



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: 27 August 2021
Language: English
Classification: Public

Prosecution submissions on the conduct of proceedings

Specialist Prosecutor's Office

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1. Pursuant to the invitation of the Trial Panel,¹ the SPO provides its submissions on the draft order on the conduct of proceedings ('Draft Order').²

2. Mindful of the broad discretion the Trial Panel enjoys in determining the conduct of proceedings, the SPO presents only a small number of proposals for its consideration.³ For the reasons below, the SPO requests that the Trial Panel integrate the proposals below into the final conduct of proceedings order for this case.

I. Public character of proceedings

3. *Proposal:* Addition at the end of para.2: '[p]arties may refer to confidential matters during open session and in public written submissions in a manner which does not defeat the purpose of the confidential classification'.

4. *Justification:* One reason why filings have been initially classified as confidential in this case is that they refer to information classified as confidential.⁴ The Trial Panel's formal acknowledgement that confidential information can be referenced publicly in a manner which does not defeat the purpose of the confidential classification would facilitate more public submissions.⁵

VI. Presentation and admission of evidence

5. *Proposal:* Revision to the remainder of para.15 after the first sentence (changes in emphasis):

Any additions to those lists shall be done at the earliest possible opportunity and, but for exceptional circumstances, sufficiently in advance of the commencement of the Party's case. A

¹ Order for Submissions and Scheduling the Trial Preparation Conference, KSC-BC-2020-07/F00267, 21 July 2021 (with annex), para.13.

² KSC-BC-2020-07/F00267/A01 ('Draft Order').

³ The proposals appear under the numbered headings as they appear in the Draft Order.

⁴ E.g. Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 77(1), KSC-BC-2020-07/F00156, 18 March 2021, Confidential, paras 1-3.

⁵ As done in ICC, Chambers Practice Manual, 29 November 2019, para.74 (preliminary directions for at or before the first trial status conference).

*Party must seek leave of the Trial Chamber to add exhibits or witnesses, and should provide notice to the opposing Party and the Trial Chamber of any decision to remove exhibits or witnesses.*⁶

6. *Justification:* The purpose of the list of exhibits is to communicate the items the parties could seek to admit during trial. The SPO agrees that adding items to the list of exhibits after the deadline has passed should be a matter for which the presenting party must seek the Trial Panel's leave.⁷ This is because such amendments can increase the evidence base which the opposing party must be prepared to contest. However, removing items from the exhibit list does not prejudice the opposing parties in the same way, particularly noting that they can always tender the same items themselves if desired. In order to incentivise the parties to streamline their exhibit lists and evidence presentations, it is suggested that a prompt notification of any removed items would be more effective than requiring leave.⁸

7. *Proposal:* Revision to the beginning of para.18 as follows (changes in emphasis): '[u]nder Rule 154, a Party tendering a witness statement into evidence shall read a concise summary of the witness's statement into the court record [...]'.⁹

8. *Justification:* Reading a sub-set of the admitted evidence into the record is generally an inefficient use of court time. Preparing meaningful summaries of such statements diverts the parties' resources at trial and, to the extent there is disagreement over the content of the summaries, may lead to litigation.

⁶ *Proposed amendment to Draft Order, KSC-BC-2020-07/F00267/A01, para.15* ('[a]ny request to amend those lists, whether to add or remove, shall be done at the earliest possible opportunity and, but for exceptional circumstances, sufficiently in advance of the commencement of the Party's case').

⁷ Rule 118(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.

⁸ This has already occurred in this case, whereby the SPO removed two items from its list of exhibits. Submission of updated exhibit list, KSC-BC-2020-07/F00254, 6 July 2021, para.2. Neither Defence team objected, nor did the Pre-Trial Judge make a ruling on the removal of these items.

⁹ *Proposed amendment to Draft Order, KSC-BC-2020-07/F00267/A01, para.18* ('[u]nder Rules 153-155, a Party tendering a witness statement into evidence shall read a concise summary of the witness's statement into the court record [...]').

9. There is value in reading Rule 154 summaries into the record, as the witness in question is in attendance and the summary can set the stage for further questioning. However, there is no corresponding benefit to reading Rule 153 or Rule 155 summaries into the record. If the object of the intended procedure is to ensure that the public is able to follow all witness statements presented in the case, a more efficient and effective way of doing so would be to make (redacted) versions of these statements available on the public KSC website.¹⁰

VIII. Witnesses

A. PROTECTIVE MEASURES

10. *Proposal*: Revision in the last sentence of para.26: '[s]hould a witness inform the presenting Party that he or she no longer requires some or all of the protective measures granted to him or her, the presenting Party shall immediately *inform the Trial Panel and, as appropriate, apply for variation or rescission of that witness's protective measures.*¹¹

11. *Justification*: When a witness makes a knowing, willing, and voluntary decision to vary his/her protective measures, then applying for a variation of protective measures will be justified in principle. However, if witnesses have, for instance, been subject to interference and only seek a variation in order to publicly recant, then applying for variation of protective measures may not be warranted. The proposed amendment introduces a case-by-case assessment when such situations arise, such that, although the Trial Panel is always informed when witnesses wish to vary

¹⁰ See ICC, *Prosecutor v. Ongwen*, Decision on Prosecution's Submission of Public Redacted Versions of 17 Testimonies Introduced Under Rule 68(2)(b) of the Rules and on Publicity of the Record, ICC-02/04-01/15-1005, 25 September 2017, paras 5-7.

¹¹ *Proposed amendment to Draft Order, KSC-BC-2020-07/F00267/A01, para.26 ('[s]hould a witness inform the presenting Party that he or she no longer requires some or all of the protective measures granted to him or her, the presenting Party shall immediately apply for variation or rescission of that witness's protective measures')*.

protective measures, the procedure no longer mandates filing a request to this effect in every instance.

B. INTERVIEW OF WITNESSES BY OPPOSING PARTY

12. *Proposal:* Addition of a one sentence paragraph after para.27: '[t]he procedure above shall not apply to SPO interviews of opposing party witnesses concerning unrelated cases'.

13. *Justification:* The extra safeguards in the Draft Order for examining opposing party witnesses are unnecessary and counterproductive when examining a witness about unrelated cases within the KSC's jurisdiction. Inviting the calling party to sit in on a witness interview with no relation to its case, for instance, would plainly compromise the efficacy of SPO investigations on entirely independent matters. It is suggested to make the procedure for calling opposing party witnesses case specific, so as to make clear the SPO can continue to carry out necessary activities within its investigative mandate.

C. SCHEDULING OF WITNESSES AND MATERIAL TO BE USED IN EXAMINATION

14. *Proposal:* Revision of paras 41-42 as follows (changes in emphasis):

41. During trial, the presenting Party shall file, *on the first working day of each month*, a list of anticipated witnesses for the next month, listed in the order in which they will be called. This list shall indicate: (a) the approximate time the calling Party estimates will be necessary for direct examination of each witness; (b) *whether the witness will testify in person or via video-link*; and (c) any applicable protective measures.

As concerns video-link witnesses, witnesses may be called via video-link without making a request to the Trial Panel. The flexibility given to the parties in calling witnesses via video-link is subject to objections from the opposing parties and countervailing considerations, including the relative logistical burdens on the Registry and the Trial Panel's overarching obligation to ensure a fair and expeditious trial.

Within seven days of a witness's testimony, the calling party shall also indicate the (proposed) exhibits the presenting Party intends to use with each witness. No later than 24 hours before a witness is due to testify, the calling Party shall upload to Legal Workflow its final presentation queue that includes all documents it intends to use with the witness.

42. Within 24 hours of notification of the aforementioned list of anticipated witnesses, each opposing Party shall file a notice with an estimate of the time it expects to take cross-examining each witness [...].¹²

15. *Justification:* The procedure in the Draft Order – which calls for a list of anticipated witnesses once every seven days – is a suitable timeframe for providing notice of intended exhibits, but provides the calling party's witness order on overly short notice and in a piecemeal fashion. It is suggested for the calling party to provide more notice by providing a witness order once per month.¹³

16. As for the information sought in the witness order, it is unnecessary to provide 'the issues, facts and circumstances in relation to which the witness will be examined' because it is duplicative of the witness summaries required by the statutory scheme.¹⁴

¹² *Proposed amendment to Draft Order, KSC-BC-2020-07/F00267/A01, paras 41-42 (paragraph numbers removed: '[d]uring trial, the presenting Party shall file, seven days in advance, a list of anticipated witnesses for each week, listed in the order in which they will be called. This list shall indicate: (a) the approximate time the calling Party estimates will be necessary for direct examination of each witness; (b) the (proposed) exhibits the presenting Party intends to use with each witness; (c) the issues, facts and circumstances in relation to which the witness will be examined; and (d) any applicable protective measures. No later than 24 hours before a witness is due to testify, the calling Party shall upload to Legal Workflow its final presentation queue that includes all documents it intends to use with the witness. Within 24 hours of notification of the aforementioned list of anticipated witnesses, each opposing Party shall file a notice with an estimate of the time it expects to take cross-examining each witness included on that weekly list').*

¹³ *See similarly ICC, Prosecutor v. Yekatom and Ngaïssona, Initial Directions on the Conduct of the Proceedings, ICC-01/14-01/18-631, 26 August 2020 ('Yekatom and Ngaïssona Conduct of Proceedings Decision'), para.28; ICC, Prosecutor v. Ongwen, Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, 13 July 2016 ('Ongwen Conduct of Proceedings Decision'), para.16. It is noted that paragraph 46 of the Draft Order requires the parties to seek agreement on the order of witnesses for the following two weeks. Although the procedure as written is not inconsistent with the SPO's proposal, if the proposal is adopted then the timeframe for such agreement could be the same as for the witness order update (i.e. the parties endeavor to agree on the witness order over the next month).*

¹⁴ Rules 95(4)(b) and 119(2).

17. In its place, the SPO proposes to include information on whether the witness is testifying in person or via video-link. Additional language is proposed to establish a procedure whereby the calling party is given an initial degree of flexibility on whether or not witnesses should appear in court via video-link. Both the Trial Panel and opposing parties will be informed via the monthly notice who is scheduled to appear via video-link, thus allowing for any objections from the opposing parties or interventions from the Trial Panel on the modalities of a witness's appearance. The Trial Panel may order *proprio motu* that testimony be received via video-conference,¹⁵ and therefore has the authority to authorise video-link in the absence of an initial request.¹⁶

18. The remaining items sought in the witness list can be provided as indicated in the Draft Order.

19. *Proposal*: Revision in the first sentence of para.45 (changes in emphasis): '[a] presentation queue listing all documents or other material to be used by the cross-examining Party must be released to the Trial Panel, the opposing Party and the Registry *within 24 hours of the beginning of the witness's testimony*'.¹⁷

20. *Justification*: Having the non-calling parties' exhibits notified around when the direct examination concludes leaves insufficient time for the direct examiner to prepare for what could be voluminous cross-examination materials. It also substantially increases the likelihood that redirect examination will be needed to

¹⁵ Rule 144.

¹⁶ See similarly *Yekatom and Ngaïssona* Conduct of Proceedings Decision, ICC-01/14-01/18-631, paras 29-31; ICC, *Prosecutor v. Al Hassan*, Annex A to the Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, 6 May 2020, para.54; *Ongwen* Conduct of Proceedings Decision, ICC-02/04-01/15-497, 13 July 2016, para.17.

¹⁷ *Proposed amendment to Draft Order*, KSC-BC-2020-07/F00267/A01, para.45 ('[a] presentation queue listing all documents or other material to be used by the cross-examining Party must be released to the Trial Panel, the opposing Party and the Registry immediately upon the completion of the direct examination of that witness at the latest').

discuss any exhibits not initially apparent to the direct examiner.¹⁸ Making all anticipated exhibits available before direct examination will lead to more efficient witness examination by all parties.¹⁹

E. ORDER OF QUESTIONING

21. *Proposal*: Revision to para.63 as follows (changes in emphasis):

Where counsel for an Accused calls a witness, the order of questioning the witness is:

- Counsel for the Accused
- *Remaining counsel for the Accused*
- *Prosecution.*²⁰

22. *Justification*: When defence witnesses are called, the flow of the proceedings would be best preserved if the remaining accused question the witness before the SPO. It is anticipated that the defence teams in this case will have very similar questions for defence witnesses - with only a single exception, they currently intend to call the same witnesses.²¹ Splitting the defence teams' questioning permits the Defence what is effectively a redirect examination as of right.²² It also creates opportunities for

¹⁸ See similarly *Yekatom and Ngaïssona* Conduct of Proceedings Decision, ICC-01/14-01/18-631, para.42; *Ongwen* Conduct of Proceedings Decision, ICC-02/04-01/15-497, para.20.

¹⁹ It is noted that, on the facts of this particular case, there are projected to be many more Defence witnesses than SPO witnesses. As the Defence will generally be the 'calling party', it will primarily be the SPO who will be the 'non-calling party' providing notice of cross-examination materials.

²⁰ *Proposed amendment to Draft Order*, KSC-BC-2020-07/F00267/A01, para.63 ('Where counsel for an Accused calls a witness, the order of questioning the witness is:

- Counsel for the Accused
- Prosecution
- Remaining counsel for the Accused').

²¹ *Compare* List of Potential Witnesses the Defence Intends to Call, KSC-BC-2020-07/F00258/A01; 12 July 2021, Confidential; *with* List of Potential Witnesses the Defence Intends to Call, KSC-BC-2020-07/F00260/A01, 12 July 2021, Confidential.

²² *Contra* Rule 127(3) (on a witness called before the Trial Panel; in relevant part: '[d]irect examination and cross-examination shall be allowed in each case. The Panel may allow redirect examination as deemed necessary').

unwanted gamesmanship, whereby certain questions are not asked by one defence team so that the other can introduce the matter after the SPO's examination.

23. Examination of defence witnesses will proceed far more efficiently if the defence teams collectively ask all questions they wish to ask before the SPO's cross-examination. This would facilitate making any further redirect examination the focused, limited inquiry it should be.

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At The Hague, the Netherlands