



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

Date: 24 September 2021

Language: English

Classification: Confidential

Prosecution consolidated response to Defence admissibility challenges

Specialist Prosecutor's Office

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I. Introduction

1. Defence challenges to the admissibility of W04841 and W04842's evidence¹ under Rule 138² are premature and speculative. The Defence also conflate considerations of admissibility with those of weight in an attempt to prevent relevant and probative evidence from being considered by the Trial Panel. These challenges should all be rejected.

II. Submissions

2. As concerns the declarations of these witnesses, Defence admissibility objections are clearly premature.³

3. W04842 is a witness for whom no Rule 154 request is to be made. Whether his declarations will be submitted for admission into evidence at all depends on how his testimony unfolds, meaning there is not currently a question of admissibility to rule upon.⁴ Certain items the Haradinaj Defence associates with W04842 are already tendered through the Bar Table Motion.⁵ As to the remainder, although the SPO was previously waiting for the resolution of the Bar Table Motion to decide whether to submit these items, the SPO has now resolved to remove them from the list of exhibits.⁶

¹ Rule 117(2) Application to have the Evidence of SPO Witnesses Ruled Inadmissible, KSC-BC-2020-07/F00318, 17 September 2021, Confidential ('Haradinaj Defence Request'); Motion to challenge the admissibility of evidence pursuant to Rule 138(1), KSC-BC-2020-07/F00317, 17 September 2021, Confidential ('Gucati Defence Request').

² 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 *Contra* Gucati Defence Request, KSC-BC-2020-07/F00317, para.1.

⁴ *Contra* Gucati Defence Request, KSC-BC-2020-07/F00317, paras 14-20.

⁵ Prosecution request for admission of items through the bar table, KSC-BC-2020-07/F00291, 31 August 2021 (with annex) ('Bar Table Motion').

⁶ *See* Haradinaj Defence Request, KSC-BC-2020-07/F00317, para.4, n.3. These changes will be reflected on the amended list of exhibits to be filed on 28 September 2021.

4. W04841 is also appearing before the Trial Panel, and the SPO has given notice it will seek to introduce her declarations pursuant to Rule 154.⁷ The SPO will not be making this request until W04841 appears before the Trial Panel,⁸ and consequently there is again no currently pending admissibility request.

5. As concerns the admissibility of W04841 and W04842's anticipated testimony, and as stated during the Trial Preparation Conference, the SPO's witnesses are providing facts and evidence, not analysis and conclusions.⁹ In response to this submission, the Trial Panel's direction was, when examining W04841 and W04842, to ensure that:

[...] as part of the examination-in-chief, that if they are asked about certain facts that their basis or circumstances in which they came to have knowledge about one particular fact or circumstance that's relevant to the case is raised with them so that it is clear at all stages the basis on which they are able to give information about this or that fact that you say is relevant to your case.¹⁰

6. The SPO will elicit clear evidence on the basis for W04841 and W04842's knowledge throughout their examination. So long as this is done, the testimony of these witnesses can be admissible within the meaning of Rule 138(1). Concerns that the SPO will elicit improper opinion evidence are entirely speculative.¹¹ The most efficient course is for W04841/W04842 to appear before the Trial Panel and have any objections to particular questions resolved in the course of their examination.

7. The Defence objections concern the alleged prejudice of anticipated evidence, rather than its relevance. These concerns fail to appreciate that the fact finders are professional judges who will rule on what evidence can be fairly elicited during the

⁷ Transcript of Hearing, 8 September 2021, p.700; Bar Table Motion, KSC-BC-2020-07/F00291, para.22, n.39.

⁸ The conditions to be satisfied under this rule are as follows: '[...] (a) the witness is present in court; (b) the witness is available for cross-examination and any questioning by the Panel; and (c) the witness attests that the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined'.

⁹ Transcript of Hearing, 1 September 2021, pp.486-87.

¹⁰ Transcript of Hearing, 1 September 2021, p.488.

¹¹ *Contra* Haradinaj Defence Request, KSC-BC-2020-07/F00317, para.4.

course of the hearing and considered at the end of trial. The Defence arguments effectively assume that the Trial Panel could only rely on W04841/W04842's evidence improperly. This evidence can clearly be relied upon without causing undue prejudice, and it should be admitted and considered as appropriate at the end of trial.

8. Repeating admissibility objections made against other evidence submitted in the Bar Table Motion¹² also does nothing to advance the matter. How W04841/W04842's testimony links to these items is a consideration of weight at the end of trial, and the admissibility of these items is already fully briefed and pending a decision of the Trial Panel.

9. The Gucati Defence Request and Haradinaj Defence Request should therefore be rejected for these reasons.

10. Although no further ruling is required at this time, in the course of their requests the Defence foreshadow certain admissibility objections during trial which would be clearly without basis. In order to ensure that the testimony of W04841 and W04842 proceeds without undue interruption, certain preliminary responses are necessary.

11. W04841 is competent to speak to the chain of custody of the Batches within the limits of her knowledge, and the authenticity of the Batches is not proven through her statements alone.¹³ Further evidence of the chain of custody of these materials has been submitted through the Bar Table Motion, including investigative reports, delivery documents, and even the public assertions of the Accused describing the details of the materials in their possession.¹⁴ That the Defence is challenging the chain of custody of

¹² Gucati Defence Request, KSC-BC-2020-07/F00317, paras 15-19; Haradinaj Defence Request, KSC-BC-2020-07/F00317, paras 4 (n.3), 5, 15-18, 25-41.

¹³ *Contra* Gucati Defence Request, KSC-BC-2020-07/F00317, paras 38-42; Haradinaj Defence Request, KSC-BC-2020-07/F00317, paras 6-11.

¹⁴ Still further evidence has been disclosed. *See also* Annex 1 to Prosecution's consolidated Rule 102(3) notice, KSC-BC-2020-07/F00183/A01, 14 April 2021, Confidential (items 84-90).

the Batches is their prerogative, but such challenges cannot preclude the introduction of admissible evidence on this point.

12. W04841 is not providing conclusions, opinions, or commentary about the Batches. The examples provided by the Gucati Defence¹⁵ are factual descriptions about them, many of which a SPO witness can contextualise. Such matters include, for example, whether the information in the Batches pertained to confidential SITF/SPO investigations and criminal proceedings, or whether the information in the Batches includes names and personal data of (potential) SPO witnesses. These are not matters of opinion,¹⁶ and W04841 is not an overview witness merely analysing evidence for the Trial Panel. She is a witness of fact.

13. The SPO is not asking the Trial Panel to simply accept its submissions as to what is in the Batches – the SPO will present pages of the Batches through the testimony of W04841 and various media articles which will make clear what they contain.¹⁷ The Trial Panel can also evaluate the credibility and reliability of W04841's testimony on these matters. As to the extent W04841 will summarise the Batches in the course of testifying, the *Perišić* case cited by the Gucati Defence makes clear that the admissibility of summary evidence depends upon the circumstances.¹⁸ Because the Batches are not independently accessible and are not being disclosed during trial in their entirety, limited summary evidence is more valuable than, for example, the open source evidence partly at issue in *Perišić*.¹⁹ That the SPO is not presenting the entirety of the Batches during trial falls within its discretion as to how to discharge its burden

¹⁵ Gucati Defence Request, KSC-BC-2020-07/F00317, para.34.

¹⁶ *Contra* Gucati Defence Request, KSC-BC-2020-07/F00317, paras 34, 37.

¹⁷ *Contra* Gucati Defence Request, KSC-BC-2020-07/F00317, paras 11, 27-33; Haradinaj Defence Request, KSC-BC-2020-07/F00317, paras 19-20.

¹⁸ Gucati Defence Request, KSC-BC-2020-07/F00317, para.7, citing ICTY, *Prosecutor v. Perišić*, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, IT-04-81-T, 11 February 2009 ('*Perišić* Decision'), para.9, in turn citing ICTY, *Prosecutor v. Milošević*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, 30 September 2002, para.21.

¹⁹ *Perišić* Decision, para.16.

of proof, noting the sound reasons set out at length in the Pre-Trial Judge's decision authorising their non-disclosure.²⁰

14. Similar considerations apply to W04842. W04842 is not an investigator – he was a Witness Security Officer within the Witness Security Team in September 2020 and currently serves as the head of that team. He is unquestionably in a position to testify, *inter alia*, on the institutional tasks carried out by this team, and in particular on the intensity of actual or perceived threats to SPO witnesses' security and well-being registered during and after the conduct of the Accused. He will further be able to provide examples of measure undertaken by the SPO to address concerns raised by (potential) witnesses in relation to their safety and well-being. Noting in particular that severe hindrance to the SPO's investigation is an element of the sentencing enhancement for one of the offences in this case,²¹ W04842 is providing evidence of fact and not analysis on these points.

III. Classification

15. The present filing is filed confidentially pursuant to Rule 82(4). The SPO has no objection to reclassifying this submission as 'public'.

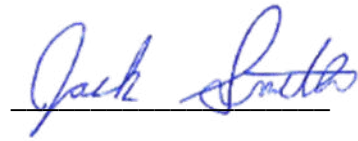
IV. Relief sought

16. For the foregoing reasons, the relief sought by the Defence should be rejected.

²⁰ Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00141/RED, 23 February 2021 (redacted version notified 15 July 2021). *Contra* Gucati Defence Request, KSC-BC-2020-07/F00317, paras 45-47.

²¹ Redacted Indictment, KSC-BC-2020-07/F00251/A02, 5 July 2021, Count 6 (violating the secrecy of proceedings, through unauthorized revelation of the identities and personal data of protected witnesses).

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Friday, 24 September 2021

At The Hague, the Netherlands