



Pursuant to instruction of the Single Judge KSC-BC-2020-07/CRSPD3 of 9 October 2020, the document is reclassified as PUBLIC.

In: KSC-BC-2018-01

Before: Single Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 24 September 2020

Language: English

Classification: Strictly Confidential and *Ex Parte*

Decision on Request for Arrest Warrants and Transfer Orders

Specialist Prosecutor

Jack Smith

THE SINGLE JUDGE,¹ is seised of the Specialist Prosecutor’s strictly confidential and *ex parte* “Urgent Request for arrest warrants and related orders” (“Request”), filed on 22 September 2020,² and hereby renders his decision.

I. BACKGROUND

1. On 7 September 2020, the Kosovo Liberation Army War Veterans Association (“KLA WVA”) convened a press conference at which they announced that they had received a package of documents allegedly relating to the Special Investigative Task Force (“SITF”) and/or the Specialist Prosecutor’s Office (“SPO”), which contained cooperation requests and witness information.³ The KLA WVA distributed copies of the documents to members of the press.⁴ That same day, the Single Judge authorised the seizure of these documents and prohibited the copying and dissemination of the documents and their content.⁵ Pursuant to the Single Judge’s order, the SPO seised on 8 September 2020 the documents from the KLA WVA.⁶

2. On 16 September 2020, the KLA WVA convened another press conference announcing that they had received a second bundle of documents relating to the SITF and/or the SPO, which purportedly included witness statements and evidence of

¹ KSCPR-2018, F00004, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, strictly confidential and *ex parte*, p. 5.

² KSC-BC-2018-01, F00125, Specialist Prosecutor, *Urgent Request for Arrest Warrants and Related Orders*, strictly confidential and *ex parte*, with strictly confidential and *ex parte* Annexes 1-2, 22 September 2020, strictly confidential and *ex parte*. A supplement to the Request was submitted on 23 September 2020, KSC-BC-2018-01, F00126, Specialist Prosecutor, *Prosecution Notice and Related Request* (“Notice”), strictly confidential and *ex parte*, 23 September 2020, with Annex 1, strictly confidential and *ex parte*.

³ Request, para. 6; Annex 1 to Request, pp. 4-5.

⁴ Request, para. 6; KSC-BC-2018-01, F00124, Specialist Prosecutor, *Prosecution Report Pursuant to Decision KSC-BC-2018/F00121*, 21 September 2020, para. 4; with strictly confidential and *ex parte* Annex 1 (“Report on Seizure”).

⁵ KSC-BC-2018-01, F00121, Single Judge, *Decision Authorising a Seizure* (“First Order”), 7 September 2020, strictly confidential and *ex parte*, para. 22.

⁶ See Report on Seizure.

cooperation with Serbian authorities.⁷ The KLA WVA allowed members of the press to take copies.⁸

3. On 17 September 2020, the Single Judge authorised the seizure of this second bundle of documents and prohibited the copying, recording, or dissemination the documents or their content.⁹ That same day, the SPO seized the second bundle of documents.¹⁰

4. On 22 September 2020, the KLA WVA held another press conference announcing that they had received an additional set of documents emanating from the SPO.¹¹ Members of the media were granted access to the documents.¹² In the afternoon of 22 September 2020, the SPO obtained these documents after issuing an order for their production.¹³

II. SUBMISSIONS

5. The SPO requests, *inter alia*, the arrest and transfer of Hysni Gucati and Nasim Haradinaj (“Mr Gucati” and “Mr Haradinaj”, respectively, and collectively referred to as “Suspects”).¹⁴ To this end, the SPO asserts that the requirements of Article 41(6) of the Law have been met.¹⁵ The SPO alleges that there is a grounded suspicion that the Suspects have committed crimes within the jurisdiction of the Specialist Chambers.¹⁶ The SPO further alleges that there are articulable grounds to believe that the Suspects

⁷ Request, para. 7; Annex 1 to Request, pp. 6-7.

⁸ Request, para. 7; Annex 1 to Request, p. 9.

⁹ KSC-BC-2018-01, F00123, Single Judge, *Decision Authorising a Seizure* (“Second Order”), 17 September 2020, strictly confidential and ex parte, para. 22.

¹⁰ Request, para. 8.

¹¹ Request, para. 9; Annex 1 to Request, pp. 12-13.

¹² Request, para. 9; Annex 1 to Request, p. 14.

¹³ Request, para. 9, Notice, para 4.

¹⁴ Request, paras 1, 35(a).

¹⁵ Request, para. 11.

¹⁶ Request, paras 12-17.

(i) are a flight risk;¹⁷ (ii) may obstruct the progress of criminal proceedings;¹⁸ and (iii) may repeat the criminal offence or commit another crime.¹⁹

6. The SPO further requests that the arrest warrant be transmitted to, and executed by, the SPO, in cooperation with the Registrar.²⁰ In executing the arrest warrant, the SPO seeks authorisation to disclose the arrest warrant as necessary for this purpose.²¹

7. With respect to the transfer of Suspects, the SPO requests that the Single Judge order his transfer to the detention facilities of the Specialist Chambers in the Host State, pursuant to Rule 50(1)-(2) of the Rules.²²

III. APPLICABLE LAW

8. Pursuant to Article 39(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), at the request of the Specialist Prosecutor, the Pre-Trial Judge may issue any orders and warrants as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.

9. Pursuant to Articles 387, 388, and 392 of the 2019 Kosovo Criminal Code, No. 06/L-074 ("KCC"),²³ and by virtue of Article 15(2) of the Law, the Specialist Chambers has jurisdiction over the offences of intimidation during criminal proceedings, retaliation, and violating the secrecy of proceedings. Article 387 of the KCC provides, in relevant part, that whoever uses force or serious threat, or any other means of compulsion to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge when such information relates to the obstruction of criminal

¹⁷ Request, paras 18-20.

¹⁸ Request, paras 21-23.

¹⁹ Request, paras 24-25.

²⁰ Request, para. 31.

²¹ Request, para. 33.

²² Request, para. 26.

²³ These articles were numbered 395, 396, and 400, respectively, in the 2012 Kosovo Criminal Code, No. 04/L-082.

proceedings shall be punished by a fine of up to one hundred and twenty-five thousand (125,000) EUR and by imprisonment of two (2) to ten (10) years.. Article 388(1) of the KCC provides, in relevant part, that whoever takes any action harmful to any person with the intent to retaliate for providing truthful information relating to the commission or possible commission of any criminal offense to the police, an authorised investigator, a prosecutor or a judge, shall be punished by imprisonment of up to three (3) years. Article 392(1) and (2) of the KCC provides, in relevant part, that whoever, without authorization, reveals (i) information disclosed in any official proceeding which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority; or (ii) information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection, shall be punished by a fine or by imprisonment of up to one (1) year, or by imprisonment of up to three (3) years.

10. Pursuant to Article 41(6)(a) of the Law, before an arrest warrant may be issued, the SPO must first demonstrate that there is a grounded suspicion that the person has committed a crime within the jurisdiction of the Specialist Chambers. Second, the SPO must prove that there are articulable grounds to believe that at least one of the three grounds in Article 41(6)(b) of the Law is present, namely that a person: (i) is a flight risk; (ii) will destroy, hide, change or forge evidence 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 he or she has threatened to commit. Lastly, pursuant to Article 41(1), (4), and (5) of the Law, the issuance of the arrest warrant must be consistent with the fundamental rights provided for in Chapter II of the Constitution, and the person concerned must be informed of his/her rights under the Law with a view to exercising them before the Specialist Chambers Judge.

11. Pursuant to Rule 53(2) of the Rules, the arrest warrant shall contain the following information: (i) the name of the person and any other relevant identifying

information; (ii) specific reference to the crimes for which the person's arrest is sought; (iii) a concise statement of facts allegedly constituting those crimes; and (iv) where applicable, the detention facilities of the Specialist Chambers where the person shall be transferred. Rule 53(3) of the Rules provides that the arrest warrant shall remain in effect until otherwise ordered by the Panel.

12. Pursuant to Rule 50(1) of the Rules, if an arrest warrant is issued, the Panel shall order the competent authorities to transfer the person to the Specialist Chambers without delay, and may include conditions for the transfer and further detention, after consulting with the Registrar.

13. Pursuant to Article 35(3) of the Law, the police within the SPO shall have the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law.

14. Pursuant to Rule 55(4) of the Rules, upon notification of the arrest by the competent authorities, the Registrar shall make the necessary arrangements, with the competent authorities and the Host State, for the prompt transfer of the arrested person to a detention facilities of the Specialist Chambers.

15. Pursuant to Article 41(7) of the Law, persons subject to arrest warrants may be detained in detention facilities overseen by the Specialist Chambers and managed by the Registry near the seat of the Specialist Chambers in the Host State if proceedings are relocated thereto.

IV. DISCUSSION

A. JURISDICTION

16. In the Request, the SPO seeks an arrest warrant and an order for the transfer of the Suspects, both citizens of Kosovo, for alleged offences under Articles 387, 388, and 392 of the KCC.

17. Based on the information provided by the SPO, and without prejudice to subsequent determinations on this matter, the Single Judge finds that the Specialist Chambers has jurisdiction *ratione personae* over the Suspects, who are believed to be Kosovo citizens, pursuant to Article 9(2) of the Law. The Specialist Chambers also has jurisdiction *ratione materiae and ratione temporis*²⁴ as the offences allegedly committed are enumerated in Articles 6(2) and 15(2) of the Law and were allegedly committed in the context of the SPO's investigations and therefore relate to the official proceedings of the Specialist Chambers.

B. REQUIREMENTS OF ARTICLE 41(6) OF THE LAW

18. Under the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 ("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."²⁵

19. If the above threshold is met, the grounds that allow the Single Judge to deprive the person of his liberty must be articulable.²⁶ In this regard, it is recalled that determining the existence of either risks under Article 41(6)(b)(i)-(iii) of the Law, so as

²⁴ As Articles 6(2) and 15(2) of the Law provide that the enumerated offences must relate to official proceedings, the temporal jurisdiction for such crimes therefore extends beyond the time period set out in Article 7 of the Law.

²⁵ See also Article 5(1)(c) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms European, as interpreted by the European Court of Human Rights, *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86; 12245/86; 12383/86, Judgment, 30 August 1990, vol. 182, Series A, p. 16, para. 32; *K.-F. v. Germany*, no. 144/1996/765/962, Judgment, 27 November 1997, Reports 1997-VII, para. 57; *Labita v. Italy*, no. 26772/95, Judgment, 6 April 2000, para. 155; *Berktaç v. Turkey*, no. 22493/93, Judgment, 1 March 2001, para. 199; *O'Hara v. United Kingdom*, no. 37555/97, Judgment, 16 October 2001, para. 34.

²⁶ Article 19.1.9 of the KCPC.

to make the arrest of the person necessary, is a matter of assessing the possibility, as opposed to the unavoidability that such risks materialise.²⁷

1. Offences Allegedly Committed

(a) Intimidation

20. In the Request, the SPO contends that there is grounded suspicion that the Suspects committed the offence of intimidating during criminal proceedings by (i) disseminating confidential and non-public documents and information including the names, personal details, and evidence of (potential) witnesses and (ii) making statements that demonstrate an indifference to potential risks to such witnesses.²⁸

21. The Single Judge notes that the Suspects held three press conferences for the purposes of publicising the fact that they were in possession of confidential and non-public documents relating to the work of the SPO.²⁹ The Suspects seemingly distributed the documents to the press or otherwise made them available to the media.³⁰ Mr Haradinaj also appears to have mentioned by name certain (potential) witnesses and additionally gave information regarding their place of residence and other personal details.³¹ The publicising of such confidential information was made in the context of justifying their viewpoint that the Specialist Chambers has “fallen prey of Serbia [and continues] to harm Kosovo exactly with the state apparatus of Milošević”.³² Furthermore, when asked about the safety of witnesses Mr Haradinaj replied that “[how] the safety of the witnesses may be guaranteed when their names may be read by anyone. [...] I do not care about witnesses of the Hague court. As for

²⁷ Similarly, ICC, *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-558, Appeals Chamber, [Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’”](#), 11 July 2014, para. 107.

²⁸ Request, paras 13-14.

²⁹ Request, paras 6-10; Annex 1 to Request, pp. 1-4, 6-7, 12-13.

³⁰ Request, paras 6, 7, 9; Annex 1 to Request, pp. 4-5, 9, 14.

³¹ Annex 1 to Request, pp. 2-4.

³² Annex 1 to Request, p. 1.

me, I would publish the data of all the witnesses of this court.”³³ Such witnesses were further referred to as “anti-national people and people who do not love Kosovo”.³⁴ Mr Gucati’s presence during the press conferences and lack of interventions demonstrates approval of Mr Haradinaj’s statements.

22. In light of the dissemination of confidential and non-public information about (potential) witnesses, with explicit indifference to the potential risks to such witnesses and a veiled threat to their safety, the Single Judge finds that the Suspects intentionally disseminated confidential and non-public information as a serious threat or other means of compulsion to induce person(s) from making a statement or to make a false statement or to otherwise fail to state true information to the SPO and/or the Specialist Chambers. Accordingly, the Single Judge finds that there is grounded suspicion that the Suspects attempted³⁵ to commit the offense of intimidation under Article 387 of the KCC.

(b) Retaliation

23. In the Request, the SPO contends that there is grounded suspicion that the Suspects took harmful action against (potential) witnesses by disseminating confidential and non-public information about them with the intent to retaliate against such persons for having provided information to the SITF and/or SPO relating to the commission or possible commission of a criminal offence.³⁶

24. The Single Judge considers that the Suspects’ dissemination of confidential and non-public information,³⁷ in particular the names and personal details of (potential)

³³ Annex 1 to Request, p. 5.

³⁴ Annex 1 to Request, p. 9.

³⁵ It is also noted that Article 28(2) of the KCC criminalises the attempt to commit a criminal offense for which a punishment of three or more years may be imposed. Article 387 of the KCC provides that intimidation during criminal proceedings shall be punished by a fine of up to one hundred and twenty-five thousand (125,000) EUR and by imprisonment of two (2) to ten (10) years. The offence of attempted intimidation during criminal proceedings is therefore recognised under Articles 28(2) and 387 of the KCC.

³⁶ Request, para. 15.

³⁷ Request, paras 6, 7, 9; Annex 1 to Request, pp. 4-5, 9, 14.

witnesses,³⁸ amounts to a harmful act as it exposes these witnesses to potential threats to their safety. Such risks were explicitly acknowledged and accepted by the Suspects.³⁹ Furthermore, the intent to retaliate for providing truthful information relating to the alleged commission of criminal offences during 1998/1999 is evidenced by the threat to publish the data of all the witnesses of Specialist Chambers despite acknowledged security risks to such persons⁴⁰ as well as the Suspects' suggestion that those who gave statements to the SITF and/or SPO were "anti-national people and people who do not love Kosovo."⁴¹ Mr Gucati's presence during the press conferences and lack of interventions demonstrates approval of Mr Haradinaj's statements. Accordingly, the Single Judge finds that there is a grounded suspicion that the Suspects committed the offence of retaliation under Article 388 of the KCC.

(c) Violating Secrecy of Proceedings

25. In the Request, the SPO contends that there is grounded suspicion that Article 392 of the KCC has been violated through the dissemination of confidential and non-public documents emanating from the criminal investigations of the SITF and/or SPO.⁴²

26. The Single Judge notes that the Suspects revealed information and documents⁴³ from SITF and SPO investigations.⁴⁴ The Single Judge has recognised this information as confidential and non-public and has warned, Mr Gucati specifically, and the KLA WVA, in general, at least on two occasions against its dissemination.⁴⁵ The Suspects' statements during the press conferences demonstrates an awareness that the

³⁸ Annex 1 to Request, pp. 2-4.

³⁹ Annex 1 to Request, p. 5.

⁴⁰ Annex 1 to Request, p. 5.

⁴¹ Annex 1 to Request, p. 9.

⁴² Request, para. 16.

⁴³ Request, paras 6, 7, 9; Annex 1 to Request, pp. 2-5, 9, 14.

⁴⁴ Investigations can be considered "official proceedings" as per Article 376 of the KCC and Article 6(2) and 101 of the KCPC.

⁴⁵ First Order, para. 22; Second Order, para. 22.

documents they provided to the media are confidential in nature.⁴⁶ Accordingly, the Single Judge finds that there is a grounded suspicion that the Suspects committed the offence of violating the secrecy of the proceedings under Article 392 of the KCC.

2. Necessity of the Arrest

27. The SPO submits that the arrest of the Suspects is necessary because there are articulable grounds to believe that all three risks envisaged under Article 41(6)(b)(i)-(iii) of the Law exist.⁴⁷

28. With respect to flight risk, the Single Judge considers the Suspects' (i) awareness of the notification of the alleged offences, as contained in arrest warrant to be served, and potential penalties;⁴⁸ (ii) access to significant funds as head and deputy head of the KLA WVA;⁴⁹ as well as (iii) vast network of supporters which include persons with security, police and intelligence expertise;⁵⁰ and (iv) ability to travel, both legally and illegally, to jurisdictions which have no obligation to transfer them to the Specialist Chambers.⁵¹

29. With respect to the obstruction of proceedings, the Single Judge considers that the Suspects have distributed confidential, non-public information and documents emanating from SITF and/or SPO investigations.⁵² In addition, they have indicated that they will continue to disclose confidential and non-public information⁵³ and encouraged members of the media to make similar disclosures.⁵⁴ Such disclosures have been made with explicit indifference to security risk posed to (potential)

⁴⁶ Annex 1 to Request, pp. 12-13, 17

⁴⁷ Request, para. 11.

⁴⁸ Request, para. 18. *See supra*, paras 20-26.

⁴⁹ Request, para. 19.

⁵⁰ Request, para. 19.

⁵¹ Request, para. 20.

⁵² Request, paras 6, 7, 9; Annex 1 to Request, pp. 4-5, 9, 14.

⁵³ Annex 1 to Request, p. 5; Annex 2 to Request, p. 8.

⁵⁴ Annex 1 to Request, p. 9; Annex 2 to Request, p. 7.

witnesses⁵⁵ and with the aim of delegitimising a court they do not recognise.⁵⁶ The Single Judge therefore concludes that the Suspects have the incentive, means and opportunity to obstruct the progress of criminal proceedings.

30. With respect to the further commission of crimes, the Single Judge notes that the Suspects have made explicit their intention to continue to make public confidential and non-public information regarding potential witnesses and SITF and/or SPO investigations,⁵⁷ thereby demonstrating a continuing risk that they may threaten, intimidate, and put at risk (potential) witnesses through similar disclosures.

31. In light of the foregoing, the Single Judge finds that there are articulable grounds to believe that there is a risk that the Suspects may flee, obstruct the progress of proceedings, or commit further crimes thereby necessitating their arrest and detention, in accordance with Article 41(6)(b) of the Law.

C. COMPLIANCE WITH FUNDAMENTAL RIGHTS

32. The SPO submits that appropriate measures will be taken for the protection and due respect of relevant victims and witnesses, and the fundamental rights of Suspects, when executing the arrest warrant.⁵⁸ In so far as the SPO undertakes to adopt such measures, the Single Judge considers that nothing in its request for an arrest warrant and transfer order is *prima facie* inconsistent with the fundamental rights provided for in Chapter II of the Constitution. To this effect, pursuant to Article 41(4) and (5) of the Law, and Rule 55(6) of the Rules, as soon as the Suspects are in custody and fall under the jurisdiction of the Specialist Chambers, they shall be informed of all their rights under the Law with a view to exercising them before the Single Judge as soon as practicable.

⁵⁵ Annex 1 to Request, p. 5.

⁵⁶ Annex 1 to Request, pp. 1, 8; Annex 2 to Request, p. 8.

⁵⁷ Annex 1 to Request, p. 5; Annex 2 to Request, p. 8.

⁵⁸ Request, para. 32.

D. ORDER FOR TRANSFER TO DETENTION FACILITIES OF THE SPECIALIST CHAMBERS

33. In light of this venue change,⁵⁹ and considering the security reasons and proper administration of justice, the Single Judge considers it necessary that the Suspects are transferred to the detention facilities of the Specialist Chambers, managed by the Registrar, in the Host State. Pursuant to Article 41(7) of the Law and Rule 55(4) of the Rules, the Registrar shall execute the order for transfer to the detention facilities of the Specialist Chambers in the Host State and make the necessary arrangements for the prompt transfer of the Suspects.

E. EXECUTION AND SERVICE OF THE ORDERS

34. Pursuant to Article 35(3) of the Law, the police within the SPO has the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law. It may therefore be considered a “competent authority” under Rule 49(1) of the Rules capable of executing and serving orders of the Specialist Chambers, including the annexed arrest warrant.⁶⁰ Pursuant to Rule 49(1) of the Rules, the Registrar shall transmit the transfer order, in cooperation with the SPO. The SPO may, as appropriate and necessary, disclose the arrest warrant for the purposes of its execution.

35. Upon arrival to the detention facilities of the Specialist Chambers from Kosovo, the Registrar shall submit a report on the arrest and transfer of the Suspects to the Single Judge, including any relevant details and information provided by the SPO.

⁵⁹ KSCPR-2018, F00003, President, *Decision on the Specialist Prosecutor’s Invocation of Change of Venue under Article 3(8)(a) of the Law*, 29 May 2018, strictly confidential and *ex parte*, p. 3. In light of the aforementioned decision, the SPO request invoking a change of venue is moot, see Request, para. 4.

⁶⁰ In notifying the Specialist Prosecutor of the present decision, together with the two annexes, through Legal Workflow, the transmission of the relevant documents to the Specialist Prosecutor is deemed fulfilled, in accordance with Rules 49(1) and 55(1) of the Rules.

V. DISPOSITION

36. For the above reasons, the Single Judge hereby:

- a. **GRANTS** the request for arrest warrants (Annexes 1 and 3);
- b. **GRANTS** the request for transfer orders (Annexes 2 and 4);
- c. **DIRECTS** the SPO to serve and execute the annexed arrest warrants in Kosovo;
- d. **DIRECTS** the SPO to consult with the Registrar on the necessary arrangements to be made, including appropriate and necessary disclosure of the arrest warrants, for its execution and service;
- e. **DIRECTS** the Registrar to execute the transfer of the Suspects to the detention facilities of the Specialist Chamber in The Netherlands; and
- f. **DIRECTS** the Registrar, upon arrival to the detention facilities of the Specialist Chambers, to submit a report on the arrest and transfer of the Suspects, including any relevant details and information provided by the SPO.



Judge Nicolas Guillou

Single Judge

Dated this Thursday, 24 September 2020

At The Hague, the Netherlands.