



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:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 10 June 2021

**Language:** English

**Classification:** Confidential

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**Consolidated Prosecution response to Defence applications F00216 and F00219 for  
leave to appeal and reconsideration**

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## I. SUBMISSIONS

1. The Defence Applications<sup>1</sup> for leave to appeal the Decision<sup>2</sup> were filed out of time<sup>3</sup> and could be summarily dismissed on that basis alone. However, even if considered on their merits, the Applications do not meet the applicable test for granting leave to appeal<sup>4</sup> under Article 45 of the Law<sup>5</sup> and Rule 77 of the Rules<sup>6</sup> and should be rejected accordingly.

2. The Applications further fail to meet the applicable test for reconsideration of decisions under Rule 79,<sup>7</sup> and should therefore be dismissed in their entirety.

### A. THE APPLICATIONS DO NOT IDENTIFY APPEALABLE ISSUES

3. The Defence for Mr Gucati ('Gucati Defence') seeks leave to appeal the Decision on the following two matters, namely: (i) '[w]hether the Pre-Trial Judge erred in finding that the issue of the process through which alleged confidential material

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<sup>1</sup> Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 77(1); Alternative Request for reconsideration under Rule 79(1), KSC-BC-2020-07/F00216, 3 June 2021, Confidential ('Gucati Application'); Application for Leave to Appeal the Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00219, 3 June 2021, Confidential ('Haradinaj Application'); collectively 'Applications'.

<sup>2</sup> Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00210, 26 May 2021, Confidential ('Decision').

<sup>3</sup> Pursuant to Rule 77(1) of the Rules, a party seeking leave to appeal must do so within seven days of the impugned decision. The Decision was notified on 26 May 2021. Following Rules 9 and 77, any application for leave to appeal that decision had to have been filed by 2 June 2021. However, the Applications were not filed until 3 June 2021. There is no indication that the Defence asked for an extension of the leave to appeal deadline.

<sup>4</sup> The applicable framework as previously set out is recalled: Prosecution response to applications for leave to appeal the Decision on Defence Preliminary Motions, KSC-BC-2020-07/F00161, 25 March 2021, paras 2-3. *See also*, Decision on the Defence Applications for Leave to Appeal the Decision on Request for Information on Diplomatic Briefing, KSC-BC-2020-07/F00178, 9 April 2021, paras 11-14.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> *See, inter alia*, Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal, KSC-BC-2020-05/F00046, 5 November 2020, paras 12, 14.

arrived to the KLA WVA premises was not relevant to the case' ('First Issue');<sup>8</sup> and (ii) '[w]hether the Pre-Trial Judge erred in finding that the information and material requested in Gucati Requests B and C [...] was not relevant to the case' ('Second Issue').<sup>9</sup> The Defence for Mr Haradinaj ('Haradinaj Defence') seeks leave to appeal the Second Issue as well.<sup>10</sup>

4. The First Issue does not emanate from the Decision, as it merely reiterates overly generic complaints on this topic that have been previously dismissed by the Pre-Trial Judge for lack of specificity.<sup>11</sup> The Decision ruled upon a specific request for disclosure advanced by the Defence under Rule 102(3).<sup>12</sup> With the First Issue, the Gucati Defence fails to address the Pre-Trial Judge's ruling and merely challenges the entirety of the decision, re-proposing abstract questions or hypothetical concerns. As such, the First Issue does not identify a discrete topic emanating from the Decision for resolution by the Court of Appeals Panel.

5. With regard to the Second Issue, the Gucati Defence does not specify the nature of the alleged errors that it seeks to appeal.<sup>13</sup> The Applications further misrepresent

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<sup>8</sup> Gucati Application, KSC-BC-2020-07/F00216, para.3(i).

<sup>9</sup> Gucati Application, KSC-BC-2020-07/F00216, para.3(ii). 'Gucati Requests B and C' are defined in Decision, KSC-BC-2020-07/F00210, paras 11, 57, 61 and further references cited therein.

<sup>10</sup> Haradinaj Application, KSC-BC-2020-07/F00219, para.15.

<sup>11</sup> Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, KSC-BC-2020-07/F00172, 1 April 2021, Confidential, paras 10, 37.

<sup>12</sup> Decision, KSC-BC-2020-07/F00210, para.61, recalling that the disclosure requests advanced by the Gucati Defence pertained to: "(i) contribution and access of current and former SPO staff members to the material contained in the Three Batches; (ii) the SPO's measures for the storage and protection of the material; (iii) the steps taken by the SPO to identify devices on which such material was stored and the users of such devices; and (iv) investigative steps taken by the SPO, including interviewing current or former SPO staff members and examining devices, in relation to the alleged leak of documents". See also, Confidential Redacted Version of Prosecution Request and Challenges Pursuant to KSC-BC-2020-07/F00172, KSC-BC-2020-07/F00190/RED, 26 April 2021, Confidential ('Prosecution Request'), para.34; Response to Confidential Redacted Version of 'Prosecution Request and Challenges Pursuant to KSC-BC-2020-07/F00172, KSC-BC-2020-07/F00190, dated 26 April 2020, 10 May 2021, Confidential, para.49.

<sup>13</sup> Gucati Application, KSC-BC-2020-07/F00216, paras 10, 13-14.

the Decision, attempting to manufacture appealable issues from a conclusion they simply disagree with.<sup>14</sup>

6. The Defence claims that the Decision contains an alleged contradiction, in that it states that (i) any submissions pertaining to a purported entrapment or incitement might be addressed by the Defence at trial, and potentially exculpatory evidence on entrapment or incitement should be immediately disclosed by the Specialist Prosecutor's Office ('SPO') under Rule 103; and (ii) the information and material requested in Gucati Requests B and C are irrelevant under Rule 102(3).<sup>15</sup>

7. These two findings are neither inconsistent nor antithetical. Rather, a plain reading makes it clear that because Gucati Requests B and C are neither relevant to the case nor material to the Defence preparation, they are not subject to disclosure under Rule 102(3).<sup>16</sup> Nevertheless, in the event that exculpatory evidence, if any, would be in the possession of the SPO and would affect the innocence or mitigate the guilt of the Accused in the case, it would need to be disclosed immediately.<sup>17</sup> The Defence continues assuming that the information and material sought in Gucati Requests B and C pertains to incitement and entrapment and is potentially exculpatory in nature, and bases its entire defective reasoning on this faulty assumption.<sup>18</sup> As stressed by the SPO on multiple occasions, the Defence position is based on a false premise and is simply wrong.<sup>19</sup>

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<sup>14</sup> Haradinaj Application, KSC-BC-2020-07/F00219, paras 16-17; *see also* Gucati Application, KSC-BC-2020-07/F00216, paras 24-29, presenting similar submissions in the framework of a request for reconsideration.

<sup>15</sup> Haradinaj Application, KSC-BC-2020-07/F00219, paras 16-17; *see also* Gucati Application, KSC-BC-2020-07/F00216, paras 24-29, with reference to Decision, KSC-BC-2020-07/F00210, paras 62-63.

<sup>16</sup> Decision, KSC-BC-2020-07/F00210, paras 61-62.

<sup>17</sup> Decision, KSC-BC-2020-07/F00210, para.63.

<sup>18</sup> Haradinaj Application, KSC-BC-2020-07/F00219, para.29; Gucati Application, KSC-BC-2020-07/F00216, para.29.

<sup>19</sup> *See* Prosecution Request, KSC-BC-2020-07/F00190/RED, para.38 and previous submissions recalled therein.

8. The Applications also ignore that the present litigation concerns Rule 102(3) disclosure alone. The Defence fails to acknowledge that the Decision clearly articulates the reasons why the requested materials and information fall outside the scope of the charges against the Accused and consequently are not subject to disclosure under the residual category defined by Rule 102(3).<sup>20</sup> Absent the identification of any error in the Pre-Trial Judge's reasoning, the Defence's position is insufficiently discrete to constitute an appealable issue. The Defence merely disagrees with the Pre-Trial Judge's conclusions.

9. The Haradinaj Defence further seeks leave to appeal an additional issue, identified by quoting, in part, paragraph 40 of the Decision ('Third Issue').<sup>21</sup> The SPO observes that by merely referring to the Pre-Trial Judge's ruling, the Haradinaj Defence falls short of identifying an appealable issue under Article 45(2) and Rule 77(2). The remaining submissions of the Haradinaj Defence on this matter both misrepresent the Decision<sup>22</sup> and are overly broad to identify a discrete appealable issue.<sup>23</sup> The Third Issue again outlines a mere disagreement with the Pre-Trial Judge's conclusions.

10. Given that all issues raised are a mere disagreement and misinterpretation of the Decision,<sup>24</sup> the Pre-Trial Judge need not proceed to consider the other elements of the cumulative Rule 77 test. However, those requirements are also not met.

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<sup>20</sup> Decision, KSC-BC-2020-07/F00210, paras 61-62, 64.

<sup>21</sup> Haradinaj Application, KSC-BC-2020-07/F00219, para.12.

<sup>22</sup> See, e.g., Haradinaj Application, KSC-BC-2020-07/F00219, para.13(b), asserting that the Pre-Trial Judge failed to explain the reasons why the videos on the search and seizure are to be withheld from the Accused while they are to be made available to the Defence teams. See however, Decision, KSC-BC-2020-07/F00210, paras 38-39, specifying that if the Accused gained access to these materials, there would be a risk that they would disseminate the identities of SPO staff members and other persons.

<sup>23</sup> See, e.g., Haradinaj Application, KSC-BC-2020-07/F00219, para.19, submitting that "the test for "strictly necessary" restrictions to disclosures and appropriate counter-balancing [...] must be set out, clarified and reviewed. See however, Decision, KSC-BC-2020-07/F00210, paras 13, 16-17, recalling the applicable legal framework.

<sup>24</sup> See above, paras 4-9.

B. NONE OF THE ISSUES SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME TO THE TRIAL

11. With respect to all three Issues, the context of the present litigation must be emphasised. Whether or not information belongs in the Rule 102(3) Notice means, by definition, that the material in question is neither relied upon as evidence by the SPO nor is it potentially exculpatory for the Defence.<sup>25</sup> Furthermore, no allegation in the Indictment<sup>26</sup> relates to any of the information covered by any of these three issues. These leave to appeal Applications therefore necessarily go to collateral matters. In this context, the Defence has the burden to show that any of the identified issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>27</sup>

12. The Defence merely argues, however, that the First and Second Issues meet this criterion by reiterating that the disclosure of the materials and information sought is necessary for the Defence's preparation for trial. The Defence's disagreement with the Pre-Trial Judge's finding on the irrelevance of such material and information to the present case, under Rule 102(3), cannot be enough on its own to justifying granting leave to appeal. If it could, this would make any finding of the irrelevance of information under Rule 102(3) appealable as of right, while the statutory framework indicates otherwise.<sup>28</sup> The Defence fails to argue why these particular disclosure requests, disconnected as they are from the charges against the Accused, justify granting leave to appeal.

13. With regards to the Third Issue, the Haradinaj Defence only asserts that the restrictions to the disclosure of the search and seizure videos significantly affect the

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<sup>25</sup> See, e.g., Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, 21 January 2021, para.47.

<sup>26</sup> Annex 1 to Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, KSC-BC-2020-07/F00075/A01, Strictly Confidential, 14 December 2020 ('Indictment').

<sup>27</sup> Rule 77.

<sup>28</sup> Article 45(2); Rules 77, 97.

fairness of the proceeding as they prevent the Defence from gaining information on the working of the SPO investigations.<sup>29</sup> Considering that the Defence Teams have in fact reviewed the videos in question and obtained access to any information contained therein, the Haradinaj Defence's submissions appear groundless. The Defence fails to substantiate how this criterion is met otherwise.

C. GRANTING LEAVE TO APPEAL ON ANY ISSUE WOULD NOT MATERIALLY ADVANCE THE PROCEEDINGS

14. The Defence argues in a very general manner that '[t]imely disclosure is necessary for the expeditious preparation of the case for trial.'<sup>30</sup> However, where the Applications misconstrue the Decision or at best amount to a mere disagreement with it, an immediate resolution of the three Issues would not materially advance the proceedings.

15. Rather, interlocutory appeal in the current circumstances would only delay the imminent transfer of the case to the trial panel and the start of trial proceedings in this contempt case. In the present proceedings, the SPO's Pre-Trial Brief and lists of witnesses and exhibits have been filed<sup>31</sup> and the case is set for transfer to the trial panel in early July 2021.<sup>32</sup> In the amount of time it would take to resolve an interlocutory appeal, the trial proceedings will have advanced considerably. Trial proceedings are also anticipated to be concluded in a relatively short period of time. In these circumstances, the Defence will generally have an adequate and timely opportunity to raise procedural issues in the context of a final appeal.<sup>33</sup>

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<sup>29</sup> Haradinaj Application, KSC-BC-2020-07/F00219, para.27.

<sup>30</sup> Gucati Application, KSC-BC-2020-07/F00216, para.21.

<sup>31</sup> Submission of Pre-Trial Brief, witness and exhibit lists and Rule 109(c) chart with confidential Annexes 1-4, KSC-BC-2020-07/F00181, 9 April 2021; Submission of amended exhibit list with confidential Annex 1, KSC-BC-2020-07/F00205, 21 May 2021.

<sup>32</sup> Revised Calendar for the Remainder of the Pre-Trial Proceedings and Order Setting the Date for the Sixth Status Conference, KSC-BC-2020-07/F00224, 9 June 2021, para.29(d).

<sup>33</sup> See ICC, *Prosecutor v. Bemba et al.*, Transcript of Hearing, ICC-01/05-01/13-T-10-Red-ENG, 29 September 2015, p.11 (in the context of a contempt case opening trial: 'even if we talk about potentially

## II. RECONSIDERATION IS NOT WARRANTED

16. Reconsideration is an exceptional measure and should only be undertaken if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.<sup>34</sup> Disagreements with a ruling fall outside the scope of reconsideration.

17. As highlighted above, the Defence's assertion that the Decision contains a contradiction is based on a misapprehension of the disclosure framework, a misrepresentation of the Decision and a false premise.<sup>35</sup> The Defence thus fails to present grounded arguments that the exceptional avenue of reconsideration is necessary to prevent an injustice or that a clear error of reasoning occurred.

## III. CONFIDENTIALITY

18. This reply is filed confidentially because it refers to filings bearing the same classification. The SPO does not object to the subsequent re-classification of this filing as public.

## IV. RELIEF REQUESTED

19. For the foregoing reasons, the Applications should be rejected in their entirety.

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reversible error this may be particular to the stage of proceedings that we have now reached better and justly deferred to any final appeal [...]).

<sup>34</sup> Rule 79. *See also*, Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal, KSC-BC-2020-07/F0046, 5 November 2020, para 14; ICC, *The Prosecutor v. Dominic Ongwen*, Trial Chamber IX, *Decision on Request for Reconsideration of the order to Disclose Requests for Assistance*, 15 June 2016, ICC-02/04-01/15-468, para.4.

<sup>35</sup> *See above*, paras 5-8.



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Thursday, 10 June 2021

At The Hague, the Netherlands.