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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
Date:	8 October 2021
Language:	English
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Public Redacted Version of Rule 117(2) Application to have the Evidence of SPO Witnesses Ruled Inadmissible

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I. INTRODUCTION

1. On the 1 and 2 September 2021, Trial Panel II convened a Trial Preparation Hearing, at the conclusion of which a number of 'Oral Orders' were made.[1]

2. Oral Order Number 8 is "*Having heard the parties on their intention to file additional Rule 117 motions, the Trial panel hereby orders that any other Rule 117 motions are filed by 17 September 2021*".[2]

3. The Defence for Mr. Haradinaj seeks to submit the below by way of a Rule 117 motion, in that it is a preliminary motion concerning the admissibility of evidence that ought to be considered prior to the commencement of the trial.

II. The Application

4. The Application is that the Trial Panel rules the evidence of [REDACTED][3] and [REDACTED][4] as being inadmissible, it not amounting to evidence, but rather, the opinion of staff members of the Specialist Prosecutor's Office ("SPO"), namely an investigator and a witness security officer, and further,

[1] KSC-BC-2020-07/F00291

[2] KSC-BC-2020-07, Transcript, Trial Perpetration Hearing, 2 September 2021, Eighth Oral Order, Page 603 Line 21 and Page 604 Line 1.

[3] KSC-BC-2020-07/F00181/A02; ERN 090141-TR-ET Part 1 RED, 090121-TR-ET Part 1 and 2 RED, 090125-TR-ET Part 1 and 2 RED, 090138-TR-ET Part 1 and 2 RED, 090134-TR-ET Part 1 and 2 RED, 090131-TR-ET Part 1 and 2 RED; ERN 084232, 084303, 089886, 089908, 089909, 089910, 090066, 090264, 091902, 091907, 092914, 092918, 092945, 093379, 093386, 093388, 094748 and 094748

[4] *Ibid*.

the opinion of staff members who were not present at all times at which the evidence is said to have arisen.

5. In short, the submission of the Defence, is that neither witness is in a position to give evidence concerning events at which they were not present, and therefore, that evidence is not capable of being heard by the Specialist Chambers.

6. Further, the witness [REDACTED] seeks to give evidence on the basis of materials that have been referred to as Batches 1, 2 and 3 and which have not been disclosed, in their entirety, to either the Defence or the Trial Panel. The witness seeks to give evidence on whether the material contained with Batches 1, 2 and 3, was confidential and non-public. The witness was neither present during the operations of 8, 17 and 22 September 2021, where the material is said to have been seized, nor is the witness an evidence custodian by which she is giving evidence on the chain of custody. Her evidence therefore in respect of the material said to be contained within Batches 1, 2 and 3 is therefore not subject to challenge and the Trial Panel is not able to assess whether her evidence is credible, probative and relevant to the proceedings.

7. To reaffirm the position already raised on a number of occasions, if it is that the SPO seeks to adduce evidence from persons identified, it is those persons

who ought to be called to give that evidence so that the Trial Panel can assess whether their evidence is credible, probative and relevant to the proceedings.

8. Further, whether the evidence to be adduced is based on documentary material, it is those documents that ought to be adduced by the author, where relevant questions can be asked to determine whether such evidence is credible, probative and relevant to the proceedings.

III. SUBMISSIONS

[REDACTED]

9. [REDACTED] seeks to give evidence in respect of various matters, the majority of which she is not in a position to actually give evidence upon, but rather, can only provide a summary and/or opinion, the SPO instead, choosing not to call the actual witness who *is* in a position to offer that evidence.

10. Specifically, certain events are described in the 'Official Notes' of [REDACTED], [REDACTED], and [REDACTED]. However, these individuals are not being called to give evidence, but rather, [REDACTED] seeks to offer comment on the basis of the 'Official Notes' of those SPO

Officers, and potentially other members of the SPO including Prosecutors and Investigators as set out in the Objections to the Bar Table Motion.[5]

11. [REDACTED] was not present at any of the events described, and therefore, cannot answer any questions about these matters, she can merely recount what she has read or what she has heard; this is not evidence, this is opinion, and further, not opinion within in the definition of an 'expert', but simply her opinion as an investigative coordinator.

12. The SPO seeks to advance a position that an Investigations Coordinator is capable of giving evidence on the conduct of the investigation and summarise the prosecution case. That is not in dispute. The Defence intends to call its own investigator on the basis of the defence investigation and the statements taken of defence witnesses. However, the defence investigation's coordinator will not be giving evidence in place of the defence witnesses, or seeking to summarise what they will say, but will comment on the procedures and will give evidence in addition to, and to set out the conduct of Defence investigations. That is the appropriate position to take in a criminal trial.

13. Further, it is accepted that [REDACTED] participated in, or was at least present in respect of a number of contacts with witnesses,[6] and therefore she

[5] KSC-BC-2020-07/F00309

[6] ERNs 084232; 084303; 089886; 089908; 089909; 089910; 090066; 090264; 091902; 091907; 092914; 092918; 092945; 093379; 093386; 093388; 094748; 094748

is in a position to give limited evidence in respect of those contacts, notwithstanding the objections already raised concerning the extent of that evidence, and the again, already raised objections in respect of the refusal to call the witness themselves.

14. Conversely, as much as [REDACTED] can give evidence in respect of those contacts at which she was present, she cannot give evidence about the nature and extent of those contacts with witnesses when she was not present.

15. Any reference that has, and is likely to again be made by the SPO to a purported 'balancing' by having the officer(s) there to be cross-examined, is therefore with respect, meaningless, given that she:

a. Cannot give evidence in respect of meetings at which she was not present; and

b. Cannot answer any questions in cross-examination in respect of those same meetings and therefore any cross-examination is rendered meaningless, which in turn, undermines the Defendant's right to a fair trial, and is any event wholly prejudicial given the ineffectiveness.

16. Further, and again as has been raised by both Defence teams, 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 them.[7]

17. [REDACTED] further seeks to give evidence concerning a number of 'International Organisation letters'.

18. Similar to the objection concerning the 'Contact Notes', the letters themselves have not been disclosed, and therefore, the Defence, and the Chamber, are being asked to accept any evidence given on this point as being fact without any consideration of the evidence itself, and without any meaningful challenge should such a challenge be brought.

19. It is a fundamental and basic principle of any trial that where witnesses give evidence in respect of a document and/or exhibit, the same is considered.

20. In the instant case, we are simply being asked to accept the letters 'are what the SPO say they are', there is no basis upon which the Defence can seek to challenge the evidence in the absence of disclosure of the materials themselves.

[7] KSC-BC-2020-07/F00308, *Gucati Defence 'Response to the Prosecution Request for Admission of Items through the Bar Table*; *see* Prosecutor v Slobodan Milosevic, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraph 22

21. Similar to the position with the contact notes therefore, the evidence of [REDACTED] on this point is wholly prejudicial, without any actual counter-balancing measure.

[REDACTED]

22. The submissions in respect of [REDACTED] in respect of the contact notes are reasserted in respect of [REDACTED], that is to say that he only participated in a limited number of the contacts.

23. Therefore, and again, [REDACTED] can comment upon the contacts he had, but cannot comment upon those he did not.

24. Further, and importantly, he can only give evidence about what was said by the witness, but he cannot be challenged on whether what was said is accurate, credible or probative.

25. Again therefore, the Chamber is being asked to simply 'accept' the evidence is what the SPO/witness, says it is, rather than have that evidence 'tested' in the usual way.

26. The pre-trial brief already submitted at paragraph 71 refers to the generally recognised principle in respect of the manner in which evidence is given, and further, the exceptions that may be applicable, noting that the SPO has not satisfied those exceptions, but further, has actively demonstrated its

reluctance and/or refusal to call any witnesses of fact for the purposes of giving oral evidence.[8]

27. It is not the intention of this submission to rehearse those previous arguments already made, as the Trial Panel is already aware of the same, however, the salient point, concerning the evidence of [REDACTED] and [REDACTED], is that the Defendant is being actively prevented from exercising his right to examine witnesses, as the witnesses are not giving evidence in person, without any actual counter-balancing measures.

28. Again as has already been raised in various submissions, including the pre-trial brief at paragraph 79 "*…the aforementioned witness voluntarily expressed a willingness to give oral evidence*".

29. Further, that witness, A.7, B.5, E, on the basis of the evidence does not appear to support the prosecution case, and yet, the Defendant remains prevented from adducing and/or challenging that evidence.

30. For instance, neither [REDACTED] nor [REDACTED] can answer any questions that may develop this position further, the most they can confirm is that the witness made the comment.

[8] *Footnote 30* KSC-BC-2020-07/F00260

31. In the same vein, where a witness is purported to support the prosecution allegation, neither of the two witnesses being called can answer any question that may be asked to challenge the evidence given.

32. In the Haradinaj submissions concerning the admissibility of evidence through the Bar Table,[9] at paragraph 93 cites various witnesses who give evidence, and are prepared to give evidence in person.

33. No reason has been provided as to why these witnesses cannot give that evidence, and therefore by extension, no reason has been provided as to why the Defendant(s) are being prevented from challenging that evidence.

34. Reference is again made to the Haradinaj pre-trial brief, at paragraphs 83 and 84, and the dicta of the European Court of Human Rights (ECtHR), in *Schatschaschwili v. Germany*[10] and that of *Al-Khawaja and Tahery v. The United Kingdom*.[11]

35. The Defendant in the instant case is not being given any opportunity to question a witness.

[9] KSC-BC-2020-07/F00309

[10] Appl. No. 9154/10, 15 December 2015, para. 101

[11] Appl. Nos. 26766/05 and 22228/06, 15 December 2011, para 127

36. Again to reference *Milošević*,[12] the content of those contact notes relate to "*a critical element of the Prosecution's case or put another way, to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue*", and therefore, the Accused must be given the right to cross-examine the individual who gives the evidence, and not merely the individual who records the same.

37. Any other approach is wholly prejudicial, and undermines Article 6(1) ECHR, again referring to *Al-Khawaja*, the question to be asked, is:

> "*[Whether] there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place.*"[13]

38. As has been consistently referred to within these submissions, and previous submissions dealing with similar issues, as much as the SPO submit that the ability to cross-examine an investigator is a 'counter-balancing' measure, it is not.

39. No measure in place, nor any measure that could be put in place, can change the fact that neither investigator can answer questions concerning the

[12] *Prosecutor v.Milošević*, Decision on Prosecution's Request to have Written Statements Admitted under Rule 92*bis*, 21 March 2002, para 24.

[13] *Al-Khawaja and Tahery v. The United Kingdom*, Appl. nos. 26766/05 and 22228/06, 15 December 2011,

evidence itself, over and above they were present on some, but not all occasions when those notes were taken.

40. Reference is drawn to the Haradinaj pre-trial brief at paragraphs 98 and 99 and the position reaffirmed.

41. It is further of note that no application has been submitted to adduce that evidence under Rules 153, 154, or 155 of the Rules of Evidence and Procedure

IV. CONCLUSION

42. The underlying commitment of any trial before the Chamber, is that each and every case that comes before it must be adjudicated fairly.

43. Fair trial rights are clear, and where an individual's fair trial rights are to be undermined if a course of action is to be taken, that action ought not to be taken.

44. This is the principle arising in the instant case and submission.

45. If the evidence of the two witnesses, as detailed above is admitted in its current form, there is a clear and unmitigated prejudice to the Defendant as the panel will hear evidence that cannot, and therefore will not be challenged or scrutinised by way of cross-examination.

46. Such a position is wholly opposed to the principle of a fair trial, and thus that evidence must be ruled as being inadmissible.

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