



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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
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**Prosecution reply to Defence responses to request for admission of items through
the bar table**

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I. SUBMISSIONS

1. The Specialist Prosecutor's Office ('SPO') hereby replies to the Gucati Response¹ and Haradinaj Response² to the Request³ concerning the admission of items through the bar table. This reply concerns three new issues⁴ raised in relation to Categories 3-5 of the Request, noting that the admission of Categories 1-2 is not contested.⁵

A. THE DEFENCE ATTEMPT TO INTRODUCE NON-STATUTORY REQUIREMENTS FOR BAR TABLE REQUESTS MUST FAIL

2. The obvious notion that documents are generally authored by individuals does not imply that, in the statutory framework, documents can only be admitted into evidence through the testimony of their authors. There is no statutory requirement that documentary evidence can only be admitted through the bar table when no available witness can speak to it.⁶ The KSC statutory scheme likewise imposes no requirement that bar table requests should be exceptional or supplemental.⁷ There is no applicable 'best evidence rule' of admissibility and, since none of the evidence submitted constitutes the testimony of witnesses, there is no interference with the principle of orality.⁸

¹ Public Redacted Version of Response to the Prosecution Request for Admission of Items through the Bar Table, KSC-BC-2020-07/F00308/RED, 10 September 2021, ('Gucati Response').

² Publicly Redacted Defence Response to SPO Bar Table Motion Submissions, KSC-BC-2020-07/F00309/RED, 10 September 2021 ('Haradinaj Response').

³ Prosecution request for admission of items through the bar table, KSC-BC-2020-07/F00291, 31 August 2021 (with annex) ('Request').

⁴ Rule 76 of the Rules 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.

⁵ Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 22-23. In the Gucati Response, no submission is made under either category.

⁶ *Contra* Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 8, 21, 51.

⁷ *Contra* Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 9-10, 20, 35.

⁸ *Contra* Gucati Response, KSC-BC-2020-07/F00308/RED, paras 9, 24. *See also* Rule 141(1).

3. The applicable provision, Rule 138 of the Rules, is a broad provision placing greater emphasis on finding admissibility (emphasis added: '[u]nless challenged or *proprio motu* excluded, evidence submitted to the Panel *shall be admitted* if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.') than the comparable ICTY rule (emphasis added: '[a] Chamber *may admit any relevant evidence* which it deems to have probative value')⁹ underpinning many of the Haradinaj Defence's cited cases.¹⁰ The Defence attempts to add requirements not provided for in the statutory scheme must fail.

4. Many of the cases cited are not even in a comparable context, even beyond the fact they concern international crimes where the charges and fact patterns differ substantially from the present case. Many of the Haradinaj Defence's cited authorities for what limits should be imposed on bar table requests actually emanate from ICTY/ICC cases interpreting provisions analogous to Rules 153-55,¹¹ and are therefore out of context. These rules implicate extra procedural requirements distinct from a bar table procedure. Were these requirements apposite, then no evidence could be admitted through the bar table without meeting one of Rules 153-55. Such a position would be extreme and, noting the lack of objection to Categories 1-2 of the Request, is one not actually held by either Defence team.

5. Human rights law also does not impose any extra requirements beyond the statutory scheme. Whether or not there is a 'good reason' not to call a witness is a factor which is relevant at the point of admissibility, but the very case cited by the

⁹ Rule 89(C) of the ICTY Rules.

¹⁰ Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 43, 100.

¹¹ Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 11-12 (*Ongwen*), 13 (*Blagojević and Jokić*) 14-15 (*Bemba*), 82-84 (*Gbagbo*). The *Bemba et al.* citation at paragraph 16 of the Haradinaj Response is to a Defence submission in that case; the ICC Trial Chamber rejected these arguments and admitted the contested items. See ICC, *Prosecutor v. Bemba et al.*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), ICC-01/05-01/13-1285, 24 September 2015 (resolving arguments in, *inter alia*, ICC-01/05-01/13-1243-Red).

Gucati Defence makes clear that even if no ‘good reason’ is found there is no automatic violation of Article 6 of the European Convention of Human Rights.¹² The case cited in fact found a violation because convictions were based solely or decisively on pre-trial statements of witnesses without adequate counterbalancing measures,¹³ findings which can only be made after the totality of the admissible evidence is considered in the trial judgment. Calling the ‘good reason’ factor a ‘precondition’ of admissibility¹⁴ is to inflate the ECtHR’s jurisprudential considerations beyond what the ECtHR itself intended.

B. THE DEFENCE CONFLATE CONSIDERATIONS OF ADMISSIBILITY AND WEIGHT

6. The Defence conflate considerations of admissibility with those of weight¹⁵ in an attempt to prevent *prima facie* relevant and probative evidence from being properly considered at the end of trial.

7. This is particularly apparent in relation to the Gucati Defence’s objections to Facebook posts.¹⁶ It is a matter for trial as to whether or not the SPO has proven that the statements in these posts are attributable to the Accused. But it is manifest that these posts are so attributable on a *prima facie* basis, noting that: (i) the account is in the name of the Accused;¹⁷ (ii) the posts concern content of direct interest to the KLA WVA;¹⁸ (iii) the posts mirror the public statements of the Accused;¹⁹ (iv) there is no evidence the Accused ever deleted or otherwise distanced himself from any of the

¹² ECtHR [GC], *Schatschaschwili v. Germany*, 9154/10, 15 December 2015 (‘*Schatschaschwili*’), para.113 (see also paras 101, 114-118, 125-131). *Contra* Gucati Response, KSC-BC-2020-07/F00308/RED, paras 10 n.5, 27, n.16.

¹³ Gucati Response, KSC-BC-2020-07/F00308/RED, paras 10, n.5, 26, n. 15, 27, n.16. See also *Schatschaschwili*, 9154/10, paras 144, 161-65.

¹⁴ Gucati Response, KSC-BC-2020-07/F00308/RED, paras 10 n.5, 27, n.16.

¹⁵ Haradinaj Response, KSC-BC-2020-07/F00309/RED, para.107.

¹⁶ Gucati Response, KSC-BC-2020-07/F00308/RED, paras 34-35.

¹⁷ SPOE00245656-00245667.

¹⁸ See SPOE00222202-SPOE00222288-ET (including posts of both Gucati and Haradinaj).

¹⁹ See especially 081983-081988-ET Revised (calling KSC racist, denying intimidating witnesses, addressing press as to why batches were sent to the KLA WVA, etc.).

posts submitted; (v) no new posts were published following the Accused's arrest; and (vi) the Gucati Defence itself admits that the Accused did access the account in question.²⁰

8. Similar problems extend to the Gucati Defence's objections to international organisation letters,²¹ whose relevance is clearly explained and which have all necessary *prima facie* of indicia of authenticity. What weight should be given to these letters is indeed interconnected with W04841's testimony, but this is not a consideration of admissibility. Deferring such considerations to a later time is unnecessary and inappropriate, noting that the Defence are obligated to present its challenges to admissibility at the point of submission.²²

C. THE DEFENCE MISAPPREHEND THE 'TESTIMONIAL' AND 'LEGAL PROCEEDINGS' REQUIREMENTS WHEN INTERPRETING RULES 153-55

9. The Haradinaj Defence invests great energy in trying to expose contradictory positions of the SPO, but can only do so by blurring the categories of documents submitted and misstating the SPO's position.²³ The Defence does not appear to contest that Rules 153-55 should be limited only to 'testimonial' evidence taken for the purposes of 'legal proceedings', but distorts the meaning of these terms and their application to the items submitted.

10. These two limitations are distinct from each other. The investigative reports identified in Category 3.2 are prepared in the context of the present legal proceedings. But the contents of these reports and the circumstances of their creation make clear

²⁰ Public Redacted Version of Defence Pre-Trial Brief on behalf of Hysni Gucati, KSC-BC-2020-067F00258, 12 July 2021 (notified 2 September 2021), paras 153, 156.

²¹ Gucati Response, KSC-BC-2020-07/F00308/RED, paras 36-38.

²² Rule 138(1). *Contra* Gucati Response, KSC-BC-2020-07/F00308/RED, para.38.

²³ Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 53-70.

that they are not ‘testimonial’ evidence.²⁴ Officer reports on seizures and receipt of emails from journalists are documentary records merely certifying the activities carried out by officers in the course of their official duties. The report from the international organisation in this category is similarly an institutional account of the activities of the organisation. The Rules must allow for a practical approach, and impractical interpretations – such as requiring every investigator or author of a ministerial note to appear for cross-examination – cannot be correct.

11. In contrast, the contact notes contain statements provided by ‘witnesses’, as that term is defined in the indictment,²⁵ outside of legal proceedings and therefore outside of Rules 153-55. It must be emphasised that the SPO never asked any of the persons contacted about their ‘knowledge of the events which are the subject matter of this indictment’.²⁶ The SPO inquired about whether and how the person heard that his/her protected information had become public, but any knowledge of the events by which such revelation occurred was beyond the scope of the inquiry.²⁷

12. These contact notes constitute a documentary record of an office-wide security and welfare check. That this check was prompted by the crimes of the Accused does not change the nature of the contacts made.²⁸ As the SPO accurately informed the Trial Panel, none of these persons have been contacted to be a witness in *this* case²⁹ and these contact notes are not interviews previously foreshadowed by the SPO.³⁰ As is clear from the consistent submissions of the SPO and the circumstances by which these

²⁴ *In agreement with* Gucati Response, KSC-BC-2020-07/F00308/RED, para.11 (submitting in relation to the items at Category 3.2: ‘[t]here is no comparison to be made with the admission of audio or video recorded interviews with suspects under caution in the presence of counsel’); Haradinaj Response, KSC-BC-2020-07/F00309/RED, para.76.

²⁵ Transcript of Hearing, 1 September 2021, p.435. *See also* Prosecution submissions on use of the term ‘witness’, KSC-BC-2020-07/F00281, 23 August 2021.

²⁶ *Contra* Gucati Response, KSC-BC-2020-07/F00308/RED, para.17.

²⁷ *Contra* Gucati Response, KSC-BC-2020-07/F00308/RED, para.19 (noting especially the citations at n.10).

²⁸ *Contra* Haradinaj Response, KSC-BC-2020-07/F00309/RED, para.74.

²⁹ *Contra* Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 88-91.

³⁰ *Contra* Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 59-61.

contact notes were disclosed, each and every instance of encouraging the persons contacted to testify or otherwise continue to be a witness is made in reference to separate proceedings before the KSC.³¹

13. Noting their length, the topics covered, and the manner in which those topics were addressed, nothing about these contacts could suggest to the persons contacted that they were providing statements in the context of legal proceedings. The Defence's interpretation of legal proceedings is so broad as to lose all meaning.³² If checking on a witness's welfare qualified as being in the context of legal proceedings, then every SPO contact with a witness on any matter would be considered a Rule 153-55 statement. On any reasonable interpretation of 'legal proceedings', these notes do not fall under those rules.

14. These contact notes concern security and welfare checks with persons not being called as witnesses in this case. They are relevant, probative, and authentic. Cross-examination of the persons contacted is not necessary to establish that not everyone felt threatened by the conduct of the Accused – this is clear from the notes themselves and the SPO is even prepared to stipulate this point. Given the complementary role they play in the case, the opportunity to cross-examine W04842,³³ and the relevant information on the contacted persons' credibility which was in fact disclosed,³⁴ no prejudice is caused through their admission.

³¹ See Prosecution request for non-disclosure of certain information pertaining to contacts with witnesses, KSC-BC-2020-07/F00107, 29 January 2021 (reclassified 30 August 2021), para.16 (emphasis added: '[t]he [information in the contact notes] relates to, and identifies, certain individuals and their specific security concerns. These persons include potential witnesses *involved in ongoing investigations and proceedings unrelated to those against the Accused*'), partially granted in Public Redacted Version of Decision on Non-Disclosure of Certain Witness Contacts, KSC-BC-2020-07/F00136/RED, 22 February 2021. *Contra* Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 92-96.

³² Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 85-87.

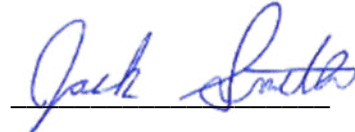
³³ Transcript of Hearing, 1 September 2021, p.505. *Contra* Haradinaj Response, KSC-BC-2020-07/F00309/RED, paras 71-73.

³⁴ See Public redacted version of 'Prosecution notification and request to provide summary', KSC-BC-2020-07/F00252/RED, 5 July 2021 (notified 27 August 2021; see also KSC-BC-2020-07/F00257), para.1. *Contra* Gucati Response, KSC-BC-2020-07/F00308/RED, para.32.

II. RELIEF REQUESTED

15. For the foregoing reasons, the SPO reiterates that the Trial Panel should grant the Request.

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Tuesday, 14 September 2021

At The Hague, the Netherlands