



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 2 October 2020

Language: English

Classification: Public

Public Redacted Version of

'Submission of Indictment for confirmation and related requests', filing KSC-BC-2020-05/F00002 dated 14 February 2020

with public Annex 1

Specialist Prosecutor's Office

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A. INTRODUCTION

1. Pursuant to Article 38(4) of the Law¹ and Rule 86(2)-(3) of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby files an indictment for confirmation against Salih MUSTAFA aka 'Cali' or 'Commander Cali', in respect of crimes committed in Zllash/Zlaš, Kosovo, in April 1999 ('Indictment').³ The Indictment is submitted together with supporting material⁴ and a detailed outline demonstrating the relevance of the evidentiary material to each allegation.⁵

2. Mr MUSTAFA was born on 1 January 1972 in Prishtinë/Priština, Kosovo. The Indictment and supporting material demonstrate there is a well-grounded suspicion⁶ that Mr MUSTAFA has committed or participated in the commission of war crimes within the jurisdiction of the Specialist Chambers. The SPO accordingly requests the Pre-Trial Judge to confirm the Indictment.

3. Under Article 3(8)(a), for security reasons and the proper administration of justice, the SPO hereby invokes a change of venue to the Host State in respect of this and all future stages of proceedings arising from or related to the Indictment.

4. In addition, once the Indictment is confirmed, the SPO requests the Pre-Trial Judge to (i) issue an arrest warrant and order for the transfer of Mr MUSTAFA, pursuant to Articles 39 and 41 and Rules 30-33, 37, 39, 48, 50, 53, 55, and 86(6)(b); (ii) pursuant to Articles 23, 35(2) and 39 and Rules 30, 80, and 88(2), order the non-disclosure of the Indictment, related documents or information to the public until further order; and (iii) pursuant to Articles 23, 35(2) and 39 and Rules 30, 80, and 105,

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev1/2017, 5 July 2017 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

³ See Annex 1. Pursuant to Rule 86(1), the Specialist Prosecutor has notified the President, who shall assign a Pre-Trial Judge in accordance with Article 33(1)(a).

⁴ The supporting materials have been submitted as a separate package through Legal Workflow.

⁵ See Annex 2. See also Rule 86(3)(b).

⁶ Article 38(4) and Rule 86(1). See also Kosovo, Criminal No.04/L-123, Procedure Code, 2012 ('CPC'), Article 19(1.12) ('Well-grounded suspicion – means filing an indictment. Possession of admissible evidence that would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence').

order the interim non-disclosure of the identities of witnesses and victims in the supporting material until appropriate protective measures have been ordered.

B. REQUEST FOR ARREST WARRANT AND TRANSFER ORDER

5. The requirements under Article 41(6) for Mr MUSTAFA's arrest and detention are fulfilled:

- i. The supporting materials establish a grounded suspicion⁷ that Mr MUSTAFA has committed crimes within the jurisdiction of the Specialist Chambers, as charged in the Indictment and as required under Article 41(6)(a); and
- ii. All three enumerated alternate grounds under Article 41(6)(b) are satisfied in this case. There are articulable grounds to believe that (1) there is a risk of flight; (2) Mr MUSTAFA will obstruct the progress of the criminal proceedings, including by influencing witnesses, victims or accomplices; and (3) the seriousness of the crime, or the manner or circumstances in which it was committed and Mr MUSTAFA's personal characteristics, past conduct, the environment and conditions in which he lives or other personal circumstances indicate a risk that he will repeat the criminal offence or commit a crime which he has threatened to commit. [REDACTED].⁸

1. Mr MUSTAFA poses a flight risk⁹

6. Once Mr MUSTAFA learns of the serious crimes for which he is charged and of the corresponding serious penalties for those crimes, he has an incentive to avoid being tried and risk conviction. His incentive to flee may further be influenced by knowledge of the publicly-reported convictions of former senior Llap Operational Zone commanders Rustem MUSTAFA, Latif GASHI and Nazif MEHMETI for crimes

⁷ [REDACTED].

⁸ [REDACTED].

⁹ Article 41(6)(b)(i).

committed against persons detained by the KLA in other parts of the Llap Operational Zone.¹⁰ The above individuals were charged with similar serious crimes to those contained in the present Indictment.¹¹

7. Mr MUSTAFA also has the means and opportunity to evade justice. Mr MUSTAFA is a former senior commander in the KLA. He is currently employed [REDACTED] within the Ministry of Defence of Kosovo.¹² As such, he is part of the Kosovo security and intelligence apparatus and has a wide network, and significant means and resources to evade justice. Further, Mr MUSTAFA does not have a known physical or other medical condition that could be expected to restrict his ability to travel, and possesses a Kosovo passport, which would allow him to immediately flee to countries that do not require a visa.

2. Mr MUSTAFA may obstruct the progress of the criminal proceedings¹³

8. Mr MUSTAFA's previous acts and conduct, including as set out below, demonstrate a risk that he might interfere with witnesses, victims or accomplices, and otherwise seek to obstruct proceedings. He also has the incentive, means and opportunity to do so.¹⁴

9. During the Llap Group trial, mentioned above, a number of witnesses refused to cooperate or failed to appear at trial or recanted their testimony as a result of having been intimidated. The Llap Group trial proceedings were marred by an atmosphere of threats and intimidation against the witnesses. Although not a party in those proceedings, Mr MUSTAFA was the former commander of the BIA Guerrilla unit, a formation within the Llap Operational Zone, and was a direct subordinate of the now-convicted Llap Operational Zone commander Rustem MUSTAFA. The threats and intimidation in those criminal proceedings did in fact result in the process being

¹⁰ Zllash/Zlaš also comes within the area of operations of the Llap Operational Zone.

¹¹ Cf. *Prosecutor v Rustem MUSTAFA, Latif GASHI and Nazif MEHMETI*, Trial Judgment of the Basic Court of Prishtinë/Priština, dated 7 June 2013, P. no. 448/2012. The case was known as "The Llap Group" trial.

¹² See Transcript of SPO Suspect Interview of [REDACTED], Part 1, p.5.

¹³ Article 41(6)(b)(ii).

¹⁴ See paras 6-7 above.

obstructed. As a former senior KLA officer, there are therefore grounds to believe that Mr MUSTAFA may seek to influence witnesses in the same way. This is supported by the fact that a number of witnesses recently interviewed by the SPO have expressed fear of reprisals taking place against them and their families in the event of them providing information that might incriminate former KLA members.

10. Once Mr MUSTAFA is informed of the allegations contained in the current Indictment, he may [REDACTED]. [REDACTED]. [REDACTED],¹⁵ [REDACTED]. [REDACTED]. [REDACTED]. Given [REDACTED], there are grounds to believe that Mr MUSTAFA may seek to interfere with them.

11. Further, [REDACTED].¹⁶ Statements of this nature show that Salih MUSTAFA may seek to obstruct the progress of the criminal proceedings.

3. There are grounds to believe that Mr MUSTAFA may commit a crime

12. Beyond the inherent criminality of any attempt to interfere with the administration of justice, Mr MUSTAFA is believed - from his past conduct - to be capable of criminal acts. In addition to the serious allegations of arbitrary detention, cruel treatment, torture, and murder that are contained in the Indictment, he is believed to have previously bragged [REDACTED], of the Serbs whom he and members of his BIA unit had executed.¹⁷ Based upon his past conduct, there is a real risk that he might commit other crimes in order to avoid being brought to account for the crimes charged in the Indictment, including use of physical violence or threats of violence, or attempt to procure or incite others to undertake acts of violence or make

¹⁵ In the event this Notification is disclosed to the Defense, the SPO will request to make certain redactions, including to the names of the witnesses.

¹⁶ Cf. [REDACTED].

¹⁷ See [REDACTED].

threats of violence against the witnesses who support the charges against Mr MUSTAFA in the Indictment, and other potential witnesses.

4. Authorisation for search and seizure

13. Pursuant to Articles 35(2) and 39(3) and Rules 30-33, 37 and 39,¹⁸ the SPO requests that, as part of the arrest warrant, the Pre-Trial Judge authorises the SPO and/or authorities executing the arrest warrant, in cooperation with the SPO, to (i) search [REDACTED]; and (ii) seize any evidence that is believed to have been used in, connected with or may be evidence relevant to the charged crimes, in particular, [REDACTED]. Such items may include [REDACTED].

14. There is grounded suspicion that Mr MUSTAFA, a former KLA member, has committed crimes within the Specialist Chamber's jurisdiction,¹⁹ and in turn, there is grounded suspicion that he may have relevant evidence [REDACTED].²⁰ Further, in light of the risks of interference and obstruction, including as outlined above,²¹ any evidence in Mr MUSTAFA's possession may not otherwise be obtained and search and seizure in connection with his arrest may be the only effective means for the purposes of the investigation.²²

15. The resulting interference with Mr MUSTAFA's rights to privacy and property is proportionate to the legitimate aim of the investigation, and the investigative measure does not negate the essence of those rights.²³ The SPO will tailor its execution of the search and seizure and/or will provide necessary information and instructions to any other authorities executing the search and seizure, in a manner designed to exclude information of no foreseeable relevance, and in accordance with the safeguards outlined in Rule 39.

¹⁸ See also [REDACTED].

¹⁹ See also para.5 above.

²⁰ Rule 37(2)(a), (3).

²¹ See paras 6-12 above.

²² Rules 31(1)(b), 37(1).

²³ Rule 31(1)(c).

16. The SPO requests that retention of any evidence seized be authorised for (i) the time necessary to complete review of the evidence; and (ii) if deemed relevant, such further period of time as may be necessary for investigations and proceedings.

5. Execution of the arrest warrant

17. The SPO requests the Pre-Trial Judge to transmit the arrest warrant, with the authorisation for search and seizure, to the SPO for execution, in cooperation with the Registrar.²⁴ The SPO, in cooperation with the Registrar, is the best-positioned, competent authority for the execution of the arrest warrant.²⁵

18. The arrest warrant will be executed by the SPO with appropriate measures for the protection and due respect of relevant victims and witnesses, and the fundamental rights of Mr MUSTAFA.²⁶

19. The SPO requests authorisation to disclose, as appropriate and necessary, the arrest warrant for purposes of its execution.

6. Transfer order

20. In light of the SPO's invocation of a change of venue to the Host State,²⁷ the SPO requests that the Pre-Trial Judge order the transfer of Mr MUSTAFA to the detention facility of the Specialist Chambers in the Host State, pursuant to Rule 50(1).

C. REQUEST FOR INTERIM NON-DISCLOSURE OF WITNESS AND VICTIM IDENTITIES

21. As set out above, there are real risks of, *inter alia*, interference with witnesses and victims, which, pursuant to Rule 105, constitute exceptional circumstances justifying interim non-disclosure of the identities of witnesses and victims involved in these proceedings until appropriate protective measures have been ordered. Accordingly, and [REDACTED], the SPO requests that the Pre-Trial Judge:

²⁴ Rule 55(1).

²⁵ Cf. [REDACTED].

²⁶ Articles 1(2), 35(2)(f); Rules 30(2), 62.

²⁷ See para.3 above.

- i. Order that the name and identifying information of any witness or victim identified in the supporting material shall not be disclosed to the public;
- ii. Authorise the SPO to redact the identity and identifying information of, and assign provisional pseudonyms to, witnesses and victims named in the supporting material prior to disclosure to the accused or public; and
- iii. Order that such interim non-disclosure continues until further order of the Pre-Trial Judge on application of the SPO or after hearing the SPO.

D. REQUEST FOR NON-DISCLOSURE OF INDICTMENT AND RELATED INFORMATION

22. Non-disclosure of the Indictment, and related information, at this stage is necessary to ensure the integrity of the proceedings, and the protection of witnesses and victims. As set out above, there are real risks of, *inter alia*, Mr MUSTAFA's flight, interference with witnesses and victims, and commission of further crimes, which, pursuant to Rule 88(2), demonstrate good cause justifying the temporary non-disclosure of the Indictment, related documents and information to the public until further order.

E. CLASSIFICATION

23. This filing and its annexes are filed strictly confidential and *ex parte* in accordance with Rules 85(4) and 86(2).

F. RELIEF REQUESTED

24. For the foregoing reasons, the SPO requests that the Pre-Trial Judge:
- i. Confirm the Indictment;
 - ii. Issue an arrest warrant, authorisation for search and seizure, and transfer order, in the terms requested in Section B(4)-(6) above;
 - iii. Order the interim non-disclosure of witness and victim identities, in the terms requested in Section C above; and
 - iv. Order the temporary non-disclosure of the Indictment, related documents and information, in the terms requested in Section D above.

Word count: 2,119



Jack Smith

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Friday, 2 October 2020

At The Hague, the Netherlands.