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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Public Redacted Version of Selimi Defence Reply to SPO Response to Defence Application for Interim Release, KSC-BC-2020-06/F00164, dated 7 January 2021

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I. INTRODUCTION

1. Pursuant to Rule 76 of the Rules[1] the Defence for Mr. Rexhep Selimi hereby replies to the new issues raised in the Specialist Prosecutor's Response[2] to the Defence Application for Interim Release[3] filed on 7 December 2020. Namely, the Defence addresses: (1) the erroneous interpretation of the level of risk applicable to the criteria in Article 41(6); (2) the relationship between context and concrete evidence of acts fulfilling Article 41(6) criteria; (3) the complete absence of risk of flight of Mr. Selimi in light of his prior conduct in these proceedings; (4) the irrelevance of the alleged acts by members of the KLA War Veterans Association [REDACTED] to the assessment of risk of obstruction of proceedings; (5) the absence of any concrete evidence that Mr. Selimi would commit any future crimes, let alone those similar in nature to those for which he faces charges; and (6) whether conditions could mitigate any risk of fulfilling Article 41(6) criteria.

2. While no Pre-Trial Judge can ever exclude any possibility that the criteria of Article 41(6) may be fulfilled, the Response singularly fails to demonstrate the existence of a real and identifiable risk that, with the conditions proposed by the Defence, Mr. Selimi would not return to face trial, would interfere with witnesses or would otherwise commit further crimes if granted interim release.

3. In these circumstances, in light of the presumption of interim release, the SPO has failed to meet its burden justifying the continued detention of Mr. Selimi.

II. SUBMISSIONS

A. The erroneous interpretation of level of risk

4. The SPO makes the general supposition that when assessing whether any of the conditions of Article 41(6) are fulfilled, the relevant assessment is the possibility –as

[1] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[2] *Prosecutor v. Thaci et al.,* Prosecution response to Application for Interim Release on behalf of Mr Rexhep Selimi with Confidential Annex 1, 17 December 2020 ("Response").
[3] *Prosecutor v. Thaci et al.,* Defence Application for Interim Release, 7 December 2020 ("Application").

opposed to the inevitability – of such future occurrences, purporting to cite the Appeals Chamber Decision in *Gucati* in support.[4]

5. In determining interim release, the Pre-Trial Judge must make a determination of what may happen in the future, in the form of an objective, measured, judicial risk assessment. It would be impossible for him to determine that the fulfilment of any of the Article 41(6)(b) conditions will inevitably occur and this is all that the ICC cases cited by the Appeals Chamber serve to illustrate.

6. However, this does not mean that the mere faintest "possibility" of a future occurrence of any of the Article 41(6)(b) criteria is a sufficient standard for continued detention as the SPO appears to suggest. It is always possible that any accused granted interim release, could ultimately fulfil one of these criteria. The Pre-Trial Judge is not required to eliminate entirely this possibility which is by definition impossible and would drastically undermine the fundamental right to liberty.

7. Instead, a sufficient elimination of these risks is required before the Pre-Trial Judge can properly grant interim release. This is the appropriate determination of the finding in *Gucati* that if the Pre-Trial Judge is "satisfied" that the conditions set forth in Article 41(6)(b) of the Law are met, the person shall continue to be detained."[5] However, by itself, this does not assist in determining the level of certainty to which the Pre-Trial Judge must be satisfied.

8. To properly interpret the application of interim release pursuant to Article 41(6) therefore, it is submitted that the Pre-Trial Judge shall only order detention if there is a reasonable likelihood, based on articulable grounds, that Mr. Selimi will obstruct proceedings or there is a reasonable likelihood, based on articulable grounds, of a risk of Mr. Selimi fleeing or repeating the criminal offence alleged against him in the Indictment. This does not require the impossible finding that such criteria will inevitably be fulfilled, but does require direct and concrete evidence by the SPO which

[4] Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public, ('Appeals Decision'), para.67.
[5] Appeals Decision, para 51.

renders the likelihood more than the merest possibility. This approach is consistent with the legal presumption in favour of liberty.[6]

B. Context, concrete evidence and unsupported allegations

9. The SPO deliberately misunderstands the Defence's reference to the projected commencement of trial as an "independent justification for release"[7] when the Defence at no point made this submission. Instead, as clearly set out in the Application, this is a relevant factor to be borne in mind when assessing the Article 41(6) criteria.[8]

10. Simply put, all of the Article 41(6) criteria require an assessment of the likely future actions of Mr. Selimi which must place relevant evidence in its proper context and for the context to be realistic. Whether any of the Article 41(6) criteria are fulfilled may be affected by whether Mr. Selimi and his chosen Defence team will have been granted sufficient time to investigate, and analyse disclosed material, and generally prepare for trial before this date. The timescale previously proposed by the SPO, and repeated in oral submissions before the Pre-Trial Judge, of trial starting in the summer of 2021, would severely undermine Defence preparations as extensively argued before the Pre-Trial Judge. While it is a possibility that trial will commence then, it is highly unlikely, and a more realistic interpretation of this must be taken into account by the Pre-Trial Judge when assessing the Article 41(6)(b) criteria.

11. In this regard, the SPO's opposition to the commencement of trial being relevant to Article 41(6) is contradicted by its submission that the Defence pursued a "flawed premise" that evidence of context cannot inform a proper, individualised assessment of the risks posed by an accused.[9] What the SPO is actually seeking to argue is that context may not be invoked when it may assist the accused but may be relied upon to his detriment.

12. Context, such as the likely date for the commencement of trial proceedings, is evidently a relevant factor to be taken into consideration when assessing the evidence relied upon

[6] Application, paras. 9-10.
[7] Response, para 8.
[8] Application, para 14.
[9] Response, para 10.

by the SPO to justify detention. However, context must not be used as a substitute for actual concrete evidence of the likelihood of flight, obstruction or re-offending by Mr. Selimi which must be produced by the SPO. Yet, this substitution of concrete evidence by vague and unsubstantiated allegations against other individuals, in other cases, often with no actual connection to Mr. Selimi to compensate for the lack of concrete evidence relating to him permeates the Response. With the burden resting firmly on the SPO to justify continued detention, not challenged in the Response, this gap is telling.

13. Notably, the SPO refers to the "known problem of witness intimidation in criminal cases involving former KLA members in Kosovo"[10] in lieu of any direct evidence that Mr. Selimi has been involved in obstructing such cases. It also relies extensively on the alleged actions of the KLAWVA, which the SPO claims has a long and particularly active network of supporters, hostile to the SPO's investigation. Yet there is no link put forward as between this organisation and Mr. Selimi, save for his past role as a senior KLA leader some twenty years previously, before the organisation was even established. In the same vein, when challenged by the Selimi Defence regarding allegations of his personal wealth, the SPO makes the unsupported allegation regarding the "funds which his broad network of supporters can avail to him"[11] without even indicating the identity of his supporters, their link with Mr. Selimi and these supposed funds.

14. Indeed, throughout the Response the SPO seeks to rely upon its own speculation as a substitute for evidence of individual conduct and besmirches the reputation of every former member of the KLA, including Mr. Selimi, by association. Such vague and unsubstantiated allegations must be studiously ignored by the Pre-Trial Judge, who will understand that the Defence need only respond to the directly relevant alleged acts of Mr. Selimi.

[10] Response, para 11.
[11] Response, para. 15.

C. Risk of Flight

15. Factors relevant to the risk Mr. Selimi is alleged to pose are divided into capacity and motive. The SPO Response provides evidence of neither.

16. First, in terms of capacity to flee, the SPO's misplaced and unsubstantiated reliance on access to nebulous funds held by his supporters is demonstrative of the absence of any concrete evidence of such funds. [REDACTED][12] [REDACTED]. There is simply no wider network of funds as insinuated by the SPO to which he has access.

17. Similarly, the SPO's assertion that "Selimi can travel to over 180 countries in the world and potentially place himself permanently beyond the reach of the KSC"[13] is undermined by the surrender of his passport and identity cards, as proposed by the Defence.[14] This would evidently eliminate the risk of flight and yet is studiously ignored by the SPO. In these circumstances, there is no other country than Kosovo to which he could travel and the limitation complained of by the SPO that "the KSC can only seek binding cooperation to surrender him from Kosovo"[15] would still allow for necessary enforcement.

18. Further, the SPO's extraordinary and fantastical comparison between Mr. Selimi and Messrs. Habré, Taylor and Karadžić[16] fails to take into account that all three of these cases involved individuals who fled before they were arrested, had no familial connections to the states from which they fled and who had already lost political power and the connection to their countries at the moment when they fled. Moreover, when they sought to flee they were in possession of their own travel documents, and were able to travel of their own free will and go into hiding without restriction. The distinction with Mr. Selimi, a serving Member of Parliament of the most popular political party in Kosovo, who has already been arrested and brought before the Chambers, and [REDACTED], could not be more pronounced.

[12] [REDACTED].
[13] Response, para 14.
[14] Application, para 28.
[15] Response, para 14.
[16] Response, para 14.

19. Second, the supposed incentive to flee relied upon extensively by the SPO is wholly undermined by all available information regarding Mr. Selimi. Mr. Selimi's intention in these proceedings is solely to challenge the SPO's allegations before the Chambers and unequivocally prove his innocence. He has willingly testified in multiple cases, without ever invoking his right to silence, whoever posed such questions and has at all times voluntarily fulfilled any obligation requested of him. He has given multiple public media interviews regarding his own actions and those of the KLA and considers that he has nothing to hide. It would fly in the face of all of this history of transparency if he were to now seek to evade justice.

20. The SPO's blithe dismissal of Mr. Selimi's voluntary surrender[17] also directly contradicts the arguments about his incentive and capacity to flee relied upon by the SPO in the Arrest Warrant Application and repeated in the Response. In the same vein, asserting that Mr. Selimi "had no choice to surrender" also undermines the SPOs' prior submission that he maintains a shadowy "network of supporters available to facilitate his escape" at any moment.[18]

21. The SPO suggests that Mr. Selimi would have a greater incentive to flee once he knew the indictment had been confirmed.[19] Yet the existence of the indictment was already notified to him before he voluntarily surrendered.[20] As such, if the mere existence of the indictment really had created the incentive to flee as the SPO suggested, Mr. Selimi would have fled at that time rather than surrendering before the scheduled time requested by the Kosovo authorities.

22. The SPO also seems to confuse the gravity of the allegations of war crimes and crimes against humanity in the indictment with their supposed impact upon Mr. Selimi's motivation to flee. In this regard, the ECHR cases relied upon by the SPO merely serve to demonstrate that in certain member states, "detention may be justified and extended solely on the gravity of the charges" pursuant to their national legal framework. Yet the Court had also repeatedly held that although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to

[17] Response, para 17.
[18] Response, para 14.
[19] Response, para 12 citing to Arrest Warrant Application, KSCBC-2020-06/F00005, paras 31-33.
[20] Arrest Report, para 4.

continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence.[21] The seriousness of the allegations must be judged against Mr. Selimi's particular circumstances and how he reacted when learning of them, both in the abstract when he was originally interviewed by the SPO as a suspect, and concretely when he was notified of the confirmed indictment and arrest warrant. In both these circumstances, Mr. Selimi's knowledge of the seriousness of these allegations has had no impact upon his actions or motivation to evade the criminal proceedings against him.

D. Obstruction of proceedings

23. As a preliminary matter, Article 41(6)(b) distinguishes between, on the one hand, detention if there is merely a "risk" of flight or risk of repetition of a criminal offence, and on the other, that the obstruction of proceedings "will" occur. Therefore, if the Pre-Trial Judge orders detention under this ground he must be satisfied that this criterion will be fulfilled to a higher level of certainty. This difference is important when assessing the allegations adduced against Mr. Selimi in the Response, which largely focus on this ground.

24. The Defence has already addressed Mr. Selimi's presence on the US sanctions list in the Application.[22] Nothing in the SPO Response undermines the submissions of the Defence on this issue. Further, as explained above, contrary to the suggestion of the SPO, there is no evidence to suggest that any actions of the KLAWVA "extend to SELIMI individually."[23] There is no evidence that Mr Selimi was involved with, or exercised any undue influence over, the KLA War Veterans Association at any point in time. The Defence therefore limits these submissions to the specific allegations against Mr. Selimi personally in relation to prior legal proceedings.

25. [REDACTED].[24] [REDACTED].

[21] Getoš-Magdić v. Croatia, 56305/08, Judgment, 2 December 2010, para 85 citing Ilijkov v. Bulgaria, no. 33977/96, § 81; Khudoyorov v. Russia, no. 6847/02, § 180, ECHR 2005-X; and Belevitskiy v. Russia, no. 72967/01, § 101, 1 March 2007.
[22] Application, paras. 32-33.
[23] Response, para. 21.
[24] Application, para 41.

26. [REDACTED],[25] [REDACTED].[26] [REDACTED].[27]

27. [REDACTED].

28. [REDACTED].[28] [REDACTED].

29. [REDACTED],[29] [REDACTED].[30] [REDACTED].

30. [REDACTED].[31] [REDACTED].

E. Commission of future crimes

31. To justify detention under Article 41(6)(b)(iii), the SPO must provide articulable grounds to demonstrate a "risk that Mr. Selimi will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit."

32. As such, the risk of repetition of criminality by Mr. Selimi must relate directly to the criminal offences for which an indictment against him has been confirmed, namely a JCE with the "common purpose to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents."[32] Despite the SPO's attempt to simplify this purpose to "targeting of perceived opponents of the KLA" this could not warrant detention under this provision. Only if the purpose of allegations is to "gain and exercise control over all of Kosovo" could this be said to do so. As such, the Sami LUSHTAKU case invoked by the SPO, involving the criminal response to an allegation of embezzlement against a former member of the KLA, is wholly irrelevant in relation to

[25] Response, para 23.
[26] [REDACTED].
[27] [REDACTED].
[28] [REDACTED].
[29] [REDACTED].
[30] Application, paras 34-38.
[31] Response, para 28.
[32] Indictment, para 32.

Mr. Selimi's propensity to commit the same crimes as those set out in the Indictment. Similarly, the SPO's allegations of obstruction of proceedings,[33] while unjustified and dealt with above, may not be relied upon to justify detention under this provision.

33. Indeed, the only basis that the SPO relies upon to justify detention under Article 41(6)(b)(iii) is that there is a "well-grounded suspicion that SELIMI committed a wide range of war crimes and crimes against humanity."[34] Yet, this is exactly the same as the test in 41(6)(a), namely whether there is a grounded suspicion that an accused has committed a crime within the jurisdiction of the Specialist Chambers. If it was intended by the drafters of the Statute that Article 41(6)(b)(iii) was automatically satisfied by Article 41(6)(a) this would render the application of the former provision entirely superfluous. That is why Article 41(6)(b)(iii) requires an assessment of "the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances" to see whether a re-occurrence would be likely.

34. The allegations in the Indictment occurred over twenty years ago, in a war of liberation by the KLA against the Former Republic of Yugoslavia, in the midst of massacres of Kosovo civilians by the FRY forces. There are no specific allegations of the direct physical commission of criminal acts by Mr. Selimi in the Indictment. Instead, allegations against him are predicated exclusively upon his contribution to the KLA which is dependent on his high-ranking position in this organisation during this conflict; a position that he no longer occupies, in an organisation that no longer exists. There is simply no comparison between these circumstances and those in which Mr. Selimi finds himself today. The likelihood of the same crimes being committed in 2021 is therefore essentially non-existent.

F. Mitigation of risks by conditions

35. The Defence has addressed above how the proposed conditions will mitigate any reasonable risk of flight, obstruction or re-offending. However, additional comments

[33] Response, para 33.
[34] Response, para 33.

are necessary in relation to the ability of the Kosovo police to implement a decision granting interim release which is called into question by the SPO.

36. First, the Defence highlights that the SPO's suggestion that the Kosovo police would be unable to manage Mr. Selimi regularly reporting to them as proposed by the Defence,[35] as bordering on the offensive. This is a standard procedure which must have been carried out in hundreds if not thousands of cases across Kosovo on a daily basis, and there is no reason to suggest that it would be unable to do so in relation to Mr. Selimi, a sitting member of parliament.

37. Second, the three cases identified by the SPO, Remzi SHALA, Sami LUSHTAKU and Sabit GECI are not directly relevant to whether the Kosovo Police can monitor interim release. All involved prison escapes, and therefore relate to the capacity of the Kosovo police to detain individuals. By definition, as an accused before the KSC on interim release and not detained by Kosovo prison authorities, it has little relevance for Mr. Selimi's situation.

38. Third, even though the SPO relies on these cases for the proposition that Kosovo authorities would be unable to monitor Mr. Selimi during his interim release, they do not actually support the position that Kosovo lacks capacity to effect arrests or monitor conditions of former KLA leaders. Although all three managed to escape from detention, all were re-arrested and subsequently detained by the Kosovo authorities despite their position. Prison escapes, even in countries with supposedly effective police forces, are all too common. The re-arrest and detention of these individuals demonstrates that the Kosovo Police are actually willing and able to ensure the implementation of provisional or interim release.

39. Further, while the SPO chose, to focus on these three cases: Shala (who was initially granted provisional release), and Lushtaku and Geci (in their post-conviction situations), the SPO singularly failed to mention the fact that, historically, when the most senior KLA leaders were put on trial at the ICTY, they invariably were granted interim release and complied with the conditions applied to their interim release

[35] Response, para 36.

40. KLA senior leaders who were tried at the ICTY, including Ramush Haradinaj, Lahi Brahimaj, Idriz Balaj and Haradin Bala were granted provisional release of varied lengths at various stages of the trial. They complied fully with all the conditions imposed by the court. No breaches of any conditions were noted in the weekly reports, which UNMIK and EULEX authorities were required to submit to the ICTY, as part of the conditions imposed, and the guarantees offered by both administrations.

41. The conditions set down by the ICTY included *inter alia* for the accused (i) to remain within the confines of the municipality of Pristina or the home town the accused came from; (2) to inform UNMIK at least 24 hours in advance every time they intended to move from Pristina to their home town or vice versa and for how long they envisaged to stay in either of these two places; (iii) to surrender their passport to UNMIK, ; (iv) to report each week to UNMIK at a time and local duty station to be designated by UNMIK; (v) to consent to having UNMIK check about their presence and to the making of occasional, unannounced visits upon the accused by UNMIK personnel or by a person designated by the Registrar of the Tribunal; (vi) not to have any contact with the other co-accused in the case; (vii) not to have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the current proceedings or the administration of justice; (viii) not to discuss their case with anyone, including the media, other than with their counsels; not to make any statement or associate themselves with any statement, public or otherwise, on their case or on any other case before this Tribunal or comparable cases that may be pending before the courts in Kosovo; (ix) not to hold any governmental position at any level in Kosovo; (x) to report to the Registrar of the Tribunal, within three days of the start of any employment or occupation, the position occupied, as well as the name and address of the employer; (xi) to comply strictly with any instructions given to them by anyone acting under the authority of UNMIK that may be necessary to enable them to comply with their obligations under this Order and their guarantees; (xii) to return to the Tribunal at such time and on such date as the Trial Chamber may order; and (xiii) To comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release.[36]

[36] See *Prosecutor v Haradinaj et al,* Trial Chamber II, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2015.

42. There is no evidence or argument put forward by the SPO which would suggest that these conditions, which have been shown to work, or even more severe ones imposed by the Pre-Trial Judge, would be insufficient to mitigate the risk of the fulfilment of any of the Article 41(6) conditions.

III. CONCLUSION & RELIEF SOUGHT

43. The SPO's response relies entirely on generic considerations that could apply to any accused brought before the KSC. Very little attempt has been made in the Response to relate these general considerations, whether they relate to allegations of witness intimidation, access to vast wealth or alleged propensity to commit future crimes, to the particular circumstances of Mr. Rexhep Selimi.

44. Many of the same generic arguments were raised against the provisional release of all these other former KLA accused before the ICTY and yet, when provisional release was granted in relation to all of those accused, as stated above, all conditions were complied with by the accused. There is nothing in this SPO Response, or even in the Arrest Warrant Request, to suggest that Mr. Selimi would not do the same.

45. The Defence therefore reiterates its request to the Pre-Trial Judge to Order the interim release of Mr. Selimi.

Respectfully submitted on 12 January 2021,

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