



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** **KSC-BC-2020-04**  
**The Prosecutor v. Pjetër Shala**

**Before:** **Pre-Trial Judge**  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 15 June 2021

**Language:** English

**Classification:** **Public**

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**Public Redacted Version of**  
**Decision on Pjetër Shala's Request for Provisional Release**

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**Specialist Prosecutor**  
Jack Smith

**Counsel for the Accused**  
Jean-Louis Gilissen

**THE PRE-TRIAL JUDGE**,<sup>1</sup> 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 16 March 2021, upon request of the Specialist Prosecutor's Office ("SPO") ("Arrest Warrant Application"),<sup>2</sup> and further to the confirmation of an indictment ("Confirmation Decision"),<sup>3</sup> Pjetër Shala ("the Accused" or "Mr Shala") was arrested in the Kingdom of Belgium ("Belgium"),<sup>4</sup> pursuant to a decision ("Decision on Arrest")<sup>5</sup> and an arrest warrant<sup>6</sup> issued by the Pre-Trial Judge.
2. On 15 April 2021, upon conclusion of the judicial proceedings in Belgium, Mr Shala was transferred to the detention facilities of the Specialist Chambers ("SC") in The Hague, the Netherlands.<sup>7</sup>

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<sup>1</sup> KSC-BC-2020-04, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

<sup>2</sup> KSC-BC-2020-04, F00002/RED, Specialist Prosecutor, *Public Redacted Version of "Submission of Indictment for Confirmation and Related Requests"*, 26 April 2021, public, para. 21(ii).

<sup>3</sup> KSC-BC-2020-04, F00007/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala*, 12 June 2020, public; KSC-BC-2020-04, F00010/A02, SPO, *Indictment*, 19 June 2020, confidential.

<sup>4</sup> KSC-BC-2020-04, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 16 March 2021, public.

<sup>5</sup> KSC-BC-2020-04, F00008, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, confidential.

<sup>6</sup> KSC-BC-2020-04, F00008/A01/RED, Pre-Trial Judge, *Public Redacted Version of Arrest Warrant for Mr Pjetër Shala*, 15 April 2021, public.

<sup>7</sup> KSC-BC-2020-04, F00019, Registrar, *Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel*, 15 April 2021, confidential, para. 2, with Annexes 1-2, confidential.

3. On 27 May 2021, the Defence for Mr Shala (“the Defence”) filed an application for interim release (“Request”).<sup>8</sup> The SPO responded on 9 June 2021 (“Response”).<sup>9</sup> The Defence replied on 14 June 2021 (“Reply”).<sup>10</sup>

## II. SUBMISSIONS

4. The Defence submits that the SPO has failed to show that there are articulable grounds that justify the detention of Mr Shala. In particular, it avers that: (i) the SPO has failed to show that Mr Shala poses a flight risk; (ii) there is no foundation for concluding that Mr Shala would interfere with the administration of justice; and (iii) there is no realistic basis for alleging a risk of further offences.<sup>11</sup> It adds that, even if the Pre-Trial Judge were to consider that such articulable grounds exist, pre-trial detention would be disproportionate in light of the Pre-Trial Judge’s power to make provisional release conditional.<sup>12</sup>

5. The SPO opposes the Request, arguing that the criteria for detention set out in Article 41(6)(b) of the Law, as already found by the Pre-Trial Judge in the Decision on Arrest, continue to be met.<sup>13</sup> It further argues that no alternative measure sufficiently addresses these risks.<sup>14</sup>

6. The Defence replies that the SPO fails to prove that there are articulable grounds justifying detention on remand of Mr Shala and reiterates that the

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<sup>8</sup> KSC-BC-2020-04, F00039, Defence for Mr Shala, *Motion for Provisional Release*, 27 May 2021, confidential.

<sup>9</sup> KSC-BC-2020-04, F00042, Specialist Prosecutor, *Prosecution Response to Application for Provisional Release on Behalf of Mr Pjetër Shala*, 9 June 2021, confidential.

<sup>10</sup> KSC-BC-2020-04, F00044, Defence for Mr Shala, *Reply to Prosecution’s Response to Motion for Provisional Release*, 14 June 2021, confidential.

<sup>11</sup> Request, paras 16, 18-44.

<sup>12</sup> Request, paras 17, 48-52.

<sup>13</sup> Response, paras 1, 4-16.

<sup>14</sup> Response, paras 1, 17-18.

Accused's pre-trial detention would be in any case disproportionate in light of the proposed conditions for provisional release.<sup>15</sup>

### III. APPLICABLE LAW

7. 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 SC.

8. 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.

9. 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 release as deemed appropriate to ensure the presence of the detained person.

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<sup>15</sup> Reply, paras 6-7.

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

#### IV. DISCUSSION

##### A. PRELIMINARY MATTERS

11. The Pre-Trial Judge notes that Mr Shala and the SPO have not yet filed a public redacted version of their submissions. Considering that all submissions filed before the SC shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel, the Pre-Trial Judge orders the Defence to file public redacted versions of the Request and the Reply, within seven days of receiving notification of the present decision and the SPO to file a public redacted version of the Response, within the same deadline.

12. Furthermore, with regard to the risk of obstructing the progress of SC proceedings and of committing further crimes, the Defence argues that the extent of the redactions in the Arrest Warrant Application and in the Decision on Arrest was such that the Pre-Trial Judge must disregard the redacted allegations.<sup>16</sup> The SPO disclosed the information under consideration in its Response, requesting the Pre-Trial Judge to reclassify the relevant documents and noting that the reclassification was being requested because of the disclosure of indictment supporting material.<sup>17</sup> In its Reply, the Defence reiterates that the redactions constituted an unjustified and disproportionate interference with its rights, which

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<sup>16</sup> Request, paras 34-35, 44.

<sup>17</sup> Response, para. 1, fn. 2 and para. 12, fn. 30.

deprived Mr Shala of an effective opportunity to respond to the core of the SPO's arguments.<sup>18</sup> The Pre-Trial Judge observes that the Defence partly anticipated the arguments of the SPO and addressed them in its Request,<sup>19</sup> the SPO disclosed the information under consideration in its Response, and the Pre-Trial Judge reclassified the relevant documents so as to allow the Defence to effectively address the SPO's submissions in its Reply.<sup>20</sup> Accordingly, considering that, viewed in combination, the Defence has had a sufficient opportunity to set out its view in relation to this matter, the Pre-Trial Judge rejects the Defence's request to set these submissions aside.

## B. APPLICABLE STANDARDS

13. The Pre-Trial Judge recalls that, while an arrest warrant, pursuant to Article 41(6) of the Law, is 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.<sup>21</sup> The Pre-Trial Judge also underscores that any analysis of pre-trial detention is taken in the context of the detained person's presumption of innocence.<sup>22</sup> This means, as a consequence, that pre-trial detention cannot be

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<sup>18</sup> Reply, paras 2-5.

<sup>19</sup> Request, paras 39-40.

<sup>20</sup> Reply, paras 13-19.

<sup>21</sup> KSC-BC-2020-07, F00058, Single Judge, *Decision on Request for Immediate Release of Nasim Haradinaj*, 27 October 2020, public, paras 12-13.

<sup>22</sup> 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; KSC-BC-2020-06, IA004/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release* ("Thaçi Interim Appeal Decision"), 30 April 2021, para. 17, with further references; similarly, ECtHR, *McKay v. the United Kingdom*, no. 543/03, [Judgment](#), 3 October 2006, para. 43.

maintained lightly<sup>23</sup> and that the SPO bears the burden of establishing that the detention of the Accused is necessary.<sup>24</sup>

### C. GROUNDED SUSPICION

14. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires at the outset a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.<sup>25</sup>

15. In this regard, the Pre-Trial Judge recalls that, in the Confirmation Decision, it was determined that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Shala is criminally liable for a number of war crimes (arbitrary detention, cruel treatment, torture and murder) under Articles 14(1)(c) and 16(1)(a) of the Law.<sup>26</sup> These findings were made on the basis of a standard exceeding the grounded suspicion threshold required for the purposes of Article 41(6)(a) of the Law<sup>27</sup>. Furthermore, the Defence does not argue that the grounded suspicion against the Accused no longer exists in its Request. The Pre-Trial Judge accordingly finds that, in the absence of any intervening information or development in relation to the present decision, the requirement set forth in Article 41(6)(a) of the Law continues to be met.

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<sup>23</sup> Thaçi Interim Appeal Decision, para. 17.

<sup>24</sup> KSC-BC-2020-06, F00177, Pre-Trial Judge, *Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release* ("Thaçi First Decision on Detention"), 22 January 2021, para. 19, with further references; similarly, ECtHR, *Merabishvili v. Georgia*, no. 72508/13, [Judgment](#) ("*Merabishvili v. Georgia*"), 28 November 2017, para. 234.

<sup>25</sup> *Merabishvili v. Georgia*, para. 222, with further references.

<sup>26</sup> Confirmation Decision, para 140(a).

<sup>27</sup> Confirmation Decision, para 35.



#### D. NECESSITY OF DETENTION

16. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be *articulable* in the sense that they must be specified in detail.<sup>28</sup> In this regard, Article 41(6)(b) of the Law echoes the principle that the 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.<sup>29</sup> Accordingly, the Panel must rely on case-specific reasoning and concrete grounds in deciding to continue detention.<sup>30</sup> The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"<sup>31</sup> that any of the risks under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.<sup>32</sup> In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.<sup>33</sup>

17. 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,<sup>34</sup> 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.<sup>35</sup> When

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<sup>28</sup> 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"; *see also, for example*, KSC-BC-2020-06, IA001/F00005, Court of Appeals Panel, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release* ("Veseli Interim Appeal Decision"), 30 April 2021, public, paras 18-19.

<sup>29</sup> SCCC 26 April 2017 Judgment, para. 113.

<sup>30</sup> SCCC 26 April 2017 Judgment, para. 115; *Thaçi Interim Appeal Decision*, para. 22; *similarly*, ECtHR, *Khudoyorov v. Russia*, no. 6847/02, [Judgment](#), 8 November 2005, para. 173.

<sup>31</sup> *See* chapeau of Article 41(6)(b) of the Law.

<sup>32</sup> KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, public, para. 17, with further references.

<sup>33</sup> *Veseli Interim Appeal Decision*, para. 17.

<sup>34</sup> *Thaçi First Decision on Detention*, para. 21, with further references.

<sup>35</sup> *Similarly*, ECtHR, *Aleksanyan v. Russia*, no. 46468/06, [Judgment](#), 22 December 2008, para. 179; *Thaçi First Decision on Detention*, para. 21, with further references.



assessing the relevant factors, the Pre-Trial Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.<sup>36</sup>

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

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

19. 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 they do not require physical execution on his or her part.<sup>37</sup>

20. Furthermore, the three grounds are in the alternative, the existence of one ground suffices to determine the necessity of detention of the Accused.<sup>38</sup>

## **1. Risk of Flight**

21. The Defence submits that Mr Shala is not a flight risk due to: (i) his longstanding record of exemplary cooperation with international tribunals, the Belgian authorities and the SPO;<sup>39</sup> (ii) the fact that he lives in the same building in Belgium with two of his children, to whom he is closely connected;<sup>40</sup> (iii) the facts that he is indigent, lacks any links with Kosovo, which he left in 1999, and has no network of supporters in Kosovo;<sup>41</sup> and (iv) the fact that, despite having been

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<sup>36</sup> Thaçi First Decision on Detention, para. 21, with further references.

<sup>37</sup> Thaçi First Decision on Detention, para. 24.

<sup>38</sup> Thaçi First Decision on Detention, para. 25.

<sup>39</sup> Request, para. 22.

<sup>40</sup> Request, para. 23.

<sup>41</sup> Request, para. 24.

informed of the convictions of two of his alleged co-perpetrators, he has never attempted to flee.<sup>42</sup> The Defence further challenges the SPO's reliance on the serious penalties Mr Shala might receive.<sup>43</sup>

22. The SPO responds that Mr Shala is a flight risk because: (i) he has been made aware of the serious charges against him and he is aware of the potential penalties he might face, also in light of the convictions of two of his alleged co-perpetrators;<sup>44</sup> (ii) his alleged cooperation with international tribunals contrasts with the repeated delegitimation of the SC, its documents and officers, which increases the risk of non-appearance should Mr Shala be released;<sup>45</sup> (iii) he could count on a network of supporters who, in light of the general climate of obstruction of proceedings against former Kosovo Liberation Army ("KLA") members, would be ready to mobilise and assist him in evading justice;<sup>46</sup> and (iv) he has neither [REDACTED] nor any family obligation that would root him to his place of residence, especially as he does not share a residence with his children.<sup>47</sup>

23. The Defence replies to the SPO's arguments, opposing them.<sup>48</sup> In particular, it argues that the SPO has failed to prove that Mr Shala maintains links with Kosovo and the KLA, and that it has provided no concrete grounds to infer that Mr Shala has the means or a realistic opportunity to evade justice.<sup>49</sup>

24. As regards the risk of flight, the Pre-Trial Judge considers that Mr Shala's awareness of the serious charges against him<sup>50</sup> that could potentially attract serious penalties are undoubtedly important factors incentivising him to abscond.

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<sup>42</sup> Request, para. 27.

<sup>43</sup> Request, para. 26.

<sup>44</sup> Response, para. 7.

<sup>45</sup> Response, paras 8-9.

<sup>46</sup> Response, para. 10.

<sup>47</sup> Response, para. 11.

<sup>48</sup> Reply, paras 8-12.

<sup>49</sup> Reply, para. 10.

<sup>50</sup> Confirmation Decision, para. 140(a).

In this regard, the Pre-Trial Judge also notes that Mr Shala is aware of the final conviction of two alleged members of the same Joint Criminal Enterprise (“JCE”), Sabit Geci (“Mr Geci”) and Xhemshit Krasniqi (“Mr Krasniqi”), for the same events for which he stands accused,<sup>51</sup> which further increases the risk of flight. The Pre-Trial Judge accepts, as the Defence argues, that Mr Shala has never attempted to flee despite having knowledge of their convictions. Yet, the Pre-Trial Judge recalls that the risk, not the inevitability, of flight must be assessed. The Pre-Trial Judge finds that the possibility of Mr Shala absconding has become more likely, since he is no longer a suspect but is now an accused on the basis of the JCE to which Mr Geci and Mr Krasniqi allegedly belonged,<sup>52</sup> and his alleged co-perpetrators have been definitely convicted and sentenced to lengthy sentences.<sup>53</sup> Having said that, the Pre-Trial Judge is mindful of the fact that the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced.<sup>54</sup> Therefore, the Pre-Trial Judge will assess whether there are other factors justifying detention under this limb of Article 41(6)(b) of the Law.

25. The Pre-Trial Judge finds that, while it is uncontested that Mr Shala repeatedly complied with summons before the ICTY, the Belgian Police and the SPO,<sup>55</sup> his recent reaction to his arrest, together with his refusal to sign a series of documents<sup>56</sup> and his statement concerning the alleged lack of legitimacy and

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<sup>51</sup> Kosovo, Court of Appeals, *The People v. XHK*, Case 648/16, Judgment, 22 June 2017; Kosovo, Court of Appeals, *Case against S. Geci et al.*, PAKR 966/2012, Judgment, 11 September 2013.

<sup>52</sup> Confirmation Decision, para. 116.

<sup>53</sup> Similarly, ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-147, Pre-Trial Chamber II, [Decision on the Defence’s Application for Interim Release](#), 18 November 2013, para. 51.

<sup>54</sup> ECtHR, *G. v. Russia*, no. 42526/07, [Judgment](#), 21 June 2016, para. 116; *Zherebin v. Russia*, no. 51445/09, [Judgment](#), 24 March 2016, para. 58.

<sup>55</sup> Request, para. 22, fns 26-28.

<sup>56</sup> KSC-BC-2020-04, F00021, Registry, *Report on the Arrest and Transfer of Pjetër Shala to the Detention Facilities* (“Registry Arrest Report”), 16 April 2021, strictly confidential and *ex parte*, paras 17, 21, 38, 40 with Annexes 1-3, strictly confidential and *ex parte*.

unlawfulness of the SC,<sup>57</sup> demonstrate that Mr Shala rejects the legitimacy of the SC, which increases the risk that, if released, he would abscond.

26. As regards the existence of a network of supporters, the Pre-Trial Judge notes the Defence arguments that Mr Shala has left Kosovo in 1999, has distanced himself from Kosovo politics and has apparently no ties to Kosovo. However, the Pre-Trial Judge recalls that Mr Shala is now aware that there is a well-grounded suspicion against him that he was a member of a JCE.<sup>58</sup> In this regard, the Pre-Trial Judge finds that the relatively small size of the group making up the alleged JCE and the fact that the events underlying the charges are easily distinguishable, increases the possibility of mutual assistance among its alleged members, including by helping each other to abscond. The Pre-Trial Judge further considers that the above finding must be placed in the general context of a general, well-established, and ongoing climate of interference with KLA-related criminal proceedings and of witnesses' intimidation.<sup>59</sup>

27. Lastly, the Pre-Trial Judge finds that, although it has been demonstrated by the SPO that Mr Shala does not physically live with his children in the same apartment,<sup>60</sup> two of them live in the same building. The Pre-Trial Judge accepts that this, together with the fact that Mr Shala alleges that he depends on his income from employment in the construction sector for his survival,<sup>61</sup> mitigates Mr Shala's risk of flight. In this regard, the Pre-Trial Judge further notes that Mr Shala has left Kosovo a long time ago and has distanced himself from politics. Nevertheless, the Pre-Trial Judge considers that these factors only mitigate the risk of flight which, although moderate, exists for the remaining reasons set out above.

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<sup>57</sup> Registry Arrest Report, para. 38.

<sup>58</sup> *Supra*, para. 24.

<sup>59</sup> *See, for example*, *Thaçi First Decision on Detention*, para. 43.

<sup>60</sup> Response, para. 11, fn. 29.

<sup>61</sup> Request, para. 51.

28. The Pre-Trial Judge accordingly finds that, while moderate, a risk of flight exists in relation to Mr Shala, which exceeds the mere possibility of this risk materialising.

## **2. Risk of Obstructing the Progress of SC Proceedings**

29. The Defence submits that, due to Mr Shala having left Kosovo more than 20 years ago and the absence of a support network, the existence of protective measures, and the absolute lack of evidence as to any (attempted) interference with the administration of justice, Mr Shala poses no risk of obstructing SC proceedings.<sup>62</sup> It further refers to [REDACTED] and points out that he did not benefit from legal advice at that time. [REDACTED].<sup>63</sup>

30. The SPO responds that [REDACTED] speak for themselves and clearly demonstrate Mr Shala's intent to interfere with witnesses.<sup>64</sup> [REDACTED].<sup>65</sup> Lastly, the SPO avers that Mr Shala's access to a broad network of supporters and his repeated delegitimisation of the SC heighten the risk of obstruction.<sup>66</sup>

31. The Defence replies that Mr Shala has neither ever attempted to interfere with the evidentiary material nor searched and/or contacted any of the witnesses.<sup>67</sup> It further challenges the SPO's interpretation of [REDACTED],<sup>68</sup> his alleged close ties to one of the witnesses<sup>69</sup> and the existence of a support network.<sup>70</sup>

32. As regards the risk of obstructing the progress of SC proceedings, the Pre-Trial Judge notes that, [REDACTED].<sup>71</sup> [REDACTED]. [REDACTED]. The Pre-Trial

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<sup>62</sup> Request, paras 29-38, 41.

<sup>63</sup> Request, paras 39-40.

<sup>64</sup> Response, paras 12-13.

<sup>65</sup> Response, para. 14.

<sup>66</sup> Response, para. 15.

<sup>67</sup> Reply, paras 13, 15-16, 18.

<sup>68</sup> Reply, paras 14, 17.

<sup>69</sup> Reply, para. 19.

<sup>70</sup> Reply, para. 20.

<sup>71</sup> Decision on Arrest Warrant, para. 22; [REDACTED].

Judge further holds that this finding is not undermined by the fact that Mr Shala was not represented by a lawyer, as it remains a fact that Mr Shala [REDACTED].<sup>72</sup>

33. The Pre-Trial Judge further notes that, [REDACTED].<sup>73</sup> [REDACTED].<sup>74</sup> [REDACTED]. This finding is not outweighed by the fact that Mr Shala has left Kosovo several years ago. In this regard, the Pre-Trial Judge recalls that the obstruction may materialise as a result of the Accused's acts or omissions, but does not require physical execution on his part.<sup>75</sup>

34. Lastly, while the Pre-Trial Judge takes note of the Defence's argument that Mr Shala refused to engage in any exchange with [REDACTED],<sup>76</sup> [REDACTED], when Mr Shala was not an Accused. At present, Mr Shala is aware of the fact that, in the Arrest Warrant Application,<sup>77</sup> the SPO relied, *inter alia*, on the evidence provided [REDACTED]; [REDACTED]. The Pre-Trial Judge finds that this substantially increases the risk of interference with [REDACTED].

35. The Pre-Trial Judge accordingly finds that there is a risk that Mr Shala will obstruct the progress of SC proceedings, which exceeds the mere possibility of this risk materialising.

### **3. Risk of Committing Further Crimes**

36. The Defence submits that there is no risk that Mr Shala will repeat the offences alleged in the indictment against him. It contends that Mr Shala has never threatened to resort to physical violence against witnesses [REDACTED].<sup>78</sup>

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<sup>72</sup> [REDACTED].

<sup>73</sup> [REDACTED].

<sup>74</sup> [REDACTED].

<sup>75</sup> *Supra*, para. 20.

<sup>76</sup> Request, para. 40.

<sup>77</sup> Arrest Warrant Application, para. 9.

<sup>78</sup> Request, paras 42-44.

37. The SPO responds that, [REDACTED], there are reasons to believe that he will commit or threaten to commit physical violence against [REDACTED], or other witnesses, or that he will incite others to do so.<sup>79</sup>

38. The Defence replies that Mr Shala has never considered or attempted causing any harm to any person or potential witnesses, and that the SPO failed to prove otherwise.<sup>80</sup>

39. The Pre-Trial Judge recalls his above findings relating to the risk that Mr Shala would obstruct SC proceedings. While the existence of such a risk does not automatically translate into a risk of committing further crimes, the factors underpinning the former are of relevance to the assessment of the latter in the present case. In particular, the Pre-Trial Judge emphasises that [REDACTED].<sup>81</sup> Although the Pre-Trial Judge is aware of the fact that such events occurred more than 20 years ago, the facts that [REDACTED] contribute to the likelihood of the risk materialising that Mr Shala will, under any form of responsibility, engage or contribute in crimes, similarly to the underlying acts charged, [REDACTED], or any other person [REDACTED], including witnesses who provided or could provide evidence in the case. Moreover, it is recalled that such a contribution need not materialise in Mr Shala physically executing such crimes. It suffices that Mr Shala, through his statements, either public or private, may instigate or assist individuals in his support network to commit such crimes or may contribute in any other way.

40. Accordingly, the Pre-Trial Judge finds that there is a risk that Mr Shala will commit further crimes, which exceeds the mere possibility of this risk materialising.

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<sup>79</sup> Response, para. 16.

<sup>80</sup> Reply, paras 13-14, 17-18.

<sup>81</sup> *Supra*, para. 33.



#### 4. Conclusion

41. The Pre-Trial Judge concludes that there is a risk that Mr Shala 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 evidence to the SPO and/or are due to appear before the SC, which exceeds the mere possibility of these risks materialising. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by the Proposed Conditions.

#### E. PROPOSED CONDITIONS

42. The Defence submits that, even if the Pre-Trial Judge were to conclude that the SPO has discharged its obligation to establish the existence of articulable grounds to believe that any of the Article 41(6) criteria exist, he must nevertheless grant provisional release on conditions, unless the SPO is able to establish that: (i) pre-trial detention is the least restrictive measure available to achieve its goals; and (ii) pre-trial detention is, in the circumstances, a proportionate restriction on the Mr Shala's rights.<sup>82</sup> It further avers that Mr Shala is willing to comply with any mitigating measures including, but not limited to: (i) surrendering of any travel documents; (ii) being subject to compulsory overnight condition of residence at his home address in Belgium and to curfew and daily checks by authorised officials from the Government of Belgium; (iii) close monitoring, by means of an ankle bracelet with GPS location monitoring; (iv) daily reporting to authorised officials from the Government of Belgium; (v) refraining from contacting any potential witnesses and/or members of their family, directly or indirectly; (vi) restricted or limited access to a single mobile telephone for limited communication; and (vii) consenting to attend proceedings before the KSC by

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<sup>82</sup> Request, paras 45-48.

video-conference facilities (“Proposed Conditions”).<sup>83</sup> In the alternative, the Defence requests that Mr Shala be placed under house arrest at his residence in Belgium.<sup>84</sup>

43. The SPO responds that no combination of the Proposed Conditions is sufficient to mitigate the risks posed by Mr Shala, if released.<sup>85</sup> It contends that detention at the SC detention facilities, including the communications monitoring framework applicable therein, is the only means by which these risks can be managed.<sup>86</sup> It further avers that the SPO does not have the means and resources to adequately monitor the Accused if released in Belgium. Moreover, due to the geographical features of Belgium and the lack of systematic border controls within the Schengen area, Mr Shala would be able to leave the country without the agreement of the supervising court and before any arrest could be made, rendering any monitoring device ineffective.<sup>87</sup> As far as the communication with the external world is concerned, the SPO contends that, having regard to the wide array of mediums available, no effective measure might counteract the relevant risk.<sup>88</sup>

44. The Defence replies that cooperation between Belgium and the SC has always been exemplary and that it is in any case open to the Pre-Trial Judge to obtain assurances by the Belgian authorities.<sup>89</sup> Lastly, it argues that the risk of disclosing confidential information, relied upon by the SPO, is not a valid ground for continuing detention.<sup>90</sup>

45. As regards the risk of flight, the Pre-Trial Judge finds that the Proposed Conditions could mitigate such a risk in relation to Mr Shala. In this regard, the

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<sup>83</sup> Request, para. 50.

<sup>84</sup> Request, para. 51.

<sup>85</sup> Response, para. 17.

<sup>86</sup> Response, para. 17.

<sup>87</sup> Response, para. 17.

<sup>88</sup> Response, para. 17.

<sup>89</sup> Reply, para. 23.

<sup>90</sup> Reply, para. 22.

Pre-Trial Judge notes favourably Mr Shala's undertakings to submit himself to daily checks by authorised officials from the Government of Belgium, surrender any travel documents and be subject to close monitoring by the Belgian authorities.

46. However, as regards the risks of obstructing the progress of SC proceedings or committing further crimes, the Pre-Trial Judge finds that none of the Proposed Conditions, nor any other additional limitations imposed by the Pre-Trial Judge, could restrict Mr Shala's ability to access information and resources that would facilitate any attempts to communicate with victims, their families or his support network. While the Pre-Trial Judge takes note of Mr Shala's commitment not to contact witnesses and/or their families, he notes that such a commitment can neither be enforced nor monitored. In this regard, even additional measures, such as installing a keylogger on Mr Shala's personal computer or ordering limited access to a controlled single mobile telephone without internet connection, would not prevent Mr Shala from employing other electronic devices belonging to other persons, including for example his family or his acquaintances, or from passing on instructions to other persons with a view to intimidating and/or interfering with witnesses. The array of communication mediums available is so varied that it is only through the communication monitoring framework applicable at the SC detention facilities that Mr Shala's communications can be effectively restricted and monitored, thereby mitigating the risks of him obstructing SC proceedings or engaging in or contributing to crimes.

47. In addition, the Pre-Trial Judge notes that, living in a country in which Albanian is not an official language, monitoring any communications by Mr Shala in this language, especially when using code or obscure language, would present significant obstacles that could seriously endanger witnesses, victims or others. At the very least, the need to translate and/or decode such communications could delay the adoption of counter-measures or even render them meaningless.

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

49. The Pre-Trial Judge finally recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.<sup>91</sup> In the circumstances of the present case, and in particular noting that Mr Shala has been detained since 15 April 2021, it finds that detention is still proportionate at this early stage of the proceedings.

## V. DISPOSITION

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

- a. **REJECTS** the Request;
- b. **ORDERS** the Defence to file public redacted versions of the Request and the Reply by **22 June 2021** or to indicate that these filings may be reclassified as public;
- c. **ORDERS** the SPO to file a public redacted version of the Response by **22 June 2021** or to indicate that this filing may be reclassified as public;
- d. **ORDERS** the Defence, if it so wishes, to file submissions on the next review of detention by **Friday, 23 July 2021**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- e. **ORDERS** the SPO, should the Defence decide not to file any submissions by the aforementioned time limit, to file submissions on the next review

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<sup>91</sup> KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

of detention by **Monday, 2 August 2021**, with the Defence filing its submissions by **Monday, 9 August 2021**, if it so wishes.



**Judge Nicolas Guillou**

**Pre-Trial Judge**

Dated this Tuesday, 15 June 2021

At The Hague, the Netherlands.