

In: KSC-BC-2018-01
Specialist Prosecutor *v.* Isni Kilaj

Before: Single Judge Panel
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Duty Counsel for Isni Kilaj

Date: 15 March 2024

Language: English

Classification: Confidential

**Kilaj request for reclassification of two filings,
and for lesser redacted version of one decision**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Defence for Mr Isni Kilaj hereby requests that the Single Judge direct (i) that filings F00549¹ and F00550² be reclassified as public, pursuant to Rule 82(5) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber³ (“Rules”); and (ii) that a lesser redacted version of decision F00611⁴ be filed.
2. The instant request is classified as confidential pursuant to Rule 82(4), but the Defence would have no objection to its reclassification as public in the event the Single Judge grants the relief requested.

II. SUBMISSIONS

(a) Filings F00549 and F00550

3. It will be recalled that filing F00549 was the Prosecution’s response to a Defence request for a status conference.⁵ The Request was predicated on the Defence’s belief and understanding that no indictment had yet been submitted to the Single Judge for confirmation. In the Response, the SPO stated that an indictment had been submitted for confirmation on 15 December 2023, thereby rendering the Request moot. Filing F00550 was the Defence’s withdrawal of the Request in light of that detail in the Response.
4. The Defence acknowledges that Rule 86(2) provides that the SPO shall file any indictment with “the Pre-Trial Judge” confidentially and *ex parte* for a

¹ Prosecution response to Defence request F00548, KSC-BC-2018-01/F00549, 15 January 2024, confidential (“Response”).

² Kilaj Withdrawal of Request for Status Conference, KSC-BC-2018-01/F00550, 16 January 2024, confidential (“Withdrawal”).

³ Unless otherwise indicated, all references to “Rule(s)” are to the Rules.

⁴ Confidential Redacted Version of Decision on Request on Variation of Time Limits concerning Retention of Evidence, KSC-BC-2018-01/F00611, 12 March 2024, confidential (“Decision”).

⁵ Kilaj Request for Status Conference, KSC-BC-2018-01/F00548, 11 January 2024, public (“Request”).

confirmation decision pursuant to Article 39(2) of the Law.⁶ The purpose of this request is not to argue that the contents of the draft indictment should, at this stage, be made public or even disclosed to the defence. It is submitted, however, that there is no reasonable justification for the mere fact an indictment has been sent for confirmation to remain confidential.

5. The publicity of criminal proceedings is an important principle, reflected in Article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the European Convention on Human Rights, and Article 21(2) of the Law. Article 19(2) of the Law guarantees that the Rules “shall reflect the highest standards of international human rights law including the ECHR and ICCPR”. Both the Single Judge and Court of Appeals Chamber have recalled the importance of filings being public unless there are exceptional reasons for keeping them confidential.⁷
6. There is a public interest in the questions of whether an indictment has been submitted for confirmation or not, and when any confirmation decision might be delivered.⁸ Closer to home for the family of Mr Kilaj, they should be allowed to know that the SPO has progressed its investigations and that a draft indictment has been prepared and placed before the Single Judge. At present, Counsel is unable to even mention these facts to Mr Kilaj’s wife and children.

⁶ 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.

⁷ See eg. Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024 (confidential), para. 71 (public redacted version notified on 18 January 2024); Decision on Isni Kilaj’s Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00006, 11 January 2024 (confidential), para. 9 (public redacted version also notified on 11 January 2024); Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00603, 5 March 2024 (confidential), para. 57 (public redacted version also notified on 5 March 2024).

⁸ See eg. recent broadcasts by the Kosovan media outlet *Radio Televizioni Dukagjini*: https://youtu.be/jCEzuv9I138?si=q_ZvWO8KNgnmI37A, <https://youtu.be/ufgxNKidA8A?si=p55qkHTK2APtHkzg>

7. Nothing in the Response or the Withdrawal references anything other than the simple fact an indictment has been submitted for confirmation. No issues of, for example, potential prejudice to any ongoing investigations, or to the security of witnesses, arise. Further, both Parties have indicated their lack of objection to their respective filings being reclassified as public.⁹ In sum, it is submitted that maintaining the confidentiality of these two filings is unnecessary and disproportionate.

(b) Decision F00611

8. Decision F00611 is a decision on the SPO's request for a variation of time limits concerning retention of seized evidence.¹⁰ To date the Defence has received a lightly redacted confidential version of the Decision. However, one redaction in particular, found at paragraph 20, masks what is evidently a key, and possibly the only, factor that the Single Judge took into account in holding that – contrary to the Defence's submissions – the Request for Retention of Evidence "was filed in a timely manner."
9. The Defence needs to be able to understand the full basis for the Single Judge's finding, including the aforementioned key factor, in order to properly assess the appropriateness of a request for certification to file an interlocutory appeal under Rule 77. The redaction that has been applied at paragraph 20 renders any proper assessment impossible. That impossibility results in real prejudice to the Defence.¹¹

⁹ Response, footnote 2; Withdrawal, para. 2.

¹⁰ Prosecution Request for Retention of Evidence (F00484), KSC-BC-2018-01/F00566, 2 February 2024 (confidential) ("Request for Retention of Evidence").

¹¹ For cases addressing the prejudicial impact of redacted information on the rights of an accused person and the fairness of a trial, see eg. *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, [Decision on Modalities of Disclosure](#), 22 May 2015, para. 11; *Prosecutor v. Yekatom & Ngaiisona*, ICC-01/14-01/18, [Decision on the Prosecution's Urgent Request for Redactions to the Warrant of Arrest for Alfred Yekatom](#), 8 February 2021, para. 5.

10. The Defence has *prima facie* a solid foundation for wishing to seek certification to appeal. As noted correctly by the Single Judge, it had argued that the Request for Retention of Evidence

should have been filed no later than Monday, 1 January 2024, in order to allow for the matter to be fully litigated and for the Single Judge make a reasoned ruling.¹²

The Single Judge also recalled that Rule 76 provides that applications for extension of time shall be filed sufficiently in advance to enable the Panel to rule on the application before the expiry of the relevant time limit.

11. Notwithstanding the Single Judge's finding that the Request for Retention of Evidence was filed one working day before the expiry of the time limit, and therefore, it is submitted, in no way sufficiently in advance to enable the Single Judge to rule on the application before the expiry of that time limit, he found that the Request for Retention of Evidence was filed in a timely manner. The ruling is difficult to understand on its face, although as mentioned above, there was a crucial factor that the Single Judge took into account in arriving at his decision. But that factor is hidden from the Defence.
12. It is submitted that fairness demands that the Single Judge direct a lesser redacted version of the Decision be made available to the Defence with the redaction at paragraph 20 removed. For the avoidance of doubt, it is not argued that this redaction should be removed in any future more heavily redacted public version of the Decision. The Defence's contention is that maintaining the redaction will have the inevitable and prejudicial effect of preventing it from exercising its right – and obligation to its client – to even consider the possibility of making a reasoned request for certification to appeal.

¹² Decision, para. 20 (sic.)

III. REMEDY

13. For the foregoing reasons, the Single Judge is respectfully requested to order:

- (i) the reclassification of filings F00549 and F00550 as public;
- (ii) that a lesser redacted version of decision F00611 be filed, with the redaction at paragraph 20 removed;
- (iii) that the seven-day time limit for a request for certification to appeal the Decision as provided for by Rule 77(1) not start until the delivery of a ruling on the instant request; and
- (iv) the reclassification of this request as public.

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Friday, 15 March 2024

Abidjan, Côte d'Ivoire