

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 Christophe Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 6 September 2021

Language: English

Classification: Public

**Written Submissions in accordance with the Third Oral Order made on 2
September 2021**

Specialist Prosecutor

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I. INTRODUCTION

1. By oral order on 2 September 21 2021 ('the Order')¹, the Trial Panel made the following orders in relation to the Gucati Defence:
 - a. Provide further jurisprudence, if any, on entrapment by a rogue agent;
 - b. File written submissions on the definition of "public interest"; and
 - c. File written submission on a question asked by a member of the Panel, namely, what legal avenues are available to the SPO other than relying on national authorities when inquiring about evidence located on their territory (see draft transcript, page 476, lines 6 to 10).
2. In relation to (c) above, the question was asked specifically in the context that it seemed to the member of the Panel that the Defence were arguing that it was at least inappropriate, if not illegal, for the SPO to seek legal assistance/cooperation/collaboration from or with the Serbian authorities (see draft transcript, page 476, lines 1 to 5).
3. The Gucati Defence hereby sets out below its written submissions in relation to the orders set out in paragraph 1 above.

II. SUBMISSIONS

¹ KSC-BC-2020-07, Transcript at page 601 line 17 to page 602 line 10

Entrapment by a rogue agent

4. The use in criminal proceedings of evidence obtained as a result of incitement by state agents is in violation of Article 6 of the European Convention on Human Rights ('Article 6')².
5. It is not essential to the existence of a violation of Article 6 in these circumstances that the state agent acts under the supervision or authorisation or with the knowledge of any more senior person within the state authority. It is sufficient if the state agent acts of his/her own initiative³.
6. Indeed, the absence of supervision or authorisation or knowledge of any more senior person within the state authority is itself an important feature *pointing towards* the finding of a violation of Article 6⁴. In practice, the authorities may be prevented from discharging the burden to prove that there was no incitement by the absence of authorisation and supervision⁵.

² *Teixeira de Castro v Portugal* (25829/94), (1999) 28 EHRR 101 (1998) at paragraph 36; *Khudobin v Russia* (59696/00), (2009) 48 EHRR 22 (2006) at paragraph 133; *Ramanauskas v Lithuania* (74420/01), (2010) 51 EHRR 11 (2008) at paragraphs 55 and 60; *Bannikova v Russia* (18757/06), ECtHR 4 November 2010 at paragraph 34; *Furcht v Germany* (54648/09), (2015) 61 EHRR 25 (2014) at paragraphs 47 to 48 (Note: (i) the remedies available to the Specialist Chambers in the event of a violation of Article 6 include the power to stay proceedings and the exclusion of evidence – see Rule 110 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers; and (ii) In *Furcht*, ante the European Court of Human Rights rejected mitigation of sentence as an inadequate remedy where a violation of Article 6 related to police incitement has occurred – see paragraphs 68 & 69

³ *Teixeira de Castro*, ante at paragraph 36, 47, and 31; *Ramanauskas*, ante at paragraphs 11-12 and 44; and *Furcht*, ante at paragraph 39

⁴ *Teixeira de Castro*, ante at paragraphs 37 and 38 (see also paragraph 47 of the decision of the Commission)

⁵ *Bannikova*, ante at paragraph 48; *Furcht*, ante at paragraph 53

7. Accordingly, the state authority will not be excused responsibility for the actions of a state agent on the basis that the state agent acted of his/her own initiative⁶.
8. Indeed, it is 'particularly important' that the authorities assume responsibility for the acts carried out by a state agent which take place in the absence of any legal framework or judicial authorisation⁷. To hold otherwise would open the way to abuses and arbitrariness by allowing the applicable principles to be circumvented through the 'privatisation' of police incitement⁸.

Definition of "public interest"

9. Article 200(4) of the Kosovo Criminal Code 2019 states that "public interest means the welfare of the general public outweighs the individual interest".
10. Whereas Article 200(4) continues to specify certain types of confidential information the disclosure of which will be in the public interest *per se*, it does not delimit the scope of the public interest in doing so.

What legal avenues are available to the SPO other than relying on national authorities when inquiring about evidence located on their territory?

⁶ *Ramanauskas*, ante at paragraph 63

⁷ *Ramanauskas*, ante at paragraph 63

⁸ *Ramanauskas*, ante at paragraph 65

11. The SPO has seemingly sweeping powers available to it, which appear to allow the SPO to inquire about evidence located within the territory of Kosovo without having to rely on the Kosovan national authorities.
12. For example, Article 35(2) of the Law on Specialist Chambers and Specialist Prosecution's Office Law No.05/L-053 ('Law') provides the Specialist Prosecutor with the powers to *inter alia*:
 - (a) Summons persons for questioning;
 - (b) Collect and examine information and evidence;
 - (c) Conduct on-site investigations; and
 - (d) Order the arrest of a person during the investigative stage for a period of no more than forty eight hours.
13. Article 35(3) of the Law provides the police of the SPO with the authority and responsibility to exercise the same powers as given to the Kosovo Police.
14. Article 35(3) requires the SPO to act independently from the other prosecution authorities in Kosovo.
15. The premises, property, papers, personnel, including counsel, experts, witnesses or any other person performing functions as part of the work of the Specialist Prosecutor's Office are granted wide privileges and immunities under Article 52(1) of the Law.
16. Moreover, Article 53(2) provides that orders issued by the Specialist Chambers are given the same force and effect as an order issued by any other Kosovo court or judge. Every natural person, corporation, authority or other entity in Kosovo is said to be required to comply with any order, decision or request issued by the Specialist Chambers.

17. A warrant of arrest issued by the Specialist Chambers is stated to have the same force and effect as a warrant of arrest issued by any other Kosovo court (Article 53(3)) and the Specialist Chambers is given primacy within its subject matter jurisdiction over all other courts in Kosovo via Article 54(1).
18. The Specialist Prosecutor has the power to order the transfer to the Specialist Chambers and Specialist Prosecutor of proceedings and investigations within their subject matter jurisdiction from any other court or prosecutor in the territory of Kosovo (Article 54(2)).
19. The legislative framework appears to have been crafted to ensure that, whilst the SPO may request the cooperation of the Kosovan authorities, the SPO is not beholden to them and can act unilaterally within Kosovo.
20. The Kosovan and Serbian authorities should not be treated differently.
21. The SPO should have identical legal powers to act in Serbia (without having to collaborate with the Serbian authorities). To the extent that the SPO does not have such powers, it is a fundamental deficit in its mandate which destroys its legitimacy. It is a mockery that the SPO is beholden to Serbia in its ability to enquire in Serbia into crimes committed during a war of aggression carried out by Serbia on Kosovan soil. That the SPO is beholden to Serbia in its ability to make enquiries in Serbia renders those enquiries at risk of obvious interference and manipulation⁹.

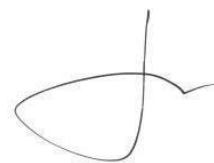
⁹ The foreword to the 2006 Constitution of Serbia obliges all Serbian state bodies to act to protect the state interests of Serbia in Kosovo

22. Serbia does not recognise Kosovan independence, the Kosovan constitution, the Assembly of the Republic of Kosovo, and necessarily (as an institution created by legislation made by the Kosovan Assembly under the Kosovan constitution) the SPO itself. Serbia still arrogantly claims that it *is* the national authority for the territory of Kosovo.
23. A legitimate, fair, independent and impartial legal structure would have required equal recognition in Serbia and Kosovo; it would have provided the SPO with the same powers to act unilaterally in both Serbia and Kosovo; and it would have investigated all offences committed during the 1998-2000 war by persons of whichever ethnicity or affiliation.

III. CLASSIFICATION

24. This filing is classified as public.

Word count: 1355 words



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6 September 2021

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