



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

In: **KSC-BC-2023-10**
Specialist Prosecutor v. Sabit Januzi and Ismet Bahtijari

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Public redacted version of 'Consolidated Prosecution response to Bahtijari Defence submissions on detention on remand'

Specialist Prosecutor's Office

Kimberly P. West

Duty Counsel for Sabit Januzi

Jonathan Elystan Rees

Duty Counsel for Ismet Bahtijari

Hendrik Sytema

I. INTRODUCTION

1. Pursuant to Article 41 of the Law¹ and Rule 57 of the Rules,² the Specialist Prosecutor's Office ('SPO') makes the following submissions in support of the need to detain the Accused Ismet Bahtijari ('Bahtijari'). As the Pre-Trial Judge found in the Decision on Arrest and Transfer,³ the criteria for detention under Article 41(6) are satisfied. No conditions short of detention in the Kosovo Specialist Chamber's ('KSC') detention facilities would be sufficient to mitigate the risks of release under any conditions and the period of detention is reasonable.

II. PROCEDURAL HISTORY

2. On 2 October 2023, the Pre-Trial Judge confirmed the indictment against Sabit Januzi ('Januzi') and Bahtijari (collectively, 'Accused').⁴ On the same day, the Pre-Trial Judge also issued arrest warrants for the Accused and ordered their transfer to the KSC detention facilities in The Hague, the Netherlands.⁵

3. On 4 October 2023, the SPO filed the confirmed Indictment.⁶

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 the Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2023-10/F00009/RED, 2 October 2023 ('Decision on Arrest and Transfer').

⁴ Decision on the Confirmation of the Indictment, KSC-BC-2023-10/F00008/CONF/RED, 2 October 2023, confidential ('Confirmation Decision'). A corrected version of the public redacted version of the Confirmation Decision was filed on 12 October 2023, KSC-BC-2023-10/F00008/RED/COR.

⁵ Decision on Arrest and Transfer, KSC-BC-2023-10/F00009/RED.

⁶ Indictment, KSC-BC-2023-10/F00010/A01, 4 October 2023, strictly confidential ('Indictment'). A public redacted version of the confirmed indictment was submitted on 6 October 2023, KSC-BC-2023-10/F00016/A01.

4. On 5 October 2023, the Accused were arrested in Kosovo.⁷ On the next day, the Accused were transferred to the KSC detention facilities in The Hague,⁸ in accordance with the Decision on Arrest and Transfer.
5. On 9 October 2023, the Accused had their initial appearances before the Pre-Trial Judge.⁹
6. On 11 October 2023, the Defence filed the First Defence Submission requesting Bahtijari's release from detention.¹⁰
7. On 12 October 2023, the Pre-Trial Judge presided over the first status conference in this case, during which the Defence indicated that it would supplement the First Defence Submission.¹¹
8. On 23 October 2023, the SPO filed a Request¹² for an extension of time in the interest of clarifying the briefing schedule.
9. On 24 October 2023, the Pre-Trial Judge ordered the Prosecution to submit consolidated responses to Defence submissions by 3 November 2023, or, in case the

⁷ Notification of Arrest of Ismet Bahtijari Pursuant to Rule 55(4), KSC-BC-2023-10/F00011, 5 October 2023, strictly confidential and *ex parte*; Notification of Arrest of Sabit Januzi Pursuant to Rule 55(4), KSC-BC-2023-10/F00012, 5 October 2023, strictly confidential and *ex parte*.

⁸ Notification of the Reception of Ismet Bahtijari in the Detention Facilities of the Specialist Chambers, KSC-BC-2023-10/F00014, 6 October 2023, strictly confidential and *ex parte*; Notification of the Reception of Sabit Januzi in the Detention Facilities of the Specialist Chambers, KSC-BC-2023-10/F00015, 6 October 2023, strictly confidential and *ex parte*.

⁹ Transcript (Initial Appearance of Sabit Januzi), 9 October 2023; Transcript (Initial Appearance of Ismet Bahtijari), 9 October 2023.

¹⁰ Submission on detention on remand, KSC-BC-2023-10/F00030, 11 October 2023 ('First Defence Submission').

¹¹ Transcript (Status Conference), 12 October 2023, pp.68-69.

¹² Prosecution request for extension of time, KSC-BC-2023-10/F00074, 23 October 2023.

Defence does not file a supplement, to submit its responses within ten (10) days from the order, namely, 3 November 2023.¹³

10. On 26 October 2023, the Defence filed the Second Defence Submission requesting Bahtijari's release from detention.¹⁴

III. APPLICABLE LEGAL FRAMEWORK

11. Before ordering that Bahtijari be detained pending trial, the Pre-Trial Judge must be satisfied¹⁵ that: (1) there is a grounded suspicion that Bahtijari has committed a crime within the jurisdiction of the KSC; and (2) there are articulable grounds to believe that: (i) there is a risk of flight; (ii) Bahtijari will obstruct the progress of the criminal proceedings, including by influencing witnesses, victims or accomplices; or (iii) the seriousness of the crime or the manner or circumstances in which it was committed and Bahtijari's personal characteristics, past conduct, the environment and conditions in which he lives or other personal circumstances indicate a risk that he will repeat the criminal offense, complete an attempted crime or commit a crime which he has threatened to commit.¹⁶

12. As also recognised by the Pre-Trial Judge,¹⁷ the Court of Appeals has been clear that, once a grounded suspicion under Article 41(6)(a) is identified, an articulable basis of a

¹³ Decision on the Prosecution Request for Extension of Time, KSC-BC-2023-10/F00075, 24 October 2023, para.10.

¹⁴ Defence supplement on submission on detention on remand, KSC-BC-2023-10/F00078, 26 October 2023, confidential ('Second Defence Submission'; together with the 'First Defence Submission', 'Defence Submissions').

¹⁵ See *Specialist 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 ('Gucati Appeals Decision'), para.51.

¹⁶ Article 41(6)(b)(i)-(iii).

¹⁷ Decision on Arrest and Transfer, KSC-BC-2023-10/F00009/RED, para.19.

single ground under Article 41(6)(b) is sufficient to support detention.¹⁸ The applicable standard is articulable grounds that support a ‘belief’ that there is a risk of one of the Article 41(6)(b) grounds occurring.¹⁹ The ‘belief’ test denotes ‘an acceptance of the possibility, not the inevitability, of a future occurrence’.²⁰ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.²¹ Articulable in this context means specified in detail by reference to the relevant information or evidence.²²

13. In considering whether an accused should be detained or released, the relevant panel must consider whether measures other than detention would sufficiently reduce the risk of the Article 41(6)(b) factors occurring.²³

14. If these conditions are met, the person shall continue to be detained.²⁴

¹⁸ See *Specialist Prosecutor v. Gucati and Haradinaj*, Consolidated Decision on Nasim Haradinaj’s Appeals Against Decisions on Review of Detention, KSC-BC-2020-07/IA007/F00004, 6 April 2022, para.49; See *Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli’s Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021 (‘Veseli Interim Release Appeals Decision’), para.15. See also Articles 19(1.9), 19(1.10) and 19(1.31) of the 2022 Kosovo Criminal Procedure Code, Code No. 08/L-032 (‘KCPC’).

¹⁹ Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.19.

²⁰ See Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, paras 13-19; *Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli’s Application for Interim Release, KSC-BC-2020-06/F00178, 22 January 2021, para.21 citing Gucati Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 63, 67.

²¹ Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.17.

²² *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F01862, 16 October 2023, para.12 citing Article 19.1.30 of the KCPC 2012, Law No. 04/L-123 defining ‘articulable’ as: ‘the party offering the information or evidence must specify in detail the information or evidence being relied upon’.

²³ 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, KSC-CC-PR-2017-1/F00004, 26 April 2017, para.14.

²⁴ Gucati Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.51.

IV. SUBMISSIONS

15. In the Decision on Arrest and Transfer, the Pre-Trial Judge found the Article 41(6) criteria to be met and Bahtijari's detention to be necessary. In light of the Defence Submissions, the Pre-Trial Judge must now consider anew whether those conditions continue to be satisfied.²⁵ In doing so, the Pre-Trial Judge may refer to previous decisions and material and evidence already before him, without this affecting the *de novo* character of his decision.²⁶ For the reasons set out below, the SPO has fully discharged its burden²⁷ in showing that all Article 41(6) criteria are met and Bahtijari's detention remains necessary.

A. GROUNDED SUSPICION

16. For the reasons set out in the Confirmation Decision²⁸ and affirmed in the Decision on Arrest and Transfer,²⁹ there is a well-grounded suspicion that Bahtijari committed or attempted to commit crimes within the jurisdiction of the KSC. This level of suspicion exceeds the 'grounded suspicion' required for detention.³⁰

17. Nothing has occurred since these decisions were issued that would affect the Pre-Trial Judge's determination. Indeed, subsequent developments have strengthened the

²⁵ See, *inter alia*, *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of the Decision on Jakup Krasniqi's Application for Interim Release, KSC-BC-2020-06/F00180/RED, 22 January 2021 ('Krasniqi Decision'), para.16. Following his first, *inter partes* detention ruling, the Pre-Trial Judge is not required to make findings on the factors already decided upon in the initial ruling on detention, but must examine these reasons or circumstances and determine whether they still exist. See, *inter alia*, *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F00371/RED, 25 June 2021, para.19.

²⁶ Krasniqi Decision, KSC-BC-2020-06/F00180/RED, para.24.

²⁷ Krasniqi Decision, KSC-BC-2020-06/F00180/RED, para.17.

²⁸ Confirmation Decision, F00008/RED/COR, paras 95, 111, 123.

²⁹ Decision on Arrest and Transfer, para.17.

³⁰ See *Specialist Prosecutor v. Shala*, Public Redacted Version of Decision on Pjetër Shala's Request for Provisional Release, KSC-BC-2020-04/F00045/RED, 15 June 2021 ('Shala Decision'), para.15.

basis for the Pre-Trial Judge's finding of well-grounded suspicion that Bahtijari committed crimes within the KSC's jurisdiction.

18. In particular, on 5 October 2023, Bahtijari gave a voluntary post-arrest interview to the SPO, wherein he denied having taken any criminal action but also confirmed several pieces of inculpatory information.³¹ Most notably, Bahtijari confirmed that he had met with Witness 1 at the place and approximate time indicated in the Indictment, around the same time of having met with Co-Perpetrator 1.³²

19. Additionally, on 4 October 2023, Januzi gave a voluntary interview to the SPO, wherein he confirmed several pieces of inculpatory information related to Bahtijari.³³ Most notably, Januzi stated that he had discussions with both Bahtijari³⁴ and Co-Perpetrator 1³⁵ about Witness 1's witness status. This is contrary to Bahtijari's representation that this topic was never discussed by him with Witness 1³⁶ or Co-Perpetrator 1.³⁷

B. DETENTION IS JUSTIFIED UNDER ALL ARTICLE 41(6)(B) FACTORS

i. Risk of Flight (Article 41(6)(b)(i))

20. In previously finding Bahtijari to present a flight risk, the Pre-Trial Judge considered: (1) the gravity of the offences charged, together with the potential sentence; (2) the opportunity to evade justice, including by travelling freely to jurisdictions beyond the

³¹ 116065-TR-ET Part 1 RED.

³² 116065-TR-ET Part 1 RED, pp.9-11, 13-14. *See also* Annex 2 to Submission of Indictment for confirmation and related requests, KSC-BC-2023-10/F00002/A02, 11 September 2023, confidential ('Detailed Outline'), pp.2-5.

³³ 116063-TR-ET Parts 1-4.

³⁴ 116063-TR-ET Part 1, pp.18-24, 30, 36; 116063-TR-ET Part 2, pp.6-7; 116063-TR-ET Part 3, pp.6-7.

³⁵ 116063-TR-ET Part 1, pp.27-32; 116063-TR-ET Part 3, pp.9-10.

³⁶ 116065-TR-ET Part 1 RED, pp.12, 14-15, 18-20.

³⁷ 116065-TR-ET Part 1 RED, p.11.

reach of the KSC; and (3) Bahtijari's demonstrated blatant disregard for the laws and rules of the KSC, in particular court-ordered protective measures.³⁸

21. In addition, the following concrete and specific information about the Accused's associated networks and personal circumstances heighten the risk of flight and supplement related submissions considered in the Decision on Arrest and Transfer.³⁹

22. The SPO previously noted Bahtijari's connection to former KLA commander Co-Perpetrator 1, who has strong ties to both [REDACTED].⁴⁰ During his SPO interview, Bahtijari confirmed that Co-Perpetrator 1 was [REDACTED] during the war, with whom he and his family have maintained contact until at least 2023.⁴¹

23. Having now been charged with crimes allegedly aimed at undermining the evidence against [REDACTED],⁴² Bahtijari has an even stronger unity of interests with influential individuals from within the former senior KLA leadership, including [REDACTED]. Regarding [REDACTED]'s network, the Pre-Trial Judge has noted that [REDACTED]'s influence as a [REDACTED] cannot be ignored in assessing the risk that individuals in his support network, who share his firm opposition to the KSC, may be willing to give him access to assets and/or help him abscond.⁴³ This network likewise has the means and incentives to assist those (perceived to be) aligned with [REDACTED].

24. More generally, the prevailing climate of obstruction in connection with KLA-related criminal proceedings, both in and outside Kosovo, allow for the mobilisation of

³⁸ Decision on Arrest and Transfer, KSC-BC-2023-10/F00009/RED, para.20.

³⁹ Decision on Arrest and Transfer, KSC-BC-2023-10/F00009/RED, para.20.

⁴⁰ [REDACTED].

⁴¹ 116065-TR-ET Part 1 RED, pp.7-9

⁴² [REDACTED].

⁴³ [REDACTED].

supporters to assist Bahtijari in fleeing to evade justice.⁴⁴ The KLA continues to enjoy broad support both inside and outside of Kosovo, and Bahtijari's case has now received widespread press coverage in the region and internationally.⁴⁵

25. Further, Bahtijari is now aware of the serious confirmed charges against him, that he may face a substantial prison sentence if convicted, and, through the ongoing disclosure process, he is gaining increasing knowledge about the strength of the evidence to be presented against him.⁴⁶ All of these factors establish Bahtijari's risk of flight as a 'sufficiently real possibility'.⁴⁷

26. Sentencing exposure is an important factor⁴⁸ that judges are required to consider.⁴⁹ In this regard, the potential maximum sentences for offences under KCC Articles 387 and

⁴⁴ See, generally, 'Obstructing the Investigation – Too many Obstacles, Too Little Evidence, in Sense Agency, ICTY: The Kosovo Case, 1998-1999', available at <https://kosovo.sense-agency.com/>.

⁴⁵ See, e.g. 'Two arrested for witness tampering at special Kosovo court', *Reuters*, 6 October 2023, available at <https://www.reuters.com/world/europe/two-arrested-witness-tampering-special-kosovo-court-2023-10-06/>; Kosovo Men Deny Witness Intimidation at Hague War Crimes Court, *Balkan Insight*, 9 October 2023, available at [Kosovo Men Deny Witness Intimidation at Hague War Crimes Court | Balkan Insight](https://www.balkaninsight.com/en/news/kosovo-men-deny-witness-intimidation-at-hague-war-crimes-court); 'Për çfarë dyshohet Sabit Jonuzi? Ish-ushtari i UÇK-së që u arrestua dje nga Specialja', *Gazeta Express*, 6 October 2023, available at [Për çfarë dyshohet Sabit Jonuzi? Ish-ushtari i UÇK-së që u arrestua dje nga Specialja - Gazeta Express](https://www.gazetaexpress.com/2023/10/06/per-çfare-dyshohet-sabit-jonuzi-ish-ushtari-i-uck-se-qe-u-arrestua-dje-nga-specialja/); 'Specialja arreston një të dyshuar për pengim të drejtësisë', *Kallxo*, 5 October 2023, available at [Specialja arreston një të dyshuar për pengim të drejtësisë \(kallxo.com\)](https://www.kallxo.com/en/specialja-arreston-nje-te-dyshuar-per-pengim-te-drejtesises/); 'The special arrests the former KLA member, Sabit Januzi', *Koha Ditore*, 5 October 2023, available at <https://www.koha.net/en/arboretum/394500/the-special-arrests-the-former-member-of-uck-se-sabit-bahtijari/>; 'Gjykata Speciale arreston ish-pjesëtarin e UÇK-së, Sabit Jonuzi', *Telegrafi*, 6 October 2023, available at [Gjykata Speciale arreston ish-pjesëtarin e UÇK-së, Sabit Jonuzi - Telegrafi - Telegrafi](https://www.telegrafi.com/en/gjykata-speciale-arreston-ish-pjesetarin-e-uck-se-sabit-jonuzi/).

⁴⁶ See Selimi Decision, KSC-BC-2020-06/F00179/RED, para.31.

⁴⁷ See *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA003/F00005/RED, 30 April 2021 ('Selimi Appeals Decision'), para.44.

⁴⁸ Gucati Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.72. ECtHR, *Panchenko v. Russia*, 45100/98, Judgment, 8 February 2005, paras. 101-105 (noting that the severity of the sentence faced is a 'relevant element in the assessment of the risk of absconding'). See also ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3249-Red OA11, Judgment on the Provisional Release Appeal, 20 May 2015 ('Bemba Decision'), paras. 1, 71 (holding that the Trial Chamber did not err in relying on the fact that charges had been confirmed against the accused as part of its analysis regarding the necessity of detention).

⁴⁹ ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, IT-04-82-PT, Decision on Johan Tarčulovski's Motion for Provisional Release, 18 July 2004, paras. 15, 34 (noting that 'a Trial Chamber *must* make specific

401 include substantial fines and up to ten years of imprisonment.⁵⁰ The sentences imposed upon Hysni Gucati and Nasim Haradinaj, who were also charged with obstruction offences before the KSC, were ultimately more than four years' imprisonment.⁵¹

27. The Defence argues that Bahtijari is a construction worker with a very limited income who is rooted in his residential area, and has no financial or actual ability to evade justice authorities for long periods of time.⁵² The Defence also inaccurately asserts that Bahtijari turned himself in for questioning upon request.⁵³ However, the Defence does not specifically indicate any physical or medical condition or family obligation that would root Bahtijari to his place of residence. Regarding lack of financial resources, Bahtijari has confirmed his status as a KLA war veteran,⁵⁴ and, as detailed above, there is reason to believe that he could have access to the associated networks and resources of, among others, Co-Perpetrator 1 and [REDACTED].

28. The Defence argues in its submissions that Bahtijari is not a risk of flight (or an obstruction risk) as he had submitted to 'voluntary' questioning, subsequent to his arrest.⁵⁵ But being aware of one's suspect status is substantially different than facing formal charges in an indictment filed by a prosecutor and confirmed by a court.⁵⁶ At the

reference to the length of the sentence the accused can expect if convicted, and the incentive this may give the accused to flee,' and denying the accused's motion for provisional release) (emphasis added).

⁵⁰ Article 387 carries a maximum sentence of 10 years of imprisonment and Article 401 generally carries a maximum sentence of 3 years of imprisonment, with a maximum sentence of 5 years of imprisonment possible where the offence is committed against, *inter alia*, a judge, prosecutor, official of a court, or a prosecution officer.

⁵¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, para.442.

⁵² Second Defence Submission, KSC-BC-2023-10/F00078, para.7.

⁵³ Second Defence Submission, KSC-BC-2023-10/F00078, para.7.

⁵⁴ 116065-TR-ET Part 1 RED, p.9.

⁵⁵ First Defence Submission, KSC-BC-2023-10/F00030, para.10.

⁵⁶ See generally Bemba Decision, ICC-01/05-01/08-3249-Red OA11, paras 1, 71.

time of the interview and arrest, Bahtijari was not yet aware of the nature of the charges against him or the substance of the evidence that the SPO has now begun disclosing to him. Bahtijari's representations that he is not a flight risk or would have surrendered are 'merely hypothetical.'⁵⁷

29. For all of those reasons, Bahtijari poses a risk of flight if released from detention.

ii. Risk of Obstruction of Proceedings (Article 41(6)(b)(ii))

30. In previously finding that Bahtijari may obstruct the progress of criminal proceedings, the Pre-Trial Judge recalled: (1) that the two Accused, jointly with others, including Co-Perpetrator 1, individually approached Witness 1, on two separate occasions, to induce him to refrain from testifying in KSC proceedings; (2) that on the first occasion, Bahtijari confirmed to Witness 1 that failure to withdraw his testimony could result in [REDACTED]; (3) that the Accused have the means and the intent to obtain and misuse witness-related information to obstruct and interfere with KSC proceedings, including by exerting pressure on Witness 1 [REDACTED] in order to dissuade him from further participating as an SPO witness; (4) that both Accused are [REDACTED] and, therefore, have increased opportunities to directly interfere with Witness 1 [REDACTED]; (5) the close coordination between Co-Perpetrator 1 and the Accused in relation to their approaches to Witness 1, which is indicative of the Accused's persistence in intimidation and obstruction efforts in the context of KSC proceedings; and (6) that such findings are made against the backdrop of the pervasive climate of fear and

⁵⁷ See ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-824 OA7, Judgment on Lubanga's Interim Release Appeal, 13 February 2007, para.138. See also ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-323 OA, Judgment on Bemba's Interim Release Appeal, 16 December 2008, para.56; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-631-Red OA2, Judgment on Prosecution's Conditional Release Appeal, 2 December 2009, para.75.

intimidation in Kosovo against witnesses or potential witnesses of the KSC.⁵⁸ These bases are specific and reasoned, and not general or abstract, as argued by the Defence.⁵⁹

31. The Defence cites to various authorities that a prosecutor should 'provide as many concrete elements of fact as possible to the relevant chamber on a regular basis regarding the context of the accused's detention' and that the risks presented must be supported by factual evidence.⁶⁰ The SPO has done just this, and it is reflected in the findings of the Pre-Trial Judge. Further, the standard utilised in assessing the risks under Article 41(6)(b) does not require 'concrete' examples of situations in which Bahtijari has personally intimidated or harassed a witness, though in this case, Bahtijari directly approached and threatened a witness [REDACTED].⁶¹ Having once attempted to obstruct [REDACTED], it is even more likely for him to do so in proceedings where he is the Accused.

32. Such obstruction could also be done through or in conjunction with the networks discussed above, including that of [REDACTED] and Co-Perpetrator 1. The Pre-Trial Judge has noted that [REDACTED]'s past and present influential positions enable him to mobilise support networks (which include the Accused and Co-Perpetrator 1), and found that this is an important factor when addressing the risk of obstruction of proceedings.⁶²

33. The Defence asserts that there is no record of obstructive acts from Bahtijari during his pre-trial detention or after April of 2023.⁶³ This submission actually supports the necessity of detention in this case. At the time when Bahtijari was at liberty, he engaged

⁵⁸ Decision on Arrest and Transfer, KSC-BC-2023-10/F00009/RED, para.21.

⁵⁹ Second Defence Submission, KSC-BC-2023-10/F00078, paras 2-4.

⁶⁰ Second Defence Submission, KSC-BC-2023-10/F00078, para.10.

⁶¹ See *Specialist Prosecutor v. Thaçi et al.*, Decision the Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F016799, 17 July 2023, para.24 citing Selimi Appeals Decision, KSC-BC-2020-06/IA003/F00005/RED, para.59.

⁶² [REDACTED].

⁶³ Second Defence Submission, KSC-BC-2023-10/F00078, para.11.

in obstructive conduct, and presented a concrete risk of further obstructing proceedings and committing further crimes. As the very purpose of detention is to mitigate this risk, the lack of further relevant conduct underlines the necessity of detention.

34. Finally, whatever Bahtijari's level in the KLA hierarchy, he has demonstrated that he is prone to direction from more senior individuals. Bahtijari has characterised his meeting with Co-Perpetrator 1 as one of chance at a coffee bar.⁶⁴ That such a meeting can result in Bahtijari threatening [REDACTED] if he does not withdraw his testimony, demonstrates the ease with which he can be induced into obstructive conduct.

35. For all of these reasons, there are concrete and objective risks that Bahtijari may continue his efforts to obstruct the progress of criminal proceedings.

iii. Risk of Criminal Offences (Article 41(6)(b)(iii))

36. In previously finding that Bahtijari may commit further crimes, the Pre-Trial Judge concluded that the relevant factors to be considered are the same as those with respect to

⁶⁴ 116065-TR-ET Part 1 RED, pp.9-11.

the obstruction of proceedings.⁶⁵ In particular, the Pre-Trial Judge found that there exists a risk that the Accused will repeat the offences alleged to have been committed by them.⁶⁶

37. The standard and factors relied upon by the Pre-Trial Judge were appropriate. On the other hand, the Defence suggests a standard which is only applicable to preventive detention outside of criminal proceedings.⁶⁷

38. Contrary to the assertion of the Defence, there are concrete and objective risks that Bahtijari may commit further crimes.

C. NO MODALITIES OF CONDITIONAL RELEASE ARE ABLE TO SUFFICIENTLY MITIGATE THE RISKS

39. Bahtijari presents a list of conditions which could be applied in the event of his release which include in-house arrest (not changing his place of residence), surrendering his passport and other travel documents, reporting daily to the police or other relevant authorities, being subject to close monitoring by the authorities, appearing in court whenever ordered to do so, and/or being subject to any other conditions deemed appropriate and ordered by the KSC.⁶⁸

40. However, no combination of release conditions, nor any additional measures foreseen in Article 41(12), could sufficiently, and to a degree comparable to that of detention at the KSC detention facilities, mitigate the existing risks with respect to

⁶⁵ Decision on Arrest and Transfer, KSC-BC-2023-10/F00009/RED, para.22.

⁶⁶ Decision on Arrest and Transfer, KSC-BC-2023-10/F00009/RED, para.22.

⁶⁷ Second Defence Submission, KSC-BC-2023-10/F00078, para.15 *citing* ECtHR, *S., V. and A. v. Denmark* [GC], no. 35553/12, 36678/12 and 36711/12, 22 October 2018, paras. 89, 91.

⁶⁸ First Defence Submission, KSC-BC-2023-10/F00030, paras 11-13; Second Defence Submission, KSC-BC-2023-10/F00078, para.20.

Bahtijari.⁶⁹ Detention is the only means by which these risks can be adequately managed. The communications monitoring framework of the KSC detention facilities will be particularly important to ensure that Bahtijari does not continue to engage in further obstructive and/or criminal behaviour.⁷⁰

41. At the outset, the SPO notes that the Defence's request for release with conditions must be summarily dismissed in that it fails to explain how such conditions might address any of the Article 41(6)(b) risks.⁷¹ Beyond a few cursory sentences, the Defence makes no attempt to lay out comprehensive conditions of release that would serve to mitigate risks, including how any conditions would be monitored or enforced.

42. Relevant specifically to the risk of flight, even were Bahtijari to surrender his passport, this would not address the fact that international travel from Kosovo is legally⁷² and illegally possible without a passport, including to countries with no obligation to transfer Bahtijari to the KSC. For these same reasons, home confinement, even with electronic monitoring, would be ineffective, since Bahtijari could remove any monitoring devices and flee the borders of Kosovo without any likelihood of being returned to the jurisdiction of the KSC.⁷³ Similarly, a monetary surety would be insufficient to address

⁶⁹ See *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F01720, 16 August 2023, para.30.

⁷⁰ See especially Articles 4.2, 6-8 and 17 of the Registry Practice Direction on Detainees – Visits and Communications, KSC-BD-09/Rev1/2020, 23 September 2020.

⁷¹ See *Specialist Prosecutor v. Mustafa*, Decision on Review of Detention, KSC-BC-2020-05/F00052, 23 November 2020, para.35; see also *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Review of Detention, KSC-BC-2020-07/F00058, 27 October 2020, para.30.

⁷² For example, based on information available on the websites of the relevant Ministries of Foreign Affairs, a passport is not required for Kosovans traveling to, *inter alia*, Montenegro, North Macedonia, and Albania.

⁷³ See generally ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-259, Decision on Kilolo Request for Provisional Release, 14 March 2014 ('Kilolo Decision'), para.22.

the concrete risks of release, particularly when considered in light of Bahtijari's access to resources through Co-Perpetrator 1 and his associated networks.

43. Further, as previously recognised by the Pre-Trial Judge, the array of communication mediums available is so varied that it is only through the communication monitoring framework in place at the KSC detention facilities that the communications of an accused can be effectively restricted and monitored, thereby mitigating the risks of him obstructing KSC proceedings or engaging in or contributing to further crimes.⁷⁴ This is particularly germane to the instant case where varied forms of communications between the Accused and Co-Perpetrator 1 were essential components to the planning and coordination of their criminal acts.

44. In the context of other cases, similar but more robust combinations of conditions than those proposed by Bahtijari have been rejected by the Pre-Trial Judge⁷⁵ with the approval of the Court of Appeals⁷⁶ and the Supreme Court.⁷⁷

45. Of particular relevance to the instant case, regarding the risk of illicit messages and instructions being transmitted by and to the Accused, the Pre-Trial Judge found that the measures in place at the KSC detention facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and

⁷⁴ Shala Decision, KSC-BC-2020-04/F00045/RED, para.46; *See also* Kilolo Decision, ICC-01/05-01/13-259, para.43.

⁷⁵ *See Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F00582/RED, 26 November 2021 ('Krasniqi Conditions Decision'), paras 67-101; *see also Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00576/RED, 23 November 2021, para.99.

⁷⁶ *See Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014/F00008/RED, 31 March 2022, paras 34-45.

⁷⁷ *See Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli's Request for Protection of Legality, KSC-BC-2020-06/PL001/F00008, 15 August 2022, paras 52-70.

pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes, and that the Kosovo Police have not provided guarantees establishing that they have the capacity to implement corresponding measures that sufficiently minimise the existing risks.⁷⁸

46. The Pre-Trial Judge has also recalled the reasons that proceedings were relocated away from Kosovo,⁷⁹ and the procedural framework and operational practice of the KSC have been specifically designed to ensure, to the maximum extent possible, the protection of witnesses, victims and others at risk.⁸⁰ The Pre-Trial Judge further noted that various international organisations have recently documented that corruption continues to affect the criminal justice sector in Kosovo.⁸¹

⁷⁸ Krasniqi Conditions Decision, KSC-BC-2020-06/F00582/RED, para.77.

⁷⁹ Law No. 04/L-274, pp.8-9 (“If the SITF investigation culminates in an indictment and trial proceedings, an environment conducive to the proper administration of justice should be provided. Accordingly, a specialist court within the Kosovo court system and a specialist prosecutor’s office would be used for any trial and appellate proceedings arising from the SITF investigation. This court would have a seat in Kosovo, but sensitive proceedings, including hearing of witnesses, would take place outside of the country in view of the nature of the allegations”); Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands, 15 February 2016, preamble (“Referring to the exchange of letters between the President of the Republic of Kosovo and the High Representative of the European Union for Foreign Affairs and Security Policy dated 14 April 2014, ratified by Kosovo Law No. 04/L-274 of 15 May 2014, containing the commitment of the Republic of Kosovo to establish Specialist Chambers and a Specialist Prosecutor’s Office within the Kosovo judicial system to be used for trial and appellate proceedings arising from the investigation of the Special Investigative Task Force of the Special Prosecution Office of the Republic of Kosovo related to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 and which may be relocated to a third State subject to the conclusion of a Host State Agreement with the Host State”), article 3 (“The Kosovo Relocated Specialist Judicial Institution shall have a seat in the Host State”).

⁸⁰ Krasniqi Conditions Decision, KSC-BC-2020-06/F00582/RED, para.80.

⁸¹ Krasniqi Conditions Decision, KSC-BC-2020-06/F00582/RED, para.80 *citing* United Nations Interim Administration Mission in Kosovo, *Report of the Secretary-General*, U.N.Doc. S/2020/964, 1 October 2020, para. 30; European Union Rule of Law Mission, *Justice Monitoring Report*, October 2020, p. 21; European Commission, *Kosovo Report 2021*, 19 October 2021, pp.23, 25.

D. DETENTION IS PROPORTIONAL

47. The Defence correctly notes that detention must be reasonable and proportional.⁸² Given all of the above, the stage of proceedings in this case, and the progress already made and framework and calendar set for pre-trial proceedings, detention is both reasonable and proportional.⁸³

V. CLASSIFICATION

48. This filing is submitted confidentially pursuant to Rule 82(4). A public redacted version will be filed.

VI. CONCLUSION

49. For the foregoing reasons, the SPO respectfully submits that Bahtijari should remain detained.

Word count: 5,159



Kimberly P. West

Specialist Prosecutor

Friday, 3 November 2023

At The Hague, the Netherlands

⁸² First Defence Submission, KSC-BC-2023-10/F00030, para.4.

⁸³ Shala Decision, KSC-BC-2020-04/F00045/RED, para.49; Gucati Appeals Decision, KSC-BC-2020-07, IA001/F00005, paras 72-73.