

**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

**Date:** 27 August 2021

**Language:** English

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**Submission on Witnesses**

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## I. INTRODUCTION AND PRELIMINARY OBSERVATIONS

1. On 21 July 2021, Trial Panel II in its Order for Submissions and Scheduling the Trial Preparation Conference,<sup>1</sup> at paragraph 12, ordered the Defence to *“file submissions on the 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.””*
2. It is noted that for this request for submissions, Trial Panel II expressly relies on Rules 95(5) and 138(1) of the Rules of Procedure and Evidence.<sup>2</sup>
3. First, Rule 95(5)(c) provides that the Defence has to submit *“a list of potential witnesses the Defence intends to call, without prejudice to any subsequent amendment or filing thereof. In relation to each witness, the Defence shall specify to which particular relevant issue the evidence relates.”* (emphasis added)
4. The Defence avers that its potential witness list fully complied with the clear wording of Rule 95(5)(c) by specifying *“which particular relevant issue the evidence”* of the witness to. For this stage, the Rule 95(5)(c) required specifications as to *issues*, not *“charges in the Indictment.”*<sup>3</sup> Indeed, the potential witnesses are relevant to *defences, investigatory failures of the SPO and admissibility of evidence*, not just the *charges*. The Defence therefore understands

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<sup>1</sup> KSC-BC-2020-07/F00267.

<sup>2</sup> *Ibid.*, at para. 12.

<sup>3</sup> *Ibid.*, at para. 12.

that further submissions as to “*facts and circumstances which the potential witnesses would be asked to testify*” are not required by Rule 95(5).

5. The Defence cannot be forced to disclose its entire Defence case at this stage. Particularly not, given that the SPO has *still* not completed full disclosure. In the Pre-Trial Brief, the Defence for Mr. Haradinaj has sketched out the defences he will rely on.<sup>4</sup> The follow supplementary submissions will demonstrate with some further detail how the witnesses are relevant to the defences that Mr. Haradinaj wishes to raise.
6. Second, the Defence notes that in ordering further submissions concerning witnesses, Trial Panel II also relies to Rule 138(1), on admissibility of evidence, which provides: “*Unless challenged or proprio motu excluded, evidence submitted to the Panel shall be admitted if it is **relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.** In exceptional circumstances, when the Panel is satisfied that an issue was not known at the time when the evidence was submitted, it shall be raised immediately after it has become known.*” (emphasis added)
7. The Defence stresses that all its potential witnesses bring *relevant, authentic evidence and probative value* and their probative value is *not* outweighed by any prejudicial effect whatsoever. In any event, the admissibility of the witnesses

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<sup>4</sup> KSC-BC-2020-07/F0060.

and their statements, in the submission of the Defence, cannot be denied based on a mere summary of their evidence.

## II. SUPPLEMENTARY INFORMATION ON WITNESSES

8. The Defence accordingly maintains that it has complied with Rule 95(5)(c) and that the admissibility of its witnesses cannot be challenged based on summaries of issues they will speak to. Nevertheless, in the following, the Defence submits supplementary information on facts and circumstances of Defence witness testimonies and their relevance to Mr. Haradinaj's defences.
9. Neither the following information, nor the references to specific defences (e.g. the entrapment or whistleblower defences) is exhaustive.

No	Name	Summary of Facts And Circumstances To Which Witness Will Testify
1	Arsim Lani	<ul style="list-style-type: none"> <li>• Circumstances press conference</li> <li>• Journalist</li> <li>• Has copies of some material – SPO has never attempted to retrieve material from him</li> </ul>
2	Cele Gashi	<ul style="list-style-type: none"> <li>• Circumstances of deliveries and seizure</li> <li>• Told by SPO officers that the KLA WVA could retain the documents after 'Lightning 1' for one month</li> </ul>

3	Elmedina Ballhazhi	<ul style="list-style-type: none"> <li>• On 16 September witnessed and filmed the second delivery from outside the KLA-WVA</li> <li>• Circumstances of the press conference</li> <li>• No contact from SPO investigating footage of second drop off</li> </ul>
4	Elvir Gucati	<ul style="list-style-type: none"> <li>• Circumstances of delivery</li> <li>• KLA WVA did not photocopy any of the documents that were delivered</li> </ul>
5	Emin Lati	<ul style="list-style-type: none"> <li>• Circumstances of delivery and press conferences</li> <li>• Professional journalists only at the press conferences</li> </ul>
6	Faik Faizliu	<ul style="list-style-type: none"> <li>• Circumstances of the delivery</li> <li>• No one spent a long time going through the documents</li> <li>• Purpose of the press conference was to inform the public of collaboration between the SPO and Serbia</li> </ul>
7	Faton Klinaku	<ul style="list-style-type: none"> <li>• Circumstances of delivery and seizures</li> <li>• Purpose of the press conference was to inform the public of collaboration between the SPO and Serbia</li> <li>• Present on 8 September 2020 when the SPO arrived. Gucati in Albania. Gucati told him to give the SPO the files.</li> <li>• The SPO as part of the handover procedure did not specify which documents the SPO took.</li> </ul>

		<ul style="list-style-type: none"> <li>Directed the SPO to examine the CCTV – the SPO did not enquire of their own initiative.</li> </ul>
8	Metush Kryeziu	<ul style="list-style-type: none"> <li>The witness is chairman of one of the WVA's branches and member of the member committee of the WVA. The decision to hold press conference was a collective decision taken by the majority vote of the WVA Chairmanship - all 22 members. Gucati, Haradinaj and Klinaku simply implemented the decision of the chairmanship.</li> </ul>
9	Patjim Bejtullahu	<ul style="list-style-type: none"> <li>Cameraman who filmed the second delivery</li> <li>No contact from the SPO to investigate</li> </ul>
10	Pren Marashi	<ul style="list-style-type: none"> <li>Circumstances of seizure</li> <li>Gucati not present – directed that the files be handed to the SPO</li> </ul>
11	Ramadan Gashi	<ul style="list-style-type: none"> <li>Circumstances of arrests</li> <li>The SPO officers were all armed with weapons (guns) and all of them had their fingers on the trigger</li> <li>Heard one of the officers in military uniform say, “they have established contact in Serbia.”. Officer speaking Serbian - also mentioned Belgrade</li> </ul>
12	Taibe Miftari	<ul style="list-style-type: none"> <li>Circumstances of deliveries</li> </ul>

		<ul style="list-style-type: none"> <li>• Unknown male making first delivery gave instruction to make the documents available to the media</li> <li>• Present on 25 September 2020 - the SPO officers armed with automatic weapons with fingers on the triggers</li> </ul>
13	Tome Gashi	<ul style="list-style-type: none"> <li>• Circumstances of press conferences, arrests and search</li> <li>• Legal advice given to KLA WVA</li> </ul>
14	Fitim Ceku	<ul style="list-style-type: none"> <li>• Circumstances of press conference</li> <li>• Journalist</li> <li>• He published some material because it was in the public interest</li> <li>• No contact from the SPO to investigate</li> </ul>
15	Malcolm Simmons	<ul style="list-style-type: none"> <li>• The practices of EULEX/KSC, whether there is an atmosphere of political pressure, whether investigative files and protected witness details were provided to Serbian officials, whether there is a culture of leaking information and whether the Accused were acting in the public interest/can be classified as whistleblower</li> </ul>
16	Maria Bamieh	<ul style="list-style-type: none"> <li>• The practices of EULEX/KSC, whether there is an atmosphere of political pressure, whether</li> </ul>

		<p>investigative files and protected witness details were provided to Serbian officials, whether there is a culture of leaking information and whether the Accused were acting in the public interest/can be classified as whistleblower</p>
17	Anna Myers	<ul style="list-style-type: none"> <li>Expert report as to whether the Accused acting in the public interest/can be classified as whistleblower</li> </ul>
18	Vehbi Kajtazi	<ul style="list-style-type: none"> <li>Investigative journalist who has written extensively on the criminal justice sector in Kosovo and in particular on EULEX – whether the Accused acting in the public interest/can be classified as whistleblower</li> </ul>
19	Rashit Qalaj	<ul style="list-style-type: none"> <li>The Kosovo Police received instructions from the Kosovo Special Prosecution Office not to investigate the deliveries</li> </ul>

## V. CONCLUSION

10. The witness list and corresponding summaries, prepared on the basis of signed witness statements and correspondence, are relevant, authentic, and have probative value to the case against and the defence of Mr. Haradinaj, and must be admitted.

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