



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 12 October 2020

Language: English

Classification: Strictly Confidential and *Ex Parte*

Order to the Specialist Prosecutor for Further Submissions

Specialist Prosecutor

Jack Smith

THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) and (13) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") hereby issues the following order.

I. PROCEDURAL BACKGROUND

1. On 24 April 2020, the Specialist Prosecutor submitted for confirmation a strictly confidential and *ex parte* indictment, charging Hashim Thaçi ("Mr Thaçi"), Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (collectively "the Suspects") with crimes against humanity under Article 13(1)(a), (e), (f), (h), (i), (j) of the Law and war crimes under Article 14(1)(c) of the Law.²
2. On 28 May 2020, the Specialist Prosecutor requested the Pre-Trial Judge to, *inter alia*, issue arrest warrants against the Suspects and corresponding orders to transfer them to the Specialist Chambers' detention facility in the Host State.³
3. On 24 July 2020, further to an order of the Pre-Trial Judge,⁴ the Specialist Prosecutor submitted for confirmation a revised indictment, providing more specificity on the charges.⁵

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation*, 24 April 2020, strictly confidential and *ex parte*, with Annexes 1 ("Indictment"), 2 ("Outline") and 3 ("Photographs"), strictly confidential and *ex parte*.

³ KSC-BC-2020-06, F00005, Specialist Prosecutor, *Request for Arrest Warrants and Related Orders*, 28 May 2020, strictly confidential and *ex parte*, with strictly confidential and *ex parte* Annexes 1-3.

⁴ KSC-BC-2020-06, F00010, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 2 July 2020, strictly confidential and *ex parte*.

⁵ KSC-BC-2020-06, F00011, Specialist Prosecutor, *Submission of Revised Indictment for Confirmation*, 27 July 2020, strictly confidential and *ex parte*, with Annex 1 ("Revised Indictment"), strictly confidential and *ex parte*.

II. APPLICABLE LAW

4. Pursuant to Article 3(2)(a) and (b) of the Law, the Specialist Chambers shall adjudicate and function in accordance with, *inter alia*, the Constitution of Kosovo (“Constitution”) and the Law as *lex specialis*.

5. Pursuant to Article 89 of the Constitution, the President of Kosovo (“President”) shall be immune from, *inter alia*, prosecution for actions or decisions that are within the scope of responsibilities of the President.

6. Pursuant to Article 16(1)(b) of the Law, the official position of any accused person, including a Head of State or Government, shall not relieve such person of criminal responsibility nor mitigate punishment.

III. DISCUSSION

7. The Pre-Trial Judge notes that while both the Constitution and the Law set out the law regarding immunity of Heads of States or Governments from *prosecution* in criminal proceedings,⁶ neither appear to regulate the immunity of such officials from *arrest and detention*.

8. The question of the President’s immunity from arrest and detention was addressed by the Kosovo Constitutional Court in relation to, *inter alia*, actions and decisions outside the scope of the President’s responsibilities. In interpreting the relevant constitutional provisions, the Kosovo Constitutional Court stated:

“The President exercises unique functions that reside in his/her capacity alone. The Constitution requires the President to be available at all times to perform these functions. They are indivisible from the Presidency and therefore the President cannot be hindered in the exercise of these functions by arrest and detention. The

⁶ Article 89 of the Constitution; Article 16(1)(b) of the Law. *See also* Kosovo, Constitutional Court, *Judgment Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo*, KO 98/11, [Judgment](#), 20 September 2011 (“KCC, Judgment on Immunities”), paras 117-120, 122, Disposition B.VII.1.

President must be permanently available to execute the functions of the institutions and with matters of state. [...]

The President cannot be subject to arrest or detention during his/her term of office because of the nature of the functions of the President which require his/her permanent availability to perform them”.⁷

9. In light of the foregoing and considering that, pursuant to the Law, the Specialist Chambers is bound to adjudicate in conformity with the Constitution, the Pre-Trial Judge considers it necessary to receive further submissions from the Specialist Prosecutor’s Office (“SPO”) on the matters indicated below.

10. Accordingly, provided that any charges against Mr Thaçi are confirmed by the Pre-Trial Judge and for as long as Mr Thaçi remains President:

- a. The legal basis pursuant to which the Specialist Chambers may issue and enforce an arrest warrant against the incumbent President of Kosovo; and
- b. Considering the specific circumstances of the case, including that Mr Thaçi has travelled to The Hague for interviews with the SPO,⁸ the possibility of the SPO requesting, in the alternative, a summons for Mr Thaçi to appear before the Specialist Chambers.

IV. DISPOSITION

11. For the above reasons, the Pre-Trial Judge orders the Specialist Prosecutor to submit, by **Monday, 19 October 2020**, further submissions on the matters raised in paragraph 10.

⁷ KCC, Judgment on Immunities, para. 125 and Disposition B.VII, para. 4.

⁸ KSC-BC-2020-06, F00012, Specialist Prosecutor, *Second Request to Present Additional Supporting Materials*, 29 July 2020, strictly confidential and *ex parte*, paras 2-3.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 12 October 2020
At The Hague, the Netherlands.