



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: 22 October 2021

Language: English

Classification: Public

Prosecution challenge to proposed Defence expert and report

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. INTRODUCTION

1. Pursuant to Rule 149(2)(a) of the Rules¹ and the Trial Panel's order,² the Specialist Prosecutor's Office ('SPO') challenges the relevance of all parts of the proposed expert report by Witness 17.³ The Defence assertion that public interest could be a defence to the charges against the Accused remains baseless. Any assertion that the Accused could be excused of criminal conduct merely by invoking whistleblower status is equally unfounded. Consequently, expert evidence on this matter is irrelevant. If the Trial Panel were minded to consider such a defence, or any argument that the Accused merit protection as whistle-blowers, the Trial Panel would itself be able to make the relevant legal determinations. The Report and Witness 17 would not be of assistance. Rather, the Report and Witness 17 would improperly usurp the Trial Panel's functions as the ultimate arbiter of fact and law.

2. Accordingly, pursuant to its powers under Article 40(2) and (6) of the Law⁴ and Rules 116(1) and (4), 138(1) and 143(4), the Trial Panel should reject the admission of the Report into evidence and not authorise the testimony, as an expert or otherwise, of Witness 17. Should the Trial Panel accept the Report or parts thereof, Witness 17

¹ 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.

² Decision on Request for an Extension of Time to Serve Expert Evidence, KSC-BC-2020-07/F00343, 30 September 2021, para.8; Transcript, KSC-BC-2020-07, 2 September 2021 p.603, lns.17-19.

³ Expert Report of Ms. Anna Myers of the Whistleblowing International Network, KSC-BC-2020-07/F00376/A01, 15 October 2021 ('Report'). The report was notified on 18 October 2021 at 09:24 a.m. No 'concise summary of the instructions provided to the expert before he or she produced its first draft of the report, and of any further instructions provided to the expert after receipt of the first and any subsequent drafts of the report' was provided with the Report, contrary to paragraph 87 of the Annex to Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314, 17 September 2021 ('Order on the Conduct of Proceedings'). On 20 October 2021, the Haradinaj Defence provided a courtesy copy of the letter of instruction sent to Witness 17 via email to the SPO. The letter of instruction was formally notified on 21 October 2021 through Annex 1 to Defence Submission of Instructions to Expert Witness 17, KSC-BC-2020-07/F00386/A01, 20 October 2021, Confidential ('Letter of Instruction').

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

should be made available for cross-examination and the SPO would reserve its right to call an expert in rebuttal ('Request').

II. SUBMISSIONS

3. As previously submitted,⁵ and as noted by the Trial Panel,⁶ a Party's discretion in selecting and presenting its evidence is not unlimited, and the Trial Panel may intervene in order to exclude irrelevant evidence and ensure the fair and expeditious conduct of the trial.⁷ Such intervention is warranted in relation to the Report and Witness 17, *inter alia*, since authorising the admission of the Report or any evidence by this witness would not be conducive to the efficiency of proceedings and would constitute an undue consumption of time and resources,⁸ thereby running contrary to the interests of justice.

A. Public interest cannot constitute a defence to the charges against the Accused

4. The Defence has failed to identify any relevant provisions or jurisprudence in support of the contention that public interest is a defence to the charges against the Accused.⁹ That is because this contention, or any claim of whistle-blower or other status, could never constitute a legal excuse or justification for the commission of crimes such as those the Accused are charged with. Accordingly, as there exists no legal basis for the claimed defence, the Report and Witness 17's testimony are irrelevant to the proceedings.

⁵ Prosecution requests in relation to Defence witnesses, KSC-BC-2020-07/F00312, 15 September 2021, Confidential ('15 September 2021 Request').

⁶ Decision on the Defence Requests for Reconsideration of Decision F00328, KSC-BC-2020-07/F00353, 7 October 2021, para.23.

⁷ See Rule 138(1); See also Rule 119(3); ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, para.6; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.7, Decision on Defendants' appeal against 'Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge', 1 July 2008, para.25.

⁸ See Rule 143(4).

⁹ See 15 September 2021 Request, KSC-BC-2020-07/F00312, para.13.

B. The Report and/or Witness 17 would not assist the Trial Panel

5. If the Trial Panel were to consider a public interest or whistle-blower defence, admission of the Report and/or testimony by Witness 17 should nevertheless be denied as this evidence would not be of assistance to the Trial Panel.¹⁰

6. The Haradinaj Defence has asserted that the purpose for calling Witness 17 is to set out laws on whistle-blowing.¹¹ The Trial Panel has already made it clear it would not hear as expert witnesses individuals who possess no expertise which the Trial Panel does not possess.¹² Given that the Report contains, in essence, a recitation and interpretation of publicly available laws, reports and jurisprudence,¹³ it cannot reasonably be said that Witness 17 possesses expertise which the Trial Panel does not.

7. Further, prior to the submission of the Report, the Defence had already filed submissions concerning what the Defence considers to be relevant laws in this regard.¹⁴ The fact that the Defence may advance the substance of proposed expert evidence in oral or written argument is another valid reason to reject the admission of such evidence.¹⁵

8. Witness 17's understanding of the definition of a whistle-blower¹⁶ is irrelevant, as is Witness 17's opinion as to whether the Trial Panel should consider a defence

¹⁰ See *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1159, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016 ('*Ntaganda Decision*'), para.8; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecution motion for reconsideration of the decision on prospective experts Guichaoua, Nowrojee and Des Forges, or for certification, 16 November 2007 ('*Karemera Decision*'), para.14.

¹¹ Transcript, KSC-BC-2020-07, 1 September 2021 p.463, lns.5-11.

¹² Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314, para.89.

¹³ Report, paras 10-11, 16, 20-21, 26-29, 33, 37, fns.13-14, 16-18, 19-20, 22-24, 26-28.

¹⁴ List of Legislation on Whistleblowing *per* Trial Panel II Oral Order Number 3, KSC-BC-2020-07/F00300, 6 September 2021.

¹⁵ *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007 ('*Nahimana Appeal Judgement*'), paras 293-294.

¹⁶ Report, paras 10-21.

related to whistle-blowing.¹⁷ The Trial Panel would itself be able to determine whether the Accused would satisfy the relevant legal provisions.

C. The Report and/or Witness 17 would inappropriately usurp the Trial Panel's functions

9. Rather than assisting the Trial Panel in understanding or determining an issue of a technical nature that is in dispute,¹⁸ the Report and/or Witness 17's testimony would usurp the functions of the Trial Panel as the ultimate arbiter of fact and law.¹⁹

10. The culpability of the Accused is an area which is the exclusive province of the Trial Panel and a report, such as Witness 17's, which contains an opinion as to such culpability should be rejected.²⁰ In particular, the Report inappropriately seeks to encroach on the Trial Panel's powers by providing opinions on a matter upon which the Defence is expecting a ruling, or draws conclusions or inferences which the Trial Panel would have to draw, or makes judgements which the Trial Panel would have to make and, as such, should be rejected.²¹ By way of example, the Report concludes that the Accused's belief that certain authorities would not address their concerns was 'reasonable',²² and, ultimately, that the Accused qualify for protection as whistle-blowers.²³ Those determinations are for the Trial Panel to make if any defence on these lines is entertained, which they should not be.

¹⁷ Report, paras 22-30.

¹⁸ *Ntaganda* Decision, para.7; *See also Prosecutor v. Popović et al.*, IT-05-88A, Judgement, 30 January 2015, para.375; *Nahimana* Appeal Judgement ('*Popović* Appeal Judgement'), para.198.

¹⁹ *See* Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314, para.90; *Ntaganda* Decision, para.8; *Karemera* Decision, para.21; *Popović* Appeal Judgement, para.293.

²⁰ *See Prosecutor v. Taylor*, SCSL-03-01-T, Decision on Defence application to exclude the evidence of proposed Prosecution expert witness Corinne Dufka or, in the alternative, to limit its scope and on urgent Prosecution request for decision, 19 June 2008 ('*Taylor* Decision'), para.21.

²¹ *See Taylor* Decision, para.22.

²² Report, para.18.

²³ Report, para.40.

D. The Report was prepared on an improper basis

11. Finally, the Report is improperly based on SPO and Defence Pre-Trial Briefs,²⁴ rather than on the underlying evidence, much of which is publicly available. In particular, while the Defence addressed the argument of public interest and/or whistle-blowing in the Defence Pre-Trial Briefs,²⁵ given the patent irrelevance of the matter to the charges the SPO did not do so in its brief. This means that Witness 17 has based the Report on an unbalanced narrative. The Report was also prepared pursuant to a letter of instruction,²⁶ which, rather than adopting a neutral tone, set out a distorted view of reality.²⁷

III. RELIEF REQUESTED

12. For the foregoing reasons, the SPO asks that the Trial Panel grant the Request.

Word count: 1580



Jack Smith

Specialist Prosecutor

Friday, 22 October 2021

At The Hague, the Netherlands

²⁴ See Report, para.24.

²⁵ See, e.g., Public redacted version of Defence Pre-Trial Brief on behalf of Hysni Gucati, KSC-BC-2020-07/F00258/RED, 12 July 2021, paras 124, 140-142, 161, 184, 190, 222, 231, 237, 240, 256, 284, 297, 321, 334, 358-359; Public redacted submission of interim Pre-Trial Brief on behalf of Nasim Haradinaj, KSC-BC-2020-07/F00260/RED, 12 July 2021, paras 283-298.

²⁶ See Report, para.24.

²⁷ See Letter of Instruction, KSC-BC-2020-07/F00386/A01, pp.3-4/6.