



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-07**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 7 January 2022

Original language: English

Classification: **Public**

**Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests
in Relation to Proposed Defence Witnesses**

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 16 December 2021 by Nasim Haradinaj (“Haradinaj” or “Accused”),² against the “Decision on Prosecution Requests in Relation to Proposed Defence Witnesses” (“Impugned Decision”).³ The SPO responded on 21 December 2021.⁴ Haradinaj replied on 29 December 2021.⁵

I. BACKGROUND

1. On 25 September 2020, Haradinaj was arrested in Kosovo pursuant to an arrest warrant issued by a Single Judge.⁶ He was transferred to the detention facilities of the Specialist Chambers in The Hague on 26 September 2020.⁷

¹ F00001, Decision Assigning a Court of Appeals Panel, 9 December 2021.

² F00003, Haradinaj Defence Submissions on Appeal in Respect of Decision KSC-BC-2020-07/F00470, 16 December 2021 (confidential) (“Appeal”). On 9 December 2021, the Panel varied, *proprio motu*, the time limits for the briefing of the Appeal and ordered Haradinaj to file his Appeal by 16 December 2021, the SPO to file its response, if any, by 23 December 2021, and Haradinaj to file a reply to the SPO’s response, if any, by 29 December 2021. See F00002, Order Varying Time Limits for Briefing of Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 9 December 2021. On 31 December 2021, the Panel, acting *proprio motu*, reclassified as confidential annexes 1 and 3 to the Appeal that were filed publicly before it, considering that they had been filed as confidential in the first instance. See CRSPD79, Reclassification Order regarding IA006-F00003-A01 and IA006-F00003-A03, 31 December 2021 (confidential) (“Reclassification Order”).

³ F00470, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 3 December 2021 (“Impugned Decision”).

⁴ F00004, Prosecution response to Haradinaj Defence appeal from ‘Decision on Prosecution Requests in Relation to Proposed Defence Witnesses’, 21 December 2021 (confidential) (“Response”).

⁵ F00005, Defence Reply to Prosecution Response to Haradinaj Defence Appeal, 29 December 2021 (confidential) (“Reply”).

⁶ F00016, Notification of Arrest Pursuant to Rule 55(4), 25 September 2020 (strictly confidential and *ex parte* version, reclassified as public on 15 October 2020); F00012/A03/COR/RED, Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj, 26 September 2020 (strictly confidential and *ex parte* filed on 24 September 2020, reclassified as confidential and *ex parte* on the same day). See also F00012, Decision on Request for Arrest Warrants and Transfer Orders, 24 September 2020 (strictly confidential and *ex parte*, reclassified as public on 9 October 2020).

⁷ F00020, Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers, 26 September 2020 (strictly confidential and *ex parte*, reclassified as public on 15 October 2020).

2. On 11 December 2020, the Pre-Trial Judge confirmed the indictment against Hysni Gucati and Nasim Haradinaj for criminal offences against the administration of justice and public administration and for criminal offences against public order, punishable under Chapters II, XXXI, and XXXII of the Criminal Code of Kosovo, Code No.06/L-074 (2019) and Articles 15(2) and 16(3) of the Law.⁸ On 14 December 2020, the SPO submitted the confirmed indictment.⁹ On 5 July 2021, further to the Court of Appeals Panel's Decision on the Defence Appeals Against Decision on Preliminary Motions¹⁰ and pursuant to the Pre-Trial Judge's Order for the Submission of a Corrected Indictment,¹¹ the SPO filed a corrected version of the confirmed indictment.¹²

3. On 12 July 2021, Haradinaj filed his Pre-Trial Brief.¹³ On 27 August 2021, Haradinaj filed submissions regarding the purported relevance of his proposed witnesses.¹⁴

4. On 15 September 2021, the SPO requested, *inter alia*, that Trial Panel II ("Trial Panel") remove proposed Witnesses DW1250 and DW1251 from Haradinaj's List of Potential Witnesses on the basis that their anticipated testimony is irrelevant for the

⁸ F00074/RED, Public Redacted Version of Decision on the Confirmation of the Indictment, 22 December 2020 (strictly confidential and *ex parte* version filed on 11 December 2020, reclassified as confidential on 24 February 2021).

⁹ F00075/A01, Annex 2 to Submission of confirmed Indictment, Redacted Indictment, 14 December 2020 (strictly confidential and *ex parte* version filed on 14 December 2020). See also, for the non-redacted version, F00075/A01, Annex 1 to Submission of confirmed Indictment, Indictment, 14 December 2020 (strictly confidential, reclassified as confidential on 24 February 2021).

¹⁰ F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("Appeal Decision on Preliminary Motions").

¹¹ F00244, Order for the Submission of a Corrected Indictment and for a Second Revised Calendar for the Remainder of the Pre-Trial Proceedings, 23 June 2021.

¹² F00251/A01/RED, Lesser Redacted Indictment, 4 October 2021 (confidential version filed on 5 July 2021) ("Indictment").

¹³ F00260/RED, Public Redacted Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 2 September 2021 (confidential version filed on 12 July 2021).

¹⁴ F00289, Submission on Witnesses, 27 August 2021 (confidential, reclassified as public on 16 December 2021) ("List of Potential Witnesses").

case against the Accused.¹⁵ On 27 September 2021, Haradinaj responded to the Request to Strike arguing, *inter alia*, that these proposed witnesses are capable of presenting evidence relevant to his “public interest” defence.¹⁶

5. On 23 October 2021, Haradinaj filed a request to add a new expert witness to his List of Potential Witnesses, Witness DW1253.¹⁷ On 9 November 2021, Haradinaj filed DW1253’s expert report.¹⁸ On 16 November 2021, the SPO filed its challenge regarding the admission of DW1253’s proposed evidence.¹⁹ On 22 November 2021, Haradinaj responded to this challenge.²⁰

6. On 26 November 2021, the Trial Panel issued a decision denying the Defence motions to dismiss charges pursuant to Rule 130 of the Rules.²¹ On 29 November 2021, Haradinaj filed his lists of witnesses and exhibits, pursuant to Rule 119(2) of the Rules.²²

7. On 2 December 2021, the Trial Panel held the Defence Preparation Conference, during which it announced its decision not to hear the proposed Witnesses DW1250, DW1251 and DW1253 (collectively, “Proposed Witnesses”) on the basis that:

¹⁵ F00312, Prosecution requests in relation to Defence witnesses, 15 September 2021 (confidential, reclassified as public on 6 December 2021) (“Request to Strike”), paras 1, 8-9, 11-15, 23.

¹⁶ F00330, Defence Response to Prosecution requests in relation to Defence witnesses, 27 September 2021 (confidential, reclassified as public on 6 December 2021) (“Response to Request to Strike”), paras 20-27, 33-35, 43-47.

¹⁷ F00394, Defence Request for Addition of an Expert to its List of Potential Witnesses, 23 October 2021 (confidential, reclassified as public on 16 December 2021).

¹⁸ F00426, Submission of Expert Report from the Defence for Mr. Haradinaj, 9 November 2021; F00426/A01, Annex A to Submission of Expert Report from the Defence for Mr. Haradinaj, 9 November 2021 (confidential). See also F00003/A03, Annex 3 to Haradinaj Defence Submission on Appeal in Respect of Decision KSC-BC-2020-07/F00470, 16 December 2021 (reclassified as confidential on 31 December 2021) (“Expert Report”).

¹⁹ F00438, Prosecution challenge to proposed Defence expert Witness 18 and report, 6 December 2021 (confidential version filed on 16 November 2021).

²⁰ F00444, Haradinaj Defence Response to F00438, 6 December 2021 (confidential version filed on 22 November 2021).

²¹ F00450, Decision on the Defence Motions to Dismiss Charges, 26 November 2021.

²² F00461, Defence Rule 119 Filing on Behalf of Nasim Haradinaj, 21 December 2021 (confidential version filed on 29 November 2021). See also F00428, Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings, 9 November 2021, para. 17(a).

(i) Haradinaj failed to demonstrate the relevance of DW1250's and DW1251's proposed evidence; and (ii) DW1253's proposed evidence related to issues which the Trial Panel could determine for itself without the assistance of expert evidence.²³ On 3 December 2021, the Trial Panel issued the Impugned Decision, elaborating, *inter alia*, on its reasons for declining to hear the Proposed Witnesses' evidence.²⁴ The Trial Panel further indicated that it "would be inclined to grant" leave to appeal under Rule 77 of the Rules in relation to the two following issues ("Issues"):²⁵

- (a) the Trial Panel's findings in relation to the irrelevance of the proposed testimony of DW1250 and DW1251 and its decision not to hear these witnesses; and
- (b) the Trial Panel's findings in relation to the impermissible character of the proposed evidence of DW1253 under Rule 149 of the Rules and its decision not to hear this witness.²⁶

8. On 6 December 2021, Haradinaj requested leave to appeal the Trial Panel's findings concerning the Issues and confirmed that he did not seek leave to appeal any other issues arising out of the Impugned Decision.²⁷ On 7 December 2021, the SPO indicated that it did not oppose the Request for Leave to Appeal.²⁸ On 8 December 2021, the Trial Panel granted the Request for Leave to Appeal.²⁹

²³ Transcript, 2 December 2021, pp. 2105-2107.

²⁴ Impugned Decision, paras 80-82, 111-115, 127(b), (e).

²⁵ Impugned Decision, para. 120.

²⁶ See also F00484, Decision on Defence Request for Leave to Appeal F00470, 8 December 2021 ("Certification Decision"), para. 16.

²⁷ F00474, Defence Application for Leave to Appeal in respect of 'Decision on Prosecution Requests in Relation to Proposed Defence Witnesses', 6 December 2021 ("Request for Leave to Appeal"), paras 2, 4, 6-8.

²⁸ Transcript, 7 December 2021, p. 2238.

²⁹ Certification Decision, paras 17-21.

II. STANDARD OF REVIEW

9. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.³⁰

III. PRELIMINARY MATTERS

A. RECLASSIFICATION OF FILINGS

10. The Panel notes that the Impugned Decision was filed as public, while the Appeal, the Response and the Reply were filed as confidential.³¹ The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.³² The Panel also notes that the SPO does not oppose the reclassification of its Response as public.³³ The Panel, therefore, orders the Parties to file public redacted versions of their filings on appeal,³⁴ or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.³⁵ Recalling further that any reclassification of a confidential filing necessitates judicial authorisation pursuant to Rule 82(3) and (5) of the Rules,³⁶ the Appeals Panel urges the Parties to abide strictly by these requirements.

³⁰ F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-14. See also e.g. F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021) ("*Appeal Decision on Disclosure*"), para. 14.

³¹ See also above, fn. 2 regarding Annexes 1 and 3 to the Appeal.

³² See e.g. Appeal Decision on Disclosure, para. 15; Appeal Decision on Preliminary Motions, para. 13. See also KSC-BC-2020-06, F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), para. 9 (encouraging the parties to file public redacted versions of their filings as soon as possible, without waiting for an order to do so).

³³ Response, para. 42.

³⁴ Namely, Appeal (F00003); Response (F00004); Reply (F00005). This concerns the core filings only.

³⁵ See Rule 82(3) and (5) of the Rules; KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, Article 39(1).

³⁶ See Reclassification Order.

B. ISSUES FALLING OUTSIDE THE SCOPE OF CERTIFIED ISSUES

11. The Court of Appeals Panel recalls that the scope of its review lies strictly within the confines of the issues certified by the lower panel.³⁷ The Panel also recalls the limited scope of the Issues certified by the Trial Panel.³⁸ Before addressing the substance of the Appeal, the Panel will assess whether it exceeds the scope of the Issues certified by the Trial Panel.³⁹

12. The Panel notes that while Haradinaj acknowledges in his Appeal the limited scope of the Issues certified,⁴⁰ he also challenges the Trial Panel's preliminary findings in relation to his submission that the alleged ethnic "bias" of the Specialist Chambers would constitute a "public interest".⁴¹ The Panel observes that the SPO submits that such arguments should be summarily dismissed on the basis that they go beyond the

³⁷ Appeal Decision on Disclosure, para. 17; Appeal Decision on Preliminary Motions, para. 20.

³⁸ See above, para. 7.

³⁹ See Appeal Decision on Preliminary Motions, para. 20.

⁴⁰ See Appeal, para. 5 (submitting that the relevant parts of the Impugned Decision are paragraphs 80-82 and 102-111). See also Appeal, para. 3; Reply, para. 3.

⁴¹ See Appeal, paras 15-29, referring to Impugned Decision, para. 58. See also Appeal, paras 38-39; Reply, para. 22. Haradinaj notably argues in that respect that: (i) the Accused appear to be criticised for evidence contained in documents the precise content of which only the SPO knows; and (ii) there is "voluminous material" already disclosed during the SPO's case "clearly establish[ing]" the involvement of Serbian perpetrators in crimes, including specifically named individuals, although the SPO is not pursuing any investigations against them. Part of Haradinaj's arguments also relate to the issue of non-disclosure of documents, which the Panel understands to be those seized from the Kosovo Liberation Army War Veterans' Association on 8, 17 and 22 September 2020 (see Appeal, paras 18-20, 22, 74-75; Reply, paras 12-14, 31-32). This issue, in addition to falling outside the scope of the certified issues since it does not arise from the Impugned Decision, has already been addressed and resolved by the Pre-Trial Judge. See F00141/RED, Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, 23 February 2021 (confidential version filed on 23 February 2021), paras 42, 44, 47(a) (wherein the Pre-Trial Judge found the non-disclosure of these documents proportionate and in accordance with the Rules); F00172/RED, Public Redacted Version of the Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, 15 July 2021 (confidential version filed on 1 April 2021), paras 37-38; F00210/RED, Public Redacted Version of Decision on Prosecution Requests and Challenges Pursuant to F00172, 15 July 2021 (confidential version filed on 26 May 2021), paras 61-65. See also Appeal Decision on Disclosure.

scope of the issues certified for appeal, are irrelevant to the Impugned Decision and/or concern matters that do not actually arise from it.⁴²

13. The Panel notes that the Trial Panel did not authorise the Accused to call or seek admission of evidence that purports to support this allegation. The Panel further notes that the Trial Panel adopted a definition of “public interest” that is limited to eliciting evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia, or its officials, and the Special Investigative Task Force (“SITF”) or the SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO’s investigation.⁴³ The Panel therefore considers that general allegations of ethnic “bias” by the Specialist Chambers made in the Appeal have already been rejected as a component of the Accused’s public interest defence. In light of this, the Panel finds that Haradinaj’s arguments on this issue fall outside the scope of the certified issues, declines to consider these submissions and formally dismisses them.

IV. DISCUSSION

14. At the outset, the Panel notes that it transpires from well-established jurisprudence of international criminal tribunals that decisions relating to the admission of evidence are generally treated as discretionary, and that appellate intervention in that respect is warranted only in very limited circumstances.⁴⁴ The

⁴² Response, para. 26. The SPO also submits that some additional arguments submitted by Haradinaj should be summarily dismissed, because he: (i) fails to set out the errors he alleges and how each error would have materially affected the Impugned Decision; (ii) merely repeats arguments that were unsuccessful before the Trial Panel; (iii) misrepresents and ignores certain parts of the factual record and the Impugned Decision; and (iv) fails to provide specific references to evidence and case law. See Response, paras 1, 22-25, 27-28. In reply, Haradinaj contends that the SPO’s submissions on the summary dismissal of the Appeal are misconceived and without merit. See Reply, paras 8-15, 37.

⁴³ Impugned Decision, paras 58-61.

⁴⁴ See e.g. ICTR, *Prosecutor v. Simba*, ICTR-01-76-A, Judgement, 27 November 2007 (“*Simba* Appeal Judgement”), para. 19; ICTR, *Prosecutor v. Bagošora et al.*, ICTR-98-41-AR93 and ICTR-98-41-AR93.2, Decision on Prosecutor’s Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 11. See also ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Judgement, 16 October 2007, para. 39.

Panel considers that a decision on whether to admit or exclude evidence pursuant to Rule 138(1) of the Rules is, likewise, one within the Trial Panel's discretion in its assessment of the relevance, authenticity and probative value of the evidence submitted. In this regard, the Panel recalls that where the decision that is being challenged is a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.⁴⁵

A. PROPOSED WITNESSES DW1250 AND DW1251

1. Submissions of the Parties

15. With respect to proposed Witnesses DW1250 and DW1251, Haradinaj argues that he maintains his position that their proposed evidence is "directly relevant to the circumstances of the case", including the Accused's state of mind, and to the defence raised by him that any actions that are found to have been taken by him were justified by public interest.⁴⁶ Haradinaj also argues that the evidence of DW1250 and DW1251 provides "essential contextual information" on "allegations of inappropriate influence" upon the SPO and/or the Specialist Chambers by the European Union Rule of Law Mission in Kosovo ("EULEX") and the European External Action Service ("EEAS").⁴⁷ He further takes issue with the Trial Panel's finding that the Accused "has not pointed to any material contained in the information allegedly disclosed by the Accused that would support a claim of 'bias' on the part of the [Specialist

⁴⁵ *Gucati* Appeal Decision, para. 14; F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 14.

⁴⁶ Appeal, paras 12-15, 35-36, 47; Reply, para. 17. See also Appeal, para. 46, referring to Impugned Decision, para. 81 (submitting that DW1250 and DW1251 are relevant as non-experts).

⁴⁷ Appeal, paras 33-34, 38, 40. Haradinaj notably mentions that EEAS is the appointing authority for both the Specialist Chambers and EULEX. See Appeal, paras 13, 34; Reply, para. 20.

Chambers]”.⁴⁸ Haradinaj adds that the risk of causing “embarrassment to the institution, individual prosecutors and judges, and/or the appointing authority” is not a sufficient basis to exclude this evidence.⁴⁹ He finally contends that not admitting the proposed evidence of DW1250 and DW1251 would be a “direct assault on the fairness of proceedings”.⁵⁰

16. The SPO responds that the Appeal is deficient and should be summarily dismissed, *inter alia*, because Haradinaj fails to set out the errors he alleges and how each error would have materially affected the Impugned Decision, and merely repeats arguments that were unsuccessful before the Trial Panel.⁵¹ The SPO further submits that the Appeal should be rejected on the merits. According to the SPO, trial panels enjoy “considerable discretion” to exclude irrelevant evidence and ensure the fair and expeditious conduct of the trial, and there is no discernible error in the exercise of the Trial Panel’s discretion in relation to DW1250 and DW1251, as the subject-matter of their proposed evidence bears no relevant link to this case.⁵² The SPO also submits that Haradinaj’s insinuation that the Trial Panel’s findings in relation to these two witnesses were based on a need to avoid “embarrassment for the institution” is unfounded.⁵³

17. Haradinaj replies that the proposed evidence demonstrates that a link exists between EULEX and/or the Special Prosecution of Kosovo, on the one hand, and the Specialist Chambers and/or the SPO, on the other hand.⁵⁴

⁴⁸ Appeal, paras 16-29, referring to Impugned Decision, para. 58. See also Appeal, para. 39; Reply, para. 22. See above, paras 12-13, fn. 41.

⁴⁹ Appeal, paras 37, 42; Reply, para. 24. See also Appeal, paras 41, 43.

⁵⁰ Appeal, para. 30. See also Reply, para. 23.

⁵¹ Response, paras 1, 22-25. See also above, fn. 42.

⁵² Response, paras 1, 30-32, 34.

⁵³ Response, para. 33, referring to Appeal, paras 37, 42.

⁵⁴ Reply, paras 18-21.

2. Assessment of the Court of Appeals Panel

18. The Panel notes that the Trial Panel rejected the admission of DW1250's and DW1251's proposed evidence on the basis that Haradinaj failed to demonstrate how it is relevant for the present case, including for his "public interest" defence, since their anticipated testimony would address the operations, functioning and alleged misconduct of EULEX without offering any credible linkage to investigations of the SITF or the SPO, the SPO's contacts with Serbian authorities, or the proceedings before the Specialist Chambers.⁵⁵ The Panel further notes that, on appeal, Haradinaj elaborates on his arguments submitted before the Trial Panel about the alleged relevance of the Witnesses' proposed evidence, without clearly identifying an error on the part of the Trial Panel or explaining how the Trial Panel's conclusion may have amounted to an abuse of its discretion.⁵⁶ An appellant's mere disagreement with the conclusions that a trial panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.⁵⁷ Furthermore, the requirement to establish an error on the part of the lower level panel is distinct from the requirements for leave to appeal pursuant to Rule 77 of the Rules.⁵⁸

19. Having reviewed the statements of DW1250 and DW1251,⁵⁹ it is clear to the Panel that the focus of the two Witnesses' proposed evidence is their allegations regarding EULEX which, regardless of their seriousness, are not relevant for the Specialist Chambers and the present case. Irrespective of whether EULEX provides logistic and operational support to the Specialist Chambers and of the fact that the

⁵⁵ Impugned Decision, paras 80-81. See also Transcript, 2 December 2021, pp. 2105-2106.

⁵⁶ Some of Haradinaj's arguments submitted before the Trial Panel are repeated on appeal. Compare e.g. Appeal, paras 12, 14, 47 with Response to Request to Strike, paras 33-35.

⁵⁷ See e.g. *Gucati* Appeal Decision, para. 64 and jurisprudence cited therein; KSC-BC-2020-06, F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, para. 47.

⁵⁸ *Contra* Reply, paras 8, 11.

⁵⁹ See F00003/A01, Annex 1 to Haradinaj Defence Submission on Appeal in Respect of Decision KSC-BC-2020-07/F00470, 17 December 2021 (reclassified as confidential on 31 December 2021) ("Statement of Witness DW1251"); F00003/A02, Annex 2 to Haradinaj Defence Submission on Appeal in Respect of Decision KSC-BC-2020-07/F00470, 16 December 2021 (confidential) ("Statement of Witness DW1250").

EEAS is administratively the appointing authority of both EULEX and the Specialist Chambers,⁶⁰ the Specialist Chambers are a distinct institution. More importantly, in the view of the Panel, the proposed evidence, through its limited references to the Specialist Chambers,⁶¹ does not provide any fact-based information about the Specialist Chambers, or the SPO and its predecessor SITF, and does not establish any link that would make DW1250's and DW1251's allegations against EULEX relevant for the Specialist Chambers.⁶² In the Panel's view, Haradinaj's arguments to the contrary misrepresent on certain occasions the content of DW1250's and DW1251's statements.⁶³ As a result, the Panel agrees with the Trial Panel's assessment that the proposed evidence bears no relevance to the case.⁶⁴ Moreover, the Panel agrees with the Trial Panel that these Witnesses' proposed evidence does not support Haradinaj's "public interest" defence as narrowly defined by the Trial Panel, since it does not constitute evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia, or its officials, and the SITF or the SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation.⁶⁵

⁶⁰ See Appeal, para. 13; Reply, para. 20. See also Appeal, para. 34, referring to Statement of Witness DW1251, paras 118-119.

⁶¹ See Statement of Witness DW1251, paras 70, 111-112, 114-115, 118-119; Statement of Witness DW1250, paras 44, 54, 88.

⁶² The hypothetical nature of the proposed evidence concerning the Specialist Chambers is partially acknowledged by Haradinaj when he argues that DW1250 and DW1251 "remain capable of commenting on specific and relevant issues in terms of the practices *likely* to have been adopted by the SPO". See Appeal, para. 32 (emphasis added). Moreover, Haradinaj's allegations regarding statements concerning the Presiding Judge of the Trial Panel during his tenure at EULEX have already been rejected by the President of the Specialist Chambers. See F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021; F00278, Decision on the Request for Reconsideration of the Decision on Recusal or Disqualification, 20 August 2021. See also Appeal, paras 41, 43, referring to Statement of Witness DW1250, paras 54-59; Statement of Witness DW1251, paras 101, 114. In any event, the Appeals Panel is not the appropriate instance to relitigate these issues.

⁶³ See e.g. Appeal, paras 39-40.

⁶⁴ See Impugned Decision, para. 80.

⁶⁵ See Impugned Decision, paras 59-61, 81.

20. A trial panel may refuse to admit evidence where no reasonable showing of relevance has been made.⁶⁶ The Panel agrees with the Trial Panel that at the stage of admissibility of evidence, relevance is assessed on the basis of whether the proposed evidence relates to elements of the offence(s) or mode(s) of liability pleaded in the indictment or to other facts or circumstances material to the case of the parties.⁶⁷ The Panel considers, in this regard, that the proposed evidence of DW1250 and DW1251 does not have any link with the charges contained in the Indictment, or with the “public interest” defence as defined by the Trial Panel.

21. In light of the above, the Appeals Panel finds that Haradinaj has failed to demonstrate that the Trial Panel committed a discernible error or abused its discretion in rejecting the admission of DW1250’s and DW1251’s proposed evidence and deciding not to hear these Witnesses.

B. PROPOSED EXPERT WITNESS DW1253

1. Submissions of the Parties

22. Haradinaj argues that DW1253’s proposed evidence is not of a general nature and that the Trial Panel’s view that this evidence concerns issues that it could determine for itself does not appreciate the complex issues under consideration,⁶⁸ including knowledge of a specialised software used by the SPO of which the Witness

⁶⁶ See Impugned Decision, paras 42-43. See also F00334, Decision on the Prosecution Request for Admission of Items Through the Bar Table, 29 September 2021 (“Bar Table Decision”), para. 11, citing *inter alia* ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal Against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 (“Prlić et al. Appeal Decision”), para. 17, ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 7; Rules 137(1) and 138(1) of the Rules.

⁶⁷ See Impugned Decision, paras 40-41, referring to Bar Table Decision, paras 11-12. See also e.g. *Prlić et al. Appeal Decision*, para. 17; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 66; ICC, *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motion, 17 December 2010, para. 16.

⁶⁸ Appeal, paras 51, 55-57, referring to Impugned Decision, para. 107.

has experience.⁶⁹ According to Haradinaj, DW1253's proposed evidence was deemed necessary due to evidence presented by the SPO at trial indicating "a complete absence of procedures and protocols, record keeping, chain of custody, continuity and professional standards".⁷⁰ Haradinaj also submits that he is not required to provide precedent as to why evidence ought to be admitted, other than demonstrating its relevance, probative value and justification.⁷¹

23. Haradinaj further argues that DW1253's evidence would assist the Trial Panel to reach a conclusion and that allowing it would not impinge on the Trial Panel's powers, while not allowing it would prevent Haradinaj from substantiating a "central pillar" of his defence.⁷² Haradinaj contends that DW1253 would provide evidence on the compliance of the SPO's search and seizure operations with best practices in international criminal investigations and not comment on their legality.⁷³ Finally, Haradinaj disputes the Trial Panel's suggestion that most of DW1253's evidence could be advanced as Counsel's submissions, the evidence being of a technical nature, rather than a legal one.⁷⁴

24. The SPO responds that, if the Appeal is addressed on the merits,⁷⁵ the Trial Panel's finding with respect to DW1253 contains no discernible error and is consistent with relevant jurisprudence.⁷⁶ In the SPO's view, none of Haradinaj's submissions succeed in establishing the relevance of DW1253's evidence and comments on the

⁶⁹ Appeal, paras 59-60; Reply, paras 28-29.

⁷⁰ Appeal, paras 52, 58. See also Reply, paras 25-27, 30-34.

⁷¹ Appeal, paras 53-54.

⁷² Appeal, paras 61-68. See also Reply, paras 35-36.

⁷³ Appeal, paras 69-72, 76, referring to Impugned Decision, para. 108. Haradinaj does not accept that DW1253 should be prevented from commenting on whether the search was in accordance with the Rules. See Appeal, para. 71.

⁷⁴ Appeal, paras 77-82, referring to Impugned Decision, para. 110. Haradinaj also challenges the Trial Panel's reliance on an ICTR decision and submits that the situation in the present case should be distinguished. See Appeal, paras 79-80, referring to ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-[T], Decision on the Expert Witnesses for the Defence, 24 January 2003, paras 21-22.

⁷⁵ See above, fn. 42, para. 16.

⁷⁶ Response, paras 1, 35, 41.

appropriateness of SPO's operations cannot assist the Trial Panel, since it, unlike DW1253, has all the relevant evidence at its disposal.⁷⁷ The SPO also argues that Haradinaj misrepresents DW1253's proposed evidence, as, contrary to his submissions, a limited part of the Expert Report contains comments on the SPO's undertakings on the basis of an incomplete record and the Expert Report assesses the lawfulness of such operations.⁷⁸ The SPO finally submits that the Trial Panel's finding that DW1253's proposed evidence relates to issues that can be addressed through Counsel's submissions was appropriate.⁷⁹

2. Assessment of the Court of Appeals Panel

25. At the outset, the Panel notes that, as with any other proposed evidence, expert evidence also needs to be relevant to material issues of the case in order to be admitted.⁸⁰ The Panel observes that while the Trial Panel does not seem to have expressly made a determination on the relevance of the proposed evidence of DW1253 as a whole, it recognised that, at least, certain aspects of the Expert Report, especially those relating to a comparison of SPO's practices with the best practices of international criminal investigations, could be relevant.⁸¹ The Appeals Panel considers that DW1253's proposed evidence is of general relevance to the case to this limited extent.

26. The Panel further notes that when determining the admissibility of an expert report or testimony, a panel, in addition to being satisfied that the proposed witness has the requisite qualifications to be deemed an expert, must determine that the proposed testimony: (i) would be of assistance; (ii) falls within the expertise of the witness; and (iii) does not usurp the functions of the panel as the ultimate arbiter of

⁷⁷ Response, paras 36-37. See also Response, para. 38.

⁷⁸ Response, para. 38, referring to Appeal, paras 55, 69.

⁷⁹ Response, paras 39-40, referring to Impugned Decision, para. 110.

⁸⁰ See above, para. 20. See also Impugned Decision, paras 62-63.

⁸¹ See Impugned Decision, para. 110.

fact and law.⁸² In the present matter, the Panel notes that while the Trial Panel accepted that DW1253 is “an experienced and highly qualified” criminal investigator, it rejected the admission of his proposed evidence on the basis that it: (i) relates to issues which the Trial Panel can determine without the assistance of expert evidence or where his opinion would not add to what the Trial Panel can determine based on its own knowledge and expertise; (ii) usurps in several respects the Trial Panel’s responsibilities; and (iii) could be advanced by Counsel as submissions.⁸³

27. The Panel notes that a significant portion of the substance of the Expert Report provides DW1253’s opinion on the compliance of the SPO’s search and seizure operations with the Rules.⁸⁴ The Panel agrees with the Trial Panel’s determination that this would constitute a legal assessment that falls within the sole scope of the Trial Panel’s responsibilities.⁸⁵ The Panel recalls in that respect that a trial panel has the discretion not to admit the testimony of an expert witness called to give evidence on legal matters.⁸⁶ The Panel also agrees with the Trial Panel that admitting this aspect of DW1253’s proposed evidence would usurp the Trial Panel’s responsibilities to assess the legality of SPO’s undertakings in accordance with the legal framework of the Specialist Chambers.⁸⁷

28. Turning to the remainder of the Expert Report, the Panel notes that it concerns a comparison of the SPO’s undertakings, as explained by SPO Witness W04841, with

⁸² See ICC, *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; ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-844, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, para. 12. See also Impugned Decision, paras 62-63 and references cited therein, fn. 148.

⁸³ Impugned Decision, paras 106-111. See also Transcript, 2 December 2021, pp. 2106-2107.

⁸⁴ See Expert Report, paras 26-28, 30-31 to the extent that these paragraphs, or parts thereof, mention DW1253’s opinion on the compliance of the SPO’s procedures with the Rules.

⁸⁵ See Impugned Decision, para. 108.

⁸⁶ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015 (“*Popović Appeal Judgement*”), para. 79. See also SCSL, *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.

⁸⁷ See Impugned Decision, para. 108.

prosecutorial practices at international criminal courts, primarily the International Criminal Tribunal for the former Yugoslavia (“ICTY”), with which DW1253 is familiar.⁸⁸ The Panel considers that these issues fall within DW1253’s expertise. The Panel further notes that the purpose of expert testimony is to supply specialised knowledge that might assist the trier of fact in understanding the evidence before it.⁸⁹ In the Panel’s view, and contrary to the Trial Panel’s finding,⁹⁰ DW1253’s opinion on SPO’s practices as demonstrated by W04841, based on his own knowledge and experience of ICTY practices and practices in international criminal investigations, would assist a trier of fact in understanding the evidence before it and requires expertise beyond that which the Trial Panel already possesses.⁹¹

29. Considering that, to the limited extent indicated above,⁹² the Expert Report provides relevant information that requires specialised knowledge, the Panel finds that admitting this aspect of DW1253’s evidence would not usurp the Trial Panel’s responsibilities.⁹³ Moreover, for the same reason, the Panel does not agree with the Trial Panel that these issues could be more appropriately addressed through Counsel’s submissions.⁹⁴ That DW1253 only reviewed some limited documentation when conducting his analysis,⁹⁵ in light of the fact that Haradinaj does not possess all

⁸⁸ See Expert Report, paras 9-25, 27, 29, 31, to the extent that these paragraphs, or parts thereof, compare the SPO’s procedures to these practices.

⁸⁹ *Popović* Appeal Judgement, para. 375; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana et al. Appeal Judgement*”), para. 198; *Simba* Appeal Judgement, para. 174; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement, 20 May 2005, para. 303; *Ntaganda* Decision, para. 7.

⁹⁰ See Impugned Decision, para. 107 (wherein the Trial Panel found that “DW1253 does not appear to rely on any sort of expertise – in terms of knowledge or experience – that the Panel does not already possess”).

⁹¹ See Impugned Decision, para. 107.

⁹² See above, para. 25.

⁹³ See Impugned Decision, para. 108 (wherein the Trial Panel found that “the proposed evidence of DW1253 would usurp, *in several respects*, the Panel’s responsibilities” (emphasis added)).

⁹⁴ See Impugned Decision, para. 110. See also *Nahimana et al. Appeal Judgement*, para. 294 (wherein the intention to rebut parts of an expert report appears to be a consideration in favour of accepting expert evidence).

⁹⁵ See Expert Report, para. 24.

the material the SPO does,⁹⁶ and that he was not in a position to conduct the same review as the one W04841 conducted, does not, in the Panel's view, necessarily prevent DW1253 from providing expert opinion in relation to the evidence adduced by W04841.⁹⁷ The Panel considers that this does not constitute a valid basis for declining to hear DW1253's proposed evidence but militates in favour of allowing Haradinaj the opportunity to challenge W04841's evidence through an expert witness, rather than solely through cross-examination and closing submissions.⁹⁸ As a result, the Panel considers that the Trial Panel's decision to exclude the entirety of DW1253's proposed evidence exceeds the limits of the reasonable exercise of its discretion.

30. In light of the above, the Appeals Panel finds that the Trial Panel erred in rejecting the admission of DW1253's proposed evidence in its entirety and deciding not to hear this Witness. Therefore, the Appeals Panel decides to reverse these findings and admit DW1253's evidence for the limited purpose of challenging the evidence of SPO Witness W04841.

V. DISPOSITION

31. For these reasons, the Court of Appeals Panel:

GRANTS the Appeal, in part;

REVERSES in part the Trial Panel's findings rejecting the admission of DW1253's proposed evidence and deciding not to hear this Witness, to the extent that his evidence aims to challenge the evidence of SPO Witness W04841, within the parameters discussed in paragraphs 27-30 of this Decision;

DISMISSES the remainder of the Appeal;

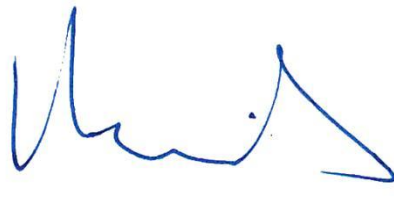
⁹⁶ See also above, fn. 41.

⁹⁷ See Impugned Decision, para. 109. See also Response, para. 38.

⁹⁸ See Impugned Decision, paras 109-110.

ORDERS the Parties to submit public redacted versions of their appellate filings referenced in paragraph 10 or indicate, through a filing, whether these filings can be reclassified as public within ten days of receiving notification of the present Decision; and

ORDERS the Registry to execute the reclassification of the filings referenced in paragraph 10 upon indication by the Parties that they can be reclassified.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 7 January 2022

At The Hague, the Netherlands