



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-05
The Specialist Prosecutor v. Salih Mustafa

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 25 September 2020

Language: English

Classification: **Strictly Confidential and *Ex Parte***

Order for Submissions on the Reclassification of Filings

Specialist Prosecutor

Jack Smith

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 21(2) and 39(6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 82(5) and 88(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues the following order.

I. PROCEDURAL BACKGROUND

1. On 14 February 2020, the Specialist Prosecutor submitted for confirmation a strictly confidential and *ex parte* indictment together with evidentiary material in support of the factual allegations and a detailed outline linking each item of evidentiary material to each allegation.²
2. On 28 February 2020, the Pre-Trial Judge ordered the Specialist Prosecutor's Office ("SPO") to file, *inter alia*, a revised indictment by 18 March 2020.³
3. On 18 March 2020, the SPO submitted a revised indictment for confirmation.⁴ A further revised indictment was submitted on 20 March 2020.⁵
4. On 12 June 2020, the Pre-Trial Judge issued the "Decision on the Confirmation of the Indictment Against Salih Mustafa" ("Confirmation Decision"),⁶ the "Decision on

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00002, Specialist Prosecutor, *Submission of Indictment for confirmation and related requests*, 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*.

³ KSC-BC-2020-05, F00003, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 28 February 2020, strictly confidential and *ex parte*.

⁴ KSC-BC-2020-05, F00004, Specialist Prosecutor, *Submission of Revised Indictment for Confirmation and Related Requests*, 18 March 2020, strictly confidential and *ex parte* with Annexes 1-2, strictly confidential and *ex parte*.

⁵ KSC-BC-2020-05, F00005, Specialist Prosecutor, *Submission of Further Revised Indictment for Confirmation*, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-05, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*.

Request for Arrest Warrant and Transfer Order”,⁷ and the “Decision Authorising Search and Seizure”.⁸

5. On 19 June 2020, the Specialist Prosecutor submitted the Confirmed Indictment,⁹ with redactions as authorised by the Pre-Trial Judge.¹⁰

6. On 24 September 2020, Salih Mustafa (“Mr Mustafa” or “Accused”) was arrested and transferred to the detention facilities of the Specialist Chambers (“SC”) in The Hague, the Netherlands.¹¹

II. APPLICABLE LAW

7. Pursuant to Articles 21(2) and 39(6) of the Law, hearings shall be public, unless the Pre-Trial Judge decides otherwise in accordance with the Rules.

8. Pursuant to Rule 82(5) of the Rules, where the basis for reclassification no longer exists, whoever submitted the original filings shall apply to the Panel for reclassification. A Panel may also reclassify a filing upon request by any other participant or *proprio motu*.

9. Pursuant to Rule 88(2) of the Rules, the Panel may, *inter alia* for security reasons, order the temporary non-disclosure of the Confirmed Indictment and related documents or information to the public, until further order.

⁷ KSC-BC-2020-05, F00009, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, strictly confidential and *ex parte*, with Annexes 1-2, public.

⁸ KSC-BC-2020-05, F00010, Pre-Trial Judge, *Decision Authorising Search and Seizure*, 12 June 2020, strictly confidential and *ex parte*.

⁹ KSC-BC-2020-05, F00011, Specialist Prosecutor, *Submission of Confirmed Indictment*, 19 June 2020, strictly confidential and *ex parte*, with one strictly confidential and *ex parte* annex and one public annex.

¹⁰ Confirmation Decision, para. 163(c).

¹¹ KSC-BC-2020-05, F00013, Registry, *Notification of Arrest Pursuant to Rule 55(4)*, 24 September 2020, strictly confidential and *ex parte*; F00014, Registry, *Notification of Reception in the Detention Facilities of the Specialist Chambers*, 24 September 2020, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

III. DISCUSSION

10. Considering that Mr Mustafa has been arrested and transferred to the detention facilities of the SC, and is due to appear before the Pre-Trial Judge for his initial appearance, it is necessary to review the classification of certain filings in the case file, in order to adhere to the principle of publicity of proceedings, which extends beyond hearings in the courtroom to cover also filings and any other submission in the case file.

11. In so doing, regard must be paid, on the one hand, to the right of the Accused to a public trial, as enshrined under Article 21(2) of the Law, and the duty of the Pre-Trial Judge to provide for the protection of victims and witnesses, including their safety, physical and psychological well-being, dignity and privacy, as stipulated by Article 23(1) of the Law.

12. Consequently, the Pre-Trial Judge has the responsibility to ensure that any given filing in the case file bears the appropriate classification and may, accordingly, reclassify any filing *proprio motu* or upon request, should the basis for the current classification no longer exist.

13. The Pre-Trial Judge intends to reclassify as public the following strictly confidential and *ex parte* filings in case file KSC-BC-2020-05, considering that Mr Mustafa is in the custody of the SC and that no sensitive information compromising the safety and security of witnesses is contained therein:

- F00003, Pre-Trial Judge, “Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules”; and
- F00006, Pre-Trial Judge, “Order Setting Target Date for a Decision Pursuant to Article 39(2)”.

14. It is also appropriate, at this stage, to request the Specialist Prosecutor to file confidential (redacted)¹² and/or public (redacted) versions of the following filings in case file KSC-BC-2020-05:

- F00002, Specialist Prosecutor, “Submission of Indictment for confirmation and related requests”;
- F00002/A01, Specialist Prosecutor, “Annex 1 to Submission of Indictment for confirmation and related requests”;
- F00002/A02, Specialist Prosecutor, “Annex 2 to Submission of Indictment for confirmation and related requests”;
- F00002/A03, Specialist Prosecutor, “Annex 3 to Submission of Indictment for confirmation and related requests”;
- F00004, Specialist Prosecutor, “Submission of revised Indictment for confirmation and related requests”;
- F00004/A01, Specialist Prosecutor, “Annex 1 to Submission of revised Indictment for confirmation and related requests”;
- F00004/A02, Specialist Prosecutor, “Annex 2 to Submission of revised Indictment for confirmation and related requests”;
- F00005, Specialist Prosecutor, “Submission of further revised Indictment for confirmation”;
- F00005/A01, Specialist Prosecutor, “Annex 1 to Submission of further revised Indictment for confirmation”; and

¹² Redactions to the names and identifying information of any victim or witness have already been authorized, on a provisional basis, for: F00002, F00002/A01, F00002/A02, F00002/A03, F00004, F00004/A01, F00004/A02, F00005, F00005/A01, and F00011/A02 (see Confirmation Decision, para. 163(c)).

- F00011, Specialist Prosecutor, "Submission of confirmed indictment".

15. Should the Specialist Prosecutor wish to retain the current classification of some or all the above-mentioned filings, he shall specify the reasons for maintaining the current classification, in accordance with Rule 82(3) of the Rules, and indicate whether and when such classification may be changed.

16. It is also appropriate, at this stage, to request the Registrar to file confidential (redacted) and/or public (redacted) versions of the following filings in case file KSC-BC-2020-05:

- F00013, Registrar, "Notification of Arrest Pursuant to Rule 55(4)";
- F00014, Registrar, "Notification of Reception in the Detention Facilities of the Specialist Chambers";
- F00014/A01, Registrar, Annex 1 to Notification of Reception in the Detention Facilities of the Specialist Chambers";
- F00015, Registrar, "Submission of the Registrar Pursuant to Rule 23(2) on COVID-19 Risk Mitigation Measures"; and
- F00015/A01, Registrar, "Annex 1 to Submission of the Registrar Pursuant to Rule 23(2) on COVID-19 Risk Mitigation Measures.

17. Should the Registrar wish to retain the current classification of some or all the above-mentioned filings, she shall specify the reasons for maintaining the current classification, in accordance with Rule 82(3) of the Rules, and indicate whether and when such classification may be changed.

IV. DISPOSITION

18. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REQUESTS** the Specialist Prosecutor to submit, **by 2 October 2020**, his reasons for maintaining the classification of filings in case file KSC-BC-2020-05, as specified in paragraphs 14 of the present order, or to submit confidential (redacted) and/or public (redacted) versions thereof; and
- b. **REQUESTS** the Registrar to submit, **by 2 October 2020**, her reasons for maintaining the classification of filings in case file KSC-BC-2020-05, as specified in paragraph 16 of the present order, or to submit confidential (redacted) and/or public (redacted) versions thereof.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 25 September 2020,

At The Hague, the Netherlands.