



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 16 May 2022
Language: English
Classification: Confidential

Prosecution consolidated response to Defence requests concerning disclosure

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. INTRODUCTION

1. The Defence Requests¹ are frivolous. To the extent the Defence seeks authorisation to make submissions concerning the disclosure of information entirely unrelated to the now-closed case against Hysni Gucati and Nasim Haradinaj (the 'Accused'), the Defence Requests should be rejected *in limine*. To the extent the Defence seeks an order by the Trial Panel for the notification and/or disclosure of any such information, the Defence Requests should also be rejected.

2. These last-minute Defence Requests do not warrant consideration on their merits since they do not establish 'exceptional circumstances' and 'good cause' to do so.² In particular, the Defence Requests are inexplicably untimely given that the information they are based on was available to the Defence, by its own admission, since at least 10 April 2022.³

3. Should the Trial Panel nevertheless decide to consider the merits of the Defence Requests, they should be rejected. Public reports of an alleged plot to murder Mr Dick Marty 18 months after the charged timeframe are plainly not relevant to the case against the Accused. As such, they cannot trigger any notification or disclosure obligations.

¹ Gucati Request for Permission to Make Further Submissions re Disclosure, KSC-BC-2020-07/F00605, 12 May 2022, Confidential ('Gucati Request'); Haradinaj Request for Permission to Make Further Submissions re: Disclosure, KSC-BC-2020-07/F00606, 12 May 2022 (notified on 13 May 2022 at 09:00), Confidential ('Haradinaj Request', together with the 'Gucati Request', the 'Defence Requests').

² See Rule 136(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ See Gucati Request, para.3.

II. BACKGROUND

4. On 17 March 2022, the Trial Panel closed the case.⁴

5. On 2 May 2022, the Gucati Defence requested that the SPO: (i) disclose what information the SPO has concerning an alleged plot to murder Mr Marty as reported in the media on 10 April 2022; (ii) confirm when the SPO first became aware of this alleged plot; (iii) disclose what, if any, steps the SPO had undertaken or was undertaking in relation to this matter; (iv) provide information as to whether the SPO Witness Security and Handling Team considered the reported plot and, if so, provide information as to what action, if any, that team has taken; and (v) confirm that an updated Rule 102(3) notice will be provided.⁵

6. On 4 May 2022, the SPO responded to the 2 May 2022 request by noting that it understands its disclosure obligations and that it is not in possession of any material subject to disclosure in relation to the request.⁶

7. Later on 4 May 2022, the Gucati Defence reiterated its request for the SPO to confirm whether it is in possession of any of the material requested and, if so, whether such material is disclosable.⁷

8. On 5 May 2022, the SPO informed the Gucati Defence that the SPO responded to the 2 May 2022 request in line with its obligations and had nothing further to add.⁸

9. On 10 May 2022, the Gucati Defence asked the SPO whether it intended to seize the Panel to dispute the materiality of the information requested.⁹

⁴ KSC-BC-2020-07, Transcript, 17 March 2022, p.3855.

⁵ Email from the Gucati Defence to the SPO, copying the Haradinaj Defence, dated 2 May 2022 at 18:57.

⁶ Email from the SPO to the Gucati Defence, copying the Haradinaj Defence, dated 4 May 2022 at 15:49.

⁷ Email from the Gucati Defence to the SPO, copying the Haradinaj Defence, dated 4 May 2022 at 16:33.

⁸ Email from the SPO to the Gucati Defence, copying the Haradinaj Defence, dated 5 May 2022 at 10:24.

⁹ Email from the Gucati Defence to the SPO, copying the Haradinaj Defence, dated 10 May 2022 at 13:52.

10. On 11 May 2022, the SPO informed the Gucati Defence that, as previously conveyed, the SPO considers that the requested information is not relevant to the case under Rule 102(3) and declined to provide further detail in relation to Defence requests for information concerning irrelevant matters.¹⁰ The SPO also noted it would not be updating its Rule 102(3) notice or seizing the Panel.

11. The Gucati Request was filed on 12 May 2022. On the same day, the Trial Panel shortened the deadline for any responses to 16 May 2022 at 16:00.¹¹

12. On 13 May 2022, the Haradinaj Request, joining the Gucati Request and reproducing several excerpts thereof verbatim, was notified.

III. SUBMISSIONS

13. The Defence Requests should be rejected *in limine* since they fail to meet the requirements of Rule 136(2). Should the Trial Panel nevertheless decide to consider the merits of the requests, they should be rejected as unfounded.

A. The Defence fails to establish 'exceptional circumstances' and 'good cause' warranting consideration of the Defence Requests

14. The case against the Accused was closed on 17 March 2022. As such, at this stage, pursuant to Rule 136(2) 'no further submissions may be made to the Panel, unless in exceptional circumstances and on showing of good cause.' The Defence fails to meet the cumulative requirements of 'exceptional circumstances' and 'good cause'.

15. The Defence merely asserts that '[t]he publication of these shocking allegations after the closing of the case amount to exceptional circumstances',¹² but does not even attempt to explain how or why this is so. The Gucati Defence asserts that 'good cause'

¹⁰ Email from the SPO to the Gucati Defence, copying the Haradinaj Defence, dated 11 May 2022 at 12:32.

¹¹ Email from the Trial Panel to the Parties dated 12 May 2022 at 14:47.

¹² Gucati Request, para.16; Haradinaj Request, para.4.2.

is established by virtue of the SPO refusing to provide it with information it has no right to in the first place.¹³ This circular argumentation fails.

16. The attempts by the Defence to draw parallels between the reported murder plot and the case against the Accused¹⁴ are unpersuasive. The Defence fails to explain what it even means by ‘a deliberate attempt by a state agency to create the circumstances in which to implicate Kosovan Albanians’,¹⁵ let alone set out coherent reasons as to how or why this would be relevant to the case against the Accused. The Defence assertion that an allegation that Serbian state authorities are engaged in impropriety ‘jeopardises the independence, impartiality and fairness of any investigation’¹⁶ is overly broad and unfounded.

17. Further, the Defence Requests are based on information which, by the Defence’s own admission, has been publicly available since at least 10 April 2022.¹⁷ The Defence provides no reason as to why it first made an *inter partes* request on 2 May 2022, three weeks after this information became publicly available and just over three hours after the Trial Panel informed the Parties, *inter partes*, that the trial judgement would be delivered on 18 May 2022.¹⁸

18. Accordingly, the Trial Panel should reject the Defence Requests *in limine*.

¹³ Gucati Request, para.19.

¹⁴ Gucati Request, paras 4, 19; Haradinaj Request, para.2.4.

¹⁵ Gucati Request, para.4; Haradinaj Request, para.2.4.

¹⁶ Gucati Request, para.4.

¹⁷ Gucati Request, para.3; Haradinaj Request, para.2.3.

¹⁸ Email from the Trial Panel to the Parties, 2 May 2022 at 15:40.

B. The SPO is under no obligation to provide the Defence with information on matters not relevant to the case against the Accused

19. Should the Trial Panel decide to consider the Defence Requests, these requests should nevertheless be rejected both to the extent they amount to requests to make further submissions or to requests for notification or disclosure.

20. No relevance can be discerned in relation to the reported murder plot. The alleged plot has no connection whatsoever to the Defence allegations of entrapment, which were the subject of distinguishable Rule 102(3) notice orders made by the Trial Panel. The reported plot likewise cannot have informed the charged conduct of the Accused, as the reports post-date the charged timeframe.

21. While the Defence asserts a right to know whether or not the SPO possesses information on the reported murder plot,¹⁹ it fails to cite to a single applicable legal provision, or any jurisprudence, bestowing it with such a right. The Defence has no entitlement to know what matters the SPO is investigating or what materials it has collected on matters irrelevant to the case. Obliging the SPO to do so would fall outside the clear scope of this Court's regulatory framework and set an unworkable precedent.

IV. CONFIDENTIALITY

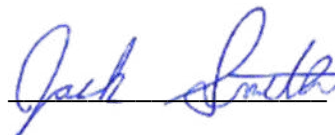
22. Pursuant to Rule 82(4), this filing is confidential in line with the classification of the Defence Requests. The SPO notes that while the Defence Requests are founded on publicly available reports, the Defence provides no reason for their confidential classification. The SPO sees no reason for the requests and this response not to be public and, as such, would not oppose the reclassification of this response to public should the Trial Panel deem it appropriate to do so.

¹⁹ Gucati Request, paras 5, 17, 19; Haradinaj Request, paras 2.5, 4.3.

V. RELIEF REQUESTED

23. For the foregoing reasons, the Trial Panel should reject the Defence Requests in full.

Word count: 1498



Jack Smith

Specialist Prosecutor

Monday, 16 May 2022

At The Hague, the Netherlands