



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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: Fidelma Donlon

Date: 24 January 2022

Language: English

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**Corrected Version of
Decision on Application for Advance Disclosure to Expert Witness DW1253**

Specialist Prosecutor

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TRIAL PANEL II ("Panel"), pursuant to Articles 21(4)(f) and 40(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 116(1) and 149 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 23 October 2021, the Defence for Nasim Haradinaj ("Haradinaj Defence") sought leave from the Panel to add Expert Witness DW1253 ("DW1253") to its list of witnesses.¹
2. On 26 October 2021, the Panel directed the Haradinaj Defence to file DW1253's expert report by 9 November 2021.²
3. On 9 November 2021, the Haradinaj Defence filed DW1253's expert report ("Expert Report").³
4. On 23 November 2021, the Haradinaj Defence sought guidance from the Panel as to whether it could show to DW1253 materials in Disclosure Package 61.⁴
5. On 24 November 2021, the Panel directed the Haradinaj Defence to refrain from disclosing the content of Disclosure 61 until it had rendered a decision on a challenge by the Specialist Prosecutor's Office ("SPO") to the testimony of DW1253.⁵

¹ F00394, Haradinaj Defence, *Defence Request for Addition of an Expert to its List of Potential Witnesses*, 23 October 2021.

² Transcript, 26 October 2021, pp 1412-1413.

³ F00426/A01, *Annex A to Submission of Expert Report from the Defence for Mr. Haradinaj*, 9 November 2021, confidential.

⁴ CRSPD 70, Email from the Haradinaj Defence to the Panel, 23 November 2021, at 09:53.

⁵ CRSPD 70, Email from the Panel to the Haradinaj Defence, 24 November 2021, at 09:56.

6. On 29 November 2021, pursuant to Rule 119(2) of the Rules and to the Panel's order,⁶ the Haradinaj Defence filed, *inter alia*, a summary of the facts DW1253 would testify to.⁷

7. On 3 December 2021, the Panel issued its decision on the Specialist Prosecutor's challenges regarding several proposed Defence witnesses.⁸ Therein, the Panel ruled that it would not hear DW1253 and indicated that, if the Haradinaj Defence requested leave to appeal the decision under Rule 77 of the Rules, the Panel would be inclined to grant leave regarding, *inter alia*, its 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 DW1253.⁹

8. On 6 December 2021, the Haradinaj Defence requested leave to appeal, *inter alia*, the Panel's findings in relation to the impermissible character of the proposed evidence of DW1253 and the Panel's decision not to hear DW1253.¹⁰

9. On 7 December 2021, the SPO indicated that it did not oppose the Haradinaj request for leave to appeal.¹¹

10. On 8 December 2021, the Panel granted the Haradinaj Defence's request for leave to appeal.¹²

11. On 7 January 2022, the Court of Appeals Panel granted in part the appeal and reversed the Panel's findings rejecting the admission of DW1253's proposed evidence

⁶ F00428, Panel, *Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings*, 9 November 2021, para. 17 (a).

⁷ F00461, Haradinaj Defence, *Defence Rule 119 Filing on Behalf of Nasim Haradinaj*, 29 November 2021. See also F00461/A01, p.6.

⁸ F00470, Panel, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses* ("Impugned Decision"), 3 December 2021.

⁹ Impugned Decision, para. 120.

¹⁰ F00474, Haradinaj Defence, *Defence Application for Leave to Appeal in respect of 'Decision on Prosecution Requests in Relation to Proposed Defence Witnesses'*, 6 December 2021.

¹¹ Transcript, 7 December 2021, p. 2238.

¹² F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021.

and deciding not to hear DW1253, to the extent that his evidence aims to challenge the evidence of SPO Witness W04841 (“Appeals Decision”).¹³

12. On 14 January 2022, following the request from the Haradinaj Defence for DW1253 to testify by video-link and the Registry’s updates in that regard,¹⁴ the Panel ordered DW1253 to testify by video-link on 24 and 28 January 2022, between 8 AM and noon, The Hague time.¹⁵

13. On 18 January 2022, the Haradinaj Defence requested the Panel to authorise the disclosure of some material to DW1253 ahead of his testimony and, if required, that DW1253 be asked to commit to a confidentiality agreement (“Application”).¹⁶

14. On 19 January 2022, upon notification of the Application, the Panel directed the SPO and the Defence for Hysni Gucati (“Gucati Defence”) to respond, if they so wished, by 20 January 2022, 12:00 hours, and informed the Parties that replies will not be entertained.¹⁷

15. On 20 January 2022, the SPO responded to the Application (“Response”).¹⁸ The Gucati Defence made no submissions.

16. On 21 January 2022, by way of an oral order, the Panel provided the Parties with a summary of the present decision and informed them that written reasons would follow. The Panel hereby provides its reasons.¹⁹

¹³ IA006-F00006, Court of Appeals Panel, *Decision on Nasim Haradinaj’s Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses* (“Appeals Decision”), 7 January 2022.

¹⁴ F00436, Gucati Defence, *Application to Call Witnesses via Video Link*, 15 November 2021, confidential. See also Transcript, 11 January 2022, pp 2687-2688; Transcript, 14 January 2022, pp 3032-3037 (“Order on the Application for Video-Link Testimony of DW1253”).

¹⁵ Order on the Application for Video-Link Testimony of DW1253.

¹⁶ F00524, Haradinaj Defence, *Application to Authorise Advance Disclosure to Expert Witness DW1253* (“Application”), 18 January 2022, confidential.

¹⁷ Correspondence 87, *Email from the Panel to the Parties regarding responses to F00524*, 19 January 2022, at 09:24 AM.

¹⁸ F00525, Specialist Prosecutor, *Prosecution Response to Application to Authorise Advance Disclosure to Expert Witness DW1253*, 20 January 2022, confidential.

¹⁹ Provisional Transcript, 21 January 2022, pp 3090-3095.

II. SUBMISSIONS

17. In its Application, the Haradinaj Defence requests the Panel to authorise the disclosure to DW1253, prior to his testimony, of the:

- a) full unredacted transcripts of the evidence of SPO witnesses: (i) W04841 (Zdenka Pumper);²⁰ (ii) W04842 (Miro Jukić);²¹ and (iii) W04876 (Daniel Moberg);²²
- b) video recording of the 25 September 2020 SPO search (“Video Recording”);²³
- c) four SPO handover forms respectively dated 8, 17, 22 September 2020 and 21 October 2020 (“Handover Notes”);²⁴
- d) declarations of: (i) W04841;²⁵ (ii) W04842;²⁶ (iii) W04876;²⁷ and (iv) an SPO investigator;²⁸

(collectively “Requested Material”).²⁹

18. The Haradinaj Defence submits that the Requested Material is directly relevant to DW1253’s testimony and is necessary to enable him to provide an opinion on SPO’s

²⁰ Transcript, 18 October 2021, confidential; Transcript, 19 October 2021, confidential; Transcript, 20 October 2021, confidential; Transcript, 21 October 2021, confidential; Transcript, 25 October 2021, confidential; Transcript, 26 October 2021, confidential; Transcript, 28 October 2021, public. The Panel notes that: Transcript, 15 December 2021, pp 2622-2626 is not requested.

²¹ Transcript, 28 October 2021, public; Transcript, 4 November 2021, confidential. The Panel notes that: Transcript, 15 December 2021, pp 2627-2635 is not requested.

²² Transcript, 5 November 2021, confidential.

²³ ERN 104414-01 (“P163”); ERN 104414-02 (“P164”).

²⁴ ERN 080449-080449, SPO Delivery Document 08.09.2020 (“P56”); ERN 079500-079500, SPO Delivery Document 17.09.2020 (“P55”); SPOE00220915-00220915, SPO Acknowledgement of delivery 22.09.2020 (“P58”); ERN 083986-083987 RED, (“P99”).

²⁵ 084015-084026 (“P86”); 091791-091792 (“P88”); 091927-091930 (“P89”); 093492-093590; 095162-095239; 095533-095602 (“P90”); 095603-095653 (“P91”); 082727-082731; 083992-083996; 103543-103544 (“P87”).

²⁶ 084008-084010; 090142-090143.

²⁷ 089919-089927, pp 1-2; 083988-083991RED (“P92”); 083986-083987RED (“P99”); 102754-102755; 103915-103915.

²⁸ 089919-089927, pp 3-9; 084011-084012; 082010-082013 RED; 082014-082016; 083997-083998RED.

²⁹ Application, paras 1, 31.

practices as demonstrated by W04841.³⁰ The Haradinaj Defence adds that, without the Requested Material, DW1253 will not be able to fully assist the Panel in assessing the manner in which the evidence was collected and the effect this might have on the course and fairness of the proceedings.³¹ The Haradinaj Defence contends that denying disclosure of the Requested Material would affect Mr Haradinaj's ability to challenge the SPO's evidence and would thus be detrimental to him.³² The Haradinaj Defence further submits that disclosure of the Requested Material, ahead of DW1253's testimony, would enable the Panel to hear his evidence in a more expeditious manner and would facilitate the coordination of the Registry with the local authorities for the video-link testimony.³³ The Haradinaj Defence notes that DW1253 could, if requested, sign a confidentiality agreement prior to the disclosure of the Requested Material.³⁴

19. The SPO responds that the Application should be rejected in the interest of ensuring fair and expeditious trial proceedings.³⁵ The SPO advances three primary grounds for rejection of the Application: (i) the inadequate notice of DW1253's proposed supplemental evidence on the Requested Material;³⁶ (ii) the failure of the Haradinaj Defence to abide by the Panel's deadlines for disclosure;³⁷ and (iii) the absence of justification or good cause from the Haradinaj Defence for the lateness of the Application.³⁸

20. More specifically, the SPO submits that the Application equates to conceding that the Expert Report is deficient and that DW1253's testimony would be incomplete

³⁰ Application, paras 2, 22, 24-27.

³¹ Application, paras 2, 23, 26.

³² Application, para. 28.

³³ Application, paras 2, 29-30.

³⁴ Application, paras 3, 31.

³⁵ Response, paras 1, 18, 20.

³⁶ Response, paras 1, 12.

³⁷ Response, paras 1, 14, 18.

³⁸ Response, paras 1, 12, 17.

without the Requested Material.³⁹ The SPO avers that the Haradinaj Defence seeks to significantly expand the scope of DW1253's testimony only days before his testimony, without reasonable notice.⁴⁰ The SPO observes that, except for the transcript of the last day of W04841's testimony on 5 November 2021, all the Requested Material was accessible to the Haradinaj Defence when it filed its request to add DW1253 to its witness list on 23 October 2021.⁴¹ The SPO argues that the Haradinaj Defence, instead of asking for the Requested Material to be disclosed to DW1253 prior to the 3 December 2021 Panel's decision or reacting immediately upon the issuance of the Appeals Decision, waited eleven days to seek disclosure of the Requested Material and to amend the Expert Report and the scope of DW1253's testimony – *i.e.* seventy days after being ordered to file the Expert Report and days before DW1253's scheduled testimony – thereby failing to provide adequate notice.⁴² The SPO submits that this course of action on behalf of the Haradinaj Defence burdens the SPO and defeats the purpose of both the Panel's deadline for submission of the Expert Report and the advance notice of the Defence case, as required by Rule 119 of the Rules.⁴³ In the view of the SPO, granting the Application at this stage would render such deadlines meaningless and cause prejudice to the SPO.⁴⁴ Lastly, the SPO submits that presenting the Requested Material to DW1253 for his opinion exceeds the scope permitted by the Court of Appeals Panel which, the SPO argues, limits DW1253's evidence to the information he considered when making the Expert Report.⁴⁵

³⁹ Response, para. 11.

⁴⁰ Response, para. 12.

⁴¹ Response, para. 12.

⁴² Response, paras 13-14.

⁴³ Response, para. 15.

⁴⁴ Response, paras 15, 17.

⁴⁵ Response, para. 18.

III. APPLICABLE LAW

21. Pursuant to Article 21(4)(f) of the Law, in the determination of any charge against him, the accused shall be entitled to, *inter alia*, obtain the examination of witnesses on his behalf under the same conditions as witnesses against him.

22. Pursuant to Article 40(2) of the Law, the Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Panel, having heard the parties, may adopt such procedures and modalities necessary to facilitate the fair and expeditious conduct of proceedings.

23. Pursuant to Rule 116(1) of the Rules, the Panel shall take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings.

24. Pursuant to Rule 149(1) of the Rules, the final report of any expert witness to be called by a Party shall be disclosed to the opposing Party within the time limit set by the Panel pursuant to Rule 102(1)(b) of the Rules.

IV. DISCUSSION

A. THE TIMING AND SCOPE OF THE APPLICATION

25. The Panel observes that the Haradinaj Defence filed the Application on 18 January 2022 – *i.e.* eleven days after the issuance of the Appeals Decision and, in effect, three working days prior to the commencement of DW1253's testimony.

26. The Panel notes that the Video Recording, the Handover Notes and all but one declarations were disclosed to the Defence during the pre-trial stage of the proceedings. It was therefore open to the Haradinaj Defence to request disclosure of these items well in advance of the preparation of the Expert Report. The Panel further

notes that the Defence does not need to seek leave to disclose to an expert witness public transcripts of the testimony of a witness, nor public redacted versions of exhibits. Moreover, the confidential, unredacted transcripts of all SPO witnesses are usually made available at the end of the day of testimony on Legal Workflow. The Haradinaj Defence could have therefore requested the disclosure of any confidential part of the trial transcript before the preparation of the Expert Report, or for the purposes of requesting leave to supplement or amend the Expert Report. It failed to do so. No reasons for this failure are provided in the Application. In line with Rule 149(1) of the Rules, paragraph 86 of the Order on the Conduct of the Proceedings provides that applications to amend or supplement a report or to provide an annex to it will only be authorised in exceptional circumstances. It further requires Parties to ensure that the report of an expert witness is finalised and ready to be tendered in evidence by the set deadline. In light of the above, the Panel finds that the Application amounts to an untimely, unduly delayed and unsubstantiated request to amend or supplement the Expert Report.

27. The Panel further observes that the Requested Material encompasses items that go well beyond the scope of the Expert Report. In its 23 October 2021 request for adding an expert to their list of potential witnesses, the Haradinaj Defence had indicated that “the second expert witness has become necessary because of the oral testimony of SPO Witness W04841, Zdenka Pumper, thus far” and went on to elaborate the reasons for this necessity.⁴⁶

28. The Requested Material also goes beyond the scope of the authorisation of the Court of Appeals Panel regarding the evidence of DW1253. The Panel recalls that the Court of Appeals Panel considered DW1253’s proposed evidence of general relevance to the limited extent of comparing the SPO’s practices with the best practices of

⁴⁶ F00394, Haradinaj Defence, *Defence Request for Addition of an Expert to its List of Potential Witnesses*, 23 October 2021, paras 12-16.

international criminal investigations.⁴⁷ The Court of Appeals Panel noted that DW1253's expert report concerned a comparison of the SPO's undertakings, as explained by W04841, with prosecutorial practices at international criminal courts, primarily the ICTY, with which DW1253 was familiar.⁴⁸ On this basis, the Court of Appeals Panel held:

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.⁴⁹

29. The Court of Appeals Panel decided "to admit DW1253 evidence for the limited purpose of challenging the evidence of W04841".⁵⁰ In doing so, the Court of Appeals Panel pointed to paragraphs 9-25, 27, 29 and 31 of the Expert Report to the extent that these paragraphs, or parts thereof, compare the SPO's procedures to these practices. These paragraphs relate to the following matters: (i) standard operating procedures and guidelines regarding investigations, including search and seizure operations (paragraphs 9-12); (ii) chain of custody practices at the ICTY (paragraphs 13-19); (iii) authentication of materials, including a comparison with SPO practices (paragraphs 20-23); and (iv) an analysis of the SPO's three search and seizure operations on 8, 17 and 22 September 2020 (paragraphs 24-25, 27, 29, 31).

30. Taking into consideration the stated scope of the Expert Report and the limits imposed by the Court of Appeals Panel, the Panel finds that the Application goes well beyond these parameters. The Requested Material concerns not only the evidence of W04841, but also: (i) the evidence of other SPO witnesses; and (ii) matters not discussed in the Expert Report and not proposed as evidence of DW1253, such as

⁴⁷ Appeals Decision, para. 25.

⁴⁸ Appeals Decision, para. 28.

⁴⁹ Appeals Decision, para. 28.

⁵⁰ Appeals Decision, para. 30.

contacts with (potential) witnesses, challenges to confidentiality of information contained in the Batches and the 25 September 2020 search and seizure operation.

31. On the basis of the facts set out above, the Panel could dismiss the Application. Nonetheless, for the reasons stated below, the Panel will assess the merits of the Application.

B. GIVING FULL EFFECT TO THE DECISION OF THE COURT OF APPEALS PANEL

32. As noted, the Court of Appeals Panel held that DW1253 should be allowed to testify “for the limited purpose of challenging the evidence of W04841”.⁵¹ The Court of Appeals Panel also held that the fact that DW1253 had only reviewed some limited documentation when conducting his analysis did not necessarily prevent him from providing an expert opinion in relation to the evidence adduced by W04841.⁵²

33. With these parameters in mind, the Panel finds that, in order to give full effect to the Appeals Decision and to guarantee that the right of the Accused to a fair trial is not negatively affected by the belated nature of the Application, it shall consider the merits of the Application with a view to allowing DW1253 to challenge the evidence of W04841 in an informed manner.

⁵¹ Appeals Decision, para. 30.

⁵² Appeals Decision, para. 29 referring to F00426/A01, Haradinaj Defence, *Annex A to Submission of Expert Report from the Defence for Mr. Haradinaj* (“Expert Report”), 9 November 2021, confidential, para. 24.

C. MERITS OF THE APPLICATION

1. Unredacted Transcripts of SPO Witnesses W04841, W04842, and W04876

(a) W04841

34. The Haradinaj Defence submits that DW1253 has only been provided with the public transcript of 28 October 2021, *i.e.* only one of the seven hearings during which W04841 testified.⁵³

35. As noted, the Defence does not need to seek leave to disclose to an expert witness public transcripts of testimony. Further, the Defence should have been aware as soon as the evidence of W04841 has concluded on 26 October 2021 of all matters arising from her evidence that it wanted to raise with DW1253. The Panel observes that public redacted versions of all transcripts of W04841's evidence were uploaded in Legal Workflow and made publicly available on the SC website since 11 November 2021.⁵⁴ As a result, nothing prevented the Haradinaj Defence from providing those public redacted transcripts to DW1253.

36. As regards the unredacted, confidential transcripts of W04841's testimony, as noted above, nothing prevented the Haradinaj Defence from requesting authorisation to provide them to the prospective witness immediately after the testimony of W04841. The Panel further observes that the Haradinaj Defence did not demonstrate the relevance of any of the redacted parts of the transcripts for DW1253's proposed testimony. That being said, to give full effect to the Appeals Decision, the Panel has reviewed all confidential parts of the requested transcripts with a view to ascertaining any evidence that may be relevant to Expert Report. The Panel has found only one confidential segment of relevance where W04841 testified, *inter alia*, about the manner in which she cross-checked names in Batch 3. This segment was held in private session

⁵³ Application, para. 23, fns 32-34.

⁵⁴ See Kosovo Specialist Chambers website, [public court record search](#).

on 19 October 2021 at pages 953 to 961 of the transcript. The Panel considers that this evidence could be relevant to the authentication analysis in the Expert Report.

37. Therefore, the Panel directs the Registry to provide to DW1253 with the private session on pages 953 to 961 of the 19 October 2021 transcript. These pages should be unredacted for DW1253, save for a name in line 21 of page 953. All other private sessions or redacted information in the transcript of 19 October 2021 should remain redacted.

(b) W04842 and W04876

38. As regards the unredacted transcripts of W04842 and W04876, the Haradinaj Defence argues that the Court of Appeals Panel, when determining the relevance of DW1253's evidence, referenced W04841's testimony merely for illustrative purposes and not to limit the scope of DW1253's exclusively to W04841's evidence.⁵⁵

39. The Panel disagrees with the Haradinaj Defence. The Panel recalls: (i) the scope of the Expert Report as stated by the Haradinaj Defence;⁵⁶ and (ii) the Court of Appeals Panel's finding that DW1253 should be permitted to testify "for the limited purpose of challenging the evidence of SPO Witness W04841".⁵⁷ In that light, the Panel finds that the testimonies of W04842 and W04876 fall clearly outside of the scope of both the Expert Report and the parameters of DW1253's testimony as permitted by the Court of Appeals Panel.

40. For this reason, the Panel finds that the confidential transcripts of the testimonies of W04842 and W04876 shall not be provided to DW1253.

⁵⁵ Application, para. 24 referring to Appeals Decision, para. 28.

⁵⁶ See *supra*, para. 27.

⁵⁷ Appeals Decision, para. 30. See also Appeals Decision, paras 28-29.

2. Video Recording

41. As regards the Video Recording,⁵⁸ the Haradinaj Defence submits that it will enable DW1253 to assess the SPO investigative conduct and reliability of the evidence produced from the 25 September 2020 search.⁵⁹

42. The SPO responds that there is no discernible purpose in DW1253 analysing the 25 September search.⁶⁰ The SPO also submits that sharing the Videos with DW1253 over open network channels is incompatible with the strict confidentiality restrictions set by the Pre-Trial Judge.⁶¹

43. The Panel recalls that, in the Appeals Decision, the Court of Appeals Panel pointed to paragraphs 9-25, 27, 29 and 31 of the Expert Report to the extent that these paragraphs, or parts thereof, compare the SPO's procedures to these practices. Insofar as the analysis of the SPO's search and seizure operations are concerned, the Court of Appeals Panel listed paragraphs 24-25, 27, 29, 31 of the Expert Report. The Panel observes that these paragraphs concern the searches conducted on 8, 17 and 22 September 2020. The search conducted by the SPO at the KLA War Veterans' Association premises on 25 September 2020 is only mentioned in paragraph 30 of the Expert Report, which does not form part of the paragraphs authorised by the Court of Appeals Panel. The Panel considers that the Video Recording therefore falls outside of the scope of the Expert Report and of the parameters of DW1253's testimony as defined by the Court of Appeals Panel.

44. Therefore, the Panel finds that the Video Recording shall not be provided to DW1253.

⁵⁸ P163; P164.

⁵⁹ Application, para. 25.

⁶⁰ Response, para. 16.

⁶¹ Response, para. 16, referring to F00210/RED, *Public Redacted Version of Decision on Prosecution Requests and Challenges Pursuant to F00172*, 26 May 2021, paras 35-41, modified by F00236, *Decision on the Haradinaj Application for Leave to Appeal the Decision on the Search and Seizure Videos*, 15 June 2021, para. 24.

3. Handover Notes

45. As regard the Handover Notes dated 8, 17 and 22 September 2020 and 21 October 2020,⁶² the Haradinaj Defence submits that they will assist DW1253 to assess SPO practices to the extent that they document the seizures conducted by the SPO.⁶³

46. The Panel observes that: (i) the Handover Notes are all publicly available in a public redacted version form;⁶⁴ (ii) three of them have already been shared with DW1253;⁶⁵ and (iii) the Haradinaj Defence provides no cogent reasons to disclose the confidential versions of the Handover Notes to DW1253 in its Application.

47. The Panel nonetheless reviewed the confidential versions of the Handover Notes. The Panel notes that the redactions applied to the public versions of the Handover Notes concern names of SPO staff and independent observers. These redactions could not affect DW1253's analysis of the Handover Notes. The Panel is therefore satisfied that the public redacted versions of the Handover Notes are sufficient for the purpose of DW1253's testimony and, consequently, sees no good cause in providing the confidential versions of the Handover Notes to DW1253.

48. For this reason, the Panel finds that the confidential versions of the Handover Forms shall not be provided to DW1253.

⁶² P55; P56; P58; P99.

⁶³ Application, para. 25.

⁶⁴ P55RED; P56RED; P58RED; P99RED.

⁶⁵ Expert Report, para. 2.

4. Declarations of W04841, W04842, W04876, and SPO Investigator

(a) W04841

49. As regards W04841's declarations,⁶⁶ the Haradinaj Defence submits that they fall within the scope of DW1253's mandate and reiterates that their disclosure would ensure the Accused's right to equality of arms.⁶⁷

50. The Panel observes that the Haradinaj Defence did not demonstrate in its Application the relevance of W04841's declarations for DW1253's testimony, nor did it offer cogent reasons for providing these to DW1253. The Panel also recalls that the Court of Appeals Panel found that the limited review carried out by DW1253 when conducting his analysis did not necessarily prevent DW1253 from providing expert opinion in relation to the evidence adduced by W04841.⁶⁸ Having nonetheless reviewed W04841's declarations, the Panel finds that some of them could be relevant to and within the scope of the Expert Report. Nonetheless, the Panel finds that no good cause for disclosing the confidential versions of these declarations exists.

51. That being said, the Panel notes that it has already approved proposed redactions to the public versions of these declarations, which are due to be disclosed on 31 January 2022. The Panel considers that some of these public redacted versions could be of relevance for DW1253's testimony and authorises them to be provided to DW1253:

- a. paragraphs 1 to 12 and 19 to 35 of P86;
- b. paragraphs 1 to 13 of P89;
- c. P90 and the first page of Annexes 1 and 3; and
- d. P91 and the first page of Annex 1.

⁶⁶ P86, P87, P88, P89, P90, P91, ERN093492-093590; 095162-095239.

⁶⁷ Application, paras 27-28.

⁶⁸ Appeals Decision, para. 29.

52. Keeping in mind both the stated scope of the Expert Report and the parameters defined by the Court of Appeals Panel, the Panel finds that the remainder of W04841's declarations have not been shown to be of relevance to DW1253's testimony.

53. Accordingly, the Panel finds that the above-mentioned public redacted versions of W04841's declarations are to be provided to DW1253. As regards P88, the Panel observes that the exhibit is already public, the Haradinaj Defence can therefore provide it to DW1253. The Panel denies the Application as regards the remainder of W04841's declarations to DW1253.

(b) W04842, W04876, and SPO Investigator

54. As regard the declarations of W04842 and W04876 and of the SPO Investigator, the Haradinaj Defence similarly argues that they fall within the scope of DW1253's mandate as determined by the Court of Appeals Panel.⁶⁹

55. For the same reasons it denied the provision of the confidential transcripts of their testimonies, the Panel finds that the declarations of W04842 and W04876 and of the SPO Investigator fall outside of the parameters defined by the Court of Appeals Panel for the DW1253 and of the scope of the Expert Report.⁷⁰

56. Accordingly, the Panel denies disclosure of the declarations W04842 and W04876 and of the SPO Investigator.

D. PRACTICAL INSTRUCTIONS

57. In light of the imminence of DW1253's testimony, the Panel provides the following instructions.

58. The Panel makes it clear that the above authorisation for disclosure of part of the Requested Material does not equate to permitting the Haradinaj Defence to amend the

⁶⁹ Application, paras 27-28.

⁷⁰ See *supra*, para. 39. See also Appeals Decision, paras 28-30.

Expert Report. Doing so at such a late stage would be unfair and prejudicial to the SPO. In this regard, the Panel clarifies that it approves the limited disclosure of part of the Requested Material with the following strict directions, which flow from the Appeals Decision:

- (i) DW1253 shall not be allowed to give evidence in his direct-examination on any matter that goes beyond the scope of paragraphs 9 to 25, 27, 29 and 31 of the Expert Report;
- (ii) Any line of questioning arising from the disclosed material will be limited to eliciting explanations of the analysis provided in the aforementioned paragraphs;
- (iii) DW1253 will be directed to answer such questions with a view to explaining, but not exceeding, the analysis he provided in the aforementioned paragraphs of the Expert Report; DW1253 will also be directed to be mindful of not disclosing confidential matters in public hearings;
- (iv) Any questions regarding the disclosed confidential transcript should focus on the procedures described therein in view of the analysis provided in the Expert Report and should not reveal any confidential information.

59. The Panel orders the Haradinaj Defence to notify the Panel and the Parties by Sunday, 23 January 2022, 10:00 AM The Hague time of any line of questioning arising from the disclosed material and any clarifications DW1253 provided upon reading the disclosed material. Failure to do so could lead to this Panel's refusal to allow any such questions during DW1253's testimony.

60. The Panel informs the SPO that it will consider any request for more preparation time for the uploading of its presentation queue or for cross-examination, but with a view to finalising DW1253's testimony no later than 28 January 2022.

V. CLASSIFICATION

61. The Panel observes that the Application (F00524) was filed confidentially because it refers to confidential decisions and to names testifying under protective measures.⁷¹ The SPO filed the Response (F00525) confidentially pursuant to Rule 82(4) of the Rules but has no objection for it to be reclassified as public.⁷² The Panel directs: (i) the Haradinaj Defence to file a public redacted version of its Application (F00524); and (ii) the Registry to reclassify the Response (F00525) as public, by 28 January 2022.

VI. DISPOSITION

62. For these reasons, the Panel:

- a. **GRANTS** the Application in part;
- b. **ORDERS** the SPO to provide the Haradinaj Defence by today, **21 January 2022, 08:00 PM, The Hague time**, the public redacted versions of:
 - i. paragraphs 1 to 12 and 19 to 35 of P86;
 - ii. paragraphs 1 to 13 of P89;
 - iii. P90 and the first page of Annexes 1 and 3;
 - iv. P91 and the first page of Annex 1;
- c. **ORDERS** the Haradinaj Defence to:
 - i. transmit these documents to DW1253 by today, **21 January 2022, 09:00 PM, The Hague time**;
 - ii. notify the Panel and the Parties by Sunday, **23 January 2022, 10:00 AM**, The Hague time of any line of questioning arising from the

⁷¹ Application, para. 32.

⁷² Response, para. 19.

disclosed material and any clarifications DW1253 provided upon reading the disclosed material;

- d. **DIRECTS** the Registry to disclose to DW1253, by end of today, **21 January 2022**, the confidential transcript of 19 October 2021 under the following conditions:
 - i. the private session on pages 953 to 961 unredacted, save for a name in line 21 of page 953 which should be redacted by the Registry;
 - ii. all other private sessions in redacted form.
- e. **ORDERS** the Haradinaj Defence to inform DW1253 that he is ordered to maintain the confidentiality of the disclosed portion of the transcript;
- f. **DENIES** the remainder of the Application;
- g. **DIRECTS** the Haradinaj Defence to file a public redacted version of the Application (F00524) by **28 January 2022**; and
- h. **INSTRUCTS** the Registry to reclassify the Response (F00525) as public by **28 January 2022**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 24 January 2022

At The Hague, the Netherlands

The last word of paragraph 37 was changed from “unredacted” to “redacted”.