



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: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
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Prosecution submissions on use of the term 'witness'

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1. For purposes of the Indictment and Pre-Trial Brief, the Specialist Prosecutor's Office ('SPO') defined the term 'witness(es)' as including 'any person(s) likely to have information about a crime, the perpetrator, or important circumstances relevant to SC Proceedings'.¹
2. Pursuant to the orders of the Trial Panel,² the SPO: (a) identifies the legal basis and authorities on which it relies for this definition; and (b) identifies the categories of individuals concerned in the present proceedings that fall within its scope.
3. The definition derives from the Law³ and the Kosovo Code of Criminal Procedure.⁴ These provisions concern summonses and refer to persons as 'witnesses' even when prosecuting authorities had never previously questioned them or resolved to call them.⁵ When referring to 'witness(es)' in the Indictment and Pre-Trial Brief, the definition extends to the following persons likely to have information about a crime, the perpetrator, or important circumstances relevant to SC Proceedings:

¹ Redacted Indictment, KSC-BC-2020-07/F00251/A02, 5 July 2021 ('Indictment'), para.4; Specialist Prosecutor's Pre-Trial Brief in the case against Hysni GUCATI and Nasim HARADINAJ, KSC-BC-2020-07/F00181/A01, 9 April 2021, Confidential ('Pre-Trial Brief'), para.5, fn.1. The term 'SC Proceedings' was defined as 'official proceedings of the Specialist Chambers ('SC'), including investigations of the Specialist Prosecutor's Office ('SPO')', Indictment, KSC-BC-2020-07/F00251/A02, para.4; Pre-Trial Brief, KSC-BC-2020-07/F00181/A01, para.5, fn.1.

² Order for Submissions and Scheduling the Trial Preparation Conference, KSC-BC-2020-07/F00267, 21 July 2021 (with annex), para.9.

³ Article 42(1) of Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law') ('[t]he Specialist Chambers or the Specialist Prosecutor may summons a witness if there is a likelihood that he or she may have information about a crime, the perpetrator or important circumstances relevant to the criminal proceedings'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

⁴ Article 124(1) of code no.04/L-123 on the Procedure Code, 28 December 2012 ('Kosovo Code of Criminal Procedure') ('[a] person shall be summoned as a witness if there is a likelihood that he or she may give information about the criminal offence, the perpetrator and important circumstances relevant for the criminal proceedings').

⁵ See Article 35(2)(a); Rule 42 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules') (referencing summonses in the section of the Rules on 'Rights of Persons During Investigation'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

- (i) Persons the SPO has interviewed⁶ and intends to rely upon in SC judicial proceedings;
- (ii) Persons the SPO has not interviewed, but intends to rely upon in SC judicial proceedings (such as witnesses who testified before the ICTY or Kosovo courts);⁷
- (iii) Persons the SPO has interviewed and does not currently intend to rely upon in SC judicial proceedings;
- (iv) Persons the SPO sought to interview, but did not interview; and
- (v) Persons who have provided or can provide information relevant to SC proceedings, such as government authorities who provide documentation establishing relevant crimes/perpetrators or facilitate contacts with those having such information.

4. In contrast to other offenses against the administration of justice and public administration in the Kosovo Criminal Code, none of the six crimes charged in the Indictment have a status element that the conduct of the accused must relate to someone who is a 'witness'.⁸

⁶ Including in the capacity as suspects, in instances when the SPO had grounds to believe that a person likely to have information about a crime, the perpetrator, or important circumstances relevant to SC Proceedings also committed or participated in the commission of a crime within the jurisdiction of the SC. *See* Rule 43(1).

⁷ In this regard, *see* Article 37(3)(a)-(b) (providing for the admissibility of testimony provided by 'witnesses' before these bodies).

⁸ *In contrast to* Articles 384 (criminalising false statements made by, *inter alia*, a witness), 385 (governing '[f]alse statements of co-operative witnesses') and 386(1)(1.7) ('[w]hoever by any means of compulsion or bribe with the intent to: [...] induce[] a witness or an expert to decline to give or to give a false statement in court proceedings, minor offence proceedings, administrative proceedings or in proceedings before a notary public or disciplinary proceedings [...]') of code no.06/L-074 on the Criminal Code of the Republic of Kosovo, 14 January 2019 ('Kosovo Criminal Code'). *See also* Rule 77(A)(iv) of the ICTY Rules ('[t]he Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who [...] threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness'); Article 70(1)(a) of the ICC Statute (offence of giving false testimony when under an obligation pursuant to Article 69(1) of the ICC Statute to tell the truth, with Article 69(1) of the ICC Statute setting out the undertaking to tell the truth which witnesses must give prior to testifying).

5. The charge of intimidation (Count 3) concerns serious threats to ‘another person’,⁹ not just ‘witnesses’. The Pre-Trial Judge made clear that intimidation extends to ‘any person likely to provide information to the SITF, the SPO and/or to any SC Panel about any crimes or offences falling under SC jurisdiction’.¹⁰ The Pre-Trial Judge applied the same understanding to those affected under retaliation (Count 4),¹¹ based on the applicable Kosovo Criminal Code provision providing that retaliation be against ‘any person’.¹²

6. The counts governing obstructing official persons in performing official duties (Counts 1 and 2) concern the obstruction not of witnesses but ‘official persons’, such as SPO officials.¹³

7. Violating the secrecy of proceedings through revealing secret information (Count 5) concerns only the classification of the information in question. The provision does not require the revelation of information of a ‘witness’, or indeed any person at all.¹⁴

8. Violating the secrecy of proceedings through revelation of identities and personal data (Count 6) does have a status element in that the information revealed must concern ‘protected persons’.¹⁵ But it is not further required that the protected persons be *witnesses* under any particular definition, as made clear by the Pre-Trial Judge when interpreting this requirement:

⁹ Article 387 of the Kosovo Criminal Code. This and other cited Kosovo Criminal Code provisions apply in this case by virtue of Article 15(2) of the Law.

¹⁰ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (redacted version notified 22 December 2020) (‘Confirmation Decision’), para.61.

¹¹ Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.54.

¹² Article 388(1) of the Kosovo Criminal Code.

¹³ Article 401 of the Kosovo Criminal Code.

¹⁴ See Article 392(1) of the Kosovo Criminal Code; Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.37.

¹⁵ Article 392(2) of the Kosovo Criminal Code.

For the purpose of Article 392(2) of the KCC within the SC legal framework, “Protected Person” means any person in relation to whom:

- a) any SC Panel has ordered measures of protection pursuant to, *inter alia*, Articles 23, 39(11), 40(6)(f), 58 of the Law, Rules 80, 81, 105, 108 of the Rules or any other applicable law. This includes any witness, victim or other person interacting with the SC whose identity and personal data is protected by virtue of such measures;
- b) the SPO has adopted, on its own motion, measures of protection pursuant to, *inter alia*, Article 35(2)(f) of the Law, Rule 30(2)(a) of the Rules or any other applicable law. This includes any person interacting with the SPO whose identity and personal data is protected by virtue of such measures;
- c) by virtue of Article 62 of the Law and despite the absence of protective measures ordered by the SC or adopted by the SPO, a general obligation of non-disclosure applies. This includes any person who has provided information to the SPO, as part of its investigations, or whose identity and/or personal data appear in material provided to the SPO by third parties.¹⁶

9. Count 6’s reference to protected persons as ‘protected witnesses’ within the meaning of the SPO’s defined term¹⁷ falls squarely within the scope of these considerations.

10. The SPO’s use of ‘witness’ is a short-form term to describe the sub-set of people affected by the crimes charged.¹⁸ The Indictment’s scope and the legal qualifications of the charged conduct would be no different if ‘witnesses’ were instead called ‘affected persons’, ‘concerned individuals’, or ‘victims’. The meaning of the term ‘witness’ in other specific contexts¹⁹ does not circumscribe these charges because the

¹⁶ Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.44.

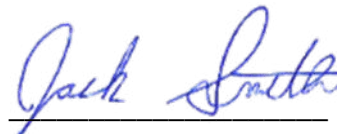
¹⁷ E.g. Indictment, KSC-BC-2020-07/F00251/A02, para.48.

¹⁸ The Gucati Defence argued previously that the Indictment was defective because references to ‘witnesses’ were insufficiently specific. Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b), KSC-BC-2020-07/F00113/RED, 2 February 2021, pp.9, 13-14. The Pre-Trial Judge rejected this argument (Public Redacted Version of Decision on Defence Preliminary Motions, KSC-BC-2020-07/F00147/RED, 8 March 2021, paras 57-60), and the Gucati Defence did not seek leave to appeal on this point. See Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021, para.67.

¹⁹ Egs Rule 121 (governing ‘Called or Summoned Witnesses’); Rule 153 (governing the admission of the written statements and transcripts of a witness in lieu of oral testimony, which naturally extends only to those ‘witnesses’ whom the parties have resolved to rely upon at trial). In the context of the present case, and as will be developed further in an upcoming bar table motion, the persons contacted in witness contact notes on the list of exhibits are ‘witnesses’ within the meaning of the Indictment and Pre-Trial Brief, but not within the context of these particular rules.

term is used in this case only as a factual description, not as an expression of a legal requirement.

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At The Hague, the Netherlands