

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Public Redacted Version of
Application for Interim Release, KSC-BC-2020-06/F00122, dated 7 December 2020
with public redacted Annexes 1-2 and public Annex 3

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper QC

Counsel for Kadri Veseli
Ben Emmerson QC

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Jakup Krasniqi ("Defence") hereby apply for interim release pursuant to Article 41(6) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("the Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").

2. The Specialist Prosecutor's Office ("SPO") has not established the criteria for detention set out in Article 41(6)(b): it has not proved that Mr. Krasniqi is a flight risk; it has not proved that he will destroy, hide, change or forge evidence; it has not proved that he will obstruct the proceedings by influencing witnesses, victims or accomplices; and it has not proved that he will commit any further specified criminal offence. Accordingly, Mr. Krasniqi should be released subject to such conditions as the Pre-Trial Judge deems necessary.

3. This filing is submitted confidentially because it refers to confidential filings in the case and personal information about Mr. Krasniqi.

II. RELEVANT PROCEDURAL HISTORY AND PERSONAL BACKGROUND

4. Mr. Krasniqi was born on 1 January 1951 (he is now 69 years old).¹ He is a proud national of Kosovo and has worked for many years to support its independence. He began working as a teacher in 1972 whilst completing his studies and worked in that capacity until 1981 (aside from a period of 11 months when he did military service). In 1974 he also began working clandestinely with the National Movement of Kosovo. As a result of these activities he was investigated by the police and he was warned to leave Kosovo. He refused to leave Kosovo. He was arrested on or around 5 April 1981 and imprisoned in various locations including Vojvodina

¹ KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Annex 3 to Submission of Corrected and Public Redacted Versions of Confirmed Indictment and Related Requests*, 4 November 2020, public, para. 10.

for ten years until his release on or around 23 July 1991. [REDACTED].² For a second time, he refused to leave Kosovo, instead working with the Democratic League of Kosovo and later becoming spokesman for the Kosovo Liberation Army. [REDACTED]. For the third time, he refused to leave Kosovo. In more recent years, he worked as a politician in Kosovo and served as Acting President of Kosovo in 2010 - 2011.

5. Mr. Krasniqi retired in 2016 at the age of 65 and receives his pension. He resigned as an MP in early 2015. Mr. Krasniqi currently holds no state office. He did not stand for election in 2017 or 2019. He remains the Chairman of the National Council of his political party, NISMA. NISMA is a small party and in coalition with another party won 6 seats (out of 120) in the 2019 parliamentary elections.³

6. He habitually resides [REDACTED].⁴

7. Mr. Krasniqi has previously cooperated with international justice in cases concerning Kosovo. On 27 April 2004, he was summonsed to be interviewed by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY").⁵ He attended that interview and gave a statement. He subsequently received a subpoena and complied with its terms by attending The Hague to give evidence on or around 10 - 15 February 2005, despite personally objecting to the charges against the accused in that case.⁶ On 29 May 2007, he was again called to The Hague by the Prosecutor of the ICTY to give evidence in another case, and again he complied with that request.⁷

² Confidential Annex 2.

³ See Republic of Kosovo Central Election Commission, Elections for the Assembly of Kosovo 2019, Final Results, p. 2.

⁴ See confidential Annex 2.

⁵ See ICTY, *Prosecutor v. Limaj et al.*, IT-03-66, Transcript, 10 February 2005, p. 3292, lines 9-15.

⁶ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66, Transcript, 10 February 2005, p. 3291, line 2.

⁷ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84, Transcript, 29 May 2007, p. 4942.

8. Further, in July 2019, the SPO summonsed Mr. Krasniqi to the Hague for a suspect interview. Mr. Krasniqi complied with this request. He travelled to the Hague on 23 July 2019 to be interviewed by the SPO on 24 July 2019. After the interview, Mr. Krasniqi returned home to Kosovo to his usual residence. There is no evidence that he made any attempt to flee or to influence witnesses, victims or accomplices after this suspect interview, despite having been told the charges that he faced.

9. On 24 April 2020, the SPO submitted *ex parte* the indictment against Mr. Krasniqi and others for confirmation. On 24 July 2020, the SPO, pursuant to an order of the Pre-Trial Judge, submitted a revised indictment for confirmation.⁸

10. On 26 October 2020, the Pre-Trial Judge confirmed the revised indictment,⁹ issued an arrest warrant for Mr. Krasniqi and ordered his transfer to the detention facilities of the Specialist Chambers (“KSC”).¹⁰

11. On 4 November 2020, Mr. Krasniqi was arrested in his house in [REDACTED] and thereafter transferred to the KSC detention center. The issuance of the arrest warrant *ex-parte* clearly denied Mr. Krasniqi the opportunity to surrender willingly, which he would have done as he did when summonsed to be interviewed in July 2019.

12. On 9 November 2020, the initial appearance was scheduled and Mr. Krasniqi appeared before the Pre-Trial Judge. Mr. Krasniqi pleaded not guilty to each of the

⁸ KSC-BC-2020-06, F00027/A07, Pre-Trial Judge, *Public Redacted Version of Corrected Version of Arrest Warrant for Jakup Krasniqi*, 26 October 2020, p. 1.

⁹ KSC-BC-2020-06, F00026, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020.

¹⁰ KSC-BC-2020-06, F00027/A07, Pre-Trial Judge, *Public Redacted Version of Corrected Version of Arrest Warrant for Jakup Krasniqi*, 26 October 2020.

Counts in the Indictment and the Defence gave notice to the court that an application for interim release will be filed.¹¹

13. Pursuant to Article 21(3) of the Law, Mr. Krasniqi is presumed innocent until proven guilty.

14. On 18 November 2020, at the first Status Conference, there was discussion about the procedure for considering interim release. The Pre-Trial Judge indicated that the Defence should file a written application for interim release.¹²

15. Further, in the course of the Status Conference, it was suggested that the likely duration of this case from the present time to its conclusion is four to five years.¹³ Instead of explaining its position during the Status Conference, the SPO subsequently filed additional written submissions contending that trial should start this Summer or no later than September 2021.¹⁴ The Defence stand by their position that it is too early to give a meaningful estimate of the length of the Defence investigation¹⁵ and the Pre-Trial Judge was therefore correct not to attempt to set a trial date at the first Status Conference.¹⁶ Nonetheless, the SPO wholly underestimates the time that a reasonable Defence investigation of this case will take. Whilst the Defence reserve the right to file detailed submissions in relation to the trial start date in due course, and in accordance with any instruction from the Pre-Trial Judge, two brief points illustrate the inadequacy of the SPO's position. First, on 11 December 2020,¹⁷ the Defence will receive a redacted version of the

¹¹ KSC-BC-2020-06, Transcript of Hearing, 9 November 2020, p. 21, lines 20-21.

¹² KSC-BC-2020-06, Transcript of Hearing, 18 November 2020, p. 166, lines 6-13.

¹³ *Ibid.*, p. 165, lines 9-10.

¹⁴ KSC-BC-2020-06, F00097, Specialist Prosecutor, *Prosecution Submissions Further to the Status Conference of 18 November 2020*, 23 November 2020, public, para. 14.

¹⁵ KSC-BC-2020-06, F00082, Defence Mr Krasniqi, *Defence Submission for First Status Conference on Behalf of Jakup Krasniqi*, 17 November 2020, public, paras 4-7.

¹⁶ KSC-BC-2020-06, Transcript of Hearing, 18 November 2020, p. 116, lines 15-17.

¹⁷ KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* ("Framework Decision"), 23 November 2020, public, para. 99(b).

evidence of the first 153 witnesses out of the 203 witnesses that the SPO intends to call.¹⁸ From that date, the start of September 2021 will be 262 days away. Even assuming that the redactions pose no impediment to the investigation (which is unrealistic – the SPO has recently filed [REDACTED]¹⁹), the SPO proposes to allow the Defence less than a day and a half (even assuming that they take no days off at all) to investigate each witness' testimony. Second, the last date in the current disclosure timetable requires the SPO to disclose unredacted Rule 102(3) material or apply for redactions of Rule 102(3) material by 5 July 2021.²⁰ That is less than two months before the SPO's proposed start date for trial (and if redactions are applied for, the Defence would, of course, not receive the material immediately). There are nearly 100,000 items of Rule 102(3) material.²¹ To expect the Defence to read and process that material and be ready to start trial in less than two months is unrealistic.

16. The start date of trial should not be determined at this time. However, in determining these applications for provisional release, the Court should not be reassured by any SPO submission that the duration of pre-trial detention will likely be short. Allowing for a reasonable Defence investigation²² after completion of the current disclosure timetable, and the likely time taken for the Prosecution to call around 200 witnesses, and four Defence teams to call evidence, it is not unrealistic to say that, if provisional release is not granted, Mr. Krasniqi will be in detention for over four years before any verdict can be rendered.

17. Mr. Krasniqi remains in KSC detention on remand and his continued detention is not justified.

¹⁸ KSC-BC-2020-06, F00076, Specialist Prosecutor, *Prosecution Submissions for First Status Conference*, 13 November 2020, public, para. 5.

¹⁹ [REDACTED].

²⁰ Framework Decision, para. 99(h).

²¹ *Ibid.*, para. 64.

²² Other Defence teams estimated 18 months, *see* KSC-BC-2020-06, Transcript of Hearing, 18 November 2020, p. 108, line 16 to p. 109, line 4.

18. Mr. Krasniqi's interim release is sought primarily to permit him to be with his family [REDACTED] for the four to five years that realistically would be the likely duration of the trial in this case. Mr. Krasniqi is not and has never been a flight risk. At all material times, he has lived in [REDACTED] and was publicly available including residing at the same residential address that he was prior to being summonsed by the SPO and interviewed as a suspect on 24 July 2019. Mr. Krasniqi intends to prove his innocence. He is 69 years old, retired and has no intention of risking his family life by fleeing justice. He did not flee when there was ample opportunity to do so between July 2019 and November 2020 and hence he is clearly not a flight risk.

19. Further, Mr. Krasniqi undertakes to meet any of the pre-conditions that may be imposed by the KSC (his written undertaking is attached as confidential Annex 1). He confirms that, if granted interim release, he will:

- a. return to the KSC to face the charges against him at the trial or whenever summonsed by the KSC to appear;
- b. indicate the address at which he would be staying [REDACTED] and adhere to any conditions imposed by the KSC including not to change his place of residence;
- c. report regularly to the authorities as may be required by the KSC;
- d. not contact and/or interfere with any witnesses or persons connected with the case;
- e. not travel to the other municipalities and locations at which crimes are alleged to have been committed in the Indictment (in order to further remove any risk of witness intimidation or interference);
- f. refrain from making public statements on matters relating to the case in the media, using social media or in any manner whatsoever; and

- g. abide by all other conditions that the KSC may impose in granting interim release.

20. In light of the status of the KSC within the Kosovo justice system,²³ it should not be necessary to seek guarantees from the Government of Kosovo as to its willingness to ensure Mr. Krasniqi's re-appearance before the KSC and other matters. Pursuant to Article 53(1)(j) and (k) of the Law, all entities and persons in Kosovo are obliged to co-operate with the KSC and SPO including regarding the arrest, detention and transfer of persons to the KSC. Pursuant to Article 54(7), the KSC and SPO may also request the assistance of a Kosovo Court. Accordingly, the Government of Kosovo is obliged to arrest Mr. Krasniqi and ensure his transfer to the KSC if requested to do so and there is no need for any further guarantees.²⁴

III. APPLICABLE LAW

21. Article 41(6) of the Law states:

The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:

- a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and
- 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.

²³ The Law Article 1(2).

²⁴ If the SPO disagrees with this position, the Defence reserve the right to introduce the appropriate guarantees in Reply.

22. Rule 57(2) provides that:

After the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law and until a judgment is final, the Panel seized with a case shall review a decision on detention on remand upon the expiry of two (2) months from the last ruling on detention, in accordance with Article 41(6), (10), (11) and (12) of the Law or at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred.

23. Furthermore, Article 3(2) of the Law provides that the Court must “*adjudicate and function*” in accordance with “*(a) the Constitution of the Republic of Kosovo*” and “*(e) 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, as given superiority over domestic laws by Article 22 of the Constitution*”.

24. Article 22 of the Constitution of the Republic of Kosovo provides that human rights “*are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions*”.

25. Amongst the fundamental rights which thus have priority over any other provisions of the Law are the right to liberty set out in Article 5(1) of the European Convention on Human Rights (“ECHR”), the right to release pending trial (Article 5(3) ECHR) and the right to freedom of speech (Article 10 ECHR).

26. The principles applicable to pre-trial detention as a matter of human rights law are well-established. The European Court of Human Rights has held that detention is an exceptional departure from the right to liberty and one that is only permissible in strictly defined cases.²⁵ It is for the prosecuting authority to establish concrete facts

²⁵ ECtHR, *Ilijkov v. Bulgaria*, no. 33977/96, *Judgment*, 26 July 2001, para. 85.

outweighing the rule of respect for individual liberty;²⁶ the burden should not be reversed to force the detained person to justify their release.²⁷ Further, continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.²⁸ This evidence must relate to the specific facts of the case and the applicant's personal circumstances;²⁹ it must not be general or abstract.³⁰

27. The jurisprudence of the ICTY, although applying a different test pursuant to its Rules of Procedure and Evidence, offers guidance on relevant factors that should be considered in relation to provisional release. The ICTY also emphasizes that decisions on provisional release are fact sensitive and must be considered on an individual basis in light of the particular circumstances of the individual accused.³¹ In a multi-accused case, that means that the position of each accused must be assessed individually.³² Thus, in a case concerning Kosovo, the ICTY held that general evidence of witness interference is not sufficient, in order to deny provisional release it must be shown that the accused poses a concrete risk of witness interference.³³ Further it is well-established that the likely co-operation of the State to which the applicant seeks to be released and the guarantees offered by the applicant himself are relevant factors to consider.³⁴

²⁶ *Ibid.*, paras 84-85.

²⁷ ECtHR, *Bykov v. Russia*, no. 4378/02, *Judgment*, 10 March 2009, para. 64.

²⁸ *Ibid.*, para. 62.

²⁹ ECtHR, *Aleksanyan v. Russia*, no. 46468/06, *Judgment*, 22 December 2008, para. 179.

³⁰ ECtHR, *Boicenco v. Moldova*, no. 41088/05, *Judgment*, 11 July 2006, para. 142; ECtHR, *Khudoyorov v. Russia*, no. 6847/02, *Judgment*, 8 November 2005, para. 173.

³¹ ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, *Decision on Defence Urgent Request for Provisional Release*, 13 March 2015, para. 30; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR65.35, *Decision on the Prosecution's Appeal of the Decision on Further Extension of Milivoj Petković's Provisional Release*, 12 June 2012, para. 6.

³² ICTY, *Prosecutor v. Sainović et al.*, IT-99-37-AR65, *Decision on Provisional Release*, 30 October 2002, para. 7.

³³ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, *Decision on Ramush Haradinaj's Application for Provisional Release*, 6 June 2005, paras 46-48.

³⁴ ICTY, *Prosecutor v. Sainović et al.*, IT-99-37-AR65, *Decision on Provisional Release*, 30 October 2002, para. 6.

28. Mr. Krasniqi does not accept that there is a grounded suspicion that he committed the alleged crimes. He awaits the disclosure from the SPO of the material supporting the Indictment. In the circumstances, this request for provisional release is founded on the second limb of the test in Article 41(6) – the necessity of detention.

29. Consistent with the above ECtHR cases, Article 41(6)(b) of the Law clearly presumes that liberty is the default position and that detention is only justified if there are “*articulable grounds to believe*” that the conditions stipulated under 41(6)(b) are established. Neither the Law, nor the Rules provide any clarification regarding this evidentiary standard.

30. Reading these provisions in the light of the overarching considerations of human rights law, it is clear that in order to justify detention the SPO must provide concrete and specific evidence that Mr. Krasniqi himself is a risk of flight, will destroy, hide, change or forge evidence, will obstruct the progress of criminal proceedings by influencing witnesses, victims or accomplices or will repeat the criminal offence, complete an attempted crime or commit a crime which he has threatened to commit. Moreover, the choice of the word “is” in Article 41(6)(b)(i) in relation to flight risk and the word “will” in Article 41(6)(b)(ii) and (iii) suggests a high standard of proof requiring more than a mere possibility must be established. The evidence does not support these conclusions and hence Mr. Krasniqi should be granted provisional release.

IV. THE SPO HAS NOT ESTABLISHED THE CONDITIONS IN ARTICLE 41(6)(1)(b)

31. The Defence submit that the SPO has failed to provide any concrete or specific evidence that Mr. Krasniqi – judged as an individual - is a flight risk, will destroy, hide, change or forge evidence, will obstruct the progress of proceedings by

interfering with witnesses, victims or accomplices or will commit further crimes as specified in Article 41(6)(b).

1. Mr. Krasniqi Presents No Flight Risk

32. On the facts of this case, the SPO's reliance on the seriousness of the charges and likely sentence if convicted, Mr. Krasniqi's former political offices and ability to travel does not establish that he is a flight risk. Rather, in considering all relevant factors, in the light of the specific and personal circumstances of Mr. Krasniqi, it is clear that he presents no flight risk.

33. As to Mr. Krasniqi's specific circumstances, there are convincing reasons to believe that he is not a flight risk. He is almost 70 years old. [REDACTED]. He has deep roots in Kosovo. [REDACTED].³⁵ This retired man is not likely to flee from his home or his family in Kosovo.

34. Moreover, Mr. Krasniqi has been offered chances to flee Kosovo before. He did not flee Kosovo as a much younger man in 1981 when he knew that he was under investigation and facing imprisonment. He did not flee Kosovo in 1991 [REDACTED]. He did not seek asylum during the conflict. Instead, he has devoted his life to Kosovan independence and has previously been imprisoned for 10 years for his support for Kosovo. It would be wholly out of character for him to flee Kosovo now.

35. In addition to these personal circumstances, Mr. Krasniqi has provided his written guarantee that he will return to face the charges.³⁶ This guarantee carries weight because his public standing will be diminished if he is shown to go back on

³⁵ Confidential Annex 2.

³⁶ Confidential Annex 1.

his word. Mr. Krasniqi emphasises that he is willing to abide by any conditions that the Court might impose, which might include regular reporting to the Authorities in Kosovo and surrendering his passport. Moreover, the Government of Kosovo is obliged to co-operate with the KSC in the arrest and transfer of persons.³⁷ This obligation to co-operate, combined with the personal guarantees offered by Mr. Krasniqi and the ability of the KSC to impose appropriate conditions, removes any conceivable flight risk.

36. The SPO claim that a risk of flight is present because Mr. Krasniqi is aware of the charges against him, of the potential penalties including a sentence of up to life-long imprisonment and of the conviction of other alleged JCE members.³⁸

37. The SPO fails to mention that Mr. Krasniqi has a history of respecting summonses from international courts. In this very case, he received a summons to appear before the SPO on 24 July 2019 for an interview in the capacity of a suspect. The SPO summons clearly stated that he was under investigation, and during the interview he was informed that he was being investigated for war crimes and crimes against humanity. Therefore, at least on 24 July 2019, Mr. Krasniqi was aware of the seriousness of the charges against him and of the potential penalties. The SPO has presented no evidence that he made any effort to evade justice in the period of more than one year and three months between this interview and his arrest. To the contrary, he fully complied with the summons and he voluntarily travelled to the Hague for the interview. He then returned to Kosovo and remained in Kosovo at his usual residence until the day he was arrested on 4 November 2020. If being aware of the charges and potential penalties was a reason for him to fly, Mr. Krasniqi had

³⁷ See Article 53 of the Law.

³⁸ KSC-BC-2020-06, F00005, Specialist Prosecutor, *Confidential Redacted Version of 'Request for Arrest Warrants and Related Orders'* filing KSC-BC-2020-06/F00005 dated 28 May 2020, 14 November 2020, para. 31.

ample opportunity to do so, either at the time when he received the summons or after the interview. He did not.

38. Mr. Krasniqi has previously complied with other international summonses and subpoenas. As set out above,³⁹ he was summonsed to interview by the Prosecutor of the ICTY and received subpoenas to give oral evidence at trial. On each occasion, he complied despite personally objecting to the content of the charges. There is absolutely no reason to believe that he would behave differently today.

39. Mr. Krasniqi is determined to face the charges against him. He knows that some alleged JCE members have been convicted for some alleged crimes. He also knows that other alleged JCE members have been acquitted and that international prosecutors have failed to establish similar allegations of an overarching JCE or of superior responsibility in other cases.⁴⁰ He looks forward to defending this case and refuting the charges against him. The possibility of a lengthy sentence if convicted, which is a generic factor which could be applied to every case in which serious allegations are made, does not establish a flight risk in this specific case. Mr. Krasniqi has already been imprisoned for 10 years in 1981 – 1991; that the likely sentence if convicted is a lengthy period of imprisonment holds no terror for him.

40. The SPO also claim that there is a risk of flight because the accused as current or former political leaders have the means and opportunity to fly. Whilst Mr. Krasniqi had a distinguished political career, he retired four years ago. He does not currently hold any state office and his party hold only 6 out of 120 seats in the Kosovan Parliament. The SPO offers no evidence that he currently has any control or influence over the Kosovan Government, any significant network of supporters or

³⁹ See *supra*, para. 7.

⁴⁰ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, *Judgment*, 30 November 2005; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, *Judgment*, 3 April 2008; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, *Re-trial Judgment*, 29 November 2012.

indeed that he previously used the public positions that he held in order to evade justice.

41. Finally, the SPO allege that the defendant has access to significant funds and the ability to travel freely.⁴¹ No evidence has been disclosed to the Defence to establish that Mr. Krasniqi has access to significant funds. In any event, whilst Mr. Krasniqi is able to travel (in the sense that most individuals are able to travel), that general and abstract evidence does not substantiate any specific risk of flight. Mr. Krasniqi has always had the ability to travel but there is no evidence that he ever attempted to fly or to hide from justice. The guarantees given herein by Mr. Krasniqi show that he will live and sleep at his home address [REDACTED] until the conclusion of this case and hence he has no intention of travelling elsewhere.

42. The SPO has failed to prove that there are articulable grounds to believe that Mr. Krasniqi is a risk of flight.

2. Mr. Krasniqi Will Not Obstruct Proceedings by Influencing Witnesses, Victims or Accomplices

43. The SPO asserts, in a general language, without any particulars, that 'the Suspects' may obstruct the proceedings by interfering with witnesses, victims or accomplices.⁴² However, the SPO fails to specify any circumstance which would lead an objective and independent observer to believe that these allegations have any merit. There is simply no evidence that Mr. Krasniqi – considered as an individual – has or will destroy, hide, change or forge evidence or has attempted to obstruct the

⁴¹ KSC-BC-2020-06, F00005, Specialist Prosecutor, *Confidential Redacted Version of 'Request for Arrest Warrants and Related Orders' filing KSC-BC-2020-06/F00005 dated 28 May 2020*, 14 November 2020, paras 32-33.

⁴² KSC-BC-2020-06, F00005, Specialist Prosecutor, *Confidential Redacted Version of 'Request for Arrest Warrants and Related Orders' filing KSC-BC-2020-06/F00005 dated 28 May 2020*, 14 November 2020, paras 34-38.

proceedings or interfere with witnesses, victims or accomplices. Indeed, the Pre-Trial Judge previously concluded that there was no grounded suspicion that Mr. Krasniqi has undertaken efforts to interfere with the administration of justice.⁴³ Thus there is no indication that he will or is likely to do so in the future if released.

44. The SPO relies heavily on the “climate of witness intimidation and fear” in Kosovo.⁴⁴ Whilst that may be a relevant factor, the SPO acknowledge that it cannot be the sole consideration justifying detention and that the primary basis must be circumstances pertaining to the individual concerned.⁴⁵ Indeed, no general climate can establish that Mr. Krasniqi himself will obstruct the proceedings by influencing witnesses, victims or accomplices.⁴⁶

45. Throughout the diverse allegations presented by the SPO across paragraphs 3 – 26 of the Request for Arrest Warrants, only two allegations actually relate to Mr. Krasniqi personally: that he has had a “years-long diatribe against the KSC”;⁴⁷ and that on 24 April 2020 in a Facebook post he branded Shkelzen Gashi a collaborator for stating that certain individuals within the KLA committed crimes.⁴⁸ Neither allegation establishes that he will obstruct court proceedings by influencing witnesses, victims or accomplices.

46. Mr. Krasniqi accepts that he has expressed his opinion that the KSC should not have been created. It is true that he has described the Martyr report as a racist report

⁴³ KSC-BC-2020-06, F00031, Pre-Trial Judge, *Corrected Version of Decision Authorising Search and Seizure*, 26 October 2020, strictly confidential and *ex parte*, para. 25.

⁴⁴ KSC-BC-2020-06, F00005, Specialist Prosecutor, *Confidential Redacted Version of ‘Request for Arrest Warrants and Related Orders’ filing KSC-BC-2020-06/F00005 dated 28 May 2020*, 14 November 2020, para. 34.

⁴⁵ *Ibid.*, fn 102.

⁴⁶ See ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, *Decision on Ramush Haradinaj’s Application for Provisional Release*, 6 June 2005, paras 46-48.

⁴⁷ KSC-BC-2020-06, F00005, Specialist Prosecutor, *Confidential Redacted Version of ‘Request for Arrest Warrants and Related Orders’ filing KSC-BC-2020-06/F00005 dated 28 May 2020*, 14 November 2020, para. 7.

⁴⁸ KSC-BC-2020-06, F00005, Specialist Prosecutor, *Confidential Redacted Version of ‘Request for Arrest Warrants and Related Orders’ filing KSC-BC-2020-06/F00005 dated 28 May 2020*, para. 5.

and that, on political grounds, he opposed the creation of the KSC. Those are his political opinions and he is entitled to express them freely⁴⁹ consistent with the guaranteed freedom of expression under Article 40 of the Constitution of the Republic of Kosovo. His criticism of the KSC and its creation does not amount to and cannot be equated with obstructing the progress of the Court's proceedings, still less interfering with witnesses, victims or accomplices. The evidence cited by the SPO does not go beyond the legitimate expression of his political opinions; it does not prove that he has tried to interfere with Court processes or to interfere with any witness. Indeed, now that the KSC has been established, Mr. Krasniqi has supported the process of justice whilst maintaining his view that the KSC should not have been created. Even in the material cited by the SPO, on 20 December 2018 whilst commenting on the *Mustafa* case, although Mr. Krasniqi was critical of the creation of the Court, he nevertheless stated "I think one should not run from justice, whatever it is".⁵⁰ In a similar vein, on 15 October 2017, *Gazeta Express* published an interview with Mr. Krasniqi in which he was asked whether Kosovo should cooperate with the KSC and responded "[n]ow the Specialist Chambers is Kosovo's even though it's located outside of our territory. No one should flee justice, nor inside or outside of Kosovo. Even though my stance about this Court was public and nothing has happened in the mean time for me to alter my opinion".⁵¹ In the case of Mr. Krasniqi, it does not logically follow and there is no evidence that his prior criticism of the creation of the KSC will translate into the obstruction of the KSC's processes or interferences with victims, witnesses or accomplices. Rather, he has made it clear that, although he disagrees with the creation of the KSC, no-one should run from justice.

⁴⁹ Article 10 ECHR.

⁵⁰ KSC-BC-2020-06, F00005/0A2, Specialist Prosecutor, *Annex 2 to Confidential Redacted Version of 'Request for Arrest Warrants and Related Orders' filing KSC-BC-2020-06/F00005 dated 28 May 2020*, 14 November 2020, p. 15.

⁵¹ Public Annex 3; also see *Gazeta Express*, [Interview with Mr. Krasniqi](#), 15 October 2015.

47. As to the Facebook post on 24 April 2020, the post substantially repeats the opinion that Mr. Krasniqi has expressed for many years about the Marty report and the creation of the KSC. It does not identify any individual by name, or call for any individual to interfere with witnesses, accomplices or victims. There is no evidence directly linking that post to Mr. Gashi, nor any evidence that Mr. Gashi was a victim or witness or otherwise connected with the procedures of the KSC. In any event, that single post was more than six months before his arrest. If the SPO really believed that it demonstrated a threat to witnesses or victims, action would have been taken significantly earlier than November 2020. Taken at its highest, the Facebook post does not establish that Mr. Krasniqi will obstruct with the court's proceedings by influencing witnesses, victims or accomplices and/or that he will destroy, hide, change or forge evidence of a crime.

48. In any event, Mr. Krasniqi is willing to agree to a condition that he will not make public statements, he will not speak to the media and will not post on social media about this case. He is also willing to agree to a condition not to travel away from his residence to other municipalities mentioned in the Indictment. He will abide by any other conditions that the Court imposes. The imposition of those conditions would remove any concern about interference with the court's processes.

49. All of the SPO's remaining allegations are general and abstract and relate to other accused or to the general situation in Kosovo. Mr. Krasniqi must be treated as an individual, rather than as part of a monolithic group of suspects. In order to justify his detention pursuant to Article 41(6)(b), the SPO must produce concrete and specific evidence that he – as an individual – will destroy, hide, change or forge evidence of a crime and/or will obstruct the court by influencing witnesses, victims or accomplices. No such evidence has been presented. No evidence is presented that he personally “wields enormous influence”, has “the ability to manipulate

government bodies” or to “mobilise additional support bases”.⁵² Put another way, there is no evidence that his release under conditions would have any significant impact on the situation of witnesses or investigations in Kosovo. As a result, the test in Article 41(6)(b)(ii) is not made out.

3. Mr. Krasniqi Will Not Repeat the Criminal Offence, Complete an Attempted Crime or Commit a Crime which he has Threatened to Commit

50. The SPO also allege that Mr. Krasniqi may commit further crimes on the basis that he is “clearly capable of orchestrating violent criminal acts”.⁵³ This allegation appears to be entirely based on the allegations underlying the Indictment itself. Mr. Krasniqi denies the allegations. He benefits from the presumption of innocence. In any event, all of the allegations relate to events in 1998 – 1999, more than twenty years ago. There is no evidence of any criminality in the intervening years. Mr. Krasniqi is now nearly 70 years old. He holds no state office or position of command over anyone. Far from wielding a network of supporters, he is a retired man whose only office is as the Chairman of the National Council of a small political party. There is simply no evidence that he is likely to commit further crimes.

51. In any event, the wording of Article 41(6)(b)(iii) is narrow and specific. It is not satisfied by a general risk of re-offending, but requires the SPO to prove a risk that Mr. Krasniqi will “repeat the criminal offence” or “complete an attempted crime” or “commit a crime which he has threatened to commit”. Taking those in reverse order, the SPO presents no evidence that Mr. Krasniqi has threatened to commit other crimes. The SPO presents no evidence identifying any attempted crime that Mr. Krasniqi might try to complete. The SPO presents no evidence that Mr. Krasniqi will

⁵² KSC-BC-2020-06, F00005, Specialist Prosecutor, *Confidential Redacted Version of ‘Request for Arrest Warrants and Related Orders’ filing KSC-BC-2020-06/F00005 dated 28 May 2020*, 14 November 2020, para. 4.

⁵³ *Ibid.*, paras 39-40.

“repeat the criminal offence”, given that he is charged with war crimes and crimes against humanity, allegedly committed more than 20 years ago in connection with a conflict which has long since ended. As a result, the test set out in Article 46(1)(b)(iii) is simply not satisfied.

V. REQUEST FOR EXPEDITED TIMETABLE AND FOR AN ORAL HEARING

52. The Defence request an expedited timetable in order that this issue can be addressed before the judicial recess. Pursuant to Rule 9(5) of the Rules, the Pre-Trial Judge has the power to shorten the time for compliance with any time limit. In relation to Provisional Release, the SPO has set out its submissions in relation to Article 41(6)(b) in its Request for Arrest Warrant and Related Orders. This Application will come as no surprise to the SPO, having been foreshadowed at both Mr. Krasniqi’s Initial Appearance and the recent Status Conference. Accordingly, the Defence submit that there is good cause to order the SPO to file its response to these motions within 5 days and the Defence to reply within 2 days of the response.

53. Further, as previously articulated at the Status Conference, the Defence formally request that the Pre-Trial Judge convene an oral hearing pursuant to Rule 95(2)(d) of the Rules. An oral hearing is justified given the importance of the rights at stake and the issue to Mr. Krasniqi. Further, this will be one of the first provisional release decisions issued by the KSC and the novelty of the issue further justifies an oral hearing. If the timetable is expedited as submitted above, the Defence submit that a hearing could take place on 17 or 18 December 2020.

VI. RELIEF SOUGHT

54. The Defence respectfully requests the Pre-Trial Judge to:-

- a. Expedite the timetable for written submissions;

- b. Convene an oral hearing on 17 or 18 December 2020, or as soon as possible following the filing of the Reply;
- c. Find that the conditions for detention in Article 41(6) are not satisfied and release Mr. Jakup Krasniqi from detention, on such conditions as is deemed necessary and appropriate by the Pre-Trial Judge.

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Specialist Counsel

Venkateswari Alagendra



Friday, 18 December 2020

Kuala Lumpur, Malaysia.