



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

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

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 14 June 2021

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Confidential Redacted Version of
'Prosecution's request for segregation and other measures', KSC-BC-2020-
05/F00133, 11 June 2021

Specialist Prosecutor's Office

Jack Smith

Counsel for the Accused

Julius von Bóné

Registrar

Dr Fidelma Donlon

Counsel for Victims

Anni Pues

A. INTRODUCTION

1. Pursuant to Articles 21 and 41 of the Law,¹ Rules 23(7) and 56(6) of the Rules,² and Rule 43(3)(c) of the Rules of Detention,³ the Specialist Prosecutor's Office ('SPO') hereby requests the Trial Panel ('Panel') to order (i) the segregation of Salih MUSTAFA ('Accused') from each of the accused in KSC-BC-2020-06 and KSC-BC-2020-07, and (ii) the active monitoring of the Accused's communications, with the exception of privileged communications. Each of these restrictions are requested to apply from the day before scheduled disclosure to the Accused of the identity of protected witnesses in this case. The SPO also requests the Panel to expressly order the Accused not to share any confidential materials or any other identifying information with anyone outside of his defence team.
2. The Law, the Rules, and the Detention Rules make the Registry the body responsible for managing the detention facilities and the well-being of the detainees. The Registry is also the body best placed to devise measures that are effective, feasible, and financially affordable. Accordingly, the SPO suggests that the Panel invite submissions from the Registry on the feasibility of, and appropriate measures for, implementation of this request.
3. This application is filed *ex parte* because it makes reference to confidential information in other proceedings. A confidential redacted version will also be submitted.

B. REQUEST FOR SEGREGATION AND OTHER MEASURES

1. Restrictions on the Accused's ability to communicate with others are allowed under KSC rules and international jurisprudence

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/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

³ KSC-BD-08/Rev1, 23 September 2020 ('Detention Rules').

4. Rule 56 allows the Panel, either *proprio motu* or upon request, to impose restrictions on the communications of an accused if it is necessary to protect witnesses and victims, confidential information, or the integrity of the proceedings. The possibility of restricting an accused's ability to communicate with other prisoners and with people outside of the detention facilities has been consistently recognised by the European Court of Human Rights ('ECtHR'), which held that such restrictions may be imposed when they are necessary and pursue a legitimate aim.⁴

5. International criminal tribunals, too, have recognised that justified and proportionate restrictions on an accused's ability to communicate with others may be imposed, provided they are necessary to mitigate an objectively justifiable risk, and that the imposed restrictions are in accordance with internationally recognised human rights.⁵ A specific instance when such restrictions may be imposed is when they are necessary to preserve the integrity of the proceedings against the accused whose segregation is sought, or of proceedings against other accused.⁶

2. Existence of a concrete risk justifying the imposition of segregation and other measures

6. At this stage, there exists a concrete risk that the Accused could reveal confidential information to the accused in other cases before the KSC, thereby frustrating protective measures ordered in those cases, creating a risk to the safety of witnesses, and jeopardising the integrity of those other proceedings. Several circumstances warrant considering this risk as not just as a theoretical one, but one

⁴ See e.g. ECtHR, *Khoroshenko v. Russia*, Judgment, 30 June 2015, para.125; *Enea v. Italy*, Judgment, 17 September 2009, para.126; *Piechowiz v. Poland*, Judgment, 17 April 2012, para.212 and *Lorsé and Others v. The Netherlands*, Judgment, 4 February 2003, paras 78-86.

⁵ International Criminal Court, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of Decision on Mr Al Hassan's restrictions and access while in detention, ICC-01/12-01/18, 21 January 2020, para.10.

⁶ See e.g. International Criminal Court, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18, Public Redacted version of Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention, 16 February 2021, paras 16-17.

that is likely to materialise if appropriate measures are not ordered and promptly put in place.

7. The presentation of evidence in this case, while not scheduled yet, is likely to begin soon.⁷ Once the Panel issues a trial schedule, the SPO will have to disclose unredacted witness statements to the Defence.⁸ This necessary step will inevitably heighten security risks. The risks of undue interference in proceedings before the KSC have been amply recognised in this case, together with the Accused's ability and incentive to obstruct the course of the proceedings against him.⁹

8. The risks associated with the disclosure of unredacted evidence will, however, not only affect this case ('Case 05'). It also has the potential to jeopardise the integrity of the proceedings [REDACTED]. [REDACTED].¹⁰ Importantly, the Pre-Trial Judge in Case 06 has found that all the accused in that case have both an incentive and the means to interfere with victims and witnesses.¹¹ Similar risks exist with regard to the accused in Case KSC-BC-2020-07 ('Case 07'), who already face charges under Article 15(2), resulting from the unlawful dissemination of confidential information, including relating to witness intimidation.

9. The Accused is a former KLA fighter who has publicly denied the possibility that members of the KLA could have committed crimes during the Kosovo conflict and expressed doubts about the fairness of the KSC as an institution.¹² These circumstances warrant particular caution in assessing the risk that the Accused may seek to share confidential information with the accused in Case 06, who during the war were his superiors and amongst the highest-ranking members of the KLA. The Accused's experience as an intelligence officer¹³ further increases the risk that he could

⁷ See Transcript of the Trial Preparation Conference, 9 June 2021, public.

⁸ See e.g. Confidential Redacted Version of First Decision on Specialist Prosecutor's Request for Protective Measures, KSC-BC-2020-05/F00041/CONF/RED, 20 October 2020, para.39.

⁹ See Fourth Decision on Review of Detention, KSC-BC-2020-05/F00127, 25 May 2021, public, para.19.

¹⁰ See [REDACTED].

¹¹ Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020, paras 29, 33, 37, 41.

¹² Transcript of Further Initial Appearance, 28 October 2020, p.56.

¹³ See Fourth Decision on Review of Detention, KSC-BC-2020-05/F00127, 25 May 2021, public, para.19.

try to assist former high-ranking officers of the Kosovo state apparatus, such as Kadri VESELI, former head of Kosovo intelligence and Minister of the Intelligence Service,¹⁴ or Hashim THACI, former Head of State with strong ties and influence over the intelligence service.¹⁵ The Accused's experience as an intelligence officer also suggests his superior ability to pass on information undetected compared to a detainee without such professional intelligence training and experience.

10. The Accused's cohabitation with the accused in Cases 06 and 07 thus poses a concrete danger to the integrity of the proceedings. It creates the specific risk that the Accused, having learned the identity of the SPO witnesses against him, will reveal this information to the accused in those cases.

11. It is thus necessary to adopt proportionate, feasible, and effective measures to mitigate this risk to the fullest possible extent.

3. Proposed measures to mitigate the risk of confidential information being divulged by the Accused to accused persons in other proceedings

12. The Law, the Rules, and the Detention Rules make the Registry the body responsible for managing the detention facilities. The Registry's responsibility includes ensuring that suspects and accused are detained in accordance with international standards.¹⁶ Furthermore, the Detention Rules specifically empower the

¹⁴ Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020, para.32.

¹⁵ Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020, para.28.

¹⁶ See Art. 41(8) and (9); Rule 23

Registry with the ability to devise and adopt measures that may be necessary to safeguard the integrity of proceedings before the KSC.¹⁷

13. The Registry is thus best placed to identify measures that are logistically and financially feasible, and that can be implemented within a reasonably short amount of time.

14. Accordingly, the SPO requests the adoption of the following measures, the practical implementation of which should be devised in detail by the Registry. The SPO remains of course available to provide the Registry with any information or assistance that may facilitate the adoption of these measures.

15. First, the Accused should be segregated from the accused in Cases 06 and 07.¹⁸ Pursuant to Detention Rule 43(6), the SPO requests that segregation be implemented the day before the Accused receives disclosure of the identity of the first protected witness(es) in Case 05.

16. Second, the Accused's non-privileged communications – whether telephonic, by other electronic means or in-person - should be actively monitored to avoid confidential information, including relating to witnesses subject to protective measures, from being revealed to unauthorised persons.

4. Order of non-disclosure to third parties

17. As a further disincentive to the divulgence of confidential information, the SPO requests the Panel to issue an order to the Accused explicitly prohibiting him from discussing or in any manner disseminating confidential information with any person outside of his defence team.

C. RELIEF REQUESTED

18. Based on the foregoing, the SPO requests the Panel to:

- i. Order the segregation of the Accused starting on the day before the SPO will have to disclose to him the identity of the first witness(es)

¹⁷ See Detention Rule 43(3)(c).

¹⁸ Detention Rule 43.

in this case and for as long as the risks identified in this application persist;

- ii. Order the active monitoring of the Accused's communications during the same period of time;
- iii. Invite the Registry to make submissions in accordance with paragraph 2 above;
- iv. Order the adoption of any other measure which may be identified by the Registry as necessary to mitigate the risks identified in this application; and
- v. Issue an order to the Accused not to divulge any confidential information to persons outside of his defence team.

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Jack Smith

Specialist Prosecutor

Monday, 14 June 2021

At The Hague, the Netherlands.