



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: Trial Panel II
Judge Charles Smith III, Presiding
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Public Redacted Version of 'Prosecution Submission Pertaining to Periodic Detention Review of Jakup Krasniqi'

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Article 41 of the Law¹ and Rule 57 of the Rules,² the Specialist Prosecutor's Office ('SPO') makes the following submissions in support of the need for the continued detention of the accused Jakup Krasniqi ('Krasniqi'). The Pre-Trial Judge and the Court of Appeals have repeatedly held that Krasniqi's detention is justified on multiple bases, that no conditions short of detention in the Kosovo Specialist Chamber's ('KSC') detention centre would be sufficient to minimize the risks, and that the detention period—taking all relevant circumstances into account—is reasonable. Since the most recent of these determinations on 18 November 2022, and contrary to the Krasniqi Submissions,³ there has been no change in circumstances that merits deviating from that determination. Indeed, the transfer of the case to the Trial Panel, and other significant developments that will give Krasniqi further access to information regarding sensitive witnesses and the case against him, buttress the necessity and reasonableness of detention.

II. PROCEDURAL HISTORY

2. The procedural history regarding Krasniqi's detention is collected in the Pre-Trial Judge's most recent detention decision.⁴
3. The Pre-Trial Judge issued the Sixth Detention Decision on 18 November 2022.
4. On 30 November 2022, the Pre-Trial Judge notified the President of the KSC that a complete case file would be ready to transfer to a Trial Panel on 15 December 2022.⁵

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 Krasniqi Defence Submissions on Detention Review, KSC-BC-2020-06/F01181, 22 December 2022, Confidential ('Krasniqi Submissions').

⁴ Decision on Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F01110, 18 November 2022, paras 1-15 ('Sixth Detention Decision').

⁵ Notification Pursuant to Rule 98(3) of the Rules of Procedure and Evidence, KSC-BC-2020-06/F01131, 30 November 2022.

5. Also on 30 November 2022, the President assigned a Trial Panel,⁶ and on 15 December 2022 the Trial Panel elected a President.⁷

6. On 15 December 2022, the case was transferred to the Trial Panel.⁸

7. On 22 December 2022, the Krasniqi Submissions were filed.⁹

III. SUBMISSIONS

8. Article 41 of the Law permits the detention of an accused person until final judgment where there is a grounded suspicion that the person has committed a crime within the jurisdiction of the KSC, and there are articulable grounds to believe that the person: (i) is a flight risk; (ii) will destroy, hide, change, or forge evidence of a crime; or, (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.¹⁰ A broad range of circumstances may merit consideration in this analysis according to the particular case:

These factors may be individual, such as the nature and scope of the crimes allegedly committed by the Accused and the potential punishment 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 the 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.¹¹

9. Pursuant to Article 41(10) and Rule 57(2), the relevant chamber will review the detention of an accused every two months at a minimum.¹² In assessing whether detention remains warranted, the relevant judicial chamber will consider both whether there has been any change in circumstances since the last determination, and ‘assess

⁶ Decision Assigning Trial Panel II, KSC-BC-2020-06/F01132, 30 November 2022.

⁷ Notification of Election of a Presiding Judge, KSC-BC-2020-06/F01167, 15 December 2022.

⁸ Decision Transmitting the Case File to Trial Panel II, KSC-BC-2020-06/F01166, 15 December 2022.

⁹ The submissions were notified on 27 December 2022.

¹⁰ Article 41(6); *see also* Sixth Detention Decision, KSC-BC-2020-06/F01110, para.18.

¹¹ Decision on Jakup Krasniqi’s Application for Interim Release, KSC-BC-2020-06/F00180, 22 January 2021, para.19 (‘First Detention Decision’).

¹² *See* Sixth Detention Decision, KSC-BC-2020-06/F01110, para.19.

whether [it] is still satisfied that, at the time of the review and under specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.’¹³ In making its determination, the chamber ‘is neither required to make findings on the factors already decided upon in the initial ruling on detention nor to entertain submissions that merely repeat arguments that have already been addressed in previous decisions.’¹⁴ This remains true when a case passes from the Pre-Trial Judge to the Trial Panel; the Trial Panel is not required to proceed to a *de novo* assessment of factors already decided upon, but must examine the reasons or circumstances to determine if they still exist.¹⁵

10. Krasniqi has been detained since his arrest on 4 November 2020 following the confirmation of the indictment (‘Confirmed Indictment’¹⁶).¹⁷ Since then, the Pre-Trial Judge has reviewed Krasniqi’s detention six times, and every time has held that Krasniqi merited continued detention.¹⁸ The Appeals Chamber has also repeatedly upheld the Pre-

¹³ Public Redacted Version of Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00506/RED, 21 December 2021, para.19; *see also* Decision on Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F01171, 19 December 2022 (‘Veseli Detention Decision’).

¹⁴ Public Redacted Version of Decision on Jakup Krasniqi’s Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA006/F00005, 1 October 2021, para.17 (‘Second Court of Appeals Decision’); *see also* Veseli Detention Decision, KSC-BC-2020-06/F01171, para.15.

¹⁵ *See* Consolidated Decision on Nasim Haradniaj’s Appeals Against Decisions on Review of Detention, KSC-BC-2020-07/IA007/F00004, 6 April 2022, para.28 (‘Consolidated Decision’); Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021, para.19; Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00562, 21 February 2022, para.20; Veseli Detention Decision, KSC-BC-2020-06/F01171, para.15.

¹⁶ Submission of Confirmed Amended Indictment, KSC-BC-2020-06/F00999/A02, 30 September 2022.

¹⁷ *See* Sixth Detention Decision, KSC-BC-2020-06/F01110, fn.2. (explaining procedural history of the indictments).

¹⁸ First Detention Decision, KSC-BC-2020-06/F00180; Decision on Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F00371, 25 June 2021 (‘Second Detention Decision’); Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F00582, 26 November 2021 (‘Third Detention Decision’); Decision on Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F00801, 13 May 2022; Decision on Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F00978, 19 September 2022; Sixth Detention Decision, KSC-BC-2020-06/F01110.

Trial Judge's assessments that Krasniqi merited detention.¹⁹ There have been no developments that diminish the factors supporting the need and reasonableness of detention. Indeed, the transfer of the case to the Trial Panel and other developments in the case augment the necessity of detention.

A. GROUNDED SUSPICION

11. Though not addressed in the Krasniqi Submissions, there remains a grounded suspicion that Krasniqi has committed a crime within the jurisdiction of the KSC.²⁰ Based on a thorough review of the Indictment and supporting evidence provided by the SPO, the Confirmation Decision held that there is a 'well-grounded suspicion'²¹ that Krasniqi is liable for crimes against humanity (persecution, imprisonment, other inhumane acts, torture, murder, and enforced disappearance) and war crimes (arbitrary detention, cruel treatment, torture, and murder) as identified in Articles 13, 14, and 16.²² The Pre-Trial Judge later also confirmed amendments to the Indictment that added similar charges against Krasniqi.²³ The 'well-grounded suspicion' standard exceeds that of 'grounded suspicion' required for detention.²⁴ Nothing has occurred since the confirmation

¹⁹ Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA002/F00005, 30 April 2021 ('First Court of Appeals Decision'); Decision on Jakup Krasniqi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA016/F00005, 25 March 2022 ('Third Court of Appeals Decision'); Decision on Jakup Krasniqi's Appeal Against Decision on Periodic Review of Detention, KSC-BC-2020-06/IA020/F00005, 2 August 2022 ('Fourth Court of Appeals Decision').

²⁰ See Article 41(6)(a); Sixth Detention Decision, KSC-BC-2020-06/F01110, paras 23-26.

²¹ Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/CONF/RED, 26 October 2020, para.18 ('Confirmation Decision').

²² Confirmation Decision, KSC-BC-2020-06/F00026/CONF/RED, para.521(a).

²³ Public Redacted Version of Decision on the Confirmation of Amendments to the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00777/RED, 22 April 2022, para.185.

²⁴ See Confirmation Decision, KSC-BC-2020-06/F00026/CONF/RED, para.46 (identifying 'four progressively higher evidentiary thresholds' contained within the Law including 'grounded suspicion' and, subsequently, 'well-grounded suspicion'); see also Consolidated Decision, KSC-BC-2020-07/IA007/F00004,

decisions that would detract from this determination. Indeed, the Pre-Trial Judge has repeatedly confirmed that there remains a well-grounded suspicion that Krasniqi has committed crimes within the KSC's jurisdiction.²⁵

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

12. The Court of Appeals has been clear that, once a grounded suspicion under Article 41(6)(a) is identified, an articulable basis of a single ground under Article 41(6)(b) is sufficient to support detention.²⁶

13. In general terms the three grounds under Article 41(6)(b) justifying detention are: 1) risk of flight; 2) potential obstruction; and, 3) risk of additional crimes.²⁷ The applicable standard is articulable grounds that support a 'belief' that there is a risk of one of the Article 41(6)(b) grounds occurring.²⁸ The 'belief' test denotes 'an acceptance of the possibility, not the inevitability, of a future occurrence. In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.'²⁹ In considering whether an accused should be detained or released, the relevant chamber must consider whether measures other than detention would sufficiently reduce the risk of the Article 41(6)(b) factors occurring.³⁰

para.29; Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021, para.24; Veseli Detention Decision, KSC-BC-2020-06/F01171, para.19.

²⁵ See, e.g., Sixth Detention Decision, KSC-BC-2020-06/F01110, para.26.

²⁶ See Consolidated Decision, KSC-BC-2020-07/IA007/F00004, para.49.

²⁷ See also Veseli Detention Decision, KSC-BC-2020-06/F01171, para.21.

²⁸ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.27; Veseli Detention Decision, KSC-BC-2020-06/F01171, para.21.

²⁹ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.27 (internal citation omitted); see also Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021, para.28; see also Veseli Detention Decision, KSC-BC-2020-06/F01171, para.21.

³⁰ Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-1/F00004, 26 April 2017, para.14.

14. The Pre-Trial Judge has previously held that all three factors were satisfied in relation to Krasniqi, and his detention has been upheld on appeal.³¹ Since the Pre-Trial Judge's last detention review decision on 18 November 2022,³² nothing has transpired that would decrease the support for an affirmative finding on any of the factors. Moreover, the progression of the case since that decision, in the form of the significant milestone of the transfer of the case file to the Trial Panel, as well as the SPO's filing of a provisional witness order of its first 40 witnesses, and the gradual lifting of protective measures, increases the risk of Krasniqi's flight, obstruction, and/or contribution to additional crimes.

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

15. Krasniqi continues to satisfy the applicable risk of flight standard.³³ As the Pre-Trial Judge summarised in the Sixth Detention Decision, Krasniqi: '(i) has been made aware of the charges against him and the possibility of a serious sentence in the event of a conviction; and (ii) even though Mr Krasniqi is now retired and no longer holds public positions, he continues to play a significant role in Kosovo on the basis of the previous positions he occupied.'³⁴ In addition to his position within the KLA, Krasniqi was the former Chairman of the Kosovo Assembly, and a former Acting President of Kosovo.³⁵ The Court of Appeals has held that the Pre-Trial Judge did not err in concluding that Krasniqi continued to play a significant role in Kosovo,³⁶ and nothing suggests that this role has diminished in any way since this ruling.

³¹ Sixth Detention Decision, KSC-BC-2020-06/F01110, paras 31, 39, 45.

³² Sixth Detention Decision, KSC-BC-2020-06/F01110.

³³ *Contra* Krasniqi Submissions, KSC-BC-2020-06/F01181, paras 16-23.

³⁴ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.30 (collecting detention decisions); *see also* First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, para.52; Second Court of Appeals Decision, KSC-BC-2020-06/IA006/F00005, para.27.

³⁵ Second Detention Decision, KSC-BC-2020-06/F00371, para.29.

³⁶ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.30; First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, para.52; Second Court of Appeals Decision, KSC-BC-2020-06/IA006/F00005, para.27.

16. As a result, Krasniqi has the ‘incentive and means to evade proceedings,’³⁷ including because the influence Krasniqi continues to derive from his previous roles ‘may assist him in evading SC proceedings by, for instance, securing access to relevant information, and obtaining funds and means to travel.’³⁸

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

17. The second factor concerns a risk that Krasniqi 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.’³⁹ This assessment considers that such acts could be accomplished by act or omission, and it does not require that Krasniqi himself physically execute the offending action,⁴⁰ but can also extend to instigating others to do so or contributing in any way towards such a risk.⁴¹

18. Krasniqi continues to pose a risk of obstructing proceedings.⁴² In the Sixth Detention Decision, the Pre-Trial Judge observed that Krasniqi’s position of influence, his public statements criticising the KSC, a Facebook post as recent as April 2020 that labelled as ‘collaborators’ in the ‘service of Milošević’s policy of genocide’ any person who dares to state that KLA members had committed crimes, and [REDACTED], all contributed to the risk that he could obstruct proceedings.⁴³ [REDACTED]⁴⁴ The Court of Appeals has held

³⁷ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.30.

³⁸ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.30.

³⁹ Article 41(6)(b)(ii).

⁴⁰ First Detention Decision, KSC-BC-2020-06/F00180/RED, para.22.

⁴¹ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.36.

⁴² *Contra* Krasniqi Submissions, KSC-BC-2020-06/F01181, paras 24-32.

⁴³ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.34; *see also* Fourth Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, para.61; Second Detention Decision, KSC-BC-2020-06/F00371/RED, para.37.

⁴⁴ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.34; *see also* First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, para.61; Second Detention Decision, KSC-BC-2020-06/F00371/RED, para.37.

that [REDACTED],⁴⁵ and has also held that it was not unreasonable to consider Krasniqi's public statements criticising the KSC and the Facebook post in assessing whether there is a risk he will obstruct proceedings.⁴⁶

19. The Pre-Trial Judge has also noted the allegation that Krasniqi:

as a KLA spokesperson, was involved in the development and dissemination of KLA policies through the drafting and/or issuance of General Staff communiqués and political statements, many of which specifically targeted KLA opponents. As previously found, Mr Krasniqi's statements at the time sought to justify KLA actions taken against such persons, who were designated as 'collaborators' and in many instances were harmed or killed.⁴⁷

20. The Pre-Trial Judge also recalled that Krasniqi, as a former political leader and KLA deputy commander, continues to hold a position of influence in Kosovo,⁴⁸ a determination that has been confirmed by the Court of Appeals.⁴⁹ [REDACTED]⁵⁰

21. There also continues to be a climate of witness intimidation and interference with criminal proceedings against KLA members in Kosovo,⁵¹ a factor that the Court of Appeals has held is a relevant 'contextual consideration'.⁵² In the Case 7 Trial Judgment, the Trial Panel observed that the 'evidence points at the existence of a prevalent climate of witness intimidation in Kosovo, in particular in respect of investigations/prosecutions

⁴⁵ First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, 30 April 2021, para.62; Second Court of Appeals Decision, KSC-BC-2020-06/IA006/F00005, para.30.

⁴⁶ First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, para.49.

⁴⁷ First Detention Decision, KSC-BC-2020-06/F00180, para.36; *see also* First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, para.45

⁴⁸ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.35.

⁴⁹ First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, paras. 52, 77.

⁵⁰ Sixth Detention Decision, KSC-BC-2020/F01110, para.35.

⁵¹ Sixth Detention Decision, KSC-BC-2020/F01110, para.36 (collecting decisions); *see also* Veseli Detention Decision, KSC-BC-2020-06/F01171, para.28.

⁵² Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA015/F00005, 25 March 2022, para.43.

of crimes attributed to ex-KLA members.⁵³ It credited the testimony of Defence Expert Witness Robert Reid, who stated:

Witness intimidation in the trials for Kosovo, I've really never seen anything like it before. I was a policeman for 20 years and I've worked here for 23 years, and I have never seen the intimidation like it. It was really quite frightening. And I'm not linking that to any individuals or any organisation. But just the fear that was engendered in the society, I've not seen any -- even in organised crime, I've never seen anything like it.⁵⁴

22. In addition, referring to testimony regarding the SPO's need to institute witness emergency risk management plans in the two years before September 2020, it observed that 'witness protection has continued to be a live and critical issue in Kosovo.'⁵⁵ In such a context, Krasniqi's position of influence, statement against 'collaborators', and securing of sensitive documents are of heightened concern.

23. More recently, the Trial Panel in *The Prosecutor v. Salih Mustafa*, in its pronouncement on the issuance of the Trial Judgment in that case, observed the 'pervasive climate of fear and intimidation that persists in Kosovo to this day.'⁵⁶ The Trial Panel continued:

Throughout the course of this trial, the Panel has heard evidence from multiple witnesses indicating that those who cooperate or are believed to cooperate with the Specialist Chambers or with the Specialist Prosecutor are labelled in Kosovo as traitors or collaborators and are subject to threat and intimidation, either themselves or their children.

The victims who have come forward as witnesses in this case now live in constant fear that something will happen to them or their families. They are still to this day unable to speak freely about the traumatic events they experienced and the harm they suffered.⁵⁷

⁵³ Prosecutor v. Gucati and Haradinaj, Trial Judgment, KSC-BC-2020-07/F00611, para.577 ('Case 7 Judgment').

⁵⁴ Case 7 Judgment, KSC-BC-2020-07/F00611, para.577.

⁵⁵ Case 7 Judgment, KSC-BC-2020-07/F00611, para.579.

⁵⁶ Prosecutor v. Mustafa, KSC-BC-2020-05, Transcript (Judgment), 16 December 2022, p.4863, lines 16-17.

⁵⁷ Prosecutor v. Mustafa, KSC-BC-2020-05, Transcript (Judgment), 16 December 2022, pp.4863-4864. The written Trial Judgment lays out in far greater detail the evidence demonstrating witness intimidation, however as of the date of this filing no public version of that judgment has been released.

24. Moreover, Krasniqi has recently received information concerning, *inter alia*, the first witnesses the SPO intends to call,⁵⁸ and as the start of trial approaches (and thereafter proceeds) protective measures in the form of delayed disclosure on the dwindling number of witnesses still subject to them will be lifted, increasing the risk of obstruction.⁵⁹

As the Trial Panel has recently noted in a separate detention decision:

With the commencement of trial, the names and personal details of certain highly sensitive witnesses will be disclosed to the Defence, and will therefore become known to a broader range of people, including the Accused. This, in turn, increases the risk that sensitive information pertaining to witnesses becoming known to members of the public before the witnesses in question give evidence. In this context, the release of an Accused with sensitive information in his possession would not be conducive to the effective protection of witnesses who are yet to testify.⁶⁰

25. In this regard, the SPO notes that, as held by the Trial Panel in Case 7, 'the mere fact that the Accused is entitled to disclosure of relevant material does not mean that the Panel ought to ignore the risks that come with such disclosure, especially in the context of conditional release.'⁶¹

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

26. The third factor concerns a risk that

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.⁶²

⁵⁸ Prosecution Submission of Provisional List of First 40 Witnesses to be Called at Trial, KSC-BC-2020-06/F01117, 18 November 2022.

⁵⁹ See Sixth Detention Decision, KSC-BC-2020-06/F01110, para.37; see also Veseli Detention Decision, KSC-BC-2020-06/F01171, para.28.

⁶⁰ Veseli Detention Decision, KSC-BC-2020-06/F01171, para.29.

⁶¹ Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507, 21 December 2021, para.36

⁶² Article 41(6)(b)(iii).

27. The possible future crime need only be similar, not identical, to those included in the charges, and need not be specified in detail.⁶³ The factors assessed as to whether there is a risk of obstructing proceedings under Article 41(6)(b)(ii) are also relevant when considering whether there is a risk of further crimes were Krasniqi to be released.⁶⁴ Under Article 41(6)(b)(iii) it is sufficient that there is a risk that Krasniqi will instigate or assist others to commit crimes, or contribute in any other way to their commission. It is not necessary that there is a risk of Krasniqi committing such crimes himself, although that would also be sufficient.⁶⁵

28. As discussed above in regards to risk of obstruction of proceedings, Krasniqi: (i) [REDACTED]; (ii) has a position of influence in Kosovo; and (iii) is progressively gaining access to more information concerning the case against him.⁶⁶ Moreover, the crimes against humanity and war crimes that Krasniqi is charged with are extremely serious, they are alleged to have been committed in cooperation with others, many of whom retain power and influence in Kosovo, and there is a general climate of intimidation of witnesses.

29. With this in mind, there remains a risk, as the Pre-Trial Judge recently found, that Krasniqi will commit—or contribute to commission of—crimes similar to the underlying acts charged against those perceived to be opposed to the KLA, including persons who have, could, or will provide evidence to the KSC.⁶⁷

⁶³ First Detention Decision, KSC-BC-2020-06/F00180, para.21.

⁶⁴ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.42.

⁶⁵ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.42; First Detention Decision, KSC-BC-2020-06/F00180, para.22.

⁶⁶ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.43; *Contra* Krasniqi Submissions, KSC-BC-2020-06/F01181, paras 33-34.

⁶⁷ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.44.

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

30. Article 41(12) sets out various options to consider in order to ensure the accused's presence at trial, to prevent reoffending, or to ensure the successful conduct of the proceedings. In addition, the competent panel should consider reasonable measures *proprio motu*.⁶⁸ This inquiry includes an assessment of: (i) whether alternative measures can be effectively enforced; and (ii) whether any proposed conditions can sufficiently mitigate the identified Article 41(6)(b) risks.⁶⁹ However, the obligation to consider other conditions *proprio motu* 'is not limitless, but rather the [panel's] enquiry as to which measures could be reasonable shall be guided by the circumstances of each case.'⁷⁰ Conditions that are 'not commonly ordered in the context of an interim release due to, *inter alia*, their complexity and requisite resources' need not be considered.⁷¹ In addition, it is within a chamber's discretion to compare possible alternative conditions to those in the detention centre when assessing whether such alternative conditions are adequate.⁷²

31. No conditions of conditional release that the Trial Panel might consider *proprio motu* are sufficient to mitigate the risks under Article 41(6)(b). Regarding the risk of flight, the influence, and means—as well as extensive support network—that Krasniqi would have access to in Kosovo should he be released even under conditions of control make any such conditions insufficient to minimize the risk of flight to the point of acceptability.

⁶⁸ See Public Redacted Version of Decision on Rexhep Selimi's Appeal against Decision on Interim Release, KSC-BC-2020-06/IA003/F00005, 30 April 2021, para.86; Veseli Detention Decision, KSC-BC-2020-06/F01171, para.36.

⁶⁹ Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021, para.44, *citing* Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA008/F00004, 1 October 2021, paras 48-53.

⁷⁰ Third Court of Appeals Decision, KSC-BC-2020-06/IA016/F00005, para.42.

⁷¹ Third Court of Appeals Decision, KSC-BC-2020-06/IA016/F00005, para.42.

⁷² Third Court of Appeals Decision, KSC-BC-2020-06/IA016/F00005, para.26.

32. As for the risks of obstructing the progress of KSC proceedings and/or committing further crimes, the Pre-Trial Judge has previously considered a range of possibilities and concerns,⁷³ including submissions by the Kosovo Police,⁷⁴ and found that ‘neither the previously proposed conditions nor any additional measures ordered *proprio motu* could sufficiently mitigate the existing risks.’⁷⁵ This determination has been upheld by the Court of Appeals.⁷⁶

33. Moreover, the Pre-Trial Judge has observed that

[T]he measures in place at the SC Detention Facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes. Moreover, they offer a controlled environment where a potential breach of confidentiality could be more easily identified and/or prevented. ... [T]he Pre-Trial Judge remains persuaded that it is only through the communication monitoring framework applicable at the SC Detention Facilities that Mr Krasniqi’s communications can be restricted in a manner to sufficiently mitigate the aforementioned risks.⁷⁷

34. Nothing has occurred since the Sixth Decision warranting a different assessment on conditions, either generally or for a discrete period of time.⁷⁸ Indeed, the obligation to consider additional measures *proprio motu* to mitigate the existing risks means the Pre-Trial Judge necessarily rejected the possibility of release for smaller periods of time than what had been previously requested. The Krasniqi Submissions simply repeat

⁷³ See Second Detention Decision, KSC-BC-2020-06/F00371, paras 50-52; Third Court of Appeals Decision, KSC-BC-2020-06/IA006/F00005, paras 52-53.

⁷⁴ Third Detention Decision, KSC-BC-2020-06/F00582, paras 69-84; see also Fourth Court of Appeals Decision, KSC-BC-2020-06/IA020/F00005, paras 29-35.

⁷⁵ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.51; First Detention Decision, KSC-BC-2020-06/F00180, para.49; see also Fourth Court of Appeals Decision, KSC-BC-2020-06/IA020/F00005, paras 38-39; Prosecutor v. Gucati and Haradinaj, Public Redacted Version of Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00506, 21 December 2021, para.78.

⁷⁶ Fourth Court of Appeals Decision, KSC-BC-2020-06/IA020/F00005, para.39; Third Court of Appeals Decision, KSC-BC-2020-06/IA016/F00005, paras 28-36.

⁷⁷ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.53 (and decisions cited therein).

⁷⁸ *Contra* Krasniqi Submissions, KSC-BC-2020-06/F01181, paras 1, 3, 37, 44.

insufficient conditions, and the transfer of the case to the Trial Panel and consequent acceleration towards trial makes the underlying risks higher than ever.

D. DETENTION REMAINS PROPORTIONAL

35. Pursuant to Rule 56(2), a panel must ensure that a person is not detained for an unreasonable period. Although Rule 56(2) refers to the reasonableness assessment only being applicable 'prior to the opening of the case', it has been interpreted to be applicable after the opening of a case as well.⁷⁹ The reasonableness of an accused's continued detention must be assessed on the facts of each case and according to its specific features.⁸⁰ The amount of time spent in detention 'is a factor that needs to be considered along with the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention stops being reasonable and the individual needs to be released.'⁸¹

36. Here, taking all factors into consideration, Krasniqi's detention continues to be reasonable.⁸² Krasniqi has been detained since 4 November 2020. He has been charged with ten counts of serious international crimes, and it is alleged that he played a significant role in their perpetration.⁸³ Should Krasniqi be convicted, he could be subject to a lengthy sentence.⁸⁴ Moreover, the proceedings against Krasniqi are complex,⁸⁵ as shown, *inter alia*, by the presence of three co-accused, a large factual base, complicated

⁷⁹ Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, KSC-CC-PR-2020-09/F00006, 22 May 2020, para.63.

⁸⁰ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.57; *see also* Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA017/F00011, 5 April 2022, para.65; Veseli Detention Decision, KSC-BC-2020-06/F01171, para.45.

⁸¹ First Court of Appeals Decision, KSC-BC-2020-06/IA002/F00005, para.69 (internal quotations omitted).

⁸² *Contra* Krasniqi Submissions, KSC-BC-2020-06/F01181, paras 39-42.

⁸³ Confirmed Indictment, KSC-BC-2020-06/F00999/A02, paras 11, 32, 39-40, 44, 49, 53, 55-57, 176, 177.

⁸⁴ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.59.

⁸⁵ Sixth Detention Decision, KSC-BC-2020-06/F01110, para.59.

witness protection issues, and extensive disclosure. Finally, as discussed above, the risks under Article 41(6)(b) cannot be adequately mitigated by measures short of detention.⁸⁶

37. In addition, there have been significant steps towards the start of trial.⁸⁷ First and foremost, the case has been transferred to the Trial Panel.⁸⁸ In addition, the SPO has filed a provisional list of its first 40 witnesses,⁸⁹ and the parties have filed their notices of agreed facts.⁹⁰ In this context, detention continues to be reasonable.

IV. CLASSIFICATION

38. This filing is submitted confidentially. A public redacted version will be filed.

V. CONCLUSION

39. For the foregoing reasons, the SPO respectfully submits that Krasniqi should remain detained.

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Alex Whiting

Acting Specialist Prosecutor

Monday, 16 January 2023

⁸⁶ See Sixth Detention Decision, KSC-BC-2020-06/F01110, para.59.

⁸⁷ See Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00562, 21 February 2022, paras 60-61 (noting 'significant developments' in the case as relevant).

⁸⁸ Decision Transmitting the Case File to Trial Panel II, KSC-BC-2020-06/F01166, 15 December 2022.

⁸⁹ Prosecution Submission of Provisional List of First 40 Witnesses to be Called at Trial, KSC-BC-2020-06/F01117, 18 November 2022.

⁹⁰ Prosecution Submission on Agreed Facts, KSC-BC-2020-06/F01114, 18 November 2022; Joint Defence Notice Related to Agreement on Facts Pursuant to Rule 95(3), KSC-BC-2020-06/F01116, 18 November 2022.

At The Hague, the Netherlands