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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Fidelma Donlon
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Public Redacted Version of

Decision on Hashim Thaçi's Appeal Against Decision on Interim Release

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules") is seised of the "Thaçi Defence appeal against the 'Decision on Hashim Thaçi's Application for Interim Release'" ("Appeal") filed on 3 February 2021,[2] challenging, the "Decision on Hashim Thaçi's Application for Interim Release" ("Impugned Decision").[3] The Specialist Prosecutor's Office ("SPO") responded on 15 February 2021 that the Appeal should be dismissed in its entirety.[4] Thaçi filed his reply on 22 February 2021.[5]

I. BACKGROUND

1. On 5 November 2020, Thaçi was arrested pursuant to an arrest warrant issued by the Pre-Trial Judge,[6] further to the confirmation of an indictment against him.[7]

2. On 22 January 2021, the Pre-Trial Judge issued the Impugned Decision rejecting Thaçi's application for interim release on the basis that there was a risk that Thaçi

[1] F00002, Decision Assigning a Court of Appeals Panel, 4 February 2021.
[2] F00001/RED, Public Redacted Version of Thaçi Defence appeal against the "Decision on Hashim Thaçi's Application for Interim Release", 4 February 2021 (original version filed on 3 February 2021) ("Appeal").
[3] F00177/RED, Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release, 26 January 2021 (original version filed on 22 January 2021) ("Impugned Decision").
[4] F00003/RED, Public redacted version of Response to Thaçi Defence Appeal of Detention Decision, 19 February 2021 (original version filed on 15 February 2021) ("Response"), para. 54.
[5] F00004, Thaçi Defence Reply to "SPO Response to Thaçi Defence Appeal of Decision against 'Decision on Hashim Thaçi's Application for Interim Release'", 22 February 2021 (confidential) ("Reply").
[6] F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 November 2020 (original version filed on 26 October 2020); F00027/A01/RED, Public Redacted Version of Arrest Warrant for Hashim Thaçi, 5 November 2020 (original version filed on 26 October 2020); F00051, Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020).
[7] F00026/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (original version filed on 26 October 2020). The operative indictment was filed on 4 November 2020; see F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020) ("Indictment").

would abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those who allege that Kosovo Liberation Army ("KLA") members committed crimes, including (potential) witnesses.[8] The Pre-Trial Judge further found that the conditional interim release proposed by Thaçi ("Proposed Conditions"), as an alternative to unconditional release, could adequately mitigate the risk of flight but would insufficiently mitigate the risk of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes.[9]

3. Thaçi submits that, in the Impugned Decision, the Pre-Trial Judge: (i) applied an incorrect threshold for the assessment of the risks under Article 41(6)(b) of the Law;[10] (ii) made erroneous findings regarding the assessment of each of the three prongs of Article 41(6)(b) of the Law;[11] and (iii) further erred regarding the assessment of the Proposed Conditions.[12]

II. STANDARD OF REVIEW

4. The Court of Appeals Panel previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgements under Article 46(1) of the Law.[13] Article 46(1) of the Law specifies, in relevant part, the following grounds of appeal:

> (i) an error on a question of law invalidating the judgement;
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> (ii) an error of fact which has occasioned a miscarriage of justice; or
>
> (iii) […].

[8] Impugned Decision, para. 51.
[9] Impugned Decision, paras 56, 58.
[10] Appeal, paras 10-15.
[11] Appeal, paras 16-50.
[12] Appeal, paras 51-57.
[13] KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-13; KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), paras 11-13.

5. The Law states in relation to errors of law that:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.[14]

6. Regarding errors of fact, the Law provides the following:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[15]

7. If challenging a discretionary decision, the appellant must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[16] The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[17]

8. The Court of Appeals Panel recalls that, according to Article 45(2) of the Law, interlocutory appeals lie as of right from decisions or orders relating to detention on remand.

[14] Article 46(4) of the Law.
[15] Article 46(5) of the Law.
[16] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.
[17] Ibid.

III. DISCUSSION

A. PRELIMINARY MATTERS

9. The Panel recalls that pursuant to Article 46(2) of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers ("Practice Direction"),[18] any reply to a response to an interlocutory appeal should not exceed 2,000 words and that, pursuant to Article 36(1) of the Practice Direction, a participant may, in exceptional circumstances, seek authorisation from the Panel sufficiently in advance to exceed the prescribed word limit and provide an explanation of the good cause that necessitates exceeding the word limit. The Panel notes that the Reply significantly exceeds the word limit of 2,000 words although Thaçi has not sought any authorization to do so. However, in the interests of justice and judicial economy, and in application of Article 36(3) of the Practice Direction, the Panel decides to recognise, on an exceptional basis, that the Reply, despite exceeding the word limit, is validly made. At any rate, the Panel reminds the Parties to abide strictly by the Practice Direction in any future filing and to seek authorisation in advance to exceed the word limit.

10. In addition, the Panel notes that Thaçi has not yet filed a public redacted version of the Reply. Considering that all submissions filed before the Specialist Chambers 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,[19] the Panel orders Thaçi to file a public redacted version of the Reply within ten days of receiving notification of the present Decision.

[18] KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 ("Practice Direction").
[19] See e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al*., ICTR-98-42-A, Decision on Prosecution's Motion for Summary Dismissal or Alternative Remedies, 5 July 2013, para. 9; ICTR, *Ntawukulilyayo v. Prosecutor*, ICTR-05-82-A, Decision on Prosecution's Request for Public Filings. 15 April 2011, p. 1. See also Practice Direction, Article 38(1).

B. APPLICABLE LAW AND GENERAL CHALLENGES

11. The Panel recalls the provisions of Article 41(6) of the Law:

> The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:
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> a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and
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> b. there are articulable grounds to believe that:
>
> i. there is a risk of flight;
>
> ii. he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; 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 he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

1. General Threshold under Article 41(6)(b) of the Law (Ground 1.1)

(a) Submissions of the Parties

12. Thaçi argues that the Pre-Trial Judge erred in law so as to invalidate the Impugned Decision by articulating and applying an incorrect legal standard for the evaluation of risk under each limb of Article 41(6)(b) of the Law.[20]

13. Thaçi argues that the correct legal standard requires the demonstration of a real risk which is more than a mere possibility, and further requires an evaluation of whether the risk could be adequately mitigated by the imposition of conditions.[21]

[20] Appeal, paras 10, 15.
[21] Appeal, paras 12, 14.

Thaçi argues that the Pre-Trial Judge erroneously required the Defence to demonstrate that all risk could be "eliminated" or "negated", thereby imposing an "exclusion of all risks" standard which is impossible to meet.[22] In addition, he claims that the Pre-Trial Judge failed to evaluate the likelihood of a risk materialising and merely found that "a risk" existed.[23] According to Thaçi, the threshold applied by the Pre-Trial Judge remained unspecified and, thus, could encompass a very low threshold, just above suspicion.[24]

14. The SPO responds that the correct legal standard was applied by the Pre-Trial Judge in the Impugned Decision. According to the SPO, the Pre-Trial Judge correctly found that the threshold for the assessment of the risks under Article 41(6)(b) of the Law is "articulable grounds to believe" denoting an acceptance of the possibility, not the inevitability, of a future occurrence.[25] According to the SPO, this threshold was already adopted by the Court of Appeals Panel in a previous decision.[26] The SPO further submits that the Panel has previously dismissed arguments that any risk posed by the accused must be "real and identifiable".[27] The SPO asserts that the Defence takes the words "eliminated" or "negated" out of their proper context, in the Impugned Decision, and that the Pre-Trial Judge properly evaluated the likelihood of the risks materialising.[28]

15. Thaçi replies that both the SPO and the Pre-Trial Judge committed the same error by simply repeating the "possibility not inevitability" language and failed to articulate the measure of risk that properly satisfies the "possibility" threshold.[29]

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[22] Appeal, paras 11, 14; Reply, para. 10. Thaçi further alleges that the standard adopted by the Pre-Trial Judge is contrary to Article 5 of the European Convention on Human Rights ("ECHR"), Article 29 of Kosovo's Constitution, and the "presumption […] in favour of liberty"; see Appeal, para. 14.
[23] Appeal, para. 13.
[24] Appeal, para. 13. See also Reply, para. 3.
[25] Response, paras 2, 14-17.
[26] Response, para. 15 citing *Gucati* Appeal Decision, paras 51, 63, 67, 69.
[27] Response, para. 16 citing *Haradinaj* Appeal Decision, para. 64 and fn. 119.
[28] Response, para. 17.
[29] Reply, para. 3.

In support of his argument, Thaçi refers to the *Katanga and Ngudjolo* case,[30] where the Appeals Chamber of the International Criminal Court ("ICC") first used the "possibility, not the inevitability" language and in which detention was justified on the basis that the risk posed by the accused became a "distinct possibility "and that "[t]he possibility of his absconding remains visible."[31] Thaçi submits that the Pre-Trial Judge adopted the same language in the Impugned Decision, but omitted putting its meaning into context, other than stating that "suspicion simpliciter" is not enough,[32] which results in the original standard encompassing a threshold so low that it cannot be reconciled with the severity of interference with the right of liberty.[33]

16. Thaçi additionally argues in his Reply that the SPO was incorrect to assert that the Panel has previously dismissed the argument that the risk posed by the accused be "real and identifiable".[34] Thaçi submits that the Panel in the *Haradinaj* Appeal Decision dismissed the accused's submissions on this point because they had not been substantiated, not because this was the incorrect threshold.[35]

(b) Assessment of the Court of Appeals Panel

17. The Panel acknowledges at the outset that any analysis of pre-trial detention must take the presumption of innocence as its starting point.[36] It follows, first, that pre-trial detention cannot be maintained lightly. Second, the burden to demonstrate that pre-trial detention is necessary is on the SPO.[37] In this latter respect, the procedures of

[30] Reply, para. 4, citing ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-572, Judgement 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 ("*Katanga and Ngudjolo* Decision").
[31] Reply, para. 4, citing *Katanga and Ngudjolo* Decision, paras 21-24.
[32] Reply, para. 5, citing Impugned Decision, para. 20.
[33] Reply, para. 5.
[34] Reply, para. 6.
[35] Ibid.
[36] This was recognised by the Pre-Trial Judge; see Impugned Decision, para. 18.
[37] This was also recognised by the Pre-Trial Judge; see Impugned Decision, para. 19.

the Specialist Chambers differ from those of the International Criminal Tribunal for the former Yugoslavia ("ICTY").[38]

18. The Court of Appeals Panel rejects the SPO's argument that it has previously dismissed arguments that any risk posed by the Accused must be "real and identifiable".[39] The Panel recalls its finding in the *Haradinaj* Appeal Decision that: "the Court of Appeals Panel dismisses the remainder of Haradinaj's unsubstantiated assertions."[40] The Panel notes that reference is notably made in a footnote to Haradinaj's argument that any risk posed by an individual must be "real and identifiable".[41] However, the Panel notes, as the Defence rightly points out, that this finding was made in a different case in which the Panel dismissed Haradinaj's submissions on this matter because they had not been substantiated and not because Haradinaj suggested an incorrect threshold. Thus, this issue has not yet been decided on and therefore needs to be addressed here.

19. The Court of Appeals Panel recalls the wording of Article 41(6)(b) of the Law: detention shall only be ordered if "there are articulable grounds to believe" that at least one of the enumerated risks materialises.[42]

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[38] At the ICTY, where the burden was on the accused to show that release is warranted, the jurisprudence adopted the "balance of probabilities" as the applicable standard of proof, requiring the judges to satisfy themselves that it is more likely than not that the accused will appear for trial and will pose no danger to others. See ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para. 41; ICTY, *Prosecutor v. Simić*, IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for His Father, 21 October 2004, para. 14. ICTY jurisprudence is also applied at the International Residual Mechanism for Criminal Tribunals ("IRMCT"). See IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Motion for Provisional Release to the United States of America, 8 February 2019, fn. 16; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Maximilien Turinabo's Motion for Provisional Release, 29 March 2019, para. 14.

[39] Response, para. 16 citing *Haradinaj* Appeal Decision, para. 64 and fn. 119.

[40] *Haradinaj* Appeal Decision, para. 64.

[41] *Haradinaj* Appeal Decision, para. 64, fn. 119.

[42] The Panel notes that according to Article 187 of the Kosovo Criminal Procedure Code ("Kosovo CPC"), (Findings Required For Detention on Remand), a court may order detention on remand against a person. Article 187(1.2.2.) of the Kosovo CPC reads as follows: "there are grounds to believe that he or she will destroy, hide, change or forge evidence of a criminal offence or specific circumstances

20. Given the peculiar set-up of the Specialist Chambers and the text of Article 41(6)(b) of the Law, it is evident that the Specialist Chambers are not bound by the standards used by international tribunals although they can provide some guidance. The Panel notes that the phrase "grounds to believe" is also used, for example, in Article 58(1)(a) of the Rome Statute and in some domestic laws relating to pre-trial detention,[43] often prefaced by the words "reasonable" or "substantial". The term "reasonable grounds" leaves room for interpretation, even though it is a common term in many legal systems. In any event, "reasonable grounds" is understood to embody an objective assessment. In that regard, the standard is lower than "substantial grounds to believe that the person committed the crime charged" used in Article 61(7) of the Rome Statute in determining whether to confirm charges.[44] In addition to showing that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, Article 58(1) of the Rome Statute requires the Prosecutor to demonstrate that the arrest of the person *appears necessary* to satisfy at least one of the three grounds specified for issuing an arrest

indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices". As Article 41(6)(b)(ii) of the Law, Article 187(1.2.2.) of the Kosovo CPC also applies the standard of "grounds to believe that he or she will destroy […]". The Panel further notes the different wording between the three prongs of Article 187(1.2.) of the Kosovo CPC, referring in turn to "danger" (Article 187(1.2.1.)), "grounds to believe that he or she will […]"(Article 187(1.2.2.)) and "indicate a risk"(Article 187(1.2.3.)). The Panel considers that the reference to "danger" and "risk" can be interpreted as synonymous in this specific context. In that respect, the Panel observes that the Kosovo courts have in practice applied a risk assessment in addressing the requirements of Article 187(1.2.) of the Kosovo CPC and, while the available jurisprudence on this point is limited, there is no indication of a different threshold being applied for the three prongs despite the different wording. See e.g. Kosovo, Constitutional Court, KI10/18, *Fahri Deqani, Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017*, Judgment, 21 October 2019, para. 93 referring to "a risk that the Applicant may repeat the criminal offense". See also Kosovo, Constitutional Court, KI63/17, *Lutfi Dervishi, Constitutional review of Judgment Pml. Kzz. 19/2017, of the Supreme Court of Kosovo, of 11 April 2017*, Resolution on Inadmissibility, 16 November 2017, para. 71 referring to the reasoning of the Supreme Court [Judgment Pml. Kzz 19/2017] making findings on "the risk of flight"; Kosovo, Supreme Court, Pml Kzz 59/2015, *BS*, Judgment, 16 March 2015, para. 10 referring to "the risks pursuant to Article 187 of the CPC".

[43] See, for example in England and Wales, the Bail Act, 1976, Sch. 1, para. 2.

[44] Ryngaert, C., "Article 58: Issuance by a Pre-Trial Chamber a warrant of arrest or a summons to appear" in Ambos, K. (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., Beck/Hart/Nomos 2021 ("Ryngaert, *Article 58*"), marginal number (mn.) 12. See also fn. 44 and references quoted therein.

warrant.[45] For example, according to Article 58(1)(b)(ii) of the Rome Statute, the Pre-Trial Chamber must satisfy itself that the arrest appears necessary to ensure that the person does not obstruct or endanger the investigation or the court proceedings. If there are reasonable grounds to believe that a suspect would interfere with the investigations of the Prosecutor, the person can be detained according to the wording of Article 58(1)(b)(ii) of the Rome Statute. The text does not refer to specific actions or types of interference. It is not necessary that the suspect has already attempted to obstruct or endanger the investigation; it is sufficient that the Pre-Trial Chamber has reasonable grounds to believe that such interference could happen. Compelling factors taken into consideration include convincing information indicating that the person detained might intimidate, influence or corrupt witnesses or victims.[46]

21. The Panel recalls its prior finding that, in determining the necessity of detention under Article 41(6)(b) of the Law, the question revolves around the possibility, not the inevitability, of a future occurrence.[47] This finding is supported by the jurisprudence of the ICC.[48] In so finding, the Panel acknowledged that a standard less than certainty was appropriate. That "certainty" cannot be required follows from the nature of the assessment under Article 41(6)(b) of the Law, namely that it entails a prediction about future conduct, and what lies in the future can never be predicted with certainty. This

[45] Rome Statute, Article 58(1)(a) and (b). See also Rome Statute, Article 60(2) according to which: "A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions."
[46] Ryngaert, *Article 58*, mn. 19.
[47] *Gucati* Appeal Decision, para. 67.
[48] According to ICC jurisprudence: "when determining whether detention appears necessary under article 58(1)(b) of the Statute, '[t]he question revolves around the possibility, not the inevitability, of a future occurrence'". See ICC, *Prosecutor v. Abd-Al-Rahman,* ICC-02/05-01/20-177, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', 8 October 2020, para. 33; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Public redacted version of Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012 ("*Gbagbo* Appeal Decision"), para. 56.

does not mean, however, that *any* possibility of a risk materialising is sufficient to justify detention. In that regard, the Panel finds merit in Thaçi's argument, when referring to the *Katanga and Ngudjolo* case, that detention cannot be justified by any kind of possibility of a future occurrence, even if negligible.[49] The Panel is not persuaded, however, that the Pre-Trial Judge's statement that "while suspicion simpliciter is not enough, certainty is not required" results in the original standard encompassing a threshold so low that it cannot be reconciled with the severity of interference with the right of liberty.[50] The Pre-Trial Judge's aim in this section of the Impugned Decision, which recalls general standards relevant to the assessment of applications for provisional release, was to explain that certainty cannot be required when conducting a risk assessment. At the same time the Pre-Trial Judge emphasised "the principle that continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person's right to liberty".[51] The Pre-Trial Judge further recalled the need to rely on specific reasoning and concrete grounds in deciding to continue detention,[52] showing that he was aware that any kind of possibility of a future occurrence would be insufficient to justify a person's deprivation of liberty.

22. The Panel further notes the finding of the Specialist Chamber of the Constitutional Court ("Constitutional Court") that any deprivation of liberty must conform to the substantive and the procedural rules established by law and should be in keeping with the key purpose of protecting the individual from arbitrariness.[53] As part of the protection against arbitrariness, the Panel highlights the importance of specific reasoning and concrete grounds which are required to be relied upon by the

[49] Reply, paras 4-5 citing Impugned Decision, para. 20.
[50] Reply, para. 5 citing Impugned Decision, para. 20.
[51] Impugned Decision, para. 20.
[52] Ibid.
[53] KSC-CC-PR-2017-01, F00004, 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 Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017 ("Constitutional Court Judgment dated 26 April 2017"), para. 111.

Pre-Trial Judge in his decisions authorising detention on remand.[54] The Panel therefore finds that the standard to be applied is, on the one hand, less than certainty, but, on the other, more than a mere possibility of a risk materialising.

23. The Panel notes that, according to Article 19(1.30.) of the Kosovo CPC,[55] "articulable" means that "the party offering the information or evidence must specify in detail the information or evidence being relied upon". Thus, the term "articulable" does not speak directly to the standard or threshold, but to the specificity of the information or evidence required. This also follows from Article 19(1.9) and (1.10.) of the Kosovo CPC, referring to "articulable evidence".

24. Recalling that the applicable standard must be determined on a scale between a mere possibility and certainty, the Panel finds that Article 41(6)(b) of the Law does not require the Pre-Trial Judge to be satisfied that the risks specified in subparagraphs (i) to (iii) will in fact occur in the event of provisional release being granted, or to be satisfied that they are substantially likely to occur. The Pre-Trial Judge must be satisfied that there are "[articulable] grounds to believe" that there is a risk that they will occur. The question posed by Article 41(6)(b) of the Law is whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the Law exist.[56] To that extent it is a question of fact depending on the individual circumstances of each case.

25. The Panel notes Thaçi's argument that the Pre-Trial Judge failed to evaluate the likelihood of a risk materialising and merely found that "a risk" existed.[57] The Panel

[54] Constitutional Court Judgment dated 26 April 2017, para. 115.
[55] Kosovo, Code No. 04/L-123, Criminal Procedure Code, 13 December 2012.
[56] See e.g. ECtHR, *Jarzyński v. Poland*, no. 15479/02, Judgment, 4 October 2005, para. 46 ([…] factor indicating that there was a real risk of his absconding or obstructing the proceedings); ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment, 28 November 2017, para. 229 (the risk [of absconding] must be "sufficiently real" to justify continued detention).
[57] Appeal, para. 13.

observes that, in concluding his assessment of the risk of obstructing the proceedings, for example, the Pre-Trial Judge found that there "is a risk that Mr Thaçi will obstruct the progress of [Specialist Chambers] proceedings".[58] This brief conclusion does not mean, however, that the Pre-Trial Judge failed to consider the likelihood of the risk materialising. The Panel finds that the Pre-Trial Judge notably took into consideration Thaçi's influence and control, his attempts to undermine the Specialist Chambers, the scheme of benefits offered to persons summonsed by the SPO or their family members, and the fact that Thaçi was [REDACTED] to reach his conclusion.[59] The Pre-Trial Judge's conclusion was therefore based on individual circumstances demonstrating that the Pre-Trial Judge considered whether there was a sufficiently real possibility of the risks materialising.

26. Finally, the Court of Appeals Panel rejects Thaçi's argument that the Pre-Trial Judge required the Defence to demonstrate that all risk could be "eliminated" or "negated", thereby imposing an "exclusion of all risks" standard which is impossible to meet. The Panel observes that Thaçi refers to paragraphs 32 and 49 of the Impugned Decision addressing the risk of flight and the risk of committing further crimes. For the reasons explained elsewhere in this Decision,[60] the Panel dismisses the Defence's arguments pertaining to these risks pursuant to Article 41(6)(b)(i) and Article 41(6)(b)(iii) of the Law. As a result, the Panel does not need to address the Pre-Trial Judge's reference to "eliminating" or "negating" the risks he identified. The Panel further observes that Thaçi refers to paragraph 42 of the Impugned Decision. While the Pre-Trial Judge stated in that paragraph that Thaçi's public activities in support of the Specialist Chambers "do not negate" the pattern of possible interference but "coexist with it", the Panel is however not persuaded that in doing so, the Pre-

[58] Impugned Decision, para. 44.
[59] See below, paras 47, 49, 52, 55, 57, 68, 72, 76.
[60] See below, paras 32, 78.

Trial Judge was requiring an "exclusion of risks" standard, but finds that he was rather explaining how he had weighed the two factors.[61]

2. Duty to Provide a Reasoned Opinion

27. In the conduct of its assessment, a Panel has a duty to provide sufficient reasoning. In this regard, the Court of Appeals Panel recalls relevant ICC jurisprudence emphasising the importance of thoroughly reasoned decisions, in particular on interim release.[62] The European Court of Human Rights ("ECtHR") also stressed that in the context of Article 5(1)(c) of the ECHR, the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention must be deemed arbitrary.[63] The Panel considers that the extent of the reasoning will depend on the circumstances of the case, but it is nevertheless essential that the lower level panel indicates with sufficient clarity the basis of the decision.[64]

28. The Panel notes that the reasoning in the Impugned Decision in relation to Article 41(6)(b)(ii) of the Law and in relation to the Proposed Conditions is relatively brief. In particular, the Pre-Trial Judge did not set out in much detail how he analysed the evidence presented by the Parties or how he reached his factual conclusions. Rather, in stating his conclusions, the Pre-Trial Judge simply made general references

[61] See below, paras 48-49.
[62] See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006 ("*Lubanga* Appeal Decision"), para. 20; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018 ("*Bemba et al.* Decision dated 8 March 2018"), paras 102-108; *Gbagbo* Appeal Decision, paras 46-50; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-323, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008 ("*Bemba* Decision dated 16 December 2008"), paras 53, 66, 67.
[63] ECtHR, *S. V. and A. v. Denmark*, nos 35553/12, 36678/12 and 36711/12, Judgment, 22 October 2018, para. 92; ECtHR, *Mooren v. Germany*, no. 11364/03, Judgment, 9 July 2009, para. 79.
[64] *Bemba* et al. Decision dated 8 March 2018, para. 105; *Gbagbo* Appeal Decision, para. 46, citing *Lubanga* Appeal Decision, para. 20.

in the footnotes to previous filings. In the conduct of its review, the Panel had to revert to evidence and arguments previously adduced by the Parties in order to clarify and interpret the findings in the Impugned Decision. Nevertheless, and despite those shortcomings of the Impugned Decision, the Panel does not consider that the decision is so lacking in reasoning that it can be said that the Pre-Trial Judge failed to comply with his obligation to provide a reasoned opinion and therefore made an error of law.

29. The Panel considers that even though the reasoning is brief, it is still comprehensible how the Pre-Trial Judge reached the conclusions he did, enabling the Accused to exercise his right to appeal. In particular, if the reasoning provided in the Impugned Decision is read together with the filings referred to in the footnotes and the submissions of the Parties, the Panel can discern the basis underpinning the conclusions reached by the Pre-Trial Judge.

30. At any rate, the Court of Appeals Panel strongly urges the Pre-Trial Judge to provide fuller reasoning in future decisions on applications for interim release or review of detention.

C. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW (GROUNDS 1.2, 1.3, 1.4)

1. Article 41(6)(b)(i) of the Law

31. Thaçi challenges the Pre-Trial Judge's finding that he poses a risk of flight.[65] As acknowledged by Thaçi,[66] in the Impugned Decision, the Pre-Trial Judge found that the conditions proposed by Thaçi in support of his alternative request for conditional interim release could mitigate the risk that Thaçi absconds.[67]

[65] Appeal, paras 16-27; Reply, paras 7-9; see also Response, paras 31-47.
[66] Appeal, para. 53.
[67] Impugned Decision, para. 56.

32. The Court of Appeals Panel stresses that, when a party alleges that an error of law or of fact has been committed, that party must go on to show that the alleged error invalidates the decision or occasions a miscarriage of justice. Indeed, the Panel is not required to consider the arguments of a party if they do not allege an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice.[68] As the Pre-Trial Judge's conclusion that Thaçi's detention shall be continued does not rely on his findings regarding the risk of flight, the Panel summarily dismisses this ground of appeal.

2. Article 41(6)(b)(ii) of the Law

(a) Submissions of the Parties

33. According to Thaçi, three legal errors invalidate the Pre-Trial Judge's finding that there is a risk that he will obstruct Specialist Chambers proceedings.[69] First, Thaçi submits that there is no evidence that he has directly or indirectly influenced or attempted to influence witnesses.[70] He argues that the Pre-Trial Judge erroneously relied on Thaçi's "past and recent influential positions" to conclude that "this may trigger the mobilisation of a vast network of supporters" aiming to obstruct the proceedings, and failed to identify "concrete grounds" to link this to Thaçi.[71]

34. Second, Thaçi challenges the Pre-Trial Judge's finding that some of his actions demonstrated a pattern of consistently undermining the Specialist Chambers, therefore militating in favour of a risk of obstruction, arguing that he failed to provide a reasoned opinion.[72] In that regard, Thaçi submits that the Pre-Trial Judge erroneously relied on: (i) a letter he wrote to the United States Secretary of State that contains "nothing improper" and simply sets out the legitimate concerns held by the

[68] See e.g. ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para. 18. See also Standard of Review, paras 4-8 above.
[69] Appeal, para. 29.
[70] Appeal, para. 30.
[71] Appeal, para. 30.
[72] Appeal, paras 31-34.

"institutions of the Republic of Kosovo";[73] (ii) [REDACTED] despite the issues raised by the Defence about the lack of reliability of [REDACTED];[74] and (iii) the reduction in the sentences of two former KLA members that was lawful and was not related, in any event, to the work of the Specialist Chambers.[75] Thaçi alleges that the Pre-Trial Judge further failed to consider that Thaçi also commuted the sentences of Serbian prisoners.[76] Moreover, Thaçi argues that the Defence is not required to "explain away" letters, requests or reductions in sentence, but rather the Pre-Trial Judge was obliged to give a reasoned opinion as to why this pre-surrender conduct could support a finding of risk of obstruction.[77] He claims that rather than engage with the Defence submissions as to the limited nature of the commutations, the SPO merely repeats that the pardons "show a pattern of consistently undermining the [Specialist Chambers]",[78] to which Thaçi submits no such link can be reasonably made.[79]

35. Third, with regard to the Pre-Trial Judge's findings on alleged attempts to interfere with the Specialist Chambers proceedings, Thaçi contends that the Pre-Trial Judge erred in law by making findings with insufficient reasoning and/or evidence regarding an alleged scheme of benefits offered to persons summonsed by the SPO (or their families) despite the fact that there was no evidence that Thaçi was involved with any payments or appointments.[80] In the same vein, Thaçi challenges the findings that he attempted to gain insight into or to influence the evidence given by certain persons, as well as his [REDACTED].[81] He further argues that he played no part in

[73] Appeal, para. 32.
[74] Appeal, para. 33.
[75] Appeal, para. 34.
[76] Appeal, para. 34.
[77] Reply, para. 13. See also Appeal, para. 31.
[78] Reply, para. 13, citing Response, para. 42.
[79] Reply, para. 13.
[80] Appeal, paras 35-36; Reply, para. 11.
[81] Appeal, paras 37-38. See also Reply, para. 14.

these allegations, that they were taken out of context or that he did not do anything improper.[82]

36. Specifically, Thaçi contends that the SPO's claim of his "unmistakeable intent to obstruct"[83] relating to Mr Driton Lajçi ("Mr Lajçi")'s [REDACTED].[84] Thaçi argues that the Pre-Trial Judge fails to provide any rational basis for preferring the SPO's theory to the [REDACTED].[85]

37. According to Thaçi, the Pre-Trial Judge's findings are not based on concrete grounds and fail to show any influence or control by Thaçi over "witnesses, victims or accomplices", as required by Article 41(6)(b)(ii) of the Law.[86] Moreover, Thaçi asserts that the Pre-Trial Judge committed the same error in finding that he established a framework of influence and control through his official capacity, and further failed to consider that he no longer held any official capacity.[87]

38. In light of the above, Thaçi concludes that each element relied on by the Pre-Trial Judge to conclude that there was a risk of obstruction is flawed and the observation on the "ongoing climate of intimidation" cannot on its own support the conclusion that the requirements of Article 41(6)(b)(ii) of the Law are met.[88]

39. Thaçi further argues that the Pre-Trial Judge erred in the exercise of his discretion by failing to consider the strict protective measures regime which applies to Thaçi's case, in order to mitigate the risk of obstruction, and the SPO cannot point to anything in the language of the Impugned Decision to demonstrate otherwise.[89] Thaçi also argues that the SPO's reliance on the Pre-Trial Judge's issuance of a

[82] Appeal, paras 36-37. The Defence further notes and adopts the evidence produced and submissions made on behalf of Veseli in respect of the alleged payments to Mr Brahimaj. See Appeal, para. 36.
[83] Reply, para. 11.
[84] Reply, para. 11.
[85] Reply, para. 11.
[86] Appeal, paras 38, 49.
[87] Appeal, para. 39.
[88] Appeal, para. 40.
[89] Appeal, para. 56; Reply, para. 12.

50+ page decision on protective measures[90] to suggest that the Pre-Trial Judge had these issues in his mind cannot be sufficient and that in reality, the Pre-Trial Judge simply failed to take this highly material factor into account when considering the risk.[91]

40. The SPO responds that the Pre-Trial Judge's assessment was undertaken on an individual basis in light of the personal circumstances of the Accused.[92] The SPO submits that the Pre-Trial Judge correctly relied upon individual factors in his assessment such as, the crimes charged and/or material facts underlying them to establish all three of the risks under Article 41(6)(b) of the Law,[93] the political profile of the Accused, his prior posts, his former influential leadership positions and his access to support networks.[94] According to the SPO these factors taken together are sufficient to support a finding on the necessity of the Accused's detention.[95]

41. With regard to Thaçi's challenge of the Pre-Trial Judge's finding that some of his actions demonstrated a pattern of consistently undermining the Specialist Chambers, the SPO responds that the Defence misrepresents the Impugned Decision and attempts to put forward a piecemeal analysis of the evidence. According to the SPO, Thaçi fails to acknowledge that the above-mentioned factors were assessed together with other factors and duly establish the risks under Article 41(6)(b) of the Law.[96]

42. In addition, the SPO argues that it was entirely reasonable for the Pre-Trial Judge to rely on evidence showing that, whilst Thaçi was President of Kosovo, the Government offered several persons – including members of the joint criminal

[90] Reply, para. 12, citing Response, para. 48.
[91] Reply, para. 12.
[92] Response, paras 23-24, 28.
[93] Response, para. 25.
[94] Response, paras 26-27.
[95] Response, paras 28-29.
[96] Response, paras 41-45.

enterprise charged in this case – benefits or disproportionate legal assistance contemporaneous with the SPO summonsing them for interview.[97] The SPO submits that Thaçi's summary denials that he had anything to do with them do not amount to the evidence having been "comprehensively rebutted" and do not demonstrate any discernible error.[98]

43. The SPO also submits that no discernible error was committed by the Pre-Trial Judge in finding that Thaçi's attempts to gain insight into or to influence the evidence given by individuals during their SPO interviews indicate, at a minimum, the Accused's influence and control.[99] Regarding Thaçi's [REDACTED], the SPO argues that Thaçi merely disagrees with the weight given to [REDACTED] by the Pre-Trial Judge.[100]

44. The SPO moreover argues that it is clear that the Pre-Trial Judge considered issues surrounding witness security and protection, including the extent to which various measures could mitigate the risk of witness interference, noting the "ongoing culture of witness intimidation in Kosovo."[101]

(b) Assessment of the Court of Appeals Panel

45. The Panel will now address Thaçi's argument that the Pre-Trial Judge erroneously relied on his past and recent influential positions to find that Thaçi's deriving influence may trigger the mobilisation of a vast network of supporters with the aim of obstructing proceedings. First, the Panel notes that while Thaçi argues that there is no evidence that he influenced witnesses or exerted his influence to interfere with the proceedings,[102] this does not reflect the Pre-Trial Judge's finding, which is rather that Thaçi's influence, direct or indirect, deriving from his "public stature" may

[97] Response, paras 33-34.
[98] Response, paras 34-35.
[99] Response, paras 36-37.
[100] Response, paras 48-50.
[101] Response, para. 38.
[102] Appeal, para. 30; Reply, para. 8.

trigger the mobilisation of a vast network of supporters to do so.[103] Furthermore, the Panel recalls that Article 41(6)(b) of the Law does not require the Pre-Trial Judge to be satisfied that any attempt to obstruct the proceedings has already occurred but that there is a sufficiently real possibility that it will occur.[104]

46. Second, recalling that the test under Article 41(6)(b) of the Law entails a prediction about future conduct and that what lies in the future can never be predicted with certainty,[105] the Panel does not find that the use of the term "*may*" by the Pre-Trial Judge indicates that he applied a lesser standard. Likewise, the Panel does not find that his finding is "pure speculation".[106] Indeed, the Panel notes that although no further detail is provided in the Impugned Decision, the Pre-Trial Judge cited the SPO's response to Thaçi's application for interim release in support of his finding, which refers to specific and concrete alleged acts of interference involving the KLA War Veterans Association.[107] While the Pre-Trial Judge's reference to the vast network of supporters as "including former subordinates and persons affiliated with the KLA [War Veterans Association]" is general,[108] the Panel does not find that the persons part of that network amount to "unconnected and unidentified third parties".[109] The Panel further recalls that the Impugned Decision referred to Thaçi's influence and authority as a founding member of the KLA, member of the KLA General Staff, KLA Commander-in-Chief and more recently Prime Minister and President of Kosovo.[110]

47. In light of supporting evidence pointing to alleged acts of obstruction involving members of the KLA War Veterans Association and the Pre-Trial Judge's finding

[103] Impugned Decision, para. 38.
[104] See above, para. 24.
[105] See above, para. 21.
[106] Contra Appeal, para. 30.
[107] Impugned Decision, fn. 77, citing F00149/RED, Public redacted version of Prosecution response to Application for Interim Release on behalf of Mr Hashim Thaçi, 21 December 2020 (original version filed on 16 December 2020) ("Response to Application for Interim Release"), paras 15-17.
[108] Impugned Decision, para. 38.
[109] Contra Appeal, para. 30.
[110] Impugned Decision, para. 31.

relating to Thaçi's influential position and authority, by virtue notably of his prior leadership positions in the KLA, it was not unreasonable for the Pre-Trial Judge to find that Thaçi was in a position to exert influence over such a network. Further, it was not unreasonable for the Pre-Trial Judge to consider this as an important factor in his determination on the existence of a risk of obstructing the proceedings. The Panel therefore finds that Thaçi failed to demonstrate an error in the Pre-Trial Judge's finding.

48. Turning to Thaçi's influence and control established through his position of authority, the Panel sees no error in the Pre-Trial Judge concluding that Thaçi's public activities in support of the Specialist Chambers coexisted with a pattern of undermining it and with a framework of influence and control established through Thaçi's official capacity.[111] In so doing, the Panel is satisfied that the Pre-Trial Judge properly weighed, as part of his findings, Thaçi's positive role in support of the Specialist Chambers and the SPO.[112] Notably, the Pre-Trial Judge expressly acknowledged Thaçi's cooperation and his efforts to establish these institutions.[113]

49. The Panel finds that it was not improper for the Pre-Trial Judge to nevertheless find that these public activities were not irreconcilable with Thaçi also carrying out — less publicly — activities tending to undermine the Specialist Chambers through the influence he enjoyed as a result of his prior positions.[114] The Panel also notes in that regard that Thaçi himself had acknowledged that "his support may have changed"

[111] Impugned Decision, para. 42.
[112] Impugned Decision, para. 42, citing F00120/RED, Public Redacted Version of Application for Interim Release on behalf of Mr Hashim Thaçi, 7 December 2020 (original version filed on 4 December 2020) ("Application for Interim Release"), paras 25-32, and F00165/RED, Public Redacted Version of Reply to Specialist Prosecutor's Response Opposing the Application for Interim Release on behalf of Mr Hashim Thaçi, 25 January 2021 (original version filed on 7 January 2021) ("Reply to Application for Interim Release"), para. 29.
[113] Impugned Decision, para. 32.
[114] Impugned Decision, para. 42. The Pre-Trial Judge made findings on such activities and the existence of the pattern elsewhere in the Impugned Decision. See Impugned Decision, para. 40.

with the years, explaining that the fact that "the court did nothing for a few years" "led him to question the need or interest of such institution".[115]

50. As to Thaçi's argument that because he no longer holds any official capacity, his influence established through his official capacity is no longer relevant, the Panel finds it unpersuasive.[116] It is clear from the Impugned Decision that the Pre-Trial Judge was mindful that Thaçi was no longer holding the positions of member of the KLA General Staff, KLA Commander-in-Chief, Prime Minister or President of Kosovo[117] when he reached his finding on Thaçi's continuing influence and control. The Panel notes indeed that the Pre-Trial Judge, when finding that Thaçi exercised a degree of influence and control, relied on Thaçi's "*past and recent*" influential positions and authority.[118] The Panel finds that it was also reasonable for the Pre-Trial Judge to consider that Thaçi, who was President of Kosovo until he recently resigned, undoubtedly continued to exercise a certain degree of influence over his former subordinates despite his recent resignation as President of Kosovo. Consequently, Thaçi's allegation of error is rejected.

51. The Panel will next address Thaçi's arguments on his letter to the United States Secretary of State, the [REDACTED] and the reduction of former KLA members' sentences. The Pre-Trial Judge considered that these incidents together, and especially in light of other factors, showed a pattern of consistently undermining the Specialist Chambers and so militated in favour of a risk of obstruction.[119] The Panel will examine these three factors in turn.

52. First, concerning Thaçi's letter to the United States Secretary of State, the Panel notes that the reasoning of the Pre-Trial Judge on this point is very brief.[120] The Panel

[115] Reply to Application for Interim Release, para. 29.
[116] Appeal, para. 39.
[117] See Impugned Decision, para. 31.
[118] Impugned Decision, para. 38 (emphasis added). See also Impugned Decision, para. 31.
[119] Impugned Decision, para. 40.
[120] Impugned Decision, para. 40.

further notes, however, that although the Pre-Trial Judge's reasoning does not indicate that he expressly engaged with the arguments made in Thaçi's request for interim release,[121] Thaçi was merely disagreeing with the interpretation that was given to that document.[122] Thaçi asserted that the letter contained nothing improper and fell "within his constitutional duties as President to express concerns on behalf of the State", without pointing to any evidence in support of his contention.[123] The Panel is therefore satisfied that it was within the Pre-Trial Judge's discretion to favour the interpretation provided by the SPO, namely that the letter's purpose was to undermine the Specialist Chambers.[124] Indeed, the Panel considers that this interpretation is supported by a plain reading of the text of the letter.[125]

[121] Appeal, para. 32.
[122] F00005/RED, Public Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020 (original version filed on 28 May 2020) ("Request for Arrest Warrants"), para. 7.
[123] See Application for Interim Release, para. 24. While Thaçi alleges that the SPO quoted selectively a single extract from the United States Secretary of State's letter in response without producing the letter, he does not produce such a letter either. See Reply to Application for Interim Release, para. 26.
[124] See Response to Application for Interim Release, para. 21.
[125] See F00005/RED/A02, Annex 2 to Public redacted version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020 (original version filed on 28 May 2020), pp. 5 ("I am writing to you in order to express the grave concern of the institutions of the Republic of Kosovo regarding the Kosovo Specialist Chambers […]"), 6 ("It is with great regret that I express my concern that the manner the said institutions continue to operate is in direct contradiction to what was set out in the beginning and what we had agreed upon"), 7 ("I regret to say, however, that the spirit of implementation of the process has been very different to what we expected at the beginning of the process"),("[I]t remains a matter for the domestic government to decide […] the mandate, operation and geographic location of its institution"), ("It is disappointing that the [SPO] has dedicated its numerous resources to investigate only one ethnic group, i.e. only the Kosovo Albanians, which in essence harms the credibility and legitimacy of the process"), 7-8 ("It is unacceptable that persons whose names have been mentioned in […] the report by Swiss senator Dick MARTY published in 2010, have been subject for 10 years now to the threat that they will be investigated and potentially face trial"), 8 ("[T]here are reliable reports which state that the statutory and procedural framework of the Kosovo Specialist Chambers is not in accordance with internationally recognised standards of fair trial and treatment"), ("There are a number of other concerns that seriously harm the process established in The Hague and which the Government of the United States of America should urgently take into consideration in order to ensure that critical reforms are undertaken before the cases are prosecuted further […]").

53. Second, with regard to Thaçi's [REDACTED], the Panel notes that the Impugned Decision is again very brief.[126] Nevertheless, the Panel can discern how the Pre-Trial Judge reached his conclusion with respect to that incident based on the evidence before him for the following reasons. The Panel notes that the SPO did not provide [REDACTED].[127] However, contrary to Thaçi's contention,[128] the Panel is not persuaded that this constitutes [REDACTED]. Indeed, [REDACTED].[129] In any event, the Panel considers it to be an established principle that hearsay evidence is in principle admissible in international criminal proceedings.[130] Although it would have been preferable for the SPO to [REDACTED], the Panel considers that the Pre-Trial Judge was entitled to find that [REDACTED] is sufficiently credible and reliable. While Thaçi alleges that the evidence is [REDACTED] and suffers from "specific problems",[131] the Panel notes that he fails to identify any specific credibility or reliability issue [REDACTED].

54. The Panel further notes that [REDACTED], also mentions that incident, [REDACTED].[132] The Panel acknowledges that Thaçi disputes the incident and [REDACTED].[133] The Panel recalls in that regard that when faced with different versions of the event, the Pre-Trial Judge is required at a minimum to satisfy himself

[126] Impugned Decision, para. 40.
[127] F00149/A02, Annex 2 to Prosecution response to Application for Interim Release on behalf of Mr Hashim Thaçi, 16 December 2020 (confidential) ("Annex 2 to Response to Application for Interim Release"), pp. 3-9. See also Response to Application for Interim Release, para. 22.
[128] Appeal, para. 33.
[129] See Response, para. 41(ii); Annex 2 to Response to Application for Interim Release, pp. 3-9.
[130] See e.g. *Bemba* Decision dated 8 March 2018, paras 620, 874; ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Judgement, 4 December 2012, para. 303; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 509; ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.
[131] Appeal, para. 33.
[132] See Annex 2 to Response to Application for Interim Release, [REDACTED].
[133] Appeal, para. 33. See also Reply to Application for Interim Release, paras 27-28.

that the evidence presented by the SPO is sufficiently specific and "articulated" to support a belief that the risk of obstruction of the proceedings exists.[134]

55. In light of the fact that the SPO provided corroborated evidence on that incident, and in the absence of any clear credibility and reliability issues, the Panel does not find that it was unreasonable for the Pre-Trial Judge to favour the version of events provided by the SPO and to consider that it was not necessary to subject the sources of such information to the Parties' questioning. In that regard, the Panel considers that the Pre-Trial Judge was correct to point out that his task was not to determine guilt or innocence in relation to the specific instances put forward by the SPO.[135] The Panel therefore finds that Thaçi fails to demonstrate that the Pre-Trial Judge erred in finding that the [REDACTED] incident formed part of a pattern of consistently undermining the Specialist Chambers and in relying on it to reach his ultimate finding on a risk of obstruction.

56. Third, as to the reduction of sentences of former KLA members, the Panel first notes that, as Thaçi alleges, the Impugned Decision makes no mention of Thaçi's argument that he also commuted the sentences of Serbian prisoners.[136] However, the Panel does not consider that the Pre-Trial Judge erred in failing to expressly refer to it. The Panel recalls that it is to be presumed that a panel evaluated all of the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence, and that if a panel did not refer to the evidence in contradiction to its finding, it is to be presumed that it assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[137] The Panel finds that it was thus within the Pre-Trial Judge's discretion not to give express consideration in the Impugned Decision to an unsupported assertion

[134] See above, para. 24.
[135] Impugned Decision, para. 40, citing Reply to Application for Interim Release, para. 28.
[136] Appeal, para. 34.
[137] ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 23.

that provides no information as to when these pardons occurred and whom they concerned.[138]

57. Furthermore, the Panel notes that the Pre-Trial Judge did not find that the pardons of KLA members were unlawful.[139] In addition, the Pre-Trial Judge did not solely rely on the fact that it was KLA members who were pardoned: he also took into account the timing of such pardons, before Thaçi's imminent resignation as President of Kosovo, as well as the fact that the reduction of sentences exceeded the governmental commission's recommendations.[140] The Panel notes in that regard that Thaçi exceeded the recommendations from the Commission only with regard to two convicted accused, Mr Bekim Sylaj (three years and six months while one year had been recommended) and Mr Shpresim Uka (four years while one year had been recommended) despite the fact that they were the only ones who had not expressed repentance for the crimes committed.[141] In addition, while Thaçi alleges that these pardons are not related to undermining the Specialist Chambers,[142] the Panel notes that evidence provided by the SPO in support of its response to Thaçi's application for interim release indicates that one of these KLA members was reportedly implicated in attempts to interfere with witnesses in [REDACTED] trials involving KLA members.[143] Therefore, the Panel sees no error in the Pre-Trial Judge's finding that this allegation, when assessed together with other factors, forms part of a pattern of undermining the Specialist Chambers and militates in favour of a risk of obstruction.

[138] See Reply to Application for Interim Release, para. 30.
[139] Contra Appeal, para. 34.
[140] Impugned Decision, para. 40, referring to Response to Application for Interim Release, para. 23.
[141] See F00149/A01, Annex 1 to Prosecution response to Application for Interim Release on behalf of Mr Hashim Thaçi, 16 December 2020, pp. 2-5.
[142] Reply, para. 13.
[143] See [REDACTED], cited at Response to Application for Interim Release, fn. 45. See also Response, para. 41(iii).

58. The Panel turns next to Thaçi's arguments about the alleged scheme of benefits for persons summonsed by the SPO or their families. The Panel notes that the Pre-Trial Judge simply stated that he "consider[ed] [the scheme] as relevant", alongside other factors, with regard to the alleged attempts to interfere in the proceedings.[144] He further considered that "this pattern of incidents, and their timing in relation to the SPO interviews, reveal, at a minimum, a degree of influence and control that Mr Thaçi has" and that, "taken together, these factors further contribute to a risk of obstruction of the progress of the proceedings by Mr Thaçi".[145] In support of his finding on the scheme, the Pre-Trial Judge cited the SPO's response to Thaçi's application for interim release.[146]

59. Thaçi makes two arguments regarding this finding: (i) that it was made without sufficient reasoning and/or evidence;[147] and (ii) that "[e]ach allegation has been comprehensively rebutted".[148] In support of his second point, Thaçi cites his application for interim release and his reply thereto before the Pre-Trial Judge, and, in relation to an incident concerning Mr Lahi Brahimaj ("Mr Brahimaj"), adopts the evidence and submissions of Veseli, Co-Accused in this case.[149]

60. Dealing with the second argument first, the Panel notes that Thaçi simply repeats, by way of a reference in a footnote, the arguments that he had made before the Pre-Trial Judge, as well as directing the Panel to arguments made regarding Mr Brahimaj in particular by Veseli. The Panel considers it to be an established principle that, on appeal, a party may not merely repeat arguments that did not

[144] Impugned Decision, para. 41.
[145] Ibid.
[146] Impugned Decision, fn. 82, citing Response to Application for Interim Release, paras 25-30.
[147] Appeal, para. 35.
[148] Appeal, para. 36.
[149] Appeal, para. 36, fns 53-54, citing Application for Interim Release, paras 54-56; Reply to Application for Interim Release, paras 31-34; F00174, Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021 ("Veseli Reply to Application for Interim Release"), paras 21-28; F00174/A06, Annex 6 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021; F00174/A07, Annex 7 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021.

succeed before the lower Panel, unless the party can demonstrate that the lower Panel's rejection of them constituted such an error as to warrant the intervention of the Appeals Panel.[150] Accordingly, the appellate arguments concerning the benefits conferred on Mr Syleman Selimi ("Mr Selimi"), Mr Rrustem Mustafa ("Mr Mustafa"), [REDACTED] and Mr Haxhi Shala ("Mr Shala"), or their respective families, are summarily dismissed. As to the incident concerning Mr Brahimaj, in light of the fact that the Pre-Trial Judge does not appear to have ultimately relied on it when reaching his finding on the scheme of benefits,[151] Thaçi's arguments in that respect are dismissed as moot.

61. Thaçi's remaining argument in relation to the scheme of benefits is the general assertion that the finding was made without sufficient reasoning and/or evidence. The Appeals Panel considers that the Pre-Trial Judge indeed appears to have made the finding that such a scheme existed without explaining how he reached that finding or the relevance of such a scheme to the existence of a risk of obstruction of justice.[152] Nor can the Pre-Trial Judge's reasoning be further elucidated by reference to the Impugned Decision's brief summary of the Parties' submissions on this point.[153] However, the Panel nevertheless considers, based on the submissions and evidence put before the Pre-Trial Judge by the SPO and Thaçi, that the Pre-Trial Judge's conclusion as to the existence of a scheme of benefits concerning individuals summonsed by the SPO, or their respective families, and its relevance to the risk of obstruction was not unreasonable.

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[150] ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007, para. 35; see also ICTR, *Uwinkindi v. Prosecutor*, ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of His Case to Rwanda and Related Motions, 16 December 2011, para. 36; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("*Karadžić* Appeal Decision"), para. 13; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgement, 22 April 2008, para. 46; *Nahimana et al.* Appeal Judgement, para. 231.

[151] See Impugned Decision, fn. 82 citing Response to Application for Interim Release, paras 25-30. These paragraphs do not pertain to the incident concerning Mr Brahimaj.

[152] Impugned Decision, para. 38.

[153] Impugned Decision, paras 35-37.

62. When considering the scheme of benefits in the Impugned Decision, the Pre-Trial Judge cites the SPO's submissions,[154] from which the Panel was able to identify the following incidents:[155] (i) Thaçi hiring Mr Mustafa as an adviser one month after his SPO interview;[156] (ii) [REDACTED];[157] (iii) Thaçi appointing Mr Shala's son as a consul general when Mr Shala was interviewed by the SPO as a suspect;[158] and (iv) Mr Selimi being hired by the Office of the Prime Minister as an adviser immediately after being summonsed by the SPO.[159] The Panel notes that the SPO's submissions also refer to an additional incident in relation to this scheme allegedly involving Thaçi and Veseli.[160] However, in light of the fact that the SPO's submissions on this point in its application for an arrest warrant were heavily redacted vis-à-vis the Defence,[161] and that the Pre-Trial Judge expressly noted in his decision on Veseli's application for interim release that as a result he would not rely on this allegation in assessing the existence of a risk of obstruction,[162] the Panel has not considered this incident in its review of the evidence.

63. The Panel first notes that the fact that all of these persons, or their relatives, were hired by senior government officers during Thaçi's time as President is not disputed by the Defence, which only denies Thaçi's involvement in some of these appointments.[163] With regard to Mr Mustafa, it is of significance that Thaçi himself did not deny being involved in his appointment.[164] He merely disagreed with the alleged

[154] Impugned Decision, fn. 82 citing Response to Application for Interim Release, paras 25-30.
[155] The Panel recalls that the Pre-Trial Judge would have been able to consider, as part of this review, evidence which had been placed before him as part of the application for the arrest warrant; see *Gbagbo* Appeal Decision, para. 69. Consequently, the Panel has also considered such evidence as part of its review.
[156] Response to Application for Interim Release, para. 26.
[157] Response to Application for Interim Release, para. 27.
[158] Response to Application for Interim Release, para. 28.
[159] Response to Application for Interim Release, para. 29.
[160] Response to Application for Interim Release, para. 25; evidence cited in Request for Arrest Warrants, fns 47-50.
[161] Request for Arrest Warrants, para. 15 and fns 47-50.
[162] F00178, Decision on Kadri Veseli's Application for Interim Release, 22 January 2021, para. 41.
[163] Application for Interim Release, paras 54-56; Reply to Application for Interim Release, paras 31-34.
[164] 076563-TR-ET Part 21, pp. 4-6, cited at Application for Interim Release, para. 55.

significance of the salary Mr Mustafa received, but provided no support for his contention that this salary of 18,000 euros, described as "13,800 euros more than Kosovo's national average [annual] salary",[165] was "of little financial consequence to such a wealthy man".[166] Thaçi did adduce evidence pointing to there having been no attempt to hide Mr Mustafa's appointment from public scrutiny.[167] Nevertheless, the Panel finds that the evidence at a minimum still shows that, around one month after his SPO interview, Mr Mustafa, a former KLA member convicted of war crimes, was hired by Thaçi as his adviser and was generously remunerated as a result.[168]

64. As to [REDACTED], the Panel notes that although [REDACTED], the evidence nevertheless indicates the following: [REDACTED][169] [REDACTED];[170] [REDACTED],[171] [REDACTED],[172] [REDACTED];[173] [REDACTED];[174] [REDACTED].[175]

65. Likewise, for Mr Selimi, although the evidence does not directly implicate Thaçi in his appointment, the Panel finds that it nevertheless indicates the following: Mr Selimi was hired by the Office of the Prime Minister as an adviser three days after being summonsed by the SPO; he was let go from the post four months later following public criticism of the appointment; [REDACTED].[176]

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[165] Osmani, T., "Kosovo President Secretly Appoints War Crimes Convict as Adviser" (6 June 2019) *BIRN* <https://balkaninsight.com/2019/06/06/kosovo-president-secretly-appoints-war-crimes-convict-as-adviser/> accessed 22 April 2021, cited at Response to Application for Interim Release, para. 26.
[166] Reply to Application for Interim Release, para. 31.
[167] Application for Interim Release, paras 55-56 and evidence cited therein.
[168] See Response to Application for Interim Release, para. 26.
[169] [REDACTED].
[170] [REDACTED].
[171] [REDACTED].
[172] [REDACTED].
[173] [REDACTED].
[174] [REDACTED].
[175] [REDACTED]
[176] See Request for Arrest Warrants, para. 17, citing F00005/RED/A03, Annex 3 to Public redacted version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020 (original version filed on 28 May 2020), p. 6; Isufi, P., "Kosovo PM Sacks Adviser Convicted of War Crimes" (4 June 2019) *BIRN* https://balkaninsight.com/2019/06/04/kosovo-pm-sacks-adviser-convicted-of-war-crimes/ accessed 22 April 2021; [REDACTED]. See also Application for Interim Release, para. 54.

66. As to the appointment of the son of Mr Shala, although it is unclear from the evidence to what extent Thaçi was involved beyond playing a merely formal role,[177] the Panel still finds that the evidence indicates the following: Mr Shala was summonsed by the SPO as a suspect; during the same month as his interview, Thaçi signed the presidential decree confirming the appointment of his son as Consul General; this appointment was criticised given the appointee's apparent lack of qualifications and the subsequent acting President of Kosovo reportedly denounced the appointment as "contrary to any diplomatic and consular practice of democratic countries".[178]

67. In light of the fact that these incidents concern Thaçi's own conduct and/or the conduct of officials in his former office and/or of other senior government offices during his time as President, that all these appointments occurred close to the times when the SPO interviews took place or the summonses were received, and that the beneficiaries were either not qualified, [REDACTED], or [REDACTED], the Panel finds that their timing and dubious circumstances cannot be merely coincidental. The Panel is satisfied that, at the very least, these incidents, taken together, point to repeated instances of benefits being offered to these persons, or their family members, contemporaneous with them being summonsed or interviewed by the SPO.

68. Based on these four incidents, the Appeals Panel is satisfied that it was not unreasonable for the Pre-Trial Judge to find that there was a scheme of benefits being offered – by Thaçi, officials in his office and/or other senior government offices – to persons summonsed by the SPO or their families, and that this scheme was a relevant

[177] See Reply to Application for Interim Release, para. 33.
[178] "Thaçi requested for the son of an MP interrogated by the SPO to be appointed consul in Prague" (25 November 2020) *KoSSev* <https://kossev.info/thaci-requested-for-the-son-of-an-mp-interrogated-by-the-spo-to-be-appointed-counsel-in-prague/> accessed 22 April 2021, cited at Response to Application for Interim Release, para. 28.

factor in considering attempts to interfere in the proceedings and the risk of obstruction.

69. Concerning Thaçi's arguments related to [REDACTED], the Panel acknowledges the Pre-Trial Judge's findings that this allegation formed part of "attempts to gain insight into or to influence the evidence" provided by persons summonsed by the SPO for interviews.[179] The Pre-Trial Judge found that Thaçi's [REDACTED], demonstrates his degree of influence and control, and that, taken together with other factors, it contributes to a risk of obstruction of the proceedings.[180]

70. While the Impugned Decision is brief in terms of reasoning or reference to the evidence relied upon,[181] the Panel can nevertheless discern how the Pre-Trial Judge reached his findings in relation to the [REDACTED], based on the totality of the evidence before him.

71. The Panel notes that Thaçi [REDACTED].[182] [REDACTED],[183] the Panel finds that the fact that [REDACTED].[184] It is of further significance that [REDACTED].[185]

72. Based on the above, the Panel sees no error in the Pre-Trial Judge concluding that this indicates, at a minimum, a degree of influence and control from Thaçi, which, if assessed together with other factors mentioned above, could contribute to a risk of obstruction.

[179] Impugned Decision, para. 41.
[180] Ibid.
[181] Impugned Decision, fn. 84, citing Response to Application for Interim Release, para. 35.
[182] Reply to Application for Interim Release, paras 37, 40, 42; Reply, para. 14. See also Appeal, para. 37(d).
[183] Response to Application for Interim Release, paras 35-36; [REDACTED].
[184] See Reply, para. 14: [REDACTED].
[185] See Rule [REDACTED] of the Rules.

73. However, the Panel notes that besides this finding on Thaçi's possession of a SPO suspect interview, the Pre-Trial Judge did not indicate on which specific incidents he relied to conclude on the existence of a "pattern of incidents" as attempts to gain insight into or to influence the evidence given by persons interviewed by the SPO.[186]

74. In the absence of any explicit findings, the Panel finds some merit in Thaçi's contention that it is impossible to identify which of these incidents the Pre-Trial Judge relied upon when referring to "a pattern of incidents".[187] For instance, it is not possible to determine with certainty whether the Pre-Trial Judge relied upon the alleged incidents concerning Mr Lajçi [REDACTED], [REDACTED], and/or Thaçi seeking to influence the choice of a lawyer.[188] The Panel finds that neither the Parties nor the Court of Appeals Panel should be expected to engage in a speculative exercise to discern the Pre-Trial Judge's findings in this regard.[189] The Panel therefore considers that, in contrast to the Pre-Trial Judge's other findings elsewhere in the Impugned Decision, the absence of any reasoning here amounts to a failure to provide a reasoned opinion and the Impugned Decision is defective in that respect. The Pre-Trial Judge's determination, on the basis of these incidents, that there was a pattern of attempts to gain insight into or to influence the evidence given by persons interviewed by the SPO, must therefore be set aside.

75. Nevertheless, in light of the Pre-Trial Judge's reliance on other factors that amply support the existence of a risk of obstruction, the Panel finds that this error does not invalidate the overall conclusion that there is a risk that, if released, Thaçi will obstruct the proceedings of the Specialist Chambers.

[186] Impugned Decision, para. 41.
[187] Appeal, para. 38.
[188] See Appeal, para. 37(a)-(c).
[189] See e.g. ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, 30 June 2016, paras 139-140.

76. The Panel recalls that to reach his ultimate finding on the existence of a risk of obstruction, the Pre-Trial Judge relied on a combination of individual factors, notably Thaçi's influence and authority (as a founding member of the KLA, member of the KLA General Staff, KLA Commander-in-Chief and more recently as Prime Minister and President of Kosovo) over a network of supporters;[190] Thaçi's letter to the United States Secretary of State, Thaçi's [REDACTED] and the reduction of the sentences of former KLA members as a pattern of consistently undermining the Specialist Chambers;[191] a scheme of benefits offered to persons summonsed by the SPO as attempts to interfere in the proceedings;[192] and Thaçi's [REDACTED] as an attempt to gain insight into evidence provided by persons summonsed by the SPO;[193] together with contextual factors linked to the general climate of witness intimidation and interferences with criminal proceedings against former KLA members.[194]

77. The Court of Appeals Panel further finds that these factors amply support the Pre-Trial Judge's conclusion that there is a risk that, if released, Thaçi will obstruct the progress of the criminal proceedings. In light of this finding, the Panel does not need to address the remainder of Thaçi's arguments on Article 41(6)(b)(ii) of the Law.[195] The Panel dismisses the grounds of appeal related to the risk of Thaçi obstructing the progress of the criminal proceedings.

[190] Impugned Decision, para. 38.
[191] Impugned Decision, para. 40.
[192] Impugned Decision, para. 41.
[193] Impugned Decision, para. 41.
[194] Impugned Decision, para. 43. Contra Appeal, para. 40.
[195] Appeal, para. 30 and Reply, para. 9, alleging that the Pre-Trial Judge erred in relying on the fact that Thaçi was progressively informed of the evidence against him to find that risks existed under Article 41(6)(b) of the Law; Appeal, para. 56 and Reply, para. 12, alleging that the Pre-Trial Judge erred by failing to consider the strict protective measures regime.

3. Article 41(6)(b)(iii) of the Law

78. The Court of Appeals Panel recalls that the conditions set forth in Article 41(6)(b) of the Law are alternative to one another.[196] If one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained. Accordingly, the errors Thaçi alleges with regard to Article 41(6)(b)(iii) of the Law need not be addressed. Any findings by the Panel on these arguments would not have an impact on the outcome of the Impugned Decision, given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued detention necessary. The Panel needs nonetheless to address the Parties' arguments on whether the Pre-Trial Judge erred in finding that the risk of obstructing the proceedings could not be mitigated by the Proposed Conditions.

D. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPOSED CONDITIONS (GROUND 2)

1. Submissions of the Parties

79. Thaçi argues that the Pre-Trial Judge committed a discernible error in finding that no alternative measures could sufficiently mitigate the risks of obstructing Specialist Chambers proceedings or committing further crimes.[197] He submits that this conclusion is "disproportionate" as it fails to give weight to relevant considerations and, hence, constitutes an abuse of discretion.[198] Thaçi argues that the Pre-Trial Judge failed to consider, at a minimum, that the risks could have been proportionately addressed by him being placed under house arrest with no or limited internet access and access to a single mobile telephone for limited communication purposes only, the details of which would be provided to the Registry and monitored by the telecoms

[196] See above, para. 11 recalling the provisions of Article 41(6) of the Law. See also Impugned Decision, para. 25.
[197] Appeal, paras 51-55, 57.
[198] Appeal, para. 51.

provider reporting to the Registry, and which would have addressed the concern of Thaçi contacting "former subordinates or supporters".[199] According to Thaçi, the Pre-Trial Judge should have sought further submissions on the issue if necessary.[200] Moreover, Thaçi adopts the evidence submitted by Co-Accused Veseli before the Pre-Trial Judge, concerning the Kosovo Police's guarantee of its capacity to enforce conditions of provisional release.[201]

80. Thaçi further argues that, when addressing whether conditions could sufficiently mitigate the risk of obstruction, both the Pre-Trial Judge and the SPO start from the position that Thaçi will "deploy clandestine means" to contact his "community or support network".[202] Thaçi submits that neither point to any evidence that he has done so in the past or would do so if released.[203]

81. The SPO responds that the Pre-Trial Judge expressly considered whether any alternatives short of detention could mitigate the identified risks,[204] and argues that there was no discernible error in the Pre-Trial Judge's finding that none of the proposed conditions could restrict the Accused's ability to communicate with his community or support network and that consequently, continued detention is warranted.[205]

[199] Appeal, paras 53-55; Reply, para. 19, citing Response, para. 53.
[200] Appeal, para. 55.
[201] Appeal, fn. 74 citing Veseli Reply to Application for Interim Release, paras 55-61; F00174/A09, Annex 9 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021; F00174/A10, Annex 10 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021; F00174/A11, Annex 11 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021.
[202] Reply, para. 19.
[203] Reply, para. 19.
[204] Response, para. 53.
[205] Response, para. 52.

2. Assessment of the Court of Appeals Panel

82. The Panel notes that the Pre-Trial Judge considered that the Proposed Conditions, including house arrest in a Third State with a cooperation agreement with the Specialist Chambers, could mitigate the risk of flight.[206] With regard to the risk of obstructing the proceedings, the Pre-Trial Judge found however that none of the Proposed Conditions, nor any additional imposed limitations, could mitigate that risk.[207]

83. With regard to Thaçi's argument that the Pre-Trial Judge failed to consider alternative conditions for his interim release, the Court of Appeals Panel recalls the finding of the Constitutional Court that, to fully comply with the constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained.[208] Although the Pre-Trial Judge's findings were general in nature, he did find that it would not be possible to restrict Thaçi's ability to communicate from his home, through any non-public means, with his community and support network; that prohibiting Thaçi from contacting witnesses, persons connected to the case or, for that matter, any person in Kosovo can neither be enforced nor monitored, whether such bar refers to in-person contacts or communication through electronic devices; and that this also holds true should Thaçi be released in a Third State with a cooperation framework with the Specialist Chambers.[209] The Panel finds that these considerations demonstrate that the Pre-Trial Judge considered relevant and possible more lenient measures. The Pre-Trial Judge's reference, in particular, to Thaçi's Proposed Conditions, as well as *any additional limitations imposed by the Pre-*

[206] Impugned Decision, para. 56.
[207] Impugned Decision, para. 57.
[208] KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020 ("Constitutional Court Judgment dated 26 May 2020"), para. 70.
[209] Impugned Decision, para. 57.

Trial Judge further shows that he did not strictly limit his assessment to the arguments raised by the Accused.[210]

84. With regard to Thaçi's argument that the Pre-Trial Judge should have sought additional submissions on alternative conditions, the Panel finds that it was within the Pre-Trial Judge's discretion to decide on whether to seek such further submissions.[211] Given that the Pre-Trial Judge gave Thaçi ample opportunities to make extensive written submissions on interim release,[212] the Panel does not find that the Pre-Trial Judge abused his discretion in not seeking further submissions.

85. Turning next to the Pre-Trial Judge's finding that no condition could adequately address the risk of obstructing the proceedings, the Panel notes Thaçi's argument that the Pre-Trial Judge failed to consider restrictions that would have addressed his concern, notably house-arrest with no or limited internet access, giving Thaçi access to a single mobile telephone for limited communication purposes and monitoring this device through the telecommunications providers.[213]

86. The Panel notes that, when assessing the Proposed Conditions against the risk of obstructing the proceedings, the Impugned Decision is relatively brief and does not

[210] Impugned Decision, para. 57 (emphasis added).
[211] See, concerning the discretion to hold an oral hearing on detention related matters, from which it follows that a panel's ability to seek further written submissions is also discretionary: ICTY, *Prosecutor v. Rašević and Todović*, IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, para. 29; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-558, Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'", 11 July 2014 ("*Bemba et al*. Decision dated 11 July 2014"), para. 48; *Gucati* Appeal Decision, para. 77; *Haradinaj* Appeal Decision, para. 41.
[212] Thaçi requested and was granted permission by the Pre-Trial Judge to: (i) extend the word limit of his Application for Interim Release from 6,000 to 10,000 words; (ii) extend the time limit for filing his Reply to the Application for Interim Release; and (iii) extend the word limit of the latter from 2,000 words to 6,000 words. See F00119, Decision on Thaçi Defence Request for Extension of the Word Limit, 4 December 2020, para. 8; F00155, Decision on Defence Requests to Vary Time Limits, 18 December 2020, para. 23; F00162, Decision on Thaçi Defence Request for Extension of the Reply Word Limit, 5 January 2021, para. 12.
[213] Appeal, para. 55. Thaçi did not raise these arguments before the Pre-Trial Judge. See Application for Interim Release, paras 62-63.

refer to any evidence. However, while it would have been preferable for the Pre-Trial Judge to explain in more detail why he was satisfied that the Proposed Conditions could mitigate the risk of flight but not the risk of obstruction, the Panel can nevertheless discern how the Pre-Trial Judge reached his conclusion from a reading of the reasoning in the Impugned Decision together with its summary of the Parties' submissions and underlying evidence on that point. Notably, in its submissions, the SPO provided concrete examples in support of its assertion that the Kosovo authorities would have a limited ability to monitor Thaçi's activities if released.[214]

87. Despite Thaçi's assertion that the Specialists Chambers have "a proven, effective police authority in Kosovo",[215] the Panel finds that it was not unreasonable for the Pre-Trial Judge not to be satisfied, based on the information before him, that the Kosovo Police could implement the onerous and resource intensive measure of monitoring all of Thaçi's private communications at all times, in the way in which they can be monitored in the Specialist Chambers Detention Facility, especially in light of his previous finding regarding Thaçi's stature, authority and influence over former subordinates and supporters.[216] In this regard, the Panel finds no merit in Thaçi's argument that the Pre-Trial Judge erroneously started from the position that Thaçi will "deploy clandestine means" to contact his "community or support network".[217] The Panel recalls that the Pre-Trial Judge had already found that there was a risk of mobilisation of a network of supporters with the aim of obstructing proceedings.[218] As Thaçi's ability to communicate with his network is a logical integral part of this risk, there was therefore no error in the Pre-Trial Judge assessing whether any conditions could mitigate the risk of Thaçi communicating with this network for the purpose of obstructing the proceedings. Likewise, the Panel finds that it was reasonable for the

[214] Response to Application for Interim Release, paras 43-48, cited at Impugned Decision, para. 53 and evidence cited therein.
[215] Application for Interim Release, para. 62.
[216] See Impugned Decision, para. 38.
[217] Reply, para. 19.
[218] Impugned Decision, para. 38.

Pre-Trial Judge to conclude, based on the information before him, that it would not be possible to restrict Thaçi's ability to communicate from his home, through any non-public means, with his community and support network.[219]

88. Furthermore, the Panel summarily dismisses Thaçi's attempt to adopt by reference in a footnote, without further elaboration, the arguments and evidence submitted by Co-Accused Veseli before the Pre-Trial Judge in relation to a guarantee from the Kosovo Police. The Panel recalls that a party cannot simply refer on appeal to arguments made in other documents, for example the submissions of his Co-Accused, and expect those arguments to be considered as properly substantiated before the Appeals Panel.[220] This is impermissible and further circumvents the applicable word limits for appellate submissions.[221] In any event, the Panel recalls that, in its decision on Co-Accused Veseli's appeal against the Pre-Trial Judge's decision on his application for interim release, it found that it was not unreasonable for the Pre-Trial Judge to consider that the blanket assertion contained in the State guarantees provided by Veseli was not sufficient to address the risk of obstruction.[222]

89. In addition, based on Thaçi's vague and general assertion that he was "confident" that he "will be able to provide" a Third State (and its consent to permit

[219] Impugned Decision, para. 57. In that regard, the SPO notably provided [REDACTED] a named joint criminal enterprise member, Mr Sabit Geci ("Mr Geci"). See Response to Application for Interim Release, paras 46-47; Indictment, para. 35. It is of significance that [REDACTED] show that, although he was detained in a hospital following his conviction for war crimes, Mr Geci [REDACTED]. See Annex 2 to Response to Application for Interim Release, [REDACTED].

[220] ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Nebojša Pavković's Second Motion to Amend His Notice of Appeal, 22 September 2009 ("*Šainović et al.* Appeal Decision"), para. 18; see also *Karadžić* Appeal Decision, para. 13; ICTY, *Prosecutor v. Hartmann*, IT-02-54-F77.5-A, Decision on Further Motions to Strike, 17 December 2009, para. 12; ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, paras 250, 273. The Panel also notes that the Practice Direction states that an interlocutory appeal must contain "[t]he ground(s) on which the appeal is submitted and arguments in support of the ground(s), […] with specific reference to applicable law relied upon"; see Practice Direction, Article 46(1)(c).

[221] *Šainović et al.* Appeal Decision, para. 18; Practice Direction, Article 46(2), which states that the word limit for an interlocutory appeal is 6,000 words.

[222] F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, para. 74.

Thaçi's residency and give effect to judicial instructions), and the absence of any detail as to which State would permit such residency and of the framework of such release,[223] the Panel finds that it was not unreasonable for the Pre-Trial Judge to similarly consider that the proposed house arrest in a Third State would not be sufficient to address the risk of obstruction. While it would have been within the Pre-Trial Judge's discretion to seek further details before reaching his decision, the Panel notes, as found above,[224] that he was not obliged to do so. Furthermore, while the Panel acknowledges that the possibility of Thaçi residing outside of Kosovo would necessarily restrict Thaçi's "in-person contacts", this would however not be the case for his private communication through electronic devices.[225] In that regard, the Panel notes that while Thaçi claims that such communications could be monitored by "reports provided by the relevant telecoms provider",[226] he does not provide any information as to the availability and efficacy of such monitoring outside of Kosovo. As a result, the Panel finds that it was likewise within the Pre-Trial Judge's discretion not to have been persuaded by Thaçi's blanket assertion that any concern as to monitoring in Kosovo was "fully addressed" by his proposal of release to a Third State not adjoining Kosovo and with a cooperation agreement with the Specialist Chambers.[227]

90. In view of the foregoing, the Court of Appeals Panel therefore dismisses Thaçi's arguments related to the alleged erroneous assessment of the Proposed Conditions.

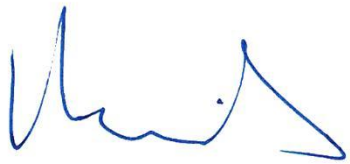
[223] Application for Interim Release, para. 63; see also Reply to Application for Interim Release, para. 54 and fn. 75, containing a list of 11 states which, the Defence submits, either have an extradition agreement with Kosovo or have agreed to continue applying extradition agreements concluded with the Federal Republic of Yugoslavia.
[224] See above, para. 84.
[225] See Impugned Decision, para. 57.
[226] See Appeal, para. 55.
[227] Reply to Application for Interim Release, para. 54.

IV. DISPOSITION

91. For these reasons, the Court of Appeals Panel:

DENIES the Appeal in its entirety; and

ORDERS Thaçi to file a public redacted version of the Reply within ten days of receiving notification of the present Decision.



Judge Michèle Picard,
Presiding Judge

Judge Kai Ambos appends a separate concurring opinion.

Dated this Friday, 30 April 2021

At The Hague, the Netherlands

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SEPARATE CONCURRING OPINION OF JUDGE KAI AMBOS

While I concur with the dismissal of the Appeal in the result, for the reasons set out in the present Decision, I wish to express some concerns, especially with regard to the practice of pre-trial detention.

1. The key issues of this Appeal concern the Pre-Trial Judge's findings on the risk of obstructing the progress of the criminal proceedings under Article 41(6)(b)(ii) of the Law and the Proposed Conditions. In that regard, the Panel rightly stresses the Pre-Trial Judge's duty to provide a reasoned opinion[1] and notes that the reasoning of the Impugned Decision is "relatively brief" in relation to these key issues.[2] While I agree that the Pre-Trial Judge's reasoning is "still comprehensible" as to his conclusions,[3] it deserves to be highlighted that the Pre-Trial Judge's reasoning has been surprisingly brief regarding the mentioned key issues.

2. In my humble view, it is not the task of an Appeals Panel to dig deep into the evidence to fully grasp the reasoning for the Pre-Trial Judge's findings (to "discern how" he "reached his conclusion"),[4] especially not in an appeals system, as ours, which only allows the substitution of the factual findings of the first instance panel where these are wholly unreasonable or erroneous.[5] The appraisal of evidence

[1] Decision, paras 27-30.
[2] Decision, para. 28.
[3] Decision, para. 29.
[4] See e.g. Decision, para. 86.
[5] Cf. Article 46(5) of the Law. For the challenge of a discretionary decision, the standard is even stricter: "patently incorrect conclusion of fact" or "so unfair or unreasonable as to constitute" an abuse of discretion (Decision, para. 7 referring to *Gucati* Appeal Decision, para. 14 and *Haradinaj* Appeal Decision, para. 14). See in this regard also ICC, *Prosecutor v. Kony et al.*, ICC-02/04-01/05-408, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2019, 16 September 2009, para. 80 ("[T]he Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion." (footnotes omitted)).

relevant to continued detention lies, first and foremost, with the Pre-Trial Judge.[6] While the extent of the reasoning will depend on the circumstances of the case, it is, in my view, essential that the Pre-Trial Judge indicates with sufficient clarity the basis of his or her decision without the need for the Appeals Panel to do further research. That means that the Appeals Panel must only do what is necessary to discern whether the Pre-Trial Judge's decision is still reasonable within the confines of the standard of review and thus "will interfere only in the case of a clear error, namely where it *cannot discern how the Pre-Trial Judge's conclusion could have reasonably been reached from the evidence before him*".[7] Indeed, this is the reason why the Pre-Trial Judge has a duty to provide a reasoned opinion, that is, an opinion "reasoned" enough to serve as a sufficient basis for the Appeals Panel's review.

3. The Panel rightly stresses the importance of the presumption of innocence and the right to liberty. It is for this reason that the Constitutional Court held that, to fully comply with the constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained.[8] Indeed, as rightly emphasised in the Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, the Pre-Trial Judge has an obligation to, *proprio motu*, "inquire and evaluate all reasonable conditions that could be imposed on an accused and not just those raised by the Defence".[9] In fact, this *proprio motu* obligation is, in my view, incumbent on every lower level panel, under the scrutiny of an appeals panel, given that it is a logical consequence of the presumption of innocence and right to liberty.

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[6] See e.g. ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-271-Red, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled "Decision on the Defence's Application for Interim Release", 5 March 2014, para. 36.

[7] See e.g. ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1937-Red2, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled "Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011", 23 November 2011, para. 48 (emphasis added).

[8] Constitutional Court Judgment dated 26 May 2020, para. 70.

[9] F00005, Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, para. 86. This more explicit sentence is not contained in the present Decision since the issue has not been raised by the Parties. See Decision, para. 83.

4. Given the importance of the presumption of innocence and the right to liberty, the world-wide practice of prolonged pre-trial detention, including the practice of international criminal tribunals, is deplorable. In the liberal criminal law of a *Rechtsstaat*, pre-trial detention is the exception, not the rule.[10] This should be all the more true in international criminal justice, as international criminal tribunals should strive to serve as models for the rule of law, irrespective of a conception of international criminal law as a liberal project.[11] Our Law is a very good case in point. It not only recognises human rights law as a standard setter for criminal justice, giving it superiority over domestic law[12] and thus, arguably, providing for a higher standard of human rights protection than Article 21(3) of the Rome Statute of the ICC;[13] it also provides, on a more concrete level, for regular judicial control and review of detention.[14]

5. Against this background, there are especially two more concrete issues which have intrigued me while deliberating on these appeals with my esteemed colleagues, and I feel now the need to share my – general – thoughts with the broader (interested) public:[15]

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[10] See e.g. *Bemba et al*. Decision dated 11 July 2014, para. 67; ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-559, Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Requête urgente de la Défense solicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu'", 11 July 2014 ("*Bemba et al*. Decision on Babala's Request"), para. 66.

[11] The argument has most convincingly been advanced by Darryl Robinson; cf. Robinson, LJIL, 21 (2008), 925– 6, 961– 2 ("liberal system of criminal justice"); Robinson, LJIL, 26 (2013), 127 ff. and Robinson, Justice in Extreme Cases (Cambridge, Cambridge University Press 2020), pp. 59- 84 (speaking of the 'humanity' of fundamental principles). See also Ambos, Treatise on International Criminal Law, Vol. I (Oxford: OUP 2013), pp. 54-55 and 2nd ed (Oxford: OUP 2021, forthcoming), pp. 95-96 with further references.

[12] Cf. Article 3(2)(e) of the Law ("international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights […]") referring to Article 22 of the Constitution of Kosovo.

[13] Cf. Alexander Heinze, "The Kosovo Specialist Chambers' Rules of Procedure and Evidence", Journal of International Criminal Justice, 15 (2017), 985, 1000.

[14] See Article 41(2), (10) of the Law. See also Rule 56(2) of the Rules.

[15] I would also like to thank the legal officers for their assistance with analysis and research.

i. The presumption of innocence and the right to liberty have to be weighed against the grounds for pre-trial detention. In this balancing exercise, the actual (realistic) *possibility of re-arrest* of a released suspect or accused must be taken into account.[16] In the context of the Specialist Chambers, it needs to be recalled that all suspects have appeared voluntarily or been arrested (so far in Kosovo or Belgium). Once released, it would be difficult if not impossible for them to either flee or hide in light of the high likelihood that they would be re-arrested if so ordered by the SPO or the Specialist Chambers. This obviously differs from the framework of a Court with a potentially universal reach like the ICC. Arguably, the higher probability of a re-arrest in our context does not only effectively eliminate the risk of flight but also, in my opinion, substantially diminishes the risk of obstruction. To be sure, there is a substantial difference between these two risks in terms of their avoidability and this difference also manifests itself throughout these proceedings. Clearly, the obstruction risk is much more difficult to predict and to control – it depends on a number of factors and is thus, arguably, more case-specific than the risk of flight. The risk of obstruction might be substantially diminished if a suspect or accused can be credibly warned by a panel that his or her re-arrest will be

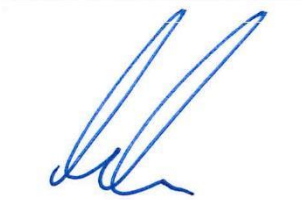
[16] See e.g. ICTY, *Prosecutor v. Rašević and Todović*, IT-97-25/1-PT, Decision on Savo Todović's Application for Provisional Release, 22 July 2005, para. 11(f) ("The Trial Chamber is required to identify all relevant factors that it has taken into account in reaching its decision as to whether it is satisfied that, if released, an accused will appear for trial. The Appeals Chamber has indicated a non-exhaustive set of factors which a Trial Chamber should take into consideration while assessing whether an accused will appear for trial, in particular: […] The likelihood that, in case of breach of the conditions of provisional release, the relevant authorities will re-arrest the accused if he declines to surrender; […]"); ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-1151, Decision Regarding Interim Release, 17 August 2015, para. 22 ("On balance, the Chamber concludes that continued detention of the Four Accused in this case is not necessary, noting that conditions can be imposed to further reduce the Article 58(1) Risks. The Appeals Chamber's pronouncements against detention and the Prosecution's own acknowledgement that the passage of time and the schedule of the proceedings render re-arrest 'not practicable' are consistent with this assessment." (footnote omitted)).

ordered if he or she violates the conditions of release (one of which could then be not to interfere with witnesses or case sensitive evidence); yet, this risk might still be (too) high when victims and witnesses are easily identifiable and/or the suspect or accused has several means to influence witnesses.[17] To avoid misunderstandings, I am fully aware of the serious potential consequences of the offence of obstructing the proceedings, that can result in the intimidation, and even killing, of witnesses, in particular in our context. I simply think that the actual possibility of re-arrest in a system like ours must be accounted for when deciding on pre-trial detention.

ii. The existence of a *Third State* that may receive and, if necessary, monitor a released suspect or accused may constitute an important, perhaps decisive offer within the framework of conditional release.[18] While this offer was too vague *in casu*, as rightly stated by the Decision[19] and, at any rate, an express consent of that State would be required,[20] such an offer could be more precise and concrete in future cases and, following the logic of the Panel's argument, may then be a strong argument in favor of conditional release. Of course, the concrete decision is always case-specific and the Third State offer by no means guarantees that conditional release will be granted. Here, again, I just want to raise awareness, namely that such an offer, if concretely made and supported

[17] See *Bemba* Decision dated 16 December 2008, para. 67 ("To establish that the conditions of article 58 (1) (b) (ii) of the Statute were fulfilled, the Pre-Trial Chamber considered that the witnesses and victims are easily identifiable and that the Appellant continues to have the means to influence witnesses").
[18] *Gbagbo* Appeal Decision, paras 1 ("In circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to consider conditional release."), 79; *Bemba et al*. Decision on Babala's Request, paras 115-116; ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-560, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", 11 July 2014, para. 128.
[19] Decision, para. 89.
[20] Rule 56(4) of the Rules.

by guarantees, including from the respective Third State, may shift the balance in favour of conditional release and must therefore be seriously considered by the Pre-Trial Judge or competent Panel.



Judge Kai Ambos

Dated this Friday, 30 April 2021

At The Hague, the Netherlands