

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 Response to Prosecution submissions on detention review of Hashim Thaçi

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I. INTRODUCTION

1. Mr Hashim Thaçi surrendered to the custody of the KSC. Having done so, he has now been detained, without release, for over 25 months. After more than two years in prison, Mr Thaçi is now facing his fifth review of detention.

2. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the SPO’s submissions on detention review,¹ and the SPO’s supplemental submissions.² The Defence seeks an end to Mr Thaçi’s manifestly disproportionate period of pre-trial detention, and requests his immediate release.

II. PROCEDURAL HISTORY

3. On 5 November 2020, following the confirmation of an indictment,³ Mr Thaçi was arrested pursuant to a decision and an arrest warrant issued by the Pre-Trial Judge.⁴

4. Since his arrest, Mr Thaçi has sought interim release on five occasions. The first four applications were rejected by the Pre-Trial Judge, ordering Mr Thaçi to remain in detention.⁵ Subsequent appeals were denied by the Court of Appeals Panel,

¹ KSC-BC-2020-06/F01086, Prosecution submissions on detention review of Hashim Thaçi, 4 November 2022 (“SPO Submissions”).

² KSC-BC-2020-06/F01095, Prosecution supplement to detention filings F01069 and F01086, 9 December 2022 (“SPO Supplemental Submissions”).

³ KSC-BC-2020-06/F00026/CONF/RED, Pre-Trial Judge, Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020, Confidential.

⁴ KSC-BC-2020-06/F00051, Registrar, Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020; KSC-BC-2020-06/F00027/A01/RED, Pre-Trial Judge, Public Redacted Version of Arrest Warrant for Hashim Thaçi, 26 October 2020.

⁵ KSC-BC-2020-06/F00177, Pre-Trial Judge, Decision on Hashim Thaçi’s Application for Interim Release, 22 January 2021; KSC-BC-2020-06/F00417, Pre-Trial Judge, Decision on Review of Detention of Hashim Thaçi, 23 July 2021; KSC-BC-2020-06/F00624, Pre-Trial Judge, Decision on Review of Detention of Hashim Thaçi, 14 December 2021 (“Third Detention Decision”); KSC-BC-2020-06/F00818, Pre-Trial Judge, Decision on Periodic Review of Detention of Hashim Thaçi, 26 May 2022.

confirming the orders of the Pre-Trial Judge.⁶ The fifth, and most recent, application for interim release by Mr Thaçi was also rejected by the Pre-Trial Judge on 29 September 2022.⁷

5. On 4 November 2022, in accordance with the timetable set by the Pre-Trial Judge in the Fifth Decision, the SPO filed its Submissions, seeking the continued detention of Mr Thaçi.⁸

6. At the Fifteenth Status Conference on 4 November 2022, the Defence, and the Defence for Mr Kadri Veseli (“Veseli Defence”) raised new disclosure issues relating to the ‘Joint Defence Motion for Disclosure Pursuant to Rule 103’.⁹ The submissions revealed problematic information about the sources of information in the SPO’s possession, and how this potentially tainted information may have been used.¹⁰ The Pre-Trial Judge authorised the filing of supplemental submissions on these issues, following a set timetable.¹¹

7. On 9 November 2022, the Defence filed a request for a variation of the time limit set by the Pre-Trial Judge to file submissions on the next review of detention, in order that such submissions be provided following resolution of the Disclosure

⁶ KSC-BC-2020-06/IA004/F00005, Court of Appeals Panel, Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release, 30 April 2021 (“First Appeal Decision”); KSC-BC-2020-06/IA010/F00008, Court of Appeals Panel, Decision on Hashim Thaçi’s Appeal Against Decision on Review of Detention, 27 October 2021 (“Second Appeal Decision”); KSC-BC-2020-06/IA017/F00011, Court of Appeals Panel, Decision on Hashim Thaçi’s Appeal Against Decision on Review of Detention, 5 April 2022; KSC-BC-2020-06/IA022/F00005, Court of Appeals Panel, Decision on Hashim Thaçi’s Appeal Against Decision on Periodic Review of Detention, 22 August 2022.

⁷ KSC-BC-2020-06/F00994, Pre-Trial Judge, Decision on Periodic Review of Detention of Hashim Thaçi, 29 September 2022 (“Fifth Detention Decision”).

⁸ SPO Submissions, paras. 1, 19.

⁹ KSC-BC-2020-06/F00877/COR, Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022), 21 July 2022 (“Disclosure Motion”).

¹⁰ KSC-BC-2020-06, Transcript of Fifteenth Status Conference, 4 November 2022 (“Fifteenth Status Conference Transcript”), pp. 1591-1618.

¹¹ Fifteenth Status Conference Transcript, Oral Order 5, p. 1692 lines 5-11.

Motion, and review of any consequent disclosure.¹² It was submitted that the issues raised at the Fifteenth Status Conference, which were also to be the subject of supplemental submissions, may have an impact on detention review, and that broader review and consideration was required to determine the precise relevance of this material to the review of detention.¹³ Consequently, the Defence submitted that submissions on whether reasons for continued detention still exist would benefit from being made following receipt and consideration of any decision on the Disclosure Motion.¹⁴

8. On 11 November 2022, the Pre-Trial Judge ordered the Defence to file its submissions by 14 December.¹⁵ The Pre-Trial Judge also ordered the Defence to file, by 15 November, a notification signed by Mr Thaçi indicating that he waived his “right to have his detention reviewed before the two-month time limit set out in Article 41(10) of the Law and Rule 57(2) of the Rules, and until a decision on his detention review is rendered by Monday, 19 December 2022”.¹⁶ On 15 November 2022, the Defence filed Mr Thaçi’s waiver.¹⁷

9. On 9 December 2022, the SPO filed supplemental submissions to the SPO Submissions, arguing that “[d]espite knowing that this witness had no bearing on the detention decisions, the Defence has persisted in delaying the next detention review over a manifestly non-existent issue”.¹⁸

¹² KSC-BC-2020-06/F01095, Thaçi Defence Request for an Extension of Time for Submissions on Review of Detention, 9 November 2022 (“Request for Extension”), paras. 4, 8.

¹³ Disclosure Motion, para. 5.

¹⁴ Request for Extension, para. 5.

¹⁵ KSC-BC-2020-06/F01098, Pre-Trial Judge, Decision on Thaçi Defence Request for an Extension of Time for Submissions on Review of Detention, 11 November 2022 (“Extension Decision”), paras. 15 and 19(f).

¹⁶ Extension Decision, paras. 16, 19(c).

¹⁷ KSC-BC-2020-06/F01104, Thaçi Defence Notification of Waiver of Detention Review with confidential Annex 1, 15 November 2022.

¹⁸ SPO Supplemental Submissions, para. 2.

10. On 9 December 2022, the Pre-Trial Judge issued the decision on the Disclosure Motion.¹⁹ The Pre-Trial Judge granted, in part, the relief sought in the Defence's Disclosure Motion and supplemental submissions,²⁰ and ordered the SPO to provide additional disclosure by 13 January 2023.²¹ However, the Pre-Trial Judge refused to further extend the time required for the current detention submissions or allow the filing of additional submissions following disclosure of the relevant material.²²

III. APPLICABLE LAW

11. Article 41(10) of the KSC Law,²³ and Rule 57(2) of the Rules,²⁴ provide that, until a judgement is final or until release, upon the expiry of two months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated. Article 41(6) defines the criteria to be met to justify such a detention.

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

¹⁹ KSC-BC-2020-06/F01149, Pre-Trial Judge, Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), 9 December 2022 ("Disclosure Decision").

²⁰ KSC-BC-2020-06/F01101, Thaçi Defence Addendum to the Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), 14 November 2022.

²¹ Disclosure Decision, para. 85.

²² Disclosure Decision, para. 83.

²³ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

²⁴ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

²⁵ See, e.g., KSC-BC-2020-06/IA004/F00004, Thaçi Defence Reply to "SPO Response to Thaçi Defence Appeal of Decision against 'Decision on Hashim Thaçi's Application for Interim Release'", 22 February 2021, para. 49; First Appeal Decision, paras. 21-24.

²⁶ See, e.g., KSC-BC-2020-06/IA004/F00001, Thaçi Defence appeal against the "Decision on Hashim Thaçi's Application for Interim Release", 3 February 2021, para. 12 and the authorities cited therein; First Appeal Decision, para. 22.

question posed by Article 41(6)(b) of the [KSC] Law is whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the [KSC] Law exist.”²⁷

IV. SUBMISSIONS

A. THE ARTICLE 41(6)(B) FACTORS ARE NOT MET

1. Risk of Flight

13. Transfer of these proceedings to the Trial Panel is imminent.²⁸ A start date for the trial has not yet been proposed, but will likely not be far behind. At this juncture, when all eyes are on the accused, the likelihood of their seeking to evade justice and refuse to return to the court for trial is manifestly negligible.

14. The SPO again relies on Mr Thaçi’s “influence and authority” as being a factor that could aid him in absconding.²⁹ The simple repetition of this assertion, without more, is manifestly insufficient given the years that have now passed since it was first put forward. Mr. Thaçi is now in the weakest position of his political career. The reduction in his public stature is quantifiable. Hashim Thaçi could once win elections; today, his political party can no longer even attract enough support to become a viable opposition. For the SPO to continue to simply refer to his “influence and authority” without more is insufficient to justify an alleged risk of flight.

15. The SPO also then argues that, since the Fifth Detention Decision, Mr Thaçi has been informed of additional witnesses that the SPO intends to rely on, has received

²⁷ First Appeal Decision, para. 24.

²⁸ KSC-BC-2020-06/F01131, Notification Pursuant to Rule 98(3) of the Rules of Procedure and Evidence, 30 November 2022.

²⁹ SPO Submissions, para. 10.

updated witness and exhibit lists, and has also received extensive additional disclosures. On this basis, the SPO submits that Mr Thaçi's increased knowledge of the charges and the possibility of a serious sentence in the event of a conviction increases his risk of flight.³⁰ No reasonable Pre-Trial Judge could accept this as being reflective of the current position.

16. Since the Fifth Detention Decision, the Pre-Trial Judge has been provided with the Pre-Trial Brief of Mr Hashim Thaçi, filed on 21 October 2022.³¹ This brief sets out the Defence's preliminary submissions in response to the SPO's case against Mr Thaçi, as contained in the Indictment,³² SPO Pre-Trial Brief,³³ and the material disclosed. The Defence Pre-Trial Brief exposes widespread flaws in the SPO's theory of the case, and the absence of evidential support for its central accusations and alleged modes of responsibility.

17. A central theme of the Defence Pre-Trial Brief is the manifest misrepresentation of historical events by the SPO, which has presented its case against the accused in an contextual void. The Defence Pre-Trial Brief illustrates that the SPO has carved out allegations of otherwise disconnected crimes and put them at the centre of an alleged criminal conspiracy encompassing the entire Kosovo Liberation Army ("KLA"), consisting of a widespread and systematic attack against a civilian population, which has never been found to exist, and in fact has been explicitly rejected.

18. The Defence Pre-Trial Brief explains that the alleged joint criminal enterprise ("JCE") at the centre of the SPO's case includes categories as broad as "KLA members"

³⁰ SPO Submissions, para. 10.

³¹ KSC-BC-2020-06/F01050, Pre-Trial Brief of Mr Hashim Thaçi, 21 October 2022 ("Defence Pre-Trial Brief").

³² KSC-BC-2020-06/F00999/A02, Annex 2 – Confidential Redacted Version of Amended Indictment, 30 September 2022.

³³ KSC-BC-2020-06/F00709/A02/CONF, Annex 2 - Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief, 24 February 2022 ("SPO Pre-Trial Brief").

and “other KLA soldiers” as alleged JCE members. As such, the SPO case hangs on these thousands of people, who voluntarily joined the KLA, at the same time being part of the same common criminal purpose. Importantly, in doing so, the SPO has ignored entirely the chaotic and frenzied reality on the ground: tens of thousands of Kosovo citizens rising up against a campaign of Serb brutality and repression, at a rate that outpaced any attempts to organise, regularise or even act in coordination with the recognised KLA groups. With reference to the established law on JCE, the Defence Pre-Trial Brief explains why the SPO’s attempts to superimpose a framework of common purpose over a reality of utter chaos and instability, in order to link Mr Taçi to the disconnected and sporadic incidents of violence, is insufficient as a case theory, unsupported by the evidence disclosed, and cannot be reconciled with the reality of the events in question.³⁴

19. Equally concerning, the Defence Pre-Trial Brief gives concrete examples of sweeping statements concerning Mr Taçi’s liability which are unsupported by the evidence cited in the SPO Pre-Trial Brief.³⁵ For example, the allegedly sophisticated, coordinated and functioning General Staff, as presented by the SPO, exists nowhere in the evidence it cites in support. The case presented by the SPO exists only in hyperbole and the SPO’s own accusations, rather than the evidence disclosed in the present proceedings.

20. Since the Fifth Detention Decision, the Defence has also filed its Motion Justifying Request for Unique Investigative Opportunities,³⁶ and subsequent Addendum,³⁷ seeking to present the evidence of nine witnesses. During the

³⁴ Defence Pre-Trial Brief, paras. 93-98.

³⁵ Defence Pre-Trial Brief, paras. 80-84.

³⁶ KSC-BC-2020-06/F01068, Taçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 October 2022 (“Taçi Motion on Witnesses”).

³⁷ KSC-BC-2020-06/F01099/COR, Corrected Version of Addendum to Taçi Defence Motion Justifying Request for Unique Investigative Opportunities, 24 November 2022.

Indictment period, these nine witnesses were senior international diplomats, administrators and military figures serving in high level positions in NATO, OSCE, the UN, UNMIK, and [REDACTED]. They interacted with Mr Thaçi both on a professional and, in some cases, a personal level. They can each testify about matters that are central to the case against Mr Thaçi, including the structure of the KLA and General Staff and Mr Thaçi's role in both; the demilitarization and disarmament of the KLA after the war; and the causes and organised nature, or lack thereof, of the violence in 1999. While the Thaçi Motion on Witnesses has since been denied,³⁸ the Pre-Trial Judge is now aware that these central witnesses, who shaped the events in question, and have a unique vantage point and involvement, are willing to be called as witnesses on behalf of Mr Thaçi.

21. In deciding whether to continue to detain Mr Thaçi, the Pre-Trial Judge has an obligation, under Article 41(10) of the KSC Law, to examine whether the reasons for detention on remand still exist. This duty to determine whether the circumstances underpinning detention still exist requires the Pre-Trial Judge to assess whether, **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.³⁹

22. Against that backdrop, continuing to insist that Mr Thaçi's knowledge of the SPO case – even a case that continues to shift by reason of the SPO's untimely amendments to its Witness and Exhibit Lists – would prompt him to flee, is simply not credible. No reasonable Judge could assess the case file as it now exists, and continue to accept that Mr Thaçi, who surrendered to the Court, who has cooperated fully with it, and who has been open in his insistence on clearing his name, would

³⁸ KSC-BC-2020-06/F01125, Pre-Trial Judge, Decision on Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 November 2022.

³⁹ Third Detention Decision, para. 27.

now abscond because of the strength of the SPO case. Mr Thaçi is not a flight risk. The requirements of Article 41(6)(b)(i) of the KSC Law have not been met.

2. Risk of Obstruction of Proceedings

23. The Pre-Trial Judge has an obligation to determine whether the circumstances underpinning detention still exist. This element requires the Pre-Trial Judge to 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.⁴⁰

24. The SPO's examples of alleged obstruction of proceedings are now years old.⁴¹ The "persisting climate of intimidation of witnesses" that is repeated in all SPO submissions on detention, and each detention decision, must reasonably be balanced against the reality on the ground. Namely, that despite the voluminous disclosure in these proceedings, not one concrete example of witness intimidation or harassment can be levelled against Mr Thaçi since these allegations were first made. The repetition of outdated allegations must be tempered by the situation in December 2022. Mr Thaçi does not present a risk of obstructing the proceedings. The requirements of Article 41(6)(b)(ii) of the KSC Law have not been met.

3. Risk of Criminal Offences

25. The SPO cites the Pre-Trial Judge's prior finding on the risk of Mr Thaçi committing criminal offences, and submits that "[t]his remains true today, and there continues to be a risk that [Mr] Thaçi may commit international crimes."⁴²

⁴⁰ Third Detention Decision, para. 27.

⁴¹ SPO Submissions, para. 11.

⁴² SPO Submissions, para. 12.

26. In reality, the Pre-Trial Judge's findings on the risk of criminal offences concern offences against the administration of justice. The Pre-Trial Judge has found that Mr Thaçi has: (i) [REDACTED]; (ii) attempted to undermine the KSC 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 sympathizers; and (iv) an increased account of the SPO's case against him.⁴³

27. There is no indication that, in the past two years, Mr Thaçi has engaged his alleged networks or sympathizers, or used his purported ongoing influence and authority in Kosovo, in order to commit offences against the administration of justice. By stark contrast, Mr Thaçi has surrendered, and his engagement with the proceedings has been one of cooperation and a continued insistence that he intends to actively engage in order to clear his name. Continuing to rely on the same disputed claims without any consideration of the present situation will not allow the Pre-Trial Judge to meet his obligation to assess the specific circumstances of the case at the time the review takes place.⁴⁴

28. Detention of an accused prior to a conviction interferes with the right to liberty.⁴⁵ As such, it must be the exception rather than the rule, and strictly limited to what is necessary.⁴⁶ The KSC statutory regime establishes a presumption in favour of an accused being at liberty. The requirement that the Pre-Trial Judge examine, every

⁴³ Fifth Detention Decision, para. 39.

⁴⁴ Third Detention Decision, para. 27.

⁴⁵ KSC-BC-2020-06/IA004/F00005, Separate Concurring Opinion of Judge Kai Ambos, para. 3 ("Ambos Separate Opinion").

⁴⁶ ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20-169, Second Order on Disclosure and Related Matters, 2 October 2020, para. 10: "it is an established principle of international human rights law that the detention of a suspect prior to conviction is exceptional in nature and must be strictly limited to what is necessary". See also ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-321, Decision on Application for Interim Release, 16 December 2008, para. 31: "the fundamental principle that deprivation of liberty should be an exception and not a rule".

two months,⁴⁷ whether the reasons for detention still exist, reflects the exceptional nature of pre-trial detention, and how quickly the circumstances previously accepted as justifying detention can change.

29. The two-monthly review envisaged by the drafters must mean something more than simply repeating and relying on exactly the same factors that existed two years ago. A Pre-Trial Judge is required to turn his mind to the situation of the present day, in terms of the developing case file, the conduct of the accused, and the stage of the proceedings, and consider whether any indications still exist to continue to deprive accused of their liberty. This must require more than repeating the exact same reasoning. If this exercise is conducted in relation to Mr Thaçi, no reasonable conclusion could be reached that there is a risk he will commit criminal offences. The conditions of Article 41(6)(b)(iii) of the KSC Law have not been met.

B. CONDITIONS MITIGATE ANY RISKS

30. Mr Thaçi has agreed to submit to the most restrictive conditions of house arrest imaginable. In proposing to essentially recreate the prison environment in his own home in order to spend more time with his wife and son, Mr Thaçi has repeatedly proposed reasonable and realistic alternatives to incarceration in The Hague.⁴⁸ He has also provided the KSC with guarantees from third states willing to facilitate his provisional release and ensure his return to the court.⁴⁹

⁴⁷ KSC Law, Article 41(10).

⁴⁸ See, e.g., KSC-BC-2020-06/F00769, Thaçi Defence Submissions on Third Detention Review, 19 April 2022 (“Submissions on Third Detention Review”), paras. 27-31; KSC-BC-2020-06/F00570, Thaçi Defence Submissions on Second Detention Review, 16 November 2021 (“Submissions on Second Detention Review”), paras. 25-38.

⁴⁹ See, e.g., KSC-BC-2020-06/F00377, Thaçi Defence Submissions on Detention Review, 30 June 2021, paras. 32-39; Submissions on Second Detention Review, paras. 39-45; Submissions on Third Detention Review, paras. 32-38.

31. These proposed conditions more than mitigate any risks of flight, interference, and the commission of international crimes. They should be meaningfully considered and accepted.

C. DETENTION IS NOW DISPROPORTIONATE

32. Taking the above into consideration, it cannot be said that Mr Thaçi's detention remains proportionate, two years after his arrest.

33. The Pre-Trial Judge has recalled the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.⁵⁰ The Appeals Panel has directed that the length of pre-trial detention must be considered, along with the risks described in Article 41(6)(b) of the KSC Law, in order to determine whether "the continued detention stops being reasonable and the individual needs to be released".⁵¹ As such there is no dispute that, in every case, there will be a point at which continued detention stops being reasonable. Importantly, there is no burden on the Defence to establish undue delay on the part of the SPO. Rule 56(2) of the Rules requires only that the Pre-Trial Judge "ensure that a person is not detained for an unreasonable period prior to the opening of the case."

34. The length of the pre-trial phase in these proceedings is abnormal. The factors cited by the SPO to support its position that detention remains proportionate are aspects common to all international criminal trials.⁵² The gravity of the charges, the possibility of a lengthy sentence, or the fact that progress is being made to advance towards trial,⁵³ do not distinguish Mr Thaçi's case from that of any other accused before the other international courts and tribunals. To accept these as justification in

⁵⁰ Third Detention Decision, para. 95.

⁵¹ Second Appeal Decision, para. 49.

⁵² SPO Submissions, para. 17.

⁵³ SPO Submissions, para. 17.

the way the SPO proposes, would open the door to unlimited pre-trial incarceration for all defendants accused of international crimes, in a manner inconsistent with both past practice and international norms concerning the right to liberty and presumption of innocence.⁵⁴

35. In reality, to seek and obtain the arrest of an accused who continues to benefit from the presumption of innocence, and then take two years to formulate and disclose a case against him, falls far below the acceptable standards of either international or domestic prosecutions. It has led to a situation where Mr Thaçi's continued detention can no longer be considered reasonable. As such, it requires the Pre-Trial Judge to act pursuant to his obligation under Rule 56(2) of the Rules.

36. The SPO relies on the fact of bi-monthly detention reviews pursuant to Article 41(10) and Rule 57(2) of the Rules as a basis for continued detention, and its purported reasonableness. This reasoning is flawed. The system of bi-monthly review indicates the drafters' concern that pre-trial detention at the KSC should be the exception, with the Pre-Trial Judge being required to regularly assess whether, in the circumstances, pre-trial detention can continue. Relying on the fact that the next review is never far away should not be a justification to continue to detain an accused.

V. CONCLUSION & RELIEF SOUGHT

37. For a question as important as ongoing pre-trial incarceration, where the accused has been detained for more than two years, the SPO Submissions are incredibly brief. In essence, they do no more than simply repeat the same arguments that have been previously accepted as justifying detention, over Defence objections. Given the requirement on the Pre-Trial Judge to assess whether detention remains

⁵⁴ Ambos Concurring Opinion, para. 3.

warranted at the time of the review, and under the specific circumstances of the case when the review takes place,⁵⁵ this is manifestly insufficient.

38. The circumstances of the case have now changed. Since the time of the Confirmation Decision in October 2020, the proceedings have been dramatically altered by the shambolic process of pre-trial disclosure which has, despite its voluminous nature, revealed that the SPO case does not come close to its optimistic and unrealistic presentation in 2020. There is no indication of flight risk or interference, and Mr Thaçi continues to cooperate with the Court, and has agreed to submit to the most restrictive conditions of house arrest imaginable. More importantly, Mr Thaçi has now lost two years of his life to pre-trial incarceration, in the absence of any indication that the SPO has faced any of the risks outlined in its original submissions seeking to justify detention.

39. For all of these reasons, the Defence requests that the Pre-Trial Judge

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

[Word count: 4217 words]

Respectfully submitted,



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Wednesday, 14 December 2022

At Tampa, United States

⁵⁵ Third Detention Decision, para. 27.