



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: 27 September 2021

Language: English

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Order on Rule 117 Defence Motions

Specialist Prosecutor

Jack Smith
Matthew Halling
Valeria Bolici
James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees
Huw Bowden

Counsel for Nasim Haradinaj

Toby Cadman
Carl Buckley



I. PROCEDURAL BACKGROUND

1. On 1 and 2 September 2021, the Trial Panel (“Panel”) held a Trial Preparation Conference (“Conference”) in accordance with Rule 116(2) of the Rules. During that Conference, in accordance with Rule 117(2), the Panel ordered the Parties to file any Rule 117 motion no later than 17 September 2021.¹
2. On 17 September 2021, the Gucati Defence filed a motion to challenge the admissibility of certain proposed Prosecution exhibits (“Gucati Motion”).²
3. On 18 September, one day after the prescribed time limit, the Defence of Mr Haradinaj filed an application to have certain proposed Prosecution exhibits ruled inadmissible (“Haradinaj Motion”).³
4. On 24 September 2021, the Specialist Prosecutor Office (“SPO”) responded to both of these motions (“Response”).⁴

II. SUBMISSIONS

5. In their respective Motions, both Defence object to the admissibility of certain documents appearing on the SPO’s exhibit list, namely, declarations prepared by two of the SPO’s witnesses W04841 and W04842 (“Witnesses”).⁵ While the Haradinaj Motion is based on Rule 117, the Gucati Motion relies on Rule 138(1) of the Rules.⁶

¹ Order setting deadline for submissions of Rule 117 motions, 2 September 2021, p. 603, line 21 to p. 604, line 1.

² F00317, Gucati Defence, *Motion to Challenge the Admissibility of Evidence Pursuant to Rule 138(1)* (“Gucati Motion”), 17 September 2021, confidential.

³ F00318, Haradinaj Defence, *Rule 117(2) Application to Have the Evidence of SPO Witnesses Ruled Inadmissible* (“Haradinaj Motion”), 18 September 2021, confidential.

⁴ F00322, SPO, *Prosecution Consolidated Response to Defence Admissibility Challenges* (“Response”), 24 September 2021, confidential.

⁵ Gucati Motion, paras 1, 20, 48-49; Haradinaj Motion, paras 4, 45-46.

⁶ Gucati Motion, paras 1-2; Haradinaj Motion, para. 3.



6. In its Response, the SPO submits that the Motions are premature and speculative, and should therefore be rejected.⁷

III. APPLICABLE LAW

7. Rule 117(2) of the Rules provides as follows:

At the Trial Preparation Conference and after having heard the Parties, the Panel shall set a time limit for any motions to be made prior to the opening of the case. Such motions shall be determined prior to the opening of the case unless the Panel, for good cause, decides to defer the determination. A Party failing to raise objections or to make requests prior to trial within the time limit set by the Presiding Judge shall be precluded from raising such objections or requests, unless good cause is shown.

8. The purpose of this provision is to ensure that issues that can be effectively dealt with before the commencement of trial are addressed at that stage to ensure that the trial itself is conducted expeditiously and focuses on issues to be decided as part of that trial. Rule 117, therefore, does not create an independent type of relief that would provide a Party with the means to ask for a type of remedy not otherwise provided under the Law, the Rules, or other instruments and sources applicable before this court.

IV. DISCUSSION

9. At the outset, the Panel observes that the Haradinaj Defence provided no justification for the belated filing of its Motion and did not formally seek leave to submit it out of time. Despite the Haradinaj Defence's failure to comply with the Rules, in accordance with Rule 9(5) of the Rules and to preserve the interests of the Accused, the Panel *proprio motu* recognises the Haradinaj Motion as having been validly filed. The Trial Panel reminds the Haradinaj Defence, once again, that it must

⁷ Response, paras 1, 16.



comply with set time- and page-limits unless leave has been sought and good cause for an extension has been shown. The Panel cautions the Haradinaj Defence – and the Parties generally – that violations of time lines or word counts could result in the dismissal of a filing or in an order to re-file.

10. In the present case, the Defence for both Mr Gucati and Mr Haradinaj are asking the Panel to exclude – or not to permit the admission – of certain declarations prepared by two Prosecution Witnesses.

11. As a preliminary matter, the Panel notes that the Defence did not object to the Witnesses being called to give evidence. Nor did the Defence object to the relevance of their proposed evidence. Instead, the Motions are based on the suggestion that the proposed evidence is objectionable on the grounds that: (i) it is in whole or in part impermissible hearsay (in contravention, it is argued, of Rules 153-155 of the Rules); (ii) the admission of such evidence would deprive the Defence of effective confrontation in respect of the substance of that evidence; and/or (iii) the information on which the declarations of the two witnesses rely pertain to undisclosed material not available to the Defence.⁸

12. The SPO has indicated that one of the two Witnesses (W04841) would be called to give evidence pursuant to Rule 154 of the Rules.⁹ The other witness (W04842) is seemingly intended to be called *viva voce*. Their declarations have, therefore, not yet been offered in evidence. Given the SPO's indication that both witnesses will give live evidence in court, it is apparent that an offer to admit their declarations, if one is made in respect of both of them, would come at the time when the witnesses give evidence in court before the Panel. At that point, the Defence would have the opportunity to object to the admissibility of these declarations (including on the grounds identified

⁸ Gucati Motion, paras 4-5, 16-20, 27-29, 30-33; Haradinaj Motion, paras 6, 15-16, 18, 20, 36, 38-39, 41, 45.

⁹ See F00291, SPO, *Prosecution Request for Admission of Items Through the Bar Table with Confidential Annex 1*, 24 September 2021, fn 39; Transcript, 8 September 2021, p. 700, line 17.



in their motions) or to ask that decision on their admission be deferred until after cross-examination if questioning might affect the admissibility of the declarations. To that extent, the Motions are, therefore, premature. Furthermore, many of the issues raised in the Motions, such as the accuracy and reliability of assertions made by the witnesses, are suitable subjects for cross-examination. The Defence will have ample opportunity to cross-examine both witnesses on their evidence.

13. Insofar as the Motions are regarded as supplementing or adding to objections articulated in the Defence Pre-Trial Briefs in respect of the admissibility of proposed Prosecution exhibits,¹⁰ they are out of time. Leave has not been sought for an extension of time, nor has good cause shown that would justify the Panel regarding these submissions as forming a valid part of the Defence Pre-Trial Briefs.

14. Based on the above, the Panel finds the two Motions to be premature insofar as they seek the non-admission of the proposed witnesses' declarations and out of time insofar as they purport to add or supplement objections raised by the Defence in their Pre-Trial Briefs.

V. CLASSIFICATION

15. The Panel notes that the Defence Motions and the Response were filed confidentially.

16. Noting that the Gucati Defence filed a public redacted version of its Motion (F00317) on 27 September 2021, the Panel orders the Haradinaj Defence to file a public redacted version of its Motion (F00318) by 11 October 2021, removing any information revealing: (i) the name, identity or other personal details of SPO staff members (who

¹⁰ See F00258/A02, Gucati Defence, *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, p. 2 (objecting to 084008-084010), p. 3 (objecting to 084015-084026), p. 10 (objecting to 090142-090143), p. 13 (objecting to 091791-091792), p. 17 (objecting to 091927-091930), however containing no objection to 095162-095239, 095533-095602, 095603-095653 listed in Gucati Motion, para. 1.



are not witnesses in this case) and of any other (potential) witnesses; (ii) organisations or entities cooperating with the SPO on a confidential basis; (iii) documents or excerpts thereof disclosed to the Defence on a confidential basis; and (iv) the content of any other documents subject to confidentiality pursuant to Specialist Chambers orders.¹¹

17. Noting the SPO's submissions regarding the classification of its Response,¹² the Panel directs the Registrar to reclassify it as public.

VI. DISPOSITION

18. For these reasons, the Panel:

- a. **DISMISSES** the Gucati Motion and the Haradinaj Motion;
- b. **ORDERS** the Haradinaj Defence to submit a public redacted version of its Motion (F00318) by **11 October 2021**; and
- c. **DIRECTS** the Registrar to reclassify as public the Response (F00322).

Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 27 September 2021
At The Hague, the Netherlands

¹¹ F00264, Pre-Trial Judge, Order on Reclassifications and Redacted Versions, 15 July 2021, para. 10.

¹² Response, para. 15.