



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: 1 December 2021

Language: English

Classification: Confidential

Prosecution further requests in relation to Defence witnesses

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. INTRODUCTION

1. Pursuant to its powers under Article 40(2) and (6) of the Law¹ and Rules 116(1) and (4), 138(1) and 143(4) of the Rules,² in addition to granting previous requests by the Specialist Prosecutor's Office ('SPO') in relation to Defence Witnesses,³ the Trial Panel should: (i) order the Defence to strike DW1248 off the Gucati Witness List⁴ ('First Request'); and (ii) not authorise improper opinion evidence which is irrelevant to the charges against the Accused, including that contained in the statements of five witnesses⁵ appearing on the Gucati and Haradinaj⁶ Witness Lists ('Second Request').

2. As previously submitted, the Defence'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 A trial is not the occasion for witnesses to speculate or to offer opinions that have no factual basis.⁸

3. The Trial Panel's intervention is warranted since the entirety of the expected testimony of DW1248 and parts of the expected testimony of the witnesses in the Second Request are divorced from the facts and circumstances of this case, irrelevant

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

² 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.

³ See Prosecution requests in relation to Defence witnesses, KSC-BC-2020-07/F00312, 15 September 2021, Confidential ('15 September 2021 Request'); Prosecution challenge to proposed Defence expert and report, KSC-BC-2020-07/F00388, 22 October 2021; Prosecution challenge to proposed Defence expert Witness 18 and report, KSC-BC-2020-07/F00438, 16 November 2021, Confidential.

⁴ Annex 1 to Defence Submission of List of Anticipated Witnesses [...], KSC-BC-2020-07/F00460/A01, 29 November 2021 ('Gucati Witness List').

⁵ DW1243; DW1244; DW1245; DW1247; DW1254.

⁶ Annex 1 to Defence Rule 119 Filing on Behalf of Nasim Haradinaj, KSC-BC-2020-07/F00461/A01, 29 November 2021 ('Haradinaj Witness List').

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, e.g., Transcript, 26 October 2021, p.1477, lns.8-13, p.1477, ln.20 – p.1478, ln.1.

to the charges against the Accused and, consequently, cannot assist in the ascertainment of the truth.⁹ Authorising the presentation of such evidence would not be conducive to the efficiency of proceedings and would constitute an undue consumption of time and resources,¹⁰ thereby running contrary to the interests of justice.

II. SUBMISSIONS

A. The Trial Panel should order the Gucati Defence to strike DW1248 off its Witness List

4. The Trial Panel should order the Gucati Defence to strike DW1248 off its Witness List. The Gucati Defence intends to admit DW1248's statement pursuant to Rule 154;¹¹ the sole issue addressed in this statement¹² is the current online availability of articles which the SPO has relied on in this case to show that documents disseminated by the Accused were published in the media. The current availability of these articles is not contested, but whether or not such articles are still available online is irrelevant to any matters at issue in this case. Such availability, for example, can have no impact on the confidential nature of the documents disseminated by the Accused.

5. Accordingly, the expected testimony of DW1248 is not probative of any of the incidents charged, the acts and conduct of the Accused, or any salient issues in the case. Such testimony is incapable of assisting in the determination of the charges, does not meet the relevance requirement provided for in Rule 138(1), and, as such, should not be authorised.

⁹ See Rule 143(4).

¹⁰ See Rule 143(4).

¹¹ See Gucati Witness List.

¹² DHG0447-DHG0449.

6. Should the Trial Panel nevertheless deem that DW1248's statement is relevant, the SPO would not oppose its admission pursuant to Rule 153.

B. The Trial Panel should not authorise improper opinion evidence, including certain proposed evidence by Witnesses DW1243, DW1244, DW1245, DW1247 and DW1254

7. The statements of DW1243, DW1244, DW1245, DW1247 and DW1254 contain speculative opinions concerning: (i) who may be responsible for providing confidential documents to the Accused in September 2020;¹³ (ii) what steps may or may not have been taken by the SPO in the wake of the Accused's alleged conduct;¹⁴ (iii) the KSC's level of competence;¹⁵ (iv) selective prosecution and/or the reasons why certain cases have been brought before the KSC;¹⁶ and (v) the SPO's use of certain evidence in cases unrelated to the Accused and the criminality of the Accused's alleged conduct.¹⁷

8. None of these excerpts of the witnesses' statements provide any relevant, factual information. Rather, they amount to opinion evidence with no factual basis, and as such should not be permitted as they contravene the consistent guidance by the Trial Panel as to what evidence may be properly elicited during trial.¹⁸ Authorising the Defence to elicit improper opinion evidence, including by these witnesses, would undermine the efficiency of the proceedings, amount to an inconsistent application of

¹³ See DW1254, DHG0184-DHG0189, para.5; DW1243, DHG0218-DHG0221, paras 22-24, 26-27; DW1244, DHG0214-DHG0217, para.19; DW1245, DHG0190-DHG0194, para.34; DW1247, DHG0323-DHG0325, para.16. Unfounded and speculative opinion concerning who may be responsible for the confidential documents being made available to the Accused is also contained in the statement of witness DW1242 (See DW1242, DHG0172-DHG0176, para.33), in relation to whom the SPO has already asked the Trial Panel not to authorise certain irrelevant parts of this witness' proposed testimony, see 15 September 2021 Request, KSC-BC-2020-07/F00312, paras 1, 17-21.

¹⁴ See DW1254, DHG0184-DHG0189, paras 7, 11.

¹⁵ See DW1254, DHG0184-DHG0189, para.10.

¹⁶ See DW1254, DHG0184-DHG0189, para.12; DW1243, DHG0218-DHG0221, para.28; DW1244, DHG0214-DHG0217, para.20; DW1245, DHG0190-DHG0194, paras 16, 32; DW1247, DHG0323-DHG0325, para.17.

¹⁷ See DW1254, DHG0184-DHG0189, paras 15-16; DW1247, DHG0323-DHG0325, paras 18-20.

¹⁸ See, e.g., Order on the Conduct of Proceedings, para.71; Transcript, 1 September 2021, p.486, lns.4-6.

the rules, and would not assist the Trial Panel in any way in its determination of the charges. Rather, it would unnecessarily prolong the proceedings, placing an unnecessary strain on institutional resources.

9. Accordingly, the Trial Panel should not authorise improper opinion evidence, including by DW1243, DW1244, DW1245, DW1247 and DW1254. For the same reasons, admission of the statements of these five witnesses pursuant to Rule 154 should also be precluded to the extent such statements contain improper opinion evidence.

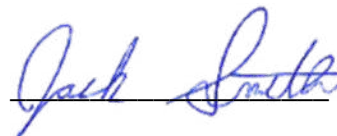
III. CLASSIFICATION

10. Pursuant to Rule 82(4), this filing is confidential since it refers to filings bearing the same classification. 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

11. For the foregoing reasons, the SPO asks that the Trial Panel grant the First and Second Requests.

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Jack Smith

Specialist Prosecutor

Wednesday, 1 December 2021

At The Hague, the Netherlands