



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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 16 November 2021

Language: English

Classification: Confidential

Prosecution challenge to proposed Defence expert Witness 18 and report

Specialist Prosecutor's Office

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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 18.³

2. The proposed evidence of Witness 18, purportedly concerning investigative standards and related international best practices,⁴ is irrelevant to the charges against the Accused. Even if the Trial Panel deemed the subject-matter of the Report relevant, it addresses matters of law and fact squarely within the purview of the Trial Panel to determine. Expert evidence is not required either to enable Defence Counsel to make submissions on such matters or to assist the Trial Panel in its consideration of them. Rather than assisting the Trial Panel, Witness 18's proposed evidence would run the risk of improperly usurping its functions as the ultimate arbiter of fact and law.

3. Further, Witness 18's liberal resort to unfounded assumptions, means that the Report amounts, in essence, to personal anecdotes, hypotheses and speculation.

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 KSC-BC-2020-07, 26 October 2021 p.1412, ln.21 – p.1413, ln.8.

³ Annex A to Submission of Expert Report from the Defence of Mr. Haradinaj, KSC-BC-2020-07/F00426/A01, 9 November 2021, Confidential ('Report'). The report was notified on 9 November 2021 at 17:07. 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 11 November 2021, following an SPO request, the Haradinaj Defence provided a copy of the letter of instruction sent to Witness 18 via email to the SPO. No letter of instruction was formally notified at the time of filing of this challenge.

⁴ See Defence Request for Addition of an Expert to its List of Potential Witnesses, KSC-BC-2020-07/F00394, 23 October 2021, Confidential ('Defence Request'), para.17; Transcript, 21 October 2021, p.1164, lns.6-10.

4. Accordingly, pursuant to its powers under Article 40(2) and (6) of the Law⁵ 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 18 ('First Request'). Alternatively, in view of the Haradinaj Defence's indication that an application to provide an addendum to the Report will be made, seemingly in relation to issues relating, *inter alia*, to the testimony of W04842 and W04876,⁶ the SPO requests that the Trial Panel provide it with an opportunity to respond in relation to any such application prior to reaching a decision in relation to Witness 18 ('Second Request'). Should the Trial Panel accept the Report or parts thereof, Witness 18 should be made available for cross-examination ('Third Request').⁷ The SPO would reserve its right to call an expert in rebuttal.

II. SUBMISSIONS

5. As previously submitted,⁸ and as noted by the Trial Panel,⁹ 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.¹⁰ Such intervention is warranted in relation to the Report and Witness 18, *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

⁵ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to the Law, unless otherwise specified.

⁶ Email from the Haradinaj Defence to the SPO dated 11 November 2021 at 12:57.

⁷ The First, Second and Third Requests are referred to collectively as the 'Requests'.

⁸ *See, e.g.*, Prosecution requests in relation to Defence witnesses, KSC-BC-2020-07/F00312, 15 September 2021, Confidential.

⁹ Decision on the Defence Requests for Reconsideration of Decision F00328, KSC-BC-2020-07/F00353, 7 October 2021, para.23.

¹⁰ *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.

constitute an undue consumption of time and resources,¹¹ thereby running contrary to the interests of justice.

A. The proposed evidence is irrelevant to the charges against the Accused

6. Witness 18's proposed evidence purportedly on '[i]nvestigative standards, international best practices and procedures normally undertaken during a complex investigation, including but not limited to chains of custody and record keeping' and his '[o]bservations on the steps and procedures taken by the SPO in this case'¹² are not relevant to the charges against the Accused. Neither is Witness 18's proposed evidence on such matters well-defined.¹³

7. Witness 18's recollection of the manner in which the prosecution office within the international organization he worked for conducted its business and his personal experiences in relation thereto¹⁴ are irrelevant to the charges against the Accused. The same applies to the publicly available material cited in the Report,¹⁵ a 242-page manual on a broad range of ICTY practices which is annexed thereto.¹⁶ Moreover, neither Witness 18 nor the Defence have set forth whether permission from the international organization the witness worked for has been obtained in order to authorize testimony about his prior employment therewith, if such permission is required.

¹¹ See Rule 143(4).

¹² Defence Request, KSC-BC-2020-07/F00394, para.17; See also Defence Request, KSC-BC-2020-07/F00394, paras 13-15; Transcript, 21 October 2021, p.1164, lns.6-10.

¹³ *Contra* Defence Request, KSC-BC-2020-07/F00394, paras 5, 14, 15.

¹⁴ Report, KSC-BC-2020-07/F00426/A01, paras 10-12, 14-17, 20-21.

¹⁵ Report, KSC-BC-2020-07/F00426/A01, paras 18-19.

¹⁶ Annex B to Submission of Expert Report from the Defence of Mr. Haradinaj, KSC-BC-2020-07/F00426/A02, 9 November 2021.

B. The Report and/or Witness 18 would not assist the Trial Panel and would inappropriately usurp the Trial Panel's functions

8. Should the Trial Panel deem it necessary to specifically consider the matters addressed in the Report and/or make any findings in relation thereto, admission of the Report and/or testimony by Witness 18 should nevertheless be denied as this evidence would not be of assistance to the Trial Panel¹⁷ and would usurp the functions of the Trial Panel as the ultimate arbiter of fact and law.¹⁸

9. 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.¹⁹ That is precisely this case. Witness 18 asserts that he 'fully understand[s] the mechanics on search and seizure operations and the retention as well as securing of potential evidentiary material'.²⁰ The Trial Panel, composed of professional Judges, certainly does as well. Accordingly, it cannot reasonably be said that Witness 18 possesses expertise which the Trial Panel does not.

10. In particular, the Trial Panel certainly does not need Witness 18's assistance in interpreting or applying the Rules of this very court. Yet, that is precisely what Witness 18 improperly seeks to do at paragraphs 26 to 31 of the Report, on the basis of incomplete information and assumptions. Additionally, this evidence squarely concerns legal matters and, as such, should be barred.²¹ By no stretch of the imagination could Witness 18 be considered an expert in such matters, noting that in

¹⁷ *Contra* Defence Request KSC-BC-2020-07/F00394, paras 5, 15; *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.

¹⁸ *See* Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314, para.90; *Ntaganda* Decision, para.8; *Karemera* Decision, para.21.

¹⁹ Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314, para.89.

²⁰ Report, KSC-BC-2020-07/F00426/A01, para.13.

²¹ *See Prosecutor v. Popović et al.*, IT-05-88A, Judgement, 30 January 2015 ('Popović Appeal Judgement'), para.79.

his own words, his connection to this court's regulatory framework stems only from having 'familiarised himself with the relevant articles' of the Law and Rules.²² The Trial Panel requires no expert assistance in reaching views on the application of the KSC statutory framework, including on chain of custody.²³

11. Indeed, rather than assisting the Trial Panel in understanding or determining an issue of a technical nature that is in dispute,²⁴ the Report and/or Witness 18's testimony would seek to usurp the functions of the Trial Panel as the ultimate arbiter of fact and law.²⁵ 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, drawing conclusions or inferences which the Trial Panel may have to draw, and making judgements which the Trial Panel may have to make and, as such, should be rejected.²⁶

12. Witness 18's opinions as to how to authenticate and/or analyse documents,²⁷ based, it seems, on his being 'aware of the steps that must be taken in order to comply with the practices and procedures relating to the authentication of material deemed to be confidential and non-public',²⁸ would also be of no assistance to the Trial Panel in any determination it may need to make on such issues. Witness 18's failure to provide specific references to certain excerpts of W04841's testimony he addresses in

²² Report, KSC-BC-2020-07/F00426/A01, para.3.

²³ See Decision on the Admissibility of Deferred Exhibits and the Classification of Certain Admitted Exhibits, KSC-BC-2020-07/F00427, 9 November 2021 ('Decision on Admissibility'), paras 19, 32, 38.

²⁴ *Ntaganda* Decision, para.7; See also *Popović* Appeal Judgement, para.375; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007 ('*Nahimana* Appeal Judgement'), para.198.

²⁵ See Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314, para.90; *Ntaganda* Decision, para.8; *Karemera* Decision, para.21.

²⁶ *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, para.22.

²⁷ Report, KSC-BC-2020-07/F00426/A01, paras 22-23.

²⁸ Report, KSC-BC-2020-07/F00426/A01, para.20.

the Report²⁹ is also unhelpful. Again, the Trial Panel is fully competent to make any relevant findings unassisted.

13. Claims by Witness 18 such as that ‘the Trial Chamber and the Defence teams appear not to have been provided with copies of the seized materials and cannot make an independent assessment of the documents seized, nor can they conduct further investigation in relation to each of the documents’³⁰ are both inaccurate³¹ and improper, going far beyond the realms of any expertise it is suggested Witness 18 possesses.

14. The Defence are perfectly able to make, and have made,³² submissions in relation to the matters addressed in the Report without third-party assistance. Having a third-party echo Defence Counsel’s arguments is unnecessary. 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.³³

15. Further, contrary to the Defence assertion, Witness 18’s evidence would not be in the interests of justice³⁴ and would be prejudicial.³⁵ No need for Witness 18’s evidence arises out of W04841’s testimony.³⁶ As set out by the Trial Panel, the Defence had an opportunity to confront W04841 and challenge the probative value and reliability of exhibits tendered through her.³⁷ The Trial Panel should not allow the Defence to waste precious court resources.

²⁹ Report, KSC-BC-2020-07/F00426/A01, para.23.

³⁰ Report, KSC-BC-2020-07/F00426/A01, para.23.

³¹ See, e.g., P00093-P00097, P00104, P00106-P00119, P00139-P00150.

³² See, e.g., Transcript, 21 October 2021, p.1679, ln.15 – p.1681, ln.3, p.1684, lns.8-22; Motion to challenge the admissibility of evidence pursuant to Rule 138(1), KSC-BC-2020-07/F00317, 17 September 2021, paras 37-45.

³³ *Nahimana* Appeal Judgement, paras 293-294.

³⁴ See Defence Request, KSC-BC-2020-07/F00394, para.16(a).

³⁵ See Defence Request, KSC-BC-2020-07/F00394, para.16(d).

³⁶ *Contra* Defence Request, KSC-BC-2020-07/F00394, paras 12, 16(b)(c); Transcript, KSC-BC-2020-07, 20 October 2021, p.1073, lns.17-23.

³⁷ See Decision on Admissibility, KSC-BC-2020-07/F00427, para.8.

16. The SPO makes no submissions, at this stage, in relation to the Haradinaj Defence's indication that an application to provide an addendum to the Report will be made,³⁸ other than to ask that the Trial Panel provide it with an opportunity to respond in relation to any such application prior to reaching a decision in relation to Witness 18.

17. Finally, should the Trial Panel accept the Report or parts thereof, Witness 18 should be made available for cross-examination in order to provide the SPO an opportunity to, *inter alia*, test the basis for, and/or credibility of, numerous assertions contained in the Report.

III. CONFIDENTIALITY

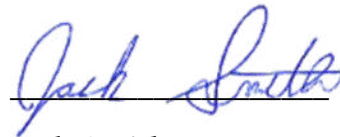
18. Pursuant to Rule 82(4), this filing is confidential in line with the classification of the Report. The SPO has not referred to the proposed Defence expert by name or provided any information which could identify him in this filing. Accordingly, the SPO would not oppose the reclassification of the filing to public should the Trial Panel deem it appropriate to do so.

IV. RELIEF REQUESTED

19. For the foregoing reasons, the SPO asks that the Trial Panel grant the First Request or, in the alternative, the Second and Third Requests.

Word count: 2205

³⁸ Email from the Haradinaj Defence to the SPO dated 11 November 2021 at 12:57.



Jack Smith

Specialist Prosecutor

Tuesday, 16 November 2021

At The Hague, the Netherlands