



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2018-01/IA004**

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

Registrar: Fidelma Donlon

Date: 11 January 2024

Original language: English

Classification: **Public**

Public Redacted Version of Decision on Isni Kilaj's Appeal Against Decision on Continued Detention

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed on 20 November 2023 by Isni Kilaj (“Appeal” and “Kilaj” or “Defence”, respectively)² against the “Decision on Continued Detention” and “Reasons for Continued Detention” (collectively, “Impugned Decision”).³ The Specialist Prosecutor’s Office (“SPO”) responded on 1 December 2023⁴ and Kilaj replied on 8 December 2023.⁵

I. BACKGROUND

1. On 2 November 2023, Kilaj was arrested in Kosovo pursuant to an arrest warrant issued by the SPO, following a judicially authorised search of Kilaj’s residence.⁶

¹ IA004/F00002, Decision Assigning a Court of Appeals Panel, 23 November 2023 (confidential, reclassified as public on 9 January 2024).

² IA004/F00001/RED Public redacted version of “Kilaj Appeal Against Decision on Continued Detention”, 13 December 2023 (confidential version filed on 21 November 2023) (“Appeal”). The Appeals Panel notes that the metadata for the filing indicates that the Appeal was “[o]riginally submitted at 00:00 on 20-21 November 2023, but was returned to submitter to correct a clerical error.” As a result, the Appeal was not filed until 21 November 2023. The Panel further notes that the SPO does not take issue with the timing of the filing in the Response. The Panel consequently recognises the Appeal as validly filed, in accordance with Rule 9(5)(b) of the Rules.

³ F00499, Decision on Continued Detention, 6 November 2023 (“Detention Decision”) and F00503/RED, Public Redacted Version of Reasons for Continued Detention, 13 November 2023 (confidential version filed on 9 November 2023) (“Reasons for Continued Detention”) (collectively, “Impugned Decision”).

⁴ IA004/F00003, Prosecution response to Defence appeal against decision on continued detention, 1 December 2023 (confidential) (“Response”).

⁵ IA004/00004, Kilaj Reply to Prosecution Response to Appeal Against Decision on Continued Detention, 8 December 2023 (confidential) (“Reply”).

⁶ F00489, URGENT Rule 52(1) notification of arrest of Isni KILAJ, 2 November 2023 (strictly confidential and *ex parte*, reclassified as public on 9 November 2023) (“Notification of Arrest”); F00490/RED, Public Redacted Version of ‘URGENT Request for transfer order’, 3 November 2023 (strictly confidential and *ex parte* version filed on 2 November 2023, reclassified as confidential on 3 November 2023) (“Request for Transfer Order”).

2. On 2 November 2023, the SPO notified the President and the Registrar of Kilaj's arrest in accordance with Rule 52(1) of the Rules,⁷ and requested Kilaj's transfer on a grounded suspicion that Kilaj had committed offences against the administration of justice within the jurisdiction of the Specialist Chambers under Article 15(2) of the Law.⁸

3. On 3 November 2023, Kilaj was transferred to the Detention Facilities of the Specialist Chambers in The Hague, the Netherlands.⁹ On the same day, the SPO submitted a request for Kilaj's continued detention.¹⁰

4. On 4 November 2023, Kilaj appeared before the Single Judge who heard oral submissions on the SPO Request and granted the Defence's request to submit a written response.¹¹

5. On 6 November 2023, after having received written submissions from the SPO and Kilaj,¹² the Single Judge issued the Impugned Decision, ordering Kilaj's continued detention on the basis that there is a grounded suspicion that Kilaj has committed crimes within the subject-matter jurisdiction of the Specialist Chambers.¹³ The Single Judge also found articulable grounds to believe that there is a risk that Kilaj will

⁷ Notification of Arrest.

⁸ Request for Transfer Order, paras 2-3.

⁹ F00495/RED, Public Redacted Version of "Report on the Transfer of Isni Kilaj to the Detention Facilities, with strictly confidential and *ex parte* Annexes 1-2" (F00495), 8 November 2023 (strictly confidential and *ex parte* version filed on 3 November 2023).

¹⁰ F00496/RED2, Further public redacted version of 'Prosecution Request for Continued Detention of Isni KILAJ, with confidential annexes 1 and 2', 8 November 2023 (strictly confidential and *ex parte* version filed on 3 November 2023, reclassified as confidential on 24 November 2023) ("SPO Request").

¹¹ Transcript, 4 November 2023, and in particular pp. 171-172, 172-173 (private session), 173-177, 177-179 (private session), 179-182, 182-183 (private session), 183-184, 190.

¹² F00497/COR/RED, Public redacted version of "Corrected Version of Kilaj Defence response to 'Confidential redacted version of "Prosecution request for continued detention of Isni KILAJ"', 8 November 2023 (confidential uncorrected version filed on 4 November 2023) ("Defence Response"); F00498/RED, Public redacted version of 'Prosecution reply to F00497', 7 November 2023 (confidential version filed on 5 November 2023).

¹³ Detention Decision, paras 13, 15.

abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes.¹⁴

6. On 9 November 2023, the Single Judge issued the Reasons for Continued Detention, providing the reasons underlying the Detention Decision.¹⁵

7. In the Appeal, Kilaj develops two grounds of appeal consisting of alleged errors of law committed by the Single Judge.¹⁶ Kilaj requests that the Court of Appeals Panel grant the Appeal and order his immediate release.¹⁷ The SPO responds that the Appeal fails to demonstrate a legal error in the Impugned Decision and should be dismissed.¹⁸

II. STANDARD OF REVIEW

8. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.¹⁹

III. PUBLIC FILINGS

9. The Appeals Panel notes that the Reasons for Continued Detention and Appeal were initially filed confidentially. As a result, all submissions on appeal were also filed confidentially. However, the Panel notes that public redacted versions of the Reasons for Continued Detention and the Appeal were subsequently filed on 13 November 2023 and 13 December 2023, respectively. The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are

¹⁴ Detention Decision, para. 14.

¹⁵ Reasons for Continued Detention.

¹⁶ Appeal, paras 6, 23.

¹⁷ Appeal, para. 24.

¹⁸ Response, paras 1, 10, 22, 24.

¹⁹ KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati Appeal Decision*"), paras 4-14. See also KSC-BC-2020-06, IA004/F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021) ("*Thaçi Appeal Decision*"), paras 4-7.

exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.²⁰

10. The Panel notes that Kilaj has requested reclassification of the Reply as public.²¹ As it does not contain any confidential information, the Panel therefore finds that the Reply can be reclassified as public. The Panel further notes that the SPO does not object to the reclassification of the Response as public.²² However, the Panel invites the SPO to follow the guidance provided by the redactions made in the public redacted versions of the Reasons for Continued Detention and of the relevant submissions from the Parties in assessing whether its submissions can be reclassified as public. The Panel, therefore, orders the SPO to file a public redacted version of the Response, or indicate, through a filing, whether it can be reclassified as public within ten days of receiving notification of the present Decision.

IV. DISCUSSION

A. WHETHER THE SINGLE JUDGE ERRED IN LAW IN FINDING THAT A GROUNDED SUSPICION HAD BEEN ESTABLISHED (GROUND 1)

1. Submissions of the Parties

11. Kilaj submits that, although the Single Judge acknowledged the correct evidentiary standard, namely that the establishment of a grounded suspicion is a condition *sine qua non* for the validity of continued detention, he erred in the application of this standard.²³ Specifically, Kilaj argues that the Single Judge:

²⁰ See e.g. KSC-BC-2020-06, IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), paras 8-9. See also KSC-CA-2022-01, F00103, Decision on Gucati Application for Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.

²¹ See IA004/F00005, Kilaj request for reclassification of IA004/F00004, 13 December 2023 ("Request for Reclassification").

²² See Response, para. 23.

²³ Appeal, paras 7, 9-10, 14-16; Reply, paras 3, 6-7.

(i) reversed the burden of proof by suggesting that Kilaj ought to present a “detailed explanation” and “concrete support” for his assertion that he obtained the seized material from a public source (“First Sub-ground”);²⁴ (ii) erroneously concluded that the seized material was not in the public domain and found that Kilaj’s possession of the materials “must have ‘required the acts of other persons’” (“Second Sub-ground”)²⁵; and (iii) applied a “lower standard of proof” to the facts in finding grounded suspicion, as evidenced by the use of the terms “may” and “possibly” in his conclusion (“Third Sub-ground”).²⁶

12. Under the First Sub-ground, Kilaj submits that it is “irrational” for the Single Judge to expect him to “present concrete support for his contention” at this stage and that he should instead have been given “the benefit of the doubt”.²⁷ Kilaj asserts that by expecting him to “provide a detailed explanation” and to “substantiate [his] claim that the Seized Material was found in the public domain”, the Single Judge reversed the burden of proof, in violation of his right to the presumption of innocence.²⁸ Kilaj further submits that the Single Judge erred in his assessment of the SPO’s evidence and “entirely ignore[d]” and “unfairly and unreasonably dismissed” the Defence’s submissions, as a result of which the Single Judge wrongly concluded that the Defence’s explanation was contradicted by the facts and thus devoid of merit.²⁹

13. Under the Second Sub-ground, Kilaj submits that, as a result of the error under the First Sub-ground, the Single Judge erred in his assessment of the circumstances of Kilaj’s possession of the seized material.³⁰ Kilaj asserts that the Single Judge’s conclusion was based on “unevidenced speculation”³¹ and that he should have

²⁴ Appeal, paras 9-11. See also Reply, paras 3-4.

²⁵ Appeal, paras 12-13.

²⁶ Appeal, paras 14-16; Reply, paras 6-7.

²⁷ Appeal, para. 9; Reply, para. 5.

²⁸ Appeal, para. 10; Reply, paras 3-5.

²⁹ Appeal, para. 11; Reply, para. 5.

³⁰ Appeal, para. 12.

³¹ Appeal, para. 13; Reply, para. 5.

required the SPO to demonstrate that Kilaj had or was about to engage in conduct beyond “simply possess[ing]” the confidential material, which he asserts is not a crime under the Law.³²

14. Under the Third Sub-ground, Kilaj submits that the Single Judge applied a “wrong” or “lower” standard of proof in finding the existence of a grounded suspicion justifying his continued detention.³³ In support, he asserts that the “more likely than not” standard, as laid out in the Reasons for Continued Detention, requires a finding that “a given circumstance or result *probably* occurred”.³⁴ However, Kilaj argues that the Single Judge’s conclusion was based on a mere possibility rather than probability, which in his view is “undeniably inadequate” to support a finding of grounded suspicion.³⁵ In support, Kilaj refers to the Single Judge’s finding that “he ‘cannot, at this stage, *exclude* that the Seized Material was not intended for dissemination, should the opportunity arise’”, and argues that the “inability to exclude an eventuality falls significantly short” of satisfying the requisite standard.³⁶ As a result, Kilaj asserts that there is no basis for the Single Judge’s finding of grounded suspicion, and his continued detention is not justified.³⁷

15. The SPO responds, with respect to Kilaj’s challenges to the Single Judge’s assessment of grounded suspicion under the First and Second Sub-grounds, that Kilaj misconstrues the Impugned Decision.³⁸ In support, the SPO asserts that the Single Judge specifically: (i) emphasised that the analysis is undertaken in the context of the

³² Reply, para. 4.

³³ Appeal, paras 14-16; Reply, paras 6-7, 9, 11.

³⁴ Appeal, para. 15 (emphasis in original). See also Reply, para. 8.

³⁵ Appeal, para. 15; Reply, para. 9. In this respect, Kilaj also draws a parallel between the Single Judge’s finding of grounded suspicion and a finding of guilt for a crime, noting that a verdict would be overturned on appeal where the trier of fact convicted an accused based on the application of a lower standard, namely that the accused was “probably guilty” of the crime instead of “guilt[y] beyond reasonable doubt”. See Reply, para. 10.

³⁶ Appeal, para. 16 (emphasis in original).

³⁷ Appeal, para. 16. See also Reply, para. 11.

³⁸ Response, para. 12.

detained person's presumption of innocence and that the SPO bears the burden of establishing the necessity of Kilaj's continued detention; and (ii) considered and addressed the Defence's submissions.³⁹ In the SPO's view, the Single Judge correctly found that the SPO had met its burden, and consequently did not err in reaching the "logical and reasonable conclusion" that Kilaj's possession of the seized materials required the acts of other persons.⁴⁰ In this respect, the SPO asserts that noting the "absence of contrary evidence" does not constitute a shifting of the burden or a violation of the presumption of innocence.⁴¹

16. The SPO further submits with respect to Kilaj's Third Sub-ground that the Single Judge correctly set out and applied the applicable standard of proof and that the Single Judge's findings, including that an intention not to disseminate the materials cannot be excluded, are "entirely consistent with the applicable standard."⁴² Furthermore, the SPO asserts that the "more likely than not" standard applies to the Single Judge's "overall conclusion based on a global assessment of multiple relevant factors", and not to individual pieces of evidence or elements of specific crimes.⁴³

2. Assessment of the Court of Appeals Panel

17. At the outset, the Panel is mindful of the fact that no indictment has yet been filed. However, the Panel recalls that the possibility to detain a suspect prior to the filing of an indictment is expressly foreseen in the Specialist Chambers' legal framework.⁴⁴ The Panel further acknowledges that any analysis of pre-trial detention

³⁹ Response, para. 12.

⁴⁰ Response, paras 12-13.

⁴¹ Response, para. 12.

⁴² Response, paras 15-16.

⁴³ Response, para. 16.

⁴⁴ See Rule 57(1) of the Rules, which governs the review of detention of a suspect by a Single Judge prior to the assignment of a Pre-Trial Judge.

must take the presumption of innocence as its starting point.⁴⁵ It follows that pre-trial detention cannot be maintained lightly.

18. The Panel will first address Kilaj's assertion under the Third Sub-ground as it relates to the standard of proof for a finding of grounded suspicion. The Panel notes that Kilaj does not challenge the evidentiary threshold identified by the Single Judge, but rather his application of the standard.⁴⁶ In particular, Kilaj asserts that the threshold ("more likely than not") requires a finding of probability and not merely a possibility that a circumstance or result occurred,⁴⁷ and that the Single Judge's use of the terms "may" and "possibly" in his conclusion suggests that he applied a lower standard.⁴⁸

19. The Panel recalls that Article 41(6)(a) of the Law provides that a person's arrest and detention shall only be ordered if "there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers". The term "grounded suspicion" is not defined in the Law or Rules.

20. The Panel notes that, in the Impugned Decision, the Single Judge laid out the evidentiary threshold of "grounded suspicion" as defined under Article 19(1)(1.9) of the 2022 Kosovo Criminal Procedure Code ("KCPC").⁴⁹ Article 19(1)(1.9) of the KCPC defines grounded suspicion as "knowledge of information which would satisfy an objective observer that a criminal offense has occurred, is occurring or there is a substantial likelihood that one will occur and the person concerned is more likely than

⁴⁵ KSC-BC-2020-06, IA001/F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, para. 14.

⁴⁶ See Appeal, paras 14-16; Reply, paras 3, 6-7.

⁴⁷ See Appeal, paras 14-15.

⁴⁸ In particular, Kilaj refers to the Single Judge's finding that Kilaj "may have acted jointly with or assisted for the purpose of further coordinated action and, possibly, further dissemination of the confidential material". See Appeal, paras 14-15, quoting Reasons for Continued Detention, para. 27.

⁴⁹ Reasons for Continued Detention, para. 23.

not to have committed the offense.” Article 19(1)(1.9) of the KCPC further provides that “[g]rounded suspicion must be based upon articulable evidence”.

21. In applying the provisions of Article 41(6) of the Law, a Panel is obliged pursuant to Article 3(2) of the Law to have due regard to the relevant constitutional provisions and to the well-established legal principles enshrined in international human rights law.⁵⁰ In this regard, the Panel recalls that both Article 29(1)(2) of the Kosovo Constitution and Article 5(1)(c) of the European Convention on Human Rights (“ECHR”), which set out the grounds for a deprivation of liberty, require a showing of “reasonable suspicion” that a criminal offence has been committed in order to justify a person’s detention. The Panel notes that, in interpreting Article 29(1)(2) of the Kosovo Constitution, the Kosovo Constitutional Court has been guided by Article 5(1)(c) of the ECHR and the jurisprudence of the European Court of Human Rights (“ECtHR”).⁵¹

22. Before the ECtHR, the standard of reasonable suspicion has been interpreted to “presuppose the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence”.⁵² Mere

⁵⁰ See KSC-CC-PR-2017-01, F00004, 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, 26 April 2017 (“Constitutional Court Judgment of 26 April 2017”), para. 110.

⁵¹ See e.g. Kosovo, Constitutional Court, *Lutfi Dervishi, Constitutional review of Judgment Pml. Kzz. 19/2017, of the Supreme Court of Kosovo, of 11 April 2017*, Resolution on Inadmissibility, KI63/17, 16 November 2017, paras 46, 56-58, 60 (finding, *inter alia*, that for an arrest or detention to be lawful and in compliance with Article 5(1)(c) of the ECHR and Article 29(1)(2) of the Kosovo Constitution, there must exist a reasonable suspicion that the suspect has committed the criminal offence, such that “all circumstances would satisfy an objective observer that the person concerned may have committed the offence”); Kosovo, Constitutional Court, *Fahri Deqani, Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017*, Judgment, KI10/18, 21 October 2019, paras 63, 65-66, 68-70, 72.

⁵² See e.g. ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, nos. 12244/86, 12245/86, 12383/86, Judgment, 30 August 1990, para. 32; ECtHR, *Mammadov v. Azerbaijan*, no. 15172/13, Judgment, 22 May 2014, para. 88; ECtHR, *Erdagöz v. Turkey*, no. 21890/93, Judgment, 22 October 1997, para. 51.

suspicion, even when held in good faith, is insufficient.⁵³ While what is deemed reasonable will depend on all the circumstances of the case, a suspicion must be justified by verifiable and objective evidence.⁵⁴ However, 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.⁵⁵ Consequently, the Panel is guided in its interpretation of grounded suspicion under Article 41(6)(a) of the Law by the meaning of reasonable suspicion under Article 5(1)(c) of the ECHR, as interpreted by the ECtHR, and considers that for a suspicion to be “grounded”, it must be supported by some objective facts and evidence.

23. Furthermore, while the Specialist Chambers are not bound by the standards used by international courts and tribunals, they can also provide some guidance. The Panel notes that at the International Criminal Court (“ICC”), pursuant to Article 60(2) of the Rome Statute, a person shall continue to be detained if the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58(1) of the Rome Statute are met. Article 58(1)(a) of the Rome Statute requires that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”⁵⁶

⁵³ ECtHR, *Muradverdiyev v. Azerbaijan*, no. 16966/06, Judgment, 9 December 2010, para. 53; ECtHR, *Sabuncu and Others v. Turkey*, no. 23199/17, Judgment, 10 November 2020, para. 145; ECtHR, *Włoch v. Poland*, no. 27785/95, Judgment, 19 October 2000, paras 108-109 (noting that “[t]he question then is whether the arrest and detention were based on sufficient objective elements to justify a ‘reasonable suspicion’ that the facts at issue had actually occurred.”).

⁵⁴ ECtHR, *Akgün v. Turkey*, no. 19699/18, Judgment, 20 July 2021, paras 156, 175; ECtHR, *Kavala v. Turkey*, no 28749/18, 10 December 2019, paras 136-137.

⁵⁵ ECtHR, *Altan v. Turkey*, no. 12778/17, Judgment, 16 April 2019, para. 127; ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment, 28 November 2017, para. 184; ECtHR, *Yüksel and Others v. Turkey*, nos. 55835/09, 55836/09, 55839/09, Judgment, 31 May 2016, para. 52; ECtHR, *Murray v. United Kingdom*, no. 14310/88, Judgment, 28 October 1994, para. 55. See also ECtHR, *Brogan and Others v. United Kingdom*, nos 11209/84, 11234/84, 11266/84, 11386/85, Judgment, 29 November 1998, para. 53.

⁵⁶ In comparison, the applicable standard at the *ad hoc* tribunals for the arrest and detention of a suspect (before confirmation of the charges) is whether “the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Mechanism has jurisdiction”. See IRMCT Rule 38(B)(ii); ICTY/ICTR Rule 40 *bis* (B)(ii). See also ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44-I, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, 8 May 2000, para. 32.

In this respect, the Panel notes that, in interpreting the “reasonable grounds to believe” standard, ICC chambers have been guided by the reasonable suspicion threshold of the ECtHR.⁵⁷ In particular, the ICC Appeals Chamber has stressed that the standard does not require certainty.⁵⁸ Rather, it has specified that: “[t]he belief must be founded upon grounds such as to warrant its reasonableness. Suspicion simpliciter is not enough. Belief denotes, in this context, acceptance of a fact. The facts placed before the Chamber must be cogent to the extent of creating a reasonable belief that the person committed the crimes”.⁵⁹

24. The Appeals Panel therefore considers that the question posed by Article 41(6)(a) of the Law embodies an assessment of specific facts and information that are sufficient to satisfy an objective observer that a specific crime may have been committed. In the Panel’s view, and consistent with Article 5(1)(c) of the ECHR and Article 19(1)(1.9) of the KCPC, “grounded suspicion” is to be distinguished from a “mere suspicion” in that it is based on objective and articulable facts and evidence, which, while they need not be conclusive or rise to the same level as those necessary

⁵⁷ See e.g. ICC, *Prosecutor v. Al Bashir*, ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010 (“*Al Bashir* Article 58 Decision”), para. 31; ICC, *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Public Redacted Version of Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 32; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, para. 24; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1-Corr-Red, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, 10 February 2006, para. 12. See also ICC, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 31 (noting that “the Court’s case-law has equated the ‘reasonable grounds to believe standard’ with the ‘reasonable suspicion’ standard under article 5(1)(c) of the European Convention on Human Rights.”). See also Ryngaert, C., “Article 58: Issuance by a Pre-Trial Chamber a warrant of arrest or a summons to appear” in Ambos, K. (ed), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth Edition), C.H. Beck, Hart Nomos 2022, mn. 13.

⁵⁸ *Al Bashir* Article 58 Decision, para. 31.

⁵⁹ ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-572, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para. 18.

to justify a conviction or the bringing of a charge, are sufficiently persuasive to support the belief that the person committed the specified offence.

25. In view of the foregoing, the Appeals Panel finds merit in Kilaj's argument that a finding of grounded suspicion cannot be based on a mere possibility. However, the Panel is not persuaded that the Single Judge's conclusion is inconsistent with the standard, as outlined above. Turning to Kilaj's challenge to the Single Judge's use of the terms "may" and "possibly",⁶⁰ the Panel notes that the terms are used in the context of the Single Judge's intermediary finding regarding an element of a specific crime, and not his overall conclusion of grounded suspicion.⁶¹ In this respect, the Panel notes that a finding of grounded suspicion under Article 41(6)(a) of the Law is based on the Single Judge's consideration of all the evidence before him, and not on individual facts or pieces of evidence.

26. Furthermore, in the Panel's view, the Single Judge's use of the term "may" in his overall conclusion of grounded suspicion, when read in the context of his findings and paragraph 32 of the Impugned Decision as a whole, expresses a degree of likelihood or probability (less than certainty, but more than a mere suspicion), and not of a mere possibility.⁶²

27. Accordingly, the Panel finds no error in the Single Judge's application of the grounded suspicion standard in reaching his conclusions. In any event, the Panel recalls that decisions concerning detention on remand are discretionary, and the Single Judge is best placed to address the relevant factors.⁶³ Therefore, the Appeals Panel will not intervene, unless the appellant demonstrates the existence of a discernible error in the Single Judge's conclusion.⁶⁴ The Panel finds that Kilaj fails to

⁶⁰ See Appeal, paras 14-15.

⁶¹ See Reasons for Continued Detention, para. 27.

⁶² See Reasons for Continued Detention, para. 32.

⁶³ *Gucati* Appeal Decision, paras 49, 51.

⁶⁴ See *Gucati* Appeal Decision, para. 49.

demonstrate such an error, and consequently dismisses Kilaj's arguments under the Third Sub-ground.

28. The Panel next turns to Kilaj's arguments under the First and Second Sub-grounds that the Single Judge erred in his allocation of the requisite burden of proof, by: (i) requiring Kilaj to substantiate his claim that the seized material was found in the public domain; and (ii) not requiring the SPO to demonstrate that Kilaj had or was about to engage in conduct beyond merely possessing the materials.

29. The Panel recalls that, as noted by the Single Judge, the burden of establishing the necessity of detention under Article 41(6)(b) of the Law lies on the SPO.⁶⁵ The SPO also bears the burden of establishing the existence of a grounded suspicion under Article 41(6)(a) of the Law, and it is not incumbent upon the detained person to demonstrate the existence of reasons warranting his or her release.⁶⁶ Accordingly, the Single Judge is required to assess, based on the evidence brought before him by the SPO, whether there is a grounded suspicion that the detained person has committed a crime within the jurisdiction of the Specialist Chambers. This, however, does not preclude the Defence from advancing arguments and submitting evidence to rebut the SPO's claim.

30. The Panel observes that, in considering the Defence's claim, the Single Judge noted that the Defence "presents no support for the assertion that Mr Kilaj obtained the information from [REDACTED] or any other public source".⁶⁷ In the Panel's view, this did not constitute a reversal of the burden of proof, as the SPO was not absolved of its burden of putting forth sufficient evidence to establish a grounded suspicion that Kilaj committed a crime within the jurisdiction of the Specialist Chambers.

⁶⁵ Reasons for Continued Detention, para. 21. See also e.g. *Thaçi* Appeal Decision, para. 17.

⁶⁶ See Constitutional Court Judgment of 26 April 2017, para. 115.

⁶⁷ Reasons for Continued Detention, para. 26.

31. Furthermore, the Panel is not persuaded by Kilaj's argument that, by expecting him to substantiate his assertion that the seized materials were in the public domain, the Single Judge violated his right to the presumption of innocence, which in his view requires the Single Judge to give him the "benefit of the doubt" at this phase of the proceedings and accept his claim at face value.⁶⁸ In this regard, the Panel notes that "[p]roviding evidence to substantiate an allegation is a hallmark of judicial proceedings"⁶⁹, and it was therefore proper for the Single Judge to have considered in his assessment of the Defence's arguments that Kilaj had provided no evidentiary support for his general assertion.⁷⁰ Regardless, the Panel notes that the Single Judge's conclusion with respect to the Defence's arguments was not based solely on the absence of supporting evidence. Rather, the Single Judge also took into consideration Kilaj's inability to explain how or from what specific source he had obtained the materials,⁷¹ and further, that his general assertion was contradicted by the evidence put forth by the SPO.⁷² Under these circumstances, the Panel finds no merit in Kilaj's arguments and accordingly dismisses them.

32. Kilaj also argues under the First Sub-Ground that the Single Judge entirely ignored the Defence's submission that the seized material did not originate exclusively from the confidential material [REDACTED].⁷³ The Panel notes that, while

⁶⁸ See Appeal, paras 9-10.

⁶⁹ ICC, *Prosecutor v. Kony et al.*, ICC-02-04-179, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, para. 36.

⁷⁰ See e.g. KSC-BC-2020-07, IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 29; KSC-CA-2023-02, F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023, para. 33(ix).

⁷¹ See Reasons for Continued Detention, para. 26. In particular, the Single Judge noted "[t]he 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 [them] in the public domain".

⁷² Reasons for Continued Detention, para. 26.

⁷³ Appeal, para. 11, referring to Defence Response, paras 8-9.

the Single Judge did not reference this specific argument in the Impugned Decision, the Single Judge considered Kilaj's arguments regarding the provenance of the seized materials and weighed his assertion against the evidence presented by the SPO, ultimately finding that there was sufficient evidence before him contradicting the Defence's assertion and supporting a finding of grounded suspicion.⁷⁴ In any event, in the Panel's view, whether the seized materials originated from [REDACTED] or another source is immaterial to the Single Judge's conclusion that the material had not been obtained from the public domain, as Kilaj did not substantiate his contention to the contrary. Accordingly, the Panel dismisses Kilaj's arguments.

33. With respect to Kilaj's assertion that his possession of the seized material is not a crime under the Law and that the SPO should have been required to demonstrate that Kilaj had engaged in conduct beyond merely possessing the material, the Panel notes that Kilaj misrepresents the Single Judge's findings. In particular, the Single Judge specifically considered that the materials found in Kilaj's possession included [REDACTED], as well as [REDACTED].⁷⁵ The Single Judge thus not only found that Kilaj was in possession of confidential witness-related material but additionally found that this evidence demonstrated that he "also processed the information he claims was obtained from the public domain", and was "indicative of an intent to contribute to [REDACTED]".⁷⁶ Having considered this evidence, the Single Judge concluded that "Kilaj may have been involved in the commission of an offence under Article 15(2) of the Law".⁷⁷ Accordingly, the Panel dismisses Kilaj's arguments.

34. In light of the above, the Panel finds that Kilaj has failed to demonstrate an error in the Single Judge's allocation of the burden of proof and assessment of the evidence

⁷⁴ Reasons for Continued Detention, paras 25-26. The Panel notes that, in summarising the Defence's arguments on the provenance of the seized materials, the Single Judge references the relevant paragraphs of the Defence Response, where the Defence puts forth this specific argument.

⁷⁵ Reasons for Continued Detention, para. 27.

⁷⁶ Reasons for Continued Detention, para. 27.

⁷⁷ Reasons for Continued Detention, para. 32.

in reaching his finding as to the existence of a grounded suspicion, and consequently dismisses the First and Second Sub-grounds.

35. Accordingly, the Panel dismisses Kilaj's first ground of appeal.

B. WHETHER THE SINGLE JUDGE ERRED IN LAW IN FINDING THAT DETENTION WAS NECESSARY (GROUND 2)

1. Submissions of the Parties

36. Kilaj submits that, although the Single Judge acknowledged the correct standard of proof to establish the necessity of continued detention, he did not apply this standard when assessing the evidence, and as a result, erred in finding the existence of risks of future obstruction and of committing future offences.⁷⁸ In his view, the Single Judge's findings that he "may be likely to obstruct the proceedings where he may be an accused", "may obstruct the progress of criminal proceedings" and "may commit further offences" amount to no more than "a possibility of a risk materialising" which is "inadequate" to meet the requisite standard.⁷⁹

37. The SPO responds that the Single Judge applied the correct legal standard and assessed in detail the relevant facts before concluding that Kilaj posed a moderate risk of flight and a risk that he will repeat and commit future offences, necessitating his continued detention.⁸⁰ In the SPO's view, there is no basis to presume that the Single Judge's subsequent "use of the word 'may'" should be interpreted in a manner inconsistent with this standard.⁸¹ Further, the SPO asserts that Kilaj's argument that

⁷⁸ Appeal, paras 18-19; Reply, paras 12-13, 17.

⁷⁹ Appeal, paras 19-22; Reply, paras 15-16. In this respect, Kilaj also draws a parallel between the Single Judge's findings of risks and a finding of guilt for a crime, noting that a verdict would be overturned on appeal where the trier of fact, despite having engaged in a specific reasoning and provided concrete grounds for arriving at its factual findings, convicted an accused based on the conclusion that the accused was "*probably* guilty" of the crime. See Reply, para. 17 (emphasis in original).

⁸⁰ Response, paras 18-19, 21-22.

⁸¹ Response, para. 17.

the Single Judge based his findings on “nothing greater than [a] possibility of a risk materialising” lacks merit, as the necessity of detention is determined based on the possibility and not the inevitability of a future occurrence.⁸²

38. Kilaj replies that, contrary to the SPO’s suggestion, there can be no “second guessing” of the Single Judge’s findings and the Court of Appeals Panel should proceed only on the basis of the actual words he employed.⁸³

2. Assessment of the Court of Appeals Panel

39. At the outset, the Panel notes that the Defence does not challenge the Single Judge’s findings with respect to a risk of flight.⁸⁴

40. The Panel further notes that, as acknowledged by the Defence, the Single Judge identified the correct standard of proof, namely that the standard to be applied is “less than certainty, but more than a mere possibility of a risk materialising”.⁸⁵

41. The Panel recalls that, in assessing the risks of obstructing the progress of the Specialist Chambers proceedings and committing future offences under Article 41(6)(b)(ii) and (iii) of the Law, the Single Judge considered the following factors: (i) the fact that the materials seized allegedly identify [REDACTED] and information that cannot be found in the public domain and which could put at risk the [REDACTED] and the integrity of the Specialist Chambers proceedings; (ii) while knowing that the unlawful dissemination of confidential witness-related material led to the conviction of Mr Gucati and Mr Haradinaj, Kilaj nevertheless had the seized material in his possession, demonstrating a willingness to violate court orders and to intervene in proceedings to which he is not a party; and (iii) the pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses of the

⁸² Response, para. 20, quoting Appeal, para. 19.

⁸³ Reply, para. 14.

⁸⁴ See Appeal, para. 17.

⁸⁵ Appeal, para. 19; Reply, para. 12. See also Reasons for Continued Detention, para. 33.

Specialist Chambers.⁸⁶ The Panel notes that the Single Judge also took into consideration other factors which he relied upon in his finding of grounded suspicion.⁸⁷

42. The Single Judge found, on the basis of the above, articulable grounds to believe that there is a risk that Kilaj may obstruct the progress of the criminal proceedings and commit further offences, necessitating his continued detention pursuant to Article 41(6)(b) of the Law.⁸⁸

43. The Panel first notes Kilaj's argument that "the erroneous assessment of the evidence that Mr Kilaj had committed any offence in the past inextricably contributed to the Single Judge's errors in finding a risk of future obstruction and future offending".⁸⁹ In this regard, the Panel recalls its finding above that the Single Judge did not err in his assessment of the evidence in reaching his finding as to the existence of a grounded suspicion.⁹⁰ In the Panel's view, it was proper in the circumstances for the Single Judge to rely on his finding of grounded suspicion to inform his assessment of a future risk under Article 41(6)(b)(2) of the Law. Furthermore, the Panel notes that, the Single Judge relied on other evidence and provided other reasons for his independent assessment of the existence of a future risk.⁹¹ The Panel finds that Kilaj fails to demonstrate an error in the Single Judge's reliance on his findings as to the existence of a grounded suspicion in reaching his finding of a risk of future obstruction and committing future offences. Accordingly, the Panel dismisses Kilaj's arguments in this regard.

44. Turning to the merits of Kilaj's argument that the Single Judge applied an incorrect standard in his assessment under Article 41(6)(b) of the Law, the Panel notes

⁸⁶ Reasons for Continued Detention, paras 46-48, 52.

⁸⁷ Reasons for Continued Detention, para. 28. See also Reasons for Continued Detention, para. 46.

⁸⁸ Reasons for Continued Detention, para. 54.

⁸⁹ See Appeal, para. 18.

⁹⁰ See above, para. 34.

⁹¹ See Reasons for Continued Detention, para. 46.

that Kilaj does not challenge the factors relied upon by the Single Judge, but only takes issue with the Single Judge's use of the terms "may" and "may be likely", arguing that such language reflects a finding of "nothing greater than a possibility of a risk materialising" and as such, falls short of the requisite standard under Article 41(6)(b) of the Law.⁹²

45. In this respect, the Panel recalls its finding that the question posed by Article 41(6)(b) of the Law is whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i) to (iii) of the Law exist.⁹³ Contrary to the Defence's assertion, the Panel considers that the terms "may be likely",⁹⁴ which taken in their context connote a distinct possibility or probability, fall on the scale between certainty and a mere possibility.⁹⁵ Furthermore, in the Panel's view, the Single Judge's use of the term "may" does not indicate that he applied a lesser standard. Rather, the Panel notes that, although the Single Judge's findings did not restate the full standard, the Single Judge cited to specific facts and considered Kilaj's personal circumstances in support of his findings.⁹⁶ The Single Judge's conclusion was therefore based on individual circumstances demonstrating that the Single Judge considered whether there was a sufficiently real possibility of the risks materialising.

46. In light of the above, the Panel dismisses Kilaj's second ground of appeal.

⁹² See Appeal, paras 19-22.

⁹³ *Thaçi* Appeal Decision, para. 24.

⁹⁴ See Reasons for Continued Detention, para. 46.

⁹⁵ See *Thaçi* Appeal Decision, para. 24.

⁹⁶ Reasons for Continued Detention, paras 46, 52. The Panel notes that the Single Judge further relied on his earlier findings as to the existence of a grounded suspicion. See Reasons for Continued Detention, para. 46.

V. DISPOSITION

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

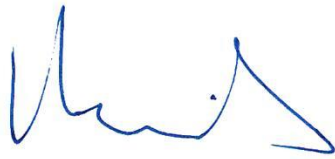
DENIES the Appeal;

GRANTS the Defence's Request for Reclassification;

ORDERS the reclassification of the Reply (IA004/F00004) pursuant to Rule 82(5) of the Rules;

ORDERS the SPO to submit a public redacted version of the Response (IA004/F00003) or indicate, through a filing, whether it can be reclassified as public, within ten days of receiving notification of the present Decision; and

INSTRUCTS the Registry to execute the reclassification of the Response (IA004/F00003) upon indication by the SPO, if any, that it can be reclassified.



**Judge Michèle Picard,
Presiding Judge**

Dated this Thursday, 11 January 2024

At The Hague, the Netherlands