

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 Christophe Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 27 September 2021

Language: English

Classification: Public

**Public Redacted Version of Motion to challenge the admissibility of evidence
pursuant to Rule 138(1)**

Specialist Prosecutor

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

I. INTRODUCTION

1. The Accused challenges the admissibility of the following evidence pursuant to Rule 138(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('Rules'):

	ERN
Declarations of SPO Officer W04842	084008-084010 090142-090143
Declarations of SPO Officer W04841 and annexes	084015-084026 091791-091792 091927-091930 093492-093590 095162-095239 095533-095602 095603-095653

II. LAW

2. Rule 138(1) of the Rules provides a route for the Accused to challenge the admissibility of evidence where its probative value is outweighed by its prejudicial effect: "Unless 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".

3. Evidence declared inadmissible, pursuant to such a challenge, shall not be considered by the Panel (Rule 139(1) of the Rules).
4. Statements provided by a witness in legal proceedings shall only be adduced otherwise than by oral testimony where the conditions in Rules 153 to 155 of the Rules are met.
5. The requirements of Rules 153 to 155 are not to be simply circumvented by the use of an investigator's report summarising such statements¹.
6. In relation to documentary materials, an investigator of the prosecuting party is not entitled to present opinions or draw conclusions on the contents and interpretation of documents with which they familiarised themselves only by virtue of having reviewed them in the context of their employment with that party².
7. Where the investigator has only become familiarised with documents by virtue of having reviewed them in the context of their employment with the prosecuting party, the investigator may testify as a fact witness only in relation to provenance and chain of custody of the documents they have obtained in the context of their employment with that party, as no other relation between the investigator and the documents has been established³.

¹ *Prosecutor v Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraph 19

² *Prosecutor v Perisic*, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, IT-04-81-T, Trial Chamber I, 11 February 2009 at paragraph 12

³ *Prosecutor v Perisic*, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, IT-04-81-T, Trial Chamber I, 11 February 2009 at paragraph 15

8. The summarising of the contents of collections of documents and individual documents necessarily entails the giving of opinions and conclusions on the contents of the documents in question⁴.
9. It is the duty of the Trial Panel itself to thoroughly analyse the evidence (the documents themselves) and familiarise itself with it⁵.
10. In the absence of the documents upon which the investigator's report was prepared, that task will be impossible - the Trial Panel cannot take for granted, or accept without question, the assertions of the investigator of the prosecuting party as to the contents of the documents⁶.
11. Where the material summarised is controversial and the summary is prepared by an employee of the party who seeks to rely upon it:
 - a. A summary of that material should not be regarded as reliable unless the material itself is in evidence so that the Trial Panel may make its own assessment of the material; and
 - b. Were the Trial Panel to rely upon the summary without having the opportunity to make its own assessment of its reliability, the public perception of a verdict based upon that summary would be that the verdict is unsafe⁷.

⁴ *Prosecutor v Perisic*, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, IT-04-81-T, Trial Chamber I, 11 February 2009 at paragraph 12

⁵ *Perisic*, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, IT-04-81-T, Trial Chamber I, 11 February 2009 at paragraph 15

⁶ *Prosecutor v Bizimungu*, Trial Transcript (ruling on the admissibility of the report of Joseph Ngarambe), ICTR-99-50-T, Trial Chamber II, 8 October 2004 at page 31 lines 8-14

⁷ *Prosecutor v Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002, at paragraph 23

12. Where the documents themselves are produced in evidence, a summary by an investigator employed by the prosecuting party is unnecessary and of no probative value – the analysis of the documents is a task within the capacity of the Trial Panel itself⁸.
13. The assessment of an investigator of a prosecuting party would not appear to the public as an independent assessment⁹.

III. SUBMISSIONS

Declarations of SPO Officer W04842

14. ERN 084008-084010 consists of [REDACTED]. ERN 090142-090143 is [REDACTED].
15. The Accused has already made submissions objecting to the admission in evidence of the content of the 'Category 5: Contact Notes' in the Accused's 'Response to the Prosecution Request for Admission of Items through the Bar Table'¹⁰.
16. The submissions at paragraphs 15 to 33 therein are repeated as they apply *mutatis mutandis* to the proposed summarising of the content of those contact notes by W04842.

⁸ *Prosecutor v Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraphs 17 and 23

⁹ *Prosecutor v Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraph 3(c) per the Trial Chamber

¹⁰ *Response to the Prosecution Request for Admission of Items through the Bar Table*, KSC-BC-2020-07/F00308, Gucati, Confidential

17. As stated above, statements provided by a witness in legal proceedings shall only be adduced otherwise than by oral testimony where the conditions in Rules 153 to 155 of the Rules are met.
18. The requirements of Rules 153 to 155 are not to be simply circumvented by the use of an investigator's report (or, for that matter, oral evidence from an investigator) summarising such statements¹¹.
19. The opportunity to cross examine a witness who may summarise the statements of others does not overcome the absence of the opportunity to cross-examine the persons who made them¹².
20. In relation to the assertions by W04842 that confidential documents were made public, the submissions made below in relation to the declarations of W04841 and annexes thereto apply *mutatis mutandis*.

Declarations of SPO Officer W04841 and annexes

21. ERN084015-084026 consists of:

- (a) [REDACTED];
- (b) [REDACTED]; and

¹¹ *Prosecutor v Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraph 19

¹² *Prosecutor v Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraph 22

(c) [REDACTED].

22. ERN091791-091792 [REDACTED].

23. ERN091927-091930 [REDACTED].

24. ERN093492-093590 and ERN095533-095602 [REDACTED].

25. ERN095162-095239 and ERN 095603-095653 [REDACTED].

26. At the outset, the declarations are said to have been [REDACTED]¹³. The SPO has not made disclosure of the '[REDACTED]' and of the [REDACTED], and the SPO does not intend to adduce the same in evidence.

27. The documents said to form Batch 1 have not been disclosed and the SPO does not intend to adduce them in evidence.

28. In relation to Batch 2, a large number of documents have been disclosed as publicly available documents. They are wholly unremarkable (see the summary in paragraph 21 of ERN084015-084026). If there is any probative value in the documents themselves, they can be produced in evidence.

29. However, it is alleged by W04841 that Batch 2 [REDACTED] which have not been disclosed and which the SPO does not intend to adduce in evidence.

¹³ ERN084015-084026 at paragraph 4; ERN091791-091792 at paragraph 4; ERN091927-091930 at paragraph 4

30. The documents said to form Batch 3 have not been disclosed and the SPO does not intend to adduce them in evidence.
31. The documents said to form Batch 4 have not been disclosed and the SPO does not intend to adduce them in evidence.
32. The assertions of W04841 as to the alleged contents of Batches 1, 3, 4 and the [REDACTED] undisclosed pages of Batch 2 are not accepted as accurate and reliable.
33. The Annexes allegedly scheduling information of the contents of Batches 1, 3, 4 and the [REDACTED] undisclosed pages of Batch 2 are not accepted as accurate and reliable.
34. The declarations of W04841 in relation to these 'batches' contain numerous examples of explicit conclusion, opinion and commentary, including but not exclusively the following examples:
- (a) "[REDACTED];
 - (b) "[REDACTED];
 - (c) "[REDACTED];
 - (d) "[REDACTED];
 - (e) "[REDACTED];
 - (f) "[REDACTED];

(g) “[REDACTED];

(h) “[REDACTED];

(i) “[REDACTED];

(j) “[REDACTED];

(k) “[REDACTED];

(l) “[REDACTED];

(m) “[REDACTED];

(n) “[REDACTED]; and

(o) “[REDACTED].

35. The [REDACTED] on Batches 1, 2, 3 and 4 include the [REDACTED] as to *inter alia*:

(a) [REDACTED];

(b) [REDACTED];

(c) [REDACTED];

(d) [REDACTED];

(e) [REDACTED]; and

(f) [REDACTED].

36. The selection of alleged samples of '[REDACTED]' by W04841 involves the witness making determinations on relevance and content. The very act of [REDACTED] by W04841¹⁴.

37. Nothing is said in the declarations or annexes as to [REDACTED].

38. Certainly, no [REDACTED] can be properly drawn from Annexes 2 and 4 to ERN093492-093590/ERN095533-095602 and Annex 2 to ERN095162-095239/ERN095603-095633. On the contrary, such Annexes only [REDACTED].

39. The relationship between the documents reviewed and W04841 is one where she is said to have become familiarised with documents by virtue of only having reviewed them in the context of her employment with the SPO (her duties being said to include 'analyzing and reporting on evidence'¹⁵).

40. In those circumstances, W04841 may testify as a fact witness only in relation to provenance and chain of custody of the documents as no other relation between the investigator and the documents has been established¹⁶.

41. In those circumstances, it is to be noted with irony that W04841, who did not participate in the seizure of any of Batches 1, 2, 3 or 4, does not - and cannot -

¹⁴ *Prosecutor v Perisic*, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, IT-04-81-T, Trial Chamber I, 11 February 2009 at paragraph 12; also *Prosecutor v Bizimungu*, Trial Transcript (ruling on the admissibility of the report of Joseph Ngarambe), ICTR-99-50-T, Trial Chamber II, 8 October 2004 at page 31 lines 8 to 14

¹⁵ ERN084015-084026 at paragraph 3

¹⁶ *Prosecutor v Perisic*, Decision on Defence Motion *In Limine* for Prosecution Witness Bretton Randall, IT-04-81-T, Trial Chamber I, 11 February 2009 at paragraph 15

provide evidence of provenance and chain of custody in relation to the same (she relies instead, it is to be presumed, upon '[REDACTED]', as to the origin of the documentation for the preparation of her declarations).

42. Indeed, the SPO does not intend to call any witness to give evidence as to the provenance and chain of custody in relation to the origin of 'Batches 1, 2, 3 or 4' (as they have been described in informal short hand, rather being given a formal exhibit number which is identified upon a sealed evidence bag, securing the contents from interference with a log produced which records the date, time and identity of the officer, whenever the bag has been opened and the contents accessed before being re-sealed). There is no evidence of continuity.
43. Instead, the SPO asks the Trial Panel to take for granted - to accept without question - the assertions of W04841 as to the origin, contents of, and conclusions to be drawn from, 'Batches 1, 2, 3 and 4', including the origin, authenticity and reliability of the alleged sampled screenshots.
44. It is not necessary for this challenge to allege, let alone establish, bad faith¹⁷ but it is nevertheless remarkable that the SPO so asks the Trial Panel in circumstances where the conduct and partiality of officials of the SPO are live issues in the case¹⁸.

¹⁷*Prosecutor v Milosevic*, Trial Transcript, IT-02-54-T, Trial Chamber, 30 May 2002 at page 5931 lines 23 to page 5932 line 1, and page 5932 line 19 to page 5933 line 6

¹⁸ E.g. *Defence Pre-Trial Brief on behalf of Hysni Gucati*, KSC-BC-2020-07/F00258, Confidential at paragraphs 36-50, 89, 91, 102, 107, 117-119, 131, 133-136, 160, 161, 164, 176, 210, 341-343, 393-404; see also Annex 1 to the Written Submissions on behalf of Hysni Gucati for Trial Preparation Conference and Related Matters, KSC-BC-2020-07/F00288/A01, Confidential

45. The issue of the contents (provenance, chain of custody, confidentiality and authenticity) of the material allegedly contained within Batches 1, 2, 3 and 4 is both highly controversial¹⁹ and at the very heart of the case against the Accused.
46. It is assumed that the documents themselves remain in the possession of the SPO.
47. The documents themselves ought to be produced in evidence so that the Trial Panel can reach its own conclusions on the content thereof (rather than be asked to take for granted the assertions of W04841).
48. The declarations and annexes prepared by W04841, a member of staff of the office of the Prosecutor, have no more probative value than the assertions that counsel makes²⁰.
49. Their prejudicial effect (being assertions that cannot be tested against the actual documents, which are withheld by the Prosecution) grossly outweighs whatever probative value is claimed and they should be excluded accordingly.

IV. CLASSIFICATION

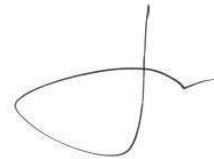
50. This filing is classified as confidential because it contains excerpts from documents disclosed to the Defence on a confidential basis²¹.

¹⁹ E.g. *Defence Pre-Trial Brief on behalf of Hysni Gucati*, KSC-BC-2020-07/F00258, Confidential at paragraphs 51-53, 77-79, 81, 194, 111, 138, 155, 168, 177, 201, 245, 247-250, 25-255, 257-258, 264-275, 278-288, 302 and 351

²⁰ *Prosecutor v Milosevic*, Trial Transcript, IT-02-54-T, Trial Chamber, 30 May 2002 at page 5932 lines 19 to page 5933 line 1

²¹ *Order on Reclassifications and Redacted Versions*, KSC-BC-2020-07/F00264, 15 July 2021 at paragraph 10

Word count: 3178 words



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

27 September 2021

Cardiff, UK