



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2018-01  
**Before:** Single Judge Panel  
Judge Nicolas Guillou  
**Registrar:** Dr Fidelma Donlon  
**Date:** 9 November 2023  
**Language:** English  
**Classification:** Public

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**Public Redacted Version of Reasons for Continued Detention**

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**Registry**  
Fidelma Donlon

**THE SINGLE JUDGE**,<sup>1</sup> pursuant to Articles 33(2), 35(2)(h) and 41 of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Rules 52(2), 56(2) and 57(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby issues reasons for continued detention.

## I. PROCEDURAL BACKGROUND

1. On 20 October 2023, the Single Judge authorised, among others, the Specialist Prosecutor's Office ("SPO") to search the residence(s), vehicle(s) and person of Isni Kilaj ("Mr Kilaj"), for the purpose of seizing evidence of an offence within the meaning of Article 15(2) of the Law ("Search and Seizure Decision").<sup>2</sup>
2. On 2 November 2023, pursuant to the execution of the Search and Seizure Decision, the SPO notified the Single Judge of the arrest of Mr Kilaj, pursuant to an order by the SPO.<sup>3</sup>
3. On 3 November 2023, the Single Judge ordered, upon request of the SPO,<sup>4</sup> that Mr Kilaj be transferred to the Specialist Chambers' ("SC") Detention Facilities in The Hague, the Netherlands, following his arrest.<sup>5</sup> The Single Judge further decided

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<sup>1</sup> KSCPR-2018, F00004, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

<sup>2</sup> See KSC-BC-2018-01, F00484, Single Judge, *Decision Authorising Search and Seizure and Special Investigative Measures*, 20 October 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential. While the order annexed to the Search and Seizure Decision is known to Mr Kilaj, the decision is not, but will be made available to him in due course.

<sup>3</sup> KSC-BC-2018-01, F00489, Specialist Prosecutor, *Urgent Rule 52(1) Notification of Arrest of Isni Kilaj*, 2 November 2023, public.

<sup>4</sup> KSC-BC-2018-01, F00490, Specialist Prosecutor, *Urgent Request for Transfer Order*, 2 November 2023, confidential. A public redacted version was submitted on 3 November 2023, F00490/RED.

<sup>5</sup> KSC-BC-2018-01, F00491/COR, Single Judge, *Corrected Version of Decision on Transfer Order Pursuant to Arrest by the Specialist Prosecutor* ("Decision on Transfer Order"), 3 November 2023, confidential, with Annex 1, confidential. A public redacted version of the main filing was issued on 5 November 2023, F00491/COR/RED.

to convene a public hearing for Mr Kilaj's first appearance on 4 November 2023, at 10h00 ("First Appearance Hearing").<sup>6</sup>

4. On the same day, Mr Kilaj was transferred to the SC Detention Facilities.<sup>7</sup>

5. On the same day, the SPO submitted a request for the continued detention of Mr Kilaj ("SPO Request").<sup>8</sup>

6. On 4 November, the First Appearance Hearing took place,<sup>9</sup> during which the SPO and the Defence for Mr Kilaj ("Defence"), among other things, presented oral submissions on the SPO Request.<sup>10</sup> The Single Judge granted the Defence's request to have the opportunity to submit a written response to the SPO Request before the Single Judge's ruling on that matter.<sup>11</sup>

7. On the same day, the Defence filed written submissions on the SPO Request, in which it requested the Single Judge to order the immediate release of Mr Kilaj ("Defence Response").<sup>12</sup>

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<sup>6</sup> Decision on Transfer Order, para. 23(f).

<sup>7</sup> KSC-BC-2018-01, F00493, Registrar, *Notification of Reception of Isni Kilaj in the Detention Facilities of the Specialist Chambers*, 3 November 2023, strictly confidential, with Annex 1, strictly confidential; F00495, Registrar, *Report on the Transfer of Isni Kilaj to the Detention Facilities*, 3 November 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. A public redacted version of the main filing and confidential redacted versions of Annexes 1-2 were submitted on 8 November 2023, F00495/RED, F00495/RED/A01/CONF/RED, and F00495/RED/A02/CONF/RED, respectively.

<sup>8</sup> KSC-BC-2018-01, F00496, Specialist Prosecutor, *Prosecution Request for Continued Detention of Isni Kilaj*, 3 November 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. Confidential redacted versions of the SPO Request and annexes were submitted on the same day, F00496/CONF/RED, F00496/CONF/RED/A01, F00496/CONF/RED/A02, respectively. A public redacted version of the main filing was submitted on 7 November 2023, F00496/RED2.

<sup>9</sup> See KSC-BC-2018-01, Transcript of Hearing ("First Appearance Transcript"), 4 November 2023, confidential, pp. 163-191.

<sup>10</sup> First Appearance Transcript, p. 171, line 14 to p. 184, line 7.

<sup>11</sup> First Appearance Transcript, p. 190, lines 4-11.

<sup>12</sup> KSC-BC-2018-01, F00497/COR, Defence, *Corrected Version of Kilaj Defence Response to "Confidential Redacted Version of 'Prosecution Request for Continued Detention of Isni KILAJ'"*, 4 November 2023, confidential. A public redacted version was filed on 8 November 2023, F00497/COR/RED.

8. On 5 November 2023, as instructed by the Single Judge,<sup>13</sup> the SPO submitted a reply to the Defence Response, in which it maintained its position that Mr Kilaj should remain detained (“SPO Reply”).<sup>14</sup>

9. On 6 November 2023, the Single Judge ordered Mr Kilaj’s continued detention, and indicated that the reasons underlying the decision would be provided in a subsequent written decision to be issued by Thursday, 9 November 2023, with a view to enabling Mr Kilaj to challenge the lawfulness of his arrest and detention.<sup>15</sup>

## II. SUBMISSIONS

10. The SPO avers that there is a grounded suspicion that Mr Kilaj has committed offences under Article 15(2) of the Law, including obstructing official persons in performing official duties within the meaning of Article 401(2) of the 2019 Kosovo Criminal Code, Code No. 06/L-074 (“KCC”), and violating secrecy of proceedings under Article 392 of the KCC.<sup>16</sup> The SPO argues that detention is justified under Article 41(6)(b) of the Law because there is a risk (i) of flight; (ii) Mr Kilaj will obstruct the progress of the criminal proceedings; and (iii) he will repeat the offences alleged to have been committed by him.<sup>17</sup> The SPO further claims that no combination of release conditions, nor any additional measures foreseen in Article 41(12) of the Law could sufficiently mitigate the aforementioned existing risks with respect to Mr Kilaj.<sup>18</sup> According to the SPO, detention at the SC Detention Facilities is the only means by which these risks can be adequately managed.<sup>19</sup>

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<sup>13</sup> First Appearance Transcript, p. 190, lines 4-12.

<sup>14</sup> KSC-BC-2018-01, F00498, Specialist Prosecutor, *Prosecution Reply to F00497*, 5 November 2023, confidential. A public redacted version was submitted on 7 November 2023, F00498/RED.

<sup>15</sup> KSC-BC-2018-01, F00499, Single Judge, *Decision on Continued Detention*, 6 November 2023, public, para. 15.

<sup>16</sup> SPO Request, paras 9, 10-15. *See also* First Appearance Transcript, p. 168, lines 9-20.

<sup>17</sup> SPO Request, paras 9, 16-20. *See also* First Appearance Transcript, p. 174, line 1 to p. 175, line 7.

<sup>18</sup> SPO Request, paras 21-23. *See also* First Appearance Transcript, p. 175, lines 2-5.

<sup>19</sup> SPO Request, para. 21.

11. The Defence responds that, based on the evidence provided, the SPO has failed to demonstrate that there is a grounded suspicion that Mr Kilaj has committed any crime within the jurisdiction of the SC.<sup>20</sup> The Defence further submits that there are no articulable grounds to believe that Mr Kilaj is a flight risk, he would destroy evidence, or commit further offences.<sup>21</sup> The Defence avers that one or more of the conditions provided for in Article 41(12) of the Law could be imposed to allay any concerns about granting provisional release, and that Mr Kilaj is willing to abide by any conditions the Single Judge might consider appropriate in this respect.<sup>22</sup> It adds that the likely delay occasioned by the next procedural steps in relation to the filing of an indictment by the SPO militates in favour of provisional release.<sup>23</sup>

12. The SPO replies that the Defence overstates what is required for the purpose of the assessment of a grounded suspicion under Article 41(6)(a) of the Law, and avers that the facts set forth in the SPO Request and elaborated in the First Appearance Hearing more than meet the applicable standard.<sup>24</sup> The SPO maintains that a risk of flight, obstruction of criminal proceedings, or commission of further offences exists in relation to Mr Kilaj.<sup>25</sup> It argues that none of the measures proposed by the Defence adequately address said risks, and claims that such risks can only be managed through, in particular, the communications monitoring regime available at the SC Detention Facilities.<sup>26</sup> The SPO further contends that the Defence's arguments as regards the likely delay occasioned by the procedural steps relating to the filing of an indictment by the SPO are premature and speculative, and that no question of proportionality arises at this stage.<sup>27</sup>

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<sup>20</sup> Defence Response, paras 4-24. *See also* First Appearance Transcript, p. 177, line 11 to p. 179, line 1 and p. 179, lines 12-18.

<sup>21</sup> Defence Response, paras 26-29, 36. *See also* First Appearance Transcript, p. 179, line 19 to p. 181, line 5.

<sup>22</sup> Defence Response, paras 30-31. *See also* First Appearance Transcript, p. 181, lines 6-12.

<sup>23</sup> Defence Response, paras 32-35. *See also* First Appearance Transcript, p. 176, lines 1-16.

<sup>24</sup> SPO Reply, paras 2-5.

<sup>25</sup> SPO Reply, paras 6, 8.

<sup>26</sup> SPO Reply, para. 7.

<sup>27</sup> SPO Reply, para. 9.

### III. APPLICABLE LAW

13. Pursuant to Article 35(2)(h) of the Law, the SPO may order the arrest of a person during the investigative stage for a period of no more than forty-eight (48) hours on grounds set out at Article 41(6) of the Law, and in compliance with Article 41 of the Law generally, other relevant provisions of this Law and the Rules.

14. Pursuant to Article 41(3) of the Law and Rule 52(2) of the Rules, any person who is deprived of his or her liberty without an order from the SC shall be brought within forty-eight (48) hours in person before a SC Judge who shall decide on his or her continued detention or release not later than forty-eight (48) hours from the moment the detained person was brought before the court.

15. Pursuant to Article 41(6) of the Law, the SC or the SPO shall only order the arrest and detention of a person when (a) there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC; and (b) there are articulable grounds to believe that the person: (i) is a flight risk; (ii) will destroy, hide, change or forge evidence of a crime or will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime that the person has threatened to commit.

16. Pursuant to Article 41(12) of the Law, in addition to detention on remand, the following measures may be ordered by the SC to ensure the presence of the accused, including by video-teleconference, to prevent reoffending or to ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave his or her place of residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion. Pursuant to Rule 56(5) of the Rules, the Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the detained person.

17. Pursuant to Rule 56 (2) of the Rules, the Single Judge shall ensure that a person is not detained for an unreasonable period prior to the opening of the case.

18. Pursuant to Rule 57(1) of the Rules, the total duration of the detention under this provision shall not exceed one (1) year.

#### IV. DISCUSSION

##### A. APPLICABLE STANDARDS

19. At the outset, the Single Judge recalls that Mr Kilaj was arrested pursuant to an arrest order issued by the SPO.<sup>28</sup> When deciding on continued detention, the Single Judge must be satisfied that there (i) is a grounded suspicion that the person committed the offence(s), and (ii) are articulable grounds to believe that any of the requirements set out in Article 41(6)(b) of the Law has been fulfilled.

20. The present initial decision on detention, which is rendered in accordance with Article 41(3) of the Law and Rule 52(2) of the Rules, is subject to review every two (2) months, pursuant to Article 41(10) of the Law and Rule 57(1) of the Rules.

21. The Single Judge also underscores in this regard that any analysis of pre-trial detention is undertaken in the context of the detained person's presumption of innocence.<sup>29</sup> Consequently, this means that pre-trial detention cannot be maintained

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<sup>28</sup> KSC-BC-2018-01, F00492/A01, Specialist Prosecutor, *Annex 1 to Prosecution Report on Arrest of Isni Kilaj*, 3 November 2023, confidential. A public redacted version was submitted on 8 November 2023, F00492/RED/A01/RED.

<sup>29</sup> KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* ("SCCC 26 April 2017 Judgment"), 26 April 2017, public, para. 113; KSC-BC-2020-06, IA004/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release* ("Thaçi Interim Appeal Decision"), 30 April 2021, public, para. 17, with further references. *See, similarly*, ECtHR, *McKay v. the United Kingdom*, no. 543/03, Judgment, 3 October 2006, para. 43.

lightly,<sup>30</sup> and that the SPO bears the burden of establishing that the detention of Mr Kilaj is necessary.<sup>31</sup>

## B. GROUNDED SUSPICION

22. As regards the threshold for (continued) detention, Article 41(6)(a) of the Law requires a grounded suspicion that the detained person has committed a crime within the SC's jurisdiction. This is a condition *sine qua non* for the validity of the detained person's (continued) detention.<sup>32</sup>

23. Under Article 19(1)(1.9) of the 2022 Kosovo Criminal Procedure Code, Code No. 08/L-032 ("KCPC"), the evidentiary threshold of "grounded suspicion" is defined as "knowledge of information which would satisfy an objective observer that a criminal offence has occurred, is occurring or there is a substantial likelihood that one will occur and the person concerned is more likely than not to have committed the offence".<sup>33</sup> In this regard, the Single Judge further notes that the facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge.<sup>34</sup>

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<sup>30</sup> *Thaçi Interim Appeal Decision*, para. 17.

<sup>31</sup> KSC-BC-2020-04, F00045/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Pjetër Shala's Request for Provisional Release* ("First Shala Detention Decision"), 23 June 2021, public, para. 13. KSC-BC-2020-06, F00177, Pre-Trial Judge, *Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release* ("First Thaçi Decision on Detention"), 22 January 2021, public, para. 19, with further references. See also ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment ("*Merabishvili v. Georgia*"), 28 November 2017, para. 234.

<sup>32</sup> *First Shala Detention Decision*, para. 14. See also ECtHR, *Merabishvili v. Georgia*, para. 222, with further references.

<sup>33</sup> See, similarly, Article 5(1)(c) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in, *inter alia*, ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, no. 1244/86; 12245/86; 12383/86, Judgment, 30 August 1990, para. 32; *Erdagöz v. Turkey*, no. 21890/93, Judgment, 22 October 1997, para. 51; *Ilgar Mammadov v. Azerbaijan*, no. 15172/12, Judgment, 22 May 2014, para. 88; *Selahattin Demirtaş (no. 2) v. Turkey*, no. 14305/17, Judgment, 22 December 2020, para. 314.

<sup>34</sup> ECtHR, *Merabishvili v. Georgia*, para. 184, with further references.



24. The Single Judge recalls that, in the Search and Seizure Decision, he found a grounded suspicion that evidence of an offence under Article 15(2) of the Law can be found in the residence(s), vehicle(s), and/or on the person of Mr Kilaj, and that the search will result in the discovery and seizure thereof accordingly.<sup>35</sup> The Single Judge observes that during the judicially authorised search of Mr Kilaj's residence, conducted by the SPO on 2 November 2023, it identified and seized confidential [REDACTED] material ("Seized Material"). The Single Judge further pays heed to the fact that the Seized Material purportedly includes [REDACTED].<sup>36</sup>

25. The Single Judge further notes that the Defence does not dispute that [REDACTED], as part of the Seized Material, was in the possession of Mr Kilaj, but contends that it was acquired from [REDACTED], and may thus be described as having been in the public domain [REDACTED].<sup>37</sup> The Defence maintains that Mr Kilaj was not involved in their transmission.<sup>38</sup>

26. The Single Judge considers the Defence claim that [REDACTED] were in the public domain to be without merit. The Defence presents no support for the assertion that Mr Kilaj obtained the information from [REDACTED] or any other public source. The fact that Mr Kilaj claims that the documents were available to him "possibly" from [REDACTED] means that, in fact, he can neither explain how the documents came into his possession, nor substantiate the claim that he had found [REDACTED] in the public domain. To the contrary, the fact that Mr Kilaj makes a correlation with [REDACTED] is indicative of the fact that he is well aware that the information contained in [REDACTED] is not destined for the public. Likewise, the Single Judge is of the view that the fact that [REDACTED],

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<sup>35</sup> KSC-BC-2018-01, F00484/A01, Single Judge, *Order Authorising Search and Seizure*, 20 October 2023, strictly confidential, p. 2. *See also* Search and Seizure Decision, paras 27-30.

<sup>36</sup> SPO Request, para. 8; Annex 2 to SPO Request, pp. 2-3; First Appearance Transcript, p. 168, lines 3-8.

<sup>37</sup> Defence Response, paras 4-9. *See also* First Appearance Transcript, p. 177, lines 11-19.

<sup>38</sup> Defence Response, paras 5-6. *See also* First Appearance Transcript, p. 177, line 20 to p. 178, line 14.

demonstrates Mr Kilaj's intention to hide that he was in possession of confidential material. In this regard, the Single Judge also pays heed to the SPO's submission that, at the time when [REDACTED].<sup>39</sup> This circumstance directly contradicts the Defence claim that Mr Kilaj found the [REDACTED] in the public domain.

27. Regarding the Defence claim that Mr Kilaj did not disseminate [REDACTED], the Single Judge notes, based also on his findings in the foregoing paragraph, that Mr Kilaj was found in possession of confidential [REDACTED] material relating to proceedings before the SC. Since this information was not in the public domain, and Mr Kilaj did not have legitimate access to it, the Single Judge is of the view that his possession of the Seized Material, and in particular of [REDACTED], required the acts of other persons, who revealed this information to him without authorization, and whom he may have acted jointly with or assisted for the purpose of further coordinated action and, possibly, further dissemination of the confidential material. Moreover, the Single Judge cannot, at this stage, exclude that the Seized Material was not intended for further dissemination, should the opportunity arise. The Single Judge notes, in this regard, that Mr Kilaj was not only found in possession of confidential [REDACTED] material but, as demonstrated by (i) [REDACTED], as well as (ii) [REDACTED], Mr Kilaj also processed the information he claims was obtained from the public domain, which is indicative of an intent to contribute to [REDACTED].

28. The Single Judge is further mindful of the context provided by the SPO, namely that (i) Mr Kilaj was a founding member of the Kosovo Liberation Army ("KLA") in Malisheva, and commander of the Lumi unit; (ii) Mr Kilaj served as the Chairman of the Democratic Party for Kosovo – PDK, founded by Hashim Thaçi ("Mr Thaçi"), in the Malisheva municipality; (iii) Mr Kilaj has been reported to have previously

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<sup>39</sup> First Appearance Transcript, p. 182, line 17 to p. 183, line 7. *See also* Annex 2 to SPO Request, p. 3; SPO Reply, para. 5.

[REDACTED]; (iv) [REDACTED]; and (v) [REDACTED].<sup>40</sup> These factors suggest [REDACTED]. The fact that [REDACTED] is not a reason to disregard it altogether. Tellingly, while the Defence singles out and questions [REDACTED]. [REDACTED]. Lastly, [REDACTED].

29. The Single Judge further observes that [REDACTED]. It is noted that Mr Kilaj admitted having [REDACTED].<sup>41</sup>

30. Conversely, based on the information and supporting material provided at this time, the Single Judge does not attach any weight to [REDACTED].<sup>42</sup> Mr Kilaj claims that [REDACTED].<sup>43</sup> Without further information about [REDACTED], the Single Judge cannot reasonably infer that [REDACTED] confidential [REDACTED] information relevant to SC proceedings. The [REDACTED] equally does not bolster that suggestion.

31. Lastly, the Defence claims that the SPO has not produced any evidence that Mr Kilaj participated in a group of persons and committed the offence of obstructing official persons from performing official duties by common action.<sup>44</sup> The Single Judge recalls that the SPO alleges that Mr Kilaj committed either alone, or in co-perpetration with others, the offences under Articles 392 and 401 of the KCC.<sup>45</sup> The SPO likewise adds in the SPO Reply that the possession of the Seized Material requires the acts of additional persons, and “unmistakeably suggest efforts aimed at obstruction of justice which would involve both further coordinated action”.<sup>46</sup> While it is true that the SPO refers specifically to Article 401(2) of the KCC

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<sup>40</sup> SPO Request, paras 11-12.

<sup>41</sup> SPO Request, para. 15; SPO Reply, para. 4. The Single observes that, according to Mr Kilaj, [REDACTED], *see* SPO Request, footnote 21.

<sup>42</sup> SPO Request, para. 15. *See also* Defence Response, para. 16.

<sup>43</sup> Defence Response, para. 16.

<sup>44</sup> Defence Response, paras 19-24.

<sup>45</sup> SPO Request, para. 10.

<sup>46</sup> SPO Reply, para. 4.

in the SPO Request,<sup>47</sup> it refers generally to Article 401 of the KCC in the SPO arrest order for Mr Kilaj and mentioned in the First Appearance Hearing.<sup>48</sup> In addition, the Single Judge emphasises that the charges have not been drawn up yet, and the investigation into the Seized Material is currently ongoing.<sup>49</sup> As a result, the Single Judge does not find fault with the SPO's allegation that Mr Kilaj may have acted alone or together with others in the commission of offences pursuant to Articles 392 and 401 of the KCC.

32. In light of the foregoing, the Single Judge finds that a grounded suspicion exists that [REDACTED], as part of the Seized Material, were either intended or actually used for the purpose of interfering with the administration of justice, and that Mr Kilaj may have been involved in the commission of an offence under Article 15(2) of the Law.

### C. NECESSITY OF DETENTION

33. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be *articulable* in the sense that they must be specified in detail.<sup>50</sup> In this regard, Article 41(6)(b) of the Law echoes the principle that the continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person's right to liberty.<sup>51</sup> Therefore, the Panel must rely on case-specific reasoning

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<sup>47</sup> SPO Request, para. 10.

<sup>48</sup> See KSC-BC-2018-01, F000492/A01, Specialist Prosecutor, *Annex 1 to Prosecution Report on Arrest of Isni Kilaj*, 3 November 2023, confidential, p. 2 (a public redacted version of Annex 1 was filed on 8 November 2023, F00492/RED/A01/RED); First Appearance Transcript, p. 168, line 17.

<sup>49</sup> SPO Reply, para. 6.

<sup>50</sup> See Article 19(1.31) of the KCPC, which defines "articulable" as: "the party offering the information or evidence must specify in detail the information or evidence being relied upon". See also, for example, KSC-BC-2020-06, IA001/F00005, Court of Appeals Panel, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release ("Veseli Interim Release Appeals Decision")*, 30 April 2021, public, para. 15.

<sup>51</sup> SCCC 26 April 2017 Judgment, para. 113.

and concrete grounds in deciding to continue detention.<sup>52</sup> The Single Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the “belief”<sup>53</sup> that any of the risks specified under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.<sup>54</sup> In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.<sup>55</sup> The Single Judge further observes that these grounds are in the alternative, and that the existence of one ground suffices to determine the necessity of detention.<sup>56</sup>

34. As regards the nature of the assessment under Article 41(6)(b) of the Law, the Single Judge recalls that, while the evaluation involves an element of discretion,<sup>57</sup> it must be based on the facts of the case and must be undertaken on an individual basis in light of the personal circumstances of the detained person.<sup>58</sup> When assessing the relevant factors, the Single Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.<sup>59</sup>

35. Lastly, in relation to the grounds set forth in Article 41(6)(b)(ii)-(iii) of the Law, the Single Judge emphasises that the risks may materialise as a result of the detained person’s acts or omissions, but they do not require physical execution on his or her part.<sup>60</sup>

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<sup>52</sup> SCCC 26 April 2017 Judgment, para. 115; *Thaçi* Interim Appeal Decision, para. 22. See also ECtHR, *Khudoyorov v. Russia*, no. 6847/02, Judgment (“*Khudoyorov v. Russia*”), 8 November 2005, para. 173; First *Shala* Detention Decision, para. 16.

<sup>53</sup> See chapeau of Article 41(6)(b) of the Law.

<sup>54</sup> First *Shala* Detention Decision, para. 16; KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, public, para. 17, with further references.

<sup>55</sup> First *Shala* Detention Decision, para. 16; *Veseli* Interim Appeal Decision, para. 17.

<sup>56</sup> First *Shala* Detention Decision, para. 20; First *Thaçi* Decision on Detention, para. 25.

<sup>57</sup> First *Thaçi* Decision on Detention, para. 21, with further references.

<sup>58</sup> See, similarly, ECtHR, *Aleksanyan v. Russia*, no. 46468/06, Judgment, 22 December 2008, para. 179. See also First *Shala* Detention Decision, para. 17; First *Thaçi* Decision on Detention, para. 21, with further references.

<sup>59</sup> First *Shala* Detention Decision, para. 17; First *Thaçi* Decision on Detention, para. 21, with further references.

<sup>60</sup> First *Shala* Detention Decision, para. 19; First *Thaçi* Decision on Detention, para. 24.

## 1. Risk of Flight

36. The SPO submits that there is a risk of flight since: (i) Mr Kilaj is aware that evidence potentially supporting grave charges, which could attract a sentence of up to five (5) years imprisonment, have been seized from his residence; (ii) should Mr Kilaj not be detained, he would have the opportunity to evade justice, including by travelling freely to jurisdictions beyond the reach of the SC; the SPO avers in this regard that a Court of Appeals in Albania has recently refused an extradition request from the SC; (iii) Mr Kilaj's possession of the Seized Material demonstrates a blatant disregard for the laws and rules of the SC, in particular as regards court-protective measures; and (iv) the prevailing climate of obstruction of KLA-related criminal proceedings, both in and outside Kosovo, allows for the mobilisation of supporters to assist Mr Kilaj in fleeing to evade justice.<sup>61</sup>

37. The Defence responds that Mr Kilaj does not present a flight risk as (i) he has demonstrated his willingness to cooperate with the SPO, not least by his agreement to undergo a voluntary SPO interview after his arrest; (ii) Mr Kilaj is a man of nearly sixty (60) years old, of good character, who has no previous convictions in Kosovo or anywhere else, and is anxious to clear his name by having his trial and proving his innocence; (iii) Mr Kilaj has very close community ties in Kosovo, has lived and worked in Malisheva his entire life, and has been married to his wife, with whom he has six (6) children, for some forty (40) years; (iv) fleeing to other jurisdictions, such as Albania, would represent an unthinkable rupture of his home and family life; and (v) it is objectionable to suggest that, because of his connections with the KLA, and because of historical criminality on the part of other persons associated with the KLA, there is some sort of presumption that Mr Kilaj should be remanded in custody.<sup>62</sup>

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<sup>61</sup> SPO Request, paras 16-17. *See also* First Appearance Transcript, p. 174, lines 4-8.

<sup>62</sup> Defence Response, paras 26-27, 29, 36. *See also* First Appearance Transcript, p. 179, line 19 to p. 181, line 5.

38. The SPO replies in this regard that the Defence's submissions fail to account for relevant context, in particular as regards the possibility of risk of flight to Albania, which the SPO submits is within relatively easy driving distance from his home.<sup>63</sup>

39. As regards the flight risk under Article 41(6)(b)(i) of the Law, the Single Judge considers that knowledge of potential serious charges and the forthcoming filing of an indictment, as well as the severity of the potential sentence, is one of the factors that has a bearing upon the assessment of the flight risk,<sup>64</sup> and provides Mr Kilaj with a motive to evade justice. In this regard, the Single Judge observes that Mr Kilaj is aware that Mr Gucati and Mr Haradinaj were convicted and sentenced by the SC to four years and three months of imprisonment for having, *among others*, violated the secrecy of proceedings and obstructed official persons from performing official duties.<sup>65</sup> Having said that, the Single Judge is mindful of the fact that the risk of Mr Kilaj absconding cannot be gauged solely on the grounds of the severity of the sentence faced.<sup>66</sup>

40. Further, the Single Judge notes favourably Mr Kilaj's willingness to participate in a voluntary interview with the SPO on 2 November 2022, his compliance with the arrest order issued by the SPO,<sup>67</sup> and expressed readiness to further cooperate with the SPO and the SC, as well as Mr Kilaj's settled family life and ties with the community. Nevertheless, the Single Judge considers that these factors would only diminish, but not eliminate the risk of flight, and that Mr Kilaj would, in principle, have the opportunity to evade justice, including by traveling freely to jurisdictions

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<sup>63</sup> SPO Reply, para. 8.

<sup>64</sup> See, *similarly*, KSC-BC-2020-07, IA002/F0005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention*, 9 February 2021, public, para. 61.

<sup>65</sup> See, *for example*, Defence Response, paras 7-8.

<sup>66</sup> See *First Shala Detention Decision*, para. 24; ECtHR, *Becciev v. Moldova*, no. 9190/03, Judgment, 4 October 2005, para. 58.

<sup>67</sup> See KSC-BC-2018-01, F00492, Specialist Prosecutor, *Prosecution Report on Arrest of Isni Kilaj*, 3 November 2023, confidential, paras 2-7, with Annexes 1-2, confidential. A public redacted version was filed on 8 November 2023, F00492/RED.

beyond the reach of the SC, such as Albania, but not only. At this juncture, it is worth recalling that it is the risk, not the inevitability, of flight that must be assessed.

41. Lastly, the Single Judge is not persuaded by the argument of the SPO that the prevailing climate of obstruction of KLA-related criminal proceedings allows for the mobilisation of supporters to assist Mr Kilaj in fleeing to evade justice. In this regard, the Single Judge notes that the SPO fails to provide any information as to the alleged supporters that could mobilise to assist Mr Kilaj to flee, or their capacity and resources.<sup>68</sup>

42. In light of the foregoing, the Single Judge finds that, while a risk of flight exists for Mr Kilaj, this risk is moderate.

## **2. Risk of Obstructing the Progress of SC Proceedings**

43. The SPO avers that the explicit and systematic nature of the Seized Material, which [REDACTED], demonstrates a conscious design to obstruct SC proceedings.<sup>69</sup> According to the SPO, the fact that Mr Kilaj has demonstrated willingness to violate court orders, and intervene in proceedings in which he is not a party, suggest that he is even more likely to do so in proceedings where he may be an accused.<sup>70</sup>

44. The Defence responds that the SPO's submissions regarding any suggested risk of obstructing the progress of the proceedings is misplaced, as the evidence that Mr Kilaj has committed any offence is extremely insubstantial.<sup>71</sup>

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<sup>68</sup> See KSC-BC-2020-06, IA002/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 55.

<sup>69</sup> SPO Request, para. 18. See also First Appearance Transcript, p. 174, lines 9-14.

<sup>70</sup> SPO Request, para. 19. See also First Appearance Transcript, p. 174, lines 9-14.

<sup>71</sup> Defence Response, para. 28. See also First Appearance Transcript, p. 180, line 24 to p. 181, line 5.



45. The SPO replies that, since investigations are ongoing in relation to Mr Kilaj, releasing him would generate an unmanageable risk of obstruction, including of [REDACTED].<sup>72</sup>

46. As regards the obstruction of proceedings under Article 41(6)(b)(ii) of the Law, the Single Judge recalls, at the outset, his findings as to the existence of a grounded suspicion that Mr Kilaj has committed offences, alone or together with others, under Articles 392 and 401 of the KCC, and that Mr Kilaj's possession of the Seized Material, which pertains to confidential [REDACTED] matters, possibly required the acts of other persons for the purpose of further coordinated action, as well as dissemination thereof.<sup>73</sup> In this regard, the Single Judge attaches weight to the fact that the Seized Material purportedly identifies [REDACTED] information that cannot be found in the public domain, and which could put at risk [REDACTED] and the integrity of SC proceedings. Furthermore, the Single Judge observes that, even knowing that the unlawful dissemination of confidential [REDACTED] material led to the conviction of Mr Gucati and Mr Haradinaj, Mr Kilaj nevertheless had the Seized Material in his possession, thus demonstrating a willingness to violate court orders and to intervene in proceedings to which he is not a party. The Single Judge agrees with the SPO that this is indicative of the risk that he may be likely to obstruct the proceedings where he may be an accused.

47. The Single Judge makes the aforementioned finding, bearing in mind also the pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses of the SC.<sup>74</sup>

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<sup>72</sup> SPO Reply, para. 6.

<sup>73</sup> See above paras 27, 32.

<sup>74</sup> See also, amongst others, KSC-BC-2023-10, F00009/RED, *Public Redacted Version of the Decision on Request for Arrest Warrants and Transfer Orders*, 2 October 2023, public, para. 21; KSC-BC-2020-07, F00611/RED, Trial Panel II, *Public Redacted Version of the Trial Judgment*, 18 May 2022, public, paras 576-581.

48. In light of the foregoing, the Single Judge finds that Mr Kilaj may obstruct the progress of criminal proceedings.

### 3. Risk of Committing Further Crimes

49. The SPO submits that, for the same reasons as provided with regard to the risk of obstructing the progress of SC proceedings, there exists a risk that Mr Kilaj will repeat the offences alleged to have been committed by him.<sup>75</sup>

50. The Defence responds that the SPO's submissions regarding any suggested risk of committing further offences is misplaced, since the evidence that Mr Kilaj has committed any offence is extremely insubstantial.<sup>76</sup>

51. The SPO replies that, since investigations are ongoing in relation to Mr Kilaj, releasing him would generate an unmanageable risk of obstruction, including of [REDACTED].<sup>77</sup>

52. As regards the further commission of crimes under Article 41(6)(b)(iii) of the Law, the Single Judge is of the view that the relevant factors to be considered are the same as those recited in paragraphs 46-48 above with respect to the obstruction of proceedings. While the existence of such a risk does not automatically translate into a risk of committing further crimes, the factors underpinning the former are of relevance to the assessment of the latter in the present case.<sup>78</sup> In particular, the Single Judge finds that there exists a risk that Mr Kilaj will repeat the offences alleged to have been committed by him.

53. In light of the foregoing, the Single Judge considers that Mr Kilaj may commit further offences.

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<sup>75</sup> SPO Request, para. 20. *See also* First Appearance Transcript, p. 174, lines 15-17.

<sup>76</sup> Defence Response, para. 28. *See also* First Appearance Transcript, p. 180, line 24 to p. 181, line 5.

<sup>77</sup> SPO Reply, para. 6.

<sup>78</sup> *See* First *Shala* Detention Decision, para. 39.

#### 4. Conclusion

54. As a result, the Single Judge finds that there are articulable grounds to believe that there is a risk that Mr Kilaj may flee (although this risk is moderate), obstruct the progress of the criminal proceedings, and commit further offences, therefore necessitating Mr Kilaj's continued detention, in accordance with Article 41(6)(b) of the Law.

#### D. CONDITIONAL RELEASE

55. The SPO submits that no modalities of conditional release could sufficiently mitigate the existing risks with respect to Mr Kilaj.<sup>79</sup> According to the SPO, it is only through the communication monitoring framework in place at the SC Detention Facilities that his communications can be effectively restricted and monitored, thus mitigating the risks of Mr Kilaj obstructing the progress of SC proceedings, or engaging in or contributing to further offences.<sup>80</sup>

56. The Defence responds that any residual concerns about granting provisional release can be allayed by the imposition of one or more conditions provided for in Article 41(12) of the Law, notably that Mr Kilaj (i) not leave Malisheva, and (ii) attend his local police station at a frequency to be determined by the Single Judge.<sup>81</sup> The Defence maintains that the Single Judge may further order, at his discretion, that Mr Kilaj (i) surrender his passport and any other international travel document he may possess; (ii) not apply for another passport or any other international travel document; (iii) have his movements electronically monitored by way of an ankle tag or similar; and (iv) [REDACTED].<sup>82</sup> The Defence adds that,

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<sup>79</sup> SPO Request, paras 21-23. *See also* First Appearance Transcript, p. 175, lines 2-5.

<sup>80</sup> SPO Request, para. 22.

<sup>81</sup> Defence Response, para. 30.

<sup>82</sup> Defence Response, para. 30.

if released, Mr Kilaj will abide by any conditions the Single Judge might consider appropriate.<sup>83</sup>

57. The SPO replies that Mr Kilaj [REDACTED], and that releasing Mr Kilaj at this time, while SPO investigations relating to him are ongoing, would generate unmanageable risks of obstruction of proceedings.<sup>84</sup> The SPO reiterates that such risks can only be managed through the communications monitoring regime available at the SC Detention Facilities.<sup>85</sup>

58. As regards the question of conditional release, the Single Judge notes that the Defence merely lists some of the conditions under Article 41(12) of the Law. It does not explain how they might address the risks foreseen under Article 41(6)(b) of the Law, in particular the ground set forth in Article 41(6)(b)(ii) of the Law, given that Mr Kilaj [REDACTED].

59. Regarding the risk of flight, the Single Judge finds that some of the conditions proposed by the Defence could mitigate such a risk in relation to Mr Kilaj. In this regard, the Single Judge positively observes Mr Kilaj's readiness to attend his local police station at a frequency determined by the Single Judge, surrender his passport and any other international travel documents, submit himself to monitoring of his movements by way of an ankle tag or similar, and abide by any other conditions that the Single Judge might consider appropriate.

60. However, as regards the risk of obstructing the progress of SC proceedings or committing further crimes, the Single Judge finds that none of the conditions put forth by the Defence could restrict Mr Kilaj's ability to obstruct the progress of SC proceedings and commit further offences. Notably, the conditions proposed by the Defence (i) do not address the possibility of Mr Kilaj employing communication

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<sup>83</sup> Defence Response, para. 31. *See also* First Appearance Transcript, p. 181, lines 6-12.

<sup>84</sup> SPO Reply, para. 6.

<sup>85</sup> SPO Reply, para. 7.

devices belonging to other persons or requesting others to use their devices for these purposes; and (ii) cannot ensure the effective monitoring of the communications of Mr Kilaj.<sup>86</sup> The Single Judge is particularly mindful of the fact that, by virtue of possessing the Seized Material, Mr Kilaj has knowledge of [REDACTED], as well as other confidential [REDACTED] information that pertains to SC proceedings. Given the ongoing nature of the investigations relating to Mr Kilaj, the Single Judge considers that the risk of obstructing proceedings and committing further offences, including [REDACTED], can be effectively managed only through the communications monitoring regime available at the SC Detention Facilities.<sup>87</sup>

61. Whereas the Single Judge takes note of Mr Kilaj's commitment to, if ordered, [REDACTED], he is of the view that such a commitment can neither be enforced nor monitored. The Single Judge also considers that the measures in place at the SC Detention Facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes as much as possible.<sup>88</sup> In this regard, the Single Judge emphasises that the Registrar and the Panel, who have unrestricted access to confidential information concerning witnesses and victims, may take action more promptly than other authorities acting under a distinct framework.<sup>89</sup>

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<sup>86</sup> See, similarly, First Shala Detention Decision, para. 46; KSC-BC-2020-04, IA001/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release* ("First Shala Appeal Decision on Provisional Release"), 20 August 2021, public, paras 53-61.

<sup>87</sup> See, similarly, First Shala Detention Decision, para. 46; First Shala Appeal on Provisional Release, para. 61. See also KSC-BC-2020-04, F00282/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala* ("Seventh Shala Detention Decision"), 21 September 2022, public, paras 33-34.

<sup>88</sup> See, similarly, Seventh Shala Detention Decision, para. 33.

<sup>89</sup> See, similarly, Seventh Shala Detention Decision, para. 33.

62. For the same reasons, the Single Judge considers that no *additional* reasonable conditions, imposed by the Single Judge,<sup>90</sup> are available to adequately mitigate the existing risks.

63. The Single Judge accordingly finds that the conditions proposed by the Defence for Mr Kilaj's provisional release are insufficient to mitigate the risk of obstructing SC proceedings or committing further crimes.

#### E. PROPORTIONALITY OF DETENTION

64. Lastly, the Single Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.<sup>91</sup> In the present circumstances, and noting that Mr Kilaj has been detained only since 2 November 2023, the Single Judge is of the view that no question of proportionality arises at this stage.

65. That being said, and mindful of Rule 57(1) of the Rules, the Single Judge notes the SPO's commitment during the First Appearance Hearing to work expeditiously in order to ensure that an indictment against Mr Kilaj is filed as soon as possible.<sup>92</sup>

#### V. DISPOSITION

66. For the above reasons, the Single Judge hereby provided the reasons for the continued detention of Mr Kilaj, and further:

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<sup>90</sup> See KSC-BC-2020-06, IA017/F00011, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 5 April 2022, confidential, para. 51. A public redacted version was issued on the same day, IA017/F00011/RED.

<sup>91</sup> KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

<sup>92</sup> First Appearance Transcript, p. 186, line 10 to p. 187, line 6 and p. 181, line 19 to p. 182, line 1.

- (a) **ORDERS** the Defence, if it so wishes, to file submissions on the review of detention by **Tuesday, 5 December 2023**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- (b) **ORDERS** the SPO, should the Defence decide not to file any submissions by the aforementioned time-limit, to file submissions on the review of detention by **Monday, 11 December 2023**, with the Defence filing its response by **Thursday, 21 December 2023**, if it so wishes.



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**Judge Nicolas Guillou**  
**Single Judge**

Dated this Thursday, 9 November 2023

At The Hague, the Netherlands.