

**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:** 24 April 2024

**Language:** English

**Classification:** Public

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**Public Redacted Version of Kilaj Consolidated Response to  
(1) Prosecution Submissions on Review of Detention, and  
(2) Prosecution Notice**

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Joe Holmes

## I. INTRODUCTION

1. The Defence for Mr Isni Kilaj (“Defence”, “Suspect”) hereby responds to the Prosecution’s submissions on review of detention<sup>1</sup> pursuant to Article 41(6) and (10) of the Law,<sup>2</sup> Rule 57 of the Rules,<sup>3</sup> and the Single Judge’s order.<sup>4</sup> Concurrently, the Defence responds to the Prosecution notice of its intention to file an amended indictment, filed on 19 April 2024.<sup>5</sup>
2. The procedural history is set out in paragraphs 2-7 of the SPO Submissions, and is incorporated by reference.

## II. REQUEST FOR EXTENSION OF TIME

3. Pursuant to the Single Judge’s direction,<sup>6</sup> the Defence incorporates herein its request for a short extension of time made under Rule 9(5)(a), initially emailed to the Single Judge via the Court Management Unit on 22 April 2024.<sup>7</sup> The Defence wished to include submissions in its response to the SPO Submissions on important new information contained in the Prosecution Notice. This new information required a substantial reworking of the submissions that had already been prepared on Mr Kilaj’s behalf. It also required the input of Mr Kilaj himself in conference. Unfortunately, and inevitably, given the

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<sup>1</sup> Prosecution submissions on review of detention, KSC-BC-2018-01/F00633, 15 April 2024, confidential (“SPO Submissions”). A public redacted version was notified on 17 April 2024.

<sup>2</sup> 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.

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chamber (“Rules”). Unless otherwise indicated, all references to “Rule(s)” are to the Rules.

<sup>4</sup> Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00603, 5 March 2024, confidential (“Third Detention Decision”), para. 58(e). A public redacted version was notified on 11 March 2024.

<sup>5</sup> Prosecution notice, KSC-BC-2018-01/F00636, 19 April 2024, confidential (“Prosecution Notice”).

<sup>6</sup> Email from Court officer, 22 April 2024, 16h08.

<sup>7</sup> Email from Counsel to Court officer, 22 April 2024, 12h00.

Prosecution Notice was circulated at 16:12 last Friday, no legal visit could take place on the date of the filing of the Prosecution Notice, nor on the date the Defence's response was originally due. In the circumstances, a short variation of the time limit to 23:59 on Wednesday, 24 April was – and is – requested. It is submitted that such an extension causes no prejudice to the SPO.

### III. SUBMISSIONS

*(a) Insufficient grounded suspicion that a crime has been committed*

4. The SPO repeats its previous submissions that (i) there is a grounded suspicion that Mr Kilaj has committed a crime within the jurisdiction of the KSC, and (ii) there are articulable grounds to believe that there is a risk of flight, or a risk that Mr Kilaj will obstruct the proceedings, or that he will commit (further) offences. The SPO also argues that no conditions could adequately mitigate the alleged risks of Mr Kilaj obstructing proceedings or committing “further” crimes.<sup>8</sup>
  
5. Firstly, and once again, the Defence does not concede the reasonableness or correctness of the SPO's Submissions. Notwithstanding the Single Judge's earlier findings that a grounded suspicion that Mr Kilaj has committed crimes within the Specialist Chamber's jurisdiction has been established,<sup>9</sup> taking the Prosecution's case at its highest and proceeding on the basis that, [REDACTED], no evidence has been adduced to support allegations that the Suspect ever *in fact* revealed, or attempted to reveal, secret information in a

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<sup>8</sup> SPO Submissions, paras 22-29.

<sup>9</sup> See eg Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023 (“Initial Detention Decision”), para. 13; Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023 (“Initial Detention Reasons”), paras 22-32; Third Detention Decision, paras 21-24.

manner proscribed by Article 392 of the Kosovo Criminal Code of 2019. Nor is there any evidence that the Suspect ever participated in a group of persons which by common action *in fact* obstructed or attempted to obstruct an official person in performing official duties in a manner proscribed by Article 401(2) of the Kosovo Criminal Code of 2019. Indeed, there is no evidence that Mr Kilaj has committed *any* Article 15(2) offence.

6. The Single Judge has reminded himself that all that needs to be established for the test under Article 41(6)(a) to be satisfied is that Mr Kilaj “may have committed Article 15(2) offences”.<sup>10</sup>
  
7. The Defence highlights that the SPO has disclosed no evidence to the Defence in the course of the nearly six months since Mr Kilaj’s arrest demonstrating anything more – always taking the Prosecution’s case at its highest – than that:
  - (i) [REDACTED];<sup>11</sup>
  - (ii) on 2 November, torn-up materials were seized by the SPO from rubbish in Mr Kilaj’s residence that indicate that they include parts of [REDACTED];<sup>12</sup>
  - (iii) also on 2 November, handwritten notes [REDACTED], were seized by the SPO from Mr Kilaj’s residence;<sup>13</sup>
  - (iv) more recently, annexed to the SPO Submissions, a (heavily redacted) [REDACTED] has been served on the Defence indicating that [REDACTED].<sup>14</sup>

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<sup>10</sup> Third Detention Decision, para. 20.

<sup>11</sup> Prosecution submissions on review of detention, KSC-BC-2018-01/F00538, 15 December 2023, confidential, paras 12-13. A public redacted version was notified on 11 January 2024.

<sup>12</sup> *Ibid.* para. 14.

<sup>13</sup> Prosecution request for continued detention of Isni KILAJ, KSC-BC-2018-01/F00496, 3 November 2023, confidential, para. 8. A public redacted version was notified on 8 November 2023.

<sup>14</sup> SPO Submissions, para. 14, and Annex 2 to SPO Submissions.

8. None of this evidence amounts to proof that Mr Kilaj has committed *any* Article 15(2) offence.
9. [REDACTED] does not amount to an offence under Article 15(2). Even [REDACTED] – while undeniably enough to give rise to suspicion – does not amount to an offence under Article 15(2). The Defence has been furnished with no evidence that [REDACTED] has ever, *in fact*, [REDACTED].
10. Even if there is evidence that Mr Kilaj was in possession of [REDACTED] material that he was not entitled to have, and that *arguendo* some of this material was [REDACTED], this is insufficient to indicate that any Article 15(2) offence has *in fact* been committed. [REDACTED] does not, on any fair and proper analysis, significantly strengthen the SPO's position that a grounded suspicion exists. At best, it corroborates [REDACTED] and the inference already drawn by the SPO that parts of [REDACTED]. In short, [REDACTED] does not take the matter much further.

*(b) The SPO's abusive use of [REDACTED]*

11. In any event, the use to which [REDACTED] has been put by the Prosecution in the SPO Submissions is deeply troubling. It is cynical, self-serving and close to duplicitous for the SPO to serve a document on the Defence that purports to be supportive of its case, as an Annex to its submission that Mr Kilaj should remain in detention, and then say that Mr Kilaj knowledge of that new evidence increases the risk of flight,<sup>15</sup> and increases the factors that underpin the purported risk of Mr Kilaj committing (further) offences. It is one thing for

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<sup>15</sup> SPO Submissions, para. 16.

the SPO to serve new evidence for the purpose of seeking to persuade the Single Judge that the evidence supporting the argument that a grounded suspicion exists has become stronger. It is another thing for the SPO to serve that evidence on the Defence and then abusively exploit the fact of that service to argue that the Suspect now has a greater incentive to, for example, flee the jurisdiction. The SPO's abusive tactics merit a reprimand.

12. Moreover, the SPO overstates the impact of [REDACTED] in arguing that it potentially exposes Mr Kilaj to additional charges pursuant to Article 15(2) for untruthful statements during his SPO interview.<sup>16</sup> This submission is unfounded. The only Articles of the Kosovo Criminal Code that fall under Article 15(2) of the Law and that relate to the making of false statements are Articles 384 and 385.
13. Article 384 relates to perjury in judicial or criminal proceedings. Article 385 relates to the giving of a false or incomplete statement or testimony to a prosecutor or the police by a co-operative witness. It does not criminalise the giving of a false statement by a criminal *suspect* during an interview under caution. Mr Kilaj was never a witness, co-operative or otherwise. He was always a suspect, and his SPO interview was accordingly an interview under caution.

*(c) The mitigating effect of the "proposed cash bail"*

14. The SPO persist in making two unfounded and speculative points at paragraph 25 of its submissions. First, the Prosecution argues again that the "proposed cash bail" would not amount to a significant disincentive for Mr

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<sup>16</sup> SPO Submissions, para. 16.

Kilaj to obstruct proceedings since violations of any conditions of provisional release would be difficult to detect. The SPO's logic is as flawed in these most recent submissions as they were in its submissions of 12 February 2024.<sup>17</sup> The point continues to ignore the reality that there is always a risk that an attempt to obstruct proceedings by [REDACTED] will be reported [REDACTED] to the Prosecution. Assuming, *arguendo*, that Mr Kilaj had any interest in [REDACTED], he could not know whether or not [REDACTED] would immediately report such contact. It is precisely because Mr Kilaj would run the risk of losing €30,000 in these circumstances that he would be disincentivised from taking the risk in the first place.

15. Second, the SPO repeats its previous argument that "it is likely that any cash bail amount could be covered by associates whose interests are closely aligned in this instance".<sup>18</sup> This submission remains nothing more than unevidenced and speculative innuendo. The SPO has pointed to no evidence that Mr Kilaj, personally, has associates whose interests are so closely aligned with his. The SPO has still failed to adduce any evidence that Mr Kilaj has associates who are able, or willing, to forfeit €30,000 in the event he were to violate conditions of provisional release. And there is still no evidence that Mr Kilaj would not feel sufficiently indebted to anyone who lost €30,000 on account of his actions so as to act to disincentivise him from breaching his release conditions.
16. As previously argued by the Defence, this argument is unworthy of an officer of the court. It demonstrates the reckless, prejudicial and discriminatory hostility of the Prosecution against Mr Kilaj as a former member of the KLA. The Prosecution continues to exercise no degree of caution by suggesting that

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<sup>17</sup> Prosecution Submissions on Review of Detention, KSC-BC-2018-01/F00575, 12 February 2024, confidential, para. 22.

<sup>18</sup> SPO Submissions, para. 25.

it is *possible* Mr Kilaj's bail might be covered by a third party. It turns the presumption of innocence on its head. The Single Judge can safely disregard the argument in its entirety, as he did in the Third Detention Decision.<sup>19</sup>

(d) *The Prosecution Notice*

17. The Prosecution has given notice of its intention to file an amended indictment. This is a highly concerning development. Even if Rule 90(1)(a) allows the SPO to amend the indictment before confirmation, the Single Judge is respectfully invited to confirm that a confirmation decision will be delivered by 15 June 2024 at the latest, that is, no later than six months after the filing of the SPO's previously submitted and now abandoned indictment, pursuant to Rule 85(5). The SPO cannot be permitted to believe that it can submit, withdraw, and then resubmit amended indictments *ad infinitum* and expect the Rule 85(5) clock to be reset to zero on each occasion. This would render his detention arbitrary.
18. It has not gone unnoticed that the Prosecution has refrained from indicating when any amended indictment will be submitted for confirmation. It is reasonable to infer that this failure to indicate was a deliberate choice, and that this choice was made because the Prosecution does not know when it will be in a position to submit its amended indictment.
19. This is an untenable position. Mr Kilaj has already been in detention for nearly six months. He has seen no indictment. He does not know with any particularity what he is charged with. And now it appears that there will be no decision on confirmation of the amended indictment any time soon. Mr

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<sup>19</sup> see para. 44.



Kilaj's position thus stands in stark contrast to that in (i) the *Gucati & Haradinaj* case, in which the Single Judge took 42 days to decide on the confirmation of the indictment (between 30 October 2020 and 11 December 2020);<sup>20</sup> (ii) the *Januzi & Bahtjari* case, in which the Single Judge took 21 days to decide on the confirmation of the indictment (between 11 September 2023 and 2 October 2023);<sup>21</sup> and (iii) the *Shala* case, in which the Single Judge took 14 days to decide on confirmation of the indictment (between 20 November 2023 and 4 December 2023).<sup>22</sup>

20. Nearly two months have passed since the Third Detention Decision. Since that decision, instead of matters progressing, they have taken several steps backward. Whereas the Single Judge may have been able to remark on 5 March 2024 that "the Defence allegation of delays in the confirmation process are premature at this stage"<sup>23</sup> and that "progress in the investigation have been made and an Indictment has now been filed against him", this no longer holds true. As, with some understatement, the SPO notes in the Prosecution Notice, "this development impacts the timeline of proceedings."<sup>24</sup> The Defence agrees. It is submitted that complaints of delay are now no longer premature. At this stage, they are now timely and well-founded. Consequently, the Single Judge must re-evaluate the question of proportionality and reasonableness, notwithstanding his prior findings about grounded suspicion and modalities of conditional bail.

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<sup>20</sup> *Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020, para. 1.

<sup>21</sup> *Prosecutor v. Sabit Januzi and Ismet Bahtjari*, Corrected Version of the Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2023-10/F00008/RED/COR, 2 October 2023, para. 1.

<sup>22</sup> *Prosecutor v. Sabit Januzi and Ismet Bahtjari*, Corrected Version of the Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2023-10/F00008/RED/COR, 2 October 2023, para. 1.

<sup>23</sup> Third Detention Decision, para. 53.

<sup>24</sup> Prosecution Notice, para. 2.

21. As more time passes and the prospect of a decision on the confirmation of the indictment recedes, Mr Kilaj's continued detention becomes less proportionate. With the passage of nearly six months in detention with no indictment in sight, it is now no longer proportionate or reasonable for Mr Kilaj to remain locked up. It is particularly disproportionate and unreasonable for him to remain in detention on account of decisions made by the SPO that are entirely beyond his control.

*(e) The need for a status conference*

22. In all the circumstances, the Defence now respectfully requests the scheduling of a status conference as soon as practicable, the purpose of which will be for the Prosecution to update the Single Judge and the Defence on the progress of its investigations into Mr Kilaj's alleged conduct to date, and the date by which any indictment might be filed.

23. It is submitted that a status conference will be useful to focus minds within the SPO. The Prosecution must know when an amended indictment will be ready for submission, and should be encouraged to share that information with the Single Judge and the Defence. Absent such information, the Defence would respectfully urge the Single Judge to give the SPO a strict deadline by which to file any amended indictment.

24. Moreover, it is important for the Single Judge to know when he is likely to receive an amended indictment for his consideration, since he will be leaving the KSC and commencing full-time service at the International Criminal Court

in mid-August 2024.<sup>25</sup> If there is any risk that the Single Judge will not have sufficient time to consider any amended indictment and supporting evidence and prepare a decision on the confirmation of the indictment before mid-August 2024, this must be ventilated now. The substitution of the current Single Judge with a successor Single Judge with no prior knowledge of Mr Kilaj's case, tasked to deliver a decision on the confirmation of the indictment sometime after August 2024, risks Mr Kilaj spending even longer in detention. Clarity is needed as soon as possible.

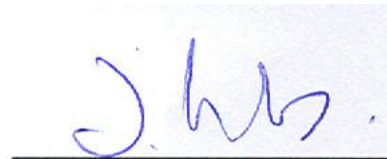
Respectfully submitted.

**Word count: 2,952**



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<sup>25</sup> ICC-01/14-185, Presidency, Decision assigning judges to divisions and recomposing Chambers, 12 March 2024, page 9.