

**In:** KSC-BC-2018-01  
**Before:** Single Judge, initial hearing  
Judge: Nicolas Guillou  
**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Bas Martens, Defense Counsel for Mr. Nasim Hardinaj  
**Date:** 29 September 2020  
**Language:** English  
**File name:** preliminary motions and motion to release from detention  
**Classification:** Public

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**Initial appearance, preliminary motion to dismiss the charges and motion for immediate release**

**(Public, Article 37 Files and Filings before the Kosovo Specialist Chambers)**

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Document to be notified in accordance with regulation 29 of the 'Files and filings before the Kosovo Specialist Chambers to:

**Specialist Prosecutor's Office**

Mr. Jack Smith

**the Office of the Registrar**

Dr. Fidelma Donlon

**the Court Management Unit**

## PREFACE

The first paragraph on the website of the Kosovo Specialist Chambers ('KSC') states:

*'The Kosovo Specialist Chambers' has a specific mandate and jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law, which were commenced or committed in Kosovo between 1 January 1998 and 31 December 2000 by or against citizens of Kosovo or the Federal Republic of Yugoslavia'<sup>1</sup>.*

Yet, Mr. Nasim Haradinaj was arrested on the street and promptly transferred to The Hague to appear before an international war crimes tribunal on charges not relating to war crimes, but concerning things he would have said and done in three press conferences in his capacity of deputy head of the Kosovo Liberation Army War Veterans Association.

Apparently, as stated in the media, but as also can be read in the arrest warrant, this case is about documents or files that have been leaked or lost or disappeared from the Special Prosecutor's Office ('SPO') and ended up in Kosovo. If that is really what happened, there is also the matter of carelessness by the SPO. The same prosecutor now applied for an international arrest warrant against Mr. Haradinaj.

He could have limited his actions to seizing the documents and filing a local police report against Mr. Haradinaj.

Even if the said facts have merit, Mr. Haradinaj in his capacity, would only have exercised his constitutional right of Freedom of Expression, Freedom of Media, Freedom of Gathering and Freedom Association under the Kosov Constitution<sup>2</sup>.

Even in this early stage, the Defense argues that the detention of Mr. Haradanaj is against the principle of proportionality pursuant to Article 33 (3) of the Constitution of the Republic of Kosovo. And that the KSC has no jurisdiction over the alleged crimes.

**Let it be very clear for everyone to hear: Mr. Haradinaj is not a war criminal, nor is he accused of having committed war crimes.**

Counsel representing Mr. Nasim Haradinaj challenges the jurisdiction of the KSC, the validity and necessity of his arrest and applies for immediate dismissal of the

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<sup>1</sup> <https://www.scp-ks.org/en>

<sup>2</sup> Articles 40-44 Kosovo Constitution

charges. Subsidiary, the Defense asks for (probational) release pending trial. The defense contends that the facts of which he is accused should not be tried by KSC.

On the grounds of the detention, the Defense contends that detention is not necessary to ensure a secure, independent, impartial, fair and efficient criminal proceedings in relation of grave trans-boundary and international crimes committed during and in aftermath of the conflict in Kosovo, as stated in article 1 of the Law on Specialist Chambers and Specialist Prosecutors ('the Law').

Detention is also not necessary to ensure his appearance at trial. It is common knowledge that a trial before an international tribunal takes years. Accused before the ICTY and the ICC have served many years in pre-trial detention before being acquitted. Referral can be made to the Article 70 case in the matter of the attorneys of Bemba Gombo<sup>3</sup>, who had to be released from pre-trial detention because the maximum term of punishment for the crimes was exceeded.

Finally, the Defense argues that the grounds mentioned in the arrest warrant for detention are not justified and only based on assumption.

### **CONFIDENTIALITY**

This application is filed as 'Public' under Article 37 the KSC: open to the public.

### **PROCEDURAL BACKGROUND AND ARGUMENTS**

#### **DISMISSAL OF THE CASE**

Persuant Article 21 (6), dealing with the Rights of the Accused all material and relevant evidence or facts in possession of the SPO which are for or against the accused shall be made available to the accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

In the case of Mr. Haradinaj the Defense received:

- the arrest warrant
- the order for transfer to detention facilities
- the Covid 19 protocol of the detention facilities

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<sup>3</sup> ICC-01/05-01/13



The accusation concerns press conferences held on 7, 16 and 22 September 2020. Mr. Haradinaj supposedly would have present there. One would expect the SPO to have filed and distributed a video or verbatim report on what was said during these press conferences. The first press conference dates three weeks before the filing of this motion.

Not only in the interest for the Defense, but especially for the Single Judge to determine the jurisdiction of the Specialist Chambers<sup>4</sup>, defects in the form of the indictment and to determine if severance of the indictment is needed<sup>5</sup>.

Persuant Rule 86 (3), the SPO must have submitted (a) evidentiary facts supporting the material facts and (b) a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the with respect to the alleged crimes.

The SPO has chosen not to share these documents or other materials with the Defense or the pre—trial Judge, nor has the prosecutor provided any necessary counter-balance. The Rights of Mr. Haradinaj und the Law have therefore been infringed.

A formal indictment was not issued. The arrest warrant states the Crimes and Concise Statement of Facts. The summary in the Arrest Warrant lacks enough circumstances how witnesses would be intimidated or be vulnerable to threats, only through comments made by someone during a press conference. The SPO has not indicated what was said and if what was said had relevance in a case under competence of the SPO and KSC, or if this fact of intimidation was committed 'during criminal proceedings' as indicated in Article 387 of the Criminal Code of Kosovo ('Criminal Code').

Nor is it stated which person could be involved in the act of retaliation as stated in Article 388 of the Criminal Code. Finally, it is not clear which information (a file, a witness testimony, an indictment, other) Mr. Haradinaj would have disclosed (Article 392). This should have been explained in the Arrest Warrant to determine jurisdiction over these offenses, as this is only the case where they relate to its official proceedings and officials<sup>6</sup>.

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<sup>4</sup> Article 15 (2) of the Law

<sup>5</sup> Rule 97 Rules and Procedures

<sup>6</sup> Article 15 (2) of the Law

Also considering that Articles 387, 388, nor 392 of the Criminal Code are offences considered as serious crimes for the purpose of Kosovo Criminal Procedure Code<sup>7</sup>.

With only limited information and lacking specifics, while the SPO could have elaborated on the facts and provided the necessary documents and materials, the Defense requests the Pre-trial Judge to dismiss the charges<sup>8</sup>.

### *Request*

The Defense requests the Pre-trial Judge to order, within his competence according to Article 39 of the Law, the SPO to provide the Defense with all available documents and material supporting the accusation, to ensure the case is prepared properly and expeditiously for trial.

## **PRE-TRIAL DETENTION**

Article 41 (2) of the Law provides the person who is deprived of his liberty the right to challenge the lawfulness of his arrest.

Under international law detainees have the right to apply for provisional release in their pre-trial phase and, in exceptional circumstances, during the trial and when the convicted person is awaiting their appeal hearing. Tribunal judges determine whether provisional release may be granted. The Judge hearing the case will carefully review the circumstances of each individual before issuing such an order and will only authorise a provisional release if satisfied that a detainee will later appear for trial and will not pose a threat to any victim, witness, or other person if released. Furthermore, the Judge may impose conditions upon the release that it feels are necessary to ensure the presence of the accused for trial and the protection of others. For example, this could take the form of the execution of a bail bond, restrictions on movement and special security arrangements, a ban on meeting with witnesses, politicians and the media. Factors determining whether an accused is granted provisional release may include elements such as whether the accused surrendered voluntarily, specific health considerations, expected length of pre-trial procedure, etc.

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<sup>7</sup> Article 22, Kosovo Criminal Procedure Code Law No. 04/L-123

<sup>8</sup> Article 39 (2) Law



In the case at hand, the Specialist Chamber shall only order the detention of a person when:

- a. there is a grounded suspicion that he has committed a crime within jurisdiction of the Specialist Chamber, and
- b. there are articulable grounds to believe that:
  - there is a risk of flight
  - he will destroy evidence etc.
  - the seriousness of the crime and circumstances etc.. merit the detention.

(Ref a)

According to Articles 6 of the Law, the KSC does not have subject jurisdiction on Article 387 of the Law.

Articles 388 and 392 of the Kosovo Criminal Code are covered by Article 6 of the Law, giving the KSC subject jurisdiction. However, these acts fall outside the scope of the temporal jurisdiction of the KSC as stipulated in Article 7 of the Law. The same counts for Article 387.

(Ref b)

The risk of flight. Mr. Haradinaj has not presented any act which would lead to believe he would be a risk of flight. When approached on the street, he cooperated fully with the local and international officers. He was not hand-cuffed at that occasion. Mr. Haradinaj has a known address and lives with his family.

Furthermore, he also has the Swedish nationality. He is a EU-citizen and can stay in The Netherlands at the availability for the Court if necessary and if asked to do so.

The SPO has not elaborated on the assumption that Mr. Haradinaj would have access to significant funds. The veterans organization does not possess significant funds. They receive money from the government to help veterans and their families in need. Mr. Haradinaj receives an amount of approx. 400 euros per month, when and if the organization has the funds.

The SPO does not substantiate the assumption that Mr. Haradinaj can rely on a vast network of persons with security, police and intelligence expertise, or has the ability to travel. The claim is completely unsubstantiated and only based on assumption.

Furthermore, the SPO claims that Mr. Haradinaj would manipulate, obstruct or destroy evidence, or disclose confidential or non-public information. The SPO

should elaborate on this claim. As far as we know, information/files/documents were seized during the raid in Kosovo. There should be no more risk of disclosure of information.

A repetition of the criminal acts, as stated by the SPO, is not covered by the grounds<sup>9</sup> upon a person can be held in detention.

The Defense of Mr. Haradinaj concludes there is no merit for the pre-trial detention because the grounds for detention are not met. He should be released immediately.

### **PROBATIONAL RELEASE**

Deprivation of liberty is a very severe matter. Mr. Haradinaj is presumed innocent until proven guilty beyond reasonable doubt according to the provisions of the Law<sup>10</sup>.

It is immediately clear that the SPO cannot meet the conditions to detain Mr. Haradinaj in this atypical case.

The Law provides the possibility to release a person from detention under certain conditions, to ensure presence during proceedings, to prevent reoffending or to ensure the successful conduct of criminal proceedings<sup>11</sup>.

Mr. Haradinaj can meet and is willing to comply with all the conditions in this Article: summons, bail, house detention, promise not to leave his place of residence, prohibition to approach certain persons or places, attendance at a police station or diversion.

There is precedent before the KSC. Mr. Thaci was summoned to The Hague for questioning. He appeared, was questioned and released awaiting confirmation of charges. Detention should not be a means to a goal when lesser measures can suffice.

### **RESPECTFULLY SUBMITTED ON THE 29<sup>TH</sup> OF SEPTEMBER 2020**

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<sup>9</sup> Article 41 (6) of the Law

<sup>10</sup> Article 21 (3)

<sup>11</sup> Article 41 (12)

The Defense of Mr. Haradinaj respectfully files the following motions and requests for decisions by the pre-trial Judge:

- to determine that the accusations are not within the jurisdiction of the KSC
- to dismiss the charges
- to immediately release Mr. Haradinaj from pre-trial detention
- to release Mr. Haradinaj from pre-trial detention under probational conditions, to be set by the pre-trial Judge
- provide Mr. Haradinaj and Counsel with all the documents and materials supporting the Indictment, in Kosovo and English language.

The Hague, The Netherlands

**Word count: 2143**



Mr. Bas Martens

(Duty) Specialist Counsel for Mr. Haradinaj

Tuesday, 29 September 2020

At The Hague, the Netherlands