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In:	**KSC-BC-2023-12**
	Specialist Prosecutor *v.* Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi
Before:	**The President of the Specialist Chambers** Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Isni Kilaj
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Public Redacted Version of "Kilaj Appeal Against Third Decision on Review of Detention of Isni Kilaj (F00324)"

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I. INTRODUCTION

1. Isni Kilaj hereby exercises his right to appeal[1] against the third detention review decision of the Pre-Trial Judge ("PTJ") denying provisional release. Four grounds of appeal are presented.

II. PROCEDURAL HISTORY

2. On 2 November 2023, Mr Kilaj was arrested pursuant to an order of the Prosecution.[2] The following day, he was transferred to the SC Detention Facilities in The Hague,[3] and the Specialist Prosecutor's Office ("SPO") submitted a request for Mr Kilaj's continued detention.[4]

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

4. On 15 December 2023, the SPO submitted the first iteration of its indictment against Mr Kilaj and his co-Accused for confirmation.[8]

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[1] Article 45(2) of Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("Law"); Rule 58(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("RPE"). Unless otherwise indicated, all references to "Article(s)" and "Rule(s)" are to Articles of the Law, and Rules of the RPE respectively.
[2] URGENT Rule 52(1) Notification of Arrest of Isni KILAJ, KSC-BC-2018-01/F00489, 2 November 2023, public (KSC-BC-2023-12/INV/F00039)
[3] Public Redacted Version of "Report on the Transfer of Isni Kilaj to the Detention Facilities", KSC-BC-2018-01/F00495/RED, 3 November 2023, public, with Annexes 1-2, confidential (public redacted version filed on 8 November 2023) (KSC-BC-2023-12/INV/F00045/RED)
[4] Prosecution Request for Continued Detention of Isni Kilaj, KSC-BC-2018-01/F00496, 3 November 2023, confidential, with Annexes 1-2, strictly confidential and *ex parte* (public redacted version filed on 7 November 2023) (KSC-BC-2023-12/INV/F00046)
[5] KSC-BC-2018-01, Transcript, First Appearance, 4 November 2023
[6] Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023, public (KSC-BC-2023-12/INV/F00049)
[7] Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023, confidential (public redacted version filed on 13 November 2023) (KSC-BC-2023-12/INV/F00053)
[8] Prosecution response to Defence request F00548, KSC-BC-2018-01/F00549, 15 January 2024, public (KSC-BC-2023-12/INV/F00070). *See also* Prosecution supplemental notice, KSC-BC-2018-01/F00654, 2 May 2024, public (KSC-BC-2023-12/INV/F00126) ("Supplemental Notice"), para. 4; Submission of

5. On 5 January 2024, the Single Judge ordered Mr Kilaj's continued detention,[9] which was upheld by the Court of Appeals Panel ("Appeals Panel") on 26 February 2024.[10]

6. On 5 March 2024, the Single Judge ordered Mr Kilaj's continued detention.[11]

7. On 3 May 2024, after having regard to the Parties' submissions[12] on his detention, the PTJ ordered Mr Kilaj's release in Kosovo subject to strict conditions, considering that the SPO's request to suspend the Revised Indictment rendered Mr Kilaj's detention unreasonable and that his fundamental right to liberty outweighed the existence of the risks under Article 41(6).[13]

8. On 15 May 2024, 195 days after his arrest, Mr Kilaj was transferred to Kosovo and released from the custody of the SC.[14]

9. On 17 October 2024, the SPO filed submissions requesting *inter alia* that the PTJ terminate Mr Kilaj's conditional release and order him to return to the SC Detention Facilities.[15]

Indictment for Confirmation and Related Requests, KSC-BC-2023-12/F00002, 15 December 2023, confidential, with Annexes 1-3, confidential

[9] Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024, confidential (public redacted version filed on 18 January 2024) (KSC-BC-2023-12/INV/F00068)

[10] Kilaj Appeal Against Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/IA005/F00001, confidential (public redacted version filed on 6 February 2024) (KSC-BC-2023-12/INV/F00252)

[11] Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00603, 5 March 2024, confidential (public redacted version filed on 11 March 2024) (KSC-BC-2023-12/INV/F00098)

[12] Prosecution submissions on review of detention, KSC-BC-2018-01/F00633, 15 April 2024, confidential (public redacted version filed on 17 April 2024) (KSC-BC-2023-12/INV/F00113); 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 filed on 15 May 2024) (KSC-BC-2023-12/INV/F00118)

[13] Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00658, 3 May 2024, confidential (corrected and public redacted versions filed on 15 May 2024) (KSC-BC-2023-12/INV/F00129), paras 63-65 ("Release Decision")

[14] Notification of Isni Kilaj's Transfer to Kosovo, KSC-BC-2018-01/F00670, 15 May 2024, public (KSC-BC-2023-12/INV/F00135)

[15] Confidential redacted version 'Prosecution submissions pursuant to F00022', KSC-BC-2023-12/F00023/SCONF/RED, 17 October 2024, confidential, with Annexes 1, 3, 5, confidential, and Annexes 2, 4, strictly confidential and *ex parte* ("Return Request")

10. On 29 November 2024, the PTJ confirmed the further amended indictment.[16] On the same day, the PTJ issued the Arrest Warrant Decision.[17]

11. On 2 December 2024, the SPO filed the Confirmed Indictment as ordered.[18]

12. On 5 December 2024, nearly seven months after his conditional release, Mr Kilaj was re-arrested by the SPO in Kosovo[19] and transferred again to the SC Detention Facilities. He has remained in custody since then.

13. On 9 December 2024, Mr Kilaj had his initial appearance before the PTJ. Mr Kilaj pleaded not guilty to both counts against him in the Confirmed Indictment,[20] and an application for conditional release was made on his behalf,[21] following which the PTJ ordered Mr Kilaj's continued detention.[22]

14. On 19 December 2024, Mr Kilaj appealed the First Detention Decision.[23]

15. On 28 January 2025, the Appeals Panel rejected the appeal and upheld the First Detention Decision.[24]

16. On 7 February 2025, the PTJ delivered the First Review Decision by which she ordered Mr Kilaj's continued detention.[25]

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[16] Decision on the Confirmation of the Indictment, KSC-BC-2023-12/F00036, 29 November 2024, confidential (public redacted version filed 12 February 2025) ("Confirmation Decision")
[17] Decision on Request for Arrest Warrants and Related Matters, KSC-BC-2023-12/F00037, 29 November 2024, confidential (public redacted version filed on 19 December 2024) ("Arrest Warrant Decision")
[18] Submission of Confirmed Indictment, KSC-BC-2023-12/F00040, 2 December 2024, strictly confidential, with Annex 1, strictly confidential, containing the Confirmed Indictment
[19] Notification of Arrest of Isni Kilaj Pursuant to Rule 55(4), KSC-BC-2023-12/F00043, 5 December 2023, public
[20] Transcript, 9 December 2024, p. 93:22-25
[21] Transcript, 9 December 2024, p. 96:16-p. 115:18; p. 118:25-p. 119:22
[22] Transcript, 9 December 2024, p. 120:21-p, 124:23 ("First Detention Decision")
[23] Corrected Version of Kilaj Appeal Against Decision on Continued Detention, KSC-BC-2023-12/IA001/F00001/COR, 19 December 2024, confidential (public redacted version filed on 30 January 2025)
[24] Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, KSC-BC-2023-12, IA001/F00005, 28 January 2025, public ("Appeal Decision")
[25] Decision on Review of Detention, KSC-BC-2023-12/F00162, 7 February 2025, public ("First Review Decision")

17. On 10 March 2025, the Defence for Mr Kilaj ("Defence") filed its submissions on the periodic review of his detention.[26]

18. On 7 April 2025, the PTJ delivered the Second Review Decision ordering Mr Kilaj's continued detention.[27]

19. On 5 May 2025, the Defence filed its most recent submissions on the periodic review of Mr Kilaj's detention.[28]

20. On 14 May 2025, the SPO responded to the Defence Submissions.[29] On 19 May 2025, the Defence replied.[30]

21. On 5 June 2025, the PTJ issued the Third Decision on Review of Detention of Isni Kilaj.[31]

22. At the date of filing, Mr Kilaj has been detained for 197 days since his re-arrest on 5 December 2024, bringing his total period of pre-trial detention to 392 days, excluding the period during which he was provisionally released but subject to conditions that significantly restricted his liberty.

III. CLASSIFICATION

23. Pursuant to paragraph 15 of the Order Regarding (Re)classification of Filings,[32] and Rules 82(3), these submissions are confidential because they refer to confidential

[26] Kilaj submissions on review of detention, KSC-BC-2023-12/F00208, 10 March 2025, confidential (public redacted version filed on 11 March 2025)
[27] Second Decision on Review of Detention of Isni Kilaj, KSC-BC-2023-12/F00248, 7 April 2025, public ("Second Review Decision")
[28] Kilaj submissions on review of detention, KSC-BC-2023-12/F00280, 5 May 2025, confidential (public redacted version filed on 7 May 2025) ("Defence Submissions")
[29] Prosecution response to 'Kilaj submissions on review of detention', KSC-BC-2023-12/F00302, 14 May 2025
[30] Reply to Prosecution response to 'Kilaj submissions on review of detention', KSC-BC-2023-12/F00324, 19 May 2025
[31] Third Decision on Review of Detention of Isni Kilaj, KSC-BC-2023-12/F00324, 5 June 2025 ("Impugned Decision")
[32] Order Regarding (Re)classification of Filings, KSC-BC-2023-12/F00111, 14 January 2025, public, para. 15

information relating to Prosecution witnesses and evidence. A public redacted version will be filed shortly.

IV. APPLICABLE LAW

24. Article 2 of the of the Law states that:

> Any limitations on fundamental rights and freedoms are undertaken pursuant to Article 55 of the Constitution for the objective and reasonable purposes expressed in this Article, consistent with Chapter II of the Constitution and international standards of justice and due process. These purposes are in the vital interest of Kosovo as an open and democratic society and are in fulfilment of Kosovo's international obligations. Consistent with Article 55 of the Constitution, these limitations shall only be imposed to the extent necessary for the fulfilment of these vital purposes.

25. Article 55 of the Constitution of Kosovo ("Constitution") specifies that:

> In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.

26. Article 3(2) of the Law states that the Specialist Chambers shall adjudicate in accordance with *inter alia* the Constitution of the Republic of Kosovo and international human rights law including the European Convention on Human Rights and Fundamental Freedoms ("ECHR") "as given superiority over domestic laws by Article 22 of the Constitution."

27. Article 5(3) of the ECHR guarantees the right to liberty. It ensures that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

28. Article 41(6) of the Law indicates that the Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:

a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and
b. there are articulable grounds to believe that:
    i. there is a risk of flight;
    ii. he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
    iii. the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal 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.

29. Similarly, Article 29(1)(2) of the Constitution specifies that:

> a. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows […]
>
> (2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law[.]

30. Rule 56(2) of the RPE specifies that "[t]he Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case."

V. STANDARD OF APPELLATE REVIEW

31. As provided for in Article 45(2) and reiterated in Rule 58(1), interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand. Rule 170(1) provides that an Appellant may file an appeal within 10 days of an impugned decision. This Appeal is filed within the deadline.

32. The Appeals Panel has repeatedly set out the standard of review applicable to interlocutory appeals,[33] which mirrors, *mutatis mutandis,* the applicable standards for

[33] *See eg* Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-

appealing a judgment.[34] An appeal may be filed against an impugned decision that contains an error on a question of law and/or of fact.[35]

33. In relation to errors of law, the Appeals Panel has held that:

> A party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law.[36]

34. In relation to errors of fact, the Appeals Panel has specified that:

> The Court of Appeals Panel will only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding. It is not any error of fact that will cause the Panel to overturn a decision by a lower level panel, but only one that has caused a miscarriage of justice. In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level
> panel.[37]

35. Regarding challenges to a decision that is, as in the instant case, a discretionary one,[38] the Panel has held that:

> 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. 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.[39]

07/IA001/F00005, 9 December 2020, public ("*Gucati* Appeal Decision"), paras 4-14; Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021, public ("*Veseli* Appeal Decision"), paras 4-7; Appeal Decision, para. 15

[34] *Gucati* Appeal Decision, para. 10

[35] *See* Article 46(1), Article 46(4) and Article 46(5)

[36] *Gucati* Appeal Decision, para. 12 [footnotes omitted]

[37] *Gucati* Appeal Decision, para. 13 [footnotes omitted]

[38] *See* Appeal Decision, para. 16 "The Panel recalls that decisions concerning detention on remand are discretionary"; *see also Gucati* Appeal Decision, para. 44

[39] *Gucati* Appeal Decision, para. 14

VI. GROUNDS OF APPEAL

(i) Ground 1: The PTJ erred in law in failing to apply the appropriate procedural and evidentiary tests to her assessment of the grounds for pre-trial detention

36. The Impugned Decision lacked procedural fairness. It adopted a flawed and inadequate methodology to the assessment of the relevant circumstances and their application to the appropriate threshold tests for pre-trial detention. Specifically, the PTJ failed to: (i) apply the presumption in favour of liberty; (ii) conduct a fresh and contemporaneous examination of the circumstances; and (iii) make specific, evidence-based findings, relying instead upon "abstract and stereotyped" generalities.

37. Pre-trial detention is an exception to the general right to liberty. Decisions that interfere with that general right must be contemporaneous, evidence-based and read in conformity with international human rights standards.

38. Based on the outcomes of provisional release decisions at the KSC, the exception has become the rule; the vast majority of Accused are remanded in pre-trial detention as a matter of course. While it is important to exercise caution before judging the fairness of a regime on the basis of outcomes alone, it is submitted that on analysis the Impugned Decision lacks many of the strictures of substantive and procedural fairness which the international human rights framework, which underpins the KSC's own legal framework, demands.

39. The KSC, like any other court that is bound by international human rights law, operates a presumption in favour of pre-trial release. This stems from Article 5(1) of the ECHR and is reflected, specifically, in Article 46(1) of the Law. As mentioned, the ECHR is incorporated into the Law of the KSC specifically by virtue of Article 3(2)(e) and consequently must be read in conformity with it. It is therefore entrenched within the KSC's legal framework that it is only once one of the express grounds for pre-trial

detention is established on the evidence that the Court may withhold bail at the pre-trial stage.

40. Establishing the exceptions to bail must be done according to well-established evidentiary and procedural standards. Pre-trial detention must be continually justified against the presumption in favour of liberty. This is clear on the face of the Law which requires the Court to "examine whether reasons for detention still exist".[40] In order to ensure a continuing justification for the withholding of liberty before ordering further detention, this requires a "fresh [or *de novo*] assessment" of the applicability of the grounds for withholding release. As the European Court of Human Rights ("ECtHR") has stated, "[e]ven if many of [the grounds for withholding bail] were identical to those made four months previously, they all required a fresh examination, since by their very nature reasons which at first justify the imposition of pre-trial detention can change over time".[41]

41. In the instant case, the PTJ failed to make a truly fresh assessment of the application of the presumption in favour of liberty. Rather than making a *de novo* assessment based upon evidence, she adopted wholesale findings made in earlier decisions and found that "the factors favourable to Mr Kilaj insufficiently mitigate the risk" in question.[42] This approach was repeated in a formulaic fashion in relation to all three of the grounds for detention.[43]

42. Methodologically, this approach is erroneous and lacks procedural fairness.

43. First, it unfairly places the burden of proving the absence of risk on the Accused. This is evident from the finding that "the factors favourable to Mr Kilaj

[40] Article 41(10) of the Law
[41] *Merabishvili v Georgia* (Application no. 72508/13), Judgment, 28 November 2017, para. 232, and references cited therein.
[42] Impugned Decision, para. 27
[43] Impugned Decision, paras 30 and 34

insufficiently mitigate the risk of flight", a formula which is repeated, cut-and-paste fashion, in relation to the other grounds for withholding liberty.[44]

44. Second, there was no *de novo* assessment of the applicable circumstances. The ECtHR has observed that the circumstances applicable to bail "*by their very nature* […] change over time" and must therefore be subject to a "fresh assessment, even if many of the circumstances were identical to those made [in a previous assessment]".[45] Thus, the fact that circumstances change over time is inherently true (and does not need to be established) and must be an intrinsic part of any fair and proper assessment of the justification for pre-trial detention. The extent to which new circumstances exist and are relevant must of course be established, but the fact that all relevant circumstances must be treated as new (because they "by their very nature change over time") is inherent and does not require proof. As the ECtHR makes explicitly clear, this can only be done by way of a "fresh examination".

45. The PTJ's approach, however, was quite different and therefore erroneous. The PTJ presumed the integrity of previous findings subject only to the introduction of new circumstances. It was not a fresh examination. This was precisely the approach criticised by the ECtHR in *Merabishvilli*:

> the Kutaisi City Court briefly noted that the applicant had not pointed to any new facts or evidence, but had merely referred to the reasons set out in the initial decision to place the applicant in pre-trial detention. It thus entirely disregarded the passage of time and made it clear that it was for the applicant to show that his detention was no longer justified […] However, under Article 5 § 3 of the Convention it is incumbent on the authorities, rather than the detainee, to establish the persistence of reasons justifying continued pre-trial detention […] As already noted, even if such reasons exist when that detention is first imposed, they can by their very nature change over time.[46]

[44] Impugned Decision, paras 27, 30 and 34
[45] *Merabishvilli*, para. 232 [emphasis added]
[46] *Merabishvilli*, para. 234; *see also Ugulava v Georgia* (Application no. 5432/15), Judgement, 9 February 2023, para. 110: "The Court notes that it was not sufficient to refer to a previous decision ordering pre-trial detention, since the previous decision did not take into account new information on which a fresh application to lift the applicant's pre-trial detention had been based."

46. The ECtHR found such an approach insufficient to satisfy the procedural and evidentiary requirements of Article 5(3) and to be, consequently, a breach thereof.[47] In *Ilijkov v Bulgaria*, the Court found in similar circumstances that "it was incumbent on the authorities to establish those relevant facts. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases."[48]

47. Third, the PTJ erred in making and relying principally upon "abstract and stereotyped" findings to deny provisional release rather than findings that were evidence-based and specific to Mr Kilaj. For example, in relation to the risk of flight the PTJ found and placed weight on "the gravity of the offences with which he is charged", "his knowledge of the evidence presented by the SPO in support", and "the prospect of a potentially significant sentence in the event of conviction".[49] While such circumstances are relevant, in the absence of any reasoned discussion of the underlying evidence upon which those findings are made, it is impossible to assess whether they are sufficient or not. There is no explanation of why these contempt charges are particularly grave in the context of other justiciable offences.[50] There is no assessment of what the "potentially significant sentence" might be by reference to the specific factual matrix underlying the charges Mr Kilaj actually faces. It is wholly inadequate for the PTJ to merely refer to the maximum sentence. In the absence of a specific assessment, attaching weight to a "potentially significant sentence" can only be speculative. Finally, whereas the PTJ places weight on Mr Kilaj's "knowledge of the

[47] *Merabishvilli*, para. 234
[48] *Ilijkov v Bulgaria* (Application no. 33977/96), Judgment, 26 July 2001, para. 85
[49] Impugned Decision, para. 25
[50] The International Criminal Court ("ICC") has considered in analogous circumstances that an Accused's responsibility for contempt charges and "not for any of the crimes under article 5 of the Statute" militated in favour of his request for interim release: ICC, *The Prosecutor v. Paul Gicheru*, Pre-Trial Chamber A, Public Redacted Version of 'Decision on Mr Gicheru's Request for Interim Release', 29 January 2021, ICC-01/09-01/20-90-RED, para. 44

evidence presented by the SPO", there is no explanation of the nature of the evidence, or of the way in which it relates to Mr Kilaj, or of its strength.

48. In each case, the PTJ refers to and adopts her findings in earlier decisions, but these earlier decisions are equally devoid of proper analysis. Self-evidently, they cannot amount to the contemporaneous analysis required to form the basis for a further extension of an Accused's pre-trial detention.

49. The PTJ failed to properly consider the circumstances of the case against Mr Kilaj, preferring instead to engage in abstract, generic and stereotyped repetition of the grounds for detention. The ECtHR has found such an approach to be in breach of Article 5:

> The Court notes […] that the applicant's pre-trial detention was extended by a number of decisions delivered by the local courts and the Court of Appeal using a standard template. In particular […] they limited themselves to repeating a number of grounds for detention in an abstract and stereotyped way, without giving any factual elements and reasons why they considered those grounds still relevant to the applicant's case [...] As they were couched in general terms and contained repetitive phrases, the courts' decisions concerning the applicant's pre-trial detention did not suggest that an appropriate assessment had been made of the continued justification of the applicant's deprivation of liberty despite the passage of time."[51]

50. For these reasons, it is submitted that the Impugned Decision lacked procedural fairness, adopting instead a flawed and inadequate methodology to the PTJ's assessment of the relevant circumstances and their application to the appropriate threshold tests for pre-trial detention.

(ii) Ground 2: The PTJ erred in law in dismissing the relevance of the likely sentence as "speculative and inapposite"

51. The PTJ erroneously dismissed Mr Kilaj's submissions concerning the probability that his pre-trial detention would exceed any likely sentence as

[51] *Vadym Melnyk v Ukraine* (Applications nos. 62209/17 and 50933/18), Judgment, 15 September 2023, para. 111

"speculative and inapposite", in the context of the Court's assessment of the overall reasonableness of extending pre-trial detention under Rule 56(2).[52] The PTJ repeated and relied upon her earlier findings, erroneously making no allowance for the passage of time.

52. The ECtHR has held that the "severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending".[53]

53. However, where the period of pre-trial detention exceeds the statutory maximum sentence imposable, international human rights law findings make it clear that an Accused should be released.[54]

54. Thus, there is a clear relationship between a likely overall sentence and justification for pre-trial detention through which reasonableness and proportionality of that pre-trial detention must be assessed. Justification for pre-trial detention always requires a fact-specific assessment;[55] it can therefore never be appropriate to dismiss submissions on reasonableness and proportionality in light of the likely overall sentence as "speculative and inapposite".

55. At the date of filing, Mr Kilaj has spent 392 days in pre-trial detention. Allowing for commutation after two-thirds of any sentence upon conviction have been served, this amounts to a sentence of over 19 months already served. This far exceeds the maximum sentence of six months' imprisonment for Count 14, (the offence of contempt of court under Article 393 of the Kosovo Criminal Code). Although time served does not exceed the statutory maximum sentence available for Count 15 (five

[52] Impugned Decision, para. 43
[53] *Ilijkov*, para. 80
[54] *See eg* Human Rights Committee, CCPR/C/GC/35, para. 38
[55] *Buzadji v The Republic of Moldova* (Application no. 23755/07), Judgment, 5 July 2016, para. 90: "The question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest."

years' imprisonment), given the length of pre-trial detention already served, it was incumbent upon the PTJ to examine the facts and the likely sentence. As set out in the Defence Submissions:

> it is likely that any sentence will be at the lower end of the range of one to five years' imprisonment. This is the case given that not only was there no actual obstruction, but there is positive evidence Mr Kilaj did not even communicate with any SPO witness with a view to interfere with their cooperation with the Prosecution.[56]

56. Having erroneously dismissed these submissions as "inapposite and speculative" the PTJ wrongly failed to take account of these facts or engage in any analysis of the questions raised in the submissions.

57. Moreover, in relation to risk of flight, the PTJ *had* felt able to make a finding concerning the likely sentence, specifically that the sentence was "potentially significant".[57] The PTJ engaged in double standards: it was unreasonable to make such a finding in relation to risk of flight, but then to refuse to do so in relation to reasonableness on the basis that the exercise would be speculative.

58. Such an unfair differential treatment of the facts has been criticised by the ECtHR in circumstances where domestic courts "dismissed as unsubstantiated and implausible the prosecutor's allegations [about a certain issue]" but, on other occasions, "accepted the same reasons without there being any apparent change in the circumstances and without explanation".[58] The ECtHR found that "where such an important issue as the right to liberty is at stake, it is incumbent on the domestic authorities to convincingly demonstrate that the detention is necessary. That was certainly not the case here."[59]

[56] Defence Submissions, para. 51
[57] Impugned Decision, para. 25
[58] *Buzajdi*, para. 122
[59] *Buzajdi*, para. 122

(iii) Ground 3: The PTJ erred in law and in fact in relation to the finding of a risk of the obstruction of proceedings

59. The PTJ erred in her assessment of the factors relevant to the risk of obstruction, and her attribution of weight thereto. In particular, the PTJ wrongly attached weight to vanishingly remote factors, including the possibility of recall of witnesses in Case 6.[60] Further, she dismissed far more relevant and weighty factors.

60. Any assessment concerning the risk of interference with witnesses "cannot be made in abstract; a concrete danger needs to be identified".[61]

61. The PTJ had previously identified the risk of obstruction as applying to proceedings in both Case 12 and Case 6 proceedings.[62] The PTJ wrongly found these risks continued to exist. This amounted to an error of fact and/or of law for the following reasons.

62. First, in relation to Case 6, the risk was based primarily upon allegations in the instant case that Mr Kilaj had interfered with witnesses in Case 6. There is no evidence that he in fact ever did so. The PTJ erred in engaging in that reality. However, even if there was such evidence, the PTJ attached no, or no adequate, weight to the fact of the closure of the Prosecution case in Case 6. On the PTJ's own analysis, the ability to recall witnesses is "exceptional"[63] and would no doubt be limited where there was evidence of prior attempts to influence the witness. Therefore, even accepting the Prosecution's assertions in relation to that risk, the risk is necessarily, and significantly, diminished by virtue of the change of procedural posture of Case 6 since the close of the SPO's case.

[60] Impugned Decision, para. 31
[61] ICTY, *Haxhiu,* Decision on Provisional Release of Baton Haxhiu, IT-04-84-R77.5, 23 May 2008, para. 10
[62] Arrest Warrant Decision, para. 62; First Review Decision, para. 23
[63] Impugned Decision, para. 31

63. As submitted to the PTJ, the ICTY found in similar circumstances that the close of the Prosecution case "diminishes any risk that witnesses, victims or other persons are interfered with".[64] Whilst this may not have entirely extinguished the risk of obstruction, the PTJ should have recognised that it does necessarily diminish it.

64. Second, the PTJ relied upon a generalised "pervasive climate of fear and intimidation in Kosovo against witnesses" at the KSC, as creating a "particularly high" risk that Mr Kilaj will obstruct proceedings.[65] The PTJ made no effort to establish an evidential link between Mr Kilaj and this "pervasive climate of fear" through which to attribute that climate to him.[66] Such an approach is antithetical to a fair and fact-based assessment and amounts to an error of fact.

65. Third, the PTJ also based her decision to withhold liberty on the risk of interference with witnesses in the instant case, Case 12. The PTJ irrationally ignored the pertinent facts. The SPO is yet to file its witness list. The only known witness (whose statement was used in the confirmation proceedings) against Mr Kilaj is [REDACTED]. It would be patently absurd to suggest that such a witness could be influenced by My Kilaj. The SPO has not alleged that this is or could be the case, and the PTJ failed to explain how it could be a realistic risk. Contrary to the PTJ's findings that "Mr Kilaj has sufficient knowledge of the identity of potential witnesses",[67] none of the other witnesses are known to him. Making such a finding was an error of fact that is linked directly to, and caused an erroneous finding of, a risk of obstruction.

66. Finally, the PTJ's finding of "Mr Kilaj's demonstrated willingness to violate court orders and intervene in proceedings to which he is not a party"[68] goes directly

[64] Defence Submissions *citing* ICTY, *Prosecutor v. Ramush Haradinaj et al.*, IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 14 December 2007, para. 19
[65] Impugned Decision, para. 32
[66] Impugned Decision, para. 32
[67] Impugned Decision, para. 31
[68] Impugned Decision, para. 30

to a central issue in this case which is yet to be determined. As such, the finding is wholly unwarranted and based upon, if anything, contested evidence.

(iv) Ground 4: The PTJ erred in law and in fact in placing weight on the disclosure of Prosecution material as increasing the risk of flight

67. The PTJ wrongly placed reliance upon the continuing disclosure of Prosecution material to provide Mr Kilaj with "an increased insight into the evidence underpinning the charges through the ongoing disclosure process".[69]

68. However, in support of that finding, the PTJ relied on a number of Disclosure Packages made since the Second Review Decision which contain no, or no significant, evidence concerning the case against Mr Kilaj specifically:

a. Packages 24 and 27 contain delivery documents of audio recordings provided to the Smakaj Defence. Although one of the recordings provided concerns Mr Kilaj, the delivery document has no bearing on the Defence since it has been in possession of the transcript of the recording since 17 December 2024 (Disclosure Package 6);

b. Package 28 contains Cellebrite extractions of messages between Bashkim Smakaj and third parties. None of them have any relevance to Mr Kilaj;

c. Package 30 contains revised transcripts and enhanced audio recordings of detention centre visits between several of the Accused in Cases 6 and 12, other than Mr Kilaj, as well as a translation of items previously disclosed in packages 6 and 11.[70] They have no bearing whatsoever on the case against Mr Kilaj;

d. Package 34 contains two revised transcripts of a YouTube video interview given by Mr Kuçi, which were previously disclosed as part of

[69] Impugned Decision, para. 25, fn. 41
[70] Disclosed to the Defence on 17 December 2024 and 17 February 2025 respectively

Package 11. In any event, they have no bearing whatsoever on the case against Mr Kilaj;

e. Package 37 contains a Cellebrite extraction from Mr Kilaj's iPhone. It merely establishes his presence in The Hague during the October 2023 visit to the detention unit. This is not in dispute;

f. Package 38 contains four revised transcripts of audio recordings of detention centre visits between several of the Accused in Cases 6 and 12, other than Mr Kilaj, previously disclosed as part of Package 11. Although one of the transcripts mentions 'Isni',[71] it is not evidence that underpins the charges against Mr Kilaj and has no bearing on the case against him;

g. Package 43 contains a delivery document of audio recordings provided to the Fazliu Defence, which were previously provided to Mr Kilaj on 18 February 2025.[72] In any event, the recordings have no bearing on the case against Mr Kilaj.

69. Contrary to her findings, none of the material relied upon by the PTJ provides Mr Kilaj with further insight into the case against him. There is certainly nothing within those Disclosure Packages that could reasonably contribute to a conclusion that Mr Kilaj poses a risk of absconding.

VII. CONCLUSION

70. For the foregoing reasons, the Defence respectfully requests that:

(i) a Panel of the Court of Appeals Chamber be appointed without delay;

(ii) the Appeal be allowed;

and

[71] 114642 120823-085000-124707-TR-AT-ET, p. 242
[72] *See* 125885-125886

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(iii) the Impugned Decision be reversed.

Respectfully submitted,

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Abidjan, Côte d'Ivoire

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