

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 Christophe Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

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Response to Prosecution Requests in Relation to Defence Witnesses

Specialist Prosecutor

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

I. INTRODUCTION

1. On 15 September 2021, the Accused received notification of the Prosecution's request that the Trial Panel should: (i) order the Defence to strike five witnesses off the Defence Provisional Witness List; 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 ('Request')¹.
2. The Accused responds to the Request as follows.

II. LAW

3. Article 40(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office Law No.05/L-053 ('Law') provides that the Trial Panel may give directions for the conduct of the fair and impartial proceedings "in accordance with the Rules of Procedure and Evidence". Any procedures and modalities adopted or directions made must be "with full respect for the rights of the accused".
4. Rule 95(5) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('Rules') provides for the *voluntary* provision of a defence Pre-Trial Brief indicating, *inter alia*, 'a list of potential witnesses the Defence intends to call, *without prejudice to any subsequent amendment or filing thereof* [emphasis added].

¹ Prosecution requests in relation to Defence witnesses, 15 September 2021, Confidential

5. Rule 104(1) requires disclosure by the Defence *in advance of the opening of the case* of names and current contact information of witnesses the Accused intends to rely upon in relation to alibi or any other grounds excluding criminal responsibility.
6. However, Defence disclosure of the proposed content of a witness' evidence, in the form of a witness statement, exhibit and other documents is not required until (i) the Defence has chosen to present a case and (ii) before the opening of the Defence case – Rule 104(5).
7. Pursuant to Rule 119(1), the Defence are entitled to wait until the close of the Prosecutor's case (or where after the closing of the Prosecutor's case, the Defence file a motion to dismiss any or all of the charges in the Indictment under Rule 130, a decision is made pursuant to that motion) before deciding whether a Defence case will be presented.
8. Where a decision is made by the Defence to present a case under Rule 119(1) and notified the Panel under Rule 119(1) accordingly, the Panel shall *then* order, pursuant to Rule 119(2), the filing of:
 - (a) The list of witnesses the Defence intends to call, including:
 - (i) The total time estimated for presentation of the Defence's case;
 - (ii) The total number of witnesses, including the number of witnesses who are expected to testify for each Accused and on each charge;

- (iii) The name or pseudonym of each witness;
- (iv) A summary of the facts on which each witness is expected to testify;
- (v) The allegations in the indictment on which each witness is expected to testify, including specific references to charges and relevant paragraphs of the indictment;
- (vi) An indication whether the witness will testify in person or give evidence through other means as provided for by the Rules; and
- (vii) The estimated length of time required for the direct examination of each witness; and

(b) The list of proposed exhibits the Defence intends to present stating, where possible, any objection of the Specialist Prosecutor regarding authenticity.

9. Rule 119(3) provides that within seven days of the Defence's filings under paragraph 119(2), where the Defence has previously notified the Panel of its decision to present a case under Rule 119(1), the Panel shall hold a Defence Preparation Conference, during which, after having heard the Parties, the Panel may:

- (a) Determine the number of witnesses the Defence may call and instruct the Defence to remove repetitive witnesses;
- (b) Determine the time available for the Defence for presenting evidence;

(c) Request the Defence to shorten the estimated length of the direct examination of any witness identified on the Defence Witness List filed under paragraph (2)(a);

(d) Verify that disclosure obligations of the Parties have been met; and

(e) Give any further directions as necessary to ensure a fair and expeditious trial.

10. Rule 118 provides for a similar procedure for the Prosecution, including verification that disclosure obligations have been met, to take place before the opening of the Prosecution case. In the present case, there are a number of outstanding matters arising from the Specialist Prosecutor's Preparation Conference and the orders that arose out of that conference which are yet to be determined (such as the application to exclude the evidence of Prosecution witnesses).

11. It is to be noted that whilst Rule 118 provides for the power at the Specialist Prosecutor's Preparation Conference to determine the number of witnesses the Specialist Prosecutor may call, to instruct the Prosecutor to remove repetitive witnesses, to determine the time available to the Specialist Prosecutor for presenting evidence, and to request the Prosecutor to shorten the estimated length of the direct examination of any witness identified on the mandatory Specialist Prosecutor Witness List filed under Rule 95(4)(b), there are no such powers in Rule 118 in relation to any voluntary 'Provisional Witness List' indicated by the Defence under Rule 95(5)(c) without prejudice to any subsequent amendment or filing thereof.

12. Rule 127(1) provides that “each party is *entitled* to present evidence relevant to the case” [emphasis added].
13. “Relevance to the case” is to be interpreted broadly².
14. Relevance to the case requires only a nexus between an allegation or issue in the trial³.
15. Relevance to the case is broader than the temporal scope of the indictment, although a temporal connection (before or after the events forming part of the charges) will be sufficient⁴.
16. Rule 138(1) does provide the Trial Panel with a discretion to exclude relevant evidence where its probative value is outweighed by its prejudicial effect, “essentially copying from the common law principle”⁵.
17. It is well-established that the common law discretion to exclude relevant evidence, which has been ‘copied’ by the international(ised) criminal tribunals and by the KSC, is to be restricted in its application to evidence upon which the Prosecution proposes to rely⁶. The power is based on a judge’s duty in a criminal trial to ensure that a defendant receives a fair trial⁷.

² IA005-F00008, Decision on the Appeals Against Disclosure Decision, Panel of the Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 42

³ Archbold International Criminal Courts: Practice, Procedure and Evidence, Karim Khan QC & Rodney Dixon QC, 5th Edition, § 9-65

⁴ IA005-F00008, IA005-F00008, Decision on the Appeals Against Disclosure Decision, Panel of the Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 43

⁵ Archbold International Criminal Courts: Practice, Procedure and Evidence, Karim Khan QC & Rodney Dixon QC, 5th Edition, § 9-55

⁶ *Lobban v Regina* [1995] 2 Cr App R 573 at page 585B-C

⁷ *Lobban v Regina* [1995] 2 Cr App R 573 at page 584A-C, quoting with approval Keane, *The Modern Law of Evidence* (3rd ed., 1994): “...the discretion may only be exercised in relation to evidence tendered by the prosecution”.

18. That the discretion in Rule 138(1) to exclude relevant evidence, on the basis that its probative value is outweighed by its prejudicial effect, is to be restricted in application to prosecution evidence only, is harmonious with the burden of proof falling upon the Prosecution and not upon the Accused (who is presumed innocent and bears no persuasive burden) (see Article 21(3) and Rules 158(3)).

III. SUBMISSIONS

19. The Request by the Prosecutor is premature.

20. The Accused has not notified the Panel under Rule 109(1) that it intends to present a case.

21. The Accused is entitled to wait until the close of the Prosecutor's case (or the determination of any motion to dismiss after the close of the Prosecutor's case) before so deciding (and thereafter notifying the Panel).

22. The procedures for Defence disclosure under Rules 104(5) and 119 have accordingly not yet been reached.

23. No Defence Witness List has been – or has been required to be - filed under Rule 119(2)(a) (as the Prosecution appears to accept by acknowledging that the voluntary indication of a list of potential witnesses the Defence intends to call, filed under Rule 95(5)(c) is *provisional* only).

24. Accordingly, the powers under Rule 119(3) to *inter alia* determine the number of witnesses the Defence may call, instruct the Defence to remove repetitive measures, determine the time available for the Defence for presenting evidence

and request the Defence to shorten the estimated length of the direct examination of any witness identified on the Defence Witness List filed under Rule 119(2)(a) are not yet available to the Trial Panel.

25. Not only is the Prosecution case yet to close – it has not even commenced.
26. There are a number of outstanding matters, not least an application to exclude Prosecution evidence under Rule 138(1) and challenges to disclosure. Further submissions in relation to the elements of offences and modes of liability (including, but not exclusively on the specific questions relating to the offence of obstruction and the relationship between the modes of liability charged which were deferred during oral proceedings) are not presently due.
27. The ‘scope of the charges’, the elements thereof and of any defences, are yet to be established. The extent to which there may be grounds to apply for a bar or stay of proceedings, and the nature of any conditions as there may be for such a remedy, remain to be determined.
28. The case against the Accused has not crystallised (and it will not until the close of the Prosecution case). Defence expert evidence is outstanding. Defence investigations are ongoing.
29. It is both oppressive and inappropriate to invite the Trial Panel to subvert the clear staged process set out in the Rules by requesting the ‘striking off’ of potential Defence witnesses from a list of potential witnesses *indicated* as part of voluntary disclosure under Rule 95(5)(c), expressly stated according to Rule 95(5)(c) to be without prejudice to any subsequent amendment or filing, at this stage.

30. Neither authority relied upon by the Prosecution supports the proposition that, despite the clear staged process set out in the Rules, the Trial Panel can consider the ‘striking off’ of potential Defence witnesses from a list of potential witnesses *indicated* as part of voluntary disclosure under Rule 95(5)(c), expressly stated according to Rule 95(5)(c) to be without prejudice to any subsequent amendment or filing, at this stage.
31. In *Prosecutor v Bemba et al*, ICC-01/05-01/13, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, Trial Chamber VII, 4 February 2016, Public, the decision of the Trial Chamber was given after the close of the Prosecution case⁸, and after the Defence team had provided its final list of witnesses and anticipated testimony summaries⁹.
32. Similarly, in *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”, Appeals Chamber, 1 July 2008, Public, the decision of the Trial Chamber was made after the close of the Prosecution case¹⁰, and after the submission of the ICTY Rule 65^{ter} (G)¹¹ list of witnesses (which, like the KSC Rule 119(2) list of witnesses, was only required in the ICTY between the close of the prosecution case and the commencement of any defence case).
33. The Trial Panel should, accordingly, reject the oppressive, inappropriate and novel invitation from the Prosecutor to subvert, without any authority, the

⁸ *Prosecutor v Bemba et al*, ICC-01/05-01/13-T-37-RED-ENG, Transcript pages 54/61, 55/61 and 58/61; and *Prosecutor v Bemba et al*, ICC-01/05-01/13-T-38-ENG, Transcript page 31/67

⁹ *Prosecutor v Bemba et al*, ICC-01/05-01/13, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, Trial Chamber VII, 4 February 2016, Public at paragraph 2

¹⁰ *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”, Appeals Chamber, 1 July 2008, Public at paragraph 2

¹¹ ICTY Rules of Procedure and Evidence IT/32/Rev.41, 28 February 2008

clear staged process in the Rules, and the rights of the Accused set out therein, by 'striking off' potential Defence witnesses and making determinations about the scope of other potential Defence witnesses' potential evidence prior not only to the closing of the Prosecution case, but prior even to the commencement of the Prosecution case.

34. To rule otherwise risks a chilling effect on voluntary defence disclosure and constructive defence participation in case management.
35. To assist case management, the Accused has voluntarily provided an indication of the relevance of the potential witnesses it has indicated it intends to call at this stage, pursuant to Rule 95(5)(c) of the Rules and to the further request of the Trial Panel¹².
36. In accordance with Rule 95(5)(c) the same was indicated without prejudice to any subsequent amendment or filing.
37. In the case of each potential witness, and in order to assist case management, the Accused has therein voluntarily indicated a nexus between an allegation or issue in the trial as identified in the Defence Pre-Trial Brief on behalf of Hysni Gucati¹³, in oral submissions before the Pre-Trial Judge and the Trial Panel, and in further written submissions before the Trial Panel¹⁴.
38. In accordance with Rule 95(5)(c) the same were indicated without prejudice to any subsequent amendment or filing.

¹² F00258/A01, Annex 1 to Defence Pre-Trial Brief on behalf of Hysni Gucati: List of Potential Witnesses the Defence Intends to Call (Without Prejudice to Any Subsequent Amendment or Filing Thereof), Gucati, 12 July 2021, Confidential; F00288/A01, Annex 1 to Written Submissions for the Trial Preparation Conference and Related Matters, Gucati, 27 August 2021, Confidential.

¹³ F00258

¹⁴ Including, but not exclusively, F00302, Written Submissions in accordance with the Third Oral Order made on 2 September 2021, Gucati, 6 September 2021, Public

39. No list of witnesses under Rule 119(2)(a) has yet been filed. Any voluntary indication given (without prejudice) previously is subject thereto.
40. No summary of the facts on which each witness is expected to testify under Rule 119(2)(iv) has yet been filed. Any voluntary indication given (without prejudice) previously is subject thereto.
41. If, after the close of the Prosecution case (or after any decision pursuant to an application to dismiss under Rule 130 after the close of the Prosecution case), the Defence decides to present a case and notifies the Panel under Rule 119 accordingly, the Defence will file a Rule 119(2) list of witnesses the Defence intends to call, including, *inter alia*, a summary of the facts on which each witness is expected to testify, and the allegations in the indictment on which each witness is expected to testify, including specific references to charges and relevant paragraphs of the indictment (under Rule 119(2)(a)).
42. After the close of the Prosecution case (or after any decision pursuant to an application to dismiss under Rule 130 after the close of the Prosecution case), and if the Defence decide to present a case and notify the Panel under Rule 119(1) accordingly, prior to the opening of the Defence case, the Defence will *inter alia* provide to the Specialist Prosecutor the statements, if any, of all witnesses the Defence intends to call at trial, and all statements taken, which the Defence intends to present at trial in accordance with Rule 104(5).
43. No witness statement has yet been provided to the Specialist Prosecutor by the Accused pursuant to Rule 104(5) (the statement referred to at paragraph 14 of the Request was not provided by co-Accused pursuant to Rule 104(5) but in relation to an application under Rule 20).

44. Any voluntary indication given, without prejudice, previously as to the anticipated content of a witness' evidence is subject to the disclosure of a statement from the witness his/herself under Rule 104(5).
45. The Accused maintains that relevance for each potential witness is already established, as voluntarily indicated previously.
46. If following any Defence disclosure required under Rules 119 and 104 the Prosecution still maintain objections on the grounds of relevance, the Accused will at that stage (that is, at any Defence Preparation Conference held under Rule 119) deal with such objections in detail, by reference to the Rule 119 list and summaries and witness statements provided under Rule 104.
47. The Prosecution has repeatedly advocated an approach to relevance which is inappropriately narrow¹⁵. In defiance of the decisions of the Panel of the Court of Appeals and the Trial Panel, it continues to do so¹⁶, including in the Request itself. Perhaps by the time that proceedings reach any Defence Preparation Conference, the SPO may have reflected thereon.
48. The Accused will maintain that at any Defence Preparation Conference that the discretion to exclude evidence under Rule 138(1) is restricted in its application to Prosecution evidence, for the reasons set out above.
49. Neither authority referred to by the Prosecution supports the contention that the discretion to exclude relevant evidence in Rule 138(1) applies to defence evidence.

¹⁵ IA005-F00008, Decision on the Appeals Against Disclosure Decision, Panel of the Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 47; F00304, Order on the Updated Rule 102(3) Detailed Notice, Trial Panel II, 7 September 2021, Public at paragraph 18

¹⁶ F00316, Confidential redacted version of Prosecution Challenges to disclosure of items in updated Rule 102(3) Notice with one confidential annex, Specialist Prosecutor, 17 September 2021, Confidential at paragraph 14, first sentence

50. In *Prosecutor v Bemba et al*, ante, the evidence of D21-001 was held to be inadmissible on the basis that it was irrelevant¹⁷.

51. Indeed, confirming that the Defence were entitled to a degree of deference in the selection and presentation of their evidence, the Trial Chamber VII refused to deprive the Kilolo defence of the opportunity to present good character evidence, even though it was not persuaded that the evidence had ‘much – if any – relevance’.

52. In *Prosecutor v Prlić et al*, ante, the Trial Chamber had not excluded relevant Defence evidence but had limited the amount of time allowed to present it¹⁸.

53. If the evidence is relevant, the Defence is entitled to present it under Rule 127(1), however ‘much relevance’ the Panel is persuaded the evidence has or otherwise.

54. Although Rule 119 does provide for the power to restrict the amount of time allowed to present it in certain circumstances, the discretion to exclude relevant evidence in Rule 138(1) does not apply to defence evidence.

IV. CONCLUSION

55. The Prosecutor concludes that assenting to the Request ‘would ensure clarity in advance of the start of the Defence case’.

56. If the purpose of the Request is genuinely to bring clarity in advance of the start of the Defence case, any clarity required can be brought to bear only in

¹⁷ *Prosecutor v Bemba et al*, ante (at paragraph 11)

¹⁸ *Prosecutor v Prlić et al*, ante (at paragraph 47)

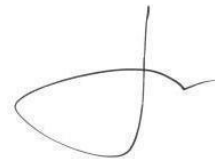
accordance with the Rules with full respect for the rights of the accused: that is, after the close of the Prosecution, following notification, if any, by the Accused that he intends to present a case under Rule 119(1) and at a Defence Preparation Conference held under Rule 119 prior to commencement of the Defence case.

57. Any ruling on a 'Defence Provisional Witness List', indicated without prejudice to any subsequent filing or amendment and prior to the opening of the Prosecution case, can itself only be provisional and subject to the right of the Accused, following notification, if any, by the Accused that he intends to present a case under Rule 119(1) after the close of the Prosecution case, to file (i) a Rule 119(2) list of witnesses with *inter alia* a summary of the facts on which each witness is expected to testify; and (ii) to provide to the Prosecutor statements of witnesses the Defence intend to call under Rule 104(5). A provisional ruling in these circumstances can only bring about less clarity, not more.
58. Moreover, the Request is oppressive and inappropriate, amounting to an invitation to the Trial Panel to subvert the clear staged process set out in the Rules and the rights of the Accused protected therein. It forms part of an overall assault on the rights of the Accused by the Prosecution and a deliberate strategy to curtail the right of the Accused to challenge the Prosecution case and present his defence.
59. For the reasons set out above, the Trial Panel should refuse the Request.

V. CLASSIFICATION

60. This filing is classified as confidential because it relates to the Request which bears the same classification. The Defence does not oppose the reclassification of the filing to public.

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JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

27 September 2021

Cardiff, UK