



In: **KSC-BC-2023-12/IA001**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 28 January 2025

Original language: English

Classification: **Public**

Decision on Isni Kilaj's Appeal Against Decision on Continued Detention

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed on 19 December 2024 by Mr Isni Kilaj (respectively, “Appeal” and “Kilaj” or the “Accused”),² against the Pre-Trial Judge’s Oral Decision on Continued Detention (“Impugned Decision”).³ The Specialist Prosecutor’s Office (“SPO”) responded on 2 January 2025 that the Appeal should be rejected.⁴ Kilaj replied on 7 January 2025.⁵

I. BACKGROUND

1. On 2 November 2023, Kilaj was arrested in Kosovo pursuant to an order issued by the SPO⁶ and transferred to the Detention Facilities of the Specialist Chambers (“Detention Facilities”) in The Hague, the Netherlands, on 3 November 2023.⁷

¹ IA001/F00002, Decision Assigning a Court of Appeals Panel, 23 December 2024 (confidential, reclassified as public on 22 January 2025).

² IA001/F00001/COR, Corrected Version of Kilaj Appeal Against Decision on Continued Detention, 31 December 2024 (confidential) (non-corrected version filed on 19 December 2024) (“Appeal”).

³ Transcript, 9 December 2024, pp. 120-124 (“Impugned Decision”).

⁴ IA001/F00003, Prosecution response to Kilaj appeal against decision on continued detention, 2 January 2025 (confidential) (“Response”).

⁵ IA001/F00004, Kilaj Reply to Prosecution Response to Appeal Against Decision on Continued Detention, 7 January 2025 (confidential) (“Reply”).

⁶ KSC-BC-2018-01, F00489, URGENT Rule 52(1) notification of arrest of Isni KILAJ, 2 November 2023 (strictly confidential and *ex parte*, reclassified as public on 9 November 2023); KSC-BC-2018-01, F00492/RED/A01/RED, Public Redacted Version of ANNEX 1 to Prosecution report on arrest of Isni KILAJ, 8 November 2023 (strictly confidential and *ex parte* version filed on 3 November 2023, reclassified as confidential on 3 November 2023).

⁷ KSC-BC-2018-01, F00495/RED, Public Redacted Version of “Report on the Transfer of Isni Kilaj to the Detention Facilities, with strictly confidential and *ex parte* Annexes 1-2” (F00495), 8 November 2023 (strictly confidential and *ex parte* version filed on 3 November 2023); KSC-BC-2018-01, F00493, Notification of Reception of Isni Kilaj in the Detention Facilities of the Specialist Chambers, 3 November 2023 (strictly confidential).

2. On 6 November 2023, the Single Judge ordered Kilaj's continued detention ("First Detention Decision").⁸ The Single Judge further reviewed and ordered the continuation of Kilaj's detention on 5 January 2024 ("Second Detention Decision")⁹ and on 5 March 2024.¹⁰ The First Detention Decision and the Second Detention Decision were both upheld by the Court of Appeals Panel ("First Appeal Decision on Detention"¹¹ and "Second Appeal Decision on Detention",¹² respectively).
3. On 15 December 2023, the SPO submitted for confirmation an indictment against several individuals including Kilaj.¹³
4. On 11 March 2024, pursuant to an order of the Pre-Trial Judge,¹⁴ the SPO submitted a revised indictment ("Revised Indictment").¹⁵
5. On 2 May 2024, the SPO requested, *inter alia*, the suspension of the Pre-Trial Judge's assessment of the Revised Indictment until the filing of additional supporting

⁸ KSC-BC-2018-01, F00499, Decision on Continued Detention, 6 November 2023 ("Decision on Continued Detention"). The Single Judge issued the reasons for that decision on 9 November 2023. See KSC-BC-2018-01, F00503/RED, Public Redacted Version of Reasons for Continued Detention, 13 November 2023 (confidential version filed on 9 November 2023) ("Reasons for Continued Detention"). The Appeals Panel will refer collectively to the Decision on Continued Detention and the Reasons for Continued Decision as "First Detention Decision".

⁹ KSC-BC-2018-01, F00547/RED, Public Redacted Version of Decision on Review of Detention of Isni Kilaj, 18 January 2024 (confidential version filed on 5 January 2024) ("Second Detention Decision").

¹⁰ KSC-BC-2018-01, F00603/RED, Public Redacted Version of Decision on Review of Detention of Isni Kilaj, 11 March 2024 (confidential version filed on 5 March 2024) ("Third Detention Decision").

¹¹ KSC-BC-2018-01, IA004/F00006/RED, Public Redacted Version of Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, 11 January 2024 (confidential version filed on 11 January 2024) ("First Appeal Decision on Detention").

¹² KSC-BC-2018-01, IA005/F00005/RED, Public Redacted Version of Decision on Isni Kilaj's Appeal Against Decision on Review of Detention, 26 February 2024 (confidential version filed on 26 February 2024) ("Second Appeal Decision on Detention").

¹³ F00002, Submission of Indictment for confirmation and related requests, 15 December 2023 (strictly confidential and *ex parte*).

¹⁴ F00004, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 22 February 2024 (strictly confidential and *ex parte*).

¹⁵ F00007, Submission of revised Indictment for confirmation, 11 March 2024 (strictly confidential and *ex parte*); F00007/A01, Indictment, 11 March 2024 (strictly confidential and *ex parte*).

material and the filing of an amended indictment (“SPO Request for Leave and Suspension”).¹⁶

6. On 3 May 2024, the Single Judge ordered Kilaj’s release in Kosovo, subject to strict conditions, having found his continued detention unreasonable, in light of the SPO Request for Leave and Suspension, and thus pending the submission of a further amended indictment against Kilaj (“Release Decision”).¹⁷ The Release Decision was upheld by the Appeals Panel on 13 May 2024,¹⁸ and Kilaj was transferred to Kosovo and released from the Specialist Chambers’ custody on 15 May 2024.¹⁹

7. On 20 June 2024, the Pre-Trial Judge rejected the SPO Request for Leave and Suspension.²⁰

8. On 28 June 2024, the SPO submitted for confirmation an amended indictment against Mr Hashim Thaçi (“Thaçi”), Mr Bashkim Smakaj (“Smakaj”), Kilaj, Mr Fadil Fazliu (“Fazliu”), and Mr Hajredin Kuçi (respectively “Kuçi” and the “Five

¹⁶ F00014, Prosecution submissions pursuant to Order F00011, 2 May 2024 (strictly confidential and *ex parte*). The Panel notes that on the same day, the SPO also formally informed the Single Judge of its request and intention to file an amended indictment. See KSC-BC-2018-01, F00654, Prosecution supplemental notice, 2 May 2024 (confidential). See also KSC-BC-2018-01, F00636, Prosecution notice, 19 April 2024 (confidential reclassified as public on 19 April 2024).

¹⁷ KSC-BC-2018-01, F00658/COR/RED, Public Redacted Version of Corrected Version of Decision on Review of Detention of Isni Kilaj, 15 May 2024 (confidential and non-corrected version filed on 3 May 2024, confidential and uncorrected version filed 15 May 2024), (“Release Decision”), paras 64-65, 70(a) and (c).

¹⁸ KSC-BC-2018-01, IA007/F00007/RED, Public Redacted Version of Decision on the Specialist Prosecutor’s Office’s Appeal Against Decision on Isni Kilaj’s Review of Detention, 15 May 2024 (confidential version filed on 13 May 2024) (“Appeal Decision on Release”).

¹⁹ KSC-BC-2018-01, IA007/F00008, Notification of Isni Kilaj’s Transfer to Kosovo, 15 May 2024 (confidential, reclassified as public on 7 August 2024).

²⁰ F00016, Decision on Prosecution Requests for Leave to Present Additional Material and for Suspension of Examination of the Indictment, 20 June 2024 (strictly confidential and *ex parte*).

Accused”).²¹ On 12 November 2024, pursuant to an order of the Pre-Trial Judge, the SPO submitted for confirmation a further amended Indictment.²²

9. On 29 November 2024, the Pre-Trial Judge issued the “Decision on the Confirmation of the Indictment”, confirming – in part – the charges against the Five Accused.²³ In particular, the Pre-Trial Judge confirmed the charges against Kilaj for attempting to obstruct, by common action of a group, official persons, including SPO prosecutors and investigators in performing official duties, punishable under Articles 17, 21, 33, 35 and 40(2) and (5) of the Criminal Code of the Republic of Kosovo, Code No.06/L-074 (2019) (“KCC”), and Articles 15(2) and 16(3) of the Law; and for contempt of court, punishable under Articles 21, 33, and 393 of the KCC, and Articles 15(2) and 16(3) of the Law.²⁴

10. On the same day, upon the SPO’s request,²⁵ the Pre-Trial Judge terminated Kilaj’s conditional release in Kosovo, issued an arrest warrant and ordered his transfer to the Detention Facilities (“Decision on Arrest Warrants”).²⁶

²¹ F00017, Submission of Amended Indictment for confirmation, 28 June 2024 (strictly confidential and *ex parte*); F00017/A01, Amended Indictment, 28 June 2024 (strictly confidential and *ex parte*).

²² F00028, Submission of Further Amended Indictment for confirmation, 12 November 2024 (strictly confidential and *ex parte*, reclassified as confidential on 13 January 2025); F00028/A01, Further Amended Indictment, 12 November 2024 (strictly confidential and *ex parte*, reclassified as confidential on 13 January 2025) (“Further Amended Indictment”).

²³ F00036, Decision on the Confirmation of the Indictment, 29 November 2024 (strictly confidential and *ex parte*, reclassified as confidential on 13 December 2024).

²⁴ Confirmation Decision, para. 313(d).

²⁵ F00023/RED, Public redacted version ‘Prosecution submissions pursuant to F00022 with strictly confidential and *ex parte* Annexes 1-5’, 13 December 2024 (strictly confidential and *ex parte* version filed on 17 October 2024). See also F00022, Order for Submissions, 8 October 2024 (strictly confidential and *ex parte*).

²⁶ F00037/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Related Matters, 19 December 2024 (strictly confidential and *ex parte* version filed on 29 November 2024, reclassified as confidential on 6 December 2024) (“Decision on Arrest Warrants”), para. 68; F00037/A03, Arrest Warrant for Isni Kilaj, 29 November 2024 (strictly confidential and *ex parte*).

11. On 2 December 2024, the SPO filed the indictment as confirmed (“Confirmed Indictment”).²⁷
12. On 5 December 2024, Kilaj was arrested in Kosovo and, on 6 December 2024, transferred to the Detention Facilities.²⁸
13. On 9 December 2024, Kilaj appeared before the Pre-Trial Judge who heard oral submissions by the Defence²⁹ and the SPO³⁰ on the question of detention (“Initial Appearance Hearing”). At the hearing, the Pre-Trial Judge rendered the Impugned Decision in which she ordered Kilaj to remain in detention.³¹
14. In the Appeal, Kilaj argues that the Pre-Trial Judge abused her discretion and therefore requests that the Court of Appeals Panel grant the Appeal, reverse the Impugned Decision and order his immediate release.³² The SPO responds that Kilaj fails to demonstrate any error in the Impugned Decision and that the Appeal should be dismissed.³³

²⁷ F00055, Submission of public redacted version of Confirmed Indictment, 6 December 2024; F00055/A01, Public redacted Confirmed Indictment, 6 December 2024 (“Confirmed Indictment”). See also F00040, Submission of Confirmed Indictment, 2 December 2024 (strictly confidential and *ex parte*, reclassified as strictly confidential on 3 December 2024); F00040/A01, Confirmed Indictment, 2 December 2024 (strictly confidential and *ex parte*, reclassified as strictly confidential on 3 December 2024).

²⁸ F00067/RED, Public Redacted Version of Report on the Arrest and Transfer of Isni Kilaj to the Detention Facilities, 10 January 2025 (strictly confidential and *ex parte* version filed on 8 December 2024, reclassified as confidential and *ex parte* on 17 December 2024); F00056, Notification of Reception of Isni Kilaj in the Detention Facilities of the Specialist Chambers, 6 December 2024 (strictly confidential and *ex parte*, reclassified as public on 17 December 2024).

²⁹ Impugned Decision, pp. 96-115, 119.

³⁰ Impugned Decision, pp. 115-118.

³¹ Impugned Decision, pp. 122-123. The Pre-Trial Judge indicated that the reasons for Kilaj’s detention are the same as set out in the Decision on Arrest Warrants at paragraphs 43 and 56 to 67, which shall be read together with the oral ruling. See Impugned Decision, p. 123. The Panel notes that, in the Impugned Decision, the Pre-Trial Judge largely refers to the relevant findings she previously made in the context of the Decision on Arrest Warrants. See Impugned Decision, pp. 122-123.

³² Appeal, paras 2, 33-34.

³³ Response, paras 1, 33.

II. STANDARD OF REVIEW AND APPLICABLE LAW

15. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.³⁴

16. The Panel recalls that decisions concerning detention on remand are discretionary.³⁵ When the decision that is being challenged is a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.³⁶ The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.³⁷

17. The Panel further recalls that the detention of a person shall only be ordered when, according to Article 41(6)(a) of the Law, there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and, according to Article 41(6)(b) of the Law, there are articulable grounds to believe that: (i) there is a risk of flight; (ii) he or she will tamper with evidence or obstruct the progress of the criminal proceedings; or (iii) circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit. The conditions set forth in Article 41(6)(b)

³⁴ KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati Appeal Decision*"), paras 4-14. See also Appeal Decision on Release, para. 14.

³⁵ Appeal Decision on Release, para. 15; First Appeal Decision on Detention, para. 27; *Gucati Appeal Decision*, paras 49, 51.

³⁶ Appeal Decision on Release, para. 16; *Gucati Appeal Decision*, para. 14; KSC-BC-2020-06, IA001/F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("*Veseli First Appeal Decision on Detention*"), para. 7.

³⁷ *Gucati Appeal Decision*, para. 14; *Veseli First Appeal Decision on Detention*, para. 7.

of the Law are alternative to one another.³⁸ If one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained.³⁹

III. PRELIMINARY MATTERS

A. ADMISSIBILITY OF THE RESPONSE

18. The Defence submits that the Response was filed out of time and that it should be disregarded.⁴⁰ The Panel recalls that: (i) a response to an appeal against a decision to detain a person on remand must be filed within 10 days of the appeal;⁴¹ (ii) time limits run from the first working day after the notification of the relevant filing;⁴² and (iii) the last day of a time limit, which falls on a weekend or a Specialist Chambers' official holiday, shall be considered to be the next working day.⁴³

19. In the present case, the Panel notes that the Appeal was notified to the Judges and the Parties on Friday, 20 December 2024.⁴⁴ In light of the weekend, the time limit started running on Monday, 23 December 2024. The tenth day fell on Wednesday, 1 January 2025, an official holiday, pushing the deadline to Thursday, 2 January 2025. Therefore, the Panel finds that the Response was filed in a timely manner.⁴⁵

³⁸ See KSC-BC-2020-07, IA007/ F00004 and IA008/F00004, Consolidated Decision on Nasim Haradinaj's Appeals Against Decisions on Review of Detention, 6 April 2022 ("*Haradinaj* Second Appeal Decision on Detention"), para. 49; KSC-BC-2020-06, IA004/F00005, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021) ("*Thaçi* First Appeal Decision on Detention"), para. 78.

³⁹ *Haradinaj* Second Appeal Decision on Detention, para. 49; *Thaçi* First Appeal Decision on Detention, para. 78.

⁴⁰ Reply, paras 3-7, 19.

⁴¹ Rules 58(1)-(2), 170(1) of the Rules.

⁴² Rule 9(2) of the Rules.

⁴³ Rule 9(4) of the Rules. See also Rule 9(1) which provides that time limits are calculated by calendar days.

⁴⁴ The notification email was sent by CMU to the Judges and the Parties on 20 December 2024 at 12:27.

⁴⁵ See below, paras 26-30.

B. PUBLIC FILINGS

20. The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel. The Appeals Panel files the present Decision as public as it does not contain any confidential information.

21. The Panel notes that the submissions made by the Parties were filed confidentially. The Panel also notes that the SPO does not object to the reclassification of its Response as public. As it does not contain any confidential information, the Panel therefore finds that the Response can be reclassified as public. The Panel orders the Defence to file a public redacted version of the Appeal and the Reply, or to indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.

IV. DISCUSSION

A. SUBMISSIONS OF THE PARTIES

22. Regarding the risk of flight, Kilaj recalls the factors the Pre-Trial Judge considered to justify his initial detention but argues that only factors post-dating his learning of the Confirmed Indictment can properly be described as giving him an “additional incentive” to flee.⁴⁶

23. Kilaj argues that the Pre-Trial Judge abused her discretion “by failing to give any, or any sufficient, weight to the facts that, notwithstanding the existence of the pre-existing factors, the Single Judge nonetheless granted Kilaj conditional release in

⁴⁶ Appeal, paras 21-22.

the Release Decision".⁴⁷ Kilaj further argues that he demonstrated he could be trusted not to flee and not to evade justice and that the Pre-Trial Judge failed to provide a reasoned explanation as to why his proven record of good behaviour and compliance should be accorded such little weight.⁴⁸

24. Regarding the factors subsequent to Kilaj learning of the Confirmed Indictment, he argues that the Pre-Trial Judge's reasons for taking these into account as additional incentives are flawed.⁴⁹ With regard to the risk of flight, Kilaj submits that: (i) the finding that the gravity of the charged offences and the length of the sentence faced go beyond what Kilaj initially foresaw is incorrect because, since the confirmation of the indictment, he has known that he is in jeopardy of a maximum sentence that is significantly less punitive than was the case when he was granted conditional release;⁵⁰ (ii) the finding that Kilaj will become aware of the evidence presented by the SPO in support of the Confirmed Indictment and that this will provide an additional incentive to flee is unreasonable because Kilaj has been aware of that evidence since the SPO's first submissions on review of detention on 15 December 2023;⁵¹ and (iii) the Pre-Trial Judge attached too much weight to the fact that the prospect of a potential sentence of a long period of imprisonment is now concrete, and failed to consider that, since 15 December 2023, Kilaj has been under no illusion that he was going to face trial.⁵²

⁴⁷ Appeal, para. 23; Reply, paras 11-12, 16-17. Kilaj also argues that when granting him conditional release on 3 May 2024, the Single Judge specifically envisaged the continuation of his provisional release and his attendance at future hearings. See Reply, paras 17-18.

⁴⁸ Appeal, paras 24-25, 31; Reply, paras 12, 17.

⁴⁹ Appeal, para. 26.

⁵⁰ Appeal, paras 27-28.

⁵¹ Appeal, para. 29.

⁵² Appeal, para. 30.

25. Turning to the risk of Kilaj obstructing the proceedings,⁵³ the Defence refers to its previous arguments and submits that the only factor identified by the Pre-Trial Judge that increases this risk is the fact that Kilaj now faces a confirmed indictment.⁵⁴ However, according to Kilaj, the Pre-Trial Judge unreasonably failed to adequately take into account the undisputed fact that even if he had had the means to, for example, approach potential witnesses in his case and/or tamper or hide evidence on which the SPO may rely on during trial, he did not do so.⁵⁵ Kilaj further underlines that the SPO already has his laptop computer and a number of mobile phones and that the SPO does not even suggest what evidence Kilaj could hide or tamper with in these circumstances.⁵⁶

26. The SPO responds that in the Appeal, Kilaj fails to acknowledge that the only reason he was provisionally released in May 2024 was because of the disproportionality of his continued detention, and the then Single Judge had not considered that the serious risks had ceased to exist.⁵⁷ The SPO further responds that Kilaj's arguments amount to a litany of disagreements with the Impugned Decision, none of which amounts to an appealable error.⁵⁸

27. In relation to the risk of obstruction, the SPO responds that the then Single Judge was particularly concerned about this risk – together with the risk of

⁵³ In the Reply, Kilaj indicated that the conciseness of his arguments relating to the risk of obstruction and commission of further offences is explained by the sparseness of the reasoning in the Impugned Decision and the significant overlap with reasoning about the risk of flight. See Reply, paras 9-10.

⁵⁴ Appeal, para. 32.

⁵⁵ Appeal, para. 32. See also Reply, paras 14-15, where Kilaj argues that according to the Prosecution case he may have been in possession of confidential material to which he was not entitled, but there is no evidence that he in fact interfered with witnesses or tampered with evidence.

⁵⁶ Appeal, para. 32.

⁵⁷ Response, para. 3. See also Response, paras 2, 17, 21-23. The SPO submits that now that the indictment has been confirmed, the circumstances have materially changed and the serious risks that have existed throughout the proceedings are no longer outweighed by the (dis)proportionality of detention. See Response, paras 21-22.

⁵⁸ Response, para. 3, 15. See also Response, paras 2, 14, 20, 23.

commission of further offences – and found it to be incapable of mitigation through conditions.⁵⁹

28. The SPO further responds that the Pre-Trial Judge gave sufficient weight to Kilaj's conduct during his provisional release.⁶⁰ In the SPO's view, it would have been artificial to consider Kilaj's conduct during his provisional release in isolation from Kilaj's alleged past conduct that demonstrates Kilaj's "sustained and pervasive disregard" for the Specialist Chambers' laws and rules.⁶¹

29. In addition, the SPO submits that, following the confirmation of the Indictment, "[t]he new stage of proceedings substantially increases the risk that Kilaj may obstruct the proceedings and commit further crimes, especially as he becomes fully aware of the breadth of evidence against him".⁶²

30. In relation to the risk of flight, the SPO responds that Kilaj's challenge to the Pre-Trial Judge's findings is built on a misrepresentation of the Impugned Decision.⁶³ The SPO adds that, in any event, the Pre-Trial Judge's findings with respect to these additional factors are not erroneous.⁶⁴ In particular, the SPO argues that: (i) the gravity of the offences with which Kilaj is now charged is far greater than what he initially foresaw;⁶⁵ (ii) the disclosure of inculpatory evidence to the Defence is ongoing and is a factor commonly taken into account when assessing the risk of flight;⁶⁶ and (iii) with the confirmation of the charges, Kilaj is incontrovertibly in a different position than he was pre-indictment as he is certain to face trial and is now closer to the prospect of a long sentence.⁶⁷

⁵⁹ Response, paras 15-16.

⁶⁰ Response, paras 17, 23.

⁶¹ Response, para. 18. See also Response, para. 20.

⁶² Response, para. 19.

⁶³ Response, para. 24. See also Response, paras 25-30.

⁶⁴ Response, para. 26.

⁶⁵ Response, paras 27-28.

⁶⁶ Response, para. 29.

⁶⁷ Response, para. 30.

B. ASSESSMENT OF THE COURT OF APPEALS PANEL

1. The Pre-Trial Judge's Assessment of Kilaj's Conduct During Conditional Release

31. At the outset, the Panel recalls that the Single Judge's decision, on 3 May 2024, to release Kilaj was not based on the absence of risks under Article 41(6)(b) of the Law or on the adequacy of the release conditions.⁶⁸ In fact, the then Single Judge found that these risks continued to exist and that no conditions could fully restrict Kilaj's ability to obstruct the progress of the proceedings of the Specialist Chambers and commit further offences.⁶⁹ The Pre-Trial Judge clearly recalled and adopted these findings as still valid in the Decision on Arrest Warrants and the Impugned Decision.⁷⁰

32. Kilaj claims that the "most important point raised by the Defence" is that he demonstrated "impeccable conduct during over six months of conditional release",⁷¹ and that the Pre-Trial Judge abused her discretion by failing to give any, or any sufficient, weight to this fact.⁷² Kilaj further argues that the Pre-Trial Judge failed to give sufficient weight to the fact that while during his release, he had the means to violate the conditions imposed on him by the Single Judge and yet, he did not do so.⁷³

33. In relation to the "impeccable conduct" argument made by Kilaj,⁷⁴ the Panel acknowledges that the Accused has been released – over six months – without any

⁶⁸ Release Decision, paras 41, 47, 50, 55-57, 63. Notwithstanding the existing risks, the Single Judge ordered Kilaj's release on the basis that, in light of the SPO Request for Leave and Suspension, and thus pending the submission of an amended indictment against him, it was no longer proportional or reasonable within the meaning of Rule 56(2) of the Rules to extend Kilaj's detention. See Release Decision, paras 60-64.

⁶⁹ Release Decision, paras 55-57, 63-64. The Panel further recalls that the previous Single Judge found, in his successive decisions, that conditions proposed by the Defence sufficiently addressed the risk of flight in relation to Kilaj. See Release Decision, para. 55; Third Detention Decision, para. 44; Second Detention Decision, para. 62; First Detention Decision, para. 59.

⁷⁰ Impugned Decision, pp. 122-124; Decision on Arrest Warrants, paras 56-62.

⁷¹ See Reply, paras 12-13.

⁷² Appeal, paras 23-24.

⁷³ Appeal, paras 31-32. See also Reply, paras 12, 17.

⁷⁴ See Reply, para. 13.

reported incident.⁷⁵ The Panel agrees with the Defence that the behaviour of a suspect or accused awaiting trial and his compliance with release conditions/court orders are relevant factors when reviewing the detention or considering applications for arrest warrants or release, though the weight to be attached to this factor must be assessed on a case by case basis.⁷⁶

34. The Panel further stresses that, in reviewing a claim that the Pre-Trial Judge has misappreciated facts in a decision on interim release, the Panel will accord a margin of appreciation both to the inferences that the Pre-Trial Judge drew from the available evidence and to the weight she accorded to the different factors militating for or against detention.⁷⁷ The Panel will not interfere with the Pre-Trial Judge's assessment just because the Panel might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Pre-Trial Judge's conclusion could have reasonably been reached from the evidence before her. In the absence of any clear error on the part of the Pre-Trial Judge, the Panel defers to the Pre-Trial Judge.⁷⁸ Furthermore, the Panel recalls that while a panel must provide reasoning in support of its findings on the substantive considerations relevant for a

⁷⁵ See Decision on Arrest Warrants, fn. 78.

⁷⁶ See ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1151, Decision Regarding Interim Release, 17 August 2015, para. 20. See also ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-631-Red, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009 ("*Bemba* Appeal Decision on Interim Release"), para. 80.

⁷⁷ See KSC-BC-2020-06, IA003/F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021) ("*Selimi* First Appeal Decision on Detention"), para. 64; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Red, Public Redacted Version Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", 19 August 2011, para. 45; ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-283, Judgment on the Appeal of Calliste Mbarushimana Against the Decision of the Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", 14 July 2011 ("*Mbarushimana* Appeal Decision on Interim Release"), para. 17.

⁷⁸ See e.g. *Selimi* First Appeal Decision on Detention, para. 64; KSC-BC-2020-06, IA007/F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), para. 47; *Mbarushimana* Appeal Decision on Interim Release, para. 17.

decision, it is neither required to articulate every step of its reasoning, nor to address all of the arguments raised by the parties or every item of evidence relevant to a particular finding, provided that it indicates with sufficient clarity the basis for its decision.⁷⁹

35. The Panel recalls that the Impugned Decision followed the Decision on Arrest Warrants and incorporated the findings made therein.⁸⁰ Therefore, the Panel considers that is appropriate to review the findings made therein together. The Panel notes that in the Decision on Arrest Warrants, the Pre-Trial Judge ruled that “[t]he fact that [Mr Kilaj] may have complied with the conditions imposed in the [...] Release Decision does not equate to risk elimination”.⁸¹ In the Impugned Decision, the Pre-Trial Judge took note of Kilaj’s argument in this respect, and “mindful of his past compliance with the conditions imposed”, still found that the risks under Article 41(6)(b) existed.⁸² The Impugned Decision was rendered as an oral decision in the context of Kilaj’s initial appearance. During the hearing, the Pre-Trial Judge declared that “[h]aving considered all arguments, I find that none of your arguments, Defence counsel, are capable of changing my assessment that the conditions provided in Article 41(6) of the Law are met (...)”.⁸³ In the Panel’s view, the Pre-Trial Judge’s reasoning shows that she did not ignore this factor but, having weighed it against the other factors she recalled, found that the risks under Article 41(6)(b) of the Law were established.⁸⁴

36. Although the Pre-Trial Judge could have elaborated further on the weight she accorded to Kilaj’s conduct during conditional release, the Panel considers that her assessment is not so lacking in reasoning that it can be said that the Pre-Trial Judge

⁷⁹ Appeal Decision on Release, para. 51; Second Appeal Decision on Detention, para. 32; *Selimi* First Appeal Decision on Detention, para. 46. See also ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para. 15.

⁸⁰ See above, fn. 31.

⁸¹ Decision on Arrest Warrants, para. 62. See also Decision on Arrest Warrants, para. 57.

⁸² Impugned Decision, pp. 121-123.

⁸³ Impugned Decision, p. 122.

⁸⁴ Impugned Decision, pp. 122-123; Decision on Arrest Warrants, paras 56-58, 61-62.

failed to comply with her obligation to provide a reasoned opinion. Accordingly, the Panel can discern how the Pre-Trial Judge's conclusion could have reasonably be reached from the evidence before her.

2. The Pre-Trial Judge's Assessment Pursuant to Article 41(6)(b) of the Law

37. In the present case, Kilaj does not challenge the finding that there is a grounded suspicion that he committed a crime within the jurisdiction of the Specialist Chambers. However, he challenges the Pre-Trial Judge's assessment of the risks under Article 41(6)(b) of the Law.

38. According to Kilaj, given his good conduct during his release, the Pre-Trial Judge should have focused only on whether factors post-dating his learning of the Confirmed Indictment would give him an *additional* incentive to flee or obstruct proceedings.⁸⁵ In addition, Kilaj argues that the Pre-Trial Judge's reasons for taking these factors into account as additional incentives are flawed.⁸⁶ The Panel will address these arguments in turn.

(a) The factors taken into consideration by the Pre-Trial Judge

39. The Panel recalls that the assessment to be conducted by a judge pursuant to Article 41(6)(b) of the Law is a holistic assessment of the specific circumstances of the case in order to determine whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the Law exist.⁸⁷ Nothing in the Specialist

⁸⁵ Appeal, paras 20-25, 32. See also Reply, para. 13.

⁸⁶ Appeal, para. 26. The Panel acknowledges Kilaj's argument regarding the overlap, in the Impugned Decision and therefore in the Appeal, of the discussion related to the risk of flight and the risk of obstruction. See Reply, para. 10.

⁸⁷ See e.g. *Veseli* First Appeal Decision on Detention, para. 19. Contra Appeal, paras 21, 26-32; Reply, paras 13, 18.

Chambers' Legal framework suggests that the Pre-Trial Judge had to limit her assessment to certain factors being "pre" or "post" confirmation of an indictment.

40. As recalled above, in the Release Decision, the Single Judge found that the risks under Article 41(6)(b) of the Law continued to exist.⁸⁸ In the Decision on Arrest Warrants and the Impugned Decision, the Pre-Trial Judge found that the Single Judge's findings with respect to the risks under Article 41(6)(b) of the Law were still valid.⁸⁹ In the Panel's view, these risks identified by the Single Judge were relevant factors to be taken into consideration by the Pre-Trial Judge. She further relied on the confirmation of the indictment and the progress of the proceedings as a buttressing factor for maintaining Kilaj in detention.⁹⁰ The Panel finds that the Pre-Trial Judge conducted her assessment in a holistic manner as required by Article 41(6)(b) of the Law.

(b) The Pre-Trial Judge's assessment of the factors

41. Regarding the risk of flight and Kilaj's specific arguments on the length of the sentence and the gravity of the offences, the Pre-Trial Judge did acknowledge, though not in detail, these arguments⁹¹ and dismissed them.⁹² The Panel notes that Kilaj is specifically arguing that since the confirmation of the indictment, he has known that he is in jeopardy of a maximum sentence that is significantly less punitive than was the case when he was granted conditional release.⁹³ The Panel finds this argument

⁸⁸ Release Decision, paras 41, 47, 50, 55-57, 63-64. See also para. 31 above.

⁸⁹ Decision on Arrest Warrants, paras 61-62, 56; Impugned Decision, pp. 122-123. See also para. 31 above.

⁹⁰ Decision on Arrest Warrants, para. 62. See also Impugned Decision, pp. 122-123.

⁹¹ See Impugned Decision, p. 121 ("As to the existence of the three risks under Article 41(6)(b) of the Law, you submit, at the outset, that Mr. Kilaj has known for a year about the SPO's factual and legal allegations, now contained in the Confirmed Indictment, and the potential lengthy sentence emanating therefrom.").

⁹² Impugned Decision, p. 122 ("Having considered all arguments, I find that none of your arguments, Defence counsel, are capable of changing my assessment that the conditions provided in Article 41(6) of the Law are met.").

⁹³ Appeal, paras 27-28.

unpersuasive in light of the fact that the charges, as confirmed by the Pre-Trial Judge, in fact carry a similar potential sentence of one to five years as the sentence Kilaj was aware of at the time of his conditional release.⁹⁴ Moreover, the Panel understands Kilaj's reference to the "basis" on which the SPO says he is criminally responsible under those charges,⁹⁵ as reflecting Kilaj's own perception of the scope of the charges and strength of the SPO's evidence in this case. However, the Panel recalls that the quality and strength of the SPO's case and evidence are matters to be discussed at trial and that the present decision on detention is not an appropriate forum to address this argument.⁹⁶

42. In addition, the Panel recalls that the confirmation of an indictment against an accused is a relevant factor to take into consideration when deciding on whether continued detention is warranted.⁹⁷ As underlined by the Pre-Trial Judge, while the

⁹⁴ The Panel recalls that Kilaj is accused of having (i) committed the crime of attempted obstruction of official persons pursuant to Article 401(2) of the KCC; (ii) agreed to commit the crime of attempted obstruction of official persons, and one or more of the persons who were party to those agreements undertook substantial acts towards the commission of the crimes; and (iii) provided assistance in the commission of the crimes of attempted obstruction of official persons and contempt of court. See Confirmed Indictment, paras 36, 40, 43, 47. The Panel notes that the potential sentence for either having obstructed official persons or having *attempted* to do so is the same. As noted by the Pre-Trial Judge in the Confirmation Decision, the offence under Article 401(2) of the KCC ("obstructs or attempts to obstruct") can be committed either when the obstruction has occurred or when it has only been attempted. See Confirmation Decision, para. 51.

⁹⁵ Appeal, para. 28, wherein Kilaj argues that: "The charges he now knows he will face at trial, and more particularly, the *basis* on which the SPO says he is criminally responsible under those charges, permit Mr Kilaj to know that he is in jeopardy of a maximum sentence that is significantly less punitive than was the case when he was granted conditional release."

⁹⁶ KSC-BC-2020-06, IA010/F00008/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 27 October 2021 (confidential version filed on 27 October 2021) ("*Thaçi* Second Appeal Decision on Detention"), para. 40. See also KSC-BC-2023-10, IA002/F00005, Decision on Haxhi Shala's Appeal Against Decision on Review of Detention, para. 51. See also KSC-BC-2020-06, IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021) ("*Veseli* Second Appeal Decision on Detention"), para. 23.

⁹⁷ KSC-BC-2020-07, IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 61, referring to ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-163, Decision on the "Defence Request for Interim Release", 19 May 2011, para. 41; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal against Denial of Provisional Release, 17 January 2008, para. 15; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 12. See also

prospect of a trial was only a possibility when Kilaj was a suspect, now that the charges are confirmed, it is a reality, and consequently the prospect of a significant sentence becomes more likely.⁹⁸ For these reasons, the Panel finds that Kilaj fails to demonstrate that the Pre-Trial Judge's reasons for considering these post-indictment factors as additional incentives to flee are flawed.

43. Turning to the risk of obstruction, the Appeals Panel further notes that in the Decision on Arrest Warrants, the Pre-Trial Judge considered that Kilaj is alleged to have willingly misused "[Specialist Chambers] witness-related information" and alleged to have displayed a "wanton disregard for [Specialist Chambers] confidentiality rules".⁹⁹ In finding that there was a risk that Kilaj may obstruct the proceedings, the Pre-Trial Judge specifically emphasised and relied on, *inter alia*, the existence of a well-grounded suspicion that Kilaj was part of a group, including Kilaj himself, and Thaçi, the leader of the group, aiming to unlawfully influence the testimony of SPO witnesses in Case KSC-BC-2020-06.¹⁰⁰ In the Panel's view, the very specific nature of the confirmed charges is a relevant factor that the Pre-Trial Judge considered in the assessment of the existence of a risk of obstruction to the proceedings.¹⁰¹

ICC, *Prosecutor v. Ntaganda*, 01/04-02/06-335, Third Decision on Bosco Ntaganda's Interim Release, 17 July 2014, paras 34, 37; ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-502, Decision on the review of detention, 1 November 2021, para. 22; ICC, *Prosecutor v. Gbagbo*, ICC-02/1101/11-668, Sixth decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute, 11 July 2014, para. 41; *Bemba Appeal Decision on Interim Release*, para. 70; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-826 "Review of the 'Decision on the Application for the Interim Release of Thomas Lubanga Dyilo'", 14 February 2007, p. 6; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-794-tENG, Second Review of the Decision on the Conditions of Detention of Germain Katanga, 12 December 2008, paras 9-10.

⁹⁸ See Impugned Decision, p. 122 (referring to the fact that the Confirmed Indictment now subjects Kilaj to concrete charges); Decision on Arrest Warrants, paras 56-57.

⁹⁹ Decision on Arrest Warrants, para. 62, referring to Confirmation Decision, paras 156-172, 195, 205-206, 211, 260, 287-288, 299; Impugned Decision, pp. 122-123.

¹⁰⁰ Decision on Arrest Warrants, para. 62. See also Impugned Decision, p. 123.

¹⁰¹ See similarly, *Haradinaj* Second Appeal Decision on Detention, para. 45.

44. The Panel further notes Kilaj's argument that since 15 December 2023, the date of the SPO's first submission on review of detention, he has known the SPO's evidence against him.¹⁰² The Panel stresses that the Pre-Trial Judge is in the best position to assess whether circumstances related to the upcoming start of the trial have heightened the risks under Article 41(6)(b) of the Law, including whether the Accused will obstruct the proceedings if released. The Panel finds it reasonable for the Pre-Trial Judge to have concluded that Kilaj's incentives to obstruct the proceedings increased with the impending start of trial given that he will have access to highly sensitive information, such as confidential witness-related information and other evidence the SPO may rely on during the trial against him.¹⁰³ In that regard, the Panel recalls that the Accused's increased knowledge of the SPO's case through the disclosure of evidence, including the identities of witnesses, may be a relevant factor, when considered together with other factors, to determine the existence of a risk of obstruction.¹⁰⁴ Likewise, at the International Criminal Court, chambers have considered that the setting of the trial commencement date and the fact that an accused's case was moving forward might incentivise the accused to abscond or interfere with witnesses.¹⁰⁵

45. Further, the Panel rejects Kilaj's argument that the Pre-Trial Judge failed to sufficiently consider that he had the means and opportunity to approach potential witnesses in his case or obstruct the proceedings in other ways but did not do so.¹⁰⁶ The Panel recalls that the weight to be attached to an accused's compliance with

¹⁰² Appeal, paras 29-30. See also Appeal, para. 32.

¹⁰³ Decision on Arrest Warrants, para. 62. See also Impugned Decision, p. 123.

¹⁰⁴ KSC-BC-2020-04, IA005/F00005/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 19 July 2022 (confidential and ex parte version filed on 19 July 2022), para. 30. See also *Veseli* Second Appeal Decision on Detention, para. 31; *Thaçi* Second Appeal Decision on Detention, para. 38; KSC-BC-2020-04, IA003/F00005/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Review of Detention, 11 February 2022 (confidential version filed on 11 February 2022), para. 36.

¹⁰⁵ See e.g. ICC, *Prosecutor v. Yekatom and Ngaißsona*, ICC-01/14-01/18-643-Red, Public redacted version of Decision on the Second Yekatom Defence Motion for Interim Release, 7 September 2020, para. 32.

¹⁰⁶ Appeal, para. 32.

release conditions must be assessed on a case by case basis.¹⁰⁷ In relation to this case, the Pre-Trial Judge's reasoning shows that she considered the fact that Kilaj may have complied with the conditions imposed on him during his release but found that this did not eliminate the risks that he may approach potential witnesses in this case or obstruct the proceedings in other ways in the future.¹⁰⁸ The Panel considers that Kilaj's good behaviour during release is limited to demonstrating that the expectation of compliance connected with the interim release previously ordered has been fulfilled. The Panel finds that the Pre-Trial Judge did not abuse her discretion in the way she assessed this specific factor.

46. Finally, the Panel finds Kilaj's argument that the SPO already has his laptop computer and a number of mobile phones and does not suggest what evidence Kilaj could hide or tamper with in these circumstances,¹⁰⁹ to be unpersuasive. Although the burden of establishing the necessity of detention under Article 41(6)(b) of the Law falls on the SPO,¹¹⁰ this burden does not expand to imposing on the SPO an obligation to list all possible means that could be used by Kilaj to obstruct the proceedings if he was released.

47. In light of the above, the Panel finds that Kilaj has failed to demonstrate that the Pre-Trial Judge's assessment of the risks under Article 41(6)(b) of the Law is so unfair or unreasonable as to constitute an abuse of discretion.

V. DISPOSITION

48. For these reasons, the Court of Appeals Panel:

DENIES the Appeal in its entirety;

¹⁰⁷ See above, para. 33.

¹⁰⁸ Decision on Arrest Warrants, para. 62. See also Impugned Decision, p. 123. See also above, paras 33-36.

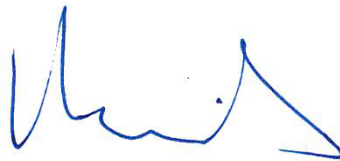
¹⁰⁹ Appeal, para. 32.

¹¹⁰ First Appeal Decision on Detention, para. 29.

ORDERS the reclassification of the Response (IA001/F00003) as public, pursuant to Rule 82(5) of the Rules;

ORDERS Kilaj to submit a public redacted version of the Appeal (IA001/F00001/COR) and the Reply (IA001/F00004) or indicate, through a filing, whether they can be reclassified as public, within ten days of receiving notification of the present Decision; and

INSTRUCTS the Registry to execute the reclassification of the Appeal (IA001/F00001/RED) and the Reply (IA001/F00004) upon indication by Kilaj, if any, that it can be reclassified.



**Judge Michèle Picard,
Presiding Judge**

Dated this Tuesday, 28 January 2025

At The Hague, the Netherlands