



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
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 1 October 2020

Language: English

Classification: Public

Public Redacted Version of

'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F0009 dated 22 September 2020

with public Annexes 1-2

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I. INTRODUCTION

1. Pursuant to Articles 35(2), 39(3) and 41 of the Law¹ and Rules 48, 50, 53 and 55 of the Rules,² the Specialist Prosecutor's Office ('SPO') requests the Single Judge Panel ('Single Judge') to urgently issue arrest warrants and orders for transfer for Mr Hysni GUCATI and Mr Nasim HARADINAJ (together the 'Suspects') for offences against the administration of justice under Article 15(2) ('Request').

2. There is grounded suspicion that the Suspects have committed a crime within the jurisdiction of the Specialist Chambers.³ In particular, the evidence shows that the Suspects, alone or in co-perpetration or in agreement with others, have committed, incited or assisted in the commission of, or attempted to commit,⁴ the crimes of intimidation during criminal proceedings, retaliation and violating the secrecy of proceedings. Such acts are punishable within the jurisdiction of the Specialist Chambers pursuant to Article 15(2) of the Law and Articles 387, 388 and 392 of the KCC. The arrest of the Suspects is necessary to (i) ensure their appearance at trial; (ii) ensure that they do not hide, destroy or change evidence or obstruct the progress of the criminal proceedings; and/or (iii) prevent them from repeating, or continuing with the commission of, the crime.⁵

3. Further, considering the grounded suspicion that the Suspects have committed crimes within the Specialist Chamber's jurisdiction and that they may have evidence necessary to the investigation on their persons or in their offices or the location of arrest,

¹ 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.

² 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.

³ Law, Art.41(6)(a).

⁴ Law, Art.16(3); Criminal Code of the Republic of Kosovo, Code No.06/L-074 (2019) ('KCC'), Arts 17, 28, 31-33, and 35.

⁵ Law, Art.41(6)(b).

the SPO also requests, pursuant to Article 39(3) and Rule 37, an authorisation for search and seizure of the foregoing persons and locations.

4. Under Article 3(8)(a) of the Law, for security reasons, the SPO hereby invokes a change of venue to the Netherlands in respect of this Request and all related matters.

II. STATEMENT OF FACTS

5. Mr GUCATI is the head of the Kosovo Liberation Army War Veterans Association ('KLA WVA'). Mr HARADINAJ is the deputy head.

6. On 7 September 2020, the KLA WVA convened a press conference at which they announced they had that morning received a package of documents (comprising hundreds of pages) allegedly relating to the Special Investigative Task Force ('SITF') and/or SPO. The KLA WVA stated that the documents included copies of various cooperation requests and witness information. The KLA WVA freely distributed copies of those documents to members of the press present at the press conference.⁶ The Single Judge authorised the seizure of these documents and ordered that any individual in possession of the documents or their content refrain from copying, recording or disseminating them.⁷ The SPO seized documents from the KLA WVA, which included SITF documents, some marked confidential, and the names and personal details of SITF witnesses and potential witnesses.⁸

7. On 16 September 2020, the KLA WVA convened a press conference at which they announced they had, that afternoon, received a further package of documents allegedly relating to the SITF and/or SPO. The KLA WVA stated that the documents related to

⁶ A rough translation of this press conference has been provided at Annex 1, along with a link where the audio video record of the press conference can be found.

⁷ Decision Authorising Seizure, KSC-BC-2018-01/F00121, 7 September 2020, Strictly Confidential and *Ex Parte* ('First Order').

⁸ See also Prosecution report pursuant to decision KSC-BC-2018-01/F00121, KSC-BC-2018-01/F00124, 21 September 2020, Strictly Confidential and *Ex Parte*.

SITF/SPO cooperation with the Serbian authorities and include witness statements.⁹ The KLA WVA informed the SPO that they had again permitted members of the press to take copies of the documents.

8. On 17 September 2020, the Single Judge authorised the seizure of these documents and again ordered that any individual in possession of the documents or their content refrain from copying, recording or disseminating them.¹⁰ That same day, the SPO seized documents from the KLA WVA, which included SITF documents, some marked confidential, and the names and personal details of SITF witnesses and potential witnesses. At least three of these documents were also part of the documents seized on 8 September 2020.

9. On 22 September 2020, the KLA WVA held a further press conference where they announced they had received further documents of the SPO, relating to charges against certain individuals, including Hashim THAÇI, Kadri VESELI, Azem SYLA, Jakup KRASNIQI, Rexhep SELIMI, and Xhavit HALITI.¹¹ Although the Suspects claim that no copies were made, media representatives were granted access to and permitted to photograph the documents. The afternoon of 22 September 2020, the SPO seized the documents.¹² When SPO personnel asked why the KLA WVA had not contacted the SPO before disseminating the documents and their contents, as previously requested by the SPO, Mr GUCATI stated that he and the KLA WVA are not the SPO's 'collaborators' and therefore informed the media instead.

⁹ A rough translation of this press conference has been provided at Annex 1, along with a link where the audio video record of the press conference can be found.

¹⁰ Decision Authorising Seizure, KSC-BC-2018-01/F00123, 17 September 2020, Strictly Confidential and Ex Parte ('Second Order').

¹¹ A rough translation of this press conference has been provided at Annex 1, along with a link where the audio video record of the press conference can be found.

¹² Separately, the SPO will seek judicial approval of this seizure, pursuant to Rule 38.

10. At each of these press conferences, the Suspects represented the KLA WVA. During the press conferences, the Suspects identified specific persons who cooperated, assisted, or were interviewed by the SITF and stated where they lived,¹³ [REDACTED].¹⁴ The Suspects have also demonstrated indifference to the risk posed to (potential) witnesses by their actions, repeatedly emphasised their opposition to and non-recognition of the KSC and SPO, which they called racist and politically motivated, and referred to (potential) witnesses as ‘anti-national people and people who do not love Kosovo’. While, at times, the Suspects have said that witness names and personal details should not be published, the overall tenor of their communications and actions demonstrates their intentions otherwise. The Suspects have declared that they will continue to disseminate documents relating to SITF/SPO investigations and (potential) witnesses and have claimed that additional documents are expected, on CDs¹⁵

III. ARREST WARRANTS

11. The requirements under Article 41(6) for the Suspects’ arrest and detention are fulfilled. There is a grounded suspicion¹⁶ that the Suspects committed crimes within the jurisdiction of the Specialist Chambers, as required under Article 41(6)(a). Further, though the satisfaction of only one of these criteria is sufficient to ground a warrant of arrest, the Suspects should be detained on the basis of all three criteria specified in Article 41(6)(b) (‘Article 41(6) Criteria’). There are ‘articulable grounds to believe’ that: (1) there is a risk of flight; (2) the Suspects 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 the Suspects’ personal characteristics, past conduct, the environment and conditions in which they live

¹³ See Annex 1, pp.2-3.

¹⁴ See Annex 1, [REDACTED].

¹⁵ See, for example, Annex 1, pp.14, 20; Annex 2, p.8.

¹⁶ Kosovo, Criminal No.04/L-123, Procedure Code, 2012, Article 19(1.9). See also [REDACTED].

or other personal circumstances indicate a risk that they will repeat the criminal offence or commit a crime which they have threatened to commit. Determining the existence of one of these three risks is a matter of assessing the possibility – as opposed to the unavailability – that such risks materialise.¹⁷

A. GROUNDED SUSPICION

12. There is grounded suspicion that the Suspects alone or in co-perpetration or in agreement with others, have committed, incited or assisted in the commission of, or attempted to commit,¹⁸ crimes within the jurisdiction of the Specialist Chambers.

(a) KCC Article 387: Intimidation during criminal proceedings

13. Mr GUCATI and Mr HARADINAJ disseminated confidential and non-public documents and information including (potential) witnesses'¹⁹ names, personal details and details of their evidence. In related press statements, Mr GUCATI and Mr HARADINAJ demonstrated their indifference to the risks to (potential) witnesses posed by their actions and referred to (potential) witnesses as 'anti-national people and people who do not love Kosovo'. Both publicly emphasised that they and the KLA WVA do not accept and are opposed to the KSC and SPO.

14. Accordingly, there is grounded suspicion that Mr GUCATI and Mr HARADINAJ disseminated this confidential and non-public information as a threat or other means of

¹⁷ [REDACTED]; ICC, *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-558, Judgment on the appeal of Mr Aime Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberte provisoire de Maitre Aime Kilolo Musamba'", 11 July 2014, para.107.

¹⁸ Law, Art.16(3); KCC, Arts 17, 28, 31-33, and 35. *See also* KCC, Art 21 (1. A criminal offense may be committed with direct or eventual intent. 2. A person acts with direct intent when he or she is aware of his or her act and desires its commission. 3. A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence).

¹⁹ References to (potential) witnesses concern not only persons interviewed by the SPO, but also persons likely to have information about a crime, perpetrator or important circumstances relevant to the SPO's investigations. *See, similarly*, Article 42(1).

compulsion to induce or attempt to induce person(s) to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the SPO and/or KSC.

(b) KCC Article 388: Retaliation

15. For the same reasons set out above, there is grounded suspicion that Mr GUCATI and Mr HARADINAJ disseminated confidential and non-public information about (potential) witnesses – a harmful action – with the intent to retaliate against persons who provided information to the SITF and/or SPO relating to the commission or possible commission of a criminal offence.

(c) KCC Article 392: Violating secrecy of proceedings

16. Mr GUCATI and Mr HARADINAJ revealed, without authorisation, confidential and non-public documents and information from official proceedings, namely, the criminal investigations of the SITF and SPO.²⁰ Pursuant to Articles 35(2)(f) and 62 and Rule 30, and consistent with the Single Judge's Orders,²¹ such documents and information are recognised as confidential or non-public by law and/or have been declared confidential by decision of the SITF or SPO.

17. Accordingly, there is grounded suspicion that Mr GUCATI and Mr HARADINAJ, by disseminating the information, violated the secrecy of an official proceeding.

B. RISK OF FLIGHT

²⁰ Articles 6(2) and 15(2) incorporate by reference the definitions set out in KCC Article 384, including that 'official proceedings' include any 'criminal proceedings' defined in the KCPC. KCPC Article 6, like Article 35(2)(g) of the Law, provides that the prosecutor initiates 'criminal proceedings', which thereafter include the investigative stage.

²¹ The Single Judge considered that the documents include sensitive information, which are typically non-public. *See* First Order, KSC-BC-2018-01/F00121, para. 12; Second Order, KSC-BC-2018-01/F00123, para.12.

18. Once the Suspects learn of the crimes for which they are charged they have a strong incentive to avoid being tried and risking conviction. The Suspects all have the means, motive, and opportunity to evade justice.

19. The Suspects, Hysni GUCATI and Nasim HARADINAJ, are the head and deputy head, respectively, of the KLA WVA. The KLA WVA, with a membership of 40,000, has previously petitioned for repeal of the Law, and has actively opposed prior attempts to prosecute former KLA members for war crimes, including through threatening protests, demonstrations and civil disobedience. As such, the Suspects have access to significant funds, and can readily mobilise a vast network of supporters, including former KLA members and persons with security, police and intelligence expertise. At least one of the Suspects has recently travelled out of the country.²²

20. Kosovo has only a small number of extradition agreements with other countries, which is significant because this is one of the mechanisms of cooperation for the KSC.²³ When combined with the number of countries which simply do not recognise Kosovo as a state, it is all too easy for the Suspects to legally travel to a jurisdiction which would have no obligation to transfer them to the KSC. The Suspects also undoubtedly have the connections to leave Kosovo through unlawful border crossings, making surrender of their passports an inadequate solution.

C. RISK OF OBSTRUCTING THE PROGRESS OF THE CRIMINAL PROCEEDINGS

21. Due to their involvement with the KLA WVA, the Suspects hold positions of authority and influence in Kosovo. Active investigations are being conducted in respect of their dissemination of documents. In these circumstances, at least until the evidence is secured, detention is necessary.

²² See KSC-BC-2018-01/F00124, para.2.

²³ Article 55(2); Rule 208.

22. The risk of the Suspects mobilising their supporters to obstruct the investigation and proceedings against them is palpably real, as can be seen by their attitude towards the SPO and KSC. The Suspects have the means, motive, and opportunity to seek to obstruct proceedings. In particular, the Suspects have indicated that they will continue to, without authorisation, disclose confidential and non-public information relevant to the SITF/SPO's investigations and witnesses, with indifference to risks posed to (potential) witnesses and others.

23. In repeatedly seeking to delegitimise the KSC, the Suspects' actions – coupled with their positions of influence and the tensions within Kosovo – will undoubtedly embolden the efforts of those who seek to obstruct the SPO's investigation. The Suspects are themselves capable of provoking public disorder if they see it in their interest.

D. RISK OF COMMISSION OF FURTHER CRIMES

24. As set out above, the Suspects have now, on three occasions, taken actions which are detrimental and threatening to the administration of justice. The names of witnesses and potential witnesses have been published and disseminated as a direct consequence of their actions. The Suspects have stated an intention to continue receiving, disseminating and publishing such information.

25. There is a significant risk that the Suspects will continue to threaten and intimidate witnesses, and ordering their detention is the only reasonable means to address this risk.

E. TRANSFER TO THE DETENTION FACILITIES OF THE KSC

26. In light of the SPO's invocation of a change of venue to the Host State,²⁴ the SPO requests that the Single Judge order the transfer of the Suspects to the Detention Centre, pursuant to Rule 50(1)-(2).

²⁴ See paragraph 4 above.

IV. SEARCH AND SEIZURE

27. The SPO requests that, as part of the arrest warrants, the Single Judge authorise the SPO and/or authorities executing the arrest warrant, in cooperation with the SPO, to:

- a. Search the person of the Suspects, location of arrest, and the office of the KLA WVA; and
- b. Seize any evidence that is believed to be connected with or may be evidence relevant to the offences outlined above, including (a) alleged materials of the SITF and/or SPO; and (b) any recent efforts to interfere with the administration of justice. Such items may include copies of documents, photographs, video and audio recordings, as well as computers, telephones, copying machine hard drives ,and other devices that reasonably could be expected to contain relevant evidence.

28. There is grounded suspicion that the Suspects have committed crimes within the Specialist Chamber's jurisdiction and, in turn, there is grounded suspicion that they may have evidence necessary to the investigation on their persons or in their offices or location of arrest.²⁵ Further, in light of the risks of interference and obstruction, including as outlined above, any evidence in the Suspects' possession will not otherwise be obtained. Search and seizure in connection with arrest is the only effective means for the purposes of the investigation.²⁶

29. The resulting interference with the Suspects' rights to privacy and property is proportionate to the legitimate aim of the investigation, and the investigative measure does not negate the essence of those rights.²⁷ The SPO will tailor its execution of the search and seizure and/or will provide necessary information and instructions to any other authorities assisting in executing the search and seizure, in a manner designed to exclude

²⁵ Rule 37(2)(a), (3). *See also* Articles 35(2)(b) and 39(3) and Rule 48(2).

²⁶ Rules 31(1)(b), 37(1).

²⁷ Rule 31(1)(c).

information of no foreseeable relevance, and in accordance with the safeguards outlined in Rule 39.

30. The SPO requests that retention of any evidence seized be authorised for (i) the time necessary to complete review of the evidence; and (ii) if deemed relevant, such further period of time as may be necessary for investigations and proceedings.

V. EXECUTION AND SERVICE

31. The SPO requests the Single Judge to transmit the arrest warrant and transfer order, with the authorisation for search and seizure, to the SPO for execution and service in cooperation with the Registrar. The SPO, in cooperation with the Registrar, is the best-positioned competent authority for the service and/or execution of these orders.

32. Mindful of the need to act in conformity with the fundamental rights provided for in Chapter II of the Constitution, these orders will be executed by the SPO with appropriate measures protecting the fundamental rights of the Suspects and victims/witnesses. Any interference with rights implicated by the measures will only be limited to that which is strictly necessary.²⁸ As soon as the arrests are effectuated, the Suspects shall be informed of their rights under the Law.

33. The SPO requests authorisation to disclose, as appropriate and necessary, the orders for purposes of their execution.

VI. CLASSIFICATION

34. This filing and its annexes are filed strictly confidential and *ex parte* in accordance with Rule 85(4).

²⁸ For instance, at the site of any search and seizure, the SPO may impose a temporary prohibition on the use of non-essential electronic communications. This is strictly necessary because, if multiple arrests and/or searches are planned to be carried out around the same time in relation to multiple suspects, the information that a particular search is taking place risks putting the other suspects on notice and jeopardising the broader operation. See ECtHR, *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, 27153/07, 17 January 2017, paras 65-67.

VII. RELIEF REQUESTED

35. For the foregoing reasons, the SPO urgently requests that the Single Judge:

- a. Issue arrest warrants against the Suspects and corresponding transfer orders in the terms requested in Sections III and V above; and
- b. Authorise search and seizure in the terms requested in Sections IV-V above.

Word count: 3179



Jack Smith

Specialist Prosecutor

Thursday, 1 October 2020

At The Hague, the Netherlands.