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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 Third Detention Review

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I. INTRODUCTION

1. Hashim Thaçi has now been incarcerated for 17 months. An additional four months have passed since the last detention review.[1] The SPO has yet to complete its disclosure of evidence,[2] the case file cannot be transferred to the Trial Panel, and no estimated trial date has recently been offered by the SPO.

2. Protracted pre-trial incarceration is an exception, and "cannot be maintained lightly".[3] Nearly a year ago to the day, His Honour Judge Ambos was right to observe that "the world wide practice of prolonged pre-trial detention, including the practice of international criminal tribunals, is deplorable".[4] The recognised presumption in favour of pre-trial release,[5] "flows from the presumption of innocence";[6] a fundamental right which underpins proceedings before this Court.

3. Prolonged pre-trial incarceration also clashes with the right to liberty as a fundamental human right, protected by Article 5 of the ECHR, and Article 29 of the Kosovo Constitution. It can be curtailed only if the alternative measures provided under Article 41(12) of the KSC Law[7] are deemed insufficient to eliminate or mitigate

[1] KSC-BC-2020-06/F00624, Pre-Trial Judge, Decision on Review of Detention of Hashim Thaçi, 14 December 2021 ("Third Decision"), para. 54.
[2] *See, e.g.*, KSC-BC-2020-06/F00742, Prosecution submissions for eleventh status conference, 21 March 2022, paras. 2-9; KSC-BC-2020-06, Transcript of Eleventh Status Conference, 24 March 2022 ("Transcript of Eleventh Status Conference"), p. 1068 line 24 to p. 1069 line 13, p. 1073 line 5 to p. 1075 line 9, p. 1086 line 22 to p. 1089 line 14.
[3] KSC-BC-2020-06/IA004/F00005, Appeals Panel, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021, para. 17 ("First Appeal Decision").
[4] KSC-BC-2020-06/IA004/F00005, Appeals Panel, Separate Concurring Opinion of Judge Kai Ambos, 30 April 2021 ("Ambos Separate Opinion"), para. 3.
[5] *See, e.g.*, ECtHR, *Bykov v. Russia,* Application no. 4378/02, Grand Chamber, Judgment, 10 March 2009, para. 61; ECtHR, *Neumeister v. Austria*, Application no 1936/63, Court (Chamber), Judgment, 27 June 1968, Series A no. 8, p. 37, § 4.
[6] ECtHR, *Buzadji v. the Republic of Moldova,* Applicationno. 23755/07, Grand Chamber, Judgment, 5 July 2016, para. 89; William A. Schabas, *The European Convention on Human Rights* (Oxford University Press, 2015), p. 250.
[7] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("KSC Law").

identified risks, which must themselves be 'real', with the standard requiring more than mere possibility.[8]

4. Importantly, detention must also be proportionate.[9] As such, as the length of time spent in detention increases, this directly impacts whether the continued detention can still be considered reasonable.[10] Protracted incarceration is not without consequences. The impact of incarceration on the physical and mental health of detainees is well documented, and consistently extends to detainees' families;[11] a further reason for its exceptional nature in the pre-trial phase.

5. Given this, the KSC's statutory framework requires automatic review, every two months, of whether pre-trial detention can still be considered necessary.[12] As part of this review, the Pre-Trial Judge must actively seek, "*proprio motu*, to inquire and evaluate all reasonable conditions that could be imposed on an accused, and not just those raised by the Defence", and always "consider more lenient measures when deciding whether a person should be detained".[13]

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[8] First Appeal Decision, para. 22; 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, para. 12 and the authorities cited therein.
[9] KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules"), Rule 56(2).
[10] Third Decision, para. 95.
[11] See *e.g.*, L. Brinkley-Rubenstein, 'Incarceration as a catalyst for worsening health', (2013) *Health and Justice* 1(3); pp. 5, 11: "*the deprivation of rights and freedoms adversely affects the health status of incarcerated individuals …[and] leads to physical, mental, and social harm that can disempower and affect incarcerated populations to an extreme extent… many also cascade, affecting families and communities*"; D. DeHart, C. Shapiro & S. Clone, '"The Pill Line is Longer than the Chow Line": The Impact of Incarceration on Prisoners and their Families', (2018) *The Prison Journal* 98(2), pp. 188-212: "*…the impact of incarceration extends well beyond the prisoner to affect families and communities in a range of ways*; M. Massoglia & W.A. Pridemore, 'Incarceration and Health', (2015) *Annual review of sociology* 41(1), pp. 291-310: "*Incarceration is an acute stressor*", and *"the consequences of incarceration for family functioning, including the mental health of inmates' partners, the behavior of their children"*. *See also*, World Health Organisation Europe, 'Prisons and Health', 2014.
[12] KSC Law, Article 41(10).
[13] First Appeal Decision, para. 3.

6. As such, the detention review process must be driven by release of the accused as the overriding imperative, given the statutory preference for pre-trial liberty. In this spirit, the Defence offers the following submissions for the third review of detention of Mr Hashim Thaçi,[14] pursuant to Rule 57(2) of the Rules, with a view to finding a way for Mr Thaçi's lengthy pre-trial incarceration to be brought to a close. This could be done through either Mr Thaçi's release into Kosovo, or into either of the two Third Party States, [REDACTED], who have provided guarantees to implement his release and return to the Court.

II. SUBMISSIONS

A. THE PRE-TRIAL JUDGE SHOULD CONVENE AN ORAL HEARING

7. For reasons expanded below, Mr Thaçi's detention can no longer be considered proportionate, necessitating his release. Moreover, concerns expressed by the Pre-Trial Judge in the Third Decision regarding apparent gaps that exist between the monitoring and enforcement regime at the SC Detention Unit, and proposed house arrest in Kosovo, can also be addressed in the terms set out below.

8. In these circumstances, all steps should be taken to avoid the risk that Mr Thaçi's continued pre-trial detention results from a lack of information or clarification regarding release conditions. In this context, the importance of an oral hearing to solicit any further details from the relevant parties regarding the practicalities and enforceability of release conditions, is magnified. While the Defence is able to propose solutions and conditions to meet concerns previously raised, the details as to the practical application of these conditions rests with others. The Pre-Trial Judge has previously denied all requests for an oral exchange about the conditions of release.

[14] KSC-BC-2020-06/F00629, Pre-Trial Judge, Decision on Thaçi Request for Extension of Time Limit, 16 December 2021, para. 9(b).

However, it is incumbent on him to actively enquire and evaluate release conditions,[15] which involves being open to receiving directly relevant information from the parties best placed to provide it. As such, and for the reasons expanded more fully below, the Defence reiterates its request for an oral hearing on the conditions of Mr Thaçi's release, whether into Kosovo, or either of the proposed Third Party States.

B. MR THAÇI IS NOT A FLIGHT RISK (ARTICLE 41(6)(B)(I))

9. In the Third Decision, the Pre-Trial Judge based his finding that Mr Thaçi was a flight risk on Mr Thaçi's **ability** to abscond,[16] combined with an apparent **motivation** to do so, should he be released.[17]

10. As regards Mr Thaçi's apparent motivation to abscond, the Pre-Trial Judge reasoned that "by receiving evidence during the ongoing disclosure process, Mr Thaçi has gained increased insight into the evidence underpinning these very charges", which was held to increase his risk of flight.[18]

11. Four months later, this reasoning is no longer sound. Firstly, the "ongoing disclosure process" has contained an increasing volume of exculpatory material, particularly since the last detention review. Since 1 February 2022, there have been 13 disclosure packages pursuant to Rule 103, totalling 1,205 documents – or 26% of the SPO's total Rule 103 disclosure. More material has been disclosed pursuant to Rule 103 in 2.5 months than the entire period between July 2021 and January 2022. The SPO has now disclosed 4,659 items pursuant to Rule 103, and continues to disclose exculpatory material at an increasing rate.

[15] First Appeal Decision, para. 3.
[16] Third Decision, paras. 35-36.
[17] Third Decision, paras. 36-37.
[18] *Ibid*, internal footnotes omitted.

12. For example, on 1 February 2022, the SPO released a Rule 103 disclosure package which contained SPO interviews with, and a statement from, the former Head of the Organisation for Security and Co-Operation in Europe ("OSCE") Mission in Kosovo, Ambassador Daan Everts (collectively, "Everts Documents").[19] These documents had been in the possession of the SPO since March 2018.

13. The SPO accepts that the Everts Documents "undoubtedly contain certain exculpatory content".[20] In a meeting note from January 2018, the SPO noted that "EVERTS' view was the criminal activities post-June 1999 were committed by individuals who sought a chance to gain personal benefit and was not part of an organized campaign from the Albanian leadership."[21] The Everts Statement contains numerous similarly exonerating statements,[22] which call into question Mr Thaçi's ability to prevent and punish crimes, and his *mens rea* for the crimes as charged.

14. As such, reliance on the "ongoing disclosure process" as supporting the conclusion that Mr Thaçi remains a flight risk, must take into account the exculpatory material included therein. Unless the Pre-Trial Judge is reviewing and analysing the mountain of disclosure passing between the SPO and the Defence, it is respectfully submitted that such a conclusion is now impossible for him to reach. It cannot be presumed that an increasing volume of disclosure equals an increasingly strong SPO case.

15. In addition, Defence investigations continue. As discussed at the Tenth Status Conference,[23] a letter was obtained from the US State Department dated 4 May 1999.

[19] [REDACTED].
[20] KSC-BC-2020-06/IA017/F00009, Request for Dismissal of KSC-BC-2020-06/IA017/F00008, para. 15.
[21] January Meeting Note, para. 8.
[22] KSC-BC-2020-06/IA017/F00008, Thaçi Defence Additional Submissions on Appeal against the Decision on Review of Detention of Hashim Thaçi, 15 February 2022, para. 16.
[23] KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022 ("Tenth Status Conference Transcript"), p. 902, lines 12-24.

This letter, from an Assistant Secretary of Legislative Affairs to US Senator Mitch McConnell (Chairman of the Foreign Operations Committee), includes a statement that "there is no political structure in Kosovo or effective command and control of the KLA." Similarly, the US Central Intelligence Agency prepared a 'Report on the Kosovo Liberation Army' dated 3 January 2000, which notes for example: "[t]he UCK was not involved in terrorist activities - defined as premeditated, politically motivated violence perpetrated against non-combatant targets".[24] These documents are exculpatory, calling into question the SPO's case that there was a joint criminal enterprise to gain and exercise control over Kosovo by committing violence and removing opponents.

16. Importantly, while recognising that Mr Thaçi's acts of cooperation since 2019 could potentially diminish the risk of flight, the Pre-Trial Judge concluded otherwise, finding that, for the most part, Mr Thaçi's cooperation "**predate[s]** the subsequent knowledge of the scope of the case and the evidence against Mr Thaçi."[25] Meaning that, at the time that Mr Thaçi surrendered and cooperated, he was unaware of the scope of the case against him.

17. Arguably, Mr. Thaçi's most significant act of cooperation was his resignation and voluntary surrender. He did this on 5 November 2020. Six months prior, an SPO press release presented a far more serious case than the one now charged, including the accusation that Mr Thaçi was criminally responsible for "**nearly 100 murders**."[26] Given that joint criminal enterprise was not explicitly foreseen in the KSC Law, the SPO Press Release left the impression that Mr Thaçi was a direct participant in the commission of these 100 murders. Mr Thaçi's cooperation with the KSC, including his voluntary surrender, did not predate his knowledge of the scope of the case and the

[24] Transcript of Eleventh Status Conference, p. 1094 line 22 to p. 1095 line 6.
[25] Third Decision, para. 37.
[26] SPO, "Press Statement", 24 June 2020, available at https://www.scp-ks.org/en/press-statement.

evidence against him. Rather, the procedural history of this case demonstrates that Mr Thaçi cooperated and complied with KSC orders even when he thought the case against him was much more extensive.

18. A desire to abscond from justice and to spend a life on the run is, on its face, irreconcilable with the decision to surrender. The Pre-Trial Judge reconciled these two states of mind by finding that Mr Thaçi only discovered the true extent of the case once in custody. In light of the June 2020 SPO press release, which paints a case of much larger scope and gravity, and the picture now emerging through SPO disclosure, the Defence respectfully submits that it is no longer reasonable to deprive Mr Thaçi of any benefit deriving from his prior acts of cooperation and compliance. In fact, they diminish the risk of flight, and should properly be considered as doing so.

C. DETENTION IS NO LONGER PROPORTIONATE

19. The time taken by the SPO to meet its Rule 102(3) disclosure obligations, is delaying the proceedings. At the Tenth Status Conference on 4 February 2022, the SPO indicated it would progress at a rate of reviewing and processing 5,000 documents per week.[27] By the Eleventh Status Conference on 24 March 2022, six weeks later, the SPO had only disclosed 8,284 items, rather than the projected 30,000.[28]

20. Since February 2022, the Defence has requested (or joined requests for) approximately 6,700 documents from the Rule 102(3) Notice, which have not yet been provided. The Defence intends to make further requests.[29] The SPO's inability to respond in a timely manner is particularly concerning given that the Thaçi Defence

[27] Tenth Status Conference Transcript, p. 892, lines 19-20.
[28] Transcript of Eleventh Status Conference, p. 1073, lines 6-8.
[29] *See, e.g.*, KSC-BC-2020-06/F00671, Thaçi Defence Submissions for the Tenth Status Conference, 1 February 2022, para. 9; Transcript of Eleventh Status Conference, p. 1075, lines 21-24.

has been significantly more targeted in its Rule 102(3) requests than the other accused. The Defence for Mr Jakup Krasniqi and the Defence for Mr Rexhep Selimi are each waiting on disclosure of more than 40,000 documents, with some requests dating back to November 2021.[30] The Defence for Mr Kadri Veseli is waiting for disclosure of approximately 10,000 documents.[31] The extent of the SPO's backlog of Rule 102(3) disclosure indicates a systemic and structural inability to cope with the volume of its own archive and providing access thereto. Regardless of the cause, the Rule 102(3) process will continue for months to come, causing a substantial delay to the proceedings.

21. The relevance of this delay is plain. The Pre-Trial Judge has recalled "the importance of the proportionality principle in the determination on the reasonableness of pre-trial detention – as reflected in Rule 56(2) of the Rules."[32] As recognised by the Appeals Panel, the length of time spent in detention pending trial must be considered, along with the risks described in Article 41(6)(b) of the KSC Law, in order to determine whether, all factors being considered, "the continued detention 'stops being reasonable' and the individual needs to be released".[33]

22. Despite the factors relied upon by the Pre-Trial Judge to previously find that the length of detention remained proportionate,[34] there will be a tipping point at which continued detention stops being reasonable. For the two-monthly review to have any purpose, it must be capable of resulting in a different outcome, and requires the Pre-Trial Judge to look at the proportionality of detention in the current circumstances.

[30] Transcript of Eleventh Status Conference, p. 1079, lines 7-10 and p. 1083, lines 15-17.
[31] Transcript of Eleventh Status Conference, p. 1077, lines 10-18.
[32] Third Decision, para. 95.
[33] KSC-BC-2020-06/IA010/F00008, Appeals Panel, Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 27 October 2021 ("Second Appeal Decision"), para. 49.
[34] Third Decision, para. 101.

23. These circumstances include that Mr Thaçi, who voluntarily paved the way for his own surrender, has already been incarcerated for 17 months; an objectively substantial period of time. The possibility of a lengthy custodial sentence in the event of a conviction,[35] while relevant, can only carry limited weight given that Mr Thaçi benefits from the presumption of innocence. Moreover, incomplete SPO disclosure, and the Rule 102(3) backlog, points to the pre-trial process continuing for months and months to come. The file cannot yet be transferred to the Trial Panel, and no estimated trial date is even being discussed. Once disclosure is completed, the Defence must still be given time for its review, and for the preparation of the Pre-Trial Brief against the backdrop of ongoing investigations.

24. Previously, the Pre-Trial Judge has considered that any discussion regarding the expected total length of Mr Thaçi's pre-trial detention "remains premature and speculative".[36] In examining this approach, the Court of Appeals Panel held that "the proportionality of pre-trial detention **shall not be assessed against its expected length** but against the risks under Article 41(6)(b) of the Law together with the other factors".[37] Rule 56(2) of the Rules, however, requires the Pre-Trial Judge to "ensure that a person **is not** detained for an unreasonable period prior to the opening of a case", obliging the Pre-Trial Judge to act in advance of the detention becoming unreasonable. In that context, the fact that the trial will not begin next week, or next month, or even in the coming six month period, is relevant to the Pre-Trial Judge's obligation to ***anticipate*** detention becoming illegal. Repeated reliance on the system of periodic review[38] cannot perpetually stave off the reality that, at some point detention will become unreasonable, and the Pre-Trial Judge has a statutory duty to act before it does.

[35] Third Decision, paras. 94, 101.
[36] Third Decision, para. 101.
[37] KSC-BC-2020-06/IA017/F00011, Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 5 April 2022 ("Third Appeal Decision"), paras. 66, 67 (emphasis added).
[38] Third Decision, para. 101; Third Appeal Decision, para. 67.

25. Relevantly, the Court of Appeal also requires consideration of whether "substantial procedural steps have been completed with a view to transmitting the case to trial in the foreseeable future".[39] In the present case, substantial procedural steps, such as the completion of SPO disclosure, are months away, and none of the parties anticipate the case moving to trial in the foreseeable future.

26. In these circumstances, Mr Thaçi's detention can no longer be considered proportionate. After 17 months in prison, the obstacles to completion of substantial procedural steps, and the fact that he continues to benefit from the presumption of innocence, mean that the tipping point has been reached. Circumstances necessitate Mr Thaçi's release under conditions considered appropriate by the Court.

D. CONDITIONS OF HOUSE ARREST CAN MITIGATE ANY REMAINING RISK

1. House Arrest in Kosovo

27. In the Third Decision, the Pre-Trial Judge found that the Kosovo Police lacks the capacity to mitigate the risks identified.[40] He pointed to "contextual considerations" involving other detainees in Kosovo that "cannot be divorced" from the context in which house arrest would take place.[41] The undertaking by the Kosovo Police to ensure the strict enforcement of any decisions, was considered inadequate.[42] The Pre-Trial Judge concluded that "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".[43]

[39] Third Appeal Decision, para. 66.
[40] Third Decision, para. 81.
[41] Third Decision, para. 85.
[42] Third Decision ,para. 86.
[43] Third Decision, para. 90.

28. On this basis, Mr Thaçi asks the Pre-Trial Judge to order that an equivalent framework for restrictions and monitoring be implemented in the context of house arrest, a regime to which he voluntarily submits. Specifically:

(i) **Family visits**: The Pre-Trial Judge and Court of Appeals Panel noted that "the [REDACTED] is not comparable to the limited visits Thaçi receives [REDACTED] at the Detention Facilities",[44] which are "strictly limited in terms of persons and time periods".[45] The Defence submits that family contact during house arrest can be strictly limited to [REDACTED]. Any increased risk from increased contact between [REDACTED] is mitigated by the fact that there is no indication - after 17 months of family visits in the SC Detention Unit - that any confidential information has passed between them. [REDACTED]. [REDACTED]. The extreme unlikelihood that they would jeopardise their own lives and livelihoods, and risk prison, to receive and pass information must also weigh in the balance. To further mitigate any increased risk, Mr Thaçi agrees to be re-incarcerated 30 days prior to the commencement of trial, being the time at which protected witness' identities will be disclosed to the Defence.[46]

(ii) **Visitors' Phones**: As regards the monitoring of visitors phones, the Defence proposes that it be made a precondition of entry to visit Mr Thaçi that visitors' phones are monitored before and after the visit. Further, the

[44] Third Appeal Decision, para. 29, fn. 76.
[45] Third Decision, para. 75; Third Appeal Decision, para. 29.
[46] Provisional release limited by time has been ordered by other tribunals, see, for example: ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber I, Decision on Motion on Behalf of Lahi Brahimaj for Provisional Release, 14 December 2007, para. 25; ICTY, *Prosecutor v. Haradinaj et al*., IT-04-84-PT, Trial Chamber II, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, paras. 51-53; ICTY, *Prosecutor v. Ademi*, IT-01-46-PT, Trial Chamber, Order on Motion for Provisional Release, 20 February 2002, paras. 38-39.

Pre-Trial Judge and Court of Appeals Panel accepted that, [REDACTED], applies equally to house arrest and to the Detention Facility.[47] As such, the Defence asks that this risk be further mitigated under house arrest by the Pre-Trial Judge: (i) restricting the pre-approved visitors permitted to visit Mr Thaçi during house arrest to a set number; and (ii) ordering active monitoring and after-the-fact listening of Mr Thaçi's visits with pre-approved visitors in order to prevent the unauthorised disclosure of confidential information.

(iii) **Written Messages**: The Pre-Trial Judge and Court of Appeals Panel noted that [REDACTED].[48] The Defence accordingly requests that the same measures in place in the Detention Unit to avoid the memorisation of written messages to evade auditory monitoring techniques, be ordered as part of the conditions of house arrest.

(iv) **[REDACTED] Kosovo Police [REDACTED]**: The Pre-Trial Judge and Court of Appeals Panel agreed that, because the Kosovo Police [REDACTED]. Specifically, "[REDACTED].[49] On this basis, the Defence asks that SC Detention Officers supervise Mr Thaçi's house arrest, either exclusively, or in combination with Kosovo Police officers, who should themselves be "[REDACTED], and receive training on applying the visits and communication regime".[50] The supervision of these SC Detention Officers and Kosovo Police should remain with the Registry, given its "unique position" of having [REDACTED].[51] Information should continue

[47] Third Decision, para. 79; Third Appeal Decision, para. 33.
[48] Third Appeal Decision, para. 32.
[49] Third Decision, para. 79.
[50] Third Decision, para. 77.
[51] Third Decision, para. 76.

to be [REDACTED] to SC Detention Officers and any trained Kosovo Police supervising house arrest.[52]

Moreover, in the view of the Court of Appeals Panel, "the Chief Detention Officer, an official of the Specialist Chambers appointed by the Registrar, is in a better position to promptly bring to the Registrar's attention any communications that raise concerns [REDACTED]."[53] The Court of Appeals Panel noted the [REDACTED].[54] The Defence therefore asks the Pre-Trial Judge to order that the SC Detention Officers and trained Kosovo Police officers supervising Mr Thaçi's house arrest be required to immediately raise concerns by phone with the Chief Detention Officer, who would then promptly raise them in the normal way with the Registrar, [REDACTED].

29. The deployment of SC Detention Officers is provided for under Article 34(10) of the KSC Law, which provides that "[KSC] officers of the court shall have the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law in accordance with the modalities established by this Law. Article 34(12) then provides that "[KSC] correction/detention officers shall have the authority and responsibility to exercise powers given to Kosovo Correctional Officers under Kosovo law and, in accordance with the modalities established by th[e KSC] Law, including but not limited to those at Article 70(3) of the Criminal Procedure Code, Law No. 04/L-123."

30. Nor can any perceived or actual increase in resources be invoked to deny the use of SC Detention Officers to supervise house arrest. Courts and human rights

[52] Third Decision, para. 76.
[53] Third Appeal Decision, para. 35.
[54] Third Appeal Decision, para. 35.

bodies have long recognised that the application of fundamental rights "cannot be dependent on material resources available",[55] and have repeatedly rejected attempts to justify the curtailing of detainees' rights on the basis of "financial or logistical difficulties".[56] Specifically, release cannot be conditioned on the availability of resources, or justified on the basis of "understaffing or budgetary constraints".[57] This principle, that "financial constraints upon the State cannot be a ground to deny fundamental rights to citizens",[58] has also been applied domestically.

31. As regards the detailed logistics of the house arrest conditions proposed above, the Defence submits that a hearing should be convened to hear the Director of the Kosovo Police, Chief Detention Officer of the KSC Detention Unit, and other relevant members of the Registry, to coordinate how the proposed conditions can be implemented, pursuant to Articles 39(13) and 53(1) of the KSC Law. The Defence notes its willingness to be present at this hearing, which would allow the parties to most effectively coordinate and collaborate to give effect to the conditions outlined herein, and answer any remaining questions from the Pre-Trial Judge.

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[55] UNHRC, CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992, adopted at the Forty-fourth Session of the Human Rights Committee (GC 21), para. 4; UNHRC, *Giri et al. v. Nepal*, CCPR/C/101/D/1761/2008, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the ICCPR concerning Communication No. 1761/2008, 24 March 2011, para. 7.9; cited in Paul M. Taylor, *A Commentary on the ICCPR* (Cambridge University Press, 2020), p. 282. *See also,* UNHRC, *Fillastre v. Bolivia*, CCPR/C/43/D/336/1988, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the ICCPR concerning Communication No. 336/1988, 5 November 1991, para. 6.5.

[56] ECtHR, *Shilbergs v. Russia*, Application, no. 20075/03, First Section, Judgment, 17 December 2009, para. 78: "*However, it reiterates its finding made in a number of cases that financial or logistical difficulties, as well as the lack of a positive intention to humiliate or debase the applicant, may not be cited by the domestic authorities as circumstances relieving them of their obligation to organise the State's penitentiary system in such a way as to ensure respect for the dignity of detainees (see, among other authorities, Mamedova v. Russia, no. 7064/05, § 63, 1 June 2006)*." See also ECtHR, *Poltoratskiy v. Ukraine*, Application no. 38812/97, First Section, Judgment, 29 April 2003, para. 148.

[57] UNHRC, General Comment No. 35 on ICCPR Article 9 on Liberty and Security of the Person, 16 December 2014, para. 37: "*The second requirement expressed in the first sentence of paragraph 3 is that the person detained is entitled to trial within a reasonable time or to release … The reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case … Impediments to the completion of the investigation may justify additional time, but general conditions of understaffing or budgetary constraint do not.*"

[58] *Brij Mohan Lal v. Union of India & Ors* (Transfer Case No. 23 of 2001), 19 April 2012, paras. 106-107.

2. Provisional release into Third Party States

32. In the alternative to house arrest in Kosovo, the Defence reiterates its proposal that Mr Thaçi be released into the territory of [REDACTED], under the conditions deemed necessary by the Pre-Trial Judge, pursuant to Article 41(11) of the KSC Law and Rule 56(4) of the Rules. Provisional release into a Third Party State, implemented successfully in other similar contexts,[59] would also serve to circumvent the Pre-Trial Judge's concerns regarding the Kosovo Police, and would not require the deployment of SC Detention Officers.

33. The Defence has previously submitted guarantees from [REDACTED],[60] confirming their willingness and capacity to accommodate Mr Thaçi under the conditions defined by the Pre-Trial Judge. Specifically, the [REDACTED] has confirmed its ability to secure and monitor [REDACTED].

34. Two judges of the Court of Appeals Panel have already emphasised the need for the Pre-Trial Judge to consider and assess guarantees provided by Third Party States prior to determining whether theses guarantees minimise or eliminate the remaining risk. In his Separate Concurring Opinion to the First Appeal Decision, his Honour Judge Ambos held 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."[61]

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[59] 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.
[60] [REDACTED].
[61] Ambos Separate Opinion, para. 3.

35. Similarly, 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" and would have remanded the matter back to the Pre-Trial Judge to assess "whether the Third States [...] that had indicated their general willingness to accept the Accused could effectively enforce the Proposed Conditions".[62]

36. On this basis, the Defence asks the Pre-Trial Judge to convene an oral hearing to hear the views of the Governments of [REDACTED] on the interim release of Mr Thaçi into their respective territories, noting that Mr Thaçi undertakes to comply with any conditions imposed by the Pre-Trial Judge during release into these Third Party States.

37. The Pre-Trial Judge has previously declined to order such a hearing, finding that "in the present circumstances, he is not required to seek the views of [REDACTED] regarding Mr Thaçi's interim release", given his finding that no additional conditions could sufficiently address the identified risks.[63] On this point, the Court of Appeals Panel confirmed that "it would have been within the Pre-Trial Judge's discretion to seek further details before making his decision", but agreed that

[62] Second Appeal Decision, Partially Dissenting Opinion of Judge Nina Jørgensen, paras. 8-11.
[63] Third Decision, para. 91.

he was not required to do so, given his finding that Mr Thaçi was not being provisionally released.[64]

38. In light of the changed circumstances outlined in the present application, and in particular the fact that Mr Thaçi's continued detention can no longer be considered proportionate, the Defence submits that an oral hearing would allow the Pre-Trial Judge to comply with his duty to actively seek, "*proprio motu*, to inquire and evaluate all reasonable conditions that could be imposed on an accused", and always "consider more lenient measures when deciding whether a person should be detained".[65]

III. RELIEF SOUGHT

39. For these reasons, the Defence respectfully requests the Pre-Trial Judge:

CONVENE a hearing or hearings, and order the presence of relevant individuals including the Director of the Kosovo Police, the Chief Detention Officer of the SC Detention Unit, representatives of the [REDACTED] Governments, the Defence, and other relevant members of the Registry to discuss the conditions of release; and

ORDER Mr Thaçi's immediate interim release on the conditions deemed necessary and appropriate, until 30 days prior to the start of the trial.

[64] Second Appeal Decision, para. 67.
[65] First Appeal Decision, para. 3.

[Word count: 5,283 words]

Respectfully submitted,

Gregory W. Kehoe

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At Tampa, United States