



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: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 15 September 2021

Language: English

Classification: Confidential

Prosecution requests in relation to Defence witnesses

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to its powers under Article 40(2) and (6) of the Law¹ and Rules 116(1) and (4), 138(1) and 143(4) of the Rules,² the Trial Panel should: (i) order the Defence to strike five witnesses off the Defence Provisional Witness Lists³ ('First Request'); and (ii) not authorise the testimony of five witnesses appearing on the Defence Provisional Witness Lists to the extent such testimony pertains to matters irrelevant to the charges against the Accused ('Second Request').⁴

2. The Defence's discretion in selecting and presenting its evidence is not unlimited, and the Trial Panel may intervene in order to exclude irrelevant evidence and ensure the fair and expeditious conduct of the trial.⁵ Such intervention is warranted in the proceedings against the Accused since the entirety of the expected testimony of the witnesses in the First Request and a significant part of the expected testimony of the witnesses in the Second Request is abstract and divorced from the facts and circumstances of this case, irrelevant to the charges against the Accused and, consequently, cannot assist in the ascertainment of the truth.⁶ Authorising the presentation of such evidence would not be conducive to the efficiency of proceedings

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

² 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.

³ Annex 1 to Defence Pre-Trial Brief on behalf of Hysni Gucati: List of Potential Witnesses the Defence Intends to Call [...], KSC-BC-2020-07/F00258/A01, 12 July 2021, Confidential ('Gucati Provisional Witness List'); Annex 1 to Defence Pre-Trial Brief on behalf of Nasim Haradinaj: List of Potential Witnesses the Defence Intends to Call [...], KSC-BC-2020-07/F00260/A01, 12 July 2021, Confidential ('Haradinaj Provisional Witness List', collectively with the Gucati Provisional Witness List, the 'Defence Provisional Witness Lists'). The five witnesses, common to the Defence Provisional Witness Lists, are Witnesses 11, 15, 16, 18 and 19.

⁴ Witnesses 1, 3, 9, 12 and 14 on the Defence Provisional Witness Lists.

⁵ See Rule 138(1); See also 119(3); ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016 ('*Bemba et al.* Decision'), para.6; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.7, Decision on Defendants' appeal against 'Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge', 1 July 2008, para.25.

⁶ See Rule 143(4).

and would constitute an undue consumption of time and resources,⁷ thereby running contrary to the interests of justice.

II. BACKGROUND

3. On 12 July 2021, the Defence provided the Defence Provisional Witness Lists.

4. On 21 July 2021, 'with a view to ensure fair and expeditious proceedings', the Trial Panel ordered the Defence to file a summary of facts or circumstances in relation to which each witness on the Defence Provisional Witness Lists would testify, in particular in respect of the specific facts and circumstances said to be relevant to the issue identified by the Defence as 'public interest'.⁸

5. On 27 August 2021, the Defence filed the submissions on witnesses requested in the Order.⁹ The Haradinaj Defence made no submissions in relation to Witness 21, who was the only witness to appear on the Haradinaj Provisional Witness List but not on the Gucati Provisional Witness List.

6. On 1 September 2021, the Specialist Prosecutor's Office ('SPO') indicated that it intended to file a motion to strike Defence witnesses and parts of testimony of Defence witnesses that are irrelevant to the trial and only go to collateral matters.¹⁰

⁷ See Rule 143(4).

⁸ Order for Submissions and Scheduling the Trial Preparation Conference, KSC-BC-2020-07/F00267, 21 July 2021 ('Order'), paras 12, 34(e).

⁹ Submission on Witnesses, KSC-BC-2020-07/F00289, 27 August 2021, Confidential ('Haradinaj Submission on Witnesses'); Annex 1 to Written Submissions for the Trial Preparation Conference and Related Matters, KSC-BC-2020-07/F00288/A01, 27 August 2021, Confidential ('Gucati Submission on Witnesses', collectively with the Haradinaj Submission on Witnesses, the 'Defence Submissions on Witnesses'). The 'Summary of Facts and Circumstances To Which Witness Will Testify' is identical in the Haradinaj Submission on Witnesses and Gucati Submission on Witnesses.

¹⁰ KSC-BC-2020-07, 1 September 2021 Transcript, p.446.

7. On 2 September 2021, the Trial Panel ordered the SPO to file its motion to strike Defence witnesses and parts of their testimony from the Defence Provisional Witness Lists by 15 September 2021.¹¹

III. SUBMISSIONS

A. The Trial Panel should order the Defence to strike Witnesses 11, 15, 16, 18 and 19 off the Defence Provisional Witness Lists

8. The Trial Panel should order the Defence to strike Witnesses 11, 15, 16, 18 and 19 off the Defence Provisional Witness Lists. The entirety of the expected testimony of these witnesses bears no connection to the specific facts and circumstances of this case. Accordingly, the evidence proposed by the Defence does not meet the relevance requirement provided for in Rule 138(1). Furthermore, granting the First Request would ensure that there is no undue consumption of time and resources.¹²

9. The Defence was given ample opportunity to provide further information concerning the relevance and propriety of the expected testimony of these witnesses.¹³ However, the Defence has failed to demonstrate any nexus between the expected testimony of these witnesses and any material fact at issue.¹⁴

Witness 11

10. The expected testimony of Witness 11 is not probative of any of the incidents charged, the acts and conduct of the Accused, or any salient issues in the case. Rather, it simply purports to address the circumstances of the arrests of the Accused, including whether and/or how 'SPO officers' were armed, and the fact that an officer

¹¹ KSC-BC-2020-07, 2 September 2021 Transcript, pp.603.

¹² See Rule 143(4).

¹³ Order, KSC-BC-2020-07/F00267, paras 12, 34(e).

¹⁴ See, e.g., Defence Submissions on Witnesses; KSC-BC-2020-07, 1 September 2021 Transcript, pp.460-466, 470-474.

allegedly mentioned and/or spoke in Serbian.¹⁵ Such testimony is incapable of assisting in the determination of the charges and should not be authorised.

Witnesses 15, 16, 18

11. As is the case with Witness 11, the expected testimony of Witnesses 15, 16 and 18 is not probative of any of the incidents charged, the acts and conduct of the Accused, or any salient issues in the case. Witnesses 15, 16 and 18 are all expected to provide testimony concerning '[t]he 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'.¹⁶

12. None of these issues are relevant to the case against the Accused. Even if they were, the SPO and EULEX are two distinct entities and there is no information indicating that Witnesses 15, 16 and 18 have any specific knowledge of 'practises' of, or the 'atmosphere' or 'culture' at, the SPO or even the KSC. An opinion by non-expert witnesses about a separate institution is incapable of providing any meaningful and relevant general background or context. There is no indication that Witnesses 15, 16 and 18 have any personal knowledge of any information specific to the Accused or any specialised knowledge about the context of this particular case.¹⁷

13. The Defence has failed to identify any relevant provisions or jurisprudence in support of the contention that public interest is a defence to the charges against the Accused.¹⁸ This is because the contention is baseless. Regardless of the Defence's

¹⁵ See 'Summary of Facts And Circumstances To Which Witness Will Testify' in the Defence Submissions on Witnesses in relation to Witness 11.

¹⁶ See 'Summary of Facts And Circumstances To Which Witness Will Testify' in the Defence Submissions on Witnesses in relation to Witnesses 15, 16 and 18.

¹⁷ See *Bemba et al.* Decision, para.9.

¹⁸ See, e.g., KSC-BC-2020-07, 1 September 2021 Transcript, pp.461-463; Written Submissions in accordance with the Third Oral Order made on 2 September 2021, KSC-BC-2020-07/F00302, 6 September

opinion on the fairness of the institutional provisions of the KSC/SPO,¹⁹ such provisions were unequivocally public and in force when the Accused allegedly committed the charged crimes. As such, the criminal conduct of the Accused cannot possibly be justified in light of the alleged interest of bringing to the public knowledge the implications of legal provisions that were already and unquestionably available to the public.

14. Even if, *arguendo*, ‘public interest’, concerning cooperation between the SPO and its predecessor with Serbian authorities²⁰ or otherwise, were to be considered a defence against the substantive charges, a matter on which the Defence teams seem to disagree,²¹ the Trial Panel should still not authorise the expected testimony of Witnesses 15, 16 and 18. There is nothing to indicate these witnesses would be capable of assisting the Trial Panel in what would be a fact-based determination. In particular, there is no indication these witnesses know anything specific about the SPO’s cooperation with the Serbian authorities – that the SPO has received cooperation from Serbia in the past is neither contested nor confidential.²² Indeed, the Defence has provided a statement for Witness 15 which only serves to highlight the irrelevance of this witness’ expected testimony to the charges against the Accused.²³

15. The SPO notes that Witness 17 will provide an expert report ‘as to whether the Accused acting in the public interest/can be classified as whistleblower’.²⁴ While the

2021 (‘Gucati Submissions’); Submissions in Respect of the Trial Panel Case Status Hearing Oral Order Number 3, KSC-BC-2020-07/F00301, 6 September 2021 (‘Haradinaj Submissions’).

¹⁹ Gucati Submissions, KSC-BC-2020-07/F00302, paras 11-23; Haradinaj Submissions, KSC-BC-2020-07/F00301, paras 40-46.

²⁰ KSC-BC-2020-07, 1 September 2021 Transcript, pp.466, 470-471, 473-474.

²¹ KSC-BC-2020-07, 1 September 2021 Transcript, pp.460-461, 465-466.

²² Defence Pre-Trial Brief on behalf of Hysni Gucati, KSC-BC-2020-07/F00258, 12 July 2021, Confidential, para.75.

²³ See KSC-BC-2020-07/F00268/COR/A06; See also Publicly Redacted Version of the Corrected Version of Application for the Recusal of the President of the Specialist Chambers, Judge Ekterina Trendifilova [sic], and the Vice President of the Specialist Chambers, Judge Charles L. Smith III, Presiding Judge of Trial Panel II, KSC-BC-2020-07/F00268/COR/RED, paras 71-74.

²⁴ See ‘Summary of Facts And Circumstances To Which Witness Will Testify’ in the Defence Submissions on Witnesses in relation to Witness 17.

Trial Panel does not require expert advice in order to qualify alleged factual circumstances under the applicable legal provisions, pursuant to Rule 149 the SPO will make any necessary submissions in relation to this matter following the submission of the expert report, which is due by 1 October 2021.²⁵

Witness 19

16. Witness 19's expected testimony, purportedly relating to the Kosovo Police receiving instructions 'from the Kosovo Special Prosecution Office not to investigate the deliveries',²⁶ should also not be authorised on grounds of irrelevance, in particular considering that the KSC has jurisdiction over these criminal proceedings,²⁷ and that under Article 35(1) and (2) the SPO has the authority and responsibility to investigate crimes falling within the KSC's jurisdiction. As with Witnesses 11, 15, 16 and 18, there is no indication that Witness 19 has any personal knowledge of any information specific to the Accused or any specialised knowledge about the context of this particular case.²⁸

B. The Trial Panel should not authorise certain testimony by Witnesses 1, 3, 9, 12 and 14

17. The Defence has submitted that intends to call Witnesses 1, 3, 9, 12 and 14 to address various issues, including the following issues which are irrelevant to the charges: (i) whether or not the SPO sought, or was able to, retrieve all copies of the Three Batches;²⁹ (ii) steps which may or may not have been taken by the SPO in the

²⁵ KSC-BC-2020-07, 2 September 2021 Transcript, p.603.

²⁶ See 'Summary of Facts And Circumstances To Which Witness Will Testify' in the Defence Submissions on Witnesses in relation to Witness 19.

²⁷ See Public Redacted Version of Decision on Preliminary Motions, KSC-BC-2020-07/F00147/RED, 8 March 2021, paras 25-34, which has not been appealed in relation to the findings on jurisdiction; See also Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021.

²⁸ See *Bemba et al.* Decision, para.9.

²⁹ See 'Summary of Facts And Circumstances To Which Witness Will Testify' in the Defence Submissions on Witnesses in relation to Witness 1, stating '[h]as copies of some material – SPO has never attempted to retrieve material from him'.

context of its investigation into how the Three Batches reached the KLA WVA,³⁰ and (iii) the manner in which the arrest of the Accused and/or search and seizure which took place on the same day was conducted.³¹ None of the latter issues are relevant to the charges against the Accused.

18. In particular, the manner in which the SPO conducted its investigation, including into how the Three Batches may have reached the KLA WVA, is not on trial; the Accused's actions themselves are.³² Further, the Defence has not raised any relevant alleged irregularities in the arrest or search and seizure operations, or articulated any grounds as to why any evidence obtained during such operations is inadmissible.

19. Authorising the Defence to elicit this proposed evidence would not assist the Trial Panel in its determination of the charges. Rather, it would unnecessarily prolong the proceedings, placing an unnecessary strain on institutional resources. Accordingly, the Trial Panel should not authorise testimony from Witnesses 1, 3, 9, 12 and 14 on such matters.

20. Further, the Defence should be cautioned that no testimony on irrelevant matters will be authorised from any other witness not specifically included in the Requests, either. In this regard, the SPO notes that, while the Defence Provisional Witness Lists refer to 'public interest' as an issue which sixteen Defence witnesses³³ would testify about, no specific reference to 'public interest' is contained in the

³⁰ See the 'Summary of Facts And Circumstances To Which Witness Will Testify' in the Defence Submissions on Witnesses in relation to Witness 3, stating '[n]o contact from SPO investigating footage of second drop off', and Witnesses 9 and 14, stating "[n]o contact from the SPO to investigate'.

³¹ See the 'Summary of Facts And Circumstances To Which Witness Will Testify' in the Defence Submissions on Witnesses in relation to Witness 12, stating '[p]resent on 25 September 2020 – the SPO officers armed with automatic weapons with fingers on the triggers'.

³² See also KSC-BC-2020-07, 1 September 2021 Transcript, pp.444-447.

³³ Witnesses 1-8, 10, 12-18.

summary of facts and circumstances for thirteen³⁴ of these sixteen witnesses in the Defence Submissions on Witnesses.

21. Issuing the ruling requested in the Second Request at this stage of the proceedings, when the Defence has already been given the opportunity to make submissions on the purported relevance of the testimony of these witnesses to the charges against the Accused,³⁵ would ensure clarity in advance of the start of the Defence case and allow the Parties to focus their investigations and examinations purely on issues relevant to the proceedings.

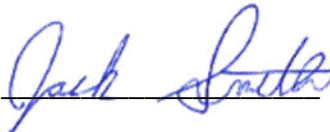
IV. CLASSIFICATION

22. Pursuant to Rule 82(4), this filing is confidential since it refers to filings bearing the same classification. The SPO has not referred to any Defence witnesses by name or provided any information which could identify these witnesses in this filing. Accordingly, the SPO would not oppose the reclassification of the filing to public should the Trial Panel deem it appropriate to do so.

V. RELIEF REQUESTED

23. For the foregoing reasons, the SPO asks that the Trial Panel grant the Requests.

Word count: 2558



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³⁴ Witnesses 1-8, 10, 12-13.

³⁵ See Order, KSC-BC-2020-07/F00267, paras 12, 34(e); Defence Submissions on Witnesses; See also KSC-BC-2020-07, 1 September 2021 Transcript, pp.460-466, 470-474.

Wednesday, 15 September 2021
At The Hague, the Netherlands