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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:	1 November 2021
Language:	English
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Publicly Redacted Version of Defence Response to Prosecution Challenge to Proposed Defence Expert and Report

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I. INTRODUCTION

1. On 15 October 2021 the Defence filed the Expert Report of **[REDACTED]** ('Witness 17'),[1] a leading expert in the field of Whistleblowing and Public Interest Disclosure, in which written testimony is provided concerning the definition of a 'whistle-blower' and whether the Defendant(s) might enjoy the status of a 'whistle-blower', having regard to that definition and the evidence as disclosed by the Specialist Prosecutor's Office ("SPO").

2. On 22 October 2021, the SPO filed its 'Prosecution challenge to proposed Defence Expert and Report'.[2]

3. The Defence now seeks to respond to that challenge, and at the outset it submits that the SPO application is without foundation and ought to be rejected, thus allowing the Defence to call expert evidence, orally if required.

4. It is of note at paragraph 2 of the SPO submission that they seek the attendance of Witness 17 for cross-examination, if it is that the Trial Panel allows the report. The Defence takes no issue with this and will of course make Witness 17 available for cross-examination, it being clear that the evidence does not fall within any of the exceptions as provided for within Rules 149, 153-155 of

[1] KSC-BC-2020-07/F00376/A01
[2] KSC-BC-2020-07/F00388

the Rules of Procedure and Evidence before the Specialist Chambers ("Rules").

5. The Procedural Background has been previously set out and there is no need to go into further detail unless there is specific instruction to do so.

III. SUBMISSIONS

6. The SPO appears to raise its objections on four primary grounds:

   a. That the assertion that public interest or 'whistleblowing' could be a defence to the charges is baseless and therefore any expert evidence on the issue is irrelevant;

   b. That the Expert Report would not assist the Trial Panel;

   c. That the Expert Report and/or Witness 17 would inappropriately usurp the Trial Panel's functions; and

   d. That the Expert Report was prepared on an improper basis.

7. The Defence will deal with each in turn.

That the Proposed Defence is Baseless

8. At paragraph 4 of the SPO objection, submissions are made to the effect that "*any claim of whistle-blower or other status, could never constitute a legal excuse or justification for the commission of crimes such as those the Accused are charged with*".[3]

9. The SPO do not however submit (i) why the defence of public interest or whistleblowing does not exist or (ii) where it does exist, why it can never apply to the offences with which the Defendant(s) is/are indicted.

10. The position of the SPO is therefore a wholly unsubstantiated assertion.

11. Reference is made to the Haradinaj Defence Pre-Trial Brief[4] on this issue wherein examples are given of various jurisdictions where 'public interest' was found to be a justified basis for disclosure in the circumstances of those cases.

12. Further, the SPO in making their submission do not, at any time, provide any authority for why the defence 'cannot' be raised, and it is therefore, at this stage, merely an unsubstantiated opinion on the part of the SPO. This is a matter that the SPO is perfectly entitled to raise as part of its case and in challenging any matters raised by the Defence as part of its case.

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[3] KSC-BC-2020-07/F00388, at para. 4.
[4] KSC-BC-2020-07/F00260.

13. In any event, it is not for the SPO to make a determination as to whether the defence is one that can be raised or otherwise. This is a matter for the Trial Panel, and in the absence of any ruling that prevents the Defence from raising the proposed defence, the Defence for Mr. Haradinaj will continue to pursue what is clearly a legitimate position to pursue.

14. In light of the above, the Expert Report is clearly of relevance, and thus the objection of the SPO is entirely without foundation.

That the Report would not Assist

15. The second objection of the SPO is entirely misconceived, and if such a position is to be followed to its natural conclusion, the assertion is expert evidence is never to be allowed on an issue, as all laws on all subjects are "*publicly available*",[5] as are the relevant "*reports and jurisprudence*",[6] and therefore it is difficult to envisage the circumstances where a witness possesses expertise that the Trial Panel does not.

16. In any event, the law on whistle-blowing is a specific and discrete area of law. There is no suggestion that the Trial Panel are not in a position to make its determination; however, given the specific nature of the defence it is

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[5] KSC-BC-2020-07/F99388 at para. 6
[6] *Ibid*

submitted that the Trial Panel would benefit from the assistance of Witness 17 who, on any assessment, is an expert in the field.

17. The SPO go on to suggest that the opinion of Witness 17 is irrelevant, as the Trial Panel can make its own determination.[7] Such a contention is preposterous in the extreme.

18. At no stage have the Defence sought to suggest that the Trial Panel cannot make a decision, or in the alternative, that they should not make a decision.

19. The Defence maintain that that the Defendant, through his actions and his reasons and the justifications for those actions, ought to enjoy the status of a 'whistle-blower' and adduce evidence to justify and support this contention.

20. Should the Trial Panel diverge from this position, having heard the evidence, then they are of course free to do so in their position as the arbiter of fact and law. This does not at any stage render the evidence of an expert as being irrelevant.

That the Report and/or Witness 17 would inappropriately usurp the Trial Panel's Functions

21. It is unclear as to the premise upon which such a submission is based.

[7] *Ibid*

22. At no stage have the Defence sought to suggest that it is the Expert Witness that makes the decision on the issue, and at all times it is the Trial Panel that is the arbiter of fact and law in the instant case.

23. At paragraph 10 of the SPO submission, the position is advanced that: "*The culpability of the Accused is an area which is the exclusive province of the Trial Panel and a report such as Witness 17's, which contains an opinion as to such culpability should be rejected*".[8]

24. At the risk of rehearsing a previously advanced argument, at no stage have the Defence sought to suggest, or attempted to usurp or restrict the province of the Trial Panel. The purpose of expert testimony is to assist the Trial Panel in reaching a decision.

25. The fact that Witness 17 provides an opinion as to whether the Defendant(s) ought to enjoy the status of a whistle-blower is not one that is binding on the Trial Panel, nor could it ever be suggested to be so.

26. In a similar vein, the SPO has and will continue to adduce evidence as to the culpability of the Defendant, some of which will contain 'opinion' evidence. To suggest that the adducing of evidence for either the Prosecution or the Defence on a case is an attempt to suggest the Trial Panel is 'bound' by that evidence is quite preposterous, as if that were the case, the entire adversarial

[8] KSC-BC-2020-07/F99388, para. 10.

trial process would be meaningless. There is no attempt to usurp or curtail the powers of the Trial Panel and to suggest otherwise is quite clearly ludicrous, however, it is analogous and a natural extension of the SPO's submissions on this point.

27. In any event, the Trial Panel is not bound to accept the evidence of Witness 17, however, this is not a basis to reject the admissibility of that evidence.

That the Report was Prepared on an Improper Basis

28. The SPO do not substantiate the allegations it makes and therefore this submission ought to be rejected without further consideration.

29. To the extent that the Trial Panel seeks to consider the position raised, the fact that the SPO did not deal with the issue of 'public interest' in their pre-trial brief is a matter for the SPO and does not impinge on the ability of the Defence to raise it with a witness.

30. Further, the fact that the SPO deems it to be an irrelevance, likewise, is a matter for the SPO. The Defence is one that will be raised and properly raised; the SPO will recall that the second prosecution witness called in giving evidence clearly set out that the actions he took on the grounds that it was

acting in the public interest to report on the issues contained within the numerous articles.[9]

31. The issue of public interest is therefore one that has been introduced into evidence by the SPO through the SPO's own witness, and therefore there cannot be a basis to suggest that the issue is an irrelevance. It was relevant in the first instance to the defences raised on behalf of the Defendant(s), and this is now recognised by the SPO Witness WO4866 (Halil Berisha) and therefore the SPO can no longer argue its way around its relevance and importance.

32. In terms of the instructions provided to the Expert Witness, Witness 17 has considered the indictment and is therefore fully aware of the offences alleged, and the underlying basis of those alleged offences as drafted (and re-drafted) by the SPO, and therefore was entirely aware of the basis of the SPO's case and the foundation of that case.

33. There is no basis to suggest that the instructions were a distorted view of reality, or selective view of the prosecution case, it being entirely appropriate that an expert witness is aware of the position being advanced by the Defendant so as to enable that expert witness to determine and/or offer an opinion on the issues raised.

[9] KSC-BC-2020-07, Provisional Transcript, Cross-Examination of Halil Berisha, 27 October 2021, p. 1584 lines 3-4; p. 1585, lines 6-9, p. 1588 lines 3-4, p. 1601 line 6, p. 1603 line 20, p. 1604 lines 5-6, p.1605 line 11, p. 1606 line 1, p. 1609 line 12, p. 1612 line 11 et seq.

34. Further, it is entirely appropriate for an expert to be directed as to the issues to consider, hence the list of questions posed to the expert in the letter of instruction.

III. CONCLUSION

35. The submissions of the SPO lack merit, and in places, are entirely misconceived and an attempt to distort the trial process to the extent that yet again, the Defendant is being prevented from presenting his case and challenging that of the SPO.

36. The Defendant is already at a marked disadvantage being prevented from challenging the documentation that underpins the indictment as the same will not be disclosed.

37. Further, the SPO have consistently, despite Orders of the Trial Panel, sought to adduce evidence without calling a witness and therefore preventing the Defendant from challenging a position and testing that evidence through cross-examination.

38. The opposition to the Expert Report of Witness 17 is yet again another example of the SPO's cavalier approach to the Defendant's right to a fair trial.

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39. The opposition ought to be rejected. The issues to be raised by Witness 17 in her Expert Report being ones for information and ultimate determination by the Trial Panel upon hearing that evidence, and the same being tested by way of cross-examination should the SPO seek to exercise such a right.

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