



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Date: 14 December 2021

Language: English

Classification: Public

Public Redacted Version of Decision on Review of Detention of Hashim Thaçi

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 41(6), (10) and (12) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 56(2) and 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 5 November 2020, further to the confirmation of an indictment ("Confirmation Decision"),² Hashim Thaçi ("Mr Thaçi" or "Accused") was arrested pursuant to a decision and an arrest warrant issued by the Pre-Trial Judge.³

2. On 22 January 2021, the Pre-Trial Judge rejected Mr Thaçi's application for interim release ("First Detention Decision").⁴

3. On 30 April 2021, the Court of Appeals denied Mr Thaçi's appeal against the First Detention Decision ("First Court of Appeals Decision").⁵

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, public. The Specialist Prosecutor submitted the confirmed indictment in F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public. A confidential further lesser redacted version of the confirmed indictment was submitted on 11 December 2020, F00134, confidential. Subsequent to the Decision on Defects in the Form of the Indictment, a confidential redacted version, F00455/CONF/RED/A01, and a public redacted version, F00455/RED/A01, of the corrected confirmed indictment were filed on 8 September 2021 ("Confirmed Indictment").

³ KSC-BC-2020-06, F00051, Registrar, *Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4)*, 5 November 2020, public; F00027/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders*, 26 October 2020, public; F00027/A01/RED, Pre-Trial Judge, *Public Redacted Version of Arrest Warrant for Hashim Thaçi*, 26 October 2020, public.

⁴ KSC-BC-2020-06, F00177, Pre-Trial Judge, *Decision on Hashim Thaçi's Application for Interim Release*, 22 January 2021, confidential. A public redacted version was filed on the same day, F00177/RED.

⁵ KSC-BC-2020-06, IA004/F00005, Court of Appeals Panel, *Decision on Hashim Thaçi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential. A public redacted version was filed on the same day, IA004/F00005/RED.

4. On 23 July 2021, the Pre-Trial Judge ordered Mr Thaçi's continued detention ("Second Detention Decision").⁶
5. On 20 October 2021, the Registrar, further to an order by the Pre-Trial Judge,⁷ provided information on the detention regime applicable to Mr Thaçi ("Registry Submissions") at the Detention Facilities of the Specialist Chambers ("SC Detention Facilities" and "SC").⁸
6. On 26 October 2021, the Kosovo Police, further to an order by the Pre-Trial Judge,⁹ provided information regarding: (i) the authority and capability of the Kosovo Police to restrict the movements of individuals subject to conditional release, monitor and restrict such individuals' communications, administer house arrest, and the enforceability of conditions attaching to interim release; and (ii) previous instances of enforcing conditions attaching to the interim release or detention of persons accused of severe crimes ("First KP Submissions").¹⁰
7. On 27 October 2021, the Court of Appeals denied Mr Thaçi's appeal against the Second Detention Decision ("Second Court of Appeals Decision").¹¹
8. On 4 November 2021, the Defence for Mr Thaçi ("Defence") requested the Kosovo Police to perform a comprehensive security assessment and/or assessment of suitability of the residence of Mr Thaçi, for the implementation, supervision,

⁶ KSC-BC-2020-06, F00417, Pre-Trial Judge, *Decision on Review of Detention of Hashim Thaçi*, 23 July 2021, confidential. A public redacted version was filed on the same day, F00417/RED.

⁷ KSC-BC-2020-06, F00522, Pre-Trial Judge, *Order to the Registrar to Provide Information on the Detention Regime*, 13 October 2021, public, para. 7.

⁸ KSC-BC-2020-06, F00536, Registrar, *Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00522)*, 20 October 2021, confidential. A public redacted version was filed on 29 November 2021, F00536/RED.

⁹ KSC-BC-2020-06, F00513, Pre-Trial Judge, *Order to the Kosovo Police to Provide Information ("Kosovo Police Order")*, 8 October 2021, public, with one Annex, confidential.

¹⁰ KSC-BC-2020-06, F00548/eng, Kosovo General Police Directorate, *Answer to the Request Number KSC-BC-2020-06, Dated 13 October 2021*, 26 October 2021, confidential. The translation into English of said submission was filed on 3 November 2021.

¹¹ KSC-BC-2020-06, IA010/F00008, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 27 October 2021, confidential. A public redacted version was issued on the same day, IA010/F00008/RED.

and enforcement of the conditions addressed in the First KP Submissions (“Defence Request to the KP”).¹²

9. On 15 November 2021, the Registrar transmitted to the Pre-Trial Judge the Kosovo Police response to the Defence Request to the KP (“Second KP Submissions”).¹³

10. On 16 November 2021, the Defence filed its submissions on the review of Mr Thaçi’s detention (“Request”).¹⁴

11. On 29 November 2021, the Specialist Prosecutor’s Office (“SPO”) responded to the Request (“Response”).¹⁵

12. On 6 December 2021, further to a decision of the Pre-Trial Judge extending the word limit for the Defence’s reply,¹⁶ the Defence replied to the Response (“Reply”).¹⁷

II. SUBMISSIONS

13. Mr Thaçi submits that, insofar as detention pending trial remains the exception and shall be applied only if the alternative measures provided for in Article 41(12) of the Law are deemed insufficient to eliminate or mitigate the identified risks, conditions for his continued detention are not met.¹⁸ Accordingly,

¹² Request, para. 12.

¹³ KSC-BC-2020-06, F00569, Registrar, *Transmission of Information from Kosovo Police*, 15 November 2021, confidential, with Annex 1, confidential. An English translated version of F00569/A01 was filed on 18 November 2021, F00569/A01/eng.

¹⁴ KSC-BC-2020-06, F00570, Defence for Mr Thaçi, *Thaçi Defence Submissions on Second Detention Review*, 16 November 2021, confidential. A public redacted version was filed on 30 November 2021, F00570/RED.

¹⁵ KSC-BC-2020-06, F00583, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Submissions on Second Detention Review*, 29 November 2021 (notified on 30 November 2021), confidential.

¹⁶ KSC-BC-2020-06, F00588, Pre-Trial Judge, *Decision on Thaçi Defence Request for Variation of Word Limit*, 1 December 2021 (notified on 2 December 2021), public.

¹⁷ KSC-BC-2020-06, F00596, Defence for Mr Thaçi, *Thaçi Defence Reply to Prosecution Response to Thaçi Defence Submissions on Second Detention Review*, 6 December 2021, confidential. A public redacted version was filed on 9 December 2021, F00596/RED.

¹⁸ Request, paras 1-2.

Mr Thaçi requests the Pre-Trial Judge to convene a hearing in order to hear: (i) the views of the Kosovo Police on the feasibility of the release of Mr Thaçi under house arrest in Kosovo in his residence; (ii) the views of the Governments of [REDACTED] on the release of Mr Thaçi into their respective territories; and (iii) the views of the Parties. He further requests the Pre-Trial Judge to order his interim release on such conditions considered appropriate.¹⁹

14. The SPO responds that the continued detention of Mr Thaçi remains necessary as there has been no relevant change in circumstances detracting from the established reasons for detention and that the Court of Appeals has confirmed that the Article 41(6)(b) risks continue to exist.²⁰

15. In his Reply, Mr Thaçi rebuts the SPO's submissions and reiterates his requests.²¹

III. APPLICABLE LAW

16. Article 41(6) of the Law provides that the SC shall only order the detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC, and there are 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 he or she has threatened to commit.

17. Article 41(10) of the Law and Rule 57(2) of the Rules provide that, until a judgment is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case

¹⁹ Request, paras 2, 62.

²⁰ Response, para. 1.

²¹ Reply, paras 8-61.

shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated.

18. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the accused, to prevent reoffending or ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

19. Pursuant to Rule 56(2) of the Rules, the Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case and, in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.

IV. DISCUSSION

A. PRELIMINARY MATTER

20. The Defence argues that oral submissions to hear: (i) the views of the Kosovo Police on the feasibility of the release of Mr Thaçi under house arrest in Kosovo in his residence and the views of the Defence on the content of the Second KP Submissions; (ii) the views of the Governments of [REDACTED] on the release of Mr Thaçi into their respective territories; (iii) the views of the Parties, including Mr Thaçi on the waiver of his constitutional rights, are warranted given the Pre-Trial Judge's need to assess carefully and exhaustively the conditions of release either under house arrest in Kosovo or in a Third State, in order to determine that conditions could be effectively implemented and enforced and mitigate any identified risks.²²

²² Request, paras 2, 12, 28, 38, 44, 62(i).

21. The SPO responds that the request for an oral hearing is ungrounded and would not advance the matter.²³ It further submits that Pre-Trial Judge has enough information to resolve the Request on the basis of written filings alone and recalls that the Court of Appeals has found that not seeking further details from [REDACTED] fell squarely within the Pre-Trial Judge's discretionary powers.²⁴

22. In the Reply, the Defence reiterates that there is the necessity of convening a hearing at which each Party could ask: (i) the Kosovo Police whether it can implement particular measures;²⁵ (ii) the State authorities of [REDACTED] to clarify any remaining issues and to determine the measures which may be adopted to order Mr Thaçi's release under house arrest.²⁶

23. The Pre-Trial Judge, having regard to the extensive and exhaustive written submissions provided by the Parties, including Mr Thaçi's comprehensive Reply, which benefited from an extension of word limit,²⁷ and the Kosovo Police, and including for the reasons laid down in paragraph 91 below, does not consider it necessary to hold an oral hearing and to receive further submissions on the matter. With particular regard to the Second KP Submissions, and insofar as the latter complement the First KP Submissions, the Pre-Trial Judge considers that the Defence has had the chance to make extensive observations on both of them.²⁸ Lastly, the Pre-Trial Judge notes that the Defence decided not to file any further submissions upon reception of the Second KP Submissions' English translation.²⁹

24. The Pre-Trial Judge accordingly dismisses the Defence's request for an oral hearing.

²³ Response, footnotes 33 and 46.

²⁴ Response, para. 45.

²⁵ Reply, para. 50.

²⁶ Reply, para. 59.

²⁷ See paragraph 12 above.

²⁸ Request, paras 29-38; Reply, paras 48-55.

²⁹ Request, para. 12, *in fine*.

B. APPLICABLE STANDARD

25. The SPO avers that, for the purpose of a detention review under Rule 57(2) of the Rules, the reasons or circumstances underpinning detention must be reviewed in order to determine whether these reasons continue to exist under Article 41(6) of the Law and this inevitably concerns what has changed, if anything, since the previous ruling on detention.³⁰

26. The Defence replies that, contrary to the SPO's submissions, the automatic review pursuant to Rule 57(2) of the Rules is not strictly limited to whether a change of circumstances occurred and that the SPO bears the burden of demonstrating that the Accused's pre-trial detention remains necessary at the current stage of the proceedings.³¹

27. The Pre-Trial Judge recalls that he has an obligation, under Article 41(10) of the Law, to examine whether the reasons for detention on remand still exist, including the grounds set out in Article 41(6) of the Law, namely whether: (i) there is a grounded suspicion that the person has committed the crime(s) and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law has been fulfilled.³² The duty to determine whether the circumstances underpinning detention still exist imposes on the Pre-Trial Judge the task to, *proprio motu*, assess whether he is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.³³ Although the automatic bi-monthly review under Rule 57(2) of the Rules is not strictly limited to whether or not a change of circumstances occurred, such a change can nonetheless be determinative and shall be

³⁰ Response, para. 3.

³¹ Reply, para. 8.

³² See for example KSC-BC-2020-07, IA002-F00005, Court of Appeals, *Decision on Nasim Haradinaj's Appeal against Decision Reviewing Detention*, 9 February 2021, public ("*Haradinaj Detention Appeal*"), para. 55.

³³ Second Court of Appeals Decision, para. 18.

taken into consideration if raised by a Party or *proprio motu*.³⁴ The Pre-Trial Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention nor to entertain submissions that merely repeat arguments that have already been addressed in previous decisions.³⁵ What is crucial is that the Pre-Trial Judge is satisfied that, at the time of the review decision, grounds for continued detention still exist.³⁶ The SPO bears the burden of establishing that the detention of the Accused is necessary.³⁷

C. GROUNDED SUSPICION

28. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires at the outset a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC. This is a *conditio sine qua non* for the validity of the detained person's continued detention.³⁸

29. Neither Mr Thaçi nor the SPO make submissions as to the existence of a grounded suspicion under Article 41(6)(a) of the Law.

30. The Pre-Trial Judge recalls that, in the Confirmation Decision, it was determined that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Thaçi is criminally liable for a number of crimes against humanity (persecution, imprisonment, other inhumane acts, torture, murder and enforced disappearance) and war crimes (arbitrary detention, cruel treatment, torture and murder) under Articles 13, 14(1)(c) and 16(1)(a) of the Law.³⁹ These findings were made on the basis of a standard exceeding the grounded suspicion

³⁴ Second Court of Appeals Decision, para. 19.

³⁵ *Haradinaj* Detention Appeal, para. 55; Second Court of Appeals Decision, para. 20.

³⁶ *Haradinaj* Detention Appeal, para. 55. *See also*, Second Court of Appeals Decision, para. 17.

³⁷ First Detention Decision, para. 18, with further references. *Similarly*, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, [Judgment](#) ("*Merabishvili v. Georgia* [GC]"), 28 November 2017, para. 234.

³⁸ ECtHR, *Merabishvili v. Georgia* [GC], para. 222, with further references.

³⁹ Confirmation Decision, para. 521(a); Second Detention Decision, para. 20.

threshold required for the purposes of Article 41(6)(a) of the Law.⁴⁰ There have been no developments in the case negating these findings.

31. The Pre-Trial Judge, accordingly, finds that there continues to be a grounded suspicion that Mr Thaçi has committed crimes within the subject-matter jurisdiction of the SC for the purposes of Article 41(6)(a) and (10) of the Law.

D. NECESSITY OF DETENTION

32. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be articulable in the sense that they must be specified in detail.⁴¹ The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"⁴² that any of the risks under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.⁴³ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.⁴⁴ When deciding on whether a person should be released or detained, the Pre-Trial Judge must consider alternative measures to prevent the risks in Article 41(6)(b) of the Law.⁴⁵

⁴⁰ See for example KSC-BC-2020-04, F00007/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala*, 12 June 2020, public, para. 35.

⁴¹ First Detention Decision, para. 20; First Court of Appeals Decision, paras 23-24; Second Detention Decision, para. 22.

⁴² See *chapeau* of Article 41(6)(b) of the Law.

⁴³ First Detention Decision, para. 20, with further references; see also KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, public, para. 17, with further references.

⁴⁴ First Court of Appeals Decision, para. 22; Second Detention Decision, para. 22.

⁴⁵ As regards the obligation to consider "alternative measures", see KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* (26 April 2017 SCCC Judgment), 26 April 2017, public, para. 114. See also ECtHR, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, [Judgment](#), 5 July 2016, para. 87 *in fine*; *Idalov v. Russia* [GC], no. 5826/03, [Judgment](#), 22 May 2012, para. 140 *in fine*.

1. Risk of Flight

33. Mr Thaçi submits that he does not pose any flight risk as: (i) he has been fully cooperating with the SPO and the SC since 2019 while still being President of Kosovo, despite knowing the that the Specialist Prosecutor had submitted an indictment for confirmation and the severity of the potential charges he could face in light of the allegations contained in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 (“CoE Report”). Therefore, Mr Thaçi’s knowledge of the charges and the possibility of a serious sentence are not a sufficient factor to determine that he poses a flight risk;⁴⁶ (ii) 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. Rather, the disclosure process demonstrates that the SPO’s investigation is weak and a “*copy-and-paste*” re-prosecution of unsuccessful prosecutions of former Kosovo Liberation Army (“KLA”) members by the International Criminal Court for Former Yugoslavia (“ICTY”);⁴⁷ (iii) his influence and authority have decreased as confirmed by the results of the last general elections and the removal of almost all officials appointed while Mr Thaçi was in office;⁴⁸ and (iv) 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.⁴⁹

34. The SPO maintains its submission regarding the continued existence of a flight risk, on the basis of Mr Thaçi’s influence and authority, his ability to travel, his knowledge of the charges against him and serious sentence in the event of conviction, and his increased insight into the evidence underpinning the charges.⁵⁰

⁴⁶ Request, paras 17-18.

⁴⁷ Request, para. 19.

⁴⁸ Request, para. 20.

⁴⁹ Request, para. 20.

⁵⁰ Response, para. 5.

The SPO further submits that the Defence repeats previous arguments which have already been rejected by the Pre-Trial Judge and the Court of Appeals.⁵¹

35. The Pre-Trial Judge recalls at the outset that he previously found that there is a risk that Mr Thaçi will abscond based on his position of influence, which might be used by Mr Thaçi to call upon the support of former subordinates and persons affiliated with the KLA War Veteran Association (“KLA WVA”), and/or persons sympathetic to the KLA, who may be willing to give him access to resources and/or help him abscond, securing access to relevant information, and obtaining funds and means to travel to several countries beyond the reach of the SC.⁵²

36. With particular regard to Mr Thaçi’s influence and authority, it was established that they stem from the following past and recent influential positions: (i) founding member of the KLA, (ii) member of the KLA General Staff, (iii) KLA Commander-in-Chief, and more recently (iv) Prime Minister and (v) President of Kosovo.⁵³ This finding was upheld by the Court of Appeal, which dismissed as unpersuasive Mr Thaçi’s allegation that, because he no longer held any official capacity, his influence was no longer relevant.⁵⁴ Both the Pre-Trial Judge and the Court of Appeals further found that neither the PDK’s electoral performance nor the Kosovo political developments are determinative of Thaçi’s position of authority and influence.⁵⁵

37. The Pre-Trial Judge further recalls that Mr Thaçi’s knowledge of the charges against him and the possibility of a serious sentence in the event of a conviction increases his risk of flight.⁵⁶ Mr Thaçi’s contention that the number of counts has decreased is currently on appeal⁵⁷ and cannot have a bearing on the matter at hand.

⁵¹ Response, para. 6.

⁵² First Detention Decision, paras 31, 33; Second Detention Decision, paras 27, 30.

⁵³ First Detention Decision, para. 31; Second Detention Decision, para. 28.

⁵⁴ First Court of Appeals Decision, para. 50; Second Detention Decision, para. 34.

⁵⁵ Second Detention Decision, paras 29-30; Second Court of Appeals Decision, para. 35.

⁵⁶ First Detention Decision, para. 31; Second Detention Decision, para. 31.

⁵⁷ Second Court of Appeals Decision, para. 30.

It is further recalled that by receiving evidence during the ongoing disclosure process, Mr Thaçi has gained increased insight into the evidence underpinning these very charges.⁵⁸ The Pre-Trial Judge is mindful that disclosure of evidence is not sufficient in itself to justify the denial of provisional release.⁵⁹ However, he considers this factor together with other factors, such as Mr Thaçi position of influence.

38. Lastly, insofar as the Defence avers that Mr Thaçi extensively cooperated with the SC and the SPO since 2019, the Pre-Trial Judge recalls that these instances of cooperation and compliance, while potentially diminishing the risk of flight, do not eliminate it, as for the most part they predate the subsequent knowledge of the scope of the case and the evidence against Mr Thaçi.⁶⁰

39. Therefore, notwithstanding the counter-balancing factors identified in the First Detention Decision,⁶¹ the Pre-Trial Judge finds that a risk of flight in relation to Mr Thaçi continues to exist.

2. Risk of Obstructing the Progress of SC Proceedings

40. Mr Thaçi argues that he neither obstructed nor would he ever attempt to obstruct SC proceedings.⁶² In any case, Mr Thaçi avers that the extensive and unprecedented protective measures regime imposed in the present case, with 37% of the witnesses subject to delayed or non-disclosure of their identity, prevents any risk of obstruction.⁶³ Reiterating that he no longer plays any significant role in

⁵⁸ Second Detention Decision, para. 31.

⁵⁹ Second Court of Appeals Decision, para. 38.

⁶⁰ First Detention Decision, para. 32.

⁶¹ First Detention Decision, para. 32.

⁶² Request, para. 21.

⁶³ Request, paras 21-22.

Kosovo, Mr Thaçi avers that he does not have either the will or the means to obstruct SC proceedings.⁶⁴

41. The SPO responds that the Court of Appeals has confirmed that the factors previously relied upon by the Pre-Trial Judge in respect of Mr Thaçi, such as, *inter alia*, Mr Thaçi's influence and authority over a network of supporters, [REDACTED], and his involvement in a pattern of efforts to undermine the SC, amply support the existence of the risk of obstruction.⁶⁵ The SPO avers that such a risk of obstruction is heightened by the well-established climate of interference with the judicial process in Kosovo, recently confirmed by: (i) allegations that the Kosovo Intelligence Agency had two agents pose as witnesses to give fabricated evidence linking Mr Thaçi's political opponents to terrorist organizations; (ii) the conduct of the KLA WVA leaders; and (iii) the crimes alleged to have been committed in case KSC-BC-2020-07.⁶⁶ Lastly, the SPO asserts that the risk of obstruction is heightened by the Accused's increasing access to incriminating evidentiary material, as well as to the identities of witnesses with in-court protective measures, and that the Court of Appeals has found that the protective measures in place are not sufficient to mitigate the inherently high risk of witness intimidation or interference.⁶⁷

42. The Pre-Trial Judge recalls, at the outset, that he previously found that there is a risk that Mr Thaçi will obstruct SC proceedings based on, *inter alia*: (i) Mr Thaçi's attempts to undermine the SC and his offer of benefits to persons summoned by the SPO; and (ii) [REDACTED].⁶⁸

43. With regard to Mr Thaçi's argument that he no longer plays a significant role in Kosovo, the Pre-Trial Judge recalls the finding made above according to which

⁶⁴ Request, para. 23.

⁶⁵ Response, paras 9-11.

⁶⁶ Response, para. 11

⁶⁷ Response, paras 12-13.

⁶⁸ [REDACTED].

Mr Thaçi's influence and authority over former subordinates and persons affiliated with the KLA WVA, and/or persons sympathetic to the KLA are premised on his past and recent positions. Therefore, this finding is not affected by recent electoral and political developments.⁶⁹ Reference is also made to the findings of the Court of Appeals on Mr Thaçi's continued position of influence, which were made in the context of the very risk of obstruction.⁷⁰

44. With regard to Mr Thaçi's argument that the adoption of protective measures in this case prevents any risk of obstruction, the Pre-Trial Judge recalls that the inherently high risk of intimidation or interference for witnesses and/or their family members cannot be effectively mitigated by relying only on protective measures.⁷¹ In this regard, the Pre-Trial Judge finds that, notwithstanding the adoption of additional decisions on protective measures following the Second Detention Decision,⁷² [REDACTED], and, irrespective of these measures, Mr Thaçi [REDACTED].⁷³

45. Relatedly, the Pre-Trial Judge further notes that, in view of the findings that Mr Thaçi has the [REDACTED] and continues to play a significant role in Kosovo, his increased insight into the evidence underpinning the serious charges against him following the Second Detention Decision increases the risk of obstruction.⁷⁴

⁶⁹ See para. 36 above.

⁷⁰ See para. 36 above; Second Court of Appeals Decision, para. 35.

⁷¹ Second Detention Decision, para. 38.

⁷² KSC-BC-2020-06, F00438, Pre-Trial Judge, *Eighth Decision on Specialist Prosecutor's Request for Protective Measures*, 24 August 2021, strictly confidential and *ex parte* (a confidential redacted version was issued on the same day, F00438/CONF/RED); F00466, Pre-Trial Judge, *Ninth Decision on Specialist Prosecutor's Request for Protective Measures*, 13 September 2021, strictly confidential and *ex parte* (a confidential redacted version was issued on the same day, F00466/CONF/RED); F00467, Pre-Trial Judge, *Tenth Decision on Specialist Prosecutor's Request for Protective Measures*, 13 September 2021, strictly confidential and *ex parte* (a confidential redacted version was issued on the same day, F00467/CONF/RED); F00559, Pre-Trial Judge, *Eleventh Decision on Specialist Prosecutor's Request for Protective Measures*, 5 November 2021, strictly confidential and *ex parte*; F00571, Pre-Trial Judge, *Twelfth Decision on Specialist Prosecutor's Request for Protective Measures*, 17 November 2021, strictly confidential and *ex parte* (a confidential redacted version was issued on the same day).

⁷³ [REDACTED].

⁷⁴ See also Second Court of Appeals Decision, para. 40.

46. The Pre-Trial Judge further recalls that there is a persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members,⁷⁵ which, even though not determinative in and of itself, provides the context against which the findings pertaining specifically to Mr Thaçi must be considered. It is also relevant in light of the fact that, as a former high-ranking KLA member and political figure, Mr Thaçi holds a position of influence that allows him to elicit the support of sympathisers in this climate. In addition, it is recalled that the risk of obstruction need not materialise in an accused personally tampering with evidence or exerting influence or pressure on witnesses. It suffices that an accused instigates others or contributes in any way to the materialisation of that risk.⁷⁶

47. Accordingly, the Pre-Trial Judge concludes that the risk that Mr Thaçi will obstruct the progress of SC proceedings continues to exist.

3. Risk of Committing Further Crimes

48. Mr Thaçi submits that, having particular regard to the time elapsed since the alleged offences have occurred and the extensive protective measures regime in place, there is insufficient specific evidence to demonstrate a sufficiently real risk that Mr Thaçi will commit further crimes.⁷⁷

49. In the Response, the SPO argues that the Pre-Trial Judge's previous findings that such a risk must be considered in light of: (i) a well-established and ongoing climate of witness intimidation and interference; (ii) the significant influential position the Accused still retains in Kosovo; (iii) the Accused's course of conduct aimed at undermining the SC and the SPO; and (iv) his attempts to interfere with

⁷⁵ First Detention Decision, para. 43; Second Detention Decision, para. 40.

⁷⁶ KSC-BC-2020-06, IA003/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 59.

⁷⁷ Request, para. 24.

the proceedings, have not been disturbed by the Court of Appeals and that, accordingly, this risk remains high.⁷⁸

50. The Pre-Trial Judge recalls that, even though the existence of a risk of obstruction does not automatically translate into a risk of committing further crimes, the factors underpinning the former are of relevance to the assessment of the latter in the circumstances of the present case.⁷⁹ It is further recalled that it suffices that Mr Thaçi instigates or assists others to commit such crimes, or contributes in any other way to their commission.⁸⁰

51. Turning to the facts under consideration, the Pre-Trial Judge recalls that, besides the climate of witness intimidation, Mr Thaçi has: (i) [REDACTED]; (ii) attempted to undermine the SC and offered benefits to persons summoned by the SPO; (iii) a position of influence in Kosovo which could allow him to elicit the support of sympathisers; and (iv) an increased account of the SPO's case against him since the Second Detention Decision as a result of the ongoing disclosure of material underpinning the serious charges against him.⁸¹

52. On this basis, the Pre-Trial Judge considers that, taken all factors together, there is a risk that Mr Thaçi will, under any form of responsibility, commit crimes similar to the underlying acts charged against those perceived as being opposed to the KLA, including witnesses who have provided or could provide evidence in the case and/or are due to appear before the SC.

53. Accordingly, the Pre-Trial Judge concludes that the risk that Mr Thaçi will commit further crimes continues to exist.

⁷⁸ Response, para. 15.

⁷⁹ First Detention Decision, para. 48; Second Detention Decision, para. 43.

⁸⁰ First Detention Decision, paras 24, 48; Second Detention Decision, para. 43.

⁸¹ See paras 42-45 above.

4. Conclusion

54. The Pre-Trial Judge concludes that the risks that Mr Thaçi will abscond, obstruct the progress of SC proceedings, or commit further crimes against those perceived as being opposed to the KLA, including witnesses who have provided or could provide evidence in the case and/or are due to appear before the SC, continue to exist. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by any conditions for his release.

E. CONDITIONAL RELEASE

1. Submissions

55. Mr Thaçi submits that any risk under Article 41(6)(b) of the Law could be entirely eliminated by the imposition of either house arrest at his residence in Kosovo or [REDACTED]. Mr Thaçi agrees to comply with any conditions that the Pre-Trial Judge may impose in addition to a conventional house arrest regime and agrees to waive any of his affected constitutional rights.⁸²

(a) House arrest in Kosovo

(i) Request

56. As regards the guarantees offered by the Kosovo Police, Mr Thaçi submits that the Second KP Submissions confirm that the conditions envisaged in the First KP Submissions can be effectively implemented at his residence in Kosovo, having served formerly as a presidential residence.⁸³ More specifically, [REDACTED]. In the view of the Defence, these are sufficient measures to ensure absolute compliance with any conditions that may be imposed by the Pre-Trial Judge.⁸⁴

⁸² Request, paras 27, 37, 45.

⁸³ Request, para. 32.

⁸⁴ Request, para. 33.

Mr Thaçi further refers to [REDACTED].⁸⁵ Lastly, Mr Thaçi highlights that the Kosovo Police confirmed its readiness to implement a series of additional measures to ensure the effective implementation, supervision and enforcement of any other measures ordered by the Pre-Trial Judge.⁸⁶ Mr Thaçi avers that all such measures would be covered by Article 183 of the Kosovo Criminal Procedure Code at a domestic level and recalls that Article 41(12) of the Law does not limit the Pre-Trial Judge in the choice of the most appropriate conditions to be imposed.⁸⁷

(ii) Response

57. The SPO responds that no conditions of release in Kosovo can mitigate the particular risks at issue. In this regard, the SPO claims that in analysing the necessary conditions for interim release, regard must be given to the influence the Accused has in Kosovo and the persisting climate of witness intimidation in Kosovo.⁸⁸

58. In the SPO's view, the Second KP Submissions do not change the previous findings that conditional release will not be effectively enforceable given the risks posed by Mr Thaçi.⁸⁹ In particular, the SPO argues that the Second KP Submissions did not address key-points raised in the SPO's submissions in response to the First KP Submissions.⁹⁰ In the SPO's view, while the conditions set out in the Second KP Submissions may protect a former President from external threats to him or his residence, they are inadequate to monitor and supervise the conditional release of Mr Thaçi.⁹¹

⁸⁵ [REDACTED].

⁸⁶ Request, para. 34.

⁸⁷ Request, paras 35-36.

⁸⁸ Response, para. 16.

⁸⁹ Response, para. 18

⁹⁰ Response, para. 21.

⁹¹ Response, para. 22.

59. The SPO maintains that the Second KP Submissions remain insufficient, since: (i) in relation to surveillance, the Kosovo Police does not address the [REDACTED]; the SPO underscores that, on the contrary, they mention [REDACTED];⁹² (ii) in relation to communications monitoring, the Second KP Submissions do not envisage any specific measures to monitor [REDACTED];⁹³ in addition, there is no specificity as to the measures ([REDACTED]) and their legal basis;⁹⁴ and (iii) in relation to officer training, the conditions proposed provide no information on the training of the officers concerned; moreover, the Kosovo Police [REDACTED] and are, thus, not well-placed to monitor communications, in particular the use of coded or obscure language.⁹⁵

60. Lastly, the SPO argues that the Kosovo Police cannot effectively enforce conditions of interim release as: (i) they have failed to demonstrate that they are willing and able to enforce sufficient conditions of release, which is indicative of their inability to effectively deliver what would be required;⁹⁶ (ii) corruption within Kosovo's criminal justice system is widely recognised;⁹⁷ (iii) [REDACTED];⁹⁸ and (iv) criminal proceedings against high-ranking former KLA members could not be conducted in Kosovo given the persisting climate of witnesses' intimidation and interference.⁹⁹

(iii) Reply

61. In the Reply, Mr Thaçi avers that notwithstanding the fact that the allegations contained in the CoE Report have never been able to be proved by the SC,¹⁰⁰ they

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ Response, paras 25, 28, 31.

⁹⁵ Response, para. 32.

⁹⁶ Response, paras 33, 40.

⁹⁷ Response, para. 34.

⁹⁸ [REDACTED].

⁹⁹ Response, para. 39.

¹⁰⁰ Reply, paras 1-2.

hang like a dark cloud over pending proceedings, as no Kosovo Albanian has been granted provisional release, in stark contrast to the procedural fairness afforded to accused persons at the ICTY.¹⁰¹

62. The Defence argues that the SPO's arguments are premised on highly prejudicial and unsubstantiated subjective grounds against Mr Thaçi, the Kosovo Police, and Kosovo in general, and they shall be, therefore, summarily dismissed.¹⁰²

63. More specifically, insofar as the SPO refers to *inter alia*, [REDACTED], the Defence replies that [REDACTED].¹⁰³ Furthermore, the Defence labels as unfair and incompatible with the presumption of liberty the SPO's mistrust of the Kosovo Police premised on the alleged allegiances between some of its members and Mr Thaçi [REDACTED].¹⁰⁴

64. The Defence further avers that the SPO puts its own credibility at stake by endorsing the partial, politically motivated and ill-funded narrative spearheaded by Russia, former political adversaries of Mr Thaçi and tabloid newspapers which portray the Kosovo Police as criminal.¹⁰⁵ On the contrary, the Defence submits that the Kosovo Police's integrity and efficiency are recognised nationally and internationally by, *inter alia*, the United States Government, the European Union, and other international and domestic non-governmental organisations.¹⁰⁶

65. The Defence further replies that the Kosovo Police are willing and competent to implement house arrest in Kosovo, seeing as: (i) the ICTY ordered the interim release of several accused on Kosovo territory thereby considering that the Kosovo Police was sufficiently reliable; denying interim release now would mean to apply

¹⁰¹ Reply, paras 3-5.

¹⁰² Reply, para. 9-13.

¹⁰³ [REDACTED].

¹⁰⁴ Reply, paras 16-18.

¹⁰⁵ Reply, paras 19-28.

¹⁰⁶ Reply, paras 30-40.

an unjustified, unfair, and prejudicial “double standard”;¹⁰⁷ (ii) the Kosovo Police does suggest, differently from what the SPO avers, to monitor the activities [REDACTED];¹⁰⁸ (iii) Mr Thaçi is willing to accept permanent video surveillance, a measure that would go beyond his actual monitoring at the SC Detention Facilities;¹⁰⁹ (iv) Mr Thaçi is willing to ask [REDACTED];¹¹⁰ (v) the Kosovo Police confirm that they are authorised to perform such an extensive monitoring of communication and monitor the implementation of house arrest pursuant to a clear and foreseeable legal basis;¹¹¹ and (vi) in any case, the sufficiency of the provisions must be assessed in light of the fact that house arrest and corresponding monitoring regime would be ordered on the basis of a reviewable, individualised and reasoned decision justifying the measures in question.¹¹²

66. Lastly, Mr Thaçi reiterates that he is willing to waive any rights which may be infringed by the conditions imposed by the Pre-Trial Judge¹¹³ and that the SPO cannot rely on an alleged lack of resources of the Kosovo Police to justify Mr Thaçi’s ongoing detention.¹¹⁴

(b) Release into Third States

67. As regards the guarantees offered by Third Parties, the Defence reiterates its proposal that Mr Thaçi be released into the territories of [REDACTED], subject to the conditions deemed necessary by the Pre-Trial Judge, and avers that similar measures have already been successfully implemented before other international courts.¹¹⁵ Recalling that these States have confirmed their willingness and capacity

¹⁰⁷ Reply, paras 43-47

¹⁰⁸ [REDACTED].

¹⁰⁹ Reply, para. 49.

¹¹⁰ [REDACTED].

¹¹¹ Reply, paras 51, 53.

¹¹² Reply, para. 54.

¹¹³ Reply, para. 55.

¹¹⁴ Reply, paras 56-58.

¹¹⁵ Request, para. 39.

to accommodate Mr Thaçi under the conditions defined by the Pre-Trial Judge, Mr Thaçi stresses that two judges of the Court of Appeals have emphasised that the Pre-Trial Judge should duly consider and assess guarantees provided by Third States prior to determining whether such guarantees minimize and/or eliminate the remaining risks.¹¹⁶

68. The SPO responds that the Defence repeats arguments already dismissed by the Court of Appeal, and maintains that consultations with a Third State are only compulsory when a Panel intends to grant interim release or envisages the possibility thereof.¹¹⁷

69. The Defence replies that there is no reason to doubt the reliability of the guarantees given by [REDACTED] and that it is the appropriate time for the Pre-Trial Judge to use his discretionary power and to seek further information from these States, in light of the length of time elapsed since Mr Thaçi's arrest.¹¹⁸

2. Discussion

(a) Risk of Flight

70. As regards the risk of flight, the Pre-Trial Judge considers that, as found in the First and Second Detention Decisions, this risk can be sufficiently mitigated on the basis of Mr Thaçi's commitment to remain in house arrest, either in Kosovo or in a Third State with a cooperation agreement with the SC, and to abide by any condition imposed by the Pre-Trial Judge, including any of the following conditions: (i) surrender of international travel documents; (ii) prohibition of approaching certain places or persons; (iii) attendance of proceedings by video-link; (iv) prohibition of the use of media or political activity.¹¹⁹

¹¹⁶ Request, para. 41.

¹¹⁷ Response, paras 41-44.

¹¹⁸ Reply, para. 59.

¹¹⁹ First Detention Decision, paras 52, 56; Second Detention Decision, para. 50.

(b) Risks of Obstruction and Committing further Crimes

71. As regards the risk of obstructing the progress of SC proceedings or committing further crimes, the Pre-Trial Judge recalls at the outset that he previously found that it is only through the communication monitoring framework at the SC detention facilities that Mr Thaçi's communications can be effectively restricted and monitored, thereby mitigating the risks of him obstructing SC proceedings or engaging in or contributing to crimes.¹²⁰

72. Having received extensive written submissions by the Kosovo Police, the Pre-Trial Judge will now, on the basis of the information contained in the First and Second KP Submissions, assess whether: (i) these conditions sufficiently mitigate these risks; and (ii) the Kosovo Police have the capacity to effectively implement the conditions under consideration in view of the risks that Mr Thaçi will obstruct SC proceedings and/or commit further crimes. Since the Second KP Submissions' aim is to provide a security assessment and/or an assessment of suitability of the residence of Mr Thaçi for the implementation, supervision, and enforcement of the conditions addressed in the First KP Submissions, the Pre-Trial Judge will refer, in his assessment, to both submissions, which complement each other.

(i) Monitoring Communications with Family Members and Pre-Approved Visitors

73. The Kosovo Police indicate that, [REDACTED].¹²¹ Furthermore, the Kosovo Police are [REDACTED]¹²² [REDACTED].¹²³ At the same time, the Kosovo Police [REDACTED].¹²⁴

¹²⁰ First Detention Decision, para. 57; Second Detention Decision, paras 51, 55.

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

74. As regards communications with family members in particular, this means that [REDACTED]. In addition, Mr Thaçi could use coded or obscure language that, [REDACTED]. Therefore, the conditions do not address the possibility that, [REDACTED], Mr Thaçi could ask a family member to pass on a message orally or to use a device belonging to a third person to do so,¹²⁵ or that he could transmit covert messages for the purposes of obstructing SC proceedings or committing further crimes. Such considerations apply similarly for monitored visits with pre-approved visitors, notably the possibility of using coded or obscure language [REDACTED]. Lastly, this applies equally to the possibility, as the Defence proposes, that [REDACTED].¹²⁶

75. By contrast, at the SC Detention Facilities, unmonitored communications are strictly limited considering that detainees are only allowed unmonitored “private visits” for certain close family members and within limited time periods.¹²⁷ In addition, in person and video visits are, as a rule, conducted within the sight and general hearing of SC Detention Officers.¹²⁸ The Registrar may also impose additional safeguards for such visits, including active monitoring and after-the-fact-listening.¹²⁹ This allows for visits to be reviewed subsequently, while an actively monitored visit may be terminated immediately in order to, for example, prevent the unauthorised disclosure of confidential information or, if it is perceived that a detainee is using coded language, interference with the safe and secure conduct of proceedings.¹³⁰

76. Furthermore, under Article 34(8) and (12) of the Law, the SC Registry is responsible for managing and administering the detention function and facilities

¹²⁵ Second Detention Decision, para. 55.

¹²⁶ [REDACTED].

¹²⁷ Second Court of Appeals Decision, footnote 134.

¹²⁸ Registry Submissions, para. 31; Second Court of Appeals Decision, footnote 134.

¹²⁹ Registry Submissions, para. 32.

¹³⁰ Registry Submissions, paras 32-33.

for the SC, as well as, [REDACTED].¹³¹ Thus, the Registry is in the unique position of managing and administering the SC Detention Facilities [REDACTED]. [REDACTED].¹³²

77. It is also significant that, unlike Mr Thaçi's private residence, the SC Detention Facilities are a high-security environment.¹³³ Most significantly, the SC Detention Officers are highly qualified, [REDACTED], and receive training on applying the visits and communications regime at the SC Detention Facilities.¹³⁴ Moreover, the Pre-Trial Judge finds that [REDACTED].

78. The Kosovo Police [REDACTED]. Furthermore, in the view of the Pre-Trial Judge, it is decisive that, [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. The Pre-Trial Judge has reached this conclusion on the basis that: (i) [REDACTED]; (ii) [REDACTED];¹³⁵ and (iii) [REDACTED].

79. [REDACTED].¹³⁶ [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

80. Furthermore, the fact that Kosovo Police officers are fluent in Mr Thaçi's native language and may be familiar with the general context in Kosovo is insufficient to ensure the effective monitoring of visits and communications given that [REDACTED].

81. In conclusion, while the risk of illicit messages and instructions cannot be entirely eliminated, the measures in place at the SC Detention Facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes.¹³⁷ In the

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ Registry Submissions, para. 43.

¹³⁴ Registry Submissions, para. 44.

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ Second Court of Appeals Decision, para. 68.

view of the Pre-Trial Judge, the Kosovo Police have not provided guarantees establishing that they have the capacity to implement corresponding measures that sufficiently minimise the existing risks.

(ii) Contextual Considerations

82. [REDACTED].¹³⁸ In addition, despite the Pre-Trial Judge's request to liaise with any other entity in Kosovo,¹³⁹ [REDACTED].¹⁴⁰ [REDACTED].¹⁴¹

83. Therefore, the Pre-Trial Judge is of the view that it has been insufficiently demonstrated that the Kosovo Police have established and recognised experience in enforcing the conditional release of individuals accused of serious crimes (who occupy or have previously occupied high-ranking positions).

84. Lastly, the Pre-Trial Judge recalls that the very reason for establishing the SC was that criminal proceedings against (high-ranking) former KLA members could not be conducted in Kosovo.¹⁴² As a result, these proceedings were relocated away from Kosovo,¹⁴³ and the procedural framework and operational practice of the SC

¹³⁸ [REDACTED].

¹³⁹ Kosovo Police Order, para. 9.

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² CoE Report, para. 10.

¹⁴³ Law No. 04/L-274, pp. 8-9 ("If the SITF investigation culminates in an indictment and trial proceedings, an environment conducive to the proper administration of justice should be provided. Accordingly, a specialist court within the Kosovo court system and a specialist prosecutor's office would be used for any trial and appellate proceedings arising from the SITF investigation. This court would have a seat in Kosovo, but sensitive proceedings, including hearing of witnesses, would take place outside of the country in view of the nature of the allegations"); Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands, 15 February 2016, preamble ("Referring to the exchange of letters between the President of the Republic of Kosovo and the High Representative of the European Union for Foreign Affairs and Security Policy dated 14 April 2014, ratified by Kosovo Law No. 04/L-274 of 15 May 2014, containing the commitment of the Republic of Kosovo to establish Specialist Chambers and a Specialist Prosecutor's Office within the Kosovo judicial system to be used for trial and appellate proceedings arising from the investigation of the Special Investigative Task Force of the Special Prosecution Office of the Republic of Kosovo related to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 and which may be relocated to a third State subject to the conclusion of a Host State Agreement with the Host State"), article 3 ("The Kosovo Relocated Specialist Judicial Institution shall have a seat in the Host State").

have been specifically designed to ensure, to the maximum extent possible, the protection of witnesses, victims and others at risk with a view to implementing the mandate of the SC. Moreover, as mentioned, there is a persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo.¹⁴⁴ In addition, the Pre-Trial Judge further notes that various international organisations have recently documented that corruption continues to affect the criminal justice sector in Kosovo.¹⁴⁵

85. The Pre-Trial Judge considers that the aforementioned considerations are, as such, not determinative of the matter under discussion. However, the assessment of the conditions of house arrest to be enforced by the Kosovo Police cannot be divorced from the context in which the house arrest would take place insofar as it affects the conduct of the proceedings before the SC. On this basis, the Pre-Trial Judge finds that, in view of the compelling indications set out above, the context in which the house arrest would take place strengthens the finding that the proposed measures would not adequately mitigate the risks of obstruction and/or further crimes being committed in relation to Mr Thaçi specifically.

(iii) Additional Measures

86. The Pre-Trial Judge is mindful of the fact that the Kosovo Police undertake, in general, to ensure the strict enforcement of any SC decisions.¹⁴⁶ However, this undertaking does not, in and of itself, provide a sufficient basis for the Pre-Trial Judge to *proprio motu* order any additional measures to mitigate the identified risks. In view of the Pre-Trial Judge's order to provide specific information to a list of detailed questions and to add any other relevant information (in particular

¹⁴⁴ See para. 46 above.

¹⁴⁵ United Nations Interim Administration Mission in Kosovo, *Report of the Secretary-General*, U.N.Doc. S/2020/964, 1 October 2020, para. 30; European Union Rule of Law Mission, *Justice Monitoring Report*, October 2020, p. 21; European Commission, *Kosovo Report 2021*, 19 October 2021, pp. 23, 25.

¹⁴⁶ First KP Submissions, pp. 1-2; Second KP Submissions, pp. 2-3.

as to any additional measures that the Kosovo Police would implement),¹⁴⁷ such a general undertaking does not, as such, amount to an acceptance that any measures ordered by the Pre-Trial Judge will be adequately implemented, let alone a guarantee that the fundamental concerns about illicit communications, as elaborated above, can be mitigated.

87. Insofar as Mr Thaçi agrees to waive any constitutional rights which may be infringed upon by any additional condition set by the Pre-Trial Judge, the latter recalls that the European Court of Human Rights (“ECtHR”) has stated that the right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention.¹⁴⁸ Although house arrest implies fewer restrictions and a lesser degree of suffering and inconvenience for an individual than ordinary detention in prison, it still amounts to a deprivation of his or her liberty in the meaning of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).¹⁴⁹ Therefore, any waiver of any constitutional rights by the individual concerned by house arrest is not valid insofar as it aims to weaken the protections afforded by the ECHR and, *mutatis mutandis* in the present case, the Constitution. The Pre-Trial Judge shall therefore always make sure that deprivation of an individual’s liberty is imposed in accordance with a procedure prescribed by law and with the individual’s constitutional rights, as also prescribed in Article 29 of the Constitution and Article 41 of the Law.

88. Lastly, the Pre-Trial Judge finds that there is no basis to request any further information from the Kosovo Police, either in writing or orally. The Kosovo Police have been repeatedly approached and the Pre-Trial Judge has formulated a

¹⁴⁷ Kosovo Police Order, para. 8; Annex to Kosovo Police Order, para. 12.

¹⁴⁸ ECtHR, *Storck v. Germany*, no. 61603/00, [Judgment](#), 16 June 2005, para. 75.

¹⁴⁹ *Similarly*, ECtHR, *Korban v. Ukraine*, no. 26744/16, [Judgment](#), 4 July 2019, paras 178-179.

detailed list of questions, which also left room for the Kosovo Police to provide any additional information considered to be relevant for the present determination. Therefore, the Kosovo Police have had ample opportunity to provide the required information and any additional information would not assist the Pre-Trial Judge any further in relation to this matter.

89. Accordingly, the Pre-Trial Judge finds that no additional measures ordered *proprio motu* could sufficiently mitigate the existing risks.

(iv) Conclusion

90. Accordingly, the Pre-Trial Judge concludes that, even with the benefit of the First and Second KP Submissions, the conditions proposed remain insufficient to adequately mitigate the risks under Article 41(6)(b)(ii)-(iii) of the Law in relation to Mr Thaçi and, in addition, any additional conditions imposed by the Pre-Trial Judge would not affect this conclusion. It follows that, as argued before, Mr Thaçi's communications can only be effectively restricted and monitored in a way to sufficiently mitigate the risks of him obstructing SC proceedings or committing further crimes through the monitoring framework at the SC Detention Facilities. Having assessed and weighed the Parties' submissions in their entirety, the Pre-Trial Judge considers that the preceding considerations continue to be decisive in adopting this conclusion and, as a result, it is not necessary to further address the Parties' remaining arguments for the present purposes – without any prejudice as to the outcome of any assessment of such arguments.

(c) Release into Third States

91. Insofar as the Defence reiterates its proposal that Mr Thaçi be released into the territories of [REDACTED], the Pre-Trial Judge recalls the finding made in the Second Detention Decision, in which he found that no additional conditions,

including those proposed by [REDACTED] or any other conditions that might be implemented [REDACTED], could sufficiently address the risks posed by Mr Thaçi.¹⁵⁰ As the Court of Appeals recently upheld, the Pre-Trial Judge also finds that, in the present circumstances, he is not required to seek the views of [REDACTED] regarding Mr Thaçi's interim release into their respective territories.¹⁵¹

F. PROPORTIONALITY OF DETENTION

1. Submissions

92. Mr Thaçi submits that his release is merited pursuant to Rule 56(2) of the Rules, particularly in light of the undue delay caused by the SPO.¹⁵² More specifically, the Defence refers to a series of SPO statements regarding its readiness for trial, which turned out to be unrealistic, and which showed the SPO's repeated failures to meet the disclosure deadlines set by the Pre-Trial Judge, which, in turn, had been set on the basis of the SPO's own estimates.¹⁵³ Such a delay is entirely attributable to the SPO and extremely prejudicial to Mr Thaçi, seeing as with the latest disclosure extensions and pending issues the beginning of trial will likely be delayed until fall 2022.¹⁵⁴

93. The SPO responds that the Court of Appeals upheld the Pre-Trial Judge's finding that, having regard to the circumstances of the case, the length of the pre-trial detention is not unreasonable at this stage. Moreover, the Court of Appeals confirmed that any discussion as to the expected length of Mr Thaçi's pre-trial detention remains premature and speculative.¹⁵⁵ In addition, the SPO

¹⁵⁰ Second Detention Decision, para. 55; Second Court of Appeals Decision, para. 65.

¹⁵¹ Second Detention Decision, para. 56; Second Court of Appeals Decision, para. 67.

¹⁵² Request, paras 47, 61.

¹⁵³ Request, paras 48-58.

¹⁵⁴ Request, paras 55, 59-61.

¹⁵⁵ Response, para. 46.

avers that the case has further actively progressed towards trial, with the SPO indicating 17 December 2021 as a date to file its pre-trial brief, the SPO's completion of the vast majority of Rule 102(1)(b) disclosure by August 2021, the Parties' filing of appeals in relation to preliminary motions, which need to be resolved before the case goes to trial, and the filing of a preliminary witness list on 22 October 2021.¹⁵⁶ Having regard to, *inter alia*, the scope and complexity of the case, the necessity of enabling the Parties to fully exercise their rights to litigate pre-trial matters, the continuing expeditious progress in pre-trial milestones, the lengthy custodial sentence, if convicted, and the heightened risks of obstruction if released, the SPO concludes that pre-trial detention continues to be reasonable and proportionate.¹⁵⁷

94. Mr Thaçi replies that, having regard to the intermittent disclosure of Rule 102(1)(b) material, the SPO's failure to disclose batches of documents by witnesses and to create witness entities, and the limited amount of Rule 103 material disclosed, the SPO's position that the case is actively progressing towards trial is not credible. The Defence submits that the fact that the trial will not start before late 2022 at the earliest warrants the immediate release of Mr Thaçi.¹⁵⁸

2. Discussion

95. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention – as reflected in Rule 56(2) of the Rules.¹⁵⁹ The duration of time in detention pending trial is a factor that needs to be considered along with the degree of the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors

¹⁵⁶ Response, paras 48-49.

¹⁵⁷ Response, para. 50.

¹⁵⁸ Reply, para. 60.

¹⁵⁹ KSC-BC-2020-07, IA001/F00005, Court of Appeals, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

being considered, the continued detention “stops being reasonable” and the individual needs to be released.¹⁶⁰ However, the question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features.¹⁶¹

96. Mr Thaçi was arrested on 5 November 2020 and, as a result, he has been detained for slightly more than one year at the time of the present review of his detention. Accordingly, the Pre-Trial Judge will assess whether this period of time is reasonable in the specific circumstances relating to Mr Thaçi.

97. First and foremost, the Pre-Trial Judge observes that the charges levelled against Mr Thaçi are of the utmost gravity.¹⁶² Specifically, Mr Thaçi is charged with ten counts of serious international crimes, namely persecution on political and/or ethnic grounds, imprisonment/illegal or arbitrary arrest and detention, other inhumane acts, cruel treatment, torture, murder, and enforced disappearance of persons.¹⁶³ It is further alleged that Mr Thaçi played a significant role in these crimes.¹⁶⁴ As such, he could be sentenced to a lengthy sentence, including life-long imprisonment, in the event of a conviction.

¹⁶⁰ Similarly, KSC-BC-2020-06, IA002/F00005/RED, Court of Appeals, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 69.

¹⁶¹ ECtHR, [Buzadji v. the Republic of Moldova \[GC\]](#), para. 90.

¹⁶² See also ECtHR, *Shabani v. Switzerland*, no. 29044/06, [Judgment](#), 5 November 2009 (“*Shabani v. Switzerland*”), paras 65, 66, 69; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21, [Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic](#), 25 September 1996, paras 20, 26; *Prosecutor v. Ademi*, IT-01-46-PT, [Order on Motion for Provisional Release](#), 20 February 2002 (“*Ademi Decision*”), para. 25; ICTR, *Prosecutor v. Ndayambaje*, ICTR-98-42-T, [Decision on the Defence Motion for the Provisional Release of the Accused](#), 21 October 2002 (“*Ndayambaje Decision*”), para. 23; *Prosecutor v. Ngirumpatse et al.*, ICTR-98-44-T, *Decision on the Motion by Ngirumpatse's Defence to Find the Accused's Detention Unlawful or, in the Alternative, to Order his Provisional Release*, 18 August 2003 (“*Ngirumpatse Decision*”), para. 25.

¹⁶³ Confirmed Indictment, para. 173.

¹⁶⁴ Confirmed Indictment, paras 2, 32, 39, 40-44, 46, 48, 53-55, 172.

98. It further follows that the proceedings against Mr Thaçi are complex.¹⁶⁵ The purported crimes extended over a lengthy period of time (from at least March 1998 through September 1999), covered a significant geographical area (numerous locations throughout Kosovo and different districts in northern Albania) and involved scores of victims.¹⁶⁶ Furthermore, the SPO preliminarily indicated that it intends to rely upon a significant number of witnesses,¹⁶⁷ [REDACTED].

99. Furthermore, the Pre-Trial Judge considers that it is highly significant that, as established, the risks that Mr Thaçi, if released, will obstruct the progress of SC proceedings or commit further crimes continue to exist, and that these risks cannot be sufficiently mitigated by means of less restrictive measures.

100. In addition, as to the conduct of the Parties,¹⁶⁸ the Pre-Trial Judge observes that, following the Second Detention Decision, substantial procedural steps have been completed with a view to transmitting the case to trial in the future. In more specific terms, several decisions on requests for protective measures have been adopted,¹⁶⁹ the Defence's preliminary motions have been adjudicated,¹⁷⁰ the date for the SPO's Pre-Trial Brief has been set to 17 December 2021 and for its Rule 109(c) chart to 28 January 2022,¹⁷¹ the SPO shall complete its disclosure under Rule 102(1)(b) of the Rules by 31 January 2022,¹⁷² and the SPO has submitted a

¹⁶⁵ See also ECtHR, *Shabani v. Switzerland*, paras 65, 69; ICTY, *Ademi Decision*, para. 26; ICTR, *Ndayambaje Decision*, para. 23; *Ngirumpatse Decision*, para. 25.

¹⁶⁶ Confirmed Indictment, paras 16, 32, 57-171, schedules A-C.

¹⁶⁷ KSC-BC-2020-06, F00542, Specialist Prosecutor, *Prosecution Submission of Preliminary Witness List*, 22 October 2021, public ("SPO Preliminary Witness List"), with strictly confidential and *ex parte* Annex 1 and confidential redacted Annex 2.

¹⁶⁸ See also ECtHR, *Shabani v. Switzerland*, paras 67-68.

¹⁶⁹ See footnote 72 above.

¹⁷⁰ KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers*, 22 July 2021, public; F00413/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment*, 22 July 2021, public; F00450, Pre-Trial Judge, *Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused*, 31 August 2021, public.

¹⁷¹ KSC-BC-2020-06, Transcript, 29 October 2021, public ("29 October 2021 Transcript"), p. 752, line 20 – p. 753, line 5.

¹⁷² 29 October 2021 Transcript, p. 752, line 20 – p. 753, line 5, p. 753, line 6 – p. 754, line 4.

preliminary list of witnesses, which will also facilitate any investigations by the Defence.¹⁷³ With regard to the delays and the SPO's representations of the projected time limits highlighted by the Defence, the Pre-Trial Judge recalls that the relevant time limits have been extended upon good cause being demonstrated. In any event, the Pre-Trial Judge considers that, for the purposes of assessing the proportionality of Mr Thaçi's detention, the actual length of time spent in pre-trial detention must be assessed as opposed to any estimates by the SPO that proved to be inaccurate. This is especially so considering that, notwithstanding the delays regarding particular time limits, progress continues to be made towards completing the pre-trial phase in the foreseeable future.

101. In conclusion, the Pre-Trial Judge finds that, in the specific circumstances of the present case, the period that Mr Thaçi has spent in pre-trial detention, which slightly exceeds one year, is not unreasonable given: (i) the extreme gravity of the crimes with which Mr Thaçi is charged and his allegedly important role in the commission of these crimes; (ii) the possibility of a serious sentence in the event of a conviction; (iii) the complexity of the case against Mr Thaçi; (iv) the continued existence of risks under Article 41(6)(b)(ii)-(iii) of the Law and the impossibility to sufficiently mitigate these risks by means of less restrictive measures; and (v) the progress achieved in the present proceedings notwithstanding the delays regarding particular time limits. Against this background, the Pre-Trial Judge finds that Mr Thaçi's pre-trial detention is proportionate and that any discussion regarding its anticipated length remains purely speculative at the moment. In this context, the Pre-Trial Judge observes that, while no start date of the trial has been established at this point in time, Mr Thaçi's detention shall be reviewed every two months or as soon as a change in circumstances arises pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules.¹⁷⁴ In these circumstances, the Pre-Trial

¹⁷³ SPO Preliminary Witness List.

¹⁷⁴ Similarly ECtHR, *Ereren v. Germany*, no. 67522/09, [Judgment](#), 6 November 2014, para. 64.

Judge finds that, at the present stage, any discussion as to the expected total length of Mr Thaçi's pre-trial detention remains premature and speculative.¹⁷⁵

102. Lastly, the Pre-Trial Judge further finds that, to the extent the Defence is arguing that an undue delay has been caused by the SPO within the meaning of the second sentence of Rule 56(2) of the Rules, such an argument also fails given that, as mentioned, good cause has been demonstrated for delays regarding particular time limits and progress continues to be made towards completing the pre-trial proceedings in the foreseeable future.

¹⁷⁵ Second Detention Decision, para. 63; Second Court of Appeals Decision, para. 51.

V. DISPOSITION

103. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **ORDERS** Mr Thaçi's continued detention;
- b) **ORDERS** Mr Thaçi, if he wishes to do so, to file submissions on the next review of detention by no later than **Monday, 17 January 2022**, with responses and replies following the timeline set out in Rule 76 of the Rules;
- c) **ORDERS** the SPO, should Mr Thaçi decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of Mr Thaçi's detention by no later than **Monday, 24 January 2022**, and Mr Thaçi, if he wishes to do so, to file his submissions by no later than **Thursday, 3 February 2022**; and
- d) **ORDERS** the SPO to submit a public redacted version of the Response by no later than **Tuesday, 21 December 2021**, or to indicate that the current classification of the Response must be maintained.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Tuesday, 14 December 2021

At The Hague, The Netherlands.