



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

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Public Redacted Version of

Decision on Rexhep Selimi's Application for Interim Release

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 41(2), (6) and (12) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 5 November 2020, Mr Selimi was arrested² pursuant to a decision³ and an arrest warrant issued by the Pre-Trial Judge,⁴ further to the confirmation of an indictment against him ("Indictment").⁵

2. On 7 December 2020, the Defence for Mr Selimi ("Defence") filed a request for interim release ("Request"), seeking an expedited timetable for further filings and an oral hearing.⁶

3. On 16 December 2020, the Pre-Trial Judge rejected the request for an expedited timetable and an oral hearing.⁷

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00049, Registrar, *Notification of Arrest of Rexhep Selimi Pursuant to Rule 55(4)* ("Arrest Notification"), 5 November 2020, public.

³ KSC-BC-2020-06, F00027/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders* ("Decision on Arrest and Detention"), 26 October 2020, public.

⁴ KSC-BC-2020-06, F00027/A05/RED, *Public Redacted Version of Arrest Warrant for Rexhep Selimi*, 26 October 2020, public.

⁵ KSC-BC-2020-06, F00026/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi* ("Confirmation Decision"), 26 October 2020, public; KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public.

⁶ KSC-BC-2020-06, F00124, Selimi Defence, *Defence Application for Interim Release*, 7 December 2020, confidential, paras 1, 49-51, with Annexes 1-3, confidential; *see also* F00124/RED, Selimi Defence, *Public Redacted Version of Defence Application for Interim Release*, KSC-BC-2020-06/F00124, Dated 7 December 2020, 12 December 2020, public, with Annexes 1-3, public.

⁷ KSC-BC-2020-06, F00150, Pre-Trial Judge, *Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions*, 16 December 2020, public, para. 30(a)-(b).

4. On 17 December 2020, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response").⁸ On the same day, the Defence requested an extension of the time limit to reply and waived the Accused's right to have his detention reviewed within two months.⁹

5. On 5 January 2021, the Pre-Trial Judge authorised a word limit of 6,000 words for all Defence replies.¹⁰

6. On 7 January 2021, further to an order extending the time limit for replies,¹¹ the Defence replied to the Response ("Reply").¹²

II. SUBMISSIONS

7. The Defence submits that Mr Selimi should be granted unconditional interim release because the criteria for detention set out in Article 41(6) of the Law have not been fulfilled, as the SPO has notably not proved that: (i) he is a flight risk; (ii) he will obstruct the proceedings; or (iii) there is a risk that he will commit further crimes.¹³ Alternatively, the Defence submits that any risks arising from interim release can be mitigated through the imposition of conditions.¹⁴

⁸ KSC-BC-2020-06, F00154, Specialist Prosecutor, Prosecution Response to Application for Interim Release on Behalf of Mr Rexhep Selimi, 17 December 2020, confidential, with Annex 1, confidential; see also F00154/RED, Specialist Prosecutor, *Public Redacted Version of Prosecution Response to Application for Interim Release on Behalf of Mr Rexhep Selimi*, 22 December 2020, public.

⁹ KSC-BC-2020-06, Transcript of 17 December 2020, public, p. 226, line 21 to p. 227, line 6.

¹⁰ KSC-BC-2020-06, F00162, Pre-Trial Judge, *Decision on Thaçi Defence Request for Extension of the Reply Word Limit*, 5 January 2021, public, para. 12(a)-(b).

¹¹ KSC-BC-2020-06, F00155, Pre-Trial Judge, *Decision on Defence Requests to Vary Time Limits*, 18 December 2020, public, para. 23.

¹² KSC-BC-2020-06, F00164, Selimi Defence, *Selimi Defence Reply to SPO Response to Defence Application for Interim Release*, 7 January 2021, confidential; see also F00164/RED, Selimi Defence, *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, 12 January 2021, public.

¹³ Request, paras 1-4, 9-44, 51.

¹⁴ Request, paras 4, 45-48, 51.

8. The SPO opposes the Request, arguing that the criteria in Article 41(6) of the Law have been and continue to be met, as underscored by newly discovered information, and there are no conditions which could mitigate the risks of interim release.¹⁵

9. In reply, the Defence renews its request for interim release, addressing six new issues raised in the Response.¹⁶

III. APPLICABLE LAW

10. Article 41(2) of the Law provides that any person deprived of his or her liberty by arrest or detention shall be entitled to challenge the lawfulness of his or her arrest and such challenge shall be decided speedily by the Specialist Chambers (“SC”).

11. Article 41(6) of the Law provides that the SC shall only order the arrest and detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC and there are articulable grounds to believe that: (i) the person is a flight risk; (ii) the person will destroy, hide, change or forge evidence or specific circumstances indicate that he or she will obstruct the progress of criminal proceedings; or (iii) 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 indicate a risk that the person will repeat the criminal offence, complete an attempted crime, or commit a crime which the person has attempted to commit.

12. Pursuant to Rule 57(2) of the Rules, after the assignment of a Pre-Trial Judge and until a judgment is final, the Panel seized with a case shall review a decision on detention upon the expiry of two months from the last ruling on detention or at any

¹⁵ Response, paras 1-40, 43.

¹⁶ Reply, paras 1-45.

time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred.

13. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the Accused, to prevent reoffending or to ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion. Pursuant to Rule 56(5) of the Rules, a Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the detained person.

IV. DISCUSSION

A. APPLICABLE STANDARDS

14. The Defence submits that it is for the SPO to show that the criteria in Article 41(6) of the Law are met at this time, and not for the Defence to seek reconsideration of the Pre-Trial Judge's Decision on Arrest and Detention.¹⁷ Mr Selimi's conduct must be assessed individually, separate from that of the other Accused and other members or tools of the alleged joint criminal enterprise.¹⁸

15. The SPO responds that this is a review of the Pre-Trial Judge's Decision on Arrest and Detention, assessing the possibility, rather than the inevitability, of the criteria set out in Article 41(6)(b) of the Law.¹⁹ Moreover, considering the Accused's position and contacts, as well as considering together common factors shared by the Accused, is compatible with an individualised assessment for each Accused.²⁰

¹⁷ Request, paras 9-10.

¹⁸ Request, paras 15-16.

¹⁹ Response, paras 2-4.

²⁰ Response, paras 10-11.

16. The Defence replies that a mere possibility of a risk materialising is insufficient; rather, the Pre-Trial Judge must consider whether, based on direct and concrete evidence from the SPO, there is a “reasonable likelihood, based on articulable grounds” that a risk will materialise, or whether risks can be sufficiently eliminated.²¹ The wording of Article 41(6)(b)(ii) of the Law requires an even higher level of certainty.²² It also argues that the SPO merely makes unsubstantiated contextual allegations without concrete evidence of Mr Selimi’s conduct.²³ In particular, general witness intimidation issues are irrelevant, and the SPO did not show a current link between Mr Selimi and the Kosovo Liberation Army (“KLA”) War Veterans Association, nor that he had access to funds through his network.²⁴

17. The Pre-Trial Judge recalls that while the arrest warrant, pursuant to Article 41(6) of the Law, was issued *ex parte*, without participation of the Defence, Article 41(2) of the Law provides the detained person with an early opportunity to challenge the lawfulness of his or her arrest, including the grounds set out in Article 41(6) of the Law. Accordingly, the Pre-Trial Judge is called upon to inquire anew into the existence of facts justifying detention in light of the arguments advanced by the Parties.²⁵ In this context, it is noted that any request for provisional release must be considered in the context of the detained person’s right to be presumed innocent.²⁶

²¹ Reply, paras 4-8.

²² Reply, para. 23.

²³ Reply, paras 12, 43.

²⁴ Reply, paras 13-14.

²⁵ KSC-BC-2020-07, F00058, Single Judge, *Decision on Request for Immediate Release of Nasim Haradinaj* (“*Haradinaj* First Decision on Detention”), 27 October 2020, public, paras 12-13.

²⁶ KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office* (“SCCC 26 April 2017 Judgment”), 26 April 2017, para. 113. Similarly, ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2151-Red, Appeals Chamber, [Judgment on the Appeal of Mr Jean-Pierre Bemba](#)

18. The SPO bears the burden for establishing that the detention of the Accused is necessary.²⁷

19. As regards the evidentiary threshold under Article 41(6)(b) of the Law, the Pre-Trial Judge recalls that, once the standard in Article 41(6)(a) of the Law is met, the grounds that allow deprivation of liberty must be *articulable* in the sense that they must be specified in detail.²⁸ In this regard, Article 41(6)(b) of the Law echoes the principle that continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person's right to liberty.²⁹ Accordingly, a Panel must rely on specific reasoning and concrete grounds in deciding to continue detention;³⁰ *i.e.* it must find that there are specific, concrete grounds to believe that the Accused poses public interest risks that can only be mitigated through continued detention. The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"³¹ that the risks under any of the three limbs of Article 41(6)(b) of the Law exist, denoting an acceptance of the possibility, not the

[Gombo Against the Decision of Trial Chamber III of 6 January 2012 Entitled "Decision on the Defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo", 5 March 2012, para. 40.](#)

²⁷ SCCC 26 April 2017 Judgment, para. 115. Similarly, for example, ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-208, Appeals Chamber, [Judgment on the Appeal of Mr Laurent Gbagbo Against the Decision of Trial Chamber I of 8 July 2015 Entitled "Ninth Decision on the Review of Mr Laurent Gbagbo's Detention Pursuant to Article 60\(3\) of the Statute"](#), 8 September 2015, para. 36; *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Appeals Chamber, [Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 28 July 2010 Entitled "Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence"](#), 19 November 2010, para. 51; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-330, Pre-Trial Chamber I, [Decision on the Powers of the Pre-Trial Chamber to Review Proprio Motu the Pre-Trial Detention of Germain Katanga](#), 18 March 2008, p. 7.

²⁸ Article 19.1.30 of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 defines "articulable" as: "the party offering the information or evidence must specify in detail the information or evidence being relied upon".

²⁹ SCCC 26 April 2017 Judgment, para. 113

³⁰ SCCC 26 April 2017 Judgment, para. 115.

³¹ See chapeau of Article 41(6)(b) of the Law.

inevitability, of a future occurrence.³² In simple terms, while suspicion simpliciter is not enough, certainty is not required.

20. The Defence avers in particular, based on the absence of the word “risk” in sub-paragraph (ii) compared to sub-paragraphs (i) and (iii) of Article 41(6)(b) of the Law, that the threshold for this provision is higher than for the others.³³ While noting this linguistic difference, the Pre-Trial Judge is not persuaded that its intended result is to impose different evidentiary thresholds to the three alternative conditions in Article 41(6)(b) of the Law. Indeed, the Appeals Chamber has recently confirmed that the condition under Article 41(6)(b)(ii) of the Law involves a “risk”.³⁴

21. As regards the nature of the assessment under Article 41(6)(b) of the Law, the Pre-Trial Judge recalls that, while the evaluation involves an element of discretion,³⁵ it must be based on the facts of the case and must be undertaken on an individual basis in light of the personal circumstances of each Accused.³⁶

³² KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention* (“Gucati Appeal Decision”), 9 December 2020, public, paras 63, 67. See also *Haradinaj* First Decision on Detention, para. 18. Similarly, ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-558, Appeals Chamber, *Judgment on the Appeal of Mr Aimé Kilolo Musamba Against the Decision of Pre-Trial Chamber II of 14 March 2014, Entitled “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”* (“Bemba et al. Appeal Judgment”), 11 July 2014, paras 107, 117; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-572, Appeals Chamber, *Judgment in the Appeal by Mathieu Ngudjolo of 27 March 2008 Against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release* (“Katanga Appeal Judgment”), 9 June 2008, para. 21; *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Appeals Chamber *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”* (“Lubanga Appeal Judgment”), 13 February 2007, para. 137.

³³ Reply, para. 23.

³⁴ *Gucati* Appeal Decision, para. 63.

³⁵ *Gucati* Appeal Decision, para. 49. Similarly, ICTY, *Prosecutor v Popović et al.*, IT-05-88-AR65.2, Appeals Chamber, *Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release* (“Borovčanin Appeal Decision”), 30 June 2006, para. 5.

³⁶ Similarly, ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR65.5, Appeals Chamber, *Decision on Prosecution's Consolidated Appeal Against Decision to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić* (“Prlić et al. Appeal Decision”), 11 March 2008, para. 7; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-AR65.1, Appeals Chamber, *Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukić's*

Accordingly, the same factors, when applied to another case, in relation to another Accused, may result in a different conclusion by the Pre-Trial Judge or may be considered irrelevant.³⁷ When assessing the relevant factors, the Pre-Trial Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.³⁸ These factors may be individual, such as the nature and scope of the crimes allegedly committed by the Accused and the potential punishment that he or she is facing,³⁹ his or her age, (past) position(s), occupation, family ties, health condition, assets, conduct and statements,⁴⁰ international contacts and ties,⁴¹ and existence of support networks that may facilitate the materialisation of a risk.⁴² Relevant factors may also be contextual, such as the environment and conditions

[Motion for Provisional Release](#) (“Lukić Appeal Decision”), 16 April 2007, para. 7; ICC, [Bemba et al. Appeal Judgment](#), para. 111.

³⁷ Similarly, ICTY, [Borovčanin Appeal Decision](#), para. 15.

³⁸ *Gucati* Appeal Decision, para. 61; Similarly, ICTY, *Prosecutor v. Šainović and Ojdanić*, IT-99-37-AR65, Appeals Chamber, [Decision on Provisional Release](#) (“Šainović and Ojdanić Appeal Decision”), 30 October 2002, para. 6; [Prlić et al. Appeal Decision](#), para. 7; [Lukić Appeal Decision](#), para. 7; *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-323, Appeals Chamber, [Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”](#), 16 December 2008, para. 55; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-970, Appeals Chamber, [Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber II of 23 January 2015 Entitled “Decision on ‘Mr Bemba’s Request for Provisional Release’](#), 29 May 2015, para. 27; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-969, Appeals Chamber, [Judgment on the Appeals Against Pre-Trial Chamber II’s Decisions Regarding Interim Release in Relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and Order for Reclassification](#), 29 May 2015, para. 45.

³⁹ *Gucati* Appeal Decision, para. 72. Similarly ICTY, [Borovčanin Appeal Decision](#), paras 9, 14-15; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Appeals Chamber, [Judgment on the Appeal of Mr Laurent Koudou Gbagbo Against the Decision of Pre-Trial Chamber I of 13 July 2012 Entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’](#) (“Gbagbo Appeal Judgment”), 26 October 2012, para. 54; *Prosecutor v. Bemba*, ICC-01/05-01/08-323, Appeals Chamber, [Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against the Decision of Pre-Trial Chamber III Entitled “Decision on Application for Interim Release”](#), 16 December 2008, para. 55.

⁴⁰ See, ECtHR, *Gábor Nagy v. Hungary*, Application No. 73999/14, [Judgment](#), 11 April 2017, para. 70; *Yegorychev v. Russia*, Application No. 8026/04, [Judgment](#), 17 May 2016, para. 54; *Aleksandr Novikov v. Russia*, Application No. 7087/04, [Judgment](#), 11 July 2013, para. 46. Similarly, ICTY, [Šainović and Ojdanić Appeal Decision](#), paras 6-7, 9-10; ICC, [Bemba et al. Appeal Judgment](#), para. 111.

⁴¹ Similarly, ICC, [Lubanga Appeal Judgment](#), paras 136-137.

⁴² *Gucati* Appeal Decision, para. 63. Similarly, ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-180-Red, [Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo”](#), 13 July 2012, para. 62.

in which the Accused lives,⁴³ or the particular stage of the ongoing proceedings.⁴⁴ In any event, contextual factors alone are not sufficient to demonstrate a risk. Any relevant factor may support one or more grounds under Article 41(6)(b) of the Law.⁴⁵ Lastly, the Pre-Trial Judge must consider the relevant factors not only as they exist at the time of the decision, but also, as much as it can be foreseen, at the time the Accused is expected to return for trial, if released.⁴⁶

22. Three articulable grounds are listed in Article 41(6)(b) of the Law:

- (i) the risk of flight;
- (ii) the risk of destroying, hiding, changing or forging evidence or obstructing the progress of the proceedings by influencing witnesses, victims or accomplices;
- (iii) the risk of repeating the criminal offence, completing an attempted crime or committing a crime which the Accused has threatened to commit.

23. In relation to the third ground, the Pre-Trial Judge holds that the future crime need not be identical to those included in the charges or occurring in the same (possibly no longer existing) context as the one for which the Accused is prosecuted. Rather, on the basis of available information, the Pre-Trial Judge must assess whether there is a likelihood that the Accused, if released, will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged. The crimes predicted to be committed in the future need not be specified in detail.⁴⁷

⁴³ See Article 41(6)(b)(iii) of the Law.

⁴⁴ Similarly, ICTY, [Prlić et al. Appeal Decision](#), paras 19-20.

⁴⁵ Similarly, ICC, [Gbagbo Appeal Judgment](#), para. 63.

⁴⁶ Similarly, ICTY, [Šainović and Ojdanić Appeal Decision](#), paras 6-7; [Prlić et al. Appeal Decision](#), para. 7; [Lukić Appeal Decision](#), para. 7.

⁴⁷ Similarly, ICC, [Bemba et al. Appeal Judgment](#), para. 116; [Gbagbo Appeal Judgment](#), para. 70.

24. In relation to the second and third grounds, the Pre-Trial Judge emphasises that the risks may materialise as a result of the Accused's acts or omissions, but do not require physical execution on his or her part.

25. Furthermore, the three grounds are in the alternative, the existence of one ground suffices to determine the necessity of detention of the Accused.⁴⁸

26. Lastly, the Pre-Trial Judge may refer to previous decisions and material or evidence already before him, without this affecting the *de novo* character of the present decision.⁴⁹

B. NECESSITY OF DETENTION

27. The Pre-Trial Judge notes that the Defence challenges the existence of a grounded suspicion, but bases the Request solely on the second limb of Article 41(6) of the Law.⁵⁰ The Pre-Trial Judge will therefore assess the Request only against the risks under Article 41(6)(b) of the Law.

1. Risk of Flight

28. The Defence argues that Mr Selimi is not a flight risk because: (i) his family ties and long-standing position as a political figure in Kosovo oblige him to remain in Prishtinë/Priština, and there is no evidence that his position allows him to mobilise supporters;⁵¹ (ii) he fully cooperated with the SPO investigation, voluntarily

⁴⁸ Similarly, ICC, [Lubanga Appeal Judgment](#), para. 139; [Katanga Appeal Judgment](#), para. 20; *Prosecutor v. Bemba*, ICC-01/05-01/08-321, Pre-Trial Chamber III, [Decision on Application for Interim Release](#), 16 December 2008, para. 35.

⁴⁹ Similarly, ICC, [Bemba et al. Appeal Judgment](#), para. 60; [Gbagbo Appeal Judgment](#), paras 27, 69.

⁵⁰ Request, para. 17. *Per a contrario*: Response, para. 5.

⁵¹ Request, paras 2, 18, 26.

surrendered for arrest, [REDACTED];⁵² (iii) several witness statements evidence his good character;⁵³ (iv) he made no effort to flee after being made aware of the potential charges and penalties when being interviewed by the SPO, and his awareness of the Indictment does not materially change this situation;⁵⁴ (v) his awareness of non-recent convictions of former senior KLA members has no impact on his incentive to flee;⁵⁵ (vi) there is no evidence that he has access to significant funds, and unsupported allegations of corruptions by others cannot be relied upon;⁵⁶ and (vii) his possession of a passport does not translate to an incentive to flee, given that he has no significant connection with any countries other than Kosovo and Albania, and would in any event be willing to surrender his passport.⁵⁷

29. The SPO responds that Mr Selimi is a flight risk because of: (i) the incentive to flee due to his knowledge of past convictions of KLA members and the Indictment, potential penalties and evidence against him; (ii) his current and past positions enabling the mobilisation of supporters to facilitate escape; (iii) access to significant funds via his network; and (iv) his ability to travel to States with no obligation to transfer him, due to not recognising Kosovo and/or not having an extradition agreement with it.⁵⁸ The SPO argues that [REDACTED] does not negate the risk of flight.⁵⁹ The SPO further argues that Mr Selimi's surrender at the time of arrest should be given little weight, as he had little choice but to surrender given the scale of the SPO operation in Kosovo; in addition, Mr Selimi would have a significantly greater opportunity to escape now, absent the same operational scale.⁶⁰

⁵² Request, paras 19-23.

⁵³ Request, paras 18, 22, Annexes 1-3.

⁵⁴ Request, para. 24.

⁵⁵ Request, para. 25.

⁵⁶ Request, para. 27.

⁵⁷ Request, para. 28.

⁵⁸ Response, paras 12-15.

⁵⁹ Response, para. 16.

⁶⁰ Response, para. 17.

30. The Defence replies that the SPO failed to prove Mr Selimi's actual access to funds or acknowledge that: (i) surrendering his travel documents would remove his ability to leave Kosovo; (ii) his situation is very different from past examples of persons evading arrest by fleeing; and (iii) he has no incentive to flee given his connections to Kosovo and intention to challenge the charges at trial, supported by past cooperation and his voluntary surrender in this case after knowing about the Indictment.⁶¹ The Defence also argues that the gravity of the charges and penalties are only one factor to be considered alongside Mr Selimi's actual reactions to the charges against him.⁶²

31. As regards risk of flight, the Pre-Trial Judge considers that some factors support a finding that Mr Selimi has an incentive to flee. In particular, Mr Selimi is now not only aware of the confirmed charges against him, comprising 10 counts of war crimes and crimes against humanity, and the possible lengthy prison sentence that may result therefrom, but additionally, through the ongoing disclosure process, Mr Selimi is gradually gaining more knowledge about the evidence to be presented in relation to the crimes allegedly committed by him. Moreover, Mr Selimi's influence as a former and current political leader and Head of the KLA Operational Directorate⁶³ cannot be ignored in assessing the risk that individuals in his support network, who share his firm opposition to the SC, may be willing to give him access to assets and/or help him abscond.

32. The Pre-Trial Judge is also mindful that Mr Selimi's co-operation with the SPO's investigations [REDACTED], his voluntary surrender for arrest in these proceedings, his strong family and professional ties to Kosovo and

⁶¹ Reply, paras 14-21.

⁶² Reply, para. 22.

⁶³ Decision on Arrest and Detention, para. 37.

Prishtinë/Priština in particular, and the statements describing his good character are factors diminishing, but not eliminating, the risk of flight.

33. The Pre-Trial Judge accordingly finds that a risk of flight exists in relation to Mr Selimi.

2. Risk of Obstructing the Progress of SC Proceedings

34. The Defence submits that the SPO has not shown Mr Selimi's incentive, means or opportunity to obstruct proceedings because: (i) unsubstantiated allegations of witness interference by others are insufficient;⁶⁴ (ii) the SPO has not shown how his past and present positions of authority increase his ability or motivation to obstruct investigations;⁶⁵ (iii) although Mr Selimi opposed and voted against the SC's creation, he made no undemocratic attempts to interfere with its progress;⁶⁶ (iv) his inclusion on a United States government sanctions list is irrelevant, as inclusion is arbitrary, political and without judicial oversight, and he was unable to challenge it;⁶⁷ (v) [REDACTED];⁶⁸ (vi) witnesses' and victims' refusal of protective measures which would address risks should not be a reason for Mr Selimi's detention [REDACTED];⁶⁹ (vii) [REDACTED].⁷⁰

35. The SPO responds that there is a risk that Mr Selimi would obstruct investigations because of: (i) the prevailing Kosovo climate of intimidating witnesses who testify against KLA members; (ii) his current and former positions of authority enabling the mobilisation of a vast network, in particular the KLA

⁶⁴ Request, para. 29.

⁶⁵ Request, para. 30.

⁶⁶ Request, para. 31.

⁶⁷ Request, paras 32-33; United States, Executive Order 13219 Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans, 26 June 2001, 66 F.R. 34777.

⁶⁸ Request, paras 32, 34-38.

⁶⁹ Request, para. 39.

⁷⁰ Request, paras 40-41.

War Veterans Association, which has allegedly been involved in disclosing confidential SITF/SPO information and which poses a risk of doing so again using leaks of information provided to the Accused; (iii) his presence on a United States sanctions list of persons who threaten international stabilization efforts in the Western Balkans, and the criteria for which is publicly available; and (iv) [REDACTED], notably [REDACTED]: (a) [REDACTED], (b) [REDACTED], (c) [REDACTED], and (d) [REDACTED].⁷¹

36. The Defence replies that the SPO has failed to: (i) link Mr Selimi to the actions of the KLA War Veterans Association; (ii) [REDACTED]; (iii) [REDACTED]; and (iv) [REDACTED].⁷²

37. As regards the risk to obstruct SC proceedings, the Pre-Trial Judge notes that Mr Selimi's past and present influential positions, including his key functions in the KLA at the time when the alleged joint criminal enterprise unfolded, enable his influence and ability to mobilise support networks, which are an important factor when addressing the risk of obstruction of proceedings. The Pre-Trial Judge is mindful that twenty years have passed since Mr Selimi held a position of authority within the KLA,⁷³ and that the SPO adduced no concrete evidence of specific influence exerted by Mr Selimi on individuals within the support network of the KLA War Veterans Association.⁷⁴ However, Mr Selimi has continued to play a significant role in Kosovo, notably holding a multitude of positions of authority until recently,⁷⁵ and whose opinions, including those opposing the SC, are heard and may mobilise support networks, including present and former subordinates. The Pre-Trial Judge notes that the risk of obstruction need not materialise in

⁷¹ Response, paras 18-30, Annexes 1.1, 1.2, 1.3, 1.4, 1.5, 1.6; [REDACTED].

⁷² Reply, paras 24-30.

⁷³ Request, para. 30.

⁷⁴ Request, para. 30.

⁷⁵ See e.g. Request, para. 18.

Mr Selimi personally tampering with evidence or exerting influence or pressure on witnesses. It suffices that Mr Selimi, through his statements may instigate or contribute in any way to the materialisation of the aforementioned risk. Accordingly, given his past statements, combined with his status as a former KLA leader and former and current prominent politician, the aforementioned risk cannot be ruled out, if Mr Selimi was released.

38. Moreover, the Pre-Trial Judge notes [REDACTED]. Although the Defence argues that the SPO has failed to substantiate [REDACTED], the Pre-Trial Judge is satisfied [REDACTED]. [REDACTED]. [REDACTED].

39. The fact that, in light of protective measures, Mr Selimi may not become officially aware of the identities of certain witnesses in the SC proceedings until closer to the start of trial does not negate this risk, in light of [REDACTED]. While the Pre-Trial Judge accepts that a witness's or victim's refusal of the most drastic protective measures cannot be the sole basis for Mr Selimi's continued detention, the factual outcome of this refusal (i.e. a witness's remaining vulnerability to intimidation) is a factor that must be borne in mind when assessing other relevant factors.

40. Accordingly, taken together, these factors militate in favour of a risk that Mr Selimi will obstruct SC proceedings.

41. The Pre-Trial Judge gives limited weight to Mr Selimi's inclusion on the United States sanctions list of persons who threaten international stabilization efforts in the Western Balkans, notably because the decision to include him on the list was made in 2001 and the SPO has not provided any updated information on how inclusion on the list is maintained or reviewed over time.

42. Lastly, the Pre-Trial Judge considers that the above findings must be placed in the context of a general, well-established, and ongoing climate of intimidation of

witnesses and interference with criminal proceedings against former KLA members.⁷⁶ While this factor alone is not determinative of a risk of obstruction of the criminal proceedings, it is a relevant consideration that must be taken into account by the Pre-Trial Judge, along with the other factors addressed above, and in light of Mr Selimi's prominent position in Kosovo and internationally.

43. The Pre-Trial Judge accordingly finds that there is a risk that Mr Selimi will obstruct the progress of SC proceedings.

3. Risk of Committing Further Crimes

44. The Defence submits that an assessment must be made of the actual risk of Mr Selimi resorting to (threats of) physical violence against perceived KLA opponents if released now; although the serious allegations in the Indictment are relevant, they must be examined alongside the consequences of detention for Mr Selimi.⁷⁷ The pervasive climate of intimidation in past cases against KLA members cannot be transferred to Mr Selimi without proof of a direct link.⁷⁸

45. The SPO responds that there is a risk that Mr Selimi will commit further crimes because of: (i) the nature of the charges against him, which concern targeting his opponents; (ii) his past attempts to obstruct legal proceedings; and (iii) the prevailing Kosovo climate of intimidating witnesses who testify against KLA members.⁷⁹ The consequences of detention for Mr Selimi do not change this risk.⁸⁰

46. The Defence replies that the risk of committing a criminal offence must relate directly to the charges in this case, specifically that the purpose of the offences

⁷⁶ Decision on Arrest and Detention, para. 41.

⁷⁷ Request, paras 42-43.

⁷⁸ Request, para. 44.

⁷⁹ Response, paras 31-33.

⁸⁰ Response, para. 33.

would be gaining and exercising control over all of Kosovo, contrary to the SPO's suggestion of offences targeting perceived KLA opponents.⁸¹ Similarly, the risk of offences obstructing the proceedings is not relevant to this particular provision.⁸² In addition, satisfying this provision cannot be based solely on a well-grounded suspicion that Mr Selimi committed the crimes charged, as this is precisely the test under Article 41(6)(a) of the Law and would make Article 41(6)(b)(iii) of the Law superfluous; rather, the latter requires an assessment of the likelihood that these crimes would re-occur.⁸³ Given the vast difference in the contextual and personal circumstances prevailing now and those prevailing at the time of the charged crimes, there is essentially no likelihood that Mr Selimi would commit those same offences if released.⁸⁴

47. As regards the risk of committing further crimes, the Pre-Trial Judge recalls his above finding that there is a risk that Mr Selimi will obstruct SC proceedings.⁸⁵ While the existence of a risk of obstruction does not automatically translate into a risk of committing further crimes, in the present case the factors underpinning the former are of relevance to the assessment of the latter. In this regard, the Pre-Trial Judge considers that, for the reasons set out below, there is a likelihood that Mr Selimi will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged against those perceived as being opposed to the KLA, including witnesses due to appear before the SC. Such contribution need not include Mr Selimi physically executing such acts. It suffices that Mr Selimi, through his statements and actions may instigate or assist individuals

⁸¹ Reply, paras 31-32.

⁸² Reply, para. 32.

⁸³ Reply, para. 33.

⁸⁴ Reply, para. 34.

⁸⁵ See *supra* paras 37-43.

in his support network to commit such crimes or may contribute in any other way to their commission.

48. With this in mind, the Pre-Trial Judge considers that there is a risk of such further crimes given the climate of witness intimidation in Kosovo, Mr Selimi's past and present prominent position in Kosovo, the indications [REDACTED], and the serious allegations made against him in the Indictment, especially at the current stage of the proceedings, where Mr Selimi is progressively informed of the evidence underpinning the charges against him, including the identity of witnesses who provided or could provide evidence in the case and/or are due to appear before the SC.

49. The Pre-Trial Judge accordingly finds that there is a risk that Mr Selimi will commit further crimes.

4. Conclusion

50. The Pre-Trial Judge concludes that there is a risk that Mr Selimi will abscond, obstruct the progress of SC proceedings or commit further crimes against those perceived as being opposed to the KLA, including witnesses who provided or could provide evidence in the case and/or are due to appear before the SC. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by the Proposed Conditions.

C. PROPOSED CONDITIONS

51. The Defence submits that the Pre-Trial Judge must keep in mind the likely trial start date, on which the Parties disagree.⁸⁶ As an alternative to unconditional interim

⁸⁶ Request, paras 11-14.

release, the Defence submits that conditional interim release would ensure Mr Selimi's appearance at trial and protect the integrity of SPO investigations.⁸⁷ State guarantees are not a pre-requisite for interim release, and are in any event unnecessary before the SC, which are within the Kosovo justice system.⁸⁸ It argues that the following Proposed Conditions would minimise any risk resulting from interim release: (i) residing and remaining at all times in his home residence in Prishtinë/Priština; (ii) surrendering his passport and other travel documents; (iii) regular reporting to Prishtinë/Priština or EULEX police; (iv) respecting any protective measures that are in effect; (v) not discussing his case with anyone other than his recognised legal team; (vi) returning to the SC at a judicially determined date; and (vii) complying with any variation or termination of his interim release, or any other conditions imposed thereon.⁸⁹

52. The SPO responds that the trial start date is irrelevant to a review under Rule 57 of the Rules, as Rule 56(2) of the Rules governs release due to an unreasonable length of detention prior to the opening of the case.⁹⁰ In addition, no combination of the Proposed Conditions can mitigate the risks of interim release, which can only be managed through detention, in particular the SC Detention Centre's communications monitoring framework.⁹¹ Neither the SC, the SPO, EULEX, nor Kosovo police would be able to adequately monitor his interim release.⁹²

53. The Defence replies that the projected start of trial is a contextual element for assessing the detention criteria.⁹³ Moreover, the SPO has not shown that the imposition of strict conditions would be insufficient to mitigate any risks posed

⁸⁷ Request, para. 4.

⁸⁸ Request, paras 45-46.

⁸⁹ Request, paras 47-48.

⁹⁰ Response, paras 8-9.

⁹¹ Response, para. 34.

⁹² Response, paras 35-40.

⁹³ Reply, paras 9-12.

by Mr Selimi's interim release.⁹⁴ The Defence challenges the SPO's submission that Kosovo's police would be unable to monitor his interim release, noting that past failures highlighted by the SPO relate to escape from detention rather than interim release monitoring, and in any event show that Kosovo's police was able to re-arrest them.⁹⁵ All senior KLA members on trial before the International Criminal Tribunal for the Former Yugoslavia were granted interim release and complied with conditions.⁹⁶

54. As regards the risk of flight, the Pre-Trial Judge finds that the Proposed Conditions can mitigate such a risk in relation to Mr Selimi. In this regard, the Pre-Trial Judge notes favourably the Proposed Conditions of remaining at his home residence, surrendering his passport and other travel documents, regular reporting to the relevant authorities, returning to the SC at a judicially determined date and complying with any variation or termination of the interim release.

55. As regards the risk of obstructing the progress of SC proceedings or committing further crimes, the Pre-Trial Judge considers that none of the Proposed Conditions, including any additional limitations imposed by the Pre-Trial Judge, could restrict Mr Selimi's ability to communicate, through any non-public means, with his community and support network. It is through such communication that Mr Selimi could instigate, assist or otherwise engage others in intimidating or harming those perceived as being opposed to the KLA. Restricting Mr Selimi's movements or public activity would not limit his ability to communicate privately, from his home. Crucially, prohibiting Mr Selimi from contacting witnesses, persons connected to the case or, for that matter, any person in Kosovo can neither be enforced nor monitored, whether such bar refers to in-person contacts or

⁹⁴ Reply, para. 42.

⁹⁵ Reply, paras 35-38.

⁹⁶ Reply, paras 39-41, 44.

communication through electronic devices. It is only through the communication monitoring framework applicable at the SC detention facilities that Mr Selimi's communications can be effectively restricted and monitored, thereby mitigating the risks of him obstructing SC proceedings or committing future crimes.

56. The Pre-Trial Judge accordingly finds that the Proposed Conditions, including any additional limitations imposed by the Pre-Trial Judge, would insufficiently mitigate the risks of obstructing SC proceedings or committing further crimes.

57. As regards the proportionality of detention, it is incumbent upon the Pre-Trial Judge to consider more lenient measures when deciding whether a person should be detained.⁹⁷ The Pre-Trial Judge notes that, in the circumstances of the present case, the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by the Proposed Conditions. Against this backdrop, and considering that Mr Selimi has been charged with 10 counts of war crimes and crimes against humanity,⁹⁸ with a potential penalty of up to life-long imprisonment,⁹⁹ and was arrested on 5 November 2020,¹⁰⁰ the Pre-Trial Judge finds that any discussion as to the expected total length of Mr Selimi's pre-trial detention is premature and speculative at the present stage.

V. DISPOSITION

58. For the above-mentioned reasons, the Pre-Trial Judge hereby:

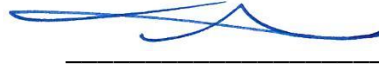
REJECTS the Request.

⁹⁷ KSC-CC-PR-2020-09, F00006, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020*, 22 May 2020, public, para. 70; *Gucati* Appeal Decision, para. 72.

⁹⁸ Indictment, paras 172-173.

⁹⁹ Article 44(1) of the Law.

¹⁰⁰ Arrest Notification.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Friday, 22 January 2021

At The Hague, the Netherlands.