



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 21 July 2021

Language: English

Classification: **Public**

Order for Submissions and Scheduling the Trial Preparation Conference

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TRIAL PANEL II, pursuant to Article 40 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 116 and 117 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this order.

I. PROCEDURAL BACKGROUND

1. On 15 July 2021, the President assigned Trial Panel II ("Trial Panel") to the present case upon transmission of the case file.¹
2. On 16 July 2021, the Pre-Trial Judge transmitted the case file to the Trial Panel pursuant to Rule 98 of the Rules.²
3. On 16 July 2021, the Trial Panel unanimously elected Judge Charles L. Smith, III as its Presiding Judge.³

II. APPLICABLE LAW

4. Pursuant to Article 40(2) of the Law, the Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the Accused and due regard for the protection of victims and witnesses. The Trial Panel may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings. It may give directions for the conduct of fair and impartial proceedings in accordance with the Rules.
5. Pursuant to Rule 117 of the Rules, upon receipt of the case file pursuant to Rule 98 of the Rules, the Trial Panel shall hold a Trial Preparation Conference with the Parties.

¹ F00263, President, *Decision Assigning Trial Panel II*, 15 July 2021, public.

² F00265, Pre-Trial Judge, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021, public.

³ F00266, Trial Panel II, *Decision Notifying the Election of a Presiding Judge*, 16 July 2021, public.

At the Trial Preparation Conference and after having heard the Parties, the Trial Panel shall set a time limit for any motions to be made prior to the opening of the case. The Trial Panel shall also set a date by which the Defence must indicate whether it elects to: (a) give an opening statement directly after the opening statements from the Specialist Prosecutor; (b) give an opening statement after the closing of the Specialist Prosecutor's case and before the opening of the Defence case; or (c) give no opening statement.

III. DISCUSSION

6. Pursuant to the aforementioned provisions and to ensure expeditious preparation for trial, the Trial Panel: (A) issues a number of orders for written submissions as set out below; (B) convenes the Trial Preparation Conference at which the Trial Panel shall seek submissions as listed below; and (C) sets out a number of preliminary directions to the Parties to inform their written and oral submissions.

A. ORDERS FOR WRITTEN SUBMISSIONS

7. The Trial Panel orders the Specialist Prosecutor's Office ("SPO") and the Defence to make written submissions as set out below in paragraphs 8-10 (SPO) and 11-12 (Defence).

8. Protective measures and associated orders: noting that the SPO indicated its intention to apply for protective measures for both of its witnesses,⁴ the Trial Panel orders the SPO to submit a request to that effect by 23 August 2021 and the Defence to respond, if it so wishes, by 27 August 2021.

9. SPO definition of "witness": at paragraph 61 of its Pre-Trial Brief, the Defence for Hysni Gucati ("Gucati Defence") makes the following submissions:

⁴ Transcript of Hearing 14 July 2021, public, pp. 365-366.

“In relation to footnote 1, the SPO is invited to identify the legal basis for the proposition that ‘witness’ is to be interpreted to include ‘any person(s) likely to have information about a crime, the perpetrator, or important circumstances relevant to SC proceedings’.”

The Trial Panel agrees that it would benefit from submissions from the SPO on this point, and orders the SPO to: (a) identify the legal basis and/or authorities on which it relies for its definition of the notion of “witness”; and (b) identify the categories of individuals concerned in the present proceedings that fall within the scope of that definition. The Trial Panel orders the SPO to file these submissions by 23 August 2021 and the Defence to respond, if it so wishes, by 27 August 2021, or to make oral submissions at the Trial Preparation Conference.

10. SPO bar table motions: the Trial Panel notes that the Defence for both Accused have outlined objections to the admissibility of certain categories of proposed SPO exhibits and, in general terms, the basis of their objections thereto.⁵ In particular, both Defence teams take issue with the admission of (a) SPO official notes; (b) newspaper articles in respect of which the author will not be called; and (c) *Facebook* postings attributed to the Accused. With a view to expediting the course of the proceedings, the Trial Panel invites the SPO to consider the possibility of filing bar table motions in respect of these categories of its proposed exhibits at the earliest opportunity, to which the Defence may respond, so that the position of all Parties in respect of these is clearly articulated, and so that the Trial Panel can consider rendering decisions in respect of the admission of some or all of these before the commencement of trial. The Trial Panel

⁵ F00258/A02, Defence for Mr Gucati, *Annex 2 to Defence Pre-Trial Brief on behalf of Hysni Gucati: List of Objections to the Admissibility of Disclosed Evidentiary Material*, 12 July 2021, confidential; F00260/A02, Defence for Mr Haradinaj, *Annex 2 to Defence Pre-Trial Brief on behalf of Nasim Haradinaj: List of Objections to the Admissibility of Disclosed Evidentiary Material*, 12 July 2021, confidential.

invites the SPO to file any such bar table motion before the tentative date of the Specialist Prosecutor's Preparation Conference (8 and 9 September 2021).

11. Claims of entrapment/incitement: noting the intention of both Accused to raise the issue of entrapment/incitement and subject to the pending decision on this matter by the Court of Appeals Panel,⁶ the Trial Panel orders each Defence team to file additional submissions by 27 August 2021, indicating:

- a. The provisions of the Law or the Rules relied upon in support of the argument that entrapment is a valid defence in the SC legal framework;
- b. The conditions and requirements applicable to such a defence in the SC legal framework;
- c. The type of evidence the Defence intends to adduce, if any, in support of such a defence; and
- d. The specific relief the Defence intends to seek in furtherance of the entrapment defence.

The SPO may respond orally, if it so wishes, during the Trial Preparation Conference.

12. Prospective Defence witnesses: the Trial Panel notes that the Pre-Trial Briefs of both Accused contain, in their respective Annexes, lists of prospective witnesses, which they might call should either or both of them decide to call a defence case.⁷ In these Annexes, the Defence for both Accused provides basic information regarding the "issues" in relation to which these witnesses would be called to testify. These descriptions provide little indication to the Panel regarding the fact(s) or circumstance(s) to which they would be asked to testify, and the relevance of the proposed testimony to the charges in the Indictment. Therefore, consistent with

⁶ F00258, *Defence Pre-Trial Brief on behalf of Hysni Gucati* ("Gucati Pre-Trial Brief"), 12 July 2021, confidential, paras 36-50; F00260, *Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj* ("Haradinaj Pre-Trial Brief"), 12 July 2021, confidential, paras 277-280.

⁷ F00258/A01, *Annex 1 to Gucati Pre-Trial Brief: List of Potential Witnesses the Defence Intends to Call*; F00260/A01, *Annex 1 to Haradinaj Pre-Trial Brief: List of Potential Witnesses the Defence Intends to Call*.

Rule 95(5)(c) and Rule 138(1) of the Rules, and with a view to ensure fair and expeditious proceedings, the Trial Panel orders each Defence team to submit, by 27 August 2021, a summary of the facts or circumstances in relation to which each witness would testify, in particular in respect of the specific facts and circumstances said to be relevant to the issue identified by both Defence teams as “public interest”. The SPO may respond orally, if it so wishes, during the Trial Preparation Conference.

13. The Trial Panel invites the Parties and the Registrar to submit, by 27 August 2021, written observations on the Draft Order on the Conduct of Proceedings (Annex 1).

14. Translation and interpretation: the Trial Panel orders the Parties to raise, by 3 September 2021, any remaining translation- or interpretation-related concerns with the Registry directly and to identify specifically the relevant passage(s) of document(s) with which an issue is taken. The Trial Panel notes in this regard that at paragraph 98 of its Pre-Trial Brief, the Gucati Defence takes issue with the accuracy of the transcription of a proposed SPO exhibit.⁸ The Trial Panel therefore orders the SPO to seek verification of this part of the transcript from the competent services of the Registry by 23 August 2021. The Trial Panel also reminds the Parties to submit English translations of any document on which they rely or which they intend to offer in evidence. In that respect, it orders the Gucati Defence to submit, by 27 August 2021, a filing containing the translation of the document relied upon in footnote 47 of its Pre-Trial Brief.

B. TRIAL PREPARATION CONFERENCE

15. The Trial Panel convenes the Trial Preparation Conference for 1 and 2 September 2021, at 10:00 hours.

⁸ F00254/A01, Specialist Prosecutor, *Annex 1 to Submission of Updated Exhibit List*, 6 July 2021, proposed SPO Exhibit 33: ERN 081358-01-TR-ET at page 8.

16. During the Trial Preparation Conference, the Trial Panel may ask follow-up questions in relation to the written submissions pursuant to paragraphs 8-14 of the present order.

17. The Trial Panel shall seek oral submissions on the following issues:

18. SPO list of witnesses: the Trial Panel shall ask the SPO whether it can confirm that it does not intend to call any additional witnesses.

19. SPO proposed witnesses and the Trial Panel's fact-finding responsibilities: the Trial Panel shall seek oral submissions from the SPO on how it intends to call the evidence of its two proposed witnesses without invading the province of the fact-finder.⁹

20. SPO amended list of exhibits: the Trial Panel shall ask the SPO whether it intends to propose additions to its amended list of exhibits and if so, the reasons for the delayed request.

21. SPO Official Notes and the right of confrontation: the Trial Panel shall seek oral submissions on how the SPO intends to guarantee the effectiveness of the right of confrontation, as provided under Article 6(3)(d) of the European Convention on Human Rights and reflected in Article 31(4) of the Constitution of Kosovo, Article 21(4)(f) of the Law and Rules 153-155 of the Rules, in respect of a proposed exhibit where:

- a. the author of the proposed exhibit is known to the Defence, but is not called to give evidence;
- b. the author of the proposed exhibit is unknown to the Defence, because identifying information has been redacted; and/or

⁹ The Trial Panel invites the SPO to give due consideration to the findings of the ICTY Appeals Chamber in *Prosecutor v. Milošević*, IT-02-54-AR73.2, [*Decision on Admissibility of Prosecution Investigator's Evidence*](#), 30 September 2002.

- c. the proposed exhibit is a record of what a third party has stated and that third party is not called to give evidence.

22. In relation to the above question, the Trial Panel shall further ask:

- a. whether the SPO can confirm that the author of the proposed exhibit or the third party whose statement is recorded is unable to testify and if so, whether the reason is within the meaning of Rule 155 of the Rules; and
- b. whether the SPO intends to tender into evidence any of the “SPO Official Note[s] concerning contact with [a] witness” and if so, under what provision of the Rules.

23. Authenticity of SPO proposed exhibits: The Gucati Defence challenges the authenticity of the documents delivered on 7 and 16 September 2020.¹⁰ The Trial Panel aims to ensure that it has properly understood the nature of these submissions and will, therefore, invite the Gucati Defence to specify if its submissions are to be understood as a suggestion: (a) that the material allegedly disclosed by the Accused did not form part of the SITF/SPO records; (b) that it was fabricated; (c) that no adequate chain of custody has been provided by the SPO; or (d) that the authenticity of the material is being disputed on another basis.

24. Confidential/non-public nature of information: The Defence disputes the SPO’s assertion that the material allegedly disclosed by the Accused was of a confidential and/or non-public nature.¹¹ The Trial Panel will invite oral submissions from all Parties in respect of this issue. In particular, the Defence will each be invited to clarify whether its position is that: (a) the material was already in whole or in part in the public domain; and, if so, which part(s); (b) for some other reason, the material did not enjoy confidential/protected status under the applicable regime; or (c) the SPO

¹⁰ See *Gucati* Pre-Trial Brief, paras 52, 265, 269, 273.

¹¹ *Gucati* Pre-Trial Brief, paras 264, 268, 272. Cf. also *Haradinaj* Pre-Trial Brief, para. 245.

failed to establish that the material enjoyed such status. The SPO will be invited to respond.

25. Defence challenges: the Trial Panel shall ask each Defence team whether it takes issue with the elements of offences and modes of liability as set forth by the Pre-Trial Judge in his confirmation decision.¹²

26. Use of Facebook account: In its Pre-Trial Brief, the Gucati Defence makes the following submissions:

“The Accused accepts that there was a Facebook account in his name which he had access to and, occasionally, did access. He did not, however, have sole access to the account and it was used by KLA WVA staff and family to post material.”¹³

The Gucati Defence will be invited to clarify whether it disputes the SPO’s claim that any of the impugned posts were posted by or with the knowledge of Mr Gucati on his *Facebook* account.

27. Clarification of claim: In its Pre-Trial Brief, the Gucati Defence makes the following submission:

“SPO officers had previously informed KLA WVA persons that they could retain such material for up to one month.”¹⁴

The SPO will be invited to clarify whether it takes issue with this assertion. If it does, the Gucati Defence will be invited to indicate whether it proposes to lead evidence in respect of this assertion (the Pre-Trial Brief contains no indication to that effect).

28. Motions pursuant to Rule 117(2) of the Rules: the Trial Panel shall ask the Parties whether they intend to submit any motion pursuant to Rule 117(2) of the Rules, other

¹² F00074, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment*, 11 December 2020, paras 33-97.

¹³ *Gucati* Pre-Trial Brief, para. 153. *See also*, *Ibid*, paras 156, 292 and 316.

¹⁴ *Gucati* Pre-Trial Brief, para. 133. *See also*, *Ibid*, para. 102.

than those addressed in this order or listed for discussion during the Trial Preparation Conference.

29. Presentation of cases: the Trial Panel shall seek oral submissions on:

- a. whether the SPO's estimate as to the time necessary for the presentation of its case has changed;¹⁵
- b. What each Defence team's estimate is as to the time necessary for the cross-examination, if any, of each of the two proposed SPO witnesses;
- c. Whether each Defence team will opt to give (i) an opening statement directly after the opening statement from the SPO; (ii) an opening statement after the closing of the SPO's case and before the opening of the Defence case; or (iii) no opening statement;
- d. What each Defence team's estimate is as to the time, if any, necessary for the presentation of its case;
- e. Should either Defence team decide to call a case, what its estimate is as to the time needed for preparation after the closing of the SPO's case; and
- f. Noting that the Trial Panel puts great emphasis on the continuity and consistency of counsel appearances, which Counsel are expected to appear on behalf of each Party during the trial proceedings.

30. The date of the Specialist Prosecutor's Preparation Conference is provisionally set for 8 and 9 September 2021.

¹⁵ F00181/A02, Specialist Prosecutor, *Annex 2 to Submission of Pre-Trial-Brief, Witness and Exhibit Lists, and Rule 109(c) Chart – List of Witnesses*, 9 April 2021, confidential, p. 2.

C. PRELIMINARY DIRECTIONS REGARDING WRITTEN AND ORAL SUBMISSIONS

31. Written submissions and, where applicable, responses pursuant to the orders in paragraphs 7-14 shall not exceed 3,000 words and shall concisely present the relevant arguments.

32. During the Trial Preparation Conference, Parties should refrain from reiterating written submissions previously made. Oral submissions shall not exceed five (5) minutes per Party for each issue and shall be concise, focusing on responding to any arguments of law, fact or procedure raised by the opposing Party. To the extent that the Parties wish to rely on legal authorities for the purpose of such oral submissions, they shall submit a list of such authorities to the other Parties and the Trial Panel no less than 24 hours before the commencement of the Trial Preparation Conference.

33. All filings before the Trial Panel shall be made *strictly* within the time limits provided by the Rules or set by the Trial Panel. Where no such time limit is provided, filings shall be made in a timely manner so as to ensure that all concerned have adequate time to give careful consideration to the issue and can address it in a fair and effective manner. Requests for variation of time limits shall be submitted at least two days before the expiration of the relevant deadline and shall be reasoned pursuant to Rule 9(5) of the Rules.

IV. DISPOSITION

34. In light of the foregoing, the Trial Panel hereby:

- a. **ORDERS** the SPO to submit, by **23 August 2021**, a request for protective measures for its witnesses, and **ORDERS** the Defence to respond in writing, if it so wishes, by **27 August 2021**, or to make oral submissions at the Trial Preparation Conference;

- b. **ORDERS** the SPO to make written submission, by **23 August 2021**, on the notion of “witness” as provided in paragraph 9, and **ORDERS** the Defence to respond in writing, if it so wishes, by **27 August 2021**, or to make oral submissions at the Trial Preparation Conference;
- c. **ORDERS** the SPO to seek verification of the accuracy of the transcription and translation of the proposed exhibit indicated in paragraph 14 by **23 August 2021**;
- d. **ORDERS** each Defence team to make additional written submissions, by **27 August 2021**, on the issue of entrapment/incitement as provided in paragraph 11;
- e. **ORDERS** each Defence team to submit, by **27 August 2021**, summaries for each of its proposed witnesses as provided in paragraph 12;
- f. **ORDERS** the Gucati Defence to file an English translation of the document referred to in footnote 47 of its Pre-Trial Brief by **27 August 2021**;
- g. **INVITES** the Parties and the Registrar to submit, if they so wish, by **27 August 2021**, written observations on the Draft Order on the Conduct of Proceedings (Annex 1);
- h. **DECIDES** to convene the Trial Preparation Conference in the presence of the SPO and the Defence on **1 and 2 September 2021, at 10:00 hours**;
- i. **ORDERS** the Parties to comply with the preliminary directions provided in paragraphs 31-33;
- j. **ORDERS** the Parties to review the translation of proposed exhibits and to bring to the attention of the competent services of the Registry, by **3 September 2021**, any remaining translation- or interpretation-related concerns, as provided in paragraph 14;
- k. **INVITES** the SPO to consider seeking admission of proposed exhibits from the bar table and to do so before **8 September 2021**; and

1. **SETS** provisionally the dates for the Specialist Prosecutor's Preparation Conference for **8-9 September 2021**.

A handwritten signature in black ink, reading "Charles L. Smith III". The signature is written in a cursive style with a horizontal line underneath the name.

Judge Charles L. Smith, III
Presiding Judge

Dated this Wednesday, 21 July 2021
At The Hague, the Netherlands.