even "enlivening",[60] concurring opinions by individual judges are not binding on a lower court. As such, there was no obligation on the PTJ to refer to this advice in his adjudication of the Second Request. However, the lack of any reference to His Honour Judge Ambos' opinion, speaks volumes about the approach of the PTJ to the Third State Guarantees that Mr Thaçi placed at the heart of his request.

53. Rather than "seriously considering" the guarantees, including from a contributing state to the Court, the PTJ went out of his way to marginalise their impact and downplay their significance, employing illogical interpretations of clear statutory

[59] KSC-BC-2020-06/IA004/F00005, Separate Concurring Opinion of Judge Kai Ambos, para. 5(ii).
[60] ICTY, *Prosecutor v. Prlić et al*, IT-04-74-T, Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 21 April 2011, p. 2.

provisions, and deciding that no matter what was on offer – which he did not want to know - it would never be enough. The errors he committed in coming to this position, are outlined above. They are clear, significant, and warrant a reversal of the Second Decision, and the release of the accused.

54. In light of the foregoing, the Defence requests that the Court of Appeals Panel:

REVERSE the Second Decision of the PTJ that the conditions for detention continue to be met; and

ORDER the immediate Interim release of Mr Thaçi, with conditions assessed to be appropriate in the circumstances.

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Respectfully submitted,

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At The Hague, The Netherlands