



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

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

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 20 November 2020

**Language:** English

**Classification:** Public

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**Prosecution Submissions on the Review of Detention**

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**Specialist Prosecutor's Office**

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## A. INTRODUCTION

1. Pursuant to Article 41(6) and (10) of the Law<sup>1</sup> and Rule 57(2) of the Rules,<sup>2</sup> and in compliance with the order of the Pre-Trial Judge,<sup>3</sup> the Specialist Prosecutor's Office ('SPO') hereby files its submissions on the review of detention of Salih MUSTAFA ('Accused').
2. On 14 February 2020, the SPO requested confirmation of the Indictment against the Accused and the issuance of an arrest warrant against him ('Arrest Warrant Request').<sup>4</sup> On 12 June 2020, the Pre-Trial Judge granted the Arrest Warrant Request, finding that there was a well-grounded suspicion that the Accused committed crimes within the jurisdiction of the Kosovo Specialist Chambers ('KSC'),<sup>5</sup> and finding that there were articulable grounds to believe that the Accused was at risk of flight, that he could intimidate victims and witnesses, and that he could commit further crimes if left free.<sup>6</sup>
3. These circumstances have not changed. Further to the Accused now being aware of the gravity of the charges against him, and to the disclosure of the indictment supporting material and other evidence against him pursuant to Rule 102(1), these risks have in fact increased. Accordingly, the Accused's continued detention remains necessary.

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<sup>1</sup> 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.

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

<sup>3</sup> Order for Submissions on the Review of Detention, KSC-BC-2020-05/F00048, Public, 16 November 2020.

<sup>4</sup> Public Redacted Version of 'Submission of Indictment for confirmation and related requests', filing KSC-BC-2020-05/F00002 dated 14 February 2020, 2 October 2020, KSC-BC-2020-05/F00002RED, para.24(ii).

<sup>5</sup> Public Redacted Version of Arrest Warrant for Mr Salih Mustafa, KSC-BC-2020-05/F00009/A01/RED, 12 June 2020, ('Arrest Warrant'), paras 1-2. *See also* Decision on Request for Arrest Warrant and Transfer Order, KSC-BC-2020-05/F00009, 12 June 2020.

<sup>6</sup> Arrest Warrant, KSC-BC-2020-05/F00009/A01/RED, para.5.

## B. CIRCUMSTANCES REQUIRING THAT THE ACCUSED BE KEPT IN DETENTION

i. Well-grounded suspicion that the Accused committed crimes within the jurisdiction of the KSC

4. In confirming the indictment against the Accused, the Pre-Trial Judge found that there was a well-grounded suspicion that he had committed crimes within the jurisdiction of the KSC.<sup>7</sup> This suspicion remains, as there has been no development in the case warranting reconsideration of this finding.

ii. Increased risk of flight

5. In the Arrest Warrant, the Pre-Trial Judge considered that the Accused's knowledge of the charges against him and potential penalties, his awareness of publicly reported convictions of senior Llap Operational Zone commanders, his employment within the Kosovo intelligence apparatus, and his ability to travel freely demonstrated that he had both an incentive and the means to flee.<sup>8</sup>

6. At present, the Accused's incentives to flee are even greater than at the time of the issuance of the Arrest Warrant. The Accused has received disclosure of the indictment supporting materials,<sup>9</sup> and of other materials that the SPO may decide to use at trial.<sup>10</sup> The Accused is therefore aware of the evidence against him and of its probative potential. Considering the seriousness of the charges against him, the Accused is now also aware of the concrete possibility that he will be convicted to a lengthy prison sentence, including life imprisonment.<sup>11</sup>

7. The Pre-Trial Judge should consider this heightened risk of flight also in light of the difficulties that could arise in pursuing a fugitive outside of Kosovo. The KSC can only seek binding cooperation to surrender the Accused from Kosovo or a country

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<sup>7</sup> Public Redacted Version of Decision on the Confirmation of the Indictment against Salih Mustafa, KSC-BC-2020-05/F00008/RED, 5 October 2020, paras 123, 129, 133, 138, 141, 145, 151. *See also* Arrest Warrant, KSC-BC-2020-05/F00009/A01/RED, paras 1-2.

<sup>8</sup> Arrest Warrant, KSC-BC-2020-05/F00009/A01/RED, para.5.

<sup>9</sup> Rule 102(1)(a).

<sup>10</sup> Rule 102(1)(b).

<sup>11</sup> Article 44(1).

which recognises Kosovo and has an extradition agreement with it, or other enabling legislation.<sup>12</sup> There are only a limited number of countries with such agreements.<sup>13</sup> This situation is markedly different from other jurisdictions and other institutions such as the ICTY, which can seek broader binding cooperation on the basis of its powers derived from the United Nations Security Council.<sup>14</sup> As outlined in the Arrest Warrant Request,<sup>15</sup> the Accused does not have any physical or other medical condition which would restrict his ability to travel, undoubtedly has the connections to leave Kosovo through illegal borders if necessary, and can travel to the overwhelming majority of countries in the world, thereby potentially placing himself permanently beyond the reach of the KSC.

iii. Increased risk of interference with witnesses and victims

8. In the Arrest Warrant, the Pre-Trial Judge found articulable grounds to believe that the Accused may obstruct the proceedings by interfering with witnesses, victims or accomplices.<sup>16</sup>

9. The circumstances relied on in support of these findings have not changed. On the contrary, Rule 102(1) disclosure to the Accused will have further increased the Accused's incentive, intention and opportunity to interfere with victims and witnesses.<sup>17</sup>

10. In particular, the limited scope of the case, relating to a particular time period and location, are relevant to the assessment of the risk of identification and interference with witnesses. Statements and exhibits have been disclosed to the

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<sup>12</sup> Article 55(2); Rule 208.

<sup>13</sup> Including, in respect of extradition agreements, Albania, Austria, Belgium, Croatia, the Czech Republic, Germany, Hungary, Italy, Macedonia, Turkey, the United Kingdom, and the United States. Most of these countries have entered into extradition agreements with Kosovo itself. Others have formally agreed with Kosovo on the continued application of extradition agreements reached with the Federal Republic of Yugoslavia.

<sup>14</sup> United Nations Security Council, S/RES/827 (1993), Resolution 827, 25 May 1993, para.4.

<sup>15</sup> Arrest Warrant Request, KSC-BC-2020-05/F00002RED, para.7.

<sup>16</sup> Arrest Warrant, KSC-BC-2020-05/F00009/A01/RED, para.5.

<sup>17</sup> See Arrest Warrant Request, KSC-BC-2020-05/F00002, paras 8-11 (which are incorporated by reference).

Accused pursuant to Rule 102(1), but the trial has not yet commenced and the evidence been heard, creating a particularly vulnerable juncture in proceedings. The Accused, is an experienced intelligence officer,<sup>18</sup> with the technical knowledge and network to identify and interfere with victims and witnesses in this case.

iv. Increased risk that the Accused could commit crimes

11. As found by the Pre-Trial Judge, the Accused's public bragging about the execution of Serbs in Pristinë/Priština on 14 June 1999 demonstrated a risk that he could resort to physical violence, or threats thereof, against victims and witnesses.<sup>19</sup> The Accused is now aware of the solid evidentiary basis supporting the charges against him. He is also aware of the concrete possibility of a lengthy prison sentence being imposed on him. The risk that, if released, the Accused could resort to threats of physical violence against witnesses may only have increased further to these developments.

v. Continued detention is the only way to manage the risks posed by the Accused

12. Overall, the risks posed by the Accused's release, considered alone or together, can only be effectively managed in the Detention Centre. Detention is the most effective means to limit the Accused's ability to flee or otherwise thwart the KSC's jurisdictional reach, obstruct the investigation or court proceedings, and/or commit further crimes. Any assurances that the Accused may give would be insufficient to guarantee compliance with any conditions or overcome the concrete risks of release. In such circumstances, release, with or without conditions, should not be granted.<sup>20</sup>

### C. RELIEF REQUESTED

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<sup>18</sup> Arrest Warrant, KSC-BC-2020-05/F00009/A01/RED, para.5.

<sup>19</sup> Arrest Warrant, KSC-BC-2020-05/F00009/A01/RED, para.5.

<sup>20</sup> 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.

13. For the foregoing reasons, the SPO requests that the Pre-Trial Judge order that the Accused remain in detention.

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**Jack Smith**

**Specialist Prosecutor**

Friday, 20 November 2020

At The Hague, the Netherlands.