



**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:** 7 October 2021

**Language:** English

**Classification:** Public

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**Decision on the Defence Requests for Reconsideration of Decision F00328**

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**Specialist Prosecutor**

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**TRIAL PANEL II** (“Panel”), pursuant to Article 40(2) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 79 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 2 September 2021, during the Trial Preparation Conference, the Panel ordered the Parties to file any Rule 117 motion no later than 17 September 2021.<sup>1</sup>
2. On 17 and 18 September 2021, the Defence of Hysni Gucati (“Gucati Defence”)<sup>2</sup> and the Defence of Nasim Haradinaj (“Haradinaj Defence”)<sup>3</sup> filed motions (“Gucati Motion”, “Haradinaj Motion” and, collectively, the “Motions”) challenging the admissibility of declarations by SPO witnesses W04841 and W04842 (“Witnesses”).
3. On 24 September 2021, the Specialist Prosecutor Office (“SPO”) responded to the Motions (“Response”).<sup>4</sup>
4. On 27 September 2021, the Panel issued an order dismissing the Motions, noting that the Defence will have an opportunity to object to the admission of the declarations, and to cross-examine the Witnesses, at trial (“Order”).<sup>5</sup> Having received the Haradinaj Motion one day after the expiry of the set deadline, the Panel cautioned the Haradinaj Defence about the timeliness of filings, but recognised the Haradinaj Motion as validly filed.<sup>6</sup>

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<sup>1</sup> Order Setting Deadline for Submissions of Rule 117 Motions, 2 September 2021, p. 603, line 21 to p. 604, line 1.

<sup>2</sup> F00317, Gucati Defence, *Motion to Challenge the Admissibility of Evidence Pursuant to Rule 138(1)* (“Gucati Motion”), 17 September 2021, confidential. *See also* F00317/RED, public.

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

<sup>4</sup> F00322, Specialist Prosecutor, *Prosecution Consolidated Response to Defence Admissibility Challenges* (“Response”), 24 September 2021, confidential.

<sup>5</sup> F00328, Panel, *Order on Rule 117 Defence Motions* (“Order”), 27 September 2021, para. 18.

<sup>6</sup> Order, 27 September 2021, para. 9.

5. On 29 September 2021, both the Gucati Defence and the Haradinaj Defence filed requests for reconsideration of the Order, asking to be permitted to file replies to the Response (“Requests”).<sup>7</sup>

6. On 30 September 2021, the Panel directed both Defence teams to file replies to the Response by 4 October 2021.<sup>8</sup>

7. On 4 October 2021, the Gucati Defence and the Haradinaj Defence filed replies to the Response (“Replies”).<sup>9</sup>

8. On 7 October 2021, upon the opening of the case, the Panel issued an oral order indicating that the Requests were denied and that a written decision would shortly be filed.<sup>10</sup> The Panel hereby provides the reasons for its decision.

## II. SUBMISSIONS

9. The Gucati Defence submits in its motion for reconsideration that, by issuing the Order before the date when the Accused were entitled to reply in accordance with Rules 9(2) and 76 of the Rules, the Panel committed a clear error of reasoning.<sup>11</sup> The Gucati Defence further submits that the Order was premature and unfairly curtailed the rights of the Accused under Rule 76 of the Rules.<sup>12</sup> The Gucati Defence requests the Panel to reconsider the Order, taking its reply into account.<sup>13</sup>

10. The Haradinaj Defence makes similar submissions in its motion for reconsideration, and requests the same relief as the Gucati Defence.<sup>14</sup> In addition, the

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<sup>7</sup> F00335, Gucati Defence, *Request for Reconsideration of Decision F00328* (“Gucati Request”), 29 September 2021; F00338, Haradinaj Defence, *Application for Reconsideration of Decision F00328 on Rule 117 Defence Motions* (“Haradinaj Request”), 29 September 2021.

<sup>8</sup> F00344, Panel, *Order to the Defence to File Replies to F00322* (“Order to File Replies”), 30 September 2021.

<sup>9</sup> F00349, Gucati Defence, *Reply to Prosecution Consolidated Response to Defence Admissibility Challenge* (“Gucati Reply”), 4 October 2021; F00348, Haradinaj Defence, *Defence Reply to KSC-BC-2020-007/F00322*, (“Haradinaj Reply”), 4 October 2021.

<sup>10</sup> Oral Order on Rule 117(2) Motions, 7 October 2021 (real-time transcript), p. 37, lines 6-8.

<sup>11</sup> Gucati Request, paras 6-7, 9.

<sup>12</sup> Gucati Request, para. 8.

<sup>13</sup> Gucati Request, paras 2, 11.

<sup>14</sup> Haradinaj Request, paras 2, 5, 6(b), 21-32.

Haradinaj Defence provides an explanation for the late submission of the Haradinaj Motion and avers that the criticism of the Panel in this regard is wholly unjustified and unwarranted.<sup>15</sup>

11. In its reply, the Gucati Defence submits that objecting to the admissibility of the anticipated testimony of W04842 and W04841 is not premature,<sup>16</sup> and that determining the merits of the Motions prior to the opening of trial would provide the Parties with notice of the Panel's position, and would thereby guarantee fairness and expeditiousness of the proceedings.<sup>17</sup> The Gucati Defence acknowledges that the Panel may defer determination of the Gucati Motion,<sup>18</sup> and argues that doing so would be preferable to dismissal on the basis that the motion is premature.<sup>19</sup> The Gucati Defence submits that the declarations of W04842 do not contain information on matters about which the SPO asserts that he is in position to testify.<sup>20</sup> In relation to W04841, the Gucati Defence submits that her anticipated testimony about undisclosed parts of the Batches is grossly prejudicial, and outweighs any probative value to the extent that it cannot be tested in cross-examination.<sup>21</sup>

12. In its reply, the Haradinaj Defence submits that the impugned evidence should not be admitted because it is of limited probative value and, even if deemed probative, so prejudicial as to outweigh any probative value.<sup>22</sup> The Haradinaj Defence contends that if evidence was heard that was otherwise inadmissible, that evidence would be prejudicial by virtue of having already been heard.<sup>23</sup> The Haradinaj Defence avers that the SPO's arguments, and its suggested course of action, are at variance with those it makes in relation to Defence witnesses and evidence, and that there must be parity in

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<sup>15</sup> Haradinaj Request, paras 6(a), 7-20.

<sup>16</sup> Gucati Reply, paras 6-8.

<sup>17</sup> Gucati Reply, paras 14-21.

<sup>18</sup> Gucati Reply, para. 13.

<sup>19</sup> Gucati Reply, para. 22.

<sup>20</sup> Gucati Reply, para. 28.

<sup>21</sup> Gucati Reply, para. 39.

<sup>22</sup> Haradinaj Reply, paras 27-29.

<sup>23</sup> Haradinaj Reply, para. 9.

its approach.<sup>24</sup> The Haradinaj Defence argues that W04842 is not in a position to testify in respect of witnesses who suggest that they have been adversely affected, and should not be permitted to testify, particularly when the allegedly affected witness is willing to testify; W04842 would, on these points, be providing opinion rather than evidence.<sup>25</sup>

### III. APPLICABLE LAW

13. Pursuant to Rule 79 of the Rules, the Panel may upon request by a Party, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, reconsider its own decisions.

14. Reconsideration is an exceptional measure and should only be undertaken if a clear error of reasoning has been demonstrated or if necessary to avoid injustice. New facts and arguments arising since the impugned Order was rendered may be relevant to this assessment.<sup>26</sup>

### IV. DISCUSSION

15. The Panel notes that the Requests are principally premised on the argument that the Panel committed a clear error of reasoning by issuing the Order prior to the expiry of the time limit for filing replies. In addition, the Haradinaj Defence maintains that the Panel committed an error of reasoning by having found that the Haradinaj Motion was filed out of time.

16. The Panel has carefully considered all submissions, including the Replies, and must now determine whether the Accused have demonstrated a clear error of

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<sup>24</sup> Haradinaj Reply, paras 22-23.

<sup>25</sup> Haradinaj Reply, para. 25.

<sup>26</sup> F00326, Pre-Trial Judge, *Decision on the Haradinaj Application for Leave to Appeal the Decision on the Search and Seizure Videos*, 15 June 2021, para. 22.

reasoning in the Order, or that reconsideration of the Order is necessary to avoid an injustice.

#### **A. LATE FILING OF THE HARADINAJ MOTION**

17. The Panel notes the explanations provided by the Haradinaj Defence regarding the circumstances of filing its motion.<sup>27</sup> The Panel observes that at the time the Order was issued, there had been no indication before the Panel of any such purported difficulties, and that the Haradinaj Defence had repeatedly failed to meet previous time limits.<sup>28</sup> However, the Panel expressly stated in the Order that “[d]espite 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.”<sup>29</sup> The arguments in the Haradinaj Motion were fully considered by the Panel in the Order and its explanations regarding the lateness of its filing are therefore moot.

18. The Haradinaj Defence has therefore failed to demonstrate any error of reasoning or that reconsideration is necessary to avoid injustice as regards the Panel’s criticism of its late filing.

#### **B. THE PANEL’S DISCRETION TO DECIDE ON MOTIONS WITHOUT HEARING REPLIES**

19. The joint Defence argument that the Panel committed an error of reasoning by issuing the Order without waiting for the Replies is moot, as the Panel has now fully considered the Replies.

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<sup>27</sup> Haradinaj Request, paras 10-20.

<sup>28</sup> F00136, Pre-Trial Judge, *Decision on Non-Disclosure of Certain Witness Contact*, 22 February 2021, footnote 10; F00178, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on Request for Information on Diplomatic Briefing*, 9 April 2021, para. 15; F00189, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj*, 23 April 2021, para. 12; F00236, Pre-Trial Judge, *Decision on the Haradinaj Application for Leave to Appeal the Decision on the Search and Seizure Videos*, 15 June 2021, para. 11; Transcript, Status Conference, 14 July 2021, p. 360 line 6 to p. 362, line 20.

<sup>29</sup> Order, para. 9.

20. Furthermore, while Rule 76 of the Rules entitles the Parties to file replies without leave, this entitlement is not absolute. The Defence accepts that the Panel may explicitly exclude or reduce the time limit of replies.<sup>30</sup> The Panel also retains discretion to determine a matter without awaiting replies, where its determination is in favour of or causes no prejudice to the Party whose reply is pending. In the Order, the Panel clearly indicated that the Defence would have the opportunity to: (i) object to the admissibility of the relevant declarations when the Witnesses give evidence in court; (ii) ask that any decision on their admission be deferred until after cross-examination; and (iii) cross-examine the Witnesses on the matters raised in the Motions.<sup>31</sup> The Panel was satisfied at the time of issuing the Order, and remains satisfied, that no prejudice was caused to the Defence by determining the matter before any replies were submitted.

21. For these reasons, the Panel finds that the Defence has failed to demonstrate any error of reasoning or injustice arising from the Panel's issuance of the Order before the time limits for replies had expired.

### **C. WHETHER THE REPLIES WARRANT AN AMENDMENT OR REVERSAL OF THE ORDER**

22. As noted, the Panel has considered the Replies in deciding whether to reconsider the Order, and makes the following observations.

23. The Panel recalls that, in their Motions, the Defence did not object to the Witnesses being called to give evidence, nor did they object to the relevance of part of their proposed evidence.<sup>32</sup> A Party is granted some discretion to decide which evidence to present in support of its case. That discretion is not, however, unfettered. The Panel notes, in particular, that Rules 118(1)(a) and 119(3)(a) of the Rules empower the Panel to determine the number of witnesses the parties may call, and to instruct the parties

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<sup>30</sup> Gucati Request, para. 7; Haradinaj Request, para. 26.

<sup>31</sup> Order, para. 12.

<sup>32</sup> Order, para. 11.

to remove repetitive witnesses. Rule 138(1)-(3) of the Rules permits the Panel to exclude evidence in the circumstances set out therein. Taken together, these Rules permit the Panel to deny hearing witnesses whose proposed testimony has not been shown to be relevant to the case or is repetitive. In this instance, however, the Motions object to the possibility for the SPO to present the proposed evidence for admission on the grounds that parts of it are impermissible hearsay, deprive the Defence of effective confrontation or pertain to undisclosed material not available to the Defence.<sup>33</sup> This is not a relief based on any of the aforementioned provisions or upon other relevant authorities. The Defence fails to provide any legal basis to support its position that admission of the proposed evidence should be dealt with prior to such evidence being effectively offered. The Replies add nothing new to these arguments.

24. The Panel reiterates its earlier findings that the impugned evidence is yet to be offered for admission and that the Defence will have a fair and full opportunity to object to its admission if and when offered. The Defence will also have ample opportunity to cross-examine the two Witnesses on the issues raised in the Motions. As a result, deferring the decision on whether to admit the evidence until it is offered causes no prejudice to the Defence.

25. The Panel rejects the argument that hearing evidence that it may later consider to be inadmissible is prejudicial to the Defence.<sup>34</sup> To the contrary, the fact that the Panel hears evidence is without prejudice to its determination of the probative value of that evidence, and does not prevent the Panel from subsequently excluding that evidence in accordance with Rule 138 of the Rules.

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<sup>33</sup> Order, para. 11.

<sup>34</sup> Haradinaj Reply, para. 9.



**D. CONCLUSION**

26. In light of the foregoing, the Defence has failed to demonstrate the existence of a clear error of reasoning, or that reconsideration of the Order is necessary to avoid injustice.

**V. DISPOSITION**

27. For these reasons, the Panel:

- a. **DENIES** the Requests; and
- b. **REMINDS** the Haradinaj Defence of its order to submit a public redacted version of its Motion (F00318) by **11 October 2021**.



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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Thursday, 7 October 2021

At The Hague, the Netherlands