

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

**Before:** Single Judge Panel  
Judge Marjorie Masselot

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Isni Kilaj

**Date:** 6 September 2024

**Language:** English

**Classification:** Public

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**Public Redacted Version of "Reply to Prosecution Response to  
Kilaj Application for Temporary Variation of Conditions for Release"**

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## I. INTRODUCTION

1. Mr Kilaj hereby replies to the Prosecution's response<sup>1</sup> to his application for temporary variation of conditions for release.<sup>2</sup> This reply addresses incorrect submissions on the legal basis for an application for variation, on the Single's Judge's consistent position on the *managed* risk of flight, and on factors allegedly increasing the risk of flight. The contended requirement of Albania's consent for Mr Kilaj to be temporarily provisionally released to its territory is also addressed.

## II. SUBMISSIONS

2. The Prosecution asserts that the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") "require" an applicant for variation of conditions of release to establish humanitarian grounds or present evidence of a change of circumstances. This is wrong. In the *Haradinaj* decision cited at footnote 4 of the Response, the Appeals Chamber specifically stated that previous variation decisions

hold no precedential value, but it is worth noting that Trial Chambers *tend* to allow modification for humanitarian grounds and *tend* to refuse them where the accused presents no new evidence to show that circumstances have changed.<sup>3</sup>

3. The real point, ignored by the Prosecution, is that each case should be considered on its own merits. In any event, of course, jurisprudence from the ICTY is in no way binding on the Specialist Chambers.

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<sup>1</sup> Prosecution response to Kilaj application for temporary variation of conditions for release, KSC-BC-2018-01/F00753, 4 September 2024, confidential ("Response").

<sup>2</sup> Kilaj Application for Temporary Variation of Conditions for Release, KSC-BC-2018-01/F00743, 23 August 2024, confidential ("Application") (public redacted version notified on 24 August 2024).

<sup>3</sup> ICTY *Prosecutor v. Ramush Haradinaj et al., IT-04-84-AR65.1, Decision on Ramush Haradinaj Modified Provisional Release*, 10 March 2006, para. 24 (added italics), cited in Application, footnote 10.

4. The Application is not complicated. Mr Kilaj does not advance an argument that there has been a change of circumstance requiring a permanent variation to his release conditions. He and his wife would simply like to go for a short and much-needed holiday, something that he cannot do under the existing release conditions. Once he returns to Kosovo – if permitted by the Single Judge to travel – the existing release conditions will apply again, unchanged. Further, Mr Kilaj does not suggest that his compliance with the conditions to date amounts to a change of circumstance.<sup>4</sup> His reliance on the fact that he has scrupulously complied with all conditions of his release is to demonstrate that he can be trusted with a variation of those conditions for a short period of time. It is almost trite to say that compliant behaviour in the past is a very good indicator of compliant behaviour in the future.
5. The Prosecution also mischaracterises the Defence’s submission regarding the Single Judge’s consistent position relating to Mr Kilaj’s risk of flight. He always considered that conditions proposed by the Defence could adequately mitigate that risk.<sup>5</sup> The Single Judge was always unruffled by the *managed* risk of flight.
6. The Prosecution’s argument that the risk of flight has increased because it has submitted (yet another) indictment for confirmation, and now has access to his [REDACTED], is without merit.<sup>6</sup> Mr Kilaj was granted conditional release on 3 May 2024 knowing that the Prosecution had already filed indictments for confirmation on 15 December 2023<sup>7</sup> and on 11 March 2024,<sup>8</sup> and had indicated

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<sup>4</sup> *Contra* Response, para. 4.

<sup>5</sup> *Contra* Response, para. 7.

<sup>6</sup> *Contra* Response, para. 8.

<sup>7</sup> Prosecution Response to Defence Request F00548, KSC-BC-2018-01/F00549, 15 January 2024.

<sup>8</sup> Prosecution Supplemental Notice, KSC-BC-2018-01/F00654, 2 May 2024.

on 19 April 2024 that it would in due course file a new amended indictment.<sup>9</sup> Mr Kilaj is under no illusion that the Prosecution wishes to indict and try him. The mere fact the Prosecution has recently got round to filing yet another version of an indictment changes nothing.

7. Similarly, Mr Kilaj was granted bail in the knowledge that the Prosecution had assessed that two seized [REDACTED] “contain information relevant to the SPO’s ongoing investigations”.<sup>10</sup> The fact the Prosecution may have access to one more [REDACTED] – [REDACTED] which is not even said at this stage to contain any data relevant to the SPO’s investigation – in no way provides an increased incentive to Mr Kilaj to flee.
8. Given that Mr Kilaj: (i) is subject to no increased incentive to flee; (ii) still faces no confirmed charges; (iii) continues to benefit from the presumption of innocence; and (iv) has a proven history of complying with conditions of release, the Prosecution’s fears that he would now abscond in Albania, or indeed any other country, after seeking authorisation from the Single Judge to travel there, are devoid of foundation and are speculative at best. Mr Kilaj has no intention of absconding, as demonstrated by the very fact that he has made the Application. He is determined to comply fastidiously with the requirement to seek prior authorisation to leave Kosovo, and will of course respect the Single Judge’s decision, whether positive or negative. He has amply demonstrated that significant weight can be attached to his “personal undertaking”.

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<sup>9</sup> Prosecution Notice, KSC-BC-2018-01/F00636, 19 April 2024.

<sup>10</sup> Namely, [REDACTED], [REDACTED], *see* Prosecution request for retention of evidence (F00484), KSC-BC-2018-01/F00566, 2 February 2024, confidential (public redacted version notified on 27 May 2024).

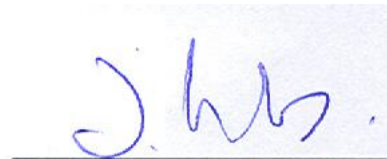
9. Finally, the Defence takes issue with the Prosecution's submission that obtaining the consent of Albania as a Third State<sup>11</sup> under Rule 56(4) is designed to ensure not simply that the State is aware of an Applicant's presence on its territory, but also that it "agrees to uphold and enforce the conditions of the court's release."<sup>12</sup> Notwithstanding, Mr Kilaj is taking steps to obtain Albania's consent for him to be provisionally and temporarily released to its territory.
10. The Single Judge is therefore respectfully asked to grant the Application to vary the conditions of release, such grant being conditional, if considered necessary, on Mr Kilaj receiving Albania's consent.

Respectfully submitted.

**Word count: 1003**



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Friday, 6 September 2024

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<sup>11</sup> *ie.* a "State or entity thereof, other than the Republic of Kosovo": Rule 2(1) of the Rules of Procedure and Evidence ("Rules").

<sup>12</sup> Response, para. 9.