



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-05
Before: Pre-Trial Judge
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 12 June 2020
Language: English
Classification: Public

**Public Redacted Version of
Decision on Request for Arrest Warrant and Transfer Order**

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Julius von Bóné

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 35(3), 39(3), 41, 53, 54 and 55 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 50, 53, 55, 86(6)(b) and 208(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber ("Rules"), hereby renders the following decision.

I. PROCEDURAL BACKGROUND

1. On 14 February 2020, the Specialist Prosecutor's Office ("SPO") submitted for confirmation a strictly confidential and *ex parte* indictment together with evidentiary material in support of the factual allegations and a detailed outline linking each item of evidentiary material to each allegation.²

2. On 28 February 2020, the Pre-Trial Judge ordered the SPO to file, *inter alia*, a revised indictment by 18 March 2020.³

3. On 18 March 2020, the SPO submitted a revised indictment for confirmation.⁴ A further revised indictment was submitted on 20 March 2020 ("Further Revised Indictment").⁵

4. On 26 May 2020, the Pre-Trial Judge issued an order setting the target date for the issuance of the decision reviewing the Further Revised Indictment.⁶

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests* ("Initial Submission"), 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*.

³ KSC-BC-2020-05, F00003, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 28 February 2020, strictly confidential and *ex parte*.

⁴ KSC-BC-2020-05, F00004, Specialist Prosecutor, *Submission of Revised Indictment for Confirmation and Related Requests* ("Second Submission"), 18 March 2020, strictly confidential and *ex parte* with Annexes 1 and 2, strictly confidential and *ex parte*.

⁵ KSC-BC-2020-05, F00005, Specialist Prosecutor, *Submission of Further Revised Indictment for Confirmation* ("Third Submission"), 20 March 2020, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-05, F00006, Pre-Trial Judge, *Order Setting Target Date for a Decision Pursuant to Article 39(2)*, 26 May 2020, strictly confidential and *ex parte*.

5. On 10 June 2020, the President issued a decision invoking a change of venue to the Netherlands (“Host State”).⁷

6. On 12 June 2020, the Pre-Trial Judge confirmed the Further Revised Indictment (“Confirmation Decision”).⁸

II. SUBMISSIONS

7. Along with confirmation of the Revised Indictment, the SPO requests, *inter alia*, the arrest and transfer of Salih Mustafa (“Mr Mustafa”).⁹ To this end, the SPO asserts that the requirements of Article 41(6) of the Law have been met.¹⁰ The SPO alleges that there is a grounded suspicion that Mr Mustafa has committed crimes within the jurisdiction of the Specialist Chambers.¹¹ The SPO further alleges that there are articulable grounds to believe that Mr Mustafa (i) is a flight risk;¹² (ii) may obstruct the progress of criminal proceedings, including by influencing witnesses, victims or accomplices;¹³ and (iii) may repeat the criminal offence or commit another crime.¹⁴

8. The SPO further requests that the arrest warrant be transmitted to, and executed by, the SPO, in cooperation with the Registrar.¹⁵ In executing the arrest warrant, the SPO seeks authorisation to disclose the arrest warrant as necessary for this purpose.¹⁶

⁷ KSC-BC-2020-05, F00007, President, *Decision Invoking a Change of Venue to the Host State* (“Decision on Change of Venue to the Host State”), 10 June 2020, confidential and *ex parte*.

⁸ KSC-BC-2020-05, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Salih Mustafa* (“Confirmation Decision”), 12 June 2020, strictly confidential and *ex parte*.

⁹ Initial Submission, paras 4, 17-21, 24(ii). The SPO incorporates by reference its argumentation in its Initial Submission, Section B(5)-(6), see Second Submission, paras 7, 24(b). *See also*, Third Submission, para. 3.

¹⁰ Initial Submission, para. 5.

¹¹ Initial Submission, para. 5(i).

¹² Initial Submission, paras 5(ii), 6-7.

¹³ Initial Submission, paras 5(ii), 8-11.

¹⁴ Initial Submission, paras 5(ii), 12.

¹⁵ Initial Submission, paras 17-18.

¹⁶ Initial Submission, para. 19.

9. With respect to the transfer of Mr Mustafa, the SPO requests that the Pre-Trial Judge order his transfer to the detention facility of the Specialist Chambers in the Host State, pursuant to Rule 50(1) of the Rules.¹⁷

III. APPLICABLE LAW

10. Pursuant to Article 39(3) of the Law and Rule 86(6)(b) of the Rules, at the request of the Specialist Prosecutor, the Pre-Trial Judge may issue any orders and warrants as may be required for the preparation of a fair and expeditious trial.

11. 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 Pre-Trial Judge.

12. 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 facility of the Specialist Chambers where the person shall be

¹⁷ Initial Submission, para. 20.

transferred. Rule 53(3) of the Rules provides that the arrest warrant shall remain in effect until otherwise ordered by the Panel.

13. Upon the issuance of an arrest warrant by the Specialist Chambers, Article 55 of the Law and Rules 50(2) and 208(1) of the Rules provide that the Pre-Trial Judge may request the transfer of the person concerned from the competent authorities of a Third State to the Specialist Chambers pursuant to an arrangement of that State with the Specialist Chambers, an agreement of that State with Kosovo, or on the basis of reciprocity. Furthermore, Rule 55(3) of the Rules provides that where an arrest warrant relates to a person located or last known to be located in a Third State, which has not yet assumed an obligation to provide assistance, the Registrar shall transmit the request for cooperation, including the arrest warrant to the competent authorities of that State.

14. 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.

15. 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 facility of the Specialist Chambers.

16. 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

17. The SPO seeks an arrest warrant and transfer order for Mr Mustafa, a Kosovan national, for crimes under Article 14(1)(c) of the Law, committed in Kosovo in April 1999.¹⁸ The Pre-Trial Judge recalls his findings that the requisite subject matter, temporal and territorial jurisdiction requirements under Articles 6-8 of the Law have been met.¹⁹

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

1. Crimes Allegedly Committed

18. The Pre-Trial Judge recalls that, when confirming the Further Revised Indictment, he found that there is a well-grounded suspicion that Mr Mustafa committed crimes within the jurisdiction of the Specialist Chamber, namely the war crimes of arbitrary detention, cruel treatment, torture and murder in violation of Article 14(1)(c) of the Law.²⁰ The Pre-Trial Judge therefore finds that the requirement of Article 41(6)(a) of the Law has been met.

2. Necessity of the Arrest

19. The SPO submits that the arrest of Mr Mustafa 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.²¹ The Pre-Trial Judge recalls that the

¹⁸ Further Revised Indictment, paras 1, 35.

¹⁹ Confirmation Decision, para. 32.

²⁰ Confirmation Decision, paras 123, 129, 133, 138, 141, 145, 151.

²¹ Initial Submission, para. 5(ii).

determination of such risks is a matter of assessing the possibility, as opposed to the unavailability that such risks materialise.²²

20. With respect to flight risk, the Pre-Trial Judge considers Mr Mustafa's (i) awareness of the notification of the charges, as contained in the indictment to be served, and potential penalties;²³ (ii) awareness of publicly reported convictions of senior Llap Operational Zone commanders for similar crimes;²⁴ (iii) current employment in [REDACTED] within the Ministry of Defence of Kosovo with resultant access to information and resources;²⁵ and (iv) ability to travel freely to countries not requiring a visa, demonstrate that he has an incentive and the means to flee.²⁶ Moreover, the Pre-Trial Judge notes the submissions of the SPO in relation to the lack of physical or medical conditions that would root him to his place of residence.²⁷

21. With respect to the obstruction of proceedings through the interference with victims and witnesses, the Pre-Trial Judge considers that [REDACTED] may allow Mr Mustafa [REDACTED].²⁸ [REDACTED].²⁹ In addition, [REDACTED].³⁰ [REDACTED].³¹ The Pre-Trial Judge therefore concludes that Mr Mustafa has an incentive, the means and the opportunity to interfere with witnesses and victims and, consequently, obstruct the progress of criminal proceedings.

22. With respect to the further commission of crimes, the Pre-Trial Judge notes that it has been reported that Mr Mustafa has publicly bragged [REDACTED] about the

²² 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.

²³ Initial Submission, para. 6; Confirmation Decision, para. 163.

²⁴ Initial Submission, para. 6; Kosovo, Basic Court of Prishtinë/Priština, *Prosecutor v. R. Mustafa et al.*, P 448/2012, Judgment, 7 June 2013.

²⁵ Initial Submission, para. 7; [REDACTED], Part 1, p. 5.

²⁶ Initial Submission, para. 7.

²⁷ Initial Submission, para. 7.

²⁸ Initial Submission, para. 10.

²⁹ Initial Submission, para. 11; [REDACTED].

³⁰ Initial Submission, para. 10.

³¹ Initial Submission, para. 10.

execution of Serbs thereby demonstrating a further risk that he may resort to physical violence or threats of physical violence against victims and witnesses.³²

23. In light of the foregoing, the Pre-Trial Judge finds that there are articulable grounds to believe that there is a risk that Mr Mustafa may flee, obstruct the progress of proceedings by influencing witnesses or victims, or commit further crimes thereby necessitating his arrest and detention, in accordance with Article 41(6)(b) of the Law.

C. COMPLIANCE WITH FUNDAMENTAL RIGHTS

24. 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 Mr Mustafa, when executing the arrest warrant.³³ In so far as the SPO undertakes to adopt such measures, the Pre-Trial 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 Mr Mustafa is in custody and falls under the jurisdiction of the Specialist Chambers, he shall be informed of all his rights under the Law with a view to exercising them before the Pre-Trial Judge as soon as practicable.

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

25. For security reasons and the proper administration of justice, the SPO has invoked a change of venue to the Host State pursuant to Article 3(8)(a) of the Law.³⁴ In light of this venue change,³⁵ the Pre-Trial Judge considers it necessary that Mr Mustafa is transferred to the detention facilities of the Specialist Chambers, managed by the

³² Initial Submission, para. 12; [REDACTED].

³³ Initial Submission, para. 18.

³⁴ Initial Submission, paras 3, 20.

³⁵ Decision on Change of Venue to the Host State, p. 3.

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 Mr Mustafa.

E. EXECUTION AND SERVICE OF THE ORDERS

26. 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.³⁶ 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.

27. If the SPO receives information about Mr Mustafa’s travel, whether planned or ongoing, or that Mr Mustafa is present on the territory of any Third State, the SPO shall promptly provide such information to the Registrar. If the Registrar receives such information from a source other than the SPO, she shall promptly provide such information to the SPO. The Registrar shall then, having consulted the Specialist Prosecutor, transmit the annexed arrest warrant and transfer order to the competent authorities of any Third State concerned, in conformity with Article 55 of the Law.

28. Upon arrival to the detention facilities of the Specialist Chambers from Kosovo, or in any case before the initial appearance, the Registrar shall submit a report on the arrest and transfer of Mr Mustafa to the Pre-Trial Judge, including any relevant details and information provided by the SPO. If the arrest of Mr Mustafa is effectuated on the territory of a Third State, the Registrar shall prepare and submit a report on any action

³⁶ 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.

involving a Third State, or any follow-up that may be received from a Third State, including (i) any information regarding the basis on which the Third State has agreed or may have assumed an obligation to provide assistance to the Specialist Chambers; and (ii) any relevant details and information provided by the competent authorities of the Third State and/or the SPO.

V. DISPOSITION

29. For the above reasons, the Pre-Trial Judge hereby:

- a. **GRANTS** the request for an arrest warrant (Annex 1);
- b. **GRANTS** the request for a transfer order (Annex 2);
- c. **DIRECTS** the SPO to serve and execute the annexed arrest warrant in Kosovo;
- d. **DIRECTS** the Registrar, in consultation with the SPO, to transmit the arrest warrant and transfer order to the competent authorities of any Third State, as the case may be, for service and execution;
- e. **DIRECTS** the SPO to consult with the Registrar on the necessary arrangements to be made, including appropriate and necessary disclosure of the arrest warrant, for its execution and service;
- f. **DIRECTS** the Registrar to execute the transfer of Mr Mustafa to the detention facilities of the Specialist Chamber in The Netherlands; and
- g. **DIRECTS** the Registrar, upon arrival to the detention facilities of the Specialist Chambers, or in any case before the initial appearance, to submit a report on the arrest and transfer of Mr Mustafa, as further specified in paragraph 28.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Friday, 12 June 2020

At The Hague, the Netherlands.