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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
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Defence Submissions in Respect of Order KSC-BC-2020-07/F00584

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I. INTRODUCTION

1. On 28 March 2022, the Trial Panel invited submissions in respect of the reclassification of Transcripts and Filings ('Order for Submissions on Reclassification of Transcripts and Filings').[1]

2. At paragraph 7 of the Order,[2] a number of 'parts' of the trial transcript which currently are denoted as being in 'Private Session' are listed, and submissions are invited from the Parties as to whether they ought to remain so classified.

II. SUBMISSIONS

3. At the outset, the Defence for Mr. Nasim Haradinaj ("Haradinaj Defence") maintains its position that any and all information provided at trial ought to be public unless it is subject to a test of strict necessity.

4. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") provides that in order to comply with the general provision of fairness, a criminal trial should be held in public. Article 6(1) provides an explicit exception to the general rule, that "the press and public may be excluded from all or part of the trial ... to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". It is submitted that this test of strict necessity must be assessed as required by the circumstances of the case.[3]

5. Whilst national security concerns may amount to a ground for holding a hearing 'in camera', before excluding the public from criminal proceedings,

[1] KSC-BC-2020-07/F00584
[2] *Ibid*.
[3] See e.g. Eur. Court HR, *Martine v. France,* App. No. 58675/00, judgment of 12 April 2006 (GC), para. 40; *Welke & Bialek v. Poland,* Appl. No. 15924/05, judgment of 1 March 2011 (4th Section), para. 74.

the court must make specific findings that closure is necessary to protect a compelling governmental interest, and must limit secrecy to the extent necessary to preserve such an interest.[4] Further, when the court decides to hold a hearing 'in camera', it is required to provide sufficient reasons to demonstrate that such means are strictly necessary within the meaning of Article 6(1).[5]

6. The need to go into 'private session' ought to be limited to those circumstances which have been shown to be 'strictly necessary', not merely as a tool of convenience or to prevent any embarrassment, so as to adhere to the principle of 'Open Justice' and to comply with Article 6(1) of the ECHR.

7. The Defence notes the standing order of the Trial Panel, that being that no names relating to the Specialist Prosecutor's Office ("SPO") and/or witnesses and/or individuals spoken to by the SPO are to be uttered publicly; however, there would appear to be no basis for this order being applied on a blanket basis, given that many of the names are public domain in any event.

8. The SPO has relied, in part, on Article 33 of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chamber,[6] although it is quite clear that paragraph (3) of the provision repeats the test of 'strict necessity'. It is submitted that the SPO has failed to establish the threshold required.

9. Further, the blanket anonymity for individuals without each case being considered on its individual merits is, with respect, an affront to the principle of open justice, and furthers the opacity with which the SPO has presented its entire case in any event.

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[4] *Welke & Bialek v. Poland,* para. 77.
[5] See e.g. Eur. Court HR, *Chaushav & Others v. Russian Federation,* App. Nos. 37037/03, 39053/03 and 1469/04, judgment of 12 April 2006 (3rd Section), para. 24.
[6] KSC-BD-15 of 17 May 2019.

10. It has been repeatedly argued throughout these proceedings, that reference to investigative staff members of the SPO is relevant to the subject matter of the proceedings. Further, the blanket ban on mentioning any names of persons part of or associated to the Government of the Republic of Serbia, persons that are alleged to have participated in the commission of atrocities during the aggression in the Republic of Kosovo, is neither proportionate nor justified in the public interest and fails to meet any test of strict necessity.

11. Where the Trial Panel remains of the position that 'names' ought not to be in public, which is vehemently opposed, it is submitted that the 'private' element ought to be limited to the name specifically, rather than any information elucidated or presented.

12. The appropriate course of action is therefore suggested to be a simple process of redaction of name, otherwise, significant portions of the transcript are classified as being 'private' without there seemingly being a strict necessity requirement for the same.

13. In terms of the sections of the transcript where individuals are referred to by name, the Defence notes pages:

a) 883-885;

b) 917-918;

c) 931-933

d) 1169

e) 1216-1252

f) 1092-1115;

g) 1123;

h) 1126-1128;

i) 1131-1146;

j) 1316-1339;

k) 1365-1366;

l) 1386-1407;

m) 1428-1430;

n) 1435;

o) 1439;

p) 1467-1469;

q) 1773-1777;

r) 1780-1793;

s) 2385-2387;

t) 1942-1943;

u) 2622-2636.

14. Paragraph 13(e) above is a clear example, of the over broad use of, in that private sessions commences at 1216, however, it does not appear to be until 1235 that an individual's name is actually mentioned, and therefore nineteen (19) pages are currently designated as 'private' when there does not appear to be any actual need for such a measure.

15. Paragraph 12(l) above is noted for similar reasons in that the private session runs to some twenty (20) pages when a simple process of redaction could reduce this significantly.

16. In terms of Private Session where no names are mentioned, the Defence notes the following excerpts:

a) 561-564 and 598;

b) 753-754 (there is a reference to the Defendant's father's name, unclear why this cannot be public);

c) 763-764;

d) 864-867;

e) 953-960

f) 968-971

g) 1006-1008;

h) 1305-1308;

i) 1343-1354;

j) 1518-1519

k) 1891-1900

l) 1920-1925

17. Of those not mentioned above, but referred to within the Order, we would highlight pages 953-960 as an example of inappropriate classification, noting in particular that the Trial Panel expresses its concern in the transcript as to why the SPO has sought to present its case in Private Session. The Defence

echoes this position, as it did at the time, in that seemingly, there is no need for the information to be withheld from the public.

18. Further, at 1131-1146, names are mentioned, however, they are subject to an INTERPOL list and/or in media reports, and therefore the information is within the public domain. It is unclear as to why this ought to be private. The SPO has failed to establish on the basis of strict necessity why it is not public.

19. At 1316-1339, names are mentioned but those individuals have publicly disclosed their own involvement either through the media or through their own personal social media accounts, and therefore, there would appear to be no basis for this portion to remain private. The SPO has again failed to establish on the basis of strict necessity why it is not public.

20. At 1343-1354 websites that are still active are discussed, and again therefore, it is unclear why this information ought to remain private, as noted, those websites are accessible to the public and the SPO seemingly accepts the same.

21. The Defence accepts on occasion there may be a requirement for certain redactions, particularly where there is a credible and justifiable threat against a witness, however, no such evidence has been presented, and further, a *carte blanche* approach ought not to be adopted. Such an approach should be viewed with the utmost scrutiny as to necessity.

22. The trial process should be open. It is noted that one of the criticisms levied concerns the opacity of prosecution investigations undertaken, and to rule that a significant swathe of the trial transcript remains private does, with respect, only further add to that criticism, particularly when portions of the transcript can be made public in its entirety, or where there is a need for privacy, a simple process of redaction of names and identifying submissions can be undertaken.

23. Such a process would protect individuals that require protecting (noting that this does not necessarily apply to those that have appeared before the media and spoken of their involvement) but importantly, would still enable the public and/or interested parties to be aware of the evidence presented.

24. In short, a balance must be struck and the test of strict necessity met and, at this stage, it is respectfully submitted that there is no balance.

Word Count: 1,443 words

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