



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

In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Single Judge Panel
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 2 October 2020

Language: English

Classification: Public

Prosecution response to Filing KSC-BC-2020-07/F00030

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I. INTRODUCTION

1. The Single Judge should dismiss the Motion.¹ The Defence for Mr Nasim HARADINAJ ('Defence') fails to substantiate its submissions, does not appreciate the current stage of proceedings, and ignores the framework established in the Law² and Rules.³ Contrary to the Motion, (i) Mr HARADINAJ has been fully informed of the reasons for his arrest; (ii) the Specialist Chambers ('SC') have jurisdiction over offences under Articles 387, 388, and 392 of the KCC;⁴ (iii) there is grounded suspicion that Mr HARADINAJ committed these offences; and (iv) his continued detention is necessary.

II. SUBMISSIONS

A. THE DEFENCE HAS BEEN PROPERLY INFORMED

2. The Arrest Warrant⁵ fully informed Mr HARADINAJ of the reasons for his arrest,⁶ and provided the Defence sufficient information to enable exercise of Mr HARADINAJ's right to challenge the lawfulness of arrest and conditions of detention.⁷ The Arrest Request and complete supporting material⁸ have now also been

¹ Initial Appearance, preliminary motion to dismiss the charges and motion for immediate release, 29 September 2020, KSC-BC-2020-07/F00030 ('Motion'). *See also* Transcript of First Appearance, 29 September 2020, p.15 (setting the response deadline). As the Motion does not include paragraph numbers (*contra* Registry Practice Direction: Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15, Article 30), the SPO has attempted to correlate its submissions with the relevant paragraph on each page.

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ Criminal Code of the Republic of Kosovo, Code No.06/L-074 (2019) ('KCC').

⁵ Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj, 24 September 2020, KSC-BC-2020-07/F00012/A03/COR/RED ('Arrest Warrant').

⁶ Article 41(4).

⁷ Article 41(2).

⁸ Confidential Redacted Version of 'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F0009 dated 22 September 2020, KSC-BC-2020-07/F00009/CONFRED, 1 October 2020, with two public annexes ('Arrest Request'). *See also* Public Redacted Version of 'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F0009 dated 22 September 2020, KSC-BC-2020-07/F00009/RED, 1 October 2020, with two public annexes.

made available to the Defence, and further reclassifications are in process.⁹ Insofar as Defence submissions are premised on inapplicable provisions consequential to submission or confirmation of an indictment, they should be summarily dismissed.¹⁰

B. THE SC HAS JURISDICTION OVER THE CRIMES

3. Articles 6(2) and 15(2)¹¹ provide that the SC shall have jurisdiction over certain offences relating to the administration of justice, including under KCC Articles 387, 388, and 392.¹² As Articles 6(2) and 15(2) provide that such offences must relate to SC/SPO¹³ official proceedings and officials, the temporal jurisdiction for such crimes necessarily extends beyond the time period set out in Article 7.¹⁴

C. THERE IS GROUNDED SUSPICION THAT MR HARADINAJ COMMITTED CRIMES

4. The facts in this matter are straightforward and based on the direct, and recent, acts and conduct of Mr HARADINAJ himself. Defence submissions requesting dismissal of the charges¹⁵ misrepresent the information provided in the Arrest Warrant and do not detract from the grounded suspicion that Mr HARADINAJ committed, or attempted, the offences of intimidation during criminal proceedings (KCC Article 387), retaliation (KCC Article 388), and violating the secrecy of

⁹ Transcript of First Appearance, 29 September 2020, p.18.

¹⁰ *See, for example*, Motion, KSC-BC-2020-07/F00030, p.3, fifth paragraph (referring to Article 21(6) and the SPO's disclosure obligations *vis-à-vis* an Accused), p.4, second paragraph (referring to preliminary motions under Rule 97), third paragraph (referring to submission of indictment supporting materials and the related outline, as provided in Rule 86(3)), p.5, second paragraph and fn.8 (referring to Article 39(2), which concerns review of an indictment), p.8 (requesting indictment supporting materials). *See* Rule 86(6)(a) (a person only attains 'accused' status upon confirmation of an indictment against him/her).

¹¹ *See also* Article 16(3).

¹² *Contra* Motion, KSC-BC-2020-07/F00030, p.2, first, second, sixth, seventh and eighth paragraphs, p.8. The Defence is incorrect that Article 6 does not provide jurisdiction over KCC Article 387, concerning intimidation during criminal proceedings. *See* Motion, KSC-BC-2020-07/F00030, p.6, second paragraph. The Arrest Warrant (*see* KSC-BC-2020-07/F00012/A03/COR/RED, p.1) and this response (*see* fn.4 above) refer to the 2019 KCC. Articles 387, 388 and 392 of the KCC were numbered 395, 396, and 400, respectively, in the 2012 Kosovo Criminal Code, No.04/L-082 (as referenced in Articles 6(2) and 15(2)).

¹³ The Specialist Prosecutor's Office is referred to in this filing as the 'SPO'.

¹⁴ *Contra* Motion, KSC-BC-2020-07/F00030, p.6, third paragraph.

¹⁵ *See* Motion, KSC-BC-2020-07/F00030, p.2, eighth paragraph, .

proceedings (KCC Article 392).¹⁶ Despite Defence assertions otherwise,¹⁷ the Arrest Warrant described the relevant conduct fulfilling the elements of these offences and provided details as to the specific dates, events, and information unlawfully disseminated.¹⁸ As indicated above,¹⁹ additional information, including that contained in the Arrest Request and accompanying annexes, has been provided since the filing of the Motion.²⁰

5. Further, the Arrest Warrant specified that Mr HARADINAJ's unlawful conduct related to the SPO's work.²¹ The SPO is responsible for the investigation and prosecution of persons responsible for crimes falling within the SC's jurisdiction; such investigations and prosecutions constitute criminal proceedings for purposes of KCC Articles 387 and 392.²² Defence submissions that the Arrest Warrant failed to specify the relevant criminal proceedings are therefore baseless.²³

6. Finally, the Defence mistakenly relies on Articles 40-44 of the Constitution of the Republic of Kosovo ('Constitution') in an attempt to excuse Mr HARADINAJ's unlawful conduct.²⁴ The freedoms expressed in these Articles are subject to necessary limitations in accordance with the law, including for the prevention of disorder and crime, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.²⁵ Investigation and prosecution of crimes, including offences under KCC Articles 387, 388, and 392, are necessary and

¹⁶ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, paras 1-3.

¹⁷ See Motion, KSC-BC-2020-07/F00030, p.4, fifth and sixth paragraphs.

¹⁸ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, paras 1-3.

¹⁹ See para.2 above.

²⁰ See, for example, Arrest Request, KSC-BC-2020-07/F00009/RED, Section III(A), KSC-BC-2020-07/F00009/RED-A01, KSC-BC-2020-07/F00009/RED-A02.

²¹ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, paras 1-3.

²² Article 35(1), (2)(g). See also Arrest Request, KSC-BC-2020-07/F00009/RED, fn.20.

²³ See Motion, KSC-BC-2020-07/F00030, p.4, fifth paragraph.

²⁴ See Motion, KSC-BC-2020-07/F00030, p.2, fifth paragraph.

²⁵ Constitution, Article 55; European Convention on Human Rights, Articles 10(2), 11(2).

proportional limitations on, *inter alia*, the freedoms set out in Articles 40-44 of the Constitution.²⁶

D. MR HARADINAJ'S DETENTION IS NECESSARY

7. For the same reasons set out in the Arrest Warrant,²⁷ the requirements under Article 41(6) for Mr HARADINAJ's detention are fulfilled.²⁸

8. Contrary to Defence submissions,²⁹ the Arrest Warrant adequately described the factors giving rise to 'articulable grounds' that (1) there is a risk of flight; (2) Mr HARADINAJ 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 HARADINAJ'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.³⁰

9. Mr HARADINAJ's conduct during and since his arrest has amplified the Article 41(6) risks of flight, obstruction and commission of further crimes already pre-existing the Arrest Warrant. At the time of arrest, Mr HARADINAJ did anything but 'cooperate[] fully', as asserted by the Defence.³¹ In fact, Mr HARADINAJ actively tried to evade SPO officers, first by vehicle and then on foot. Shortly after his arrest, Mr HARADINAJ was loud and demonstrative. Consistent with prior statements,³² he

²⁶ See, similarly, ICTY, Trial Chamber, *Prosecutor v. Hartmann*, IT-02-54-RR77.5-T, Judgment, 14 September 2009, paras 69-70; ICTY, Appeals Chamber, *Prosecutor v. Hartmann*, IT-02-54-R77.5-A, Judgment, 19 July 2011, paras 159-161.

²⁷ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, paras 4-6. See also Arrest Request, KSC-BC-2020-07/F00009/RED, para.11 and Sections III(B)-(D).

²⁸ *Contra* Motion, KSC-BC-2020-07/F00030, p.2, sixth paragraph, p.3, second, third and fourth paragraphs, p.7, third and fifth paragraphs.

²⁹ See Motion, KSC-BC-2020-07/F00030, p.6, seventh paragraph, p.7, first paragraph.

³⁰ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, paras 1-3. Contrary to Defence submissions (see Motion, KSC-BC-2020-07/F00030, p.7, second paragraph), risk of commission of further crimes is expressly recognized as a ground for detention under Article 41(6)(b)(iii).

³¹ See Motion, KSC-BC-2020-07/F00030, p.6, fourth paragraph.

³² Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, para.5; Arrest Request, KSC-BC-2020-07/F00009/RED, paras 10, 13, 23.

declared that he rejected being arrested by the SPO because he does not recognise the SC. Mr HARADINAJ also emphasised, at his first appearance before the Single Judge, that he does not recognise the SC.³³

10. Mr HARADINAJ's involvement in unauthorised dissemination of confidential and non-public information on at least three recent occasions clearly demonstrates the risk that he will take measures to obstruct proceedings and commit further crimes.³⁴ Indeed, Mr HARADINAJ publicly declared that he would continue to disseminate confidential and non-public information,³⁵ despite the Single Judge's orders recognising its confidential and non-public nature and forbidding further unauthorised dissemination.³⁶ In these circumstances, Defence submissions that the seizure of unlawfully disseminated information eliminated risks of further unlawful disclosure defy logic.³⁷

11. The Motion also fails to undermine prior findings that, in addition to his incentives to evade the SC's jurisdiction and obstruct its proceedings, Mr HARADINAJ also has the means, motive, and opportunity. Regardless of Mr HARADINAJ's alleged personal salary and the funds of the Kosovo Liberation Army War Veterans Association ('KLA WVA'),³⁸ prior findings and submissions concerning available network and resources are largely based upon the vast membership of the KLA WVA, estimated to include 40,000 members.³⁹

³³ Transcript of First Appearance, 29 September 2020, pp.17-18.

³⁴ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, paras 5-6; Arrest Request, KSC-BC-2020-07/F00009/RED, paras 6-10, 22-25.

³⁵ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, para.5; Arrest Request, KSC-BC-2020-07/F00009/RED, paras 10, 22.

³⁶ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, para.6; Arrest Request, KSC-BC-2020-07/F00009/RED, paras 6-10, 22, 24. *See also* Order in Relation to Non-Public and Confidential Documents, 25 September 2020, KSC-BC-2020-07/F00017/A01.

³⁷ *See* Motion, KSC-BC-2020-07/F00030, p.7, first paragraph.

³⁸ *See* Motion, KSC-BC-2020-07/F00030, p.6, fifth paragraph.

³⁹ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, para.4; Arrest Request, KSC-BC-2020-07/F00009/RED, para.19.

12. Moreover, Mr HARADINAJ's Swedish and European Union citizenship⁴⁰ enables him to travel even more freely than if he had only Kosovan citizenship, including to jurisdictions that do not have extradition agreements with Kosovo.⁴¹ Mr HARADINAJ would also be able to leave Kosovo through unlawful border crossings.⁴²

13. Overall, the risks posed by Mr HARADINAJ's release, considered alone or together, can only be effectively managed in the Detention Centre. Mr HARADINAJ's past conduct, as set out above and in the Arrest Request and Arrest Warrant, demonstrate that his personal assurances⁴³ are insufficient to guarantee compliance with any conditions and overcome the concrete risks of release.⁴⁴ In such circumstances, release, with or without conditions, should not be granted.⁴⁵

III. RELIEF REQUESTED

14. For the foregoing reasons, the Single Judge should dismiss the Motion in its entirety.

Word count: 1866



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Friday, 2 October 2020

At The Hague, the Netherlands.

⁴⁰ See Motion, KSC-BC-2020-07/F00030, p.6, fifth and sixth paragraphs.

⁴¹ Arrest Request, KSC-BC-2020-07/F00009/RED, para.20.

⁴² Arrest Request, KSC-BC-2020-07/F00009/RED, para.20.

⁴³ See Motion, KSC-BC-2020-07/F00030, p.7, seventh and eighth paragraphs.

⁴⁴ The Motion in fact merely lists available conditions without elaborating on their suitability or how they might mitigate existing risks. See Motion, KSC-BC-2020-07/F00030, p.7, seventh and eighth paragraphs.

⁴⁵ See, similarly, ICC, Appeals Chamber, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on [...]", 26 October 2012, para.80.