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 Guenael Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Defence Reply to KSC-BC-2020-07/ F00322

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I. INTRODUCTION

1. On 17 September 2021, the Defence for Mr. Haradinaj submitted its application challenging the admissibility of SPO witnesses.[1]

2. On 24 September 2021, the Specialist Prosecutor's Office ("SPO") filed its 'Consolidated Response to Defence Admissibility Challenges'.[2]

3. On 27 September 2021, the Trial Panel II issued an order dismissing the Defence applications.[3]

4. On 29 September 2021, the Defence filed a request for reconsideration of that Order on the basis that the Panel had issued its Order prior to any reply being filed and therefore issued a decision prematurely and that the Panel had wrongly determined the application as out of time.[4]

5. On 30 September 2021, the Trial Panel II issued its Order on that application[5] directing that the Defence were to file any reply to the response by 4 October 2021.

[1] KSC-BC-2020-07/F00318
[2] KSC-BC-2020-07/F00322
[3] KSC-BC-2020-07/F00328, *Order on Rule 117 Defence Motions, 27 September 2021*
[4] KSC-BC-2020-07/F00338, *Application for Reconsideration of Decision F00328 on Rule 117 Defence Motions*
[5] KSC-BC-2020-07/F00344, *Order to the Defence to File Replies to F00322*

6. The Defence recalls that a reply serves to respond specifically to points raised within any response and not to either rehearse arguments already made or to raise a new argument.

7. The Defence does not seek to address the issue of the Panel's prior determination as being out of time, as the Order of 30 September 2021 directs the Defence to submit its Reply, thereby implicitly accepting that the original application was filed in time.

II. Submissions

8. The SPO seek, at the outset, to submit that the challenges raised are "*premature and speculative*".[6] This is wholly rejected as being without substance or merit.

9. The admissibility or otherwise of evidence is a preliminary issue that must be dealt with prior to the commencement of any trial having regard to the fact that if evidence is heard that is otherwise inadmissible, that evidence has already been heard and is therefore prejudicial to any defence.

10. If evidence is heard prior to the issue of admissibility being considered, any argument of admissibility is null and void as the same has already been

[6] *Ibid* at paragraph 1 and 2

admitted; the position advanced by the SPO is therefore without foundation in law.

11. This lack of foundation continues with what appears to be an argument that as testimony has not been heard, there is no question of admissibility currently.[7] Such an argument is, with the greatest respect, puzzling and somewhat illogical.

12. It is of note that this position appears to run counter to the argument the SPO raises in respect of the Defence witnesses, wherein the SPO seeks to 'strike' witnesses and/or prevent other witnesses from answering questions on certain issues.[8]

13. It is quite clear that the SPO cannot argue a point in their favour on the one hand, and yet seek to prevent the same on another. The principal and quite fundamental difference between the position of the SPO and the position of the Defence in the witnesses being proposed is that the former seeks to introduce inadmissible hearsay evidence through its witnesses whereas the latter does not.

[7] *Ibid* at paragraph 3
[8] KSC-BC-2020-07/F00312

14. If such an argument is to succeed, the *de facto* position is that there can never be a question of admissibility in the context of evidence that the SPO seeks to advance as no testimony would be heard prior to the trial.

15. In a similar vein, the argument at paragraph 4 of the SPO Response, namely that "*…the SPO has given notice it will seek to introduce her declarations pursuant to Rule 154. The SPO will not be making this request until W04841 appears before the Trial Panel, and consequently there is again no currently pending admissibility request*" is without foundation.

16. The SPO Response continues in a similar vein, and with respect, does not engage with the actual arguments being raised, instead, the submission attempts to re-draft the Rules of Procedure and Evidence to suit its own needs.

17. The Defence notes that the SPO witnesses will be "*providing facts and evidence, not analysis and conclusions*";[9] however, therein lies the problem, or at least part of the problem.

18. As is referred to within the substantive submission,[10] the witnesses <u>cannot</u> give evidence in respect of certain essential matters, as they either were not present, or the information concerns points that they simply cannot speak

[9] KSC-BC-2020-07/F00322 at paragraph 5
[10] KSC-BC-2020-07/F00318

about and to pass comment, or, to "*provide facts*" on such matters is wholly inappropriate as it is beyond their competence or knowledge.

19. Noting *Kordić*,[11] as has been raised on previous occasions, the Prosecution applied for an investigator's report concerning other pieces of evidence to be admitted; the Chamber held that although "*[t]he International Tribunal is not bound to reject hearsay evidence that position with regard to the Report is somewhat different. The Investigator is not reporting as a contemporary witness of fact, he has only recently collated statements and other materials for the purpose of this Application. He could, in reality, only give evidence that material was or was not in the Dossier. The report therefore is of little or no probative value and will not be admitted into evidence*".

20. The position must hold true in the instant case, in that the evidence itself is not being admitted, those witnesses remaining anonymous and their statements not being adduced as evidence, and therefore, the investigator(s) can only give very limited evidence rather than direct evidence of fact.

21. This is not an issue of "*efficiency*",[12] as the SPO purports to argue, but rather, an issue of fairness. A trial is an adversarial process, but one that must be fair, and one that must adhere to the Rules of Procedure and Evidence.

[11] *Prosecutor v. Kordic*, Decision on the Prosecution Application to admit the Tulica Report and Dossier into Evidence, 29 July 1999, at paras 19 and 20.
[12] KSC-BC-2020-07/F00322 at paragraph 6

22. It is simply not enough to suggest that all evidence can be admitted, and that issues of admissibility ruled upon during the trial, or further, that the most efficient way to deal with the issue is to hear the evidence and deal with objections piecemeal.

23. Again, it is noted that the SPO does not suggest a similar course of action for Defence witnesses and/or evidence, and actively seeks to prevent certain evidence from being adduced. This, when raised by the SPO appears to be in accordance with the Rules, and in accordance with the appropriate running of the trial, but not when it is the SPO that is negatively affected by such an application. There must be parity.

24. No further submissions are made in respect of Witness W04841 as to do so would merely repeat that which is contained within the substantive application.

25. In terms of Witness W04842, paragraph 14 of the SPO Response is noted; however, at the risk of rehearsing that which has already been argued in the substantive submission, the witness is not in a position to testify in respect of witnesses who suggest that they have been adversely affected, and further, ought not to be permitted to give evidence when the witness alleged to have been subjected to the apparent threats and intimidation is available, and further, is willing to attend and give evidence.

26. Contrary to the submission of the SPO, the witness is not providing evidence of fact on these points, but rather, it is opinion and therefore ought to be deemed inadmissible.

III. CONCLUSION

27. For the reasons given in the substantive submission and further, the aforesaid, to admit the evidence as proposed is both contrary to the Rules of Procedure and Evidence, and further, is of limited probative value given the circumstances and the nature of what evidence can be given.

28. Still further, even where it is found that the evidence subject to the application has probative value, it is so prejudicial so as to outweigh the probative value, and therefore the evidence falls foul of Rule 138(1) "*…shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect*".

29. Accordingly, the Trial Panel ought to find in favour of the Defence application(s).

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