

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

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Isni Kilaj

Date: 21 November 2024

Language: English

Classification: Public

Kilaj Request for Target Date for Confirmation Decision

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I. INTRODUCTION

1. The Defence for Isni Kilaj respectfully requests that the Pre-Trial Judge provide information about the most recent proposed indictment against him, and to set a target date for the issuance of that decision.

2. It has been more than a year since Mr Kilaj was arrested at a family home in Prishtinë by the Special Prosecutor's Office ("SPO"), brought before the Specialist Chambers ("SC") in The Hague, and publicly alleged to be responsible for serious criminal offences. At the time he was arrested, there was no indictment against him. At the time of his first appearance hearing, there was no indictment against him.

3. The SPO submitted a first iteration of a proposed indictment against Mr Kilaj on 15 December 2023. That indictment was never confirmed. A revised proposed indictment was filed three months later, on 11 March 2024. That revised indictment, too, was never confirmed. A third iteration of the proposed indictment was submitted over three months after that, on 28 June 2024. Nearly five months have passed since then.

4. Mr Kilaj's uncertainty about his and his family's future causes him great stress. He experiences anxiety about the prospect of criminal proceedings as a result of the SPO's unconfirmed allegations. Whereas these proceedings have inevitably created a public impression that he has stood accused of serious criminal offences for over a year, formally, he is not judicially accused of anything. He is, and remains, merely a suspect before the SC.

5. The six-month time limit for delivery of a confirmation decision under Rule 85(5) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules") is very close. The Defence respectfully seeks information about whether the Pre-Trial Judge expects to issue a decision before the expiry of that time limit.

II. PROCEDURAL HISTORY

6. On 2 November 2023, Mr Kilaj was arrested pursuant to an order by the SPO.¹ The next day, he was transferred to the SC Detention Facilities in The Hague,² and the SPO submitted a request for Mr Kilaj's continued detention.³

7. On 4 November 2023, Mr Kilaj had his first appearance hearing.⁴ On 6 November 2023, the former Single Judge ordered Mr Kilaj's continued detention,⁵ and issued reasons thereto on 9 November 2023.⁶

8. On 15 December 2023, the SPO submitted the first iteration of its indictment against Mr Kilaj for confirmation by the former Pre-Trial Judge.⁷

9. On 5 January 2024, and again on 5 March 2024, the Single Judge ordered Mr Kilaj's continued detention.⁸

10. On 11 March 2024, the SPO submitted a second iteration of its indictment – described as a revised indictment – against Mr Kilaj for confirmation.⁹

¹ Urgent Rule 52(1) Notification of Arrest of Isni Kilaj, KSC-BC-2018-01/F00489, 2 November 2023, public.

² Report on the Transfer of Isni Kilaj to the Detention Facilities, KSC-BC-2018-01/F00495, 3 November 2023, strictly confidential and *ex parte* (public redacted version filed on 8 November 2023).

³ Prosecution Request for Continued Detention of Isni Kilaj, KSC-BC-2018-01/F00496, 3 November 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte* (public redacted version filed on 7 November 2023).

⁴ Transcript, First Appearance, 4 November 2023.

⁵ Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023, public.

⁶ Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023, confidential (public redacted version issued on 13 November 2023).

⁷ Prosecution Response to Defence Request F00548, KSC-BC-2018-01/F00549, 15 January 2024, public. *See also*, Prosecution Supplemental Notice, KSC-BC-2018-01/F00654, 2 May 2024, confidential ("Supplemental Notice"), para. 4. The Defence notes that the Single Judge ordered the SPO to submit a public redacted version of the Supplemental Notice, *see* Decision on Request for Reclassification and Related Matters, KSC-BC-2018-01/F00696, 5 June 2024, public, para. 11. To the best of the Defence's understanding, the SPO has not yet done so.

⁸ Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024, confidential (public redacted version issued on 18 January 2024); Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00603, 5 March 2024, confidential (public redacted version issued on 11 March 2024).

⁹ Supplemental Notice, para. 3.

11. On 19 April 2024, the SPO filed a notice informing the Pre-Trial Judge of its intention to file what was described as an amended indictment.¹⁰ About two weeks later, on 2 May 2024, the SPO filed the Supplemental Notice informing the Pre-Trial Judge and the Defence that it had requested the suspension of the revised indictment of 11 March 2024 in light of its intention to submit an amended indictment by a specified date.

12. On 3 May 2024, after having considered the Parties' submissions¹¹ on his continued detention, the Single Judge ordered Mr Kilaj's release in Kosovo ("Release Decision").¹² On 15 May 2024, he was transferred to Kosovo and released from the custody of the SC.¹³

13. On 28 June 2024, the SPO filed the third version of its proposed indictment against Mr Kilaj for confirmation.¹⁴ In the absence of information to the contrary, the Defence understands that this third version remains the operative proposed indictment before the Pre-Trial Judge.

III. SUBMISSIONS

14. Rule 85(5) provides that a target date for a confirmation decision "*shall*" be set "no later than six (6) months from the filing of the indictment and all supporting material".

15. On 28 December 2024, the six-month window for the Pre-Trial Judge's consideration of the third iteration of the proposed indictment will expire. The critical point placing this request in its proper context is that over 11 months have passed

¹⁰ Prosecution Notice, KSC-BC-2018-01/F00636, 19 April 2024, public.

¹¹ Prosecution submissions on review of detention, KSC-BC-2018-01/F00633, 15 April 2024, confidential (public redacted version notified on 17 April 2024); Kilaj Consolidated Response to (1) Prosecution Submissions on Review of Detention, and (2) Prosecution Notice, KSC-BC-2018-01/F00644, 24 April 2024, confidential (public redacted version notified on 15 May 2024).

¹² Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00658, 3 May 2024, confidential (corrected and public redacted versions notified on 15 May 2024).

¹³ Notification of Isni Kilaj's Transfer to Kosovo, KSC-BC-2018-01/F00670, 15 May 2024, public.

¹⁴ Prosecution Notice, KSC-BC-2018-01/F00725, 18 July 2024, public.

since the first version of a proposed indictment was submitted to the former Pre-Trial Judge. The Defence makes it clear that it does not doubt the Pre-Trial Judge is working hard to prepare the confirmation decision. The problem is that no reasons for the delay have been shared with Mr Kilaj.

16. His position stands in contrast to those in the comparable contempt cases of (i) *Gucati & Haradinaj*, in which the Pre-Trial Judge took 42 days to decide on the confirmation of the indictment (between 30 October 2020 and 11 December 2020);¹⁵ (ii) *Januzi & Bahtjari*, in which the Pre-Trial Judge took 21 days to decide on the confirmation of the indictment (between 11 September 2023 and 2 October 2023);¹⁶ and (iii) *Haxhi Shala*, in which the Pre-Trial Judge took 14 days to decide on confirmation of the indictment (between 20 November 2023 and 4 December 2023).¹⁷

17. Even in far more complicated and more serious substantive war crimes cases, confirmation decisions have been delivered in less time. In the *Pjetër Shala* case, the Pre-Trial Judge took 119 days to issue a decision on confirmation of the indictment (between 14 February 2020 and 12 June 2020), and only 86 days to confirm the revised indictment in that case.¹⁸ Similarly, in the *Salih Mustafa* case, the Pre-Trial Judge took 119 days to issue a decision on confirmation of the indictment (also between 14

¹⁵ *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, 22 December 2020, para. 1 (original decision issued 11 December 2023).

¹⁶ *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, 12 October 2023, para. 1 (original decision issued 2 October 2023).

¹⁷ *Prosecutor v. Haxhi Shala*, Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2023-11/F00005/RED, 4 January 2024, para. 1 (original decision issued 4 December 2023).

¹⁸ *Prosecutor v. Pjetër Shala*, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala, KSC-BC-2020-04/F00007/RED, 6 May 2021, paras 1-3 (original decision issued 12 June 2020).

February 2020 and 12 June 2020), and only 84 days to confirm the second revised indictment.¹⁹

18. In *Hashim Thaçi et al.* a case that is several orders of magnitude more complex than Mr Kilaj's contempt matter, an initial indictment was submitted on 24 April 2020. A final revised indictment was submitted, on the request of the Pre-Trial Judge, on 24 July 2020. The confirmation decision was delivered 95 days later, on 26 October 2020.²⁰ A total of 186 days passed between the initial *Thaçi et al.* indictment of 24 April 2020 and the issuing of a confirmation decision. Nearly twice that time has elapsed since the SPO filed its initial proposed indictment against Mr Kilaj.

19. The fact that there has been a tsunami of well over 100 *ex parte* filings since the submission of the Supplemental Notice on 2 May 2024, a little over 200 days ago, has not gone unnoticed. Rule 86(4)(a) empowers the Pre-Trial Judge to "request or permit the Specialist Prosecutor to present additional material in support of any or all charges".

20. Notwithstanding the absence of any explicit limit on the number of revisions the SPO may submit, the overall timeline must be seen in the context of the general need to administer justice openly, publicly, fairly and expeditiously with full respect to the rights of (even) an unaccused suspect.

21. A literal interpretation of the Rules outside of that important context could enable the SPO to attempt to cure a fatally flawed and evidentially unsupported indictment *in perpetuum*. Whether or not that is what underlies the delays in this case, neither the Defence nor the public at large can know for certain. But in the absence of

¹⁹ *Prosecutor v. Salih Mustafa*, Public Redacted Version of Decision on the Confirmation of the Indictment Against Salih Mustafa, KSC-BC-2020-05/F00008/RED, 5 October 2020, paras 1-3 (original decision issued 12 June 2020).

²⁰ *Prosecutor v. Hashim Thaçi et al.*, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 30 November 2020, paras 1-13 (original decision issued 26 October 2020).

any communication at all concerning the progress of the confirmation process, this remains a reasonable inference to draw.

22. It is respectfully submitted that the Prosecution cannot revise its indictments without limit. It is not for the Pre-Trial Judge to do the Specialist Prosecutor's work for her, or to direct the Specialist Prosecutor how to do her work. If the SPO's evidence is insufficient to support a well-grounded suspicion against Mr Kilaj in respect of any or all of the charges in the operative proposed indictment, the consequences are clear: such charges should simply be dismissed in accordance with Article 39(2) of the Law and Rule 86(5).

23. Respecting the need for the process to take its course, the Defence has thus far refrained from seeking updates from the Pre-Trial Judge. However, it is submitted that in the all the circumstances it is now reasonable to request a public decision containing the following uncontroversial and non-sensitive information:

- (i) whether the third version of the SPO's proposed indictment of 28 June 2024 is the indictment currently under consideration; and, if so
- (ii) the target date for a confirmation decision, bearing in mind Rule 85(5).

24. Mr Kilaj still does not know with any particularity the crimes of which he is suspected. His not knowing when any confirmation decision will be delivered, or whether any charges will be confirmed, causes him, and his family, anxiety on a daily basis. Not knowing whether he will face trial at some point in the future is highly distressing.

25. Unlike most SC accused who know exactly what they are charged with within hours of their arrest, Mr Kilaj remains in a position of uncertainty about the prospect of criminal proceedings flowing from the SPO's allegations. Although the very worst effects of this delay and uncertainty have, to a certain extent, been mitigated by virtue of his being conditionally released in Kosovo since 15 May 2024, his liberty

nevertheless remains subject to restrictions. He cannot, for example, reside anywhere other than his home in Malishevë without leave, and cannot leave Kosovo.

26. In the spirit of both transparency and expeditiousness, it is submitted that Mr Kilaj has a right to information about the timeline of his case, and when a confirmation decision is likely to be delivered.

IV. CONCLUSION

27. It is submitted that the interests of justice, and ordinary requirements of fairness, demand that Mr Kilaj be provided with information about the current state of his case.

28. For the foregoing reasons, the Pre-Trial Judge is respectfully invited to:

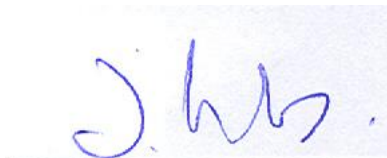
- (i) confirm whether the third version of the SPO's proposed indictment is the indictment under consideration; and, if so
- (ii) set the target date for a confirmation decision as soon as possible.

Respectfully submitted.

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