

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: A Panel of the Court of Appeals Chamber

Judge Michele Picard

Judge Emilio Gatti

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 13 August 2021

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Publicly Redacted Version

of Submissions on Appeal of Decision KSC-BC-2020-07/F00210

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I. CLASSIFICATION

1. These submissions on appeal have been classified as Confidential, following the application for leave, and the decision on leave being so classified.
2. For the avoidance of doubt, the Defence for Mr. Haradinaj maintains that these submissions, and all submissions are capable of being made public, and ought to be made public in the interests of transparency and open justice, and as noted by a Panel of the Court of Appeals Chamber in its “Decision on the Defence Appeals Against Decision on Preliminary Motions”,¹ all filings should be filed publicly unless there are exceptional reasons for keeping them confidential.² In keeping with the approach of the Court of Appeals Chamber, there is no discernible reason why these matters should not be public.

II. INTRODUCTION AND PROCEDURAL BACKGROUND

3. On 14 April 2021, further to the Decision on the Rule 102(3) Material,³ the Specialist Prosecutor’s Office (“SPO”) submitted a consolidated detailed

¹ KSC-BC-2020-07/IA004/F0007, paras. 12-13.

² See KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaci’s Appeal Against Decision on Interim Release, 30 April 2021, para. 10

³ Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, KSC-BC-2020-07/F00172, 1 April 2021

notice of Rule 102(3) material in its possession (Consolidated Rule 102(3) Notice).⁴

4. On 26 April 2021, the SPO submitted a request for the non-disclosure of certain items included on the Consolidated Rule 102(3) Notice and other material on the grounds that they are not material to the Defence or are subject to Rule 108 of the Rules.⁵
5. On 10 May 2021, the Defence for Mr. Gucati, and on 11 May 2021, the Defence for Mr. Haradinaj (the Defence) filed their respective responses to the request.⁶
6. On 17 May 2021, the SPO filed its reply.⁷
7. On 20 May 2021, the Pre-Trial Judge ordered the Parties to make submissions on, *inter alia*, some of the items referred to in the Request.⁸

⁴ KSC-BC-2020-07, F00183/A01, Specialist Prosecutor, Annex 1 to Prosecution's Consolidated Rule 102(3) Notice, 14 April 2021, confidential.

⁵ KSC-BC-2020-07, F00190, Specialist Prosecutor, Prosecution Requests and Challenges Pursuant to KSCBC- 2020-07/F00172 ("Request"), 26 April 2021, strictly confidential and ex parte, with Annexes 1-3, strictly confidential and ex parte. See also F00190/RED, Specialist Prosecutor, Confidential Redacted Version of Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172, 28 April 2021, confidential.

⁶ KSC-BC-2020-07, F00199, Defence for Mr Gucati, Response to Confidential Redacted Version of 'Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 Dated 26 April 2020 ("Gucati Response"), 10 May 2021, confidential; F00200, Defence for Mr Haradinaj, Defence Response to SPO Confidential Redacted Version of 'Prosecution Requests and Challenges Pursuant to KSC-BC-2020- 07/F00172', and F00190 ("Haradinaj Response"), 11 May 2021, confidential.

⁷ KSC-BC-2020-07, F00201, Specialist Prosecutor, Prosecution Reply to Defence Responses to Filing F00190 ("Reply"), 17 May 2021, confidential.

⁸ KSC-BC-2020-07, F00204/A01, Pre-Trial Judge, Annex to the Order Setting the Date for the Fifth Status Conference, 20 May 2021, confidential.

8. On 26 May 2021, the Pre-Trial Judge issued a decision (the 'Impugned Decision'),⁹ on, *inter alia*, the non-disclosure of any material held by the SPO which relates to:
- a. The origin and provenance of the material contained within the Three Batches, including material as to the authorship and chain of custody from creation to its arrival at the KLA WVA [**Gucati Request B**]; and
 - b. Attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA [**Gucati Request C**].
9. On 3 June 2021, the Defence filed their respective applications for leave to appeal.¹⁰
10. On 10 June 2021 the SPO filed its consolidated response to the applications for the Defence applications for leave.¹¹

⁹ KSC-BC-2020-07, F00210, Pre-Trial Judge, Decision on Prosecution Requests and Challenges Pursuant to F00172 ("Impugned Decision"), 26 May 2021, confidential.

¹⁰ KSC-BC-2020-07, F00216, Defence for Mr Gucati, 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) ("Gucati Application"), 3 June 2021, confidential; KSC-BC-2020-07, F00219, Defence for Mr Haradinaj, Application for Leave to Appeal the Decision on Prosecution Requests and Challenges Pursuant to F00172 ("Haradinaj Application"), 3 June 2021, confidential.

¹¹ KSC-BC-2020-07, F00226, Specialist Prosecutor, Consolidated Prosecution Response to Defence Applications F00216 and F00219 for Leave to Appeal and Reconsideration ("SPO Response"), 10 June 2021, confidential.

11. On 14 June 2021, the Defence filed their respective replies.¹²
12. Pursuant to Article 45 of the Law on the Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law") an interlocutory appeal may be brought in accordance with the Law and the Rules of Procedure and Evidence ("Rules") and pursuant to Rule 77(2) where an appeal does not lie as of right, an application to certify leave to appeal must be filed with the Pre-Trial Judge or Trial Panel.
13. On 15 June 2021, The Pre-Trial Judge issued the "Decision on the Defence Applications for Leave to Appeal the Decision on the Gucati Requests B-C,"¹³ the two issues raised were certified given the finding that "*the Two Issues would significantly affect the fair and expeditious conduct of the proceedings and an immediate resolution by the Court of Appeals in their regard may materially advance the proceedings*".¹⁴

III. STANDARD OF REVIEW AND APPLICABLE LAW

¹² KSC-BC-2020-07, F00230, Defence for Mr Gucati, Reply to Consolidated Prosecution Response to Defence

Applications F00216 and F00219 for Leave to Appeal and Reconsideration ("Gucati Reply"), 14 June 2021, confidential; F00234, Defence for Mr Haradinaj, Defence Reply to Prosecution Response to Defence Applications F00216 and F00219 ("Haradinaj Reply"), 14 June 2021, confidential.

¹³ KSC-BC-2020-07/F--235

¹⁴ *Ibid* at paragraph 38

14. As noted in Sections II and IV of the Gucati submissions on appeal, the standard of review and the applicable are set out. Those submissions are adopted in this appeal.¹⁵ In particular, the stage approach regarding Rule 102(3) and Article 21(6) and the applicable tests for determining ‘relevance’ and ‘materiality’ are adopted in this appeal. In this regard, the Defence for Gucati submits that the Pre-Trial Judge has determined that what is relevant for the purposes of Rule 102(3) should not be limited by the temporal scope of the Confirmed Indictment nor should it be confined to material relevant to countering the prosecution case. The Defence for Haradinaj supports this view as the only correct interpretation as the notion of ‘defence preparation’ must be broadly construed

IV. GROUNDS OF APPEAL

15. The two issues certified by the Pre-Trial Judge, and therefore the issues to be determined by the Panel of the Court of Appeals Chamber are as follows:¹⁶

¹⁵ KSC-BC-2020-07, F00183/A01, Specialist Prosecutor, Annex 1 to Prosecution’s Consolidated Rule 102(3) Notice, 14 April 2021, confidential.

¹⁶ Noting that leave was sought in respect of 3 issues initially, however, due to a degree of overlap between issues 2 and 3 as originally pleaded, the Pre-Trial Judge, for reasons of judicial economy, re-phrased issue 2 so as to take account of issue 3.

- a. Whether the Pre-Trial Judge erred in finding that the issue of the process through which alleged confidential material arrived to the KLA WVA premises was not relevant to the case;¹⁷ and
- b. Whether the Pre-Trial Judge erred in finding that the information and material requested in Gucati requests B-C, which went to the issue of the process through which alleged confidential material arrived to the KLA WVA premises, was not relevant to the case and not material to the Defence preparation.¹⁸

V. SUBMISSIONS

16. The following submissions will deal with each certified ground in order.
 - (a) *Whether the Pre-Trial Judge erred in finding that the issue of the process through which alleged confidential material arrived to the KLA WVA premises was not relevant to the case.*
17. The Defence at the outset maintains that the Pre-Trial Judge did so err, given that the process through which the information arrived at the KLA WVA is fundamental, both to understanding the wider context of the allegations, and

¹⁷ KSC-BC-2020-07/F00235 at paragraph 7(a).

¹⁸ *Ibid* at paragraph 21

further, the availability of the Defence of Entrapment and/or Incitement to the Defendant.

18. In short, it is submitted that the 'process' underpins the entire case and gives rise to the purported evidential foundation for the counts on the indictment.
19. The allegations in the instant case centre on the alleged disclosure(s) made by the Defendant(s), it is therefore clear, that 'but for' Batches 1, 2, and 3 being delivered to the KLA WVA offices, the alleged disclosures would not have been made, as they could not have been made.
20. This position must be considered within the factual framework of the allegations of the SPO and certain issues that have arisen since the confirmation of the indictment.¹⁹
21. The SPO, as part of the allegations, seek to assert that the Defendant(s) have, with others, sought to undermine the work of the KSC from the outset, stopping short of, but inferring a form of conspiracy with persons named and unnamed.

¹⁹ Noting that the indictment has been ruled as Defective with an order that it be referred to the SPO to be remedied, per the Decision on the Defence Appeals Against Decision on Preliminary Motions – KSC-BC-2007/IA004/F00007 – The fact that the Indictment has been ruled as 'Defective', does not, at this stage, affect these specific submissions on appeal.

22. The allegations as set out in the indictment, are therefore suggestive of being a further incident in a conspiracy and a continuation of that prior intent on the part of the Defendant(s).
23. We therefore move to the delivery of Batch 1, after which, the SPO allege that the Defendant(s) made certain disclosures.
24. Of import for the purposes of this appeal concerning relevance, is the allegation that the Defendant(s) within press-conferences and/or media appearances, suggest that they have been advised that further deliveries were to be made. It is the Defendant(s) position that this was made clear to the SPO both in terms of public representations to the media and informal discussions with SPO investigators.
25. At no stage, other than the order of the Pre-Trial Judge,²⁰ did the SPO take any action, in that, the Defendant(s) were not arrested or questioned, seemingly no investigation into the 'leak' occurred, and further, the building was not put under surveillance, despite there being a suggestion that this might happen again. The Defendant(s) in fact warned the SPO investigators that they needed to act more promptly in future.

²⁰ KSC-BC-2020-07/F00007

26. The same position can be said as to what occurred or did not occur after 'Batch 2' was delivered.
27. Again, other than the second order of the Pre-Trial Judge,²¹ no action was taken, in that neither Defendant was detained or questioned, seemingly no investigation was undertaken, and no surveillance or any alternative preventative or investigatory measure was put into place by the SPO.
28. The delivery of "Batch 3" is perhaps of even further importance, in that Batch 3 is said to have included the draft indictment concerning the case of Hashim Thaci and others.²²
29. Accordingly, it is submitted that it is a reasonable suggestion to advanced that this information cannot have come from anywhere other than the offices of the SPO.
30. After the delivery of Batch 3 and that which is alleged to have occurred thereafter, the Defendant(s) were arrested on 25 and 26 September 2020, respectively.

²¹ KSC-BC-2020-07/F00017/A01

²² *Prosecutor v. Thaci et al.*, Specialist Prosecutor, Submission of Revised Indictment for Confirmation ("Second Submission"), strictly confidential and ex parte with Annex 1 ("Revised Indictment"), strictly confidential and ex parte, KSC-BC-2020-06, F00011

31. Given the contextual background to the delivery of ‘the Batches’, it is submitted that the circumstances that gave rise to the ‘leaks’ are of fundamental importance.
32. The Defendant has a right to raise any Defence he deems appropriate at trial.
33. The Defendant, as per previous submissions before the Pre-Trial Judge²³ and as noted by the Pre-Trial Judge in the decision on certification,²⁴ has raised that Incitement and/or Entrapment is to be raised at trial, all parties are therefore aware of the intention of the Defence.
34. To prevent such information from being disclosed, or to seek to prevent such information from being disclosed is in the instant case and circumstances, actively preventing the Defence from either investigating whether there is evidence to substantiate a particular Defence to be raised, or further, actively preventing that Defence from being raised in its entirety.

²³ See, for example KSC-BC-2020-07, F00100, Defence for Mr Gucati, Defence Submissions for the First Status Conference, 7 January 2021, public, para. 7; F00119, Defence for Mr Gucati, Response to Prosecution Request for Non-Disclosure of Certain Information Pertaining to Contacts with Witnesses, 10 February 2021, confidential, para. 22; F00122, Defence for Mr Gucati, Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, 11 February 2021, confidential, paras 22-23 (p. 11); Transcript, 24 February 2021, public, p. 156; F00157, Defence for Mr Gucati, Response to Prosecution Submissions on the Rule 102(3) Notice, 18 March 2021, confidential, paras 30-31; Transcript, 30 April 2021, public, pp. 231, 233; F00199, Defence for Mr Gucati, Response to Confidential Redacted Version of ‘Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172’, KSC-BC-2020-07/F00190 Dated 26 April 2021, 10 May 2021, confidential, paras 51-55; F00200, Defence for Mr Haradinaj, Defence Response to SPO Confidential Redacted Version of ‘Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172’, and F00190, 10 May 2021, confidential, paras 67-70; F00211, Defence for Mr Haradinaj, Defence Submissions for the Fifth Status Conference, 26 May 2021, confidential, paras 33-39.

²⁴ KSC-BC-2020-07/F00235

35. Again therefore, in the knowledge that a particular defence was to be raised, and in the knowledge that the Defence may seek to examine certain evidence in accordance with that intention, it is respectfully submitted that the information sought cannot be said to be anything other than relevant, the circumstances behind 'the leaks' therefore being of direct relevance to the Defence to be raised.
36. The SPO submission that the offences *per* the indictment concern alleged actions after the disclosures, and therefore that which led up to the disclosures or any subsequent investigation into the same is of no relevance as it does not relate to the alleged offending itself, is entirely flawed on the facts.
37. There were three separate batches delivered on three separate occasions, over a period of time, and therefore the alleged offending is in fact said to have taken place at the same time that the leaks were ongoing.
38. The SPO's submissions on this point are fundamentally incorrect, and in any event, do not detract from the relevance of the information sought for the reasons already given. As noted by the Defence Gucati in its submissions, the unilateral evaluation by the SPO as to what it deems relevant, material or exculpatory is irrelevant to the error made by the Pre-Trial Judge in limiting relevance to the temporal scope of the charges. The errors in making the determination are compounded by two relevant factors, one the unilateral

evaluation by the SPO, two the fact that the Pre-Trial Judge made such a determination without having viewed the information to determine relevance, usefulness or materiality to defence preparations. It is here that the temporal scope of the charges and the temporal scope of the indictment are two fundamentally different assessments. The Pre-Trial Judge erred by considering the narrow test.

39. Further at paragraph 15 of the Impugned decision, as per paragraph 15 of Gucati Application for Leave,²⁵ the Pre-Trial Judge acknowledges that:

“the extent to which the Defence’s submissions regarding incitement or entrapment may constitute a permissible substantive defence or a ground for the exclusion of evidence are matters to be addressed at trial’.

40. However, and again, per the Gucati application for Leave at paragraph 16:

“those matters can only be properly addressed where appropriate disclosure has taken place, so as ensure the rights to adversarial proceedings and to equality of arms”.

41. At this stage, such disclosure has not taken place on account of a blanket refusal on the part of the SPO, again therefore, the Defence are in effect being prevented from actively and/or appropriately advancing such a defence, in

²⁵ KSC-BC-2007-07/F00216

the first instance on account of the position of the SPO, but in the second instance, on account of the impugned decision.

42. Further, the position of the Pre-Trial Judge in the impugned decision is, with respect, contradictory.
43. The Pre-Trial Judge acknowledges on the one hand that the defence is one that is permitted, albeit the issue is to be resolved at trial, and yet, goes on to rule that information and/or evidence that relates to the advancement of that defence is 'irrelevant'.
44. Again therefore, it would appear to be clear in our respectful submission, that the Pre-Trial Judge erred on the question of relevance.
45. The two issues cannot be separated.

(b) Whether the Pre-Trial Judge erred in finding that the information and material requested in Gucati requests B-C, which went to the issue of the process through which alleged confidential material arrived to the KLA WVA premises, was not relevant to the case and not material to the Defence preparation

46. The submissions in terms of the second ground, are substantially the same as per that for the first as again, they concern the issue of relevance, although in terms of requests B-C, there is an element of further specificity.

47. The Pre-Trial Judge, within the impugned decision at paragraph 61 notes that the Gucati request B-C concerns the following information:

- (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.*

48. Further, the Pre-Trial Judge found at paragraphs 62-64 of the impugned decision:

"62. Having reviewed the questions posed by the Defence for Mr Gucati, the Pre-Trial Judge finds that the information and material requested fall squarely outside the scope of the present case. The Pre-Trial Judge emphasises that the charges against the Accused pertain to their conduct following the receipt of alleged confidential information at the KLA WVA premises. The process through which the information arrived to the KLA WVA premises, whether or not it is subject to an SPO investigation, does not fall under the

scope of the charges against the Accused, which are based on the alleged unlawful revelation of confidential information and [REDACTED] purportedly contained in the delivered material.

63. The extent to which the Defence's submissions regarding incitement or entrapment may constitute a permissible substantive defence or a ground for the exclusion of evidence are matters to be addressed at trial. In any event, the Pre-Trial Judge notes that, were the SPO to have any material or information in its custody, control or actual knowledge as regards any purported incitement or entrapment of the Accused, such material or information would fall under the scope of Rule 103 of the Rules and would have to be immediately disclosed.

(emphasis added)

64. The Pre-Trial Judge accordingly finds that the information and material sought by the Defence in the Gucati Requests B-C are not relevant to the case and are not material to the Defence preparation and, as such, are not subject to disclosure under Rule 102(3) of the Rules. In light of the foregoing, the Pre-Trial Judge rejects the Gucati Requests B-C."

49. Again, at the risk of rehearsing those arguments outlined for the purposes of the first ground, as much as the Defence accept the premise of the position at paragraph 63 of the impugned decision in that whether

incitement/entrapment is a substantive defence is a matter to be addressed at trial, this does not absolve the SPO or the Pre-Trial of ensuring that the Defence can properly prepare its case, and therefore secure the disclosure of any and all information deemed to be relevant.

50. For the reasons already given, the information sought is plainly relevant to the case to be advanced.
51. In a similar vein, in accepting that the Defence itself is one that can be properly advanced, the Pre-Trial Judge erred in ruling that the information sought was not material to the Defence preparation, the two positions being entirely at odds.
52. The Defendant has the right to advance his Defence, it is for the Trial Panel to rule whether the relevant elements of that Defence have been made out or otherwise.
53. Accordingly, it is submitted that to deny the Defendant the opportunity to advance the defence of Entrapment and/or any other relevant defence would constitute a flagrant violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

VI. CONCLUSION

54. As has been outlined above, the questions to be determined centre on the issue of 'relevance' and 'materiality', and whether the requests made relate to evidence and/or information that can be said to be as such.
55. The Defence maintains that the Pre-Trial Judge erred in making the determination that the said information and/or evidence was not relevant.
56. The Defence highlights that the information subject to those requests was, and remains, fundamental to at least one limb of defence that the Defendant(s) seeks to advance at trial.
57. On that basis, the information cannot be said to be anything other than relevant and material, and therefore, as a natural conclusion, the decision of the Pre-Trial judge must be flawed and therefore, this appeal ought to be allowed for the reasons advanced above.
58. It is respectfully submitted that if the impugned decision is maintained, it has the effect, for the aforesaid reasons, of preventing a legitimate and appropriate defence from being raised and advanced appropriately.

59. This in turn will result in significant prejudice to the Defendant(s), and therefore, 'unfairness', and thus contrary to the principle that criminal proceedings must be fair.²⁶
60. In *Nahimana and others* case, it was noted "the concept of a fair trial includes equal opportunity to present one's case"²⁷, this principle is, with respect, being violated.
61. The principle of fairness is enshrined in all major international human rights conventions,²⁸ and has been considered and further developed in the jurisprudence of those various tribunals.²⁹
62. This principle of 'fairness' was considered further, and in a similar context to the instant case in terms of 'fairness' and 'disclosure' in *Lubanga*, wherein proceedings were stayed because of the unfairness apparent in not disclosing substantial amounts of information.³⁰
63. Accordingly, the concept of fairness, is inextricably linked to the complimentary principles of the 'Equality of Arms', the right to 'Adequate

²⁶ An ideal that is recognised in any and all national and international instruments and treaties that proscribe rules for criminal proceedings. Further, in an international context, see ICTY, *Prosecutor v Tadic*, Case No. IT-94-1-A, Appeals Judgment *Tadic* at para. 47.

²⁷ ICTR, *Prosecutor v Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007, at para. 181.

²⁸ See UN Covenant on Civil and Political Rights (Articles 14(1) and (26)), the European Convention on Human Rights (Article 6(1)), and the American Convention on Human Rights (Article 8)).

²⁹ Outside of the KSC and 'the Law', see Article 16 of the Charter of the Nuremberg Tribunal, Article 9 of the Tokyo Tribunal, Article 21(2) of the Statute of the ICTY, Article 20(2) of the ICTR, and Article 67 of the ICC.

³⁰ ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case No. IT-01/04-01/06, Trial Chamber, "Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 July 2010.

Time and Facilities, all of which must be considered when dealing with applications for disclosure, what is relevant, and what is material.

64. It is therefore submitted that this appeal must be allowed so as to ensure that the Defendant's rights are respected and upheld.
65. As a final point, the Defence for Mr. Haradinaj confirms that it adopts and maintains the submissions that have been made on behalf of Mr. Gucati.

VI. RELIEF SOUGHT

66. The Defence for Haradinaj invites the Panel of the Court of Appeals Chamber:
- a. Order the disclosure of all material falling within the Gucati Requests B-C; or
 - b. Order that all material falling with the Gucati Requests B-C be listed on the detailed Rule 102(3) Notice.

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