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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
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Public Redacted Version of 'Thaçi Response to 'Prosecution motion for admission of Accused's statements''

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I. INTRODUCTION

1. On 8 March 2023, the Specialist Prosecutor's Office ("SPO") filed the 'Prosecution motion for admission of Accused's statements',[1] seeking the admission of 31 prior interviews, statements or testimony of the four accused, and associated materials. The SPO has not specified in its Motion the way in which it intends to 'use' these materials if admitted.

2. On 16 March 2023, following a joint application by the Defence teams for Mr Hashim Thaçi, Mr Rexhep Selimi and Mr Jakup Krasniqi, the Chamber granted the defence an extension of time to respond.[2] On 17 February 2023, the word limit for any Defence response was increased to 12,000 words.[3] On 17 April 2023, the Chamber granted the Defence a further extension of time to respond[4] following an application by the Defence for Mr Hashim Thaçi ("Defence").[5]

3. The Defence for Mr Hashim Thaçi ("Defence") hereby responds to the SPO Motion pursuant to Article 21(4) of the KSC Law,[6] and Rules 76, 138 (1-2), and 154 of the Rules.[7] It objects to the *admission* of some of Mr Thaçi's prior statements and to the *use* of the statements of his co-accused against him.

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[1] KSC-BC-2020-06/F01351, Prosecution motion for admission of Accused's statements, 8 March 2023, Public ("SPO Motion").
[2] KSC-BC-2020-06/F01378, Trial Panel II, Decision on Thaçi, Selimi and Krasniqi Defence Request for an Extension of Time for Response to 'Prosecution Motion for Admission of Accused's Statements', 16 March 2023, paras. 7, 8(b).
[3] KSC-BC-2020-06/F01304, Trial Panel II, Decision on Prosecution Request for Extension of Words to File Motion for admission of Prior Statements of the Accused, 17 February 2023, paras. 13, 15(a).
[4] KSC-BC-2020-06, Transcript of Hearing, 17 April 2023, Oral Order, pp. 2955-2957.
[5] KSC-BC-2020-06/F014, Thaci Request for an Extension of Time for Response to Prosecution Motion for Admission of Accused's Statements', 17 April 2023.
[6] Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").
[7] KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

4. This filing is filed confidentially as it refers to confidential information. A public redacted version will be filed shortly.

II. APPLICABLE LAW

5. The Defence agrees with the SPO that there is no specific provision in either the KSC Law or the Rules that governs the admissibility of an accused's previous statements. Consequently, the general admissibility provisions in the KSC Rules and Law, together with the relevant Kosovo law, apply. They are as follows:

Rule 137(1) provides that: "[T]he Parties may submit evidence relevant to the case….". Rule 137(2) provides that a Panel has discretion to freely assess evidence to determine its admissibility and weight.

Rule 138(1) provides that:

> "[U]nless it is challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect. …" [8]

Rule 138(2) provides for an exclusionary rule for evidence obtained by means of a violation of the Law or Rules or standards of international human rights:

> Evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law shall be inadmissible if:
>
> (a) The violation casts substantial doubt on the reliability of the evidence; or
> (b) The admission of the evidence would be antithetical to or would seriously damage the integrity of proceedings.

[8] *See also: Prosecutor v. Mustafa*, KSC-BC-2020-05/F00169, Trial Panel I, Decision on the submission and the admissibility of evidence, 25 August 2021 ("*Mustafa* Decision"), para. 13.

6. Article 37 of the KSC Law governs the admission of evidence obtained prior to the establishment of the KSC. It provides at the relevant part:

> 1. Evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by any national or international law enforcement or criminal investigation authority or agency including the Kosovo State Prosecutor, any police authority in Kosovo, the ICTY, EULEX Kosovo or by the SITF may be admissible before the Specialist Chambers. Its admissibility shall be decided by the assigned panels pursuant to international standards on the collection of evidence and Article 22 of the Constitution. The weight to be given to any such evidence shall be determined by the assigned panels.
> 2. In principle, all evidence should be produced in the presence of the accused with a view to adversarial argument. Exceptions may be provided in the Rules of Procedure and Evidence adopted pursuant to Article 19 in compliance with human rights standards.
>   a. Subject to judicial determination of admissibility and weight in paragraphs 1 and 2, transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY Rules of Procedure and Evidence may be admissible before the Specialist Chambers provided that the testimony or deposition is relevant to a fact at issue in the proceedings before the Specialist Chambers;
>   b. transcripts of testimony of witnesses given before a Kosovo court, including pre-trial testimony or testimony preserved as part of a Special Investigative Opportunity under any criminal procedure code applicable in Kosovo at the relevant time, may be admissible before the Specialist Chambers, regardless of whether the judges sitting on the Panel heard the original testimony;
>   c. […]
>   d. […]
> 3. […]
> 4. When deciding on the relevance or admissibility of evidence collected by a State or State authorities other than Kosovo or its authorities, the Specialist Chambers shall not rule on the application of another State's national law.

7. Article 22 of the Constitution of Kosovo (referred to in Article 37(1) of the KSC Law) directly applies various international human rights treaties, including the ECHR and the ICCPR.

8. The applicable law on the use as opposed to the admission of an accused previous statement is dealt with below at paragraphs 36 to 46.

III. SUBMISSIONS – ADMISSION OF MR THAÇI'S STATEMENTS

A. MR THAÇI'S JANUARY 2020 SPO INTERVIEW

9. The Defence objects to the admission of the SPO's January 2020 interview of Mr Thaçi as a suspect and its related exhibits, pursuant to Rule 138(2).[9] The Defence submits that Mr Thaçi was not sufficiently put on notice by the SPO of the charges he could potentially face at the KSC before deciding to waive his right to silence and to counsel. For the reasons set out below, this breached his rights as a suspect to be properly informed of the case against him, to remain silent and to free legal assistance protected under Articles 38(a)-(c) of the Law guaranteed under Article 30 of the Constitution of Kosovo and international human rights law, namely Article 6(3) ECHR, and Article 14(3) ICCPR.[10] The admission of this interview into evidence would be antithetical to or would seriously damage the integrity of proceedings, and the Defence challenges its admission under Rule 138(2).

1. Rights of Suspects at the KSC

10. At the time of his interview, Mr Thaçi was a suspect and was accorded certain rights pursuant to Article 38(3) of the Law, Rules 42-44 of the Rules, and international human rights law, which are set out below.

11. Article 38(3) of the Law provides that:

[9] 071840-TR-ET (Parts 1-9); 071840-TR-AT Revised (Parts 1-9); 071793-071793, 071793-071793-ET; 071794-071839.

[10] In addition, in both of his SPO interviews, the SPO advised Mr Thaçi that if he gave a statement that was untruthful, he could be prosecuted before the KSC pursuant to Article 15(2) of the KSC Law. There is no legal basis in the KSC Law or Rules for the SPO to prosecute a suspect for giving an untruthful statement. Since the KSC's legal framework does not regulate this matter explicitly, the Kosovo Criminal Procedure Code should be applied pursuant to Rule 4(1). The SPO acted improperly by giving Mr Thaçi this warning in direct contradiction with Article 125(3) of the Kosovo Criminal Procedure Code.

> 3. If questioned, the suspect shall not be compelled to incriminate himself or herself or to confess guilt. […] He or she shall have the following rights of which he or she shall be informed prior to questioning, in a language he or she speaks and understands:
>
> a. The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Specialist Chambers;
>
> b. The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;
>
> c. The right to be assisted by Specialist Counsel of his or her own choosing and to be questioned in the presence of Specialist Counsel, including the right to have legal assistance provided by the Specialist Chambers without payment by him or her where he or she does not have sufficient means to pay for it.

12. Article 30 of the Constitution of Kosovo provides as follows:

> Everyone charged with a criminal offense shall enjoy the following minimum rights:
>
> (1) to be promptly informed, in a language that she/he understands, of the nature and cause of the accusation against him/her;
> (2) to be promptly informed of her/his rights according to law;
> (3) to have adequate time, facilities and remedies for the preparation of his/her defense;
> (4) to have free assistance of an interpreter if she/he cannot understand or speak the language used in court;
> (5) to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel;
> (6) to not be forced to testify against oneself or admit one's guilt.

13. Under Article 6(3)(a) ECHR, everyone charged with a criminal offence has the right, *inter alia*, to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. A 'criminal charge' exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, *or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him*.[11] The ECtHR has previously held that a suspect questioned about

[11] ECtHR, *Beuze v. Belgium*, 71409/10, Grand Chamber, Judgment, 9 November 2018 ("*Beuze* Judgment"), para. 119.

his involvement in acts constituting a criminal offence can be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the ECHR.[12]

14. Although not specifically mentioned in Article 6 of the ECHR, the Court has found that "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6".[13]

15. Importantly, the rights of a suspect to be informed of the charges against him is intrinsically linked to his ability to make an *informed* and *voluntary* choice to waive their right to legal counsel and their right to silence.[14] A Trial Chamber of the ICTY has held that "a suspect should be informed of the nature of the investigation prior to an interview in order to make an informed decision about the waiver of his rights".[15] There is a heavy burden on the prosecution to demonstrate that a suspect "voluntarily waived" a right to counsel.[16]

16. Similarly, under Article 14(3)(a) of the ICCPR, people who are facing criminal charges shall be entitled "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".

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[12] ECtHR, *Zaichenko v. Russia*, 39660/02, First Section, Judgment, 18 February 2010 ("*Zaichenko* Judgment"), paras. 41-43. *See also,* KSC, *Prosecutor v. Shala*, KSC-BC-2020-04/F00364, Trial Panel I, Public redacted version of Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2002 ("*Shala* Decision"), para. 24.
[13] ECtHR, *Murray v. The United Kingdom*, 14310/88, Grand Chamber, Judgment, 8 February 1996, para. 45. See also, *Shala* Decision, para. 25.
[14] *Shala* Decision, para. 27, citing ECtHR, *Pishchalnikov v. Russia,* 7025/04, First Section, Judgment, 24 December 2009, paras. 77-79.
[15] ICTY, *Prosecutor v. Haraqija & Morina*, IT-04-84-R77.4-A, Appeals Chamber, Judgement, 23 July 2009, para. 37.
[16] ICTY, *Prosecutor v Delalić et al.,* IT-96-21, Trial Chamber, Decision On Zdravko Mucic's Motion For The Exclusion Of Evidence, 2 September 1997, para. 42.

2. *In the circumstances of his SPO interview, Mr Thaçi's rights as a suspect were violated and the interview should not be admitted in evidence*

17. First, the Defence submits that when Mr Thaçi was questioned by the SPO in January 2020 about his involvement in acts constituting a criminal offence, his rights were *substantially affected*. Consequently, pursuant to Article 30 of the Kosovo Constitution and Article 6 of the ECHR, he had the right to be properly informed, in detail of the nature and cause of the accusations against him.[17] He was not.

18. Rather, at the start of this interview, the SPO informed Mr Thaçi very generally that it was "investigating allegations of serious international and transboundary crimes in Kosovo and parts of the Republic of Albania between 1998 and 2000."[18] The SPO did not inform him in any further detail about the case against him, including who it suspected he had committed crimes with or what these crimes were. Following this very vague statement, and having been read his rights, Mr Thaçi confirmed that he was content to answer the SPO's questions without an attorney.[19] The Defence submits that the SPO's failure to sufficiently inform Mr Thaçi in any meaningful detail about the crimes it suspected him of committing meant he could not make a fully informed choice to waive his right to counsel and thus constitutes a breach of that right. This caused irretrievable prejudice in breach of his rights and is a basis for the exclusion of this interview.

19. Second, the stage at which this interview took place is relevant to the level of detail that Mr Thaçi was entitled to about his alleged crimes *before* he waived his right to counsel.

[17] See, authorities at footnotes 11 and 12 above.
[18] 071840-TR-ET Part 1, p. 2.
[19] 071840-TR-ET Part 1, p. 3.

20. In *Shala*, Trial Panel I found that it was sufficient for a suspect to be told in general terms of the nature and cause of the allegations against him, in order for the Accused to make an informed decision about the waiver of his rights, at the point when "charges are yet to be defined and the contours of the case are yet to be drawn".[20]

21. Similarly, the *Haraqija & Morina* Trial Chamber of the ICTY held that the right under Article 14(3)(a) ICCPR to be informed promptly and *in detail* in a language which he understands of the nature and cause of the charge against him did not apply to a suspect when the Trial Chamber was satisfied that interview was "part of the Prosecution's fact-gathering process to determine which, if any, charges should be brought against him".[21]

22. While it is not known exactly when the investigation commenced for this case, the first investigation into the allegations in the Marty Report was initiated by the Special Investigative Task Force ("SITF") in 2011. In 2014, the SITF stated that it had gathered enough evidence to support indictments. The KSC and the SPO were then established in 2015, and assumed responsibility for the investigations started by the SITF.[22] The SPO submitted the indictment in the current proceedings for confirmation on 24 April 2020.[23] Therefore, on any view, this interview took place at the final stages of the SITF/SPO's investigation into Mr Thaçi. It can be reasonably inferred that the SPO had already formed the contours and details of the case against him in January 2020 and, given the date and its proximity to the date the indictment was sent to the Pre-Trial Judge for confirmation, it would be disingenuous to suggest that it was

[20] *Shala* Decision, para. 32 (emphasis added).
[21] ICTY, *Prosecutor v. Haraqija & Morina*, IT-04-84-R77.4, Trial Chamber I, Decision on Bajrush Morina's Request for a declaration of inadmissibility and exclusion of Evidence, 28 August 2008 ("*Morina* Decision"), para. 30 (emphasis added).
[22] For a detailed chronology, see KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021, paras. 56-59.
[23] *See* KSC SPO, 'Press Statement', 24 June 2020, available at https://www.scp-ks.org/en/press-statement ("June Press Statement").

merely part of a *fact finding process*. As such the SPO could and should have informed Mr Thaçi in much more detail about what he was suspected of doing and with whom, to enable him to take an informed view of whether he wished to retain an attorney or speak to the SPO at all especially given the gravity of the charges. Rather, the SPO was purposely vague, which breached Mr Thaçi's rights as a suspect as guaranteed under Article 38 of the Law, Article 30 of the Kosovo Constitution and international human rights law. Admission of this interview in such circumstances would, pursuant to Rule 138(2) of the Rules, be antithetical to and would seriously damage the integrity of the proceedings. The Defence therefore submits it should not be admitted. Further, pursuant to Rule 138(1), to admit this evidence would adversely affect the fairness of the proceedings as it was obtained in breach of Mr Thaçi's constitutional and legal rights as a suspect and thus its probative value would be outweighed by its prejudicial effect.

3. Admission of Exhibits

23. The SPO seeks to admit a number of exhibits referred to in this interview into evidence as 'integral' parts of the interview. The admission of such exhibits is largely parasitic on whether the interview itself is admitted. However, this position is subject to four exceptions: first, exhibits that the SPO has sought inclusion of, but which were not utilised in the interview; second, exhibits whose authenticity is in doubt; third, exhibits which are dated or relate to matters that are outside the temporal jurisdiction of the indictment; and fourth, exhibits that Mr Thaçi had no knowledge of. If this interview is admitted, then it is submitted that these exhibits should be excluded. They are as follows:

(i) exhibits that were not referred to: Exhibit 10, Exhibit 12 [REDACTED], Exhibit 14;

(ii) exhibits that lack authenticity: Exhibit 2;[24]

(iii) exhibits which are dated or relate to matters that are outside the temporal jurisdiction of the indictment, Exhibits 3, 4, 5, and 6; and

(iv) exhibits that Mr Thaçi had no knowledge of: Exhibits 3, 4, 5, 6 and 7.

24. Further, Exhibits 3, 4, 5, 6, 7 and 12 are communiques. According to the case law,[25] they cannot be considered to be an inseparable and indispensable part of Mr Thaçi's interview as either no questions were asked of them (Exhibit 12) or Mr Thaçi said he had no knowledge of them (Exhibits 3, 4, 5, 6[26] and 7[27]). This is a bar to their admissibility. Moreover, the Trial Panel is aware that the Defence challenges the authenticity and reliability of communiques more generally[28] and so it is not the proper way for the SPO to tender them as Mr Thaçi said he had no knowledge of them and did not confirm their authenticity and/or reliability. Accordingly, these items should not be admitted as associated exhibits.

B. MR THAÇI'S JULY 2020 SPO INTERVIEW

25. The Defence objects to the admission of the SPO's July 2020 interview of Mr Thaçi as a suspect and related exhibits, pursuant to Rule 138(2).[29] Specifically, the Defence submits that Mr Thaçi was not sufficiently put on notice of the charges he

[24] 071840-TR-ET Part 5, pp. 1-3.

[25] ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Motion for Admission of Evidence of GH-003 Pursuant to Rule 92 *ter*, 18 October 2012, paras. 4-5; *Prosecutor v. Djordjević*, IT-05-87/1-T, Trial Chamber II, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter*, 10 February 2009, para. 5; *Prosecutor v. Stanisic & Zupljanin*, IT-08-91-T, Trial Chamber II, Public Redacted Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 *ter* (ST012 and ST019), 2 October 2009, para. 5. See also KSC-BC-2020-06/F01380, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, 16 March 2023, paras 24, 52, 54.

[26] 071840-TR-ET Part 5, pp. 11-18.

[27] 071840-TR-ET Part 6, pp. 5-6.

[28] See Defence challenge more generally to communiques: KSC-BC-2020-06/F01387, Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table, 21 March 2023, paras. 16-17.

[29] 076563-TR-ET (Parts 1-21), 076563-TR-AT (Parts 1-21), 076565-076705, 076565-076565-ET, 076603-076603-ET, 076630-076630-ET, 076642-076642-ET.

could potentially face at the KSC before deciding to waive his right to silence protected under Articles 38(a)-(b) of the Law, Article 30 of the Kosovo Constitution and international human rights law, namely Article 6(3) ECHR, and Article 14(3)(a) ICCPR.[30] As such, his rights as a suspect were violated. In these circumstances, the admission of this interview into evidence would be antithetical to or would seriously damage the integrity of proceedings and the Defence challenges its admission under Rule 138(2) for the reasons set out below.

26. First, when Mr Thaçi was questioned by the SPO in January 2020 about his involvement in acts constituting a criminal offence, his rights were *substantially affected*. Consequently, pursuant to Article 6 ECHR he had the right to be properly informed in detail of the nature and cause of the accusations against him.[31] He was not.

27. Rather, at the start of the interview, the SPO informed Mr Thaçi that it was "investigating allegations of serious international and transboundary crimes in Kosovo and parts of the Republic of Albania between 1998 and 2000."[32] He was then informed that there were grounds to believe he had "been involved in the commission of a crime within the jurisdiction of" the KSC, and was advised of his right to remain silent.[33] Mr Thaçi had availed himself of an attorney for this interview and proceeded to answer the questions asked.

28. However, at the date of this interview the SPO had *already* filed the Indictment for confirmation and issued a press release regarding the same.[34] Therefore, the charges against Mr Thaçi were defined and the specifics of the case against him were

[30] See paragraphs 13-16 above.
[31] See paragraph 13 above.
[32] 076563-TR-ET Part 1, p. 2.
[33] 076563-TR-ET Part 1, pp. 2-3.
[34] *See* June Press Statement.

drawn up. In such circumstances, this interview cannot be considered as merely part of the SPO's fact-finding process.[35] At this stage in the proceedings it is submitted, relying on *Shala* above,[36] that it was insufficient to inform Mr Thaçi in such general terms of the nature and cause of the suspicions against him especially when, as detailed below, he was asked about events that form specific charges in the Indictment. By doing so, he was deprived of the opportunity to make an informed choice to waive his right to silence in breach of Article 38 and international human rights standards. Indeed the SPO questioned him about members of the JCE he is charged with, without putting him on notice that he was to be charged with them before he chose to answer.[37] Further the SPO questioned him about matters that are the subject of the charges he faced without telling him, when at that stage they knew. For example, Mr Thaçi was asked if he knew of the existence of any locations used by members of the KLA to hold civilians against their will legally, illegally or otherwise in 1998-1999. The SPO took Mr Thaçi through site after site charged in the Indictment, but at no stage informed him that these were the charges against him.[38] The SPO also questioned Mr Thaçi about the arrest and detention of two Serb journalists, Nebojsa Radosevic and Vladimir Dobricic,[39] and the disappearance and death of [REDACTED]. Each of these are linked to crimes charged in the indictment, but the SPO failed to inform him of this.[40]

29. In these circumstances, admission of this interview would, pursuant to Rule 138(2) of the Rules, be antithetical to and would seriously damage the integrity of the proceedings and thus the Defence submit it should not be admitted. Further, pursuant

[35] *Morina* Decision, para. 30.
[36] See para. 20 above.
[37] *See, for example,* questioning regarding Sabit Geci, 076563-TR-ET Part 7, pp. 13-17; Jakup Krasniqi, 076563-TR-ET Part 8, pp. 5-14; Rexhep Selimi, Part 8, p. 14; Rexhep Selimi, 076563-TR-ET Parts 15-16.
[38] 076563-TR-ET Part 11, pp. 1-7. See also detailed questions regarding expulsion and disappearance of Serbs, 076563-TR-ET Part 11, pp. 8-11.
[39] 076563-TR-ET Part 3, pp. 7-10; and Part 14.
[40] 076563-TR-ET Part 15.

to Rule 138(1), admission of this evidence would adversely affect the fairness of the proceedings as it was obtained in breach of Mr Thaçi's rights as a suspect and thus its probative value would be outweighed by its prejudicial affect.

1. Admission of Exhibits

30. The SPO seeks to admit a number of exhibits referred to in this interview into evidence as 'integral' parts of the interview. The admission of such exhibits is parasitic on whether the interview itself is admitted and so the Defence does not make separate submissions regarding their admission on the basis that if the interview is admitted then the exhibits will be too. However, this is subject to one exception: exhibits whose authenticity is in doubt. If this interview is admitted, then it is submitted that these exhibits should be excluded. The exhibits for which authenticity is in doubt are as follows: Exhibit 16,[41] Exhibit 19,[42] Exhibit 20,[43] Exhibit 21,[44] Exhibit 22,[45] Exhibit 23,[46] and Exhibits 24/25.[47]

C. INVESTIGATORS NOTES OF MR THAÇI'S MAY 2004 ICTY INTERVIEW

31. The Defence objects to the admission of Mr Thaçi's so-called 'statement' to the ICTY as a witness in May 2004. It is not in fact a statement; it is the notes of the investigator who interviewed Mr Thaçi. There is no verbatim transcript nor an audio or video recording of this evidence available. There is therefore no way to be certain that it is a complete record of what Mr Thaçi said. Indeed the notes have a disclaimer stating that "These notes are not intended to constitute a comprehensive/

[41] 076563-TR-ET Part 4, pp. 9-10.
[42] 076563-TR-ET Part 7, pp. 2-4.
[43] 076563-TR-ET Part 7, pp. 4-5.
[44] 076563-TR-ET Part 7, pp. 8-9.
[45] 076563-TR-ET Part 7, pp. 10-11.
[46] 076563-TR-ET Part 7, pp. 12-13.
[47] 076563-TR-ET Part 8, pp. 1-3. See also the Defence's general challenge to communiques referred to in footnote 28 above.

contemporaneous record of interview, but a summary of the most relevant and important points". It goes on to say, "[t]hese notes are drafted on my personal recollection of the interview".[48] In his Second SPO interview, Mr Thaçi confirmed that he had received a copy of the document as was indicated by his signature. He pointed out that it was not his full interview as the audio recording had had a technical issue. He was not given a copy of the whole interview where the questions and answers would have all been noted. Instead it was actually the notes of the ICTY investigators and he distanced himself from it.[49]

32. In the case of *Halilović,* an ICTY Trial Chamber held that the 'statement' of an accused comprising a summary of seven days of interviews, taken when he was a witness, five years before he was indicted, was not admissible. The Trial Chamber found that while it was a "general reflection" of what he had said, it was "not satisfied that the Statement represents a full and complete record of what [the Accused] said".[50] It found it was more probable than not that not every detail or nuance of the interview would have been included, therefore affecting the reliability of the statement. As the statement was not audio or video recorded, its accuracy could not be verified.[51] Similarly, in this case, in the absence of an audio or video recording of this interview, there is no way for the Defence to test the accuracy of the statement, bringing its reliability into doubt.[52] This can only be rectified if the statement taker is called as a witness, which they are not.

33. Consequently, the admission of this document could threaten the fairness of proceedings and it must be excluded under Rule 138(1).

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[48] U008-1957-U008-1967, U008-1968-U008-1979.
[49] 076563-TR-ET Part 10, pp. 14–16. *See also*, 071840-TR-ET Part 7, p. 2.
[50] ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005 ("*Halilović* Decision"), para. 25.
[51] *Ibid*.
[52] *See also*, ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Appeals Chamber, Judgement, 16 October 2007, para. 39.

D. MR THAÇI'S SPRK STATEMENTS

34. The Defence does not object to the admission of Mr Thaçi's SPRK suspect interview in May 2016;[53] or his witness statements in the SPRK investigations against Arben Krasniqi et al (November 2011)[54] or 'NN et al.' (July 2018).[55] However, it notes that there was an error in the recording of his answer to question 27 of his November 2011 statement which wrongly states that Mr Thaçi was inspecting the KLA's military operations. He was not and he corrected this in his interview with the SPO in July 2020.[56]

IV. SUBMISSIONS – ADMISSION AND USE OF STATEMENTS OF CO-ACCUSED

35. The Defence will not make submissions about the *admission* of the out of court statements of Mr Thaçi's co-accused contained in the SPO Motion. This is a matter to be litigated by those accused rather than by Mr Thaçi, as the Thaçi Defence cannot take instructions from them about their statements' authenticity or the circumstances in which they were taken to determine if they were taken by means of a violation of the KSC Law or the Rules or standards of international human rights law, which are relevant for any application for their exclusion under Rule 138. Rather, this is a matter to be litigated by the accused who gave the statements as this Defence team has done on behalf of Mr Thaçi above. Moreover, the Defence acknowledges the Trial Panel's previously stated position that "the admission of a record or statement made by an

[53] 051716-051719-ET, 051716-051719
[54] SITF00009007-00009016.
[55] SPOE00213717-SPOE00213719- ET, SPOE00213717-SPOE00213719.
[56] 076563-TR-ET Part 18, pp. 6-12, re Exhibit 41.

accused does not, without more, infringe upon the fundamental rights of his co-defendants."[57]

36. However, the Defence does challenge the future *use* of such statements by the SPO or the Trial Panel as evidence of any critical element of the prosecution case, unless corroborated or as evidence of the acts or conduct of Mr Thaçi. In this regard the Defences observes that it does not know exactly how the SPO intends to use the statements of the co-accused against Mr Thaçi as it was silent as to this in its Motion. Consequently, the Defence preserves its right to make future submissions about this in due course when the SPO makes its position clear.

A. RELEVANT JURISPRUDENCE

37. Authority for the Defence position that the out of court statements of Mr Thaçi's co-accused cannot be used as evidence of any critical element of the prosecution case, unless corroborated or as evidence of the acts or conduct of Mr Thaçi can be found in the caselaw of international tribunals and domestic jurisdictions set out below.

1. International Tribunals

38. The ICTY Appeals Chamber in *Prlić,* upheld the Trial Chambers' decision that, while witness interviews of a co-accused are admissible, they cannot be used as evidence of any critical element of the prosecution case, unless corroborated.[58] This is wider than 'acts and conduct of the accused'. Relying on ECHR jurisprudence, the Appeals Chamber noted that it would result in

> unacceptable infringements of the rights of the defence … if a conviction was based solely, or in a decisive manner, on the depositions of a witness whom the accused has

[57] KSC-BC-2020-06/F01380, Trial Panel II, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, 16 March 2023, Confidential, para. 50.
[58] ICTY, *Prosecutor v Prlić et al.*, IT-04-74-AR73.6, Appeals Chamber, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlic's Questioning Into Evidence, 23 November 2007, paras. 57, 59, 60 (emphasis added).

> had no opportunity to examine or to have examined either during the investigation or at trial.[59]

39. In *Sainovic et al*, the ICTY Trial Chamber i) admitted into evidence at large the interviews of one accused who decided to testify and ii) used the interviews of the other accused who chose not to testify as evidence in relation to the accused who gave the interview on any matter affecting the case for or against him, but were taken into account in relation to co-accused only on matters not going to the acts and conduct or state of mind of the co-accused.[60]

40. In *Karemera et al.*, an ICTR Trial Chamber excluded the admission of audio recordings and the transcripts thereof of the interview with the one accused, Mathieu Ngirumpatse, primarily on the basis that he had not been fully informed of the case against him before giving the statements. However, they also held that that it would be antithetical to the integrity of the proceedings to admit into evidence the part of the accused's testimony that concerns the co-accused before the accused had indicated a decision to testify in his own defence.[61] In reaching this decision, the Chamber noted:

> that the transcripts indeed show that Mathieu Ngirumpatse gave information about the Co-accused, in particular about the power struggle between Joseph Nzirorera and himself and that it seems unlikely that Joseph Nzirorera would fully agree on his version of events.[62]

41. The ICC has followed the *ad-hoc* Tribunals in its approach to the use of the statements of co-accused. In *Katanga*, the Trial Chamber held that an accused's testimonial statement (i.e. a statement that has as its primary purpose to establish

[59] *Ibid*, para. 53.
[60] ICTY, *Prosecutor v. Sainović et al.*, IT-05-87-T, Trial Chamber, Judgement, 26 February 2009, para. 42.
[61] ICTR, *Prosecutor v. Karemera & Ngirumpatse*, ICTR-98-44-T, Trial Chamber III, Decision On Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera And Matthieu Ngirumpatse", 2 November 2007, paras. 44-46.
[62] *Ibid*, para. 45.

evidence for use in a future prosecution) is not admissible against another co-accused to prove any fact involving "another co-accused."[63]

2. Domestic Jurisprudence

42. The Defence adopts and incorporates the recent Veseli Defence survey of domestic law and jurisprudence concerning the admission and use of out of court statements of co-accused against each other. This was contained in filing F01414 and relates to the legal position regarding such statements in Kosovo, the UK, the USA, Ireland, Canada and Germany.[64]

3. The Statements of Mr Thaçi's co-accused should not be used as evidence of any critical element of the prosecution case, unless corroborated or as evidence of the acts or conduct of Mr Thaçi.

43. The Defence observes that Mr Thaçi's co-accused are not witnesses in this case and there is no requirement that they give evidence. Consequently, the Defence submits, relying on the case law cited above, that their statements, if admitted, cannot be used as evidence of any critical element of the prosecution case, unless corroborated or as evidence of the acts or conduct of Mr Thaçi.

44. Having reviewed the out of court statements of the co-accused that the SPO seeks to admit, the Defence takes particular exception to the use of the SPO interviews of Rexhep Selimi in November 2019[65] and February 2020[66] as evidence of the truth of their contents in so far as the acts and conduct of Mr Thaçi are concerned. In these two interviews to the SPO, Mr Selimi gives extensive evidence about the acts and conduct

[63] ICC, *Prosecutor v. Katanga & Ngudjolo Chui,* ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 53.
[64] KSC-BC-2020-06/F01414, Veseli Defence Submissions Regarding an Associated Exhibit of W04474, 31 March 2023, Confidential, paras. 13-16, 18– 24.
[65] 068933-TR-ET (Parts 1-14), 068933-TR-AT (Parts 1-14).
[66] 074459-TR-ET (Parts 1-9), 074459-TR-AT (Parts 1-9).

of Mr Thaçi throughout the relevant period. This includes [REDACTED],[67] Mr Thaçi's presence and role in the disappearance of [REDACTED],[68] Mr Thaçi's presence and role in the questioning of parliamentarians in Qirez,[69] Mr Thaçi's movements in the indictment period,[70] Mr Thaçi's role, influence and actions in the KLA,[71] Mr Thaçi's role in drafting, and knowledge of, communiques [REDACTED],[72] and Mr Thaçi's relationship with named JCE members.[73]

45. The circumstances in which these interviews came about gives rise to concerns about their reliability. This is because the interviews (a) took place when an indictment was being prepared by the SPO for crimes alleged to have been committed in Kosovo and Albania in 1998-1999 and (b) frequently exculpate Mr Selimi. Mr Selimi is not a witness in this case and therefore Mr Thaçi and his co-accused cannot scrutinise how these (or other) circumstances may bear on the contents of the interviews. Until such times (if at all) as Mr Selimi can be questioned about these interviews, it would be unfair to use them against Mr Thaçi as evidence of his acts and conduct, or without more, as evidence of any critical element of the prosecution case. If they were used in this manner they would seriously prejudice Mr Thaçi's fair trial rights – specifically, his right to confrontation.[74]

V. CONCLUSION & RELIEF SOUGHT

46. In light of the foregoing, the Defence requests that the Trial Panel does not admit into evidence Mr Thaçi's: January and July 2020 SPO Interviews and related exhibits; and the investigators notes of his May 2004 ICTY interview.

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[67] 068933, Parts 1, 10; 074459, Part 1.
[68] 068933, parts 1-2; 074459, Part 3.
[69] 074459, Part 7.
[70] 068933, Part 3; 074459, Part 5.
[71] 068933, Parts 3, 4, 6, 7; 074459, Parts 2, 5, 6, 7.
[72] 068933, Part 7; 074459, Part 3.
[73] *See for example,* 074459, Parts 4, 5.
[74] Article 21(4)(f) of the KSC Law.

47. The Defence further requests that the Panel does not use the statements of the co-accused, and in particular the two SPO statements of Rexhep Selimi, as evidence of the acts or conduct of Mr Thaçi, absent Mr Selimi testifying which would allow the Defence the right to challenge this evidence.

[Word count: 6,374 words]

Respectfully submitted,

Gregory W. Kehoe

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Monday, 24 April 2023

At Tampa, United States