

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 Guenaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 27 September 2021

Language: English

Classification: Confidential

Defence Response to Prosecution requests in relation to Defence witnesses

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I. INTRODUCTION

1. On 15 September 2021 the Specialist Prosecutor's Office ("SPO") filed its submissions concerning the defence witnesses,¹ and requested that the Trial Panel should: (i) order the Defence to strike five witnesses off the Defence Provisional Witness Lists² ('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').³
2. It is the Defence submission that these requests should not be granted as to do so would result in the Defence not being given the opportunity to present evidence that is relevant to proceedings.
3. Both the expected testimony of the witnesses in the First and Second Requests are relevant to the facts and circumstances of this case, and thus entirely capable of assisting in the ascertainment of the truth.⁴ The inclusion of such testimony is therefore in keeping with furthering the interests of justice.

¹ KSC-BC-2020-07/F00312, *Prosecution Requests in Relation to Defence Witness, Confidential*

² 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

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

⁴ See Rule 143(4).

II. PRELIMINARY OBSERVATIONS

4. As a preliminary point, the Haradinaj Defence takes note of, and fully endorses the position taken by the Gucati Defence in its Response to the **Prosecution Requests in Relation to Defence Witnesses**.⁵
5. Reference is made to Rule 119(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”),⁶ whereupon the Defence is entitled to wait until the close of the Prosecution Case, and following a decision by the Trial Panel in accordance with Rule 130 if such an application to dismiss has been filed, to decide whether it intends to present a defence case.
6. Pursuant to Rule 119(2), the Trial Panel shall order the Defence, if it intends to present a defence case,
 - 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;*

⁵ At the time of filing a case reference for *Gucati Response to Prosecution Requests in Relation to Defence Witnesses*, Confidential.

⁶ KSC-BD-03/Rev3/2020

- 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.*

7. Rule 119(3) provides that:

“(119(3)) Within seven (7) days of the Defence’s filing under paragraph (2), 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.”*
8. As noted by the Gucati Defence, Rule 127(1) clearly provides that each party is entitled to present evidence relevant to the case. There is no need here to duplicate the submissions of the Gucati Defence on the broad interpretation of ‘relevance’. The Haradinaj Defence adopts those submissions and emphasises that the Rule 138(1) power to exclude is based on its prejudicial value outweighing its probative value aimed towards the presentation of evidence by the Prosecution who bears the burden of proving its case beyond reasonable doubt.
9. The application by the SPO is premature. As noted by the Gucati Defence, there remain matters outstanding such as the admissibility of Prosecution evidence, the ‘scope of the charges’, and Defence investigations remain ongoing.
10. The Defence has provided a provisional witness list. That list is likely to change as the Prosecution determines the case it intends to present.
11. The appropriate time for making a proper determination, for case management purposes and for determination of relevance is at the close of the

Prosecution case once the Defence indicates to present a case pursuant to Rule 109(1).

III. BACKGROUND

12. On 12 July 2021, the Defence provided the Defence Provisional Witness Lists.⁷
13. 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 respect of the specific facts and circumstances said to be relevant to the issue identified by the Defence as ‘public interest.’⁸
14. On 27 August 2021, the Defence filed the submissions on witnesses requested in the Order.⁹

⁷ 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’,

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.

15. On 1 September 2021, the 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
16. 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 and this was indeed filed on 15 September 2021.¹²

IV. SUBMISSIONS

17. The SPO premises its submissions at paragraph 2 on the contention that “*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*”.¹³
18. Such a contention is wholly rejected.

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

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

¹² KSC-BC-2020-07/F00312, 15 September 2021, “Prosecution requests in relation to Defence witnesses”

¹³ KSC-BC-2020-07/F00312, para 2

19. Further, it ought to be borne in mind that the SPO is presenting two witnesses who cannot give evidence in respect of issues that are key to the trial given their inability to answer relevant questions that may be asked.¹⁴
20. The same cannot be said for the proposed Defence witnesses, each and every one of whom can, and will, give evidence in respect of pertinent issues arising in the trial.
21. The fact that the SPO do not accept that the issues being raised by the Defence are relevant does not mean that those issues are irrelevant. It has been a common theme throughout these proceedings that the SPO objects to matters being raised as being improperly raised or irrelevant to the case it seeks to present.
22. The opposition of the SPO to the witnesses as per their submission¹⁵ is simply a further extension of the reluctance to deal with what the Defence submits to be clear and obvious irregularities with the investigation and the case as a whole.
23. The fact that the SPO is reluctant to have any evidence in terms of the investigation does, in the Defence submission, provide further weight to the

¹⁴ KSC-BC-2020-07/F0038, *Rule 117(2) Application to have the Evidence of SPO Witnesses Ruled Inadmissible*, Confidential

¹⁵ KSC-BC-2020-07/F00312

argument that the evidence to be given by these witnesses is probative and relevant.

24. Further, and again at paragraph 2, the SPO submits that: *“[A]uthorising the presentation of such evidence would not be conducive to the efficiency of proceedings and would constitute an undue consumption of time and resources, thereby running contrary to the interests of justice”*.
25. It is respectfully submitted that this is merely an attempt to prevent the Defendant from putting his case.
26. Time, resources, and the efficacy of proceedings can be a relevant consideration, but not where it undermines the Defendant’s ability to present his case; if the Defendant is prevented from calling witnesses as proposed by the SPO, that ability is undermined, and in doing so, his fair trial rights violated.
27. Each and every witness that is proposed by the Defence is to give relevant and probative value and thus the submissions of the SPO ought to be dismissed.

The Trial Panel should not order the Defence to strike Witnesses 11, 15, 16, 18 and 19 off the Defence Provisional Witness Lists

28. The Trial Panel should not order the Defence to strike Witnesses 11, 15, 16, 18 and 19 off the Defence Provisional Witness Lists. Collectively, their expected testimony is entirely relevant to the facts and circumstances of this case. As such, the evidence we propose without question meets the relevance requirement provided for in Rule 138(1).
29. Whilst the Defence maintains the position, and endorses the approach of the Gucati Defence that the SPO application is improperly brought and is wholly premature, the Haradinaj Defence nonetheless takes this opportunity to demonstrate the nexus between the expected testimony of these witnesses and the material facts at issue. This is caveated on the basis that no decision has been taken as to whether a defence will be presented at this stage, as that depends on the presentation of the Prosecution case and whether it has met its burden.

Witness 11

30. The testimony of Witness 11 is entirely probative of salient issues in the case and the conduct of the Defendant. The circumstances of the arrest of the Defendant, including the conduct of armed SPO and EULEX officers, and the fact that an officer mentioned and/or spoke in Serbian are all significant trial

issues. Any reference to Serbia is probative of the underlying connection between the SPO's investigation and Belgrade – and a key issue that should be examined at trial.

31. Accordingly, given the issues relevant to this case, the proposed evidence is of direct relevance to the 'Public Interest' point that is being raised by the Defendant.

32. Furthermore, the expected testimony of Witness 11 is probative of the nature and demeanour of the Defendant, Mr. Haradinaj, upon arrest. Such testimony is thus entirely capable of assisting in the determination of the charges and should be authorised.

Witnesses 15, 16, 18

33. Witnesses 15, 16 and 18 are capable of presenting evidence relevant to the public interest defence. Witness 18 is an investigative journalist who has reported extensively on these matters and was questioned by the SPO as part of the investigation into the leaks. Witness 18 is capable of providing relevant testimony as to the nature and impact of the leaks, and whether the Defendant was acting in the public interest as a whistleblower.

34. Witnesses 15 and 16 are capable of presenting evidence relevant to the public interest defence. Both Witnesses 15 and 16 have been designated 'whistleblowers' for disclosures they have made in the past and in particular

the improper transfer of casefiles and protected witness details to Serbian officials. Their particular knowledge is relevant to the defence that the Defendant may seek to advance if it is determined that, pursuant to Rule 109(1), it will present a defence case.

35. Accordingly, given the issues relevant to this case, the proposed evidence of Witnesses 15, 16 and 18 are of direct relevance to the 'Public Interest' point that is being raised by the Defendant.

Witness 19

36. Witness 19's expected testimony, relating to the Kosovo Police receiving instructions "*from the Kosovo Special Prosecution Office not to investigate the deliveries,*"¹⁶ should be authorised as it is entirely relevant. It is accepted that the KSC has jurisdiction over these criminal proceedings,¹⁷ and that under Article 35(1) and (2) the SPO has the authority and responsibility to investigate crimes falling within the KSC's jurisdiction. However, Witness 19's expected testimony is probative of the fact that despite having the authority and responsibility, the SPO did not sufficiently investigate these crimes which they accept fall within the KSC jurisdiction.

¹⁶ KSC-BC-2020-07, 2 September 2021 Transcript, p.603

¹⁷ 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.

37. Furthermore, Witness 19's testimony will demonstrate that not only did the SPO not take adequate steps to investigate such crimes, but it also prevented the Kosovan police from assisting in any meaningful way – in turn actively thwarting the chances of any successful investigation. Witness 19, in his position as former Director of the Kosovo Police, holds specialised institutional knowledge that will assist with the context of this case, and further, given the evidence concerning the lack, or the prevention, of an investigation, goes to the defence of Entrapment and/or Public Interest.

The Trial Panel should authorise testimony by Witnesses 1, 3, 9, 12 and 14

38. The Defence has submitted that we intend to call Witnesses 1, 3, 9, 12 and 14 to address various issues which are asserted to be entirely relevant to the charges, and the defences to be raised, including: (i) whether the SPO sought, or was able to, retrieve all copies of the Three Batches;¹⁸ (ii) steps which may or may not have been taken by the SPO in the context of its investigation into how the Three Batches reached the KLA WVA;¹⁹ and (iii) the manner in which the arrest of the Accused and/or search and seizure which took place on the

¹⁸ See 'Summary of Facts and Circumstances To Which Witnesses 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.'

¹⁹ See the 'Summary of Facts and Circumstances to Which Witnesses Will Testify' in the Defence Submissions on Witnesses in relation to Witness 3, stating '[n]o contact from the SPO to investigate.'

same day was conducted.²⁰ All of these issues are relevant to the context concerning the charges against the Accused, and further, are relevant and therefore of probative value, in terms of the defence(s) to be raised.

39. Indeed, the manner in which the SPO conducted its investigation, including into how the Three Batches may have reached the KLA WVA, is very much a 'trial issue' as it is this that provides the context whereby the Defendant's actions occur. The fact that the SPO maintain that it is not an issue, is with respect, an irrelevance.

40. Any realisation by the SPO of their own investigatory shortcomings at the time, does not now make such issues irrelevant. The Defence has continually raised irregularities in the search and seizure operations, in addition to the woeful standard of the SPO investigation into the crimes. It is thus essential that these witnesses' testimony be authorised, so that they can be cross-examined on these issues at trial.

41. It is for these reasons, that this proposed evidence will assist the Trial Panel in its determination of the charges. Allowing the Trial Panel to have as much contextual evidence before them as possible, should in no way be seen as unnecessary prolonging of proceedings; but rather be understood as ensuring

²⁰ See the Summary of Facts and Circumstances to Which Witnesses 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.'

that the Trial Panel is adequately armed with all the relevant evidence necessary to be able to oversee expeditious trial proceedings. Accordingly, the Trial Panel should authorise testimony from Witnesses 1, 3, 9, 12 and 14 on such matters.

42. The Defence would confirm that none of the witnesses on the Defence Provisional Witness List will be providing irrelevant testimony, as the SPO wrongly asserts in their requests. It is true that on the Defence Provisional Witness List, sixteen Defence witnesses refer to 'public interest'; but each of these witnesses can comment and testify to various contextual aspects of public interest, either by virtue of being KLA WVA members (present at the time of the alleged crimes), or journalists who were present at the press conferences and subsequently reported on the crimes. Thus, the Defence remains as ever, focused purely on issues relevant to the proceedings.

V. CONCLUDING REMARKS

43. The SPO is viewing each witness in isolation, and further, viewing each witness through the lens of the offences indicted, rather than considering each witness in the context of the defence(s) that will be raised at trial.
44. The fact that a witness might not give evidence concerning an act of alleged disclosure for instance does not mean that the evidence that witness might

give is irrelevant, or lacks any probative value, particularly when the evidence is considered in terms of what will be raised by the Defendant.

45. It is submitted that this is the test, is the evidence of probative value in terms of the Defence(s) that are to be advanced. If the evidence is to support or supplement the defence(s) to be raised, then that evidence has probative value and accordingly, the submission of the SPO ought to be rejected.
46. In the same vein, as the SPO have been at pains to point out that evidence it seeks to submit through the Bar Table can be disregarded by the Trial Panel having heard and/or considered the same, the Trial Panel are equally able to disregard the evidence of a witness if, having heard that evidence, they do not deem it to be relevant.
47. To rule that the evidence cannot be adduced prior to it being heard is however, with respect, premature to such an extent that it is prejudicial and fundamentally undermines the fair trial rights of the Defendant(s).
48. It is submitted, as the Gucati Defence also notes, that the Request is oppressive. It is improperly brought as it seeks to circumvent the very clear procedures set out in the applicable legal and regulatory framework of the Specialist Chambers. Such an approach would fundamentally undermine the Defendant's right to a fair trial by seeking to curtail the presentation of a defence case.

VI. CLASSIFICATION

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

VII. RELIEF REQUESTED

50. For the foregoing reasons, the Defence invites the Trial Panel to refuse the request.

Word Count: 3,014 words



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