

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: Trial Panel II
Judge Charles L. Smith III, Presiding Judge
Judge Christoph Barthe,
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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**Selimi Defence Response to Prosecution submission pertaining to periodic
detention review of Rexhep Selimi**

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I. INTRODUCTION

1. Pursuant to Article 41 of the Law¹ and Rule 57 of the Rules², the Defence for Mr. Rexhep Selimi (“the Defence”) hereby responds to the Prosecution submission pertaining to the periodic detention review of Rexhep Selimi (“SPO Submissions”).³
2. The SPO’s approach to the scheduling of witnesses in the course of its case presentation calls into serious question the extent to which it has exercised the special diligence required to substantiate the reasonableness of Mr. Selimi’s detention. The repeated failure to ensure the successive and timely appearance of witnesses has occasioned numerous delays and the concomitant loss of allocated courtroom time. These consequences severely hamper the expeditiousness of proceedings and thereby undermine Mr. Selimi’s right to be tried without undue delay.

II. SUBMISSIONS

A. Reasonableness and necessity of detention must be assessed on a proactive basis

3. The concept of reasonableness of detention has been addressed at length in international jurisprudence, most often in the context of pre-trial detention. However, as the need to ensure that the Accused’s detention remains reasonable

¹ Law No.05/L-053 on SC and SPO, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

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 KSC-BC-2020-06/F01887, Prosecution submission pertaining to periodic detention review of Rexhep Selimi, 25 October 2023.

is a corollary of the right to a trial without undue delay,⁴ the jurisprudence in question is equally persuasive in the present case.

4. Indeed, it would be absurd for the obligation on the part of the authorities concerned to act diligently so as to ensure that the Accused is not unreasonably detained to wane upon the case reaching trial stage. As the ECtHR has determined, “[t]here is furthermore no reason why the protection given to the persons concerned against the delays of the court should end at the first hearing in a trial: unwarranted adjournments or excessive delays on the part of trial courts are also to be feared.”⁵ In that respect, the ECtHR determined that Article 6 of the ECHR, which specifically provides for the right to be tried within a reasonable time, covers the entire period of the proceedings in question.⁶ The practice of the KSC further supports this position, where the reasonableness of detention was consistently assessed after the cases concerned have proceeded to trial, including in the latest review of Mr. Selimi’s detention.⁷ Accordingly, the jurisprudence relied upon herein, be it concerned with pre-trial detention or otherwise, is dispositive in the present case.
5. In light of the above, international chambers have considered the reasonableness of detention as a factor that must be considered along with the risks that may warrant an individual’s detention, and where the continued detention “stops being reasonable”, the individual needs to be released.⁸ In that regard, the

⁴ ICC, *Prosecutor v. Bemba-Gombo et al.*, Case No. ICC-01/05-01/13 OA 5, OA 6, OA 7, OA 8, OA 9, 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. 43.

⁵ ECtHR, *Wemhoff v. Germany*, Application No. 2122/64, Judgment of 27 June 1968, para. 18.

⁶ ECtHR, *König v Germany*, Application No. 6232/73, Judgment of 28 June 1978, para. 98.

⁷ KSC-BC-2020-06/F01794, Decision on Periodic Review of Detention of Rexhep Selimi, 15 September 2023.

⁸ ICC, *Prosecutor v Jean-Pierre Bemba Gombo et al*, Case No. ICC- 01/05-01/13-969, Decision Regarding Interim Release, 29 May 2015, para. 45; *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Decision on Mr Gbagbo’s Detention, 25 September 2017, para. 62.

effective time spent in detention alongside the conduct of the authorities have been recognized as relevant factors in assessing the reasonableness of an Accused's continued detention.⁹

6. An assessment of the reasonableness of detention must be made on an ongoing basis, and should not only take into account the time that has already been spent in detention, but must also ensure that future detention is not unreasonable in light of the likely duration of trial proceedings. In that context, the ECtHR has found that determinations made pursuant to Article 5(3) of the ECHR, which establishes the right of a detained individual "to trial within a reasonable time or to release pending trial", must take into account the period which starts when the person is arrested and ends when he or she is released and/or the charge is determined.¹⁰ It is therefore the entire breadth of the detention that must be considered in determining its reasonableness.
7. The Panel is not required however to engage in hypothetical assessments at this stage as to the exact duration of the present proceedings. Nonetheless, when clear and discernible risks arise as to the detention becoming unreasonable, it is incumbent upon the Trial Panel to consider such risks and take action in order to ensure that the risks in question do not materialize.
8. In contrast, waiting for detention to have become unreasonable during the proceedings, when it is self-evident that it will become so, violates the obligation of the Panel to mitigate and prevent violations of an Accused's fundamental rights. Therefore, it is not speculative to account for the prospective risk that

⁹ ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Order Denying a Motion for Provisional Release, 20 December 1996, p. 5; ICTR, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay, 3 November 2004, para. 26; ECCC, *Ieng Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Ieng Thirith's Appeal Against Order on Extension of Provisional Detention, 11 May 2009, para. 58.

¹⁰ ECtHR, *Selahattin Demirtaş v Turkey (no. 2)*, Application no. 14305/17, Judgment of 22 December 2020, para. 290.

detention will become unreasonable when there are manifest indications that that risk will ensue. It is rather the only effective way of implementing the Panel's judicial obligation to ensure that detention is not unreasonable. And as will be described below, the danger that the risk in question will ensue is conspicuous.

9. In the most recent decision on the periodic detention review of Mr. Selimi, the Trial Panel has identified a number of factors pertinent to the present case which, in its estimation, render Mr. Selimi's detention necessary and reasonable.¹¹ Nonetheless, the Panel further noted that, notwithstanding those factors, Mr. Selimi has already been in detention for a significant period of time, and the trial in this case is likely to be lengthy.¹² In that regard, the Trial Panel determined that this "this will require the Panel as well as all Parties to be particularly mindful of the need to ensure that the trial proceeds as expeditiously as possible", and that it "will continue to monitor at every stage in these proceedings whether continued detention is necessary and reasonable."¹³
10. In its Submissions, the SPO argues that, on the basis of those, and some "additional", yet unspecified, factors, Mr. Selimi's detention continues to be reasonable, "especially in light of the continuing reasonable progression of proceedings."¹⁴ However, an analysis of the actual use of courtroom time, and of how much time has been lost as a result of the SPO's scheduling practices, significantly undermines the reliability of the SPO's assertion.
11. As per the Defence calculations, since the beginning of the presentation of evidence by the SPO in April 2023, 51 hours of courtroom time which were

¹¹ KSC-BC-2020-06/F01794, Decision on Periodic Review of Detention of Rexhep Selimi, 15 September 2023, paras. 33-34.

¹² *Ibid*, para. 35.

¹³ *Id*.

¹⁴ SPO Submissions, para. 28.

scheduled by the SPO have been lost¹⁵ as a result of the SPO not having a subsequent witness available to testify after the conclusion of the previous witness' evidence. This translates into the complete loss of over 10 days of testimony, or more than two weeks, only in the past 7 months since the start of the trial, during which only 30 witnesses have been heard.

12. In that respect, the Defence further notes that the SPO intends to call a total of 164 witness who will testify pursuant to Rule 154 and 36 witnesses who will testify *viva voce*, totalling to 200 witness who are expected to testify in court.¹⁶ Should the SPO's case continue at the same pace as it has done so far, with 30 witnesses being heard in 7 months, then the SPO will finish presenting its evidence in March 2027 - despite the Trial Panel having set the target date for the closure of the SPO's case to April 1, 2025.¹⁷ Further, if March 2027 will indeed mark the end of the SPO's case, then the 51 hours of lost courtroom time accumulated up until now will translate into almost 300 hours, 60 days or 15 weeks¹⁸ that will be progressively lost up until that date.
13. Whether this time period is reasonable depends on the conduct of the SPO in ensuring that its case is presented efficiently and effectively to the requisite standard of diligence. For the reasons set out below, it conspicuously fails to meet that standard.

¹⁵ The entire days of 1 November, 31 October and 19 October, 21 June and 24 May, consisting of 5 scheduled hours of testimony each, alongside 1 hour and 30 minutes lost on 2 November, 30 minutes on 30 October, 4 hours and 35 minutes on 18 October, 32 minutes on 17 October, 4 hours on 27 September, 2 hours and 40 minutes on 30 August, 2 hours and 10 minutes on 17 August, 4 hours and 40 minutes on 20 July, 3 hours and 30 minutes on 15 June, 1 hour on 23 May, and 45 minutes on 20 April 2023.

¹⁶ KSC-BC-2020-06/F01594, ANNEX 2 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief, Confidential Redacted Version of 'Amended List of Witnesses', 9 June 2023.

¹⁷ Oral Order on the Target date for closing of the SPO case, 15 February 2023.

¹⁸ Without factoring in the non-sitting weeks. Should those be factored in, it would amount to a total of 22 weeks.

B. The SPO has failed to exercise special diligence in the course of its case presentation

14. In assessing the conduct of the authorities concerned, the concept of “special diligence”, originating from Article 5(3) of the European Convention on Human Rights, has been considered as a guiding factor.¹⁹
15. The diligence of the authorities might be assessed by reference to when (and to the extent that) the investigation and trial are conducted less expeditiously than is possible in a manner consistent with the proper administration of justice.²⁰ At the ICC, in its jurisprudence related to Article 60(4) of the Rome Statute, pursuant to which Pre-Trial Chambers ought to ensure that individuals are “not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”, a factor that was taken into consideration was the extent to which “the organs of the Court have acted swiftly and that at no moment were proceedings dormant”.²¹ Such inexcusable delays may also be evidenced through “a failure to take timely steps to move the judicial process forward, as the ends of justice may demand.”²² Finally, at the ICTY, the prospect of further delays in the trial was considered a factor which weighs in the exercise of the Trial

¹⁹ KSC-BC-2020-06/IA016/F00005, Decision on Jakup Krasniqi’s Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 25 March 2022, para. 49; ECCC, *Ieng Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Ieng Thirith’s Appeal Against Order on Extension of Provisional Detention, 11 May 2009, para. 60; *Khieu Samphan*, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, para. 68.

²⁰ ECtHR, *Wemhoff v. Germany*, Application No. 2122/64, Judgment of 27 June 1968, p. 26. See also D. J. Harris, ‘Recent Cases on Pre-Trial Detention and Delay in Criminal Proceedings in the European Court of Human Rights’ (1970) 44 *British Yearbook of International Law* 92.

²¹ ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-586, Decision on the Application for the interim release of Thomas Luganga Dyilo, 18 October 2006, p. 7.

²² ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA 4, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para. 14.

Chamber's discretion in granting provisional release.²³ It is further incumbent upon the authorities to explain any periods of inactivity or inertia.²⁴

16. Pursuant to the Order on the Conduct of Proceedings, it is the exclusive responsibility of the calling party to ensure that, at the conclusion of the evidence of a witness, there is another witness ready to begin to testify.²⁵ Furthermore, should the proposed witness not be able to testify at the scheduled time, or should there be no cross-examination of the witness concerned or the cross-examination proceeds faster than expected, it is further incumbent upon the calling party to ensure that an alternative witness is available to ensure that no court time is wasted.²⁶ The SPO has failed to abide by this obligation on numerous occasions resulting in unjustifiable delays that are at variance with the SPO's purported reasonable progression of its case.
17. The SPO's consistent failure to ensure that witnesses are available for testimony immediately after the completion of the previous witness' evidence demonstrates that the SPO has failed to exercise the requisite level of diligence. A projected delay of 15 weeks during the SPO's case attributable exclusively to this failure is plainly incompatible with the SPO's diligence obligations and with Mr. Selimi's right to be tried without undue delay.
18. In that respect, it is of note that the current pattern of violations on the part of the SPO has continued even after having received a warning from the Trial Panel, and being admonished that a second violation will attract sanctions.²⁷ The

²³ ICTY, *Prosecutor v Milutinovic et al*, Case No. IT-99-37-PT, Decision on Applications for Provisional Release, 14 April 2005, para. 32.

²⁴ ICTR, *Zigiranyirazo v. The Prosecutor*, Case No. ICTR-200 1-01 -073, Decision on Protais Zigiranyirazo's Motion for Damages, 18 June 2012, para. 34; ECtHR, *Labita v. Italy*, Application no. 26772/95, 6 April 2000, para.153.

²⁵ KSC-BC-2020-06/F01226/A01, Annex 1 to Order on the Conduct of Proceedings, 25 January 2023, para. 81.

²⁶ Id.

²⁷ Transcript of 15 June 2023, p. 4982.

Accused's detention during extended periods of inactivity attributable solely to the SPO is wholly unreasonable.

19. By labelling the progression of its case as "reasonable", the SPO thereby trivializes its own inertia, consistently reflected in its failure to ensure the appearance of witnesses in a manner that maximizes the allocated courtroom time.

C. The SPO may not shift responsibility on to the Defence for its scheduling failures

20. Perhaps cognisant of its own failures, the SPO has sought to distract from its consistent apathy but seeking to shift responsibility onto the Defence by reference to the reduction in the Defence's estimated time for cross-examination.²⁸ As previously underscored in greater detail,²⁹ the Defence reiterates that its cross-examination estimates are contingent upon a number of issues that cannot be minutely anticipated by the Defence except immediately prior to the start of its cross-examination, such as the nature of the evidence proffered during the course of direct examination, the extent to which that evidence differs from or contradicts the incriminating evidence offered as part of the witness' written evidence, the credibility or reliability of the witness' evidence or the extent to which the areas that a party intended to cross-examine on have already been addressed by the cross-examining parties before it.
21. The Defence uses its cross-examination sensibly and is judicious in the questions it asks in cross-examination, in line with the Trial Panel's directions at the beginning of each witness' evidence. Where the Defence considers that no cross-examination is necessary and in the interests of Mr. Selimi, no questions will be

²⁸ See, for example, Transcript of 15 June 2023, pp. 4940-4941.

²⁹ KSC-BC-2020-06/F01838, Joint Defence Response to Prosecution request for video-conference testimony for W04448 and related matters, 5 October 2023, para. 26.

asked, regardless of what has been prepared in advance. At all times, the SPO must be prepared for this eventuality.

22. In this regard, the Defence accepts and notes that on one occasion in relation to W4769, it preferred to commence cross-examination on the subsequent court day, with leave of the panel when court time remained available.³⁰ However, the circumstances of that witness were wholly exceptional in light of the refusal of the previous witness, W4577, to effectively answer questions, despite being scheduled to testify and be cross-examined for several days. W04769 was additionally not scheduled to testify on that week, and no reserve witnesses were notified either for that particular week by the SPO. In light of the complexity of W04769's evidence, the lack of notice would have hampered the Defence's ability to cross-examine effectively.
23. In any event, any reduction in the Defence cross-examination does not absolve the SPO of its obligation to ensure the maximum use of courtroom time. This is amply supported by the Order on the Conduct of Proceedings, which explicitly establishes the SPO's obligation to have witnesses available in situations where there is no cross-examination or it proceeds faster than expected.³¹ As the SPO was ordered to have back-up witnesses available precisely for such circumstances,³² its failure to discharge its case scheduling obligations in that respect is inexcusable.

III. CONCLUSION

24. The SPO has alleged a vast joint criminal enterprise against the Accused and insists that it requires over three hundred witnesses to support the allegations

³⁰ Transcript of 12 October 2023, p. 8841. For these reasons, the delay occasioned by this instance was not included in the analysis in paragraph 11 above.

³¹ KSC-BC-2020-06/F01226/A01, Annex 1 to Order on the Conduct of Proceedings, 25 January 2023, para. 81

³² Order on upcoming witness schedule, 19 June 2023.

underpinning these charges. There is no logical or justifiable reason why it is not able to select enough witnesses to call before the Trial Panel from among this list, regardless of what questions are or are not asked in cross-examination by the Defence. In this regard, it may not hide behind its own choice to avoid any risk of the evidence of a witness spanning different hearing blocks. This choice, coupled with SPO's refusal to present witnesses in a logical and coherent manner, which is supported neither by practice at other international tribunals or the effective administration of justice, contributes substantially to the likelihood of court time being wasted.

25. The SPO's repeated violations of the obligation to ensure that a witness is ready to testify, regardless of the exercise of the Accused's right to cross-examine SPO witnesses set out in the Order on the Conduct of Proceedings unequivocally calls into question the reasonableness of Mr. Selimi's continued detention.
26. The Defence therefore requests the Trial Panel to take all available measures to ensure that Mr. Selimi's right to be tried without undue delay is respected, and that his detention does not become unreasonable.

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Respectfully submitted on 3 November 2023,



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