



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Court of Appeals Panel
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Response to Selimi Defence Appeal of Detention Decision

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. Introduction

1. With regard to Article 41 of the Law¹ and Rules 57 and 170 of the Rules,² the SPO responds to the SELIMI Appeal³ against the Decision⁴ rejecting the SELIMI Release Request.⁵

2. The Court of Appeals Panel ('Panel') should deny the SELIMI Appeal in its entirety. As set out in detail below, in the Decision: (a) the correct legal standards were applied; (b) the assessment was properly individualised; (c) other specific risk factors were weighed correctly; and (d) no conditions sufficiently mitigate the risks identified. The Defence significantly misapprehends the applicable framework.

II. Procedural background

3. On 28 May 2020, the SPO filed the Arrest Warrant Application.⁶

4. On 26 October 2020, the PTJ confirmed a ten-count indictment against the Accused which charged him with a range of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.⁷

¹ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

² 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.

³ Public Redacted Version of Appeal against Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/IA003-F00001/RED, 3 February 2021 (SELIMI Appeal).

⁴ Public Redacted of Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/F00179/RED, 22 January 2021 (public version notified 26 January 2021) ('Decision').

⁵ Public Redacted Version of Defence Application for Interim Release, KSC-BC-2020-06/F00124, dated 7 December 2020, KSC-BC-2020-06/F00124/RED (with three annexes) ('SELIMI Release Request').

⁶ Public Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, KSC-BC-2020-06/F00005/ RED, 17 November 2020 ('Arrest Warrant Application').

⁷ Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (public version notified 30 November 2020).

5. That same day, the Arrest Warrant Application was granted.⁸ The Accused went into custody on 5 November 2020 and was transferred to the seat of the KSC in The Hague.

6. On 7 December 2020, the Accused filed the SELIMI Release Request, after which came the SPO Release Response⁹ and SELIMI Release Reply.¹⁰

7. On 22 January 2021, the PTJ rendered the Decision. The PTJ concluded that there is a risk that the Accused will abscond, obstruct the progress of KSC proceedings or commit further crimes against those who allege that KLA members committed crimes, including witnesses who provided or could provide evidence in the case and/or are due to appear before the KSC. The PTJ further concluded that no conditions would sufficiently mitigate the risks of the Accused obstructing KSC proceedings or committing further crimes.

8. On 3 February 2021, the Accused filed the SELIMI Appeal against the Decision.

III. Standard of review

9. When rendering discretionary decisions, like provisional release decisions, the weight given to relevant considerations may depend on numerous factors.¹¹ Because of the fact-specific nature of provisional release decisions, the lower level panel is better placed to assess these factors.¹² Accordingly, the Panel must not intervene unless the

⁸ Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020 (public version notified 26 November 2020) ('Arrest Warrant Decision').

⁹ Public Redacted Version of Prosecution response to Application for Interim Release on behalf of Mr Rexhep Selimi, KSC-BC-2020-06/F00154/RED, 17 December 2020 (public version notified 22 December 2020) ('SPO Release Response').

¹⁰ Selimi Defence Reply to SPO Response to Defence Application for Interim Release, KSC-BC-2020-06/F00164, dated 7 January 2021, KSC-BC-2020-06/F00164/RED ('SELIMI Release Reply').

¹¹ *Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public ('*Gucati Appeals Decision*'), paras 44, 49.

¹² *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.49.

appellant demonstrates the existence of a discernible error in that the Decision was based on an error of law, error of fact, or abuse of discretion.¹³ A mere disagreement with the conclusions that the first instance panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.¹⁴

10. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.¹⁵ An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.¹⁶

11. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.¹⁷ In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.¹⁸

12. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.¹⁹

IV. Submissions

A. THE CORRECT LEGAL STANDARDS WERE APPLIED

13. This section addresses the arguments in Grounds B.1 to B.5 of the SELIMI Appeal,²⁰ all of which should be rejected in their entirety.

¹³ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras 14, 49; *Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, Public (*'Haradinaj Appeals Decision'*), para.14.

¹⁴ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.64.

¹⁵ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.12.

¹⁶ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.12.

¹⁷ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.13.

¹⁸ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.13.

¹⁹ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.14; *Haradinaj Appeals Decision*, KSC-BC-2020-07/IA002/F00005, para.14.

²⁰ The 'grounds' in the SELIMI Appeal have been identified using the sub-headings in the SELIMI Appeal's submissions section.

14. As a preliminary matter, contrary to Defence submissions,²¹ it is self-evident that the PTJ referencing and quoting from the applicable legal framework does not denote an error. Article 41(2) is precisely the procedural avenue through which an accused can be provided with an early opportunity to challenge detention, and therefore was the operative provision pursuant to which the SELIMI Release Request was considered. The Decision did no more than note that fact.²² Nothing about the Article 41(2) framework implicates a shifting of burden.²³ Indeed, the PTJ expressly noted that such a challenge triggers a *de novo* inquiry into the facts justifying detention.²⁴ However, such an inquiry does not require the PTJ to ignore materials which are before him;²⁵ rather, the relevant requirement is that he reassess such materials anew. Indeed, in respect of the two grounds which the Defence now claims were improperly relied upon,²⁶ the Defence was not only fully aware of them as being amongst the factors which underlay the Accused's detention, but had conceded the facts in question.²⁷

15. With regard, to the applicable standard,²⁸ Article 41(6)(b) of the Law requires there to be 'articulable grounds to believe' that the risks identified in Article 41(6)(b)(i)-(iii) are established. The PTJ held that the grounds must be 'articulable' in the sense that they

²¹ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 8-10 (Ground B.1).

²² Decision, KSC-BC-2020-06/F00179/RED, para.17.

²³ *Contra*. SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 9-10. *See also Haradinaj Appeals Decision*, KSC-BC-2020-07/IA002/F00005, paras 26-27.

²⁴ Decision, KSC-BC-2020-06/F00179/RED, para.17.

²⁵ *Contra*. SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 11-12. All such materials were properly before the PTJ, both as previously submitted by the SPO at the time of the Arrest Warrant Application, and subsequently disclosed to the Defence prior to the SELIMI Release Request, and through the parties subsequent submissions (*see, for example*, SPO Release Response, KSC-BC-2020-06/F00154/RED, para.18, fn.32 and para.31, fn.51).

²⁶ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.11 (namely the Accused's 'influence as a former and current political leader and Head of the KLA Operational Directorate' and the climate of witness intimidation).

²⁷ SELIMI Release Request, KSC-BC-2020-06/F00124/RED, paras 18, 44.

²⁸ SELIMI Release Request, KSC-BC-2020-06/F00124/RED, Grounds B.2 and B.3.

must be specified in detail, meaning that specific reasoning and concrete grounds are required in deciding to continue detention.²⁹ The PTJ further concluded that specific articulable grounds must support the ‘belief’ that the risks under Article 41(6)(b)(i)-(iii) exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.³⁰

16. Although the Law includes the terms ‘is’ and ‘will’ when describing the Article 41(6) criteria, these terms are surrounded by language making it clear that certainty is not remotely required.³¹ The Pre-Trial Judge need not conclude that the Accused ‘will’ obstruct the investigation, but rather that ‘there are articulable grounds to believe’ this. It is apparent that ‘belief’ is a standard less than certainty, and—as conceded by the Defence³²—any assessment of future conduct *per se* involves an assessment of possibility and of risk.

17. This Panel has already concluded that an interim release inquiry involves a risk assessment.³³ In particular, the Panel concluded that determining the necessity of detention revolves around the ‘possibility, not the inevitability, of a future occurrence’.³⁴ This was not an idle reference to something less than certainty being required;³⁵ the Panel framed the relevant determination in these exact words and favourably cited ICC jurisprudence using that same language.³⁶

²⁹ Decision, KSC-BC-2020-06/F00179/RED, para.19.

³⁰ Decision, KSC-BC-2020-06/F00179/RED, para.19.

³¹ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.24.

³² SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.15.

³³ *See Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 51, 63, 67, 69.

³⁴ *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.67.

³⁵ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.15.

³⁶ *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.67, *citing* ICC, *Prosecutor v. Mbarushimana*, Judgment on the Appeal of Mr Callixte Mbarushimana Against the Decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, ICC-01/04-01/10-283, 14 July 2011, para.60.

18. Proposing additional or different thresholds of what the PTJ must find does not advance the matter.³⁷ The degree of certainty required follows naturally from the ‘articulable grounds to believe’ language in Article 41(6)(b). This interpretation has already been settled by the Panel,³⁸ and the PTJ did not articulate an inconsistent or incorrect legal standard.³⁹

19. Regarding Article 41(6)(b)(iii) specifically, as the PTJ correctly noted, criminal responsibility may arise through various forms of commission.⁴⁰ It is not necessary to demonstrate that an accused would personally carry out the *actus reus* of the foreseen crime(s) in order to establish the relevant risk.⁴¹ Indeed, such an interpretation would make a mockery of the provision. The PTJ’s finding clearly indicated that the engagement or contribution to a crime, is required to be under a recognised ‘form of responsibility’.⁴² Consequently, in Ground B.5, the Defence simply misrepresents the Decision, or misapprehends the various ways in which criminal liability can be incurred.⁴³ Neither denotes an error in the Decision.

20. Finally, the PTJ’s finding that Article 41(6)(b)(iii) encompasses future crimes which are ‘similar’, but need not be ‘identical’, to the underlying crimes charged contains no error.⁴⁴ It was plain to the drafters in 2015 that any armed conflict or attack against the

³⁷ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 16-23 (‘substantial likelihood’ threshold). *See also* Haradinaj Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.64 and fn.119.

³⁸ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 24-29.

³⁹ The paragraphs cited by the Defence in an attempt to substantiate this ground are either (i) lifted entirely out of context from the reasoning where the PTJ was in fact in the midst of carefully weighing the risks in question (SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.21(a) and (b) quoting from Decision, KSC-BC-2020-06/F00179/RED, paras 31 and 40), or (ii) constitute the PTJ’s risk findings, which are phrased in a manner entirely consistent with the applicable standards (SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.21(a)-(c) quoting from Decision, KSC-BC-2020-06/F00179/RED, paras 33, 43, 49).

⁴⁰ Decision, KSC-BC-2020-06/F00179/RED, paras 23-24.

⁴¹ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, Ground B.5.

⁴² Decision, KSC-BC-2020-06/F00179/RED, para.23.

⁴³ *See also* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.50.

⁴⁴ Decision, KSC-BC-2020-06/F00179/RED, para.23. *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, Ground B.5.

civilian population from the jurisdictional period had already ceased, and would not be applicable to an accused's arrest some 15-20 years after the mandate period. Consequently, the interpretation proposed by the Defence, which seeks to confine the applicability of this detention ground to 'identical' crimes,⁴⁵ is nonsensical.

21. It defies rational scrutiny to suggest that the drafters would have deliberately included a provision which they knew could have no application to the core international crimes which form the foundation of the institutional mandate. The Defence places undue emphasis on one article ('the') in the phrase 'the criminal offence'⁴⁶ to the exclusion of all other principles of interpretation.⁴⁷ The only plausible interpretation of the provision is that a perfect overlap between offences is not required. As such, the correct enquiry is for the PTJ to assess the likelihood that the Accused, if released, will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged.⁴⁸

22. Moreover, Article 41(6)(b)(iii) sets out three categories of future crimes in relation to which a relevant risk may arise. The PTJ was not specifically addressing only the first of those categories,⁴⁹ nor was the relevant portion of the reasoning so confined.⁵⁰

23. Indeed, the specific factors giving rise to the Article 41(6)(b) risks in respect of the Accused—as described in the Decision—implicate more than one of the categories of potential future crimes, noting in particular the PTJ's findings regarding the Accused's [REDACTED].⁵¹

⁴⁵ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.34.

⁴⁶ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.31.

⁴⁷ Including considering the object and purpose of the provision. Moreover, the Accused's interpretation betrays the surplusage canon of statutory interpretation, whereby no provision should be needlessly given an interpretation that causes it to have no consequence. Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson Reuters 2012), chapter 26.

⁴⁸ Decision, KSC-BC-2020-06/F00179/RED, para.23.

⁴⁹ Decision, KSC-BC-2020-06/F00179/RED, para.23 (referring globally to the 'third ground' of Article 41(6)(b)).

⁵⁰ Decision, KSC-BC-2020-06/F00179/RED, para.47.

⁵¹ Decision, KSC-BC-2020-06/F00179/RED, paras 37, 48.

24. Finally, contrary to Defence submissions,⁵² the Decision clearly indicates the nature of the foreseen future crimes and modes of responsibility, as well as the basis for their similarity to the charged crimes.⁵³

B. THE ASSESSMENT WAS PROPERLY INDIVIDUALISED

25. This section sets out why Grounds C, C.1, and C.2 should be dismissed. The remainder of the arguments under these grounds are addressed in Section C below.

26. It is not disputed that the PTJ's assessment must be undertaken on an individual basis in light of the personal circumstances of each Accused.⁵⁴ Within this individualised assessment, and with reference to a wide array of jurisprudence, the PTJ distinguished individual and contextual risk factors as follows:

[F]actors 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, his or her age, (past) position(s), occupation, family ties, health condition, assets, conduct and statements, international contacts and ties, and existence of support networks that may facilitate the materialisation of a risk. Relevant factors may also be contextual, such as the environment and conditions in which the Accused lives, or the particular stage of the ongoing proceedings.

27. This distinction is meaningful, as contextual risk factors alone are not sufficient to justify a risk necessary to continue detention.⁵⁵ As outlined below, the SELIMI Appeal deliberately misapplies this distinction in an attempt to evade clear findings of risk.⁵⁶

28. The gravity of the charges and the potential penalties which may be imposed are individual risk factors.⁵⁷ Such considerations are particular to the individual charged, and were therefore correctly considered by the PTJ as individual risk factors contributing to

⁵² *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.35.

⁵³ Decision, KSC-BC-2020-06/F00179/RED, para.47.

⁵⁴ Decision, KSC-BC-2020-06/F00179/RED, para.21.

⁵⁵ Decision, KSC-BC-2020-06/F00179/RED, para.21.

⁵⁶ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 38.

⁵⁷ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.39.

the Article 41(6)(b) risks.⁵⁸ It is entirely misplaced, and contrary to established jurisprudence, to describe these as 'generic factors'.⁵⁹ They are particular to each accused person, and their specific application to SELIMI was explained in the Decision.⁶⁰ As the Panel has held, they are important factors to consider when determining whether detention is necessary in the circumstances of a specific case.⁶¹

29. The political profile of the Accused and his prior posts are likewise individual considerations. Rexhep SELIMI was a founding member of the KLA General Staff. He is the former Head of the KLA Operational Directorate and was the Provisional Government of Kosovo's Minister of Public Order. Prior to his arrest, he was a member of the Kosovo Assembly and Head of the Parliamentary Group of the Vetëvendosje political party.⁶² It was entirely reasonable for the PTJ to place significant weight on such influential leadership positions in the KLA and government of Kosovo when assessing each of the risks under Article 41(6)(b).⁶³

30. An Accused's available support networks is also a risk factor particular to the individual.⁶⁴ In respect of each of the Article 41(6)(b) risks,⁶⁵ the PTJ concluded that the Accused had access to and could mobilise a network of supporters, including former subordinates and persons affiliated with the KLA WVA. It was entirely reasonable for the PTJ to conclude that this risk supported the necessity of continued detention in light of the ample evidence of such a support network, the active interference which they have

⁵⁸ Decision, KSC-BC-2020-06/F00179/RED, paras 31, 48.

⁵⁹ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.39.

⁶⁰ Decision, KSC-BC-2020-06/F00179/RED, para.31.

⁶¹ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.72.

⁶² SELIMI Release Request, KSC-BC-2020-06/F00124/RED, paras 18, 30 (acknowledging these past roles).

⁶³ Decision, KSC-BC-2020-06/F00179/RED, paras 31, 37, 48. *Contra* SELIMI Release Request, KSC-BC-2020-06/F00124/RED, para.49.

⁶⁴ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.45.

⁶⁵ Decision, KSC-BC-2020-06/F00179/RED, paras 31, 37, 47.

already undertaken,⁶⁶ and, as noted by the PTJ, the Accused's particular access and influence over them by virtue of his profile and specific prior positions of authority.

31. It was not necessary for the PTJ to identify specific members of the Accused's support network or his precise 'level of control' over it.⁶⁷ That such a support network exists is clear from, *inter alia*, the uncontested climate of witness intimidation in Kosovo in trials of former KLA members, a climate which continues to the present day through the actions of the KLA WVA and others. The Accused himself need not know the individual composition of his support network in order to galvanise them to obstruct the proceedings or commit further crimes. What matters is the Accused's access to the support network, and his ability to do so follows clearly from the PTJ's findings.⁶⁸

32. In an effort to evade the implications of the clear findings made on each of the factors outlined above,⁶⁹ the SELIMI Appeal attempts to mischaracterise them as 'contextual' or 'generic'.⁷⁰ This is inaccurate. Each of the findings are findings of risk on factors individual and specific to the Accused, and which, taken together, would in themselves be more than sufficient to support the necessity of the Accused's detention.

33. Finally, the Defence argues that there is insufficient evidence of a link between the Accused and certain contextual factors relied upon in the Decision.⁷¹ However, there is no requirement that every factor considered in a risk assessment relate directly to the Accused's own acts and conduct. In particular, contextual factors are frequently relevant

⁶⁶ The publication of confidential SPO documents by the KLA WVA in particular demonstrates the motivation and capability of this support network and its direct link to the present proceedings.

⁶⁷ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 45, 48.

⁶⁸ *See* Decision, KSC-BC-2020-06/F00179/RED, paras 31, 37, 47.

⁶⁹ Paras 28, 29, 30 above.

⁷⁰ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 38-39.

⁷¹ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.40.

and may be considered.⁷² The Decision clearly indicates the relevance of contextual factors which were taken into account.⁷³

C. OTHER SPECIFIC RISK FACTORS WERE WEIGHED CORRECTLY

34. The additional specific risk factors challenged by the Accused are addressed below. This section responds to Grounds B.6, C, C.1, C.2, C.3 of the SELIMI Appeal.

35. Preliminarily, it must be noted that the PTJ concluded that the Accused's current risk of flight is sufficiently mitigated by his proposed conditions. As such, any alleged errors on this basis have no chance of changing the outcome of a Decision⁷⁴ and should be summarily dismissed. The SPO only engages with the Accused's flight risk arguments to the extent they apply to the PTJ's reasoning on the Article 41(6)(b)(ii)-(iii) risks.

1. Detention duration

36. There was nothing unlawful or unreasonable in the PTJ declining to estimate the expected total length of pre-trial detention.⁷⁵

37. Clearly, because deprivation of liberty must always be proportional,⁷⁶ the length of detention is a relevant factor and may be grounds for release if an accused is detained for an unreasonable period prior to the opening of the case.⁷⁷ However, and in contrast to the ICTY, detention at the KSC is reviewed every two months.⁷⁸ Therefore, a detention decision made now will not dictate for how long an accused is detained. Estimating the future length of detention is not required at this stage and, in light of the applicable

⁷² Decision, KSC-BC-2020-06/F00179/RED, para.21 (and jurisprudence cited therein).

⁷³ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.41. Decision, KSC-BC-2020-06/F00179/RED, para.42.

⁷⁴ SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 42-46.

⁷⁵ Decision, KSC-BC-2020-06/F00179/RED, para.57. *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 36-37.

⁷⁶ *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.73.

⁷⁷ Rule 56(2).

⁷⁸ Rule 57(2).

framework, would not advance the relevant assessment. Such an estimate is indeed premature and speculative. Moreover, the timing of the trial is heavily contested between the parties.⁷⁹ The PTJ committed no discernible error in declining to resolve this matter, nor in concluding that the Accused's actual length of detention to this point created no proportionality concerns.

2. Witness Security

38. Contrary to Defence submissions,⁸⁰ the PTJ committed no error in considering the potential vulnerability of witnesses to intimidation.⁸¹ This formed part of the PTJ's careful consideration of issues surrounding witness security and protection, including the extent to which various measures could mitigate the risk of witness interference. The PTJ noted, in particular, the context of the general, well-established, and ongoing culture of witness intimidation in Kosovo,⁸² and the vulnerability faced by SPO witnesses participating in these proceedings is likewise part of those contextual factors identified by the PTJ as supporting continued detention.⁸³ Indeed, the paragraph with which the Defence takes issue in fact amply demonstrates the careful assessment undertaken by the PTJ regarding the weight to give such factors, expressly noting, for example, the partially mitigating impact of protective measures.⁸⁴

3. Positions of Authority

⁷⁹ It is notable that, since the SELIMI Appeal, the SELIMI Defence has argued that setting a commencement date for trial is 'premature'. See Defence Submissions in relation to Third Status Conference, KSC-BC-2020-06/F00195, 10 February 2021, para.10. The PTJ not estimating the length of the pre-trial phase is an alleged error in the SELIMI Appeal, only to become a suggested approach when considering the SELIMI Defence's own trial readiness.

⁸⁰ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.52.

⁸¹ Decision, KSC-BC-2020-06/F00179/RED, para.39.

⁸² Decision, KSC-BC-2020-06/F00179/RED, para.42.

⁸³ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.52.

⁸⁴ Decision, KSC-BC-2020-06/F00179/RED, para.39.

39. The Pre-Trial Judge considered the Accused's prior positions, and there was no discernible error in how the relevant factors were weighed. SELIMI himself listed his various responsibilities and indicated that, since the war, his patriotic and professional duties have been 'substantial'.⁸⁵ On the basis of SELIMI's own submissions, it was eminently reasonable for the PTJ to conclude he has held a multitude of positions of authority in Kosovo.⁸⁶

4. Progressive Disclosure

40. The PTJ committed no discernible error in relying upon the fact that the Accused 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 KSC. SELIMI's knowledge of the case against him at any given moment is particular to him as an individual, and thus is correctly understood as an individual factor for purposes of the interim release assessment.⁸⁷

41. Whether or not the necessity of detention increases because the Accused is progressively informed of the evidence against him is first and foremost a matter for the lower level panel to determine in the exercise of its discretion.⁸⁸ By virtue of his detailed understanding of the evidence following the confirmation process, the PTJ is best able to assess how additional disclosure impacts the incentives of the Accused and, correspondingly, the Article 41(6)(b) risks. In the present case, the Accused being progressively informed of the witnesses against him was found, in light of all other

⁸⁵ SELIMI Release Request, KSC-BC-2020-06/F00124/RED, paras 18, 30. *See also* para.29 above.

⁸⁶ Decision, KSC-BC-2020-06/F00179/RED, para.37. *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, para.49. *See also* para.29 above.

⁸⁷ *Contra* SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 39, 44, 54.

⁸⁸ *See* ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para.15 (in the context of the Accused progressively hearing the evidence against him during trial).

relevant factors, as a consideration which bore on the risk of interference.⁸⁹ There is no discernible error in this assessment;⁹⁰ the Accused merely disagrees with how the PTJ's discretion was applied.

5. Indictment Allegations

42. This Panel has identified no error in relying upon the allegations presented by the SPO in the course of assessing the risk of obstructing the proceedings.⁹¹ There is no indication this factor was relied upon in isolation; rather, it was one of several factors underpinning the PTJ's findings.⁹² These allegations reasonably informed the assessment of Article 41(6)(b) risks, given that, amongst other reasons, the PTJ has already concluded that there is a well-grounded suspicion the Accused committed the crimes alleged by the SPO.

6. [REDACTED]

43. The Defence concedes the *prima facie* relevance to the Article 41(6)(b) assessment of [REDACTED],⁹³ yet disputes the finding which the PTJ drew from this evidence.

⁸⁹ Decision, KSC-BC-2020-06/F00179/RED, para.48.

⁹⁰ To the contrary, the ICC Appeals Chamber expressly endorsed relying on this factor in the same manner. See ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, 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'", 26 October 2012 ('*Gbagbo Appeals Judgment*'), para.65 (citations removed: '[...] the Appeals Chamber notes that the Pre-Trial Chamber found that the disclosure of evidence "amplified" the risk to the investigation and the court proceedings in case of Mr Gbagbo's release. In the view of the Appeals Chamber, this finding cannot be faulted. Disclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute [governing risk of interference at the ICC] it may be a relevant factor.').

⁹¹ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras 60-63.

⁹² *Contra SELIMI Appeal*, KSC-BC-2020-06/IA003-F00001/RED, para.55.

⁹³ *SELIMI Appeal*, KSC-BC-2020-06/IA003-F00001/RED, para.51.

44. [REDACTED].⁹⁴ Altogether, [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]⁹⁵ [REDACTED].

45. The PTJ [REDACTED],⁹⁶ and relied upon it as one of multiple factors contributing to a finding of Article 41(6)(b)(ii) and (iii) risk in respect of the Accused.⁹⁷ It was eminently reasonable for him to do so.

D. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED

46. Finally, Ground C.4 of the SELIMI Appeal is meritless as it is again misapprehending the required assessment.

47. The PTJ considered that none of the proposed conditions, nor any additional limitations that could be imposed by him, could restrict the Accused's ability to communicate, through any non-public means, with his community or support network.⁹⁸ The PTJ found the risks to be such that they can only be effectively managed through the fully controlled environment that detention alone can provide.⁹⁹ The primary way the Accused is going to be able to either interfere or commit further crimes is to get messages out to his former subordinates and supporters. The Accused's communications are how the risks identified will be realised, and as such their control and monitoring are essential aspects of his detention. There was no discernible error in these findings.

48. It is apparent that careful consideration was given to the possibility of adequate mitigation in respect of each of the identified Article 41(6)(b) risks.¹⁰⁰ Moreover, the PTJ

⁹⁴ Decision, KSC-BC-2020-06/F00179/RED, para.38. *Regarding [REDACTED] see SPO Release Response, KSC-BC-2020-06/F00154, paras 23-25.*

⁹⁵ Decision, KSC-BC-2020-06/F00179/RED, para.51.

⁹⁶ Decision, KSC-BC-2020-06/F00179/RED, para.38.

⁹⁷ Decision, KSC-BC-2020-06/F00179/RED, paras 40, 43, 47-49.

⁹⁸ Decision, KSC-BC-2020-06/F00179/RED, para.55.

⁹⁹ Decision, KSC-BC-2020-06/F00179/RED, para.55.

¹⁰⁰ Decision, KSC-BC-2020-06/F00179/RED, paras 54-55, 57. *Contra SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 60-61.*

was specific in identifying the basis for his conclusion that no provisional release conditions could adequately address the risks in question, being the impossibility of adequately monitoring communications outside the controlled environment of detention.¹⁰¹ Any attempts to propose conditions which further restrict phone calls and public statements¹⁰² fail to appreciate the reality behind the PTJ's considerations. Contrary to what the Defence appears to envisage, there was no requirement for the PTJ to expressly and exhaustively list every conceivable potential condition and the manner in which it would fail to address the identified risks. The PTJ's conclusion was correct, reasoned, and reasonable. There is no discernible error.

V. Conclusion

49. For the foregoing reasons, the Panel should deny the SELIMI Appeal in its entirety.

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Jack Smith
Specialist Prosecutor

Monday, 22 February 2021
At The Hague, the Netherlands.

¹⁰¹ Decision, KSC-BC-2020-06/F00179/RED, para.55.

¹⁰² SELIMI Appeal, KSC-BC-2020-06/IA003-F00001/RED, paras 57-61.