



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

In: KSC-BC-2023-12
Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj,
Isni Kilaj, Fadil Fazliu, and Hajredin Kuçi

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Prosecution response to 'Kilaj submissions on review of detention'

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I. INTRODUCTION

1. Pursuant to Rule 76 of the Rules,¹ the Specialist Prosecutor's Office ('SPO') hereby responds to the KILAJ Submissions.² KILAJ's claim that his detention is no longer reasonable or proportionate³ is incorrect. Further, none of the issues raised by KILAJ constitute a meaningful change in circumstances, nor do they impact upon the Pre-Trial Judge's individualised findings, such that his continued detention remains necessary and proportionate.

II. SUBMISSIONS

2. The Pre-Trial Judge has consistently found: (i) a grounded suspicion that KILAJ committed crimes within the jurisdiction of the Kosovo Specialist Chambers ('KSC');⁴ (ii) the existence of a risk of flight;⁵ (iii) articulable grounds to believe that KILAJ will obstruct the progress of KSC proceedings⁶ and commit further crimes;⁷ (iv) that no

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ('KSC'), KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

² Kilaj submissions on review of detention, KSC-BC-2023-12/F00280, 5 May 2025, Confidential ('KILAJ Submissions').

³ KILAJ Submissions, KSC-BC-2023-12/F00280, paras 6, 54.

⁴ Second Decision on Review of Detention of Isni Kilaj, KSC-BC-2023-12/F00248, 7 April 2025 ('Decision F00248'), paras 16-20. *See also* Public Redacted Version of Decision on the Confirmation of the Indictment, KSC-BC-2023-12/F00036/RED, 29 November 2024, paras 211, 287-288, 313(d); Public Redacted Version of Decision on Request for Arrest Warrants and Related Matters, KSC-BC-2023-12/F00037/RED, 29 November 2024, ('Decision on Arrest and Transfer'), para.43; Transcript (Initial Appearance), 9 December 2024, pp. 120-124; Decision on Review of Detention of Isni Kilaj, KSC-BC-2023-12/F00162, 7 February 2025 ('Decision F00162'), paras 13-15.

⁵ Decision F00248, KSC-BC-2023-12/F00248, paras 25-27, 34. *See also* Decision on Arrest and Transfer, KSC-BC-2023-12/F00037/RED, paras 56-60, 67; Transcript (Initial Appearance), 9 December 2024, pp. 120-124; Decision F00162, KSC-BC-2023-12/F00162, paras 20-22, 30.

⁶ Decision F00248, KSC-BC-2023-12/F00248, paras 28-31, 34. *See also* Decision on Arrest and Transfer, KSC-BC-2023-12/F00037/RED, paras 61-64, 67; Transcript (Initial Appearance), 9 December 2024, pp. 120-124; Decision F00162, KSC-BC-2023-12/F00162, paras 23-26, 30.

⁷ Decision F00248, KSC-BC-2023-12/F00248, paras 32-34. *See also* Decision on Arrest and Transfer, KSC-BC-2023-12/F00037/RED, paras 65-67; Transcript (Initial Appearance), 9 December 2024, pp. 120-124; Decision F00162, KSC-BC-2023-12/F00162, paras 27-28, 30.

release conditions can mitigate the Article 41(6)(b) of the Law⁸ risks;⁹ and (v) that KILAJ's continued detention is proportional.¹⁰

3. Following these sustained findings, no contrary information or meaningful development has intervened. All articulable risks under Article 41(6)(b) remain clear and present as the pre-trial stage of the proceedings continues to advance. Accordingly, and as a review of detention under Rule 57(2) of the Rules concerns what has changed, if anything, since the prior ruling on detention,¹¹ the KILAJ request for release must be denied. Importantly, the Pre-Trial Judge is not required to make findings on the factors already decided upon in an earlier ruling,¹² and need not 'entertain submissions that merely repeat arguments that have already been addressed in previous decisions.'¹³ This is particularly relevant as to KILAJ's repeated submissions as to the legal test for proportionality of pre-trial detention and a future commutation of sentence.¹⁴

4. KILAJ contends that the closure of the Prosecution's case in *Thaçi et al.* (KSC-BC-2020-06, 'Case 6') is a material change in circumstances which neutralises the risks of obstruction or of committing (further) offences.¹⁵ However, the argument that there is 'no rational basis' to suggest KILAJ could repeat a criminal offence¹⁶ is predicated on a narrow and self-serving view, with respect to only Witnesses 3-4, and ignores: (i) the

⁸ 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.

⁹ Decision F00248, KSC-BC-2023-12/F00248, paras 35-39. *See also* Transcript (Initial Appearance), 9 December 2024, pp. 120-124; Decision F00162, KSC-BC-2023-12/F00162, paras 31-36.

¹⁰ Decision F00248, KSC-BC-2023-12/F00248, paras 40-46. *See also* Transcript (Initial Appearance), 9 December 2024, pp. 120-124; Decision F00162, KSC-BC-2023-12/F00162, paras 37-40.

¹¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021 ('*Haradinaj Appeal*'), para.55.

¹² *Haradinaj Appeal*, KSC-BC-2020-07/IA002/F00005, para.55.

¹³ *Specialist Prosecutor v. Pjetër Shala*, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Review of Detention, KSC-BC-2020-04, IA003/F00005/RED, 11 February 2022, para. 18.

¹⁴ *Contra* KILAJ Submissions, KSC-BC-2023-12/F00280, paras 50, 52-53.

¹⁵ KILAJ Submissions, KSC-BC-2023-12/F00280, paras 2, 26-41.

¹⁶ KILAJ Submissions, KSC-BC-2023-12/F00280, para.32.

still relevant multitude of factors assessed by the Pre-Trial Judge, which previously led to a determination that there is a risk of obstruction of proceedings by KILAJ;¹⁷ and (ii) that the proceedings in Case 6 remain ongoing up until a closing under Rule 136 of the Rules, while the risk of obstruction is assessed not only in relation to Case 6, but also in relation to this case.¹⁸ Relevantly, there are many examples in international criminal law of accused, convicted persons, and third parties attempting to undermine the judicial process, even after the closure of a prosecution phase of evidence.¹⁹ Further, and as the factors underpinning an assessment as to obstruction are inherently relevant with respect to considering the risk of committing further crimes, the KILAJ Submissions have no impact with respect to previous findings under Article 41(6)(b)(iii).

5. After declaring that there are no grounds to consider that obstruction or further offences could occur – arguments which have been dispensed with above – the KILAJ Submissions assert that the risk of flight must be re-evaluated.²⁰ However, the ‘concrete incentives to abscond’ previously identified – that is, the gravity of the charged offences, more than originally foreseen; the supporting evidence presented by the SPO; and, the prospect of a potential sentence of a long imprisonment²¹ – remain relevant at this time, and have not been rebutted. While the KILAJ Submissions suggest that these independent findings as to a risk of flight result in a ‘striking and

¹⁷ Decision F00248, KSC-BC-2023-12/F00248, paras 28-31.

¹⁸ Public Redacted Version of Second Decision on Review of Detention of Fadil Fazliu, KSC-BC-2023-12/F00251/RED, 7 April 2025, para.41

¹⁹ See for example Special Court for Sierra Leone (‘SCSL’), *Independent Counsel v. Eric Koi Senessie*, SCSL-2011-01-T, Judgment in Contempt Proceedings, 16 August 2012; International Residual Mechanism for Criminal Tribunals (‘IRMCT’), *Prosecutor v. Nzabonimpa et al.*, MICT-18-116-T, Judgment, 25 June 2021; SCSL, *Independent Counsel v. Bangura et al.*, SCSL-2011-02-T, Judgment in Contempt Proceedings, 25 September 2012; IRMCT, *Prosecutor v. Gérard Ntakirutimana*, MICT-12-17-R, Review Judgment, 22 November 2024, paras 57, 62. See also Confidential Redacted Version of ‘Prosecution submissions concerning the completion of its case’, KSC-BC-2020-06/F02400/CONF/RED, 21 June 2024, para.14; Public Redacted Version of ‘Prosecution submission pertaining to periodic detention review of Hashim Thaçi’, KSC-BC-2020-06/F01813/RED, para.12.

²⁰ FAZLIU Submissions, KSC-BC-2023-12/F00278, paras 42-47.

²¹ Decision on Arrest and Transfer, KSC-BC-2023-12/F00037/RED, 29 November 2024, para.57. See also, KILAJ Submissions, KSC-BC-2023-12/F00280, para.43.

incomprehensible' dichotomy when compared to the posture of Trial Panel II in Case 6,²² this ignores the individualised and case-specific nature of the respective assessments.

6. KILAJ again distorts the legal test for proportionality of pre-trial detention by forecasting what a potential sentence could be, based on inapposite cases,²³ to conclude that he can reasonably expect to receive a sentence lesser than two years, if convicted.²⁴ However, the 'proportionality of pre-trial detention shall not be assessed against its expected length but against the risks under Article 41(6)(b) of the Law together with other factors [...].'²⁵ Additionally, KILAJ's reiterated position that he 'will be entitled to request commutation of any sentence of imprisonment after serving two-thirds'²⁶ is irrelevant as it ignores that any prospective early release decision is discretionary and undertaken on a case-by-case basis.²⁷ KILAJ faces charges which include sentences up to five years. The fact that he has been detained for approximately 12 ½ months as a result of these confirmed charges does not, in and of itself, militate in favour of his immediate conditional release.²⁸

²² KILAJ Submissions, KSC-BC-2023-12/F00280, paras 44-46.

²³ See Decision F00248, KSC-BC-2023-12/F00248, para.43.

²⁴ KILAJ Submissions, KSC-BC-2023-12/F00280, paras 52-53.

²⁵ *Specialist Prosecutor v. Hashim Thaçi et al.*, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-202-06/IA017/F00011/RED, 5 April 2022, para.67.

²⁶ KILAJ Submissions, KSC-BC-2023-12/F00280, para. 50.

²⁷ See *Specialist Prosecutor v. Januzi et al.*, Decision on Bahtijari's Second Request for Clarification, KSC-SC-2025-05/CS002/F00008, 7 March 2025, para.8.

²⁸ The SPO recalls that the European Court of Human Rights ('ECtHR') has found that in certain cases periods of detention of multiple years were not disproportionate. Likewise, the Kosovo Constitutional Court has upheld similar periods of detention as compliant with Article 5 of the European Convention on Human Rights (see for example ECtHR, *W v Switzerland*, 14379/88, Judgment, Court, 26 January 1993; ECtHR, *Chraidi v Germany*, 65655/01, Judgment, Court (Fifth Section), 26 October 2006; KCC, Case No. KI 20/13, Resolution on Inadmissibility, 12 March 2013; KCC, Case No. KI 73/20, Constitutional review of Judgment Pml. No. 117/2020 of the Supreme Court of Kosovo of 24 April 2020, 27 November 2020).

7. Ultimately, and while only one of the articulable risk factors in Article 41(6)(b) needs to be met for purposes of KILAJ's continued detention,²⁹ all continue to be clear and present at this time. Further, these risks can only be effectively managed in the KSC Detention Centre, which is the most effective means to limit KILAJ's ability to flee, otherwise thwart the KSC proceedings, and/or commit further crimes. Additionally, the assurances offered in the KILAJ Submissions³⁰ are insufficient to overcome the concrete risks of release, as previously found by the Pre-Trial Judge.³¹ When the Article 41(6)(b) conditions are met and no lesser measures than detention are available, the person shall continue to be detained.³²

8. As noted by the Pre-Trial Judge in Decision F00248, the proceedings in this case continue to move forward expeditiously.³³ Indeed, and since Decision F00248: (i) the SPO filed its second Rule 102(3) Notice, and has continued to disclose material; (ii) remaining investigative steps are progressing efficiently; and (iii) preliminary motions have been filed by Specialist Counsel. Finally, and by way of the ongoing disclosure process, KILAJ continues to gain increased insight into the evidence against him.³⁴

9. Against this backdrop, KILAJ's continued detention remains reasonable and proportionate.

III. CLASSIFICATION

10. This filing is classified as confidential pursuant to Rule 82(4), but can be reclassified as public as it does not contain confidential information.

²⁹ See for example Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, KSC-BC-2023-12/IA001/F00005, 28 January 2025, para.17 ('[i]f one of those conditions is fulfilled, the other conditions do not have to be addresses in order for detention to be maintained').

³⁰ KILAJ Submissions, KSC-BC-2023-12/F00280, para.55.

³¹ Decision F00248, KSC-BC-2023-12/F00248, paras 35-39.

³² *Specialist 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.

³³ Decision F00248, KSC-BC-2023-12/F00248, para.42.

³⁴ See Decision F00248, KSC-BC-2023-12/F00248, para.25.

IV. RELIEF REQUESTED

11. For the foregoing reasons, the Pre-Trial Judge should order KILAJ's continued detention.

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At The Hague, the Netherlands