

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 Guenael Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

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Defence Submissions on Elements of Crimes and Modes of Liability

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I. INTRODUCTION

1. On 8 September 2021, the Trial Panel convened a Prosecution Trial Preparation Hearing. By way of its Fourth Oral Order:¹

“The Panel orders the parties to file further written submissions, if they so wish, on the elements of offences and modes of liability. In particular, on the specific questions related to the offence of obstruction and the relationship between the modes of liability charged which were deferred during the proceedings.”

2. The Defence for Mr. Haradinaj now seek to make those submissions, noting at the outset, that the Trial Chamber is not bound by any decision of the Pre-Trial Judge, and therefore can rule as it deems appropriate in the circumstances and can invite further written or oral submissions.
3. The Defence for Mr. Haradinaj therefore invites the Trial Panel to make its own determination in respect of the indictment, elements of crime, and modes of liability.

II. SUBMISSIONS

4. The Defence for Mr. Haradinaj challenges the elements of crimes and modes of liability and joins the submissions made at the Prosecution Trial

¹ KSC-BC-2020-07, Transcript, 8 September 2021, page 710, lines 9-19.

Preparation Hearing on 8 September 2021 by Specialist Counsel for Mr. Gucati.²

5. The following paragraph references refer to the Decision Confirming the Indictment (the "Decision") issued by the Pre-Trial Judge on 11 December 2020.³ The Defence will deal with the Pre-Trial Judge's legal analysis in the order in which they are dealt with in his Decision.

Elements of Crimes

A. Violating the secrecy of proceedings

6. The Defence does not take issue with paragraphs 33-34 as the Pre-Trial Judge here merely restated Article 392(2) of the Criminal Code of the Republic of Kosovo ("KCC").⁴
7. Paragraphs 35-37 of the Decision are not accepted.
8. The Pre-Trial Judge adopted his own interpretation Article 392(1) KCC without reference to any authority. The Defence invites the Trial Panel to interpret Article 393(1) KCC afresh. The interpretation adopted by the Pre-Trial Judge is too broad when the interpretation of what constitutes an

² KSC-BC-2020-07, Transcript, 8 September 2021, page 651ff.

³ KSC-BC-2020-07/F00074/RED, in particular paras. 33-97.

⁴ Code No. 06/L-074, Criminal Code of the Republic of Kosovo, Official Gazette of the Republic of Kosovo No. 2 of 14 January 2019, Prishtinë

“offence” in accordance with the KCC should be narrowly interpreted, as opposed to that specifically in terms of the reference to what constitutes ‘revelation’, and further, ‘protected information’.

9. In respect of paragraphs 39 to 40 of the Decision, the Defence submits that for both forms of intent the perpetrator pursuant to Article 392(1) KCC must have ‘knowledge’ that the information was secret,⁵ this being an essential element. The current interpretation being too wide in scope.
10. Nothing is said in the Pre-Trial Judge’s analysis of Article 392(1) about ‘authorisation’ – which is an essential element of the offence that any revelation of information is without authorisation. The Prosecution is put to strict proof in terms of the absence of authorisation.
11. Further, the Defence submits that authorisation in this context ought to include disclosure where that disclosure is in the public interest and that the public interest element is part of Article 392(1) KCC when looking at the issue of authorisation or otherwise.
12. At paragraphs 41 and 42 of the Decision, the Pre-Trial Judge considered other aspects of Article 392 for these purposes. The Pre-Trial Judge’s Decision in

⁵ Kosovo Court of Appeals, MZ reference 19PAKR336/16, Judgment of 13 December 2016.

respect of Article 392(2) and 392(3) appears unobjectionable in the sense that it rehearses the content of those articles.

13. Paragraphs 43 to 46 are not accepted. Again, it is submitted that the interpretation adopted by the Pre-Trial Judge is without legal authority.
14. In particular, but not exclusively, paragraph 44(c) refers to *“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”*.
15. This is submitted to be too wide in terms of its definition, and further, is of relevance to the issue raised at paragraph 9 above, and the requirement of ‘knowledge’.
16. The Defendant(s), or any other individual, is, with this definition, potentially committing an offence without knowledge of whether an individual has communicated or provided information to the SPO. The very fact that an individual has provided information to the SPO is not sufficient of itself, to warrant protection, and only furthers opacity.
17. Paragraph 50 of the Decision is not accepted. In that paragraph, the Pre-Trial Judge suggested that the perpetrator must have known or, as an alternative, had reason to know, that he or she was revealing the identity or personal data of protected persons. Again, it is submitted for the purposes of Article 392(2) and (3) KCC, the perpetrator must have known that, in this case, the identity

or personal data was protected. Reference is again made to a relevant decision of the Court of Appeals of the Republic of Kosovo.⁶ It was noted that, in order to violate the identity of a protected witness, the perpetrator should have known about the existence of the order and its content; the order and its content being, in that case, the order protecting the identity or personal data and the extent to which it was protected. In the absence of that knowledge, the perpetrator could not be found guilty of the offence.

18. Finally, the wording of Article 392(3), the aggravated offence, refers to criminal proceedings being made impossible or severely hindered. The Defence takes issue with what could be referred to as a watering down of that high hurdle that occurs in the analysis carried out by the Pre-Trial Judge in relation to the issue of consequences and the extent.

B. Retaliation

19. Again, at paragraph 51 of the Decision, the Pre-Trial Judge simply rehearses the content of Article 338(1) KCC and therefore no issue is taken.
20. In relation to paragraph 52, the Pre-Trial Judge missed an important element that must be satisfied; that the perpetrator acts with the intent to retaliate for providing truthful information. An essential 'element of the crime' is therefore removed without there being justification for doing so and further,

⁶ Kosovo Court of Appeals, MZ reference 19PAKR336/16, Judgement of 13 December 2016, at p. 7.

resulting in the offence not being a reflection of that which is contained within the domestic law and applicable to these proceedings.

21. Paragraph 53 of the Decision is not accepted. Again, it is an interpretation adopted by the Pre-Trial Judge without any authority in support. The Defence does not accept, for example, that harm should be interpreted in the case of Article 388(1) KCC to include interference with well-being, privacy, or dignity as the Pre-Trial Judge suggested, again, without authority.
22. The content of paragraph 54 is not accepted. Not only must the perpetrator act with the intent to retaliate for providing truthful information, but the Pre-Trial Judge missed an essential element that the information provided must be truthful. That is an element of the offence that the Prosecution must prove.
23. The SPO has to prove that the person concerned provided truthful information and the truthfulness of the information is both part of the *actus reus* and *mens rea* of the offence in Article 388 KCC.
24. The Pre-Trial Judge is, with respect, re-drafting the offence rather than interpreting the domestic offence within the context of the allegations being made against the Defendant(s).
25. Paragraphs 55 and 57 of the Decision are not accepted. In those paragraphs, despite acknowledging that there was specific intent, the Pre-Trial Judge nevertheless goes on to state that direct intent or eventual intent would

suffice. The Defence submits that eventual intent will not suffice for the offence under Article 388(1) KCC, as the intent to retaliate for providing truthful information is explicit. It is therefore an offence of specific intent, and the Defence submits that only a direct intent under those circumstances will suffice for Article 388(1). It was understood that the SPO agreed with that proposition in light of submissions made by the representative of the SPO.⁷

C. Intimidation

26. Paragraph 58 of the Pre-Trial Judge's Decision is not accepted. Article 387 requires “force or serious threat [...]” to induce a person to refrain from making a statement. In other words, it requires that a person is induced to refrain from making a statement or otherwise failing to state true information, etc. In terms of “making a statement”: to refrain from making a statement or otherwise failing to state true information. The Defence submits this is an offence that requires proof of consequence, namely that a person was induced to refrain from making a statement. The Defence does not accept the proposition from the Pre-Trial Judge, without authority, that the “force or serious threat [...]” can be directed at a person making or likely to make a statement. This is not sufficient. Article 387 KCC also requires that the information – which was to be provided, and was not, as a result, of the force

⁷ KSC-BC-2020-07, Transcript, 1 September 2021, page 490, line 25.

or serious threat – relates to the obstruction of criminal proceedings. That is an element that the Pre-Trial Judge has neglected to address within the decision.

27. Paragraph 59 of the Decision is not accepted. Article 387 does not prohibit, as the Pre-Trial Judge finds, any conduct that may have or is expected by the perpetrator to have, an impact or influence on the statement or information to be given by the person alleged to have been affected. The Defence submits that Article 387 only prohibits the use of force or serious threat or any other means of compulsion, a promise of a gift or any other form of benefit, and, as previously submitted, that it requires another person to be induced to refrain from making a statement or to otherwise fail to state true information. Again, the decision is demonstrative of a seeming position of widening the scope of the relevant offences.

28. The Pre-Trial Judge's analysis at paragraph 60 is not accepted. It is acknowledged that the definition of the term "force" in Article 113 KCC appears to be comprehensive in that it defines "force" for the purposes of the Code. Article 113 begins: "For the purpose of this Code, the terms below have the following meanings ..." And "force," at sub-article 15, is given the meaning: "The implementation of hypnosis or other means of intoxication for the purpose of bringing a person against his or her will into a state of unconsciousness or incapacitating him or her full resistance..." Accordingly,

if "force," for the purposes of Article 387 KCC, and despite what is said in the definitions' section, is said to include the use of some other form of physical violence, the Defence nevertheless draws attention to the definition requiring the person being brought into a state of unconsciousness or incapacitation. The Defence submits, therefore, that the offence in Article 387 should be interpreted in the use of force and in the use of serious threat to relate to the actual or threatened use of serious force which has the consequences set out in Article 113(5). The Pre-Trial Judge's analysis is therefore incorrect and is not accepted.

29. With regard to paragraph 61 of the Decision, it is not understood what the Pre-Trial Judge meant by a potential witness in the circumstances of an offence under Article 387.
30. Paragraph 62 of the Decision is also not accepted. As previously submitted, the offence requires proof that there is a particular effect on the person. Namely, that another is induced to refrain from making a statement, otherwise, the definition of the offence is replete with ambiguity.
31. The Pre-Trial Judge makes a comparison between Articles 386 and 387, which is respectfully submitted to be incorrect. The Pre-Trial Judge accepted that Article 386 requires proof of consequence.⁸ Like Article 387, the Article 386

⁸ Decision, at footnote 42.

offence can be committed by bribery, making a promise or offering a benefit, the threat, violence, or other form of compulsion. There is a considerable overlap of an offence under Articles 386 and 387. Article 386 requires proof of consequence, and likewise, Article 387 requires the same. The Defence notes, and the Pre-Trial Judge did not observe or comment on this, that the maximum penalties, both prescribed punishments and maximum punishments, for Article 387 are more severe than Article 386, which would make little sense if Article 386 required proof of consequence, but Article 387 did not. The Defence submits that the aggravating feature and the distinction between the two offences of Article 386 and Article 387 offences is that the Article 387 offence must occur in relation to proceedings for an Article 386 offence. It is aggravated because it demonstrates a persistence to obstruct not only the original proceedings, the Article 386 offence, but proceedings for obstructing the original proceedings, and the Defence submits that is the Article 387 offence.

32. Paragraphs 63 to 65 of the Decision on intent are also not accepted. The Defence submits that this is an offence of specific intent. That is, the purpose or desire, the direct intent required is to induce a person to refrain from making a statement. The Defence submits that the perpetrator can only have direct intent for the purposes of the offence. The wording in Article 387 KCC makes it clear that it is an offence of specific intent: The use of force or serious

threat must be to induce. The purpose of the conduct it is to induce. That imports a specific, direct intent only.

D. Obstructing official persons and performing official duties

33. Paragraphs 67 and 68 of the Decision are not accepted having regard to the Pre-Trial Judge's reference to his analysis of force and threats and other means in relation to earlier passages of his decision. The Defence submits that "serious threat", in this context, means "serious threat of force."
34. The Defence further submits that Article 401(1) KCC *does* require the force or serious threat to be directed against the official person. The Pre-Trial Judge, in setting out a contrary position, had no authority for the proposition that it does not, and he noted that the wording in Article 401 does not refer to using force or serious threat against the official person, but, in fact, the article does.
35. The Pre-Trial Judge did not observe that Article 401(5), in particular, states that the offence is to be committed against a judge and other official person, during the exercise of their official functions. In Article 401(5), the aggravated offence, the words specifically refer to when the offence is committed against a judge and other officials. The Defence submits that this makes it clear, if it was not already clear from the face of Article 401(1), that the force or serious threat needs to be directed against the official person.

36. Paragraphs 69 and 70 of the Decision are again examples of the Pre-Trial Judge interpreting the article otherwise than in accordance with domestic legislation without authority.
37. Paragraph 73 of the Decision is not accepted. The Defence submits that the prohibited consequence for the purposes of Article 401(1) and (5) KCC is the obstruction or attempted obstruction of an official person by the use of force or serious threat. It is not sufficient for eventual intent that the defendant is aware that an official person might be obstructed. The Defence submits that the defendant must use force or serious threat against an official person, must be aware that the obstruction of an official person in performing his official duties by that force or serious threat can occur, and that he accedes to that occurrence.
38. The obstruction of an official person itself is not prohibited. It can, of course, occur through lawful means. The Defence adds that when the offence is one of an attempt, which is alleged on the indictment, only direct intent will suffice.

E. Obstruction of official persons by participation in a group

39. The Defence does not accept paragraph 75 of the Decision. The Defence submits the “common action”, as referred to in Article 401 KCC, must refer to common action to use force or serious threat. The use of the word “common”

makes clear that the group can only act in a common action where they share the specific/direct intention shared by three or more persons. One interpretation of the Pre-Trial Judge's analysis is that otherwise perfectly lawful joint activity, such as class litigation, would fall to be penalised, which cannot be right.

40. The Defence does not accept paragraph 76 of the Decision for the same reasons.
41. In relation to paragraphs 78 and 80, it is repeated that the intention required is direct intention, namely, the desired use of force or serious threat by three or more persons. The use of the word "common" makes it clear that only a shared direct intention by three or more persons will suffice.
42. Eventual intent in the current circumstances runs contrary to the contention in terms of 'common action' and 'joint action'.

Modes of Liability

43. To the extent that the submissions have not dealt with the issue thus far, the Defence do not accept paragraph 82 where the Pre-Trial Judge submitted that an eventual intent was sufficient for all charges.
44. Paragraphs 84 to 87 of the Decision are also not accepted. The Defence submits that co-perpetration, a form of perpetration with several persons, each of them

fulfilling requirements for a perpetrator, knowingly and wilfully commits certain criminal acts, requires specific intent. It is there in the Pre-Trial Judge's definition of "co-perpetration." That is, knowledge and wilfulness is required. The Defence also submits that the actions of the co-perpetrators must be concerted in the course of perpetration of the offence.

Questions from the Trial Panel

45. The Defence were asked to reflect on two questions posed by the Trial Panel during the Prosecution Trial Preparation Hearing and makes the following submissions in response here.

1. *Does the Prosecution have to prove that the actions of the accused were directed against the performance of specific official duties; for example, against a specific investigative measure, such as the execution of a search warrant or the seizure of evidence?*⁹

46. The Defence submits that the consequence must be specific, in that the actions complained of that is/are said to fulfil the elements of crime resulted in a specific consequence that a specific investigative measure(s) was negatively affected.

⁹ KSC-BC-2020-07, Transcript, 8 September 2021, Question from Judge Barthe, page 668, lines 13-17.

47. Further, it is for the SPO to demonstrate what was affected and how the alleged actions of the Defendant(s) resulted in this effect.

2. *Are there any other legal requirements not expressly foreseen in Article 401(1) of the Kosovo Criminal Code, such as the requirement of simultaneity, meaning that the force or threat has to be simultaneous with the official act which the official person undertakes within his or her powers. Reference is made to a commentary on the Kosovo Criminal Code 2012 published by Salihu/Zhitija/Hasani in 2014. More specifically, to Article 409(1), margin number 4.*¹⁰

48. The Defence is aware, having sought the assistance of the KSC Library, that the commentary referred to by the Panel above, has not been translated into English, further, we have sought to obtain a translation outside of the KSC library, and again, we have been advised that no English translation has been undertaken.

49. Accordingly, we are not in a position to comment as specifically requested, unless provided with an official English translation by the Trial Panel.

50. We respectfully reserved the right to make additional representations once an English translation has been made available to the parties.

¹⁰ KSC-BC-2020-07, Transcript, 8 September 2021, Question from Judge Barthe, page 669, lines 7-14.

III. CONCLUSION

51. The simplistic position as elucidated further above, is that the Pre-Trial Judge, in confirming the indictment has in effect sought to change the elements of crime, without citing authority to do so, and thus sought to inappropriately 'widen' the ambit of the offences beyond that which has been enacted for domestic crimes, noting that the Specialist Chambers is a domestic institution of the Republic of Kosovo and is required to apply domestic law, including the KCC and the Constitution, and to give effect to rulings of the superior courts in Kosovo.
52. Further, in terms of 'modes of liability', the Pre-Trial Judge has determined that intent other than 'specific intent', if demonstrated, can satisfy the offence.
53. This cannot be correct, particularly, but not limited to, offences involving witness intimidation and/or retaliation, which must on any assessment, be offences of specific intent.
54. We would again seek to respectfully highlight that the Trial Chamber is not bound by decisions of the Pre-Trial Judge, and accordingly, invite the Trial Chamber to consider the position anew in light of the above submissions.

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