

**In:** KSC-BC-2020-06  
**The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** **Trial Panel II**  
Judge Charles L. Smith, III, Presiding  
Judge Christoph Barthe  
Judge Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 29 September 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of Thaçi Defence Response to ‘Prosecution submission pertaining to periodic detention review of Hashim Thaçi’ (F01813)**

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## I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) has not filed submissions during the last three detention reviews. This decision was based, in part, on the consistent nature of the SPO submissions and Trial Panel decisions. The present SPO Submissions,<sup>1</sup> however, introduce new elements which warrant a response, and should be disregarded by the Trial Panel.

## II. PROCEDURAL HISTORY

1. On 5 November 2020, following the confirmation of an indictment<sup>2</sup> and issue of an arrest warrant,<sup>3</sup> Mr Thaçi resigned from his position as President of the Republic of Kosovo, voluntarily surrendered to KSC officials and was transferred to the KSC’s detention facility in The Hague.<sup>4</sup>

2. Since surrendering to the custody of the KSC, Mr Thaci has been detained for nearly three years. In this time, Mr Thaçi has had his detention reviewed on 10 occasions, including the initial application and four reviews adjudicated by the Pre-Trial Judge, as well as five reviews adjudicated by the Trial Panel. Three appeals were denied by Panels of the Court of Appeals Chamber. On each occasion, the relevant Panel have ordered Mr Thaçi’s continued detention.<sup>5</sup>

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<sup>1</sup> KSC-BC-2020-06/F01813, Prosecution submission pertaining to periodic detention review of Hashim Thaçi, 25 September 2023 (“SPO Submissions”).

<sup>2</sup> 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.

<sup>3</sup> KSC-BC-2020-06/F00027/A01/RED, Pre-Trial Judge: Public Redacted Version of Arrest Warrant for Hashim Thaçi, 26 October 2020.

<sup>4</sup> KSC-BC-2020-06/F00051, Registrar: Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020; KSC-BC-2020-06/F00065/Red, Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities, 8 November 2020, paras. 3-7.

<sup>5</sup> The Trial Panel noted in their most recent decision on detention that the procedural history has been set out extensively in previous decisions: *see*, KSC-BC-2020-06/F01720, Trial Panel II: Decision on Periodic Review of Detention of Hashim Thaçi, 16 August 2023 (“F01720”), para. 1.

3. The trial in this case commenced on 3 April 2023 with the presentation of opening statements. Since the evidentiary hearings commenced on 11 April 2023, the court has heard the testimony of 27 witnesses.

4. On 25 September 2023, in accordance with the timetable set by the Trial Panel,<sup>6</sup> the SPO filed its submissions for the eleventh review of detention, once again seeking the continued detention of Mr Thaçi.<sup>7</sup>

### III. APPLICABLE LAW

5. Article 41(6) of the KSC Law<sup>8</sup> provides that the KSC 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 KSC, 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.

6. Article 41(10) of the Law and Rule 57(2) of the Rules<sup>9</sup> provide that, until a judgement is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the 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.

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<sup>6</sup> F01720, para. 37(b).

<sup>7</sup> SPO Submissions, para.

<sup>8</sup> Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

<sup>9</sup> KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

#### IV. SUBMISSIONS

##### A. RISK OF FLIGHT (ARTICLE 41(6)(B)(I))

7. Mr Thaçi is not a flight risk. He has never been assessed by either the Pre-Trial Judge, or the Trial Panel, as being a flight risk. This conclusion accords with a consistent and now-lengthy pattern of his cooperation with these proceedings, starting with his most significant act of cooperation on 5 November 2020, being his resignation and voluntary surrender to the Court. The Trial Panel has now heard directly from Mr Thaçi that he intends to cooperate fully with these proceedings and defend the charges brought against him, rather than abscond. During the opening of the trial in April 2023, Mr Thaçi gave unsworn statement, and presented an overview of his previous cooperation with the ICTY, UNMIK and EULEX courts, which has been “in the interest of justice and has been totally transparent both in Pristine and in The Hague.”<sup>10</sup> These words are mirrored in his actions. Mr Thaçi appears and engages with the trial process, in a manner which is incompatible with a desire to abscond from justice and spend his life on the run.

8. In the last decision on his detention, on 16 August 2023, the Trial Panel confirmed, again, that “Mr Thaçi’s continued detention is not justified at this time based on the risk of flight.”<sup>11</sup> This conclusion correctly took into account Mr Thaçi’s ongoing presumption of innocence,<sup>12</sup> and his cooperation with the relevant authorities associated with his detention and transfer.<sup>13</sup> These factors have not changed. Importantly, the Trial Panel dismissed as unpersuasive the SPO’s general argument that the risk of flight increases in the context of the ongoing trial, and found that the

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<sup>10</sup> KSC-BC-2020-06, Transcript of Hearing (Opening Statements), 4 April 2023, p. 2350, ll. 10-13.

<sup>11</sup> F01720, para. 17.

<sup>12</sup> F01720, para. 15.

<sup>13</sup> F01720, para. 14.

SPO had failed to establish its claim of a “sufficiently real possibility” that the Accused will abscond if released based on the stage of the proceedings.<sup>14</sup>

9. The SPO has now come back on this question, and submits that “the continuation of trial takes the risk of flight to an even higher level, as [Mr] Thaçi now sees the evidence against him steadily entering the record. The combination of continuing to gain a fuller knowledge of the case against him and actually seeing inculpatory evidence enter the record elevates [Mr] Thaçi’s risk of flight to a ‘sufficiently real possibility’.”<sup>15</sup>

10. This argument is, again, unpersuasive. If indeed “actually seeing” evidence enter the record is a relevant consideration for risk of flight, Mr Thaçi had already spent four months seeing this evidence by the time of the previous Trial Panel decision on 16 August 2023, including the evidence of 16 SPO witnesses. The Defence also vigorously disputes that the evidence that Mr Thaçi is actually seeing is a steady flow of inculpatory evidence entering the record. This is not the forum for the parties to present their assessment of the SPO case so far. However, at a minimum, it cannot reasonably be submitted that the SPO evidence being presented in court, lines up with the characterisation of this evidence in its pre-trial written pleadings. The idea that Mr Thaçi would consider the stream of evidence entering the record as “inculpatory” is not a reasonable conclusion. SPO witnesses have repeatedly deviated in significant part from their prior statements, given objectively exculpatory evidence which undermines the SPO case, and have shown themselves as being unreliable, or unreliable on issues central to the charges.

11. The SPO’s attempt to find a new approach to the question of flight risk is again

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<sup>14</sup> F01720, para. 14.

<sup>15</sup> SPO Submissions, para. 9.

unpersuasive, and speculative. Mr Thaçi has never been a flight risk. It cannot reasonably be argued that the presentation of the SPO's case to date is enough to alter this reality, and give rise to a "sufficiently real possibility" that he will abscond if released.

B. RISK OF OBSTRUCTION OF PROCEEDINGS (ARTICLE 41(6)(B)(II))

12. The SPO's new submissions, addressing social media and press commentary about the public testimony of an SPO witness, are similarly unpersuasive.

13. There has never been any nuance to the way in which the SPO has presented the question of witness interference in the present case. The "climate of witness interference" has been central to the SPO's submissions on all aspects of witness protection, contact protocols, disclosure, and detention review.<sup>16</sup> The picture painted has been extreme, with the SPO citing a "persistent climate of intimidation of witnesses and interference with criminal proceedings" in all filings on detention.

14. The SPO now claims that the disclosure of highly sensitive information about upcoming witnesses, increases this already extreme risk. In particular, this disclosure will "amplify the risk of sensitive information pertaining to witnesses becoming known to members of the public before the witnesses in question give evidence", on

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<sup>16</sup> See, e.g., KSC-BC-2020-06/F01523/CONF/RED, URGENT Confidential Redacted Version of 'Request for protective measures for W03165', 15 May 2023, para. 2. KSC-BC-2020-06/F01365, Prosecution request for protective measures for W04589, W04591, W04871, and W04872, 13 March 2023, paras. 2, 6. KSC-BC-2020-06/F00094/CONF/RED, Confidential Redacted Version of 'Request for Protective Measures', 24 November 2020, para. 7; KSC-BC-2020-06/F01765, Prosecution request concerning post-testimony witness contacts, 4 September 2023, para. 3; KSC-BC-2020-06/IA024/F00013, Prosecution Response to Defence Appeals from Decision on Witness Contact Framework (F00854), 21 September 2022, para. 14; KSC-BC-2020-06/F01208/CONF/RED, Confidential Redacted Version of 'Prosecution submission pertaining to select delayed disclosure witnesses with strictly confidential and ex parte Annexes 1-3', 16 January 2023, paras. 4, 28-32; KSC-BC-2020-06/F01019, Prosecution disclosure report, 7 October 2022, para. 14; KSC-BC-2020-06/F01398, Prosecution Submission Pertaining to Periodic Detention Review of Hashim Thaçi, 27 March 2023, paras. 13-15, 21; KSC-BC-2020-06/F01235, Prosecution Submission Pertaining to Periodic Detention Review of Hashim Thaçi, 30 January 2023, paras. 15-17.

the basis that disclosure to the Defence necessarily results in it being known by the Accused.<sup>17</sup> This argument cannot work both ways. The risk of Mr Thaçi knowing about witness identities was the justification for keeping witness particulars from the Defence and accused in the pre-trial phase through a regime of delayed disclosure. Now that Mr Thaçi has received information concerning the first 40 witnesses, it is not open to the SPO to argue that this disclosure continues to amplify the risk of obstruction, without showing how. For this argument to be persuasive, the SPO would need to demonstrate that, because of this disclosure of witness particulars, witnesses were in fact intimidated or threatened or even contacted. The SPO has presented no such information.

15. Instead, the SPO points to the [REDACTED] which followed the testimony of W04018, a witness who testified publicly,<sup>18</sup> [REDACTED].<sup>19</sup> There is no suggestion, nor could one be made, that Mr Thaçi was responsible for this public commentary. Social media and press coverage of the testimony of both Prosecution and Defence witnesses in the situation country is by no means unique to these proceedings. The ICC has previously been required to take steps to address members of the public, bloggers, and journalists, who were in the public gallery or following proceedings on the internet, who posted live commentary about confidential information mistakenly revealed,<sup>20</sup> or who posted names of protected witness on Facebook and Twitter;<sup>21</sup>

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<sup>17</sup> SPO Submissions, para. 14.

<sup>18</sup> SPO Submissions, para. 12.

<sup>19</sup> [REDACTED].

<sup>20</sup> See, e.g., The Guardian, '[ICC to probe 'outing' of secret witnesses in Gbagbo case](#)', 6 February 2016: "Certain bloggers, journalists and members of the public" following the case in the public gallery or on the Internet are "posting live commentary" about the case on Twitter; Open Society Justice Initiative, '[Witness Interference in Cases before the International Criminal Court](#)', November 2016.

<sup>21</sup> Judie Kaberia, '[ICC Cases Threatened by Social Media Leaks](#)', *IWPR*, 19 October 2021: "The concern comes after one Twitter user – known as a tweep – published the names of protected witnesses due to testify in cases against those accused of orchestrating the post-election violence in Kenya in 2007 and early 2008. The witnesses' names were published despite being classified by judges as confidential in order to protect their safety."

situations which were objectively more serious than the comments cited by the SPO in relation to W04018's public testimony.

16. Importantly, where members of the press or public are commenting about the public testimony of a witness, even where those comments are offensive or incorrect, this does not give rise to a greater risk that Mr Taçi himself will obstruct the proceedings if released. The SPO's new attempt to link his detention to press and social media reports should also be dismissed.

**[Word count: 2039 words]**

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

**Gregory W. Kehoe**

**Counsel for Hashim Taçi**

Friday, 29 September 2023

At The Hague, The Netherlands