



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

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Response to Krasniqi Defence Appeal of Detention Decision

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I. Introduction

1. With regard to Article 41 of the Law¹ and Rules 57 and 170 of the Rules,² the Specialist Prosecutor's Office ('SPO') responds to the KRASNIQI Appeal,³ against the Decision⁴ which rejected the KRASNIQI Release Request.⁵

2. The Court of Appeals Panel ('Panel') should deny the KRASNIQI Appeal in its entirety. As set out in detail below, in the Decision: (a) the correct legal standards were applied; (b) the assessment was properly individualised; (c) other specific risk factors were weighed correctly; and (d) no conditions sufficiently mitigate the risks identified.

II. Procedural background

3. On 28 May 2020, the SPO filed the Arrest Warrant Application.⁶

4. On 26 October 2020, the PTJ confirmed a ten-count indictment against the Accused which charged him with a range of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.⁷

¹ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Public Redacted Version of Krasniqi Defence Appeal Against Decision on Jakup Krasniqi's Application for Interim Release, KSC-BC-2020-06/IA002-F00001/RED, 3 February 2021 (with annex) ('KRASNIQI Appeal').

⁴ Public Redacted of Decision on Jakup Krasniqi's Application for Interim Release, KSC-BC-2020-06/F00180/RED, 22 January 2021 (public version notified 26 January 2021) ('Decision').

⁵ Public Redacted Version of Application for Interim Release, KSC-BC-2020-06/F00122, dated 7 December 2020, KSC-BC-2020-06/F00122/RED, 18 December 2020 (with three annexes) ('KRASNIQI Release Request').

⁶ Public Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, KSC-BC-2020-06/F00005/ RED, 17 November 2020 ('Arrest Warrant Application').

⁷ Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (public version notified 30 November 2020).

5. That same day, the Arrest Warrant Application was granted.⁸ The Accused went into custody on 4 November 2020 and was transferred to the seat of the KSC in The Hague.

6. On 7 December 2020, the Accused filed the KRASNIQI Release Request, after which came the SPO Release Response⁹ and KRASNIQI Release Reply.¹⁰

7. On 22 January 2021, the PTJ rendered the Decision. The PTJ concluded that there is a risk that the Accused will abscond, obstruct the progress of KSC proceedings or commit further crimes against those who allege that KLA members committed crimes, including witnesses who provided or could provide evidence in the case and/or are due to appear before the KSC. The PTJ further concluded that no conditions would sufficiently mitigate the risks of the Accused obstructing KSC proceedings or committing further crimes.

8. On 3 February 2021, the Accused filed the KRASNIQI Appeal against the Decision.

III. Standard of review

9. When rendering discretionary decisions, like provisional release decisions, the weight given to relevant considerations may depend on numerous factors.¹¹ Because of the fact-specific nature of provisional release decisions, the lower level panel is better

⁸ Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020 (public version notified 26 November 2020) ('Arrest Warrant Decision').

⁹ Public Redacted Version of Prosecution response to Application for Interim Release on behalf of Mr Jakup Krasniqi, KSC-BC-2020-06/F00153/RED, 17 December 2020 (public version notified 22 December 2020) ('SPO Release Response').

¹⁰ Public Redacted Version of Krasniqi Defence Reply to Prosecution Response to Application for Interim Release, KSC-BC-2020-06/F00163, dated 6 January 2021, KSC-BC-2020-06/F00163/RED, 26 January 2021 ('KRASNIQI Release Reply').

¹¹ *Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public ('Gucati Appeals Decision'), paras 44, 49.

placed to assess these factors.¹² Accordingly, the Panel must not intervene unless the appellant demonstrates the existence of a discernible error in that the Decision was based on an error of law, error of fact, or abuse of discretion.¹³ A mere disagreement with the conclusions that the first instance panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.¹⁴

10. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.¹⁵ An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.¹⁶

11. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.¹⁷ In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.¹⁸

12. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.¹⁹

IV. Submissions

A. THE CORRECT LEGAL STANDARDS WERE APPLIED

¹² *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.49.

¹³ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras 14, 49. *Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, Public (*'Haradinaj Appeals Decision'*), para.14.

¹⁴ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.64.

¹⁵ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.12.

¹⁶ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.12.

¹⁷ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.13.

¹⁸ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.13.

¹⁹ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.14; *Haradinaj Appeals Decision*, KSC-BC-2020-07/IA002/F00005, para.14.

13. The arguments in Grounds 1 and 4 of the KRASNIQI Appeal should be rejected in their entirety.

14. Article 41(6)(b) of the Law requires there to be ‘articulable grounds to believe’ that the risks identified in Article 41(6)(b)(i)-(iii) are established. The PTJ held that the grounds must be ‘articulable’ in the sense that they must be specified in detail, meaning that specific reasoning and concrete grounds are required in deciding to continue detention.²⁰ The PTJ further concluded that specific articulable grounds must support the ‘belief’ that the risks under Article 41(6)(b)(i)-(iii) exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.²¹

15. Although the Law includes the terms ‘is’ and ‘will’ when describing the Article 41(6) criteria, these terms are surrounded by language making it clear that certainty is not remotely required.²² The Pre-Trial Judge need not conclude that the Accused ‘will’ obstruct the investigation, but rather that ‘there are articulable grounds to believe’ this. It is apparent that ‘belief’ is a standard less than certainty, and that any assessment of future conduct *per se* involves an assessment of possibility and of risk.²³

16. This Panel has already concluded that an interim release inquiry involves a risk assessment.²⁴ In particular, the Panel concluded that determining the necessity of detention revolves around the ‘possibility, not the inevitability, of a future occurrence’.²⁵ This was not an idle reference to something less than certainty being required; the Panel framed the relevant determination in these exact words and favourably cited ICC jurisprudence using that same language.²⁶

²⁰ Decision, KSC-BC-2020-06/F00180/RED, para.18.

²¹ Decision, KSC-BC-2020-06/F00180/RED, para.18.

²² *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001/RED, paras 14, 18.

²³ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001/RED, para.19.

²⁴ *See Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras 51, 63, 67, 69.

²⁵ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.67.

²⁶ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.67, *citing* ICC, *Prosecutor v. Mbarushimana*, Judgment on the Appeal of Mr Callixte Mbarushimana Against the Decision of Pre-Trial Chamber I of 19

17. Proposing additional or different thresholds of what the PTJ must find does not advance the matter.²⁷ The degree of certainty required follows naturally from the ‘articulable grounds to believe’ language in Article 41(6)(b). This interpretation has already been settled by the Panel, and the PTJ did not articulate an inconsistent or incorrect legal standard.²⁸

18. Regarding Article 41(6)(b)(iii) specifically, as the PTJ correctly noted, criminal responsibility may arise through various forms of commission. It is not necessary to demonstrate that an accused would personally carry out the *actus reus* of the foreseen crime(s) in order to establish the relevant risk.²⁹ Indeed, such an interpretation would make a mockery of the provision.

19. Further, contrary to Defence submissions,³⁰ it is precisely a risk of, *inter alia*, further serious violent crimes that are at issue. Requiring ‘crimes similar to the underlying acts charged’³¹ makes clear that the PTJ’s Article 41(6)(b)(iii) inquiry concerned crimes of a grave nature.³² It is apparent that the PTJ considered this risk to be clearly established with respect to the Accused, finding a ‘likelihood’ that the Accused will, under applicable forms of responsibility, commit such crimes.³³

20. The PTJ’s finding that Article 41(6)(b)(iii) encompasses future crimes which are ‘similar’, but need not be ‘identical’, to the underlying crimes charged contains no error.³⁴ It was plain to the drafters in 2015 that any armed conflict or attack against the civilian

May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, ICC-01/04-01/10-283, 14 July 2011, para.60.

²⁷ See *Haradinaj Appeals Decision*, KSC-BC-2020-07/IA002/F00005, para.64 and fn.119.

²⁸ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001/RED, paras 14-20.

²⁹ Decision, KSC-BC-2020-06/F00180/RED, paras 22, 42.

³⁰ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001/RED, para.38.

³¹ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001/RED, paras 34-36.

³² Decision, KSC-BC-2020-06/F00180/RED, para.42.

³³ Decision, KSC-BC-2020-06/F00180/RED, para.42.

³⁴ Decision, KSC-BC-2020-06/F00180/RED, paras 21, 42. *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001/RED, para.34.

population from the jurisdictional period had already ceased, and would not be applicable to an accused's arrest some 15-20 years after the mandate period. Consequently, the interpretation proposed by the Defence, which seeks to confine the applicability of this detention ground to Article 15(2) offences only,³⁵ is nonsensical.

21. It defies rational scrutiny to suggest that the drafters would have deliberately sought to ensure that a wider range of grounds for detention were available in respect of those charged with offences against the administration of justice, than for those charged with core international crimes. If the international crimes charged had to be 'identical' to qualify under Article 41(6)(b)(iii), this provision would effectively be rendered a nullity in all core crimes cases. The Defence places undue emphasis on one article ('the') in the phrase 'the criminal offence'³⁶ to the exclusion of all other principles of interpretation.³⁷ The only plausible interpretation of the provision—as acknowledged in the Defence's fall-back position³⁸—is that a perfect overlap between offences is not required. As such, the correct enquiry is for the PTJ to assess the likelihood that the Accused, if released, will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged.³⁹ As noted above, it is precisely such similar crimes that are at issue, and for which the PTJ found a risk to arise.

22. Moreover, Article 41(6)(b)(iii) sets out three categories of future crimes in relation to which a relevant risk may arise. The KRASNIQI Appeal focuses exclusively on the first of those categories, being the risk that an accused will 'repeat the criminal offence'.⁴⁰

³⁵ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.37.

³⁶ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.35.

³⁷ Including considering the object and purpose of the provision. Moreover, the Accused's interpretation betrays the surplusage canon of statutory interpretation, whereby no provision should be needlessly given an interpretation that causes it to have no consequence. Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson Reuters 2012), chapter 26.

³⁸ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.38.

³⁹ Decision, KSC-BC-2020-06/F00180/RED, para.21.

⁴⁰ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, paras 35, 37.

However, the PTJ was not specifically addressing only that category of future crime,⁴¹ nor was the relevant portion of the reasoning so confined.⁴²

23. Indeed, there is every indication that the specific factors giving rise to the Article 41(6)(b) risks in respect of the Accused—as described in the Decision—implicate more than one of the categories of potential future crimes.⁴³ In particular, the PTJ found a ‘pattern’ of behaviour on the part of the Accused,⁴⁴ which - as recently as April 2020 - encompassed branding individuals who merely stated that certain members of the KLA committed crimes as ‘collaborators’ in the ‘service of Milošević’s policy of genocide’.⁴⁵ As noted by the PTJ, the Accused did so ‘in full knowledge’ of the context and implications of such terms.⁴⁶ As such, the Accused’s recent conduct should reasonably be interpreted as an attempt to incite or instigate crimes against such persons⁴⁷ and/or a threat indicating his intent to commit future crimes.⁴⁸

B. THE ASSESSMENT WAS PROPERLY INDIVIDUALISED

24. This section sets out why Grounds 2-3 and 5 should be dismissed, with further arguments arising from these grounds addressed in Section C below.

⁴¹ Decision, KSC-BC-2020-06/F00180/RED, para.21 (referring globally to the ‘third ground’ of Article 41(6)(b)).

⁴² Decision, KSC-BC-2020-06/F00180/RED, paras 42, 43.

⁴³ Notably the PTJ’s conclusion was framed as a finding that there is a risk the Accused ‘will commit further crimes’ (Decision, KSC-BC-2020-06/F00180/RED, para.43).

⁴⁴ Decision, KSC-BC-2020-06/F00180/RED, para.42.

⁴⁵ Decision, KSC-BC-2020-06/F00180/RED, paras 36, 42 (noting the Accused’s ‘enduring standpoint regarding ‘collaborators’). *See also* SPO Release Response, KSC-BC-2020-06/F00153/RED, para.25, *citing* Arrest Warrant Application, KSC-BC-2020-06/F00005, para.6 (Annex 2, Part II F, 24 April 2020 Jakup Krasniqi Facebook Post: ‘[e]very Albanian that D. MARTY calls a PATRIOT, either in the service of the prime minister or in any other position, is a collaborator and in the service of [Slobodan] MILOŠEVIĆ’s policy of genocide!’)

⁴⁶ Decision, KSC-BC-2020-06/F00180/RED, paras 36, 42.

⁴⁷ Article 41(6)(b)(iii) (‘complete an attempted crime’).

⁴⁸ Article 41(6)(b)(iii) (‘commit a crime which he or she has threatened to commit’).

25. It is not disputed that the PTJ's assessment must be undertaken on an individual basis in light of the personal circumstances of each Accused.⁴⁹ Within this individualised assessment, and with reference to a wide array of jurisprudence, the PTJ distinguished individual and contextual risk factors as follows:

[F]actors may be individual, such as the nature and scope of the crimes allegedly committed by the Accused and the potential punishment that he or she is facing, his or her age, (past) position(s), occupation, family ties, health condition, assets, conduct and statements, international contacts and ties, and existence of support networks that may facilitate the materialisation of a risk. Relevant factors may also be contextual, such as the environment and conditions in which the Accused lives, or the particular stage of the ongoing proceedings.

26. This distinction is meaningful, as contextual risk factors alone are not sufficient to justify a risk necessary to continue detention.⁵⁰ The Defence attempts to misuse this distinction by claiming that the Accused's detention is only based on a small number of specific factors.⁵¹

27. The gravity of the charges and the potential penalties which may be imposed are individual risk factors. Such considerations are particular to the individual charged, and were therefore correctly considered as individual risk factors. The PTJ relied upon the crimes charged and/or material facts underlying them to establish all three of the Article 41(6)(b) risks.⁵² As the Panel has held, they are important factors to consider when determining whether detention is necessary in the circumstances of a specific case.⁵³

28. The political profile of the Accused and his prior posts are likewise individual considerations relied upon by the PTJ in his assessment.⁵⁴ Jakup KRASNIQI is the former Chairman of the Kosovo Assembly and a former Acting President of Kosovo. He is also the former Deputy Commander of the KLA. A lifetime of KLA and government contacts

⁴⁹ Decision, KSC-BC-2020-06/F00180/RED, para.19.

⁵⁰ Decision, KSC-BC-2020-06/F00180/RED, para.19.

⁵¹ See para.31 below.

⁵² Decision, KSC-BC-2020-06/F00180/RED, paras 29, 36, 42.

⁵³ *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.72.

⁵⁴ Decision, KSC-BC-2020-06/F00180/RED, paras 29, 36, 42.

are not forgotten simply through retirement. KRASNIQI has access to the same vast support network as the other accused in this case, including those with security, police, and intelligence expertise. The PTJ correctly placed significant weight on the Accused's former influential leadership positions in the KLA and government of Kosovo.

29. An Accused's available support networks is also a risk factor particular to the individual. In respect of each of the Article 41(6)(b) risks,⁵⁵ the PTJ concluded that the Accused had access to and could mobilise a network of supporters. It was entirely reasonable for the PTJ to conclude that this risk supported the necessity of continued detention in light of the ample evidence of such a support network, the active interference which they have already undertaken,⁵⁶ and, as noted by the PTJ, the Accused's particular access and influence over them by virtue of his profile and specific prior positions of authority.

30. The Defence significantly understates KRASNIQI's potential to galvanize supporters in Kosovo by attempting to present him as a retiree with no influence.⁵⁷ KRASNIQI calling out collaborators for punishment gave voice to the joint criminal enterprise alleged against him.⁵⁸ His recent public statements must be understood in this light.⁵⁹ That KRASNIQI has access to a support network is clear from the climate of witness intimidation in Kosovo in trials of former KLA members, a climate which continues to the present day through the actions of the KLA WVA and others. Requiring the PTJ to fully define or identify the complete membership of this network in the present circumstances is unreasonable (in fact, impossible);⁶⁰ the Defence provides no judicial

⁵⁵ Decision, KSC-BC-2020-06/F00180/RED, paras 29, 36, 42.

⁵⁶ The publication of confidential SPO documents by the KLA WVA in particular demonstrates the motivation and capability of this support network and its direct link to the present proceedings.

⁵⁷ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.29.

⁵⁸ [REDACTED]'. SPO Release Response, KSC-BC-2020-06/F00153/RED, para.23, [REDACTED].

⁵⁹ See paragraph 23 above.

⁶⁰ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.29.

precedent requiring such specificity, which is not even required when pleading cases on their merits.⁶¹

31. The Defence's repeated assertions that KRASNIQI's detention is only grounded in Facebook posts and [REDACTED] misrepresent the Decision.⁶² Each of the findings outlined above are findings of risk on factors individual and specific to the Accused, and which, taken together, would in themselves be more than sufficient to support the necessity of the Accused's detention.

32. Finally, the Defence repeatedly argues that there is insufficient evidence of a link between the Accused's acts/conduct and the risk factors identified by the PTJ.⁶³ As stated previously, the PTJ correctly concluded that risks may materialise as a result of the Accused's acts or omissions, but do not require physical execution on his or her part.⁶⁴ In particular, contextual factors are frequently relevant and may be considered.⁶⁵ The Decision clearly indicates the relevance of contextual factors which were taken into account.⁶⁶

C. OTHER SPECIFIC RISK FACTORS WERE WEIGHED CORRECTLY

⁶¹ STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Decision on Alleged Defects in the Form of the Indictment, 28 September 2020, paras 51, 54(b) (there is no requirement on the Prosecution to identify all co-perpetrators, in particular when their identities are unknown). *See also* European Commission, *A v. The Netherlands*, 15243/89, Decision, 11 May 1992, pp.1, 5 (dismissing as manifestly unfounded a challenge to the overall detail of the charges where it was alleged, *inter alia*, that an accused committed a crime 'together and in association with others or another, in any event alone (repeatedly)'); ECtHR, *Previti v. Italy*, 45291/06, Decision, 8 December 2009, para.208.

⁶² *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, paras 29, 33, 40.

⁶³ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, paras 29-31, 38.

⁶⁴ Decision, KSC-BC-2020-06/F00180/RED, para.22. *See* paragraph 18 above.

⁶⁵ Decision, KSC-BC-2020-06/F00180/RED, para.19 (and jurisprudence cited therein).

⁶⁶ Decision, KSC-BC-2020-06/F00180/RED, para.38.

33. The additional specific risk factors challenged by the Accused are addressed below. This section responds to all remaining arguments in Grounds 2, 3, and 5 of the KRASNIQI Appeal.

1. Detention duration

34. There was nothing unlawful nor unreasonable in the PTJ declining to estimate the expected total length of pre-trial detention.⁶⁷

35. Clearly, because deprivation of liberty must always be proportional,⁶⁸ the length of detention is a relevant factor and may be grounds for release if an accused is detained for an unreasonable period prior to the opening of the case.⁶⁹ However, and in contrast to the ICTY, detention at the KSC is reviewed every two months.⁷⁰ Therefore, a detention decision made now will not dictate for how long an accused is detained. Estimating the future length of detention is not required at this stage and, in light of the applicable framework, would not advance the relevant assessment. Such an estimate is indeed premature and speculative. Moreover, the timing of the trial is heavily contested between the parties. The PTJ committed no discernible error in declining to resolve this matter, nor in concluding that the Accused's actual length of detention to this point created no proportionality concerns.

2. Progressive Disclosure

36. The PTJ committed no discernible error in relying upon the fact that the Accused is progressively informed of the evidence underpinning the charges against him, including the identity of witnesses who provided or could provide evidence in the case

⁶⁷ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.23.

⁶⁸ *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.73.

⁶⁹ Rule 56(2).

⁷⁰ Rule 57(2).

and/or are due to appear before the KSC.⁷¹ Indeed, KRASNIQI's alleged contrary authorities do not support that reliance upon such a factor is erroneous.⁷²

37. Whether or not the necessity of detention increases because the Accused is progressively informed of the evidence against him is first and foremost a matter for the lower level panel to determine in the exercise of its discretion.⁷³ By virtue of his detailed understanding of the evidence following the confirmation process, the PTJ is best able to assess how additional disclosure impacts the incentives of the Accused and, correspondingly, the Article 41(6)(b) risks. In the present case, the Accused being progressively informed of the witnesses against him was found, in light of all other relevant factors, as a consideration which bore on the risk of interference.⁷⁴ There is no discernible error in this assessment;⁷⁵ the Accused merely disagrees with how the PTJ's discretion was applied.

3. Public Statements

⁷¹ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.32.

⁷² Specifically, KRASNIQI offers: (i) a dissenting opinion; (ii) a protective measures decision whose cited paragraph makes no comment on whether progressive disclosure can increase the risks of witness interference; and (iii) a 2005 Appeals Chamber decision which found no error in declining to consider this factor when, unlike in the present case, there was no evidence the Accused had the contacts necessary to exert influence over witnesses.

⁷³ See ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para.15 (in the context of the Accused progressively hearing the evidence against him during trial).

⁷⁴ Decision, KSC-BC-2020-06/F00180/RED, para.36.

⁷⁵ To the contrary, the ICC Appeals Chamber expressly endorsed relying on this factor in the same manner. See ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, 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 Appeals Judgment'), para.65 (citations removed: '[...] the Appeals Chamber notes that the Pre-Trial Chamber found that the disclosure of evidence "amplified" the risk to the investigation and the court proceedings in case of Mr Gbagbo's release. In the view of the Appeals Chamber, this finding cannot be faulted. Disclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute [governing risk of interference at the ICC] it may be a relevant factor.').

38. Whether or not KRASNIQI's opinions are an expression of his free speech is beside the point as concerns the Article 41(6)(b) risk assessment.⁷⁶ The PTJ is not assessing the criminality of these pronouncements as such. Rather, they are relevant to the risk assessment that KRASNIQI will attempt to obstruct justice or interfere with witnesses. The PTJ relied upon them for this purpose only, making clear in doing so 'that every person is entitled to his or her political opinions, including criticising the SC.'⁷⁷ KRASNIQI points to no discernible error in this assessment.

39. Of course, the PTJ relied upon evidence well beyond the Accused's public condemnations of the KSC. As concerns Article 41(6)(b)(iii) in particular, the PTJ relied upon his findings underlying a risk of obstructing the proceedings, KRASNIQI's prominent position in Kosovo, his enduring standpoint regarding 'collaborators' (in reference to both his past role in the KLA and his recent remarks), and the context of witness intimidation in Kosovo.⁷⁸

4. Indictment Allegations

40. This Panel has identified no error in relying upon the allegations presented by the SPO in the course of assessing the risk of obstructing the proceedings.⁷⁹ There is no indication this factor was relied upon in isolation; rather, it was one of several factors underpinning the PTJ's findings. Contrary to the arguments of the Accused, the PTJ's assessment had no impact on the presumption of innocence.⁸⁰ The inquiry at issue is only an assessment of risks and possibilities— the PTJ made no assessment of whether the Accused was guilty of a crime within the jurisdiction of the KSC. These allegations were

⁷⁶ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, Ground 2 (para.24), Ground 3 (para.28).

⁷⁷ Decision, KSC-BC-2020-06/F00180/RED, para.36.

⁷⁸ Decision, KSC-BC-2020-06/F00180/RED, para.42. KRASNIQI does not identify all factors relied upon when alleging that 'it is wholly unreasonable to find that those matters demonstrate a sufficient risk that Mr. Krasniqi will commit serious crimes'. See KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.39.

⁷⁹ *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 60-63.

⁸⁰ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, Ground 2 (paras 22, 25), Ground 3 (para.27).

rather used as informing the assessment of Article 41(6)(b) risks. It was reasonable to do so given, amongst other reasons, the existing finding that there is a well-grounded suspicion the Accused committed the crimes alleged by the SPO.

5. [REDACTED]

41. The Accused merely disagrees with the weight given to [REDACTED] and identifies no discernible error in the PTJ's reliance upon them.⁸¹ It is in fact the Accused who fails to appreciate the import of [REDACTED].

42. In the course of [REDACTED].⁸² [REDACTED]. [REDACTED]. [REDACTED].

43. [REDACTED]:⁸³

[REDACTED].

[REDACTED]. [REDACTED]. [REDACTED].

[REDACTED].⁸⁴

44. [REDACTED].⁸⁵ [REDACTED].⁸⁶ [REDACTED],⁸⁷ [REDACTED]. The Defence's insistence that the PTJ had to require that KRASNIQI was actually involved in interference [REDACTED] conflates actual interference with a risk of interference, and once again misstates the nature of the interim release assessment.

45. Indeed, contrary to Defence submissions,⁸⁸ there is absolutely no inconsistency between the PTJ's finding in the challenged Decision and his earlier decision authorising [REDACTED]. In the earlier decision, the PTJ concluded that there was no evidence

⁸¹ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, paras 30-31.

⁸² SPO Release Response, KSC-BC-2020-06/F00153, para.26, *citing* [REDACTED].

⁸³ *See generally* [REDACTED]. [REDACTED].

⁸⁴ SPO Release Response, KSC-BC-2020-06/F00153, para.27, *citing* [REDACTED].

⁸⁵ *See* [REDACTED].

⁸⁶ Decision, KSC-BC-2020-06/F00180, para.36.

⁸⁷ KRASNIQI Release Reply, KSC-BC-2020-06/F00163, paras 8, 12-13.

⁸⁸ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.31.

KRASNIQI had undertaken efforts to interfere with the administration of justice.⁸⁹ But the assessment in the Decision concerned only a finding of the risk that KRASNIQI would interfere. The PTJ did not conclude—and in the interim release context need not have concluded—that KRASNIQI had already previously obstructed the proceedings.⁹⁰

D. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED

46. Finally, Ground 6 of the KRASNIQI Appeal is meritless as it is premised on a distortion of the PTJ's findings.

47. The PTJ considered that none of the proposed conditions, nor any additional limitations that could be imposed by him, could restrict the Accused's ability to communicate with his community or support network.⁹¹ The PTJ found the risks to be such that they can only be effectively managed through the fully controlled environment that detention alone can provide.⁹² It is apparent that careful consideration was given to the possibility of adequate mitigation in respect of each of the identified Article 41(6)(b) risks.⁹³ There was no discernible error in these findings.

48. Although the Accused has previously given direct incitements,⁹⁴ he is also fully capable of giving statements with indirect and latent calls for interference.⁹⁵ There is no error in the PTJ's concerns that public statements on unrelated topics can further the risks identified under Article 41(6)(b).

⁸⁹ Public Redacted Version of Corrected Version of Decision Authorising Search and Seizure, KSC-BC-2020-06/F00031/CORR/RED, para.25.

⁹⁰ [REDACTED].

⁹¹ Decision, KSC-BC-2020-06/F00180/RED, para.49.

⁹² Decision, KSC-BC-2020-06/F00180/RED, para.49.

⁹³ Decision, KSC-BC-2020-06/F00180/RED, paras 48-49. *Contra*. KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.43.

⁹⁴ See paragraph 23 above.

⁹⁵ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.42.

49. The Decision did not include a finding that the Accused must be detained because of his 'mere ability to have private communications'.⁹⁶ The PTJ weighed all relevant factors taken together.⁹⁷ When considering KRASNIQI's prior positions of power in the KLA and the government, public statements, the climate of intimidation, and other factors identified, KRASNIQI's potential to have private conversations becomes an unmanageable risk.

50. Any attempts to propose conditions which further restrict phone calls and public statements⁹⁸ fail to appreciate the reality behind the PTJ's considerations. The primary way the Accused is going to be able to either interfere or commit further crimes is to get messages out to his former subordinates and supporters.⁹⁹ The Accused's communications are how the risks identified will be realised, and as such their control and monitoring is an essential aspect of his detention.

51. As to the Kosovo Police's willingness to enforce conditions, the PTJ did not conclude or assume anything on this point.¹⁰⁰ If no condition can mitigate the risks identified, a chamber is not obligated to assess a State's willingness and ability to enforce conditions.¹⁰¹ There is significant evidence that the Kosovo authorities are limited in their ability to monitor an accused of KRASNIQI's stature, resources, and authority in a case like this one.¹⁰² However, in view of the PTJ's finding that no conditions could manage the risks identified, willingness to enforce conditions became immaterial. The PTJ committed no discernible error on this point.

⁹⁶ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.44.

⁹⁷ *See* Decision, KSC-BC-2020-06/F00180/RED, para.19.

⁹⁸ KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, paras 41-44.

⁹⁹ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.42.

¹⁰⁰ *Contra* KRASNIQI Appeal, KSC-BC-2020-06/IA002-F00001, para.43.

¹⁰¹ *Gbagbo* Appeals Judgment, ICC-02/11-01/11-278-Red, para.80.

¹⁰² SPO Release Response, KSC-BC-2020-06/F00153/RED, paras 37-43.

V. Conclusion

52. For the foregoing reasons, the Panel should deny the KRASNIQI Appeal in its entirety.

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At The Hague, the Netherlands.