



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

**In:** KSC-BC-2018-01  
**Before:** Single Judge  
Judge Marjorie Masselot

**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Prosecutor's Office  
**Date:** 4 September 2024  
**Language:** English  
**Classification:** Public

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**Public redacted version of 'Prosecution response to Kilaj application for temporary variation of conditions for release'**

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## I. INTRODUCTION

1. KILAJ's Application<sup>1</sup> for a holiday to Albania should be denied because: (i) he fails to show a change in circumstances justifying a variation of his release conditions; and (ii) the risks presented by his unmonitored travel to a third state with his passport cannot be sufficiently mitigated and would effectively nullify the strict conditions already imposed by this Court.

## II. SUBMISSIONS

### A. THE APPLICATION LACKS A PROPER BASIS

2. As a threshold matter, KILAJ fails to present any change in circumstances since the decision granting his provisional release ('Release Decision').<sup>2</sup> To the contrary, the factors that informed the release conditions—such as the continued existence of a risk that KILAJ may flee and a risk that he may obstruct the progress of criminal proceedings and commit further offences—remain unchanged or, with regard to the risk of flight, have increased.

3. While the Kosovo Specialist Chambers ('KSC')'s legal framework does not explicitly regulate applications for variation of conditions of release,<sup>3</sup> the ICTY Appeals Chamber has noted that such applications require an accused to establish humanitarian grounds or present new evidence to show that circumstances have changed.<sup>4</sup> In the context of decisions on continued detention, a change in

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<sup>1</sup> Kilaj Application for Temporary Variation of Conditions for Release, KSC-BC-2018-01/F00743, 23 August 2024, Confidential ('Application').

<sup>2</sup> Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00658, 3 May 2024, Confidential ('Release Decision'), para.51.

<sup>3</sup> See similarly *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, para.51.

<sup>4</sup> ICTY, *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Modified Provisional Release, Case no.IT-04-84-AR65.1, 10 March 2006, para.24. See also ICTY, *Prosecutor v. Prlić et al.*, Decision to Grant Accused Slobodan Prljak's Supplemental Application for Variation of Conditions of Provisional Release, Case no.IT-04-74-PT, 14 October 2005; ICTY, *Prosecutor v. Prlić et al.*, Decision on Slobodan Prljak's Urgent Application for Variation of Conditions of Provisional Release, Case No. IT-04-74-PT,

circumstances means a change in some or all of the facts underlying the previous detention decision, or a new fact or facts satisfying a panel that a modification of its previous ruling is necessary.<sup>5</sup>

4. KILAJ's claim that he has complied with the conditions to date is not a change in circumstances, let alone one sufficient to support his Application.<sup>6</sup> Compliance with release conditions is the minimum expected behaviour and does not—in and of itself—justify a variation of those conditions that were imposed to ensure continued compliance and prevent flight.<sup>7</sup> Similarly, contrary to KILAJ's submission,<sup>8</sup> the alleged stress resulting from his involvement in the present proceedings does not give rise to a compelling humanitarian ground warranting variation of release conditions.

5. KILAJ's failure to show a change in circumstances in support of his request to modify his release conditions is alone sufficient to deny the Application.

B. KILAJ'S PROPOSES CONDITIONS OF RELEASE THAT THE KSC WOULD BE INCAPABLE OF MONITORING OR ENFORCING.

6. The proposed modifications to KILAJ's release conditions are inadequate to satisfy Rules<sup>9</sup> 56(2) and (5).

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3 August 2005; ICTR, *Prosecutor v. Nshogoza*, *Decision on Defence Motion for Provisional Release*, Case No. ICTR-07-91-PT, 17 December 2008.

<sup>5</sup> See for example, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", ICC-01/05-01/08-1019 OA4, 19 November 2010, paras 51-52.

<sup>6</sup> See Application, KSC-BC-2018-01/F00743, paras 11-12, 17.

<sup>7</sup> See for example, ICC, *Prosecutor v. Laurent Gbagbo*, Decision on review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, ICC-02/11-01/11-29-291, 12 November 2012, paras 41-43 (the reaffirmation of an accused's willingness to abide by the conditions of provisional release is not a changed circumstances).

<sup>8</sup> See Application, KSC-BC-2018-01/F00743, para.13.

<sup>9</sup> 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.

7. First, contrary to the Defence's submissions,<sup>10</sup> the Single Judge has continuously held that KILAJ presents a flight risk, as well as a risk of obstruction and the commission of further offences.<sup>11</sup> Indeed, it was the attempt to mitigate these risks that led the Single Judge to impose the 'strict requirements' KILAJ now seeks to modify.<sup>12</sup>

8. The previously-found risks have increased since the Release Decision. Since then, KILAJ has learned that the SPO has submitted an amended indictment that is currently pending confirmation and has gained access to KILAJ's seized [REDACTED].<sup>13</sup> KILAJ now has an increased incentive to evade prosecution.<sup>14</sup>

9. The risks posed by granting the Application are particularly acute with regard to the risk of flight. Although – on paper – KILAJ would be required to travel *directly* to and from [REDACTED] and report to the Kosovo Police by telephone, KILAJ proposes no modalities for ensuring his compliance with these conditions, other than his personal undertaking. Conditions of detention can only effectively mitigate the risks associated with provisional release to the extent that they can be monitored and enforced. For this reason, the Law and the Rules require the consent of a third state if an accused is provisionally released outside of the territory of Kosovo,<sup>15</sup> even temporarily on compassionate grounds.<sup>16</sup> Third state consent is not a mere formality,

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<sup>10</sup> See Application, KSC-BC-2018-01/F00743, para.9.

<sup>11</sup> See Release Decision, KSC-BC-2018-01/F00658, paras 41, 65.

<sup>12</sup> Release Decision, KSC-BC-2018-01/F00658, para.65.

<sup>13</sup> See Prosecution request for retention of evidence (F00668), KSC-BC-2018-01/F00726, 18 July 2024, Confidential; Prosecution Notice, KSC-BC-2018-01/F00725, 18 July 2024.

<sup>14</sup> The SPO notes that, KILAJ submits that if he wished to flee to Albania, he could do so at any time. See Application, KSC-BC-2018-01/F00743, para.17.

<sup>15</sup> Article 41(12) of 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; Rule 56(4).

<sup>16</sup> *Specialist Prosecutor v. Pjetër Shala*, Public Redacted Version of Decision on the "Defence Urgent Request for Interim Release of Mr Shala on Humanitarian Grounds", KSC-BC-2020-04/F00614/RED, 17 August 2023, para.14; see also ICTY, *Prosecutor v. Vojislav Šešelj*, Decision on Defence Motion for Provisional Release, Case No.IT-03-67-PT, 23 July 2004; ICTR, *Prosecutor v. Ndindiliyimana et al.*, Decision on Augustin Ndindiliyimana's Emergency Motion for Temporary Provisional Release, Case No.ICTR-2000-56-T, 11 November 2023; ICC, *Prosecutor v. Alfred Yekatom and Patrice Edouard Ngāissona*, Decision

but is designed to ensure that the state is aware of that individual's presence and agrees to uphold and enforce the conditions of the court's release. Absent third state consent, the accused is released into an enforcement-vacuum where the conditions of detention, designed to mitigate risk, are suspended.<sup>17</sup> The third state, not being a party to any release conditions, would not be bound to enforce them, creating a potential safe haven for the accused.

10. The risk is particularly high in cases – such as here— where the third state has not been consulted or agreed to cooperate with the court.<sup>18</sup> Should KILAJ decide to flee, the KSC would have virtually no recourse. Once in Albania, KILAJ would be outside the immediate control of the KSC and Kosovo authorities, increasing the complexity of any effort to ensure his return and presence for proceedings if he were to abscond.

11. [REDACTED].<sup>19</sup> [REDACTED].

12. Further, the proposed return of KILAJ's passport, even temporarily, further elevates the flight risk. With his passport, and absent any monitoring, KILAJ could easily travel undetected to a country outside Albania, including to a country that would make any potential extradition request even more difficult.

13. KILAJ's personal assurances are insufficient to counterbalance the increased risks.

14. Finally, KILAJ's already-found risk of obstruction and commission of further offences is also exacerbated by the proposed unmonitored travel outside of Kosovo.

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on Ngaissona Defence's Requets for Temporary Transfer and Cancellation of Hearings on 19 and 20 February 2024, 23 February 2024

<sup>17</sup> ICC, *Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, Public redaction version of 'Decision on the "Defence Request for Interim Measures"', ICC-01/14-01/22-195-Red, 4 May 2023, paras 5,9.

<sup>18</sup> See for example, ICTY, *Prosecutor v. Vojislav Šešelj*, Decision on Defence Motion for Provisional Release, Case No.IT-03-67-PT, 23 July 2004, para.7.

<sup>19</sup> [REDACTED].

Any detection of or investigation into the commission of further offences, interference, or other violations committed while in Albania would be exceptionally difficult. Moreover, the telephonic check-in proposed by KILAJ is inherently unreliable, as it would not provide real-time or location-based verification of KILAJ's whereabouts. In contrast, the current release conditions include monitoring provisions intended to ensure KILAJ's presence in Kosovo and permit action by Kosovo law enforcement should he violate the terms of his release. Suspending these already-limited safeguards would create a significant gap in enforcement and undermine the purpose of the imposed conditions.

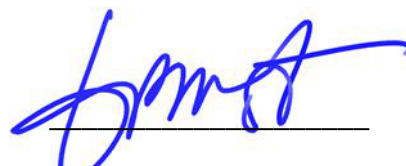
### III. CLASSIFICATION

15. This filing is filed confidential pursuant to Rule 82(4). A public redacted version will be filed.

### IV. CONCLUSION

16. For the foregoing reasons, the Application should be denied.

**Word count: 1,602**



**Kimberly P. West**

**Specialist Prosecutor**

Wednesday, 4 September 2024

At The Hague, the Netherlands