

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 Guenael Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 23 October 2021

Language: English

Classification: Confidential

Defence Request for Addition of an Expert to its List of Potential Witnesses

Specialist Prosecutor

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I. INTRODUCTION

1. At the trial hearing on 20 October 2021,¹ Specialist Counsel for Mr. Haradinaj informed the Trial Panel and Specialist Prosecutor's Office ("SPO") that the Defence seeks to add one additional expert to its List of Potential Witnesses the Defence Intends to Call ("List of Potential Witnesses").²
2. On 20 October 2021, Trial Panel II invited Specialist Counsel for Mr. Haradinaj to apply for permission through the regular procedures.³ On 21 October 2021, Specialist Counsel for Mr. Haradinaj identified the additional expert witness as Dr. William Wiley, pseudonym 'Witness 18' being used from hereon ("Witness 18").⁴
3. On 21 October 2021, Specialist Counsel for Mr. Haradinaj informed the Trial Panel via e-mail communication that there was potential for conflict should Dr. William Wiley be instructed as an expert. In order to avoid any further delay, an alternative expert was identified and has now agreed to be instructed as an expert witness, should the Trial Panel authorise the instruction.
4. The identified expert is Mr. Robert Reid, former Chief of Operations at the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia. The additional expert witness as Mr. Robert Reid, pseudonym 'Witness 18' being used from hereon ("Witness 18").
5. As described further below, Witness 18 is a suitable expert because (a) he can opine on well-defined matters that are in dispute and central to the case; (b) will assist the Panel through giving his evidence; and (c) is a leading expert

¹ KSC-BC-2020-07, Provisional Transcript, 20 October 2021 p. 0173.

² KSC-BC-2020-07/F00260, Haradinaj Interim Pre-Trial Brief, Annex 1.

³ KSC-BC-2020-07, Provisional Transcript, 20 October 2021, p. 1073.

⁴ KSC-BC-2020-07, Provisional Transcript, 21 October 2021, p. 3.

with over thirty (30) years' experience on the investigative and legal sides of international criminal and humanitarian law so suitably qualified.

6. The Order on the Conduct of Proceedings⁵ is silent on the addition of experts to the Defence List of Potential Witnesses. This application is therefore made pursuant to Article 40(6) of the Law on the Specialist Chambers and Specialist Prosecutor's Office (the "Law") and Rules 9(5) and 95(5)(c) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), and without prejudice to the Defendant's ability to submit further information before opening, in accordance with Rules 104(5) and (6) and 119.
7. Defence Counsel for Mr. Haradinaj recalls that the List of Potential Witnesses was filed in accordance with Rule 95(5) of the Rules and stated: "*a list of potential witnesses the Defence intends to call, without prejudice to any subsequent amendment or filing thereof.*" This further application is therefore entirely proper and the Panel is invited to add the Witness 18, to the Defendant's List of Potential Witnesses.

II. THE LAW

8. Article 40(6) of the Law provides:

Prior to a trial or during the course of a trial, the Trial Panel may, as necessary:

(a) exercise any functions or powers of the Pre-Trial Judge referred to in Article 39;

(b) require parties to meet disclosure obligations as set out in the Rules of Procedure and Evidence;

⁵ KSC-BC-2020-07/F00314, Annex to the Order on Conduct of the Proceedings, 17 September 2021.

(c) require the attendance and testimony of witnesses and production of documents and other evidence, if necessary, by obtaining the assistance of States as provided in this Law;

(d) provide for the protection of confidential information;

(e) order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(f) provide for the protection of the accused, witnesses and victims;

(g) take any necessary steps to maintain order in the course of a hearing; and

(h) rule on any other matters, including the admissibility of evidence.

9. Rules 9(5) provides:

The Panel may, proprio motu or upon showing of good cause:

(a) extend or reduce any time limit prescribed by the Rules or set by the Panel; or

(b) recognise as valid any act carried out after the expiration of the time limit.

10. Rule 95(5)(c) provides:

After the submission by the Specialist Prosecutor of the items mentioned in paragraph (4), the Pre-Trial Judge shall invite the Defence to file, within a set time limit, a Pre-Trial Brief indicating:

(c) a list of potential witnesses the Defence intends to call, without prejudice to any subsequent amendment or filing thereof. In relation to each witness, the Defence shall specify to which particular relevant issue the evidence relates.

11. Rule 104(5) and (6) provide:

(4) The Trial Panel shall proprio motu consider, as a matter of law, grounds under paragraph (1)(b) even if they were not advanced by the Defence.

(5) The Defence, should it choose to present a case, shall, within the time limit set by the Panel and no later than fifteen (15) days prior to the opening of the Defence case:

(a) permit the Specialist Prosecutor to inspect and copy any statements, documents, photographs and other tangible objects in the Defence's custody or control, which are intended for use by the Defence as evidence at trial;

(b) 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; and

(c) provide to the Specialist Prosecutor the exhibits that the Defence intends to present at trial.

III. SUBMISSIONS

12. The Defence for Mr. Haradinaj repeats its oral submissions made in court on 20 October 2021,⁶ namely that the second expert witness has become necessary because of the oral testimony of SPO Witness W04841, Zdenka Pumper, thus far.

13. During the examination-in-chief of Ms Pumper and cross-examination in particular, Ms Pumper testified and revealed to the Defence and the Trial

⁶ KSC-BC-2020-07, Provisional Transcript, 20 October 2021, p. 1073.

Panel, for the first time, some of the practices and procedures followed for SITF/SPO investigators and prosecutors. However, Ms Pumper has not been able to give evidence or opine upon the suitability or appropriateness of the procedures in this case.

14. The SPO procedures, their suitability and reliability in this case go to the core of the Prosecution's case and the Defence.
15. Witness 18 is a highly recognised and senior international investigator, with relevant experience in national and international law enforcement and the coordination of complex investigations. He is able to speak to directly to international investigative standards, practices and procedure, including those described by Ms Pumper, particularly search and seizure operations and the retention and securing of evidential material. Given the central importance of this evidence to the case, this evidence will assist the Panel and the parties.
16. Further or alternatively, the expert evidence is necessary because:
 - a. The information is directly relevant to several defences that the Accused seek to raise in this case, including challenges to the SPO's chain of custody, authentication of material deemed to be confidential and non-public, and the entrapment defence, and therefore, the addition of the expert is necessary in the interests of justice.
 - b. The information on the practices and procedures of SITF/SPO investigators and prosecutors revealed by Ms Pumper's testimony is new information and thus requires a response.
 - c. Witness 18 will primarily respond to facts and matters raised in Ms Pumper's testimony and the scope of expert evidence will therefore be limited in scope.

d. Addition of the expert evidence will not prejudice the SPO because they will have an opportunity to cross examine Witness 18 and will have more than adequate time to prepare.

17. In accordance with Rule 95 and further in accordance with the Trial Panel's Order issued before the Trial Preparation Hearings in respect of its List of Potential Witnesses,⁷ the Defence submits the following information concerning Witness 18:

No	Name	Summary of facts and circumstances to which the witness will testify
18	Mr. Robert Reid (Witness 18)	<p>Witness 18's experience and suitability to provide an Expert Report.</p> <p>Investigative standards, international best practices and procedures normally undertaken during a complex investigation, including but not limited to chains of custody and record keeping.</p> <p>Observations on the steps and procedures taken by the SPO in this case, in Witness 18's opinion and experience.</p>

⁷ KSC-BC-2020-07/F00267, Order for Submissions and Scheduling the Trial Preparation Conference, 21 July 2021.

III. CONCLUSION

18. For the above reasons, the Trial Panel is invited to grant the Defence Request for the addition of the expert witness, Witness 18, to its List of Potential Witnesses and direct an expert report to be filed within a deadline of fourteen (14) days.

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