

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

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Public Redacted Version of

Thaçi Defence Submissions on Second Detention Review

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I. INTRODUCTION

1. The right to liberty is a fundamental right enshrined in Article 5 of the European Convention on Human Rights and Article 29 of the Kosovo Constitution. Consequently, detention pending trial remains the exception and, as such, may be applied only if the alternative measures provided under Article 41(12) of the KSC Law are deemed insufficient to eliminate or mitigate the identified risks.

2. In the present case, the conditions for Mr Thaçi's continued detention are simply not met. Pursuant to Article 41(10) of the KSC Law, Rules 56(4) and 57(2) of the KSC Rules,¹ the Defence for Mr Thaçi ("Defence") requests the Pre-Trial Judge ("PTJ") to:

- (i) convene a hearing in order to hear:
 - (a) the views of the Kosovo Police ("KP") on the feasibility of the release of Mr Thaçi under house arrest in Kosovo in his residence;
 - (b) the views of the Governments of [REDACTED] on the release of Mr Thaçi into their respective territories; and
 - (c) the views of the parties, and
- (ii) order Mr Thaçi's interim release on such conditions considered appropriate.

3. These submissions are classified as confidential pursuant to Rule 82(3) of the KSC Rules, given that they contain the names of Third States, the details of Mr Thaçi's residence in Kosovo, and references to sensitive operational information pertaining to the mechanisms/resources that may be employed by KP to implement the conditions that may be imposed by the PTJ. A public redacted version will be filed in due course.

¹ 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").

II. PROCEDURAL HISTORY

4. On 5 November 2020, Mr Thaçi resigned as President of the Republic of Kosovo, thereby waiving his personal constitutional immunity from arrest and detention,² and voluntarily surrendered to the KSC in Kosovo. In doing so, he honored his public vow to resign from the office of the President of Kosovo if the indictment against him was confirmed and to face the charges as an ordinary citizen of Kosovo.³ In spite of this, ever since, he has been treated as an arrested fugitive.⁴

5. On 22 January 2021, Mr Thaçi's first application for interim release was rejected by the PTJ.⁵ Following an appeal by Mr Thaçi,⁶ a Panel of the Court of Appeals Chamber issued a decision denying the First Appeal.⁷ However, the First Appeal Decision was accompanied by a concurring opinion of Judge Ambos, which underlined that concrete guarantees from a Third Country willing to receive Mr Thaçi in its territory may change the analysis in favour of interim release with conditions.⁸

6. On 30 June 2021, after securing guarantees from two NATO Member States, one of which is a contributing state of the KSC, and in accordance with the concurring opinion of Judge Ambos, the Defence requested the release of Mr Thaçi in the

² KCC, AGJ138/11, Judgment in Case No. KO-98/11 Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo, 20 September 2011, Section VII.4 of the operative clause and paras. 125 – 128.

³ The Guardian, "Kosovo president Hashim Thaçi vows to resign if war crimes trial goes ahead," 1 July 2020, available at <https://www.theguardian.com/world/2020/jul/01/kosovo-president-hashim-thaci-vows-to-resign-if-war-crimes-trial-goes-ahead>.

⁴ KSC-BC-2020-06/F00065/Red, Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities, 8 November 2020, paras. 3-7.

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

⁶ 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 ("First Appeal").

⁷ KSC-BC-2020-06/IA004/F00005, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 ("First Appeal Decision").

⁸ KSC-BC-2020-06/IA004/F00005, Separate Concurring Opinion of Judge Kai Ambos ("Ambos Separate Opinion"), para. 5(ii).

aforementioned Third Countries. For the purpose of assessing the feasibility of the submitted guarantees, the Defence asked the PTJ to seek the views of the aforementioned Third Countries concerning the interim release of Mr Thaçi, or alternatively, to order Mr Thaçi's interim release into one of these two Third Countries.⁹

7. On 23 July 2021, the PTJ issued a ruling putting aside the concurring opinion of Judge Ambos, decided not to seek the views of the Third Countries and ordered Mr Thaçi's continued detention.¹⁰ Importantly, the Decision on Review of Detention did not opine on or address the guarantees provided by Third Countries. On 16 August 2021, the Defence filed an appeal against the Decision on Review of Detention.¹¹

8. On 26 August 2021, the President of KSC removed Judge Ambos from the Appeals Panel. The Thaçi Defence's objections to his removal and subsequent replacement by Judge Gatti were summarily dismissed by the President.¹²

9. On 27 October 2021, a majority of the Court of Appeals Panel denied the Second Appeal,¹³ while Judge Jørgensen issued a dissenting opinion regarding the failure of the PTJ to hear the views of the Third Countries for the purpose of assessing their guarantees, thereby recalling and reinforcing Judge Ambos' concurring opinion.¹⁴ In

⁹ KSC-BC-2020-06/F00377, Thaçi Defence Submissions on Detention Review, 30 June 2021 ("Submissions on Detention Review"), para. 42.

¹⁰ KSC-BC-2020-06/F00417, Decision on Review of Detention of Hashim Thaçi, 23 July 2021 ("Decision on Review of Detention"), para. 64.

¹¹ KSC-BC-2020-06/IA010/F00004, Thaçi Defence Appeal against Decision on Review of Detention of Hashim Thaçi, 16 August 2021 ("Second Appeal").

¹² KSC-BC-2020-06/F00440, Decision on Application for the Recusal of the President, 25 August 2021; KSC-BC-2020-06/F00476, Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel, 17 September 2021.

¹³ KSC-BC-2020-06/IA010/F00008, Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 27 October 2021 ("Appeal Decision on Review of Detention"), para. 70.

¹⁴ Appeal Decision on Review of Detention, Partially Dissenting Opinion of Judge Nina Jørgensen ("Jørgensen Dissenting Opinion"), paras 8-11.

her dissent, Judge Jørgensen noted that the inconsistency between the Appeal Decision on Detention Review and the decisions of the Appeals Panel on the detention review of Veseli, Selimi and Krasniqi¹⁵ raised questions on the integrity of the process.¹⁶ The majority dismissed the Defence's grounds of appeal relating to the PTJ's assessment of: (i) the burden of proof and the standard applicable to review of detention; (ii) the criteria under Article 41(6)(b); (iii) the proportionality of detention; and (iv) the conditions of release.¹⁷ In particular, the majority found that, given that the PTJ had determined that no additional conditions could sufficiently address the risks posed (including those proposed by the Third States), he was not obliged to seek further details from the nominated Third Countries before rendering a decision.¹⁸ This stands in contrast with the Appeal Decisions on Review of Detention of Co-Accused in which the respective Appeals Panel found that the failure of the PTJ to hear the views of the guarantors, when such views can inform the analysis on the sufficiency of the guarantees and particularly after being asked to do so by the Defence, is an abuse of discretion.¹⁹

10. On 8 October 2021, following the Appeal Decisions on Review of Detention Review of Co-Accused, the PTJ issued an Order to the Kosovo Police to Provide Information, relating to their ability to enforce conditions of release.²⁰ Importantly, the latter was not limited only to the Accused that originally offered guarantees from KP and whose interim release applications were remanded for reconsideration by the Appeal Decisions on Review of Detention Review of Co-Accused. On 26 October 2021,

¹⁵ KSC-BC-2020-06/IA008/F00004, Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021; KSC-BC-2020-06/IA006/F00005, Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention, 1 October 2021; KSC-BC-2020-06/IA007/F00005, Decision on Rexhep Selimi's Appeal Against Decision on Review of Detention, 1 October 2021 (collectively, "Appeal Decisions on Review of Detention of Co-Accused").

¹⁶ Jørgensen Dissenting Opinion, paras 1-2.

¹⁷ Appeal Decision on Review of Detention, paras. 20, 30-31, 43, 52, 69.

¹⁸ Appeal Decision on Review of Detention, para. 67.

¹⁹ See footnote 15.

²⁰ KSC-BC-2020-06/F00513, Order to the Kosovo Police to Provide Information with confidential Annex, 8 October 2021.

the KP provided their submissions containing detailed answers to each of the questions raised by the PTJ (“KP Report”).²¹

11. Similarly, on 13 October 2021, the PTJ issued an Order to the Registrar to Provide Information on the Detention Regime.²² The Registrar provided her submissions on 20 October 2021.²³

12. On 15 November 2021, following a request from the Defence, the KP issued a detailed report on the feasibility of implementing, supervising and enforcing conditions discussed in the KP Report, in general, and house arrest, specifically, at the residence of Mr Thaçi in Kosovo (“KP Security Assessment of Mr Thaçi’s Residence”).²⁴ The KP did not provide the aforementioned document to the Defence directly, because the latter contained sensitive operational information. Consequently, the Defence obtained the KP Security Assessment of Mr. Thaçi’s Residence through the KSC CMU, in Albanian. Given that the Defence has not been able to fully digest the KP Security Assessment by the time the present application is filed, the Defence requests that an oral hearing be ordered for the purpose of enabling the Defence to address its content. The Defence reserves the right to file further submissions upon reception of its English translation.

²¹ KSC-BC-2020-06/F00548/eng, Answer to the Request number KSC-BC-2020-06, dated 13 October 2021, 26 October 2021.

²² KSC-BC-2020-06/F00522, Order to the Registrar to Provide Information on the Detention Regime, 13 October 2021.

²³ KSC-BC-2020-06/F00536, Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00522), 20 October 2021.

²⁴ KSC-BC-2020-06/F00569, Transmission of Information from Kosovo Police with one confidential Annex.

III. APPLICABLE LAW

13. Article 41(10) of the KSC Law provides for the automatic review, every two months, of the necessity of the detention on remand; article 41(6) defines the criteria to be met to justify such a detention.

14. In the First Appeal Decision, the Appeals Panel accepted the Defence's position that detention cannot be justified on the basis of **any** possibility of a risk materialising.²⁵ Rather, the risk must be 'real', with the standard requiring less than certainty, but more than mere possibility.²⁶ 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.'²⁷

IV. SUBMISSIONS

15. The Defence submits that Mr Thaçi's interim release is warranted for the following reasons.

A. NO REAL RISK OF FLIGHT (ARTICLE 41(6)(B)(I))

16. As previously submitted,²⁸ the Defence maintains that Mr Thaçi does not pose any flight risk.

²⁵ 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.

²⁶ See, e.g. First Appeal, para. 12 and the authorities cited therein; First Appeal Decision, para. 22.

²⁷ Appeal Decision, para. 24.

²⁸ See, *inter alia*, KSC-BC-2020-06/F00120, Application for Interim Release on behalf of Mr Hashim Thaçi, 4 December 2020, paras 34-41.

17. Mr Thaçi agreed to be interviewed by the SPO in 2019 and 2020 while still President, and further agreed to resign and surrender to the jurisdiction of the KSC, rather than asserting his personal constitutional immunity from legal process, arrest and detention. Furthermore, as noted above, Mr Thaçi's determination to cooperate with the KSC did not diminish even after the publication of the unconfirmed indictment by the SPO. The PTJ rightly noted that Mr Thaçi's cooperation with the SPO and the KSC, his efforts to establish these institutions, and his renouncing the immunity attached to his position were relevant factors.²⁹

18. Mr Thaçi cooperated with the KSC when not only he already knew the nature of the allegations following the publication of the unconfirmed indictment by the SPO in June 2020, but thought the potential charges were far more severe in light of the Council of Europe's Parliamentary Assembly Report of 7 January 2011. Therefore, his knowledge of the charges and the possibility of a serious sentence in the event of a conviction is not a sufficient factor to determine that he could pose a flight risk.

19. Moreover, the fact that the SPO's case continues to 'unfold' in line with the SPO's disclosure of incriminating evidence does not create any additional incentive to flee. The number of counts has only decreased, pending confirmation by the Appeals Panel, and the maximum possible sentence remains the same. Mr Thaçi knew very well the eventual consequences of any legal proceedings against him. Thus, his increased insight into the evidence underpinning the charges on the basis of the ongoing disclosure process does not constitute a factor sufficient to consider that he would pose a flight risk. On the contrary, the disclosure process to date has revealed that SPO's case against Mr Thaçi is a *copy-and-paste* re-prosecution of unsuccessful prosecutions of former Kosovo Liberation Army members by the International Criminal Court for former Yugoslavia ("ICTY"). Also, the weakness of the SPO's case

²⁹ First Decision, para. 32.

is confirmed by the continuation of its investigations. In any case, given that this factor is not unique to Mr Thaçi, but applies to any accused before the KSC, it cannot in itself justify the continued detention of a particular individual.

20. Finally, more than one year has elapsed since Mr Thaçi's arrest and surrender to the KSC on 5 November 2021. While detained, his alleged influence and authority have decreased, with limited contact with the outside world. This reality was confirmed by the results of the last general elections, and the removal, by the new President and new Government, of almost all officials appointed while Mr Thaçi was in office.³⁰ In summary, the SPO has not demonstrated specific, contemporaneous evidence establishing a sufficiently real possibility that Mr. Thaçi would present a risk of flight at *this* stage of the proceedings.

B. NO REAL RISK OF OBSTRUCTION OF THE PROCEEDINGS (ARTICLE 41(6)(B)(II))

21. The Defence position remains that Mr Thaçi has neither obstructed nor would he ever attempt to obstruct the KSC proceedings. In any event, the extensive and unprecedented protective measures regime imposed by the PTJ prevents any such risk, even in theoretical terms.³¹ The current witness protection regime encompasses the following:

- The delayed disclosure of the identity of **20** witnesses until the filing of the SPO lists of witnesses and exhibits, i.e. until 17 December 2021;³²
- The delayed disclosure of the identity of **69** witnesses until 30 days before trial;
- The delayed disclosure of the identity of **25** witnesses until 30 days before their testimony;

³⁰ Submissions on Detention Review paras. 18-21.

³¹ *Ibid.*, para. 26.

³² KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021 ("Transcript of Eighth Status Conference"), Oral Order 2.

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

Thus, 121 witnesses are subject to delayed or non-disclosure of their identity, i.e. 37% in total.

22. Regarding 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.³³

23. The SPO has not demonstrated specific, contemporaneous evidence establishing a sufficiently real possibility of witness interference by Mr Thaçi or at his request at *this* stage of the proceedings. As stated by the ICTY Trial Chamber in *Prlic*, “*even if the Accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully*”.³⁴ Thus, Mr Thaçi, who does not play any significant role in Kosovo, one year after his resignation and arrest, does not have the will or the means to obstruct the KSC proceedings.

C. NO REAL RISK OF COMMITTING CRIMINAL OFFENCES (ARTICLE 41(6)(B)(III))

³³ Submissions on Detention Review, para. 27.

³⁴ ICTY, *Prosecutor v. Prlic et al.*, IT-04-74-PT, Order on Provisional Release of Jadranko Prlic, 30 July 2004, para. 28.

24. The Defence submits that in light of the elements quoted above, and in particular the time elapsed since the alleged offences have occurred and the extensive protective regime put in place, there is now insufficient specific evidence to demonstrate a sufficiently real risk that Mr. Thaçi will commit crimes. In any event, the burden to prove this risk is on the SPO and this burden must be met every time detention of Mr Thaçi is reviewed anew.

D. CONDITIONS CAN MITIGATE ANY REMAINING RISK

25. Notwithstanding the above, even if the PTJ were to consider that Mr Thaçi could pose a risk pursuant to Article 41(6)(b), such a risk could be entirely eliminated by the imposition of a regime of house detention, which may include additional conditions, at Mr Thaçi's residence in Kosovo, in [REDACTED].

26. 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.³⁵ The PTJ further confirmed that when deciding on whether a person should be released or detained, he must consider alternative measures to prevent the risks in Article 41(6)(b) of the KSC Law.³⁶

27. The PTJ could order house detention in accordance with Article 41(12) of the KSC Law. More importantly, Mr Thaçi agrees to comply with – or rather waive any of his affected constitutional rights – that the PTJ may impose in addition to a conventional house arrest regime.

³⁵ 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. See also KSC-BC-2020-06/IA003/F00005, Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, para. 85.

³⁶ Decision on Review of Detention, para. 23.

28. The relevant State authorities have provided sufficient guarantees to ensure the feasibility of such a measure. Oral submissions on the question of interim release, involving the parties concerned, in the presence of Mr Thaçi, would provide a forum for addressing any remaining questions of the SPO and/or PTJ. Given what is at stake, namely the integrity of the KSC's detention review process and the freedom of an individual, who cooperated with and then surrendered to the KSC, for crimes allegedly committed 23 years ago, an oral hearing should be held. In fact, oral submissions are further warranted given the PTJ's need to assess carefully and exhaustively the conditions of release either under house arrest in Kosovo or in a Third Country.

1. The guarantees provided by KP

29. The Defence submits that an order from the PTJ ordering Mr Thaçi's house detention in Kosovo would be sufficient to eliminate any identified risk. The guarantees provided by the KP constitute a new element which further warrants the interim release of Mr Thaçi's under the conditions set by the PTJ.

30. Indeed, following a request from the PTJ, on 26 October 2021, the KP filed a Report confirming its obligation, capacity and willingness to implement, supervise and enforce any conditions of release which would be imposed by the PTJ in Kosovo, including but not limited house arrest with additional conditions.

31. Furthermore, at the request of the Defence, the KP submitted a KP Security Assessment of Mr Thaçi's Residence for the purpose of implementing, supervising and enforcing the conditions mentioned in the KP Report.

32. After a preliminary untranslated review by the Defence, the KP Security Assessment of Mr Thaçi's Residence appears to confirm that all of the measures

mentioned in the KP Report, and any other conditions, may be successfully implemented at his residence. Mr Thaçi's residence is suitable because it was already subject to a number of conditions having served as the primary residence of the President of Kosovo.³⁷ Namely, the KP has indicated that most of the equipment needed to implement house arrest is already in place, thus facilitating expedited implementation of the conditions that may be imposed by the PTJ.

33. As noted in the KP Security Assessment of Mr Thaçi's Residence, [REDACTED].³⁸ Consequently, the measures for access control [REDACTED],³⁹ are sufficient to ensure absolute compliance with any conditions that may be imposed by the PTJ for access control. The KP also intends to rely on [REDACTED].⁴⁰ [REDACTED].⁴¹ [REDACTED].

34. The KP has confirmed its ability to install [REDACTED], if ordered to do so by the PTJ, [REDACTED].⁴² Also, the KP has confirmed that it can employ [REDACTED].⁴³ Finally, the KP has confirmed that it may implement a series of additional measures to ensure the effective implementation, supervision and enforcement of any and all measures ordered by the PTJ, which may include: [REDACTED].

35. At the national level, the legal provisions on standard house detention are set forth in Article 183 of the Kosovo Criminal Procedure Code.⁴⁴

³⁷ KP Security Assessment of Mr Thaçi's Residence, page 7.

³⁸ *Ibid.*

³⁹ *Ibid.*, page 8.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>.

36. In the current case, any and all conditions would be imposed by the PTJ pursuant to Article 41(12) of the KSC Law, which is not limited by the conditions envisaged by the Kosovo Criminal Procedure Code.

37. In any case, if required, Mr Thaçi confirms that he is ready to accept house arrest under any reasonable conditions deemed necessary by the PTJ, including beyond standard conditions of house arrest, to satisfy any demands or concerns of the SPO and PTJ. In this respect, he is willing to waive any constitutional rights which may be infringed upon by the conditions set by the PTJ.

38. The Defence accordingly invites the PTJ to convene a hearing to hear the parties, a representative of the KP and/or any other relevant Kosovo authorities on the interim release of Mr Thaçi in Kosovo and to hear Mr Thaçi on the waiver of constitutional rights for the purposes of effecting house arrest. This hearing would allow the PTJ to ask any remaining questions he might have and assist him in determining whether the guarantees offered by the KP are sufficient to ensure that conditions could be effectively implemented and enforced to mitigate any identified risks.

2. The guarantees provided by Third Party States

39. In the alternative, the Defence reiterates its proposal that Mr Thaçi be released into the territory of [REDACTED], under the conditions deemed necessary by the PTJ, pursuant to Article 41(11) of the KSC Law and Rule 56(4) of the Rules. Such a measure, already implemented successfully before other international courts for former senior officials,⁴⁵ is wholly warranted in the present case.

⁴⁵ See, for instance, ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1251-Red2, Appeals Chamber, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 21 February 2019, para. 60.

40. The Defence has previously submitted guarantees from [REDACTED],⁴⁶ which confirmed their willingness and capacity to accommodate Mr Thaçi under the conditions defined by the PTJ. The Government of [REDACTED] has notably confirmed its ability to secure and monitor Mr Thaçi's place of residence in [REDACTED] on a daily basis, in accordance with the requirements of the KSC.

41. It is worth noting that two judges of the Court of Appeal Chamber have already emphasised that the PTJ should duly consider and assess guarantees provided by Third Party States prior to determining whether such guarantees minimize and/or eliminate the remaining risks.

42. In a Separate Concurring Opinion to the First Appeal Decision, his Honour Judge Ambos stressed 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 PTJ or competent Panel.'*⁴⁷

43. In a partially Dissenting Opinion to the Appeal Decision on Review of Detention, her Honour Judge Jørgensen stated that *"when the Pre-Trial Judge is provided with the guarantees of Third States affirming their willingness and ability to enforce conditions of release in respect of an accused before the Specialist Chambers, he should duly consider and assess those guarantees. This conclusion follows from the fundamental right to liberty of an accused person in pre-trial detention and the presumption of innocence governing this part of the proceedings."* In her opinion, *"the Pre-Trial Judge did not have sufficient information before him regarding the proposed conditions of release to enable him to make an informed decision as to the mitigation of the identified risks."* Therefore, she would have granted one ground of appeal and remanded the matter back to the PTJ in order to assess *"whether*

⁴⁶ KSC-BC-2020-06/F00377/A01, Letter of guarantee from [REDACTED]; KSC-BC-2020-06/F00377/A02, Letter of guarantee from [REDACTED].

⁴⁷ Ambos Separate Opinion, para. 3.

*the Third States [...] that had indicated their general willingness to accept the Accused could effectively enforce the Proposed Conditions”.*⁴⁸

44. In the current case, the Defence invites the PTJ to convene a hearing to hear the views of the Governments of [REDACTED] on the interim release of Mr Thaçi into their respective territories. Such a hearing would assist the PTJ to determine whether the guarantees offered by those Third Countries are sufficient to ensure that conditions could be effectively implemented and enforced and mitigate any identified risks.

45. Mr Thaçi undertakes to comply with any conditions imposed by the PTJ.

E. UNDUE DELAY CAUSED BY THE SPO (RULE 56(2))

46. Pursuant to Rule 56(2) of the KSC Rules, the PTJ must ensure that an Accused is not detained for an unreasonable period prior to trial; undue delay caused by the SPO may warrant the release of the Accused. As noted by the Appeal Panel, *“the length of time spent in detention pending trial is a factor that needs to be considered along with the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention “stops being reasonable” and the individual needs to be released.”*⁴⁹

47. In the current case, the Defence submits that all factors being considered, the ongoing detention of Mr Thaçi is no longer proportionate, particularly in light of undue delay caused by the SPO, and more precisely, its statements to the PTJ regarding its readiness for trial.

⁴⁸ Jørgensen Dissenting Opinion, paras 1-2, 6.

⁴⁹ Appeal Decision on Review of Detention, para. 49.

48. Indeed, during the first status conference, the SPO 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”.⁵⁰ It considered that the trial could start in the **summer of 2021**.⁵¹

49. On the basis of these unrealistic estimates, the PTJ ordered the SPO to complete the disclosure of all material falling under Rule 102(1)(b) of the Rules by 31 May 2021.⁵² Thereafter, the SPO sought repeated extensions to meet these deadlines and consistently reconsidered its estimates as to a trial start date.

50. During the second⁵³ and third⁵⁴ status conferences, 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.

51. During the fourth status conference, the SPO stated 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 2021.⁵⁵

⁵⁰ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, paras. 2, 15.

⁵¹ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14.

⁵² KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, paras. 99(e) and (f).

⁵³ KSC-BC-2020-06, Transcript of Second Status Conference, 17 December 2020, p. 199.

⁵⁴ KSC-BC-2020-06/F00191, Prosecution submissions for third status conference, 8 February 2021, paras. 14, 17.

⁵⁵ KSC-BC-2020-06/F00235, Prosecution submissions for fourth status conference and request for adjustment of time limits, 22 March 2021, para. 7; KSC-BC-2020-06, Transcript of Fourth Status conference, 24 March 2021, p. 363.

52. At the fifth⁵⁶ and sixth⁵⁷ status conferences, the SPO submitted that it now anticipated being in a position to submit its Rule 95(4) material by mid-October 2021.

53. At the seventh status conference, the SPO acknowledged that it would not be in a position to provide the Rule 95(4) materials in October 2021, and could not even commit with certainty to a concrete date. In light of the repeated defence requests, the SPO nevertheless agreed to disclose a preliminary witness list by 22 October 2021.⁵⁸

54. At the eighth status conference, the SPO finally said that it would be able to file its pre-trial brief and related materials on 17 December 2021, seven months later than its own initial estimates. Further, it could not file the Rule 109(c) chart until 28 January 2022 at the earliest.⁵⁹ The PTJ confirmed those dates by an oral order issued the same day. The PTJ further decided to extend the SPO deadline to disclose Rule 102(1)(b) material by 31 January 2022.⁶⁰

55. The delay in the provision of the Rule 95(4) and Rule 102(1)(b) materials is entirely attributable to the SPO. The additional categorisation of evidence imposed on the SPO is not the fault of the defence, but merely a result of the implementation of an obligation resulting from the KSC Law and Rules.

56. It should be stressed that the court has always operated on the basis of the SPO's own estimates, the PTJ granting systematically the extensions of time sought by the SPO to fulfil its disclosure obligations.

⁵⁶ 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 Fifth Status Conference, 19 May 2021, pp. 420-421.

⁵⁷ KSC-BC-2020-06/F00398, Prosecution submissions for sixth status conference, 16 July 2021, para. 10.

⁵⁸ KSC-BC-2020-06, Transcript of Seventh Status Conference, 14 September 2021, pp. 602-603.

⁵⁹ KSC-BC-2020-06, Transcript of Eighth Status Conference, pp. 725-726.

⁶⁰ *Ibid*, pp. 752-754.

57. In this context, the PTJ has no choice but to conclude that the continued detention of Mr Thaçi is no longer reasonable, given the extensive, undue delay caused by the repeated failures by the SPO to meet the disclosure deadlines set by the PTJ, following the SPO's own estimates.

58. The president of the Specialist Chambers, Her Honour Ekaterina Trendafilova, has herself stressed that:

“Trendafilova: [...] Rest assured that we have been working extremely hard in order for a very short period of time to provide such a legal framework that would equally serve the purpose of safe (sic) for anyone appearing before the Court and also fair proceedings for anyone having a standing. Thus, for example, we have provided that detention cannot last more than one year. [...]

Interviewer: So whoever is accused or arrested cannot stay in detention more than one year?

Trendafilova: Yes. Yes. It has to be reviewed and after a very thorough review it could be in exceptional circumstances extended. Also, it is very important that every second month, every two months, the detention has to be reviewed. This is by virtue of the law. Also, if there is a delay in the development of the proceedings which actually violates another fundamental right of a person to be tried without undue delay in due course, then the Chamber, if this delay is due to some bad performance on behalf of the Prosecutor, could release the person and even terminate the proceedings and this is another very important proposal.”⁶¹

59. While the SPO initially said the trial could start in the **summer of 2021**, the SPO has been now authorised to disclose new incriminating evidence until, at least, the end of **January 2022**. Such a substantial delay was not foreseeable when the PTJ issued

⁶¹ Rubikon Interview with President Ekaterina Trendafilova, 23 November 2017, available at: <https://www.youtube.com/watch?v=f8FEo8KXvwk>, 15:15 – 16:38.

its previous Decision on Review of Detention. A further four months have passed since that Decision and, as noted by the other defence teams, the beginning of trial appears to be even further in the distance, with pending issues relating to disclosure pursuant to Rules 102(1)(b), Rule 102(3) and Rule 103.⁶²

60. This situation is extremely prejudicial to Mr Thaçi, who remains in detention, and is exacerbated by the SPO's failure to conclude its investigations.⁶³ SPO transcripts of interview and statements taken by the SPO as late as July, August or October 2021 have been disclosed to the Defence.

61. Because of the SPO's rolling investigations, and continued inability to meet its disclosure obligations, the commencement of the trial will likely be delayed until the fall of 2022 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.

V. CONCLUSION

62. For these reasons, the Defence respectfully requests that the PTJ:

- (i) convene a hearing in order to hear (a) the views of the Kosovo Police on the feasibility of the release of Mr Thaçi under house arrest at his residence in Kosovo; (b) the views of the Governments of [REDACTED] on the release of Mr Thaçi into their respective territories; (c) the views of the parties;
- (ii) order Mr Thaçi's interim release on such conditions considered appropriate.

⁶² See, *inter alia*, KSC-BC-2020-06/F00523/CONF, Selimi Defence Submissions on Review of Detention and Response to Order of the Pre-Trial Judge, KSC-BC-2020-06/F00514, paras 19, 21; Veseli Reply, para. 25.

⁶³ The SPO continued investigations may imply that Mr Thaçi is still considered as a suspect.

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Respectfully submitted,



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At Tampa, United States of America