

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: 12 May 2022

Language: English

Classification: Confidential

Haradinaj Request for Permission to Make Further Submissions re: Disclosure

Specialist Prosecutor

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I. INTRODUCTION

- 1.1. The Defence for Mr. Haradinaj notes the submissions of the Defence for Mr. Hysni Gucati (“Gucati Defence”) filed on 12 May 2022 seeking permission of the Trial Panel to make further submissions in respect of disclosure in accordance with Rule 136(2) of the Rules.¹
- 1.2. With regard to that application, the Defence for Mr. Nasim Haradinaj (“Haradinaj Defence”) seeks to join the same and therefore seeks that same permission.

2. FACTUAL BACKGROUND

- 2.1. It is accepted that the relevant factual background has been outlined by the Gucati Defence, however, for completeness, the same is repeated here.
- 2.2. On 18 March 2022, the Trial Panel declared the case closed in accordance with Rule 136(91) of the Rules.
- 2.3. In a series of press reports beginning on 10 April 2022, it was reported that Mr. Dick Marty, the former Swiss Senator, supported by information received from the Office of the Attorney General of Switzerland, had alleged that Serbian state authorities were behind a serious and shocking plot to threaten his life with the design of falsely implicating Kosovan Albanians in the operation (‘Reported Matters’). It was reported that the existence of the plot had been known to the Swiss Federal Office of Police (Fedpol) since December 2020.

¹ KSC-BC-2020-07/F00605, *Gucati Request for Permission to Make Submissions re Disclosure*, 12 May 2022, Confidential.

- 2.4. On the face of the reports, the information shared two features relevant to the defence case of Mr Haradinaj (and Gucati): (i) a deliberate attempt by a state agency to create the circumstances in which to implicate Kosovan Albanians; and (ii) the allegation that Serbian state authorities are engaged in impropriety with a view to the fabrication and manipulation of evidence (such that collaboration by the SPO with Serbian state agencies jeopardises the independence, impartiality and fairness of any investigation).
- 2.5. In order to avoid unnecessarily troubling the Trial Panel, on 2 May 2022, 4 May 2022, 5 May 2022, 10 May 2022, 11 May 2022, the Parties were in correspondence in order to ascertain, on the part of the Defence, whether the Specialist Prosecutor's Office ("SPO") held any information in relation to the Reported Matters in late April (which might confirm or otherwise the Reported Matters). In particular, the Defence sought to clarify whether the SPO had any information relating to these allegations *before* the declaration of the closing of the case (no such material appearing on any Rule 102(3) Notice).
- 2.6. The *inter partes* communications were initiated by the Gucati Defence and joined by the Haradinaj Defence.
- 2.7. The SPO in reply has refused to confirm whether or not it is in possession of any material relating to these allegations, nor when it first received such material (if it is in possession of such material). The SPO has stated that it considers the information requested is not relevant to the case under Rule 102(3).
- 2.8. The pronouncement of the Trial Judgment is scheduled for 10:00CET on 18 May 2022.²

² KSC-BC-2020-07/F00596, *Scheduling Order for the Pronouncement of the Trial Judgment*, Trial Panel II, Public at paragraph 6

3. APPLICABLE LAW

- 3.1. Rule 112 provides for the continuing nature of the SPO's disclosure obligations, notwithstanding the closing of the case pursuant to Rule 136.
- 3.2. The disclosure obligations of the SPO under Rule 102(3) require the provision of a notice of all relevant material in the possession of the SPO, whether or not such information must thereafter be disclosed as material to the preparation of the defence, or exculpatory material (information which may reasonably suggest the innocence or mitigate the guilt of the Accused).
- 3.3. Rule 102(3) provides a mechanism for the Specialist Prosecutor to seize the Panel where grounds to dispute the materiality of information exist. The SPO has refused to do so.
- 3.4. There is no mechanism in Rule 102(3) for the defence to seize the Panel. Moreover, the dispute mechanism foreseen under the last limb of Rule 102(3) concerns challenges to the *materiality* of the requested materials, not their *relevance* (i.e. basis for inclusion in the Rule 102(3) Notice)³.
- 3.5. Though the route to remedy is undefined it cannot follow, however, that the SPO has the power to make a unilateral and *unchallengeable* assessment as to 'relevance to the case' of information in its possession⁴. Indeed, Rule 75 of the Rules makes general provision for the defence to "apply before the competent Panel for a relief, except where otherwise provided by the Rules".

³ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 47; KSC-2020-07, Oral Order on updated Rule 102(3) Notice, 1 September 2021, Trial Panel II, Transcript pages 442-443

⁴ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 45;

3.6. In accordance with Rule 136(2), however, no further submissions may be made to the Panel post-closing unless in exceptional circumstances and on showing of good cause.

4. SUBMISSIONS

4.1. The submissions of the Gucati Defence at paragraph 14 onwards of their filing are echoed and adopted herein.

4.2. In the first instance, the Haradinaj Defence echo the position of the Gucati Defence in that exceptional circumstances have been demonstrated, in that shocking and serious allegations that amount to an interference with the judicial process, and the rule of law, have been disclosed after the closing of the case.

4.3. Further, the Defence have sought to address the issue by way of *inter partes* correspondence to avoid formalising the position before the Trial Panel. However, the SPO have steadfastly refused to provide any information concerning the reported matters, and further, have refused to either confirm or deny that they even hold such information, although the SPO have sought to suggest that the information requested was not relevant to the case before the Trial Panel.

4.4. Again, we would echo previous submissions in that it is not for the SPO to determine what is and what isn't relevant to a case, it is for the SPO however, to be transparent with the Defence and the Trial Panel in terms of the information it does and does not hold in its possession.

4.5. The position of opacity adopted by the SPO is one that has been raised on numerous occasions by both Defence teams, and remains a significant concern in terms of the fairness of proceedings.

4.6. To reaffirm the submissions of the Gucati defence at paragraph 15 of their filing:

“Compliance with the obligation under Rule 102(3) to provide detailed notice of any material and evidence in the SPO’s possession which has not been disclosed and which is relevant to the case is fundamental to the three-step process to disclosure under Rule 102(3)⁵. Within the framework of Rule 102(3), detailed notice of all such material must be provided to the Defence, before any request for the disclosure of information potentially material to the Defence preparation can be made⁶. In the absence of detailed notice of all relevant information in the possession of the SPO, the Defence are deprived of the opportunity to be informed of the relevant materials in the SPO’s possession in order to assist its identification of items which could be material to its preparation and facilitate its request of such items (placing a higher – and unwarranted – burden on the Defence to identify with specificity material not in its possession and potentially not even within its knowledge)⁷.”

4.7. Given (i) the shared features of the Reported Matters and the Defence case, on the face of the reports,⁸ and (ii) the refusal of the SPO to provide any further

⁵ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 38

⁶ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 44

⁷ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 44 and 45

⁸ Noting that both the Defence for Mr. Haradinaj and Mr. Gucati have advanced a defence that there was the involvement of hitherto unknown third parties in the procurement, supply, and dissemination of the alleged documents amounting to Entrapment.

information by way of *inter partes* communication, the Defence are precluded from considering any such information in terms of its relevance and/or materiality to the case.

4.8. The Defence seek to challenge that unilateral assessment, there being no other opportunity to do so, having regard to the fact that the case has closed, and that judgment is due on 18 May 2022.

4.9. It is respectfully submitted that there is a very real risk of both Defendants being prejudiced in terms of their Defence without them being provided with the opportunity sought in this filing.

5. CLASSIFICATION

5.1. By way of an abundance of caution, this filing is classified as confidential, however, the Haradinaj Defence raise no objection to it being re-classified as public.

Word Count: [1,411] words



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