

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 Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 30 September 2021

Language: English

Classification: Public

**Further Written Submissions on the
Elements of the Offence and Modes of Liability**

Specialist Prosecutor

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I. INTRODUCTION

1. On 8 September 2021, the Trial Panel made the following oral order:

“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 offences of obstruction and the relationship between the modes of liability charged which were deferred during the proceedings... the parties are instructed not to repeat submissions made during the hearing unless strictly necessary for the logic of the argument. Submissions shall be filed by 30 September 2021.”

2. In accordance with the oral order above, and in addition to the matters set out in (i) the Pre-Trial Brief on Behalf of Hysni Gucati¹ at paragraphs 21 to 33, 260 to 263, and 280 to 283; and (ii) oral submissions at Transcript page 651 line 3 to page 663 line 10, page 667 line 3 to page 668 line 2, page 671 line 6 to line 19, page 672 line 20 to line 23, page 673 line 3 to page 674 line 24, page 676 line 3 to line 14, page 677 line 8 to page 678 line 10, page 678 line 24 to page 680 line 14, page 680 line 25 to page 681 line 5, the Accused raises the following additional matters.

II. SUBMISSIONS

A. Specific questions related to the offences of obstruction and the relationship between the modes of liability charged which were deferred during the proceedings

¹ F00258, Defence Pre-Trial Brief on behalf of Hysni Gucati, Gucati, 12 July 2021, Confidential

- (i) *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?*²
3. For the purposes of Article 401, the Prosecution has to prove that the use of force or serious threat was concurrent, or simultaneous, with the official action obstructed (see the submissions below). The Prosecution is required, accordingly, to specify the official action which the use of force or serious threat is alleged to be concurrent with and obstructed (e.g. the execution of a search warrant or the seizure of evidence). To that extent, the Prosecution are required to prove that the actions of the accused were directed against an official person performing a specific official duty³.
- (ii) *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 (And I refer 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)?*⁴

² Transcript page 668, lines 13 to 17

³ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1166 margin number 5

⁴ Transcript page 669 lines 6 to 14

4. The aim of Article 401 is to protect official persons performing official duties against violent or threatening actions⁵.
5. The use of force or serious threat must be directed at the person when they are performing official duties⁶. The threat must be of *immediate* use of force⁷.
6. The obstruction by force or serious threat must be concurrent, or simultaneous, with the performance of official duties by the official to whom the force or serious threat is directed.
7. In support of the above, Article 401(5) specifically states that the offence can only be committed *against* a judge, a prosecutor, a police officer etc. *during* the exercise of his official functions [emphasis added].

(iii) ...*what the relationship is between paragraphs 1 and 2 of Article 401 of the Kosovo Criminal Code?*⁸

8. In addition to the oral submissions at Transcript page 671 lines 6 to 17, it is submitted that Article 401(1) covers the situation in which there is evidence of individual specific actions of obstruction (i.e. by use of force or threat of immediate use of force) performed by the perpetrator⁹. Article 401(2) covers the situation in which there is evidence that the perpetrator was in a group and

⁵ *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3; also Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1164 margin number 1

⁶ "On the spot" – Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1165 margin number 2, 3 & 4

⁷ *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

⁸ Transcript page 670 lines 14 to 16

⁹ *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

took part in common actions, but it is not possible to establish the specific individual actions of obstruction committed by him/her¹⁰. Article 401(2) is the less serious offence and is subsidiary to situations on which the greater offence is not established¹¹.

9. The 'common actions' for the purposes of Article 401(2) must involve the use of force or threat of immediate use of force – the offence is a Chapter XXXII offence against *public order* (not an offence against the administration of justice and public administration under Chapter XXXI or an offence of 'contempt').

*(iv) Does Article 392(2) of the Kosovo Criminal Code ... protect persons whose identity and/or personal data appear in material provided to the SPO by third parties?*¹²

10. Article 392(2) will not protect persons whose identity and/or personal data appear in material provided to the SPO by third parties by reason of a claim or declaration by that third party that such data is to be treated as secret or confidential.
11. Article 392(2) only protects 'information on the identity or personal data of a person under protection in the criminal proceedings or in a special programme of protection'.

¹⁰ *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

¹¹ *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

¹² Transcript page 679 line 1 to 5

(v) *What is the relationship between the different modes of liability contained in the indictment, in particular the relationship between co-perpetration and incitement?*¹³

12. Alternative convictions for several modes of liability are, in general, incompatible with the principle that a judgment has to express unambiguously the scope of the convicted person's criminal responsibility. The modes of liability may either augment or lessen the gravity of the crime¹⁴.
13. Where alternative modes of liability relate to the same (or essentially the same) set of facts, a conviction on the lesser mode of liability is subsidiary to the situations on which the greater is not established¹⁵.
14. The nature of the specific relationship (i.e. which is the greater and which the lesser mode of liability) between co-perpetration and incitement (of which there are three sub-modes of liability in Articles 32(1), (2) and (3)) will depend upon the rulings of the Trial Panel at trial as to the *mens rea* and *actus reus* sufficient for those different modes of liability¹⁶.
15. The Prosecution should not be permitted to seek alternative convictions for several modes of liability in breach of the general principle set out in paragraph 12 above.

¹³ Transcript page 681 lines 13 to 15

¹⁴ *Prosecutor v Ndindabahizi*, ICTR-01-71-A, Appeals Judgment, Appeals Chamber, 16 January 2007 at paragraph 122

¹⁵ *Prosecutor v Dragomir Milosevic*, IT-98-29/1-A, Appeals Judgment, Appeals Chamber, 12 November 2009 at paragraph 274

¹⁶ See, for example, Transcript at page 663 lines 2 to 6; Transcript at page 683 line 20 to page 684 line 2

(vi) *Article 32(3) of the Kosovo Criminal Code states that: “Whoever intentionally incites another person to commit a criminal offence punishable by imprisonment of at least five years ... shall be punished for attempt”. Given that none of the crimes with which the accused are charged has a minimum sentence of five years imprisonment, do you consider that Article 32(3) might not be applicable in the present case?¹⁷*

16. Article 32(3) only applies to an offence in relation to which attracts a minimum term of five years imprisonment (“punishable by imprisonment of *at least* five years”).

17. No offence charged has a minimum sentence of five years imprisonment.

18. Each offence charged is punishable by imprisonment of *less than* five years.

19. Accordingly, Article 32(3) has no application in the present case.

B. Other Matters

(i) *Public Interest*

20. The offence of violating the secrecy of proceedings under Article 392 requires any revelation to be unauthorized. If there was a legal basis for revealing the information concerned, no offence will have been committed (for example, in case of necessity)¹⁸.

¹⁷ Transcript page 683 line 20 to page 684 line 2

¹⁸ Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10

21. Disclosure of confidential information in the public interest, where such interest outweighs the individual interest in non-disclosure, is a legal basis under Articles 22 and 40 of the Constitution of the Republic of Kosovo (as recognised by Article 200(2) of the KCC 2019).
22. The Prosecution accordingly must prove that there was no legal basis for revealing the information concerned, including that disclosure was not in the public interest.

Secret information

23. "Secret" information is defined in the Law on Classification of Information and Security Clearances Law No.03/L-178 (Article 6(1)(1.1) and (1.2) of Law No.03/L-178 in particular).
24. The Prosecution must prove that any declaration, that the information was secret, was lawful. If information was declared secret by an unlawful decision of the court or the institutions of Kosovo, then the revelation of that material will not be an offence¹⁹.
25. A declaration (or, more accurately, a claim) by an institution other than an institution of Kosovo that information is secret is not sufficient²⁰. A third-party institution is not a 'competent authority' for the purposes of Article 392(1) (see Articles 2, 1.14 and 7 of Law No.03/L-178).

¹⁹ Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10

²⁰ Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10

26. The Prosecution must prove that the declaration remains effective at the time of revelation²¹.

Article 401 – Conditions re circumstances of disclosure to the perpetrator

27. The offence under Article 401(1) concerns “information disclosed in any official proceedings” - that is, information made known during judicial and administrative proceedings to those taking part in those proceedings. The Prosecution must prove, therefore, that the information concerned was disclosed to the perpetrator during the course of official proceedings²².

28. Similarly, the offence under Article 401(2) relates to information that has been revealed to the perpetrator either during criminal proceedings or during proceedings relating to a protection program²³.

Relationship between Articles 386 & 387 KCC 2019

29. It was submitted by the Prosecution on 8 September 2021 that “the difference between the sentencing ranges in [Articles 386 and 387] can also be explained that Article 387 talks about conduct including force or serious threats including by means of compulsion; whereas Article 386 doesn’t have that same kind of aggravating conduct”²⁴.

²¹ Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10); and Article 11 of Law No.03/L-178

²² Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1142 margin number 8

²³ Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1143 margin number 1

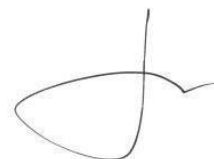
²⁴ Transcript page 675 lines 11 to 14

30. That submission was made in clear and simple error.
31. Article 386(1) specifically refers to 'any means of compulsion' as a means of commission.
32. Articles 386(4) and (5) specifically contemplate 'any means of compulsion' to include the use of violence (indeed, causing injury).
33. Witness intimidation (including where a witness is threatened with violence; where violence is actually used against the witness; even where a witness suffers bodily injury) can be properly prosecuted under Article 386 KCC 2019.
34. The offence under Article 387, however, is restricted to the additionally aggravated circumstances where witness intimidation occurs in relation to proceedings for earlier witness intimidation ("when such information relates to obstruction of criminal proceedings").

III. CLASSIFICATION

- IV. This filing is classified as public.

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