



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

In: KSC-BC-2020-06
Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 14 June 2021
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**Public redacted version of Prosecution response to Krasniqi Defence Submissions
on Detention Review**

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I. INTRODUCTION

1. The continued detention of Jakup KRASNIQI remains necessary.¹ There has been no relevant change in circumstances detracting from the established reasons for detention.² Rather, the Article 41(6)(b) risks have increased since the latest decision.³

2. The Pre-Trial Judge ('PTJ') previously found: (i) grounded suspicion that the Accused committed crimes within the jurisdiction of the Specialist Chambers ('KSC');⁴ (ii) articulable grounds to believe that the Accused will obstruct the progress of criminal proceedings, and will repeat or attempt to repeat the criminal offences;⁵ and (iii) that the release conditions proposed by the Accused insufficiently mitigated the Article 41(6)(b) risks.⁶ These findings continue to be true in all respects.

II. SUBMISSIONS

3. For purposes of a detention review under Rule 57(2), the reasons or circumstances underpinning detention must be reviewed in order to determine whether these reasons continue to exist under Article 41(6) of the Law.⁷ That determination inevitably concerns what has changed, if anything, since the previous

¹ *Contra* Krasniqi Defence Submissions on Detention Review, KSC-BC-2020-06/F00329, 31 May 2021, Confidential ('KRASNIQI Submissions').

² *See* Article 41 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'); Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Article' or 'Articles' herein refer to articles of the Law, and all references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Public Redacted Version of the Decision on Jakup Krasniqi's Application for Interim Release, KSC-BC-2020-06/F00180/RED, 22 January 2021 (redacted version notified 26 January 2021) ('KRASNIQI Release Decision'), *upheld by* Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA002/F00005/RED, 30 April 2021 ('KRASNIQI Release Appeal Decision').

⁴ *See* KRASNIQI Release Decision, KSC-BC-2020-06/F00180/RED, para.25.

⁵ KRASNIQI Release Decision, KSC-BC-2020-06/F00180/RED, paras 32-39.

⁶ KRASNIQI Release Decision, KSC-BC-2020-06/F00180/RED, paras 45-50.

⁷ *Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.55.

ruling on detention.⁸ The Pre-Trial Judge is not required to make findings on the factors already decided upon in the initial ruling on detention,⁹ and any Defence arguments suggesting otherwise must be rejected.

4. Certain Defence submissions repeat past arguments. In particular, the KRASNIQI Defence relies upon certain aspects of the Appeals Panel's decision whereby the Pre-Trial Judge's reasoning was not confirmed.¹⁰ But it must be emphasised that, despite these points, the Appeals Panel still upheld KRASNIQI's detention. Repeating insufficient arguments does not justify release.

5. Below, the SPO addresses new arguments concerning the Accused's detention. None of them constitutes a relevant change in circumstances, impacts the Pre-Trial Judge's previous findings, or detracts from the need for the continued detention of the Accused.

A. RECENT DEVELOPMENTS INCREASE THE RELEVANT RISKS

6. The SPO has disclosed voluminous Rule 102(1)(b) material since the last detention decision. As the disclosure process reaches an advanced stage,¹¹ the Accused has an ever-growing account of the SPO's case against him, which only increases his incentive to attempt to unlawfully evade or obstruct the proceedings, including through a repetition of criminal offences.

7. That KRASNIQI is in a position of influence to mobilise support networks was upheld by the Appeals Panel,¹² and this potential network remains as active as ever.¹³

⁸ How this assessment compares or does not compare with assessing 'changed circumstances' at the ICC is immaterial. *Contra* KRASNIQI Submissions, KSC-BC-2020-06/F00329, para.13.

⁹ KSC-BC-2020-07/IA002/F00005, para.55

¹⁰ KRASNIQI Submissions, KSC-BC-2020-06/F00329, paras 30-31.

¹¹ Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, KSC-BC-2020-06/F00218, 12 March 2021, para.22.

¹² KRASNIQI Release Appeal Decision, KSC-BC-2020-06/IA002/F00005/RED, para.52.

¹³ See United States Department of State, Kosovo 2020 Human Rights Report, available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kosovo/> ('Leading politicians and civil society leaders, particularly veterans' organizations, publicly denounced the SPO

The 'Freedom has a name, the KLA' campaign was set up shortly after the Accused's arrest and went viral.¹⁴ This campaign has been highly active in recent months, demonstrating the widespread support for the Accused in Kosovo.

8. On 4 June 2021, Faton KLINAKU, the acting chairman of the KLA War Veterans Association ('KLA WVA') gave an interview whereby he promised he would publish more confidential KSC documents if he obtained them.¹⁵ This is extraordinary, noting that Mr KLINAKU is the acting chairman because the previous head and deputy head of the KLA WVA are being prosecuted before the KSC for identical conduct.¹⁶ That the law is no constraint for the acting head of the KLA WVA is emblematic of the lengths the Accused's supporters are willing to go to obstruct these proceedings, and indeed this court.

9. [REDACTED].¹⁷ [REDACTED].¹⁸ [REDACTED].¹⁹ [REDACTED].
[REDACTED].²⁰

and the KSC and worked to undermine public support for the work of the SPO and the KSC. These efforts included public protests, a petition drive to abrogate the court, and a legislative initiative proposed by former president Thaci that could have undermined the KSC's mandate').

¹⁴ Balkan Transitional Justice, Serbeze HAXHIAJ, Kosovo: Top Politicians Sent to Hague to Face War Charges, 28 December 2020, available at <https://balkaninsight.com/2020/12/28/kosovo-top-politicians-sent-to-hague-to-face-war-charges/> ('KLA war veterans were furious at the indictment, however. A nationwide campaign was launched under the slogan "Freedom has a name" by artists, veterans and politicians as a sign of support for the former KLA leaders facing trial.').

¹⁵ Faton KLINAKU interview with KlanKosovaTv, 4 June 2021, 100911-100915 (Annex 1.1; '[w]e, as a Veterans Association, have opposed the Special Court because it is a monoethnic court and prosecutes only the KLA, after they were served the files by Serbia, like UNMIK and EULEX did earlier, and they do not deal with the crimes and massacres committed by the Serb occupier during the war in Kosovo. As we have been against this Court, we will make public any material we receive that is in everybody's interest').

¹⁶ *Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07.

¹⁷ [REDACTED].

¹⁸ [REDACTED]. [REDACTED]. [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

10. [REDACTED]. [REDACTED].²¹ [REDACTED],²² the necessity of KRASNIQI's detention is even clearer than before.

B. PROTECTIVE MEASURES AND ELECTION DEVELOPMENTS DO NOT CONSTITUTE CHANGED CIRCUMSTANCES

11. That protective measures would be adopted in this case was eminently foreseeable as of the last detention decision – the SPO's first and largest protective measures request had already been ruled upon²³ and a calendar for further protective measures requests was established.²⁴ That witnesses were granted protective measures since the last decision does not constitute a changed circumstance.²⁵

12. The number of protective measures required to prosecute this case illustrates the serious risks faced by SPO witnesses.²⁶ The efficacy of these measures will be fatally compromised if the Accused is released from detention.

13. The Accused's illegitimate access to confidential information from Kosovo cases featuring the same crimes charged in this case demonstrates the limits of protective measures in resolving the significant security concerns of SPO witnesses. Further, for nearly all witnesses for whom protective measures have been requested, delayed disclosure of identity is only temporary and redacted statements have been provided upfront as counterbalancing measures. Any mitigation of risks afforded by

²¹ [REDACTED].

²² [REDACTED].

²³ Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, KSC-BC-2020-06/F00133/COR/CONF/RED, 10 December 2020, Confidential (corrected confidential redacted version notified 14 December 2020).

²⁴ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020, para.99(c).

²⁵ *Contra* KRASNIQI Submissions, KSC-BC-2020-06/F00329, paras 1, 20-28.

²⁶ In this regard, *see* Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021, para.51 (finding no error in the Pre-Trial Judge's assessment in considering issues of witness security and protection of potential witnesses).

protective measures is offset by the progressive disclosure to the Accused of the SPO's evidence.

14. The Defence's reliance on recent Kosovo election results – whereby KRASNIQI's political party lost all its parliament seats²⁷ - is likewise misplaced. KRASNIQI's position of influence is premised primarily on his past positions in the KLA and in government.²⁸ Noting especially the Defence's indications that KRASNIQI is retired from politics,²⁹ the present-day performance of his political party does nothing to change that influence.³⁰ There is no reason to conclude that the latest Kosovo elections reduce KRASNIQI's ability to use his contacts and supporters to obstruct proceedings or commit further crimes.

C. CONDITIONS REMAIN UNABLE TO MITIGATE THE RISKS

15. The Pre-Trial Judge concluded that no conditions could mitigate the risks posed by KRASNIQI if released, and this conclusion has been upheld on appeal.³¹ The latest Defence submissions provide no information warranting a different assessment.

16. As set out previously by the SPO, Kosovo Police have been unable to enforce conditions of release concerning high profile former KLA members.³² Whether or not

²⁷ KRASNIQI Submissions, KSC-BC-2020-06/F00329, para.29.

²⁸ KRASNIQI Release Appeal Decision, KSC-BC-2020-06/IA002/F00005/RED, para.52.

²⁹ 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), para.5.

³⁰ See similarly ICC, *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the review of detention', ICC-02/05-01/20-415, 2 June 2021, paras 59-60 (present day indigence not indicative of influence, with emphasis in original: 'The Pre-Trial Chamber concluded that it was irrelevant to establish that Mr Abd-Al-Rahman has no assets today, because even if confirmed, it would not eliminate the possibility that he *never* had a leadership role *before* or that he could not *still* have supporters and sympathisers *today* [...] the Appeals Chamber considers that Mr Abd-Al-Rahman seems to disagree with the Pre-Trial Chamber's factual assessment that evidence of his current monetary condition is irrelevant, and that he failed to show that the Pre-Trial Chamber erred in law or was unreasonable in its assessment of the facts before it').

³¹ KRASNIQI Release Appeal Decision, KSC-BC-2020-06/IA002/F00005/RED, paras 77-83.

³² European Commission, Kosovo 2020 Report, 6 October 2020, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/kosovo_report_2020.pdf, p.23 ('[s]ignificant concerns remain about the willingness to investigate, prosecute, judge and effectively enforce convictions in war crime cases involving former Kosovo Liberation Army members.').

EULEX would have been able to enforce such conditions in the past is irrelevant, given that its mandate is currently more limited and would not encompass such responsibilities.³³

17. Defence citations to Kosovo cases involving ordinary KLA soldiers³⁴ or members of Serbian forces³⁵ are clearly distinguishable from the present situation. The four cases cited by the Defence which do concern higher level KLA accused being given house arrest (*A.K. et al.*,³⁶ *J.D et al.*,³⁷ *A.D. et al.*,³⁸ *S.A. et al.*³⁹) are illustrative of precisely the risks at issue. The SPO has discussed all these cases previously, but in summary:

- In *A.K. et al.*, [REDACTED].⁴⁰
- *J.D et al. and A.D. et al.* are connected trials (known as the *Drenica 1* case and *Drenica 2* cases). It is in the *Drenica* cases where Sami LUSHTAKU and Syljeman SELIMI abused the provisions of their hospitalization

³³ The KRASNIQI Defence's citation of an article recounting 2011 intercept operations against former KLA General Staff member Adem GRABOVCI – operations which pre-date the 2015 interception law cited at paragraph 48 of the KRASNIQI Submissions – is therefore inapposite. See Balkan Insight, EULEX Assessing Kosovo Wiretap Claims, 4 August 2016, available at <https://balkaninsight.com/2016/08/04/eulex-checking-kosovo-wiretap-claims-08-04-2016/>.

³⁴ EULEX, *People v. G.G.*, 191/2009, Judgment, 8 December 2009; Humanitarian Law Center Kosovo, An Overview of War Crime Trials in Kosovo 1999-2018, October 2018, pp.380-82; EULEX, *People v. S.G. et al.*, 14/2013, Judgment, 12 September 2013.

³⁵ Humanitarian Law Center Kosovo, War Crimes Trials – Still at the Beginning, March 2020, pp.402-12 (*People v. Zajić*); EULEX, *People v. O.I. et al.*, 98/14, Judgment, 30 March 2016; EULEX, *People v. J.D. and D.B.*, 13/2013, Judgment, 17 April 2013.

³⁶ EULEX, *People v. A.K. et al.*, 766/12, Judgment, 17 September 2013.

³⁷ EULEX, *People v. J.D. et al.*, 455/15, Judgment, 15 September 2016.

³⁸ EULEX, *People v. A.D. et al.*, 456/15, Judgment, 14 September 2016.

³⁹ EULEX, *People v. S.A. et al.*, 98/2014, Judgment, 3 September 2014.

⁴⁰ Confidential 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/CONF/RED, 15 November 2020 ('Arrest Warrant Application'), para.20.

imposed in lieu of detention.⁴¹ *Drenica* witnesses were also offered inducements and threatened,⁴² [REDACTED].⁴³

- *S.A. et al.* is the case where [REDACTED].⁴⁴ This is also the case where two convicted persons were pardoned by Hashim THAÇI in one of his final acts as President.⁴⁵

18. It is revealing that the KRASNIQI Defence cannot cite a single case without witness intimidation when persons like the accused were released. That Kosovo's statutory framework allows for release conditions to be monitored is not the issue.⁴⁶ It is rather whether there is a sufficient prospect that the law will be actually capable of being effectively enforced against such a high profile accused as KRASNIQI.⁴⁷

19. No conditions can actually mitigate the risks posed by the Accused. The Article 41(6) risks are such that anything short of detention creates an unacceptable opportunity for clandestine communications. Even a single such communication could have grave consequences.

20. The Accused's network will stop at nothing to secure his acquittal in this case. In the circumstances of a case like this one, there is nothing that Kosovo or any other state could do to sufficiently mitigate the Article 41(6) risks becoming manifest.

⁴¹ Public redacted version of Prosecution response to Application for Interim Release on behalf of Mr Jakup Krasniqi, KSC-BC-2020-06/F00153/RED, 22 December 2020, paras 41-42.

⁴² Arrest Warrant Application, KSC-BC-2020-06/F00005/CONF/RED, paras 18 (*Demaj et al.* citation at fn.57), 23.

⁴³ [REDACTED].

⁴⁴ Arrest Warrant Application, KSC-BC-2020-06/F00005/CONF/RED, para.25.

⁴⁵ Public redacted version of Prosecution response to Application for Interim Release on behalf of Mr Hashim Thaçi, KSC-BC-2020-06/F00149/RED, 16 December 2020 (redacted version notified 21 December 2020), para.23.

⁴⁶ *Contra* KRASNIQI Submissions, KSC-BC-2020-06/F00329, paras 48-49.

⁴⁷ In this regard, the Defence mis-cites one of its own articles. The 8 January 2016 Balkan Insight article in footnote 73 of the KRASNIQI Submissions is a statement of a Kosovo state prosecutor, not Kosovo Police. This prosecutor does indeed vow to enforce surveillance provisions, but makes clear that the laws referenced had already been in place since 2013. It is clear from the context of the article that this statement is an attempt to redress a failing of the Kosovo Police to follow the surveillance laws as written, the exact opposite proposition for which the article was cited.

Should this occur, it will irreversibly damage the integrity of these proceedings. Continued detention is the only way to address the risks entailed.

D. DETENTION REMAINS PROPORTIONATE

21. The Appeals Panel has already determined that the Pre-Trial Judge's detention assessment did not require estimating the probable length of detention.⁴⁸ All deadlines set by the Pre-Trial Judge in the case to date have been met or extended for good cause. There is no indication that the SPO has been dilatory, and trial preparations are proceeding in an expeditious manner.⁴⁹

22. As the SPO has stated previously, '[t]he length of pre-trial detention must be balanced against the Article 41(6) risks and the circumstances of the case as a whole, including the potential penalties for the crimes charged. [...] In the course of this balancing exercise, even significant pre-trial detention may still be reasonable.'⁵⁰ The Accused has been detained for seven months on a vast array of war crimes and crimes against humanity committed over a near two-year period. The scale of these charges affects all aspects of the trial process, including preparations and the necessity of continued detention.

23. The Defence's insistence that pre-trial proceedings must certainly be too long conveniently ignores its own responsibility in this regard. The Defence received an

⁴⁸ See KRASNIQI Release Appeal Decision, KSC-BC-2020-06/IA002/F00005/RED, para.71.

⁴⁹ KRASNIQI Submissions, KSC-BC-2020-06/F00329, paras 1, 18, 34-39, 40-45.

⁵⁰ Prosecution response to Application for Interim Release on behalf of Mr Kadri Veseli, KSC-BC-2020-06/F00161, 4 January 2021, para.10, n.16, citing ICC, *Prosecutor v. Bemba et al.*, Judgment on the appeals against Pre-Trial Chamber II's decision regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, ICC-01/05-01/13-969, para.45. Incidentally, this same ICC judgment makes clear that ICC chambers may determine that persons have been detained for an unreasonable period, even absent inexcusable delay by the Prosecutor. ICC-01/05-01/13-969, para.43. As such, the ICC's framework is more similar to the KSC framework than what is argued by the KRASNIQI Defence. *Contra* KRASNIQI Submissions, KSC-BC-2020-06/F00329, para.18.

extension of time to file the present detention submissions,⁵¹ as well as its preliminary motions⁵² (which must all have a final resolution before the case can be sent to a trial panel). The Defence has made no effort to attempt to reach any agreed facts which might expedite trial proceedings, even on proposed facts such as the Accused's date and place of birth. All Defence teams in this case have also made submissions that they have not received sufficient disclosure in order to meaningfully prepare, repeatedly failing to appreciate the volume of what has been disclosed and the reality that delayed disclosure loses its meaning if the Defence renders itself unable to proceed without postponements following delayed disclosure.

24. Nothing about the Accused's detention thus far has been unreasonable. There have not been any unjustified delays. The Accused's rights have been fully respected.⁵³ Defence arguments on the proportionality of detention must therefore be rejected.

III. CLASSIFICATION

25. The present submission is filed confidentially in accordance with Rule 82(4). A public redacted version will be filed.

⁵¹ Oral order regarding timeline for defence submissions on continued detention, 19 May 2021, pp.451-52.

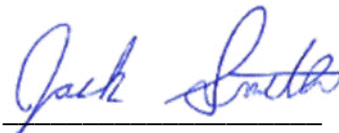
⁵² Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions, KSC-BC-2020-06/F00150, 16 December 2020, para.30(f).

⁵³ KRASNIQI's arguments about a lack of family visits are premised on an assumption that these issues would have been different in Kosovo, which is not necessarily the case. Ombudsperson Institution of Kosovo, Annual Report 2020, 27 April 2021, available at <https://oik-rks.org/en/2021/04/14/annual-report-2020/>, p.106 ('[s]ome rights of prisoners, which are guaranteed by the Constitution of the Republic of Kosovo, Law no.04/L-149 on the Execution of Penal Sanctions (hereinafter: LEPS) and other applicable laws, depending on the situation with COVID-19 were restricted and restored after the situation with COVID-19 improved. These rights in general are: contacts with the outside world, realization of family visits and free visits, development of activities inside prisons, etc.'). Nevertheless, the Defence's arguments indicate that family visits at the detention centre are conditional on when the Accused can be vaccinated for COVID-19. [REDACTED].

IV. RELIEF REQUESTED

26. For the foregoing reasons, the relief sought by the KRASNIQI Defence should be rejected.

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Monday, 14 June 2021
At The Hague, the Netherlands.