



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Trial Panel II
Judge Charles Smith III, Presiding
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Prosecution submissions on the conduct of proceedings

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1. Pursuant to the invitation of the Trial Panel,¹ the SPO provides its submissions on the draft order on the conduct of proceedings ('Draft Order').²

2. Mindful of the broad discretion the Trial Panel enjoys in determining the conduct of proceedings, the SPO presents only a small number of proposals for its consideration.³ For the reasons below, the SPO requests that the Trial Panel integrate these proposals into the final conduct of proceedings order for this case.

I. Public character of proceedings

3. *Proposal:* Addition at the end of para.4: '[p]arties may refer to matters subject to confidentiality during open session and in public written submissions in a manner which does not defeat the purpose of the confidential classification.'

4. *Justification:* As done in *Gucati and Haradinaj*,⁴ the Trial Panel's formal acknowledgement that confidential information can be referenced publicly in a manner which does not defeat the purpose of the confidential classification would facilitate more public submissions.⁵

II. Fair and expeditious character of the proceedings

5. *Proposal:* Revise the beginning of para.7⁶ to the following:

¹ Order for Submissions on the Draft Order on the Conduct of Proceedings, KSC-BC-2020-06/F01178, 22 December 2022 (with annex), para.4.

² KSC-BC-2020-06/F01178/A01 ('Draft Order').

³ The proposals appear under the numbered headings as they appear in the Draft Order.

⁴ *Prosecutor v. Gucati and Haradinaj*, Annex to Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, 17 September 2021 ('G&H Conduct Order'), para.4.

⁵ *As done in ICC*, Chambers Practice Manual, 24 November 2022, para.75(v) (preliminary directions for at or before the first trial status conference).

⁶ Proposed Amendment to Draft Order, KSC-BC-2020-06/F01178/A01, para.7 ('[p]arties and participants shall avoid raising any issue in the courtroom that could unnecessarily delay the course of proceedings prior to the commencement of a witness's evidence, unless that issue has a direct bearing on that witness

Parties and participants shall avoid raising any issue in the courtroom that could unnecessarily delay the course of proceedings, unless that issue has a direct bearing on a witness whose testimony is about to commence or for other legitimate purposes. Before raising any such issue, a Party or participant shall give timely written or oral notice to the Trial Panel and to the other Parties and participants of its intention to do so, providing adequate details of the nature of the application and the basis for it. This should include providing notice of any documents and corresponding reference numbers to be used when raising the issue.

6. *Justification:* This notice provision in the draft order will allow for more meaningful discussion of issues which must be raised in court, enabling all sides to fully prepare and thereby also promoting trial efficiency. These principles should apply in all court hearings – not just witness examinations – so the first sentence is modified to broaden the scope of the paragraph.⁷

7. In order to further the purpose of this part of the Draft Order, it should be made clear that the advance notice should include any documentation to be referenced when raising the issue and that Parties and participants shall avoid making reference to documents no one else in the courtroom had an opportunity to review in advance of the discussion. A new last sentence is proposed at the end of this part of para.7 for this purpose.

VI. Disclosure

8. *Proposal:* Amend the following sentence in para.22 (amendment in emphasis): '[n]evertheless, *subject to the date of receipt of the materials, procedures in the Rules and any applicable restrictions*, the SPO shall endeavor to disclose all such material prior to the commencement of trial.'

or for other legitimate purposes. Before raising any such issue, a Party or participant shall give timely written or oral notice to the Trial Panel and to the other Parties and participants of its intention to do so, providing adequate details of the nature of the application and the basis for it').

⁷ This broader scope obviates the need to regulate providing notice for procedural matters in the last sentence of para.127 of the Draft Order. If this sentence is maintained, the notice should extend to not just the Trial Panel, but the other parties and participants as well.

9. *Justification:* For paragraph 22, everything the SPO has received falling under Rule 102(3) and 103 will not necessarily be disclosed prior to the commencement of trial. Rule 102(3) is built around a notice procedure, and items falling under the rule may not necessarily be selected prior to the trial commencement for reasons in control of the Defence and not the SPO. For new items received just before the commencement of trial, it will not be feasible to notice, review, and process them for disclosure before commencement. Moreover, both Rule 102(3) and 103 items may be subject to protective measures and Rule 107 conditions restricting disclosure. It is suggested to amend the paragraph to account for these caveats.

XII. Presentation and Admission of Evidence

10. *Proposal:* Amend the beginning of paragraph 51⁸ to the following:

The Trial Panel strongly encourages the Parties and participants to consider making effective use of Rules 153, 154 and 155, to the greatest extent possible, with a view to expediting proceedings. Parties and participants shall file any Rule 154 applications for witnesses no later than the moment of the submissions set out in para.73 below.

11. *Justification:* As originally written, this paragraph requires all applications under Rules 153-155 to be filed no later than three months before a witness is to be called. The proposal as drafted should be amended for two reasons.

⁸ Draft Order, KSC-BC-2020-06/F01178/A01, para.51 ('[t]he Trial Panel strongly encourages the Parties and participants to consider making effective use of Rules 153, 154 and 155, to the greatest extent possible, with a view to expediting proceedings. Parties and participants shall file any such application no later than 3 months before a witness is to be called consistent with the three-month timeframe set out at para. 73 below').

12. First, the SPO's Rule 153 and unavailable Rule 155 witnesses are, in principle, not intended to be called.⁹ Any such timeline would be meaningful only for Rule 154 witnesses, so it is proposed to narrow the scope of the second sentence only to this rule.

13. Second, the procedure set out in paragraph 73 of the draft order requires the SPO to file information on the next three months of witnesses 'one month prior to the completion of the testimony' of the previous group of witnesses.¹⁰ It is actually not consistent with this procedure to file any Rule 154 motions no later than three months prior to a witness being called, as this would entail filing motions for certain witnesses well in advance of one month prior to the completion of the previous group of witnesses. The fair and expeditious conduct of the proceedings does not require this much notice for all such applications – in fact, noting the contemplated trial commencement date of 1 March 2023, the SPO would already be in breach of the procedure in the Draft Order for its early Rule 154 witnesses in the case.¹¹

14. Accordingly, the SPO proposes to limit this sentence only to Rule 154 applications and to time their submission to the list and associated information filed pursuant to paragraph 73.¹² Whenever it is necessary to file such applications at an earlier date – such as when the decision on a Rule 154 request has a substantial impact on the preparations for a certain witness – the calling party can always file such requests at an earlier date.

⁹ Witnesses whose evidence appears under Rule 153 can also appear for cross-examination (Rule 153(3)), but on the SPO witness list all such witnesses are identified under Rule 154. SPO Rule 153 witnesses would therefore only appear for cross-examination when so ordered by the Trial Panel. It is also acknowledged that Rule 155 covers both unavailable witnesses and witnesses subject to interference, including for witnesses who attend and do not give evidence at all or in a material aspect (Rule 155(2)). It is not possible to anticipate whether a given witness will fall under this part of Rule 155 so as to file such a motion on a pre-determined deadline prior to testimony.

¹⁰ Draft Order, KSC-BC-2020-06/F01178/A01, para.73.

¹¹ In this regard, *see* Order Scheduling the Trial Preparation Conference, KSC-BC-2020-06/F01200, 12 January 2023, para.6(iii).

¹² *See also* Draft Order, KSC-BC-2020-06/F01178/A01, paras 74-75.

XIV. Bar Table Motions

15. *Proposal*: Delete paragraph 61.

16. *Justification*: Irrespective of the general merit of resolving matters *inter partes* instead of formal litigation, the envisaged consultations on bar table items are likely to lead to unnecessary delays. It is highly likely that the other parties and participants will not be able to take a position on an item's admissibility before the tendering party explains its purported relevance and probative value. In other words, the parties will not be able to have a meaningful *inter partes* conversation until the bar table motion is essentially ready to file.

17. Instead of delaying the filing of such motions to explore *inter partes* solutions, it is more efficient for the tendering party to file its bar table motion as soon as it is ready. Should the other parties and participants have no objections to certain exhibits upon full review of the bar table motion, they can indicate this position in the course of their responses.

XV. Witnesses

A. Protective Measures

18. *Proposal*: Revision to paragraph 65: '[w]here a witness advises the calling Party that he or she no longer needs protective measures, the calling Party shall promptly notify the Witness Protection and Support Office ("WPSO") and the Panel and facilitate compliance with the waiver requirements of Rule 81(6).¹³

¹³ *Proposed amendment to Draft Order, KSC-BC-2020-07/F00267/A01, para.65* ('[s]hould a witness inform the presenting Party that he or she no longer requires some or all of the protective measures granted to him or her, the presenting Party shall immediately apply for variation or rescission of that witness's protective measures').

19. *Justification:* When a witness makes a knowing, willing, and voluntary decision to vary his/her protective measures, then applying for a variation of protective measures will be justified in principle. However, if witnesses have, for instance, been subject to interference and only seek a variation in order to publicly recant, then applying for variation of protective measures may not be warranted. The proposed amendment from *Gucati and Haradinaj*¹⁴ introduces a case-by-case assessment when such situations arise, such that, although the Trial Panel is always informed when witnesses wish to vary protective measures, the procedure no longer mandates filing a request to this effect in every instance.

C. Scheduling of Witnesses and Material to be Used in Examination

20. *Proposal:* Addition to the following at the end of para.74(i): ‘The name and pseudonym of the witness, *subject to protective measures*’.

21. *Justification:* When providing the tentative witness order for the next three months, certain witnesses in this group may have delayed disclosure of their identity until 30 days before their testimony or anonymity. When this occurs, the protective measures would preclude providing the witness’s name in addition to their pseudonym in the tentative order.

22. *Proposal.* Amend paragraph 75 as follows (amendments in emphasis): ‘At the same time, the SPO shall file submissions on the necessity and proportionality of any *delayed disclosure* and/or withholding of any evidentiary material associated to the proposed witnesses. The SPO shall set forth clearly, for each existing protected witness, fact-specific reasons justifying the necessity and proportionality at this stage of the proceedings of the relevant protective measure’.

¹⁴ G&H Conduct Order, KSC-BC-2020-07/F00314/A01, para.26.

23. *Justification.* All protective measures previously granted have been pursuant to reasoned requests of the SPO and subsequent rulings by the Pre-Trial Judge. All other items have standard redactions, where the justification for the redactions is included in the alpha numeric code specified in the Framework Decision.¹⁵

24. Re-justifying all redactions for these witnesses would be a repetitive exercise that would not add a lot of meaningful information. As limited by the Trial Panel in a similar order for the first 40 witnesses,¹⁶ it is suggested to limit this further justification only to those witnesses which still have delayed disclosure (and corresponding withholding of materials)¹⁷ at the time the list specified in para.73 is filed.

25. *Proposal:* Amendment of the first sentence of para.82 (amendment in emphasis): '[a] presentation queue listing all documents or other material to be used by the cross-examining Party must be released to the Trial Panel and the other Parties and participants *no later than 24 hours before the end of the direct examination*'.¹⁸

26. *Justification:* Having the non-calling parties' exhibits released¹⁹ around when the direct examination concludes leaves insufficient time for the direct examiner to prepare

¹⁵ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020.

¹⁶ Transcript of Hearing, 16 December 2022, p.1776 ('[i]f the SPO wishes to maintain any redaction in the indictment or to withhold the identity or unredacted evidentiary material of any of the first 40 witnesses beyond 30 January 2023, the SPO shall set forth clearly for each relevant protected witness fact-specific reasons justifying the necessity and proportionality at this stage of the proceedings of the relevant protective measure.').

¹⁷ The proposed language also extends to anonymous witnesses.

¹⁸ *Proposed amendment to Draft Order*, KSC-BC-2020-07/F01178/A01, para.82 ('[a] presentation queue listing all documents or other material to be used by the cross-examining Party must be released to the Trial Panel and the other Parties and participants immediately upon the completion of the direct examination of that witness at the latest').

¹⁹ It is noted that the Draft Order discusses having to 'upload' a presentation queue (para.78) and 'file' or 'submit' a list of exhibits to be used in direct examination (para.81). It is understood these procedures are all describing the act of releasing the presentation queue in Legal Workflow to the other parties, participants, and Trial Panel.

for what could be voluminous cross-examination materials. It also substantially increases the likelihood of redirect examination. Making all anticipated exhibits available 24 hours before the direct examination concludes will lead to more efficient witness examination by all parties.²⁰

D. Witness Preparation

27. *Proposal:* Amendment to para.89 (amendment in emphasis): '[w]hen conducting witness preparation, the lawyer should be accompanied by at least one other *person* of the calling Party's team unless exceptional circumstances render this impossible.'²¹

28. *Justification:* The volume of this case will put intense demands on all of the lawyers involved during trial. It is a sufficient safeguard for the integrity of any preparation session that another member of the calling party's team attend the session, without that additional person necessarily needing to be a lawyer.

29. *Proposal:* Deletion of the following sentences in paragraph 95: 'This information shall be recorded into a note and read back to the witness, who shall confirm that it reflects his/her account fully and accurately. The note shall be signed by the person who prepared it and then sent to the Panel and the Parties and Victims' Counsel through Legal Workflow.'

30. *Justification:* In order to secure a signed note in the manner proposed, the calling party will need to suspend the preparation session in order to prepare a draft note which

²⁰ Certain ICC cases adopt even earlier notice period, with notice of cross-examination exhibits 24 hours before the witness testimony even begins. See similarly *Yekatom and Ngaïssona* Conduct of Proceedings Decision, ICC-01/14-01/18-631, para.42; *Ongwen* Conduct of Proceedings Decision, ICC-02/04-01/15-497, para.20.

²¹ *Proposed amendment to Draft Order, KSC-BC-2020-07/F01178/A01, para.89* ('[w]hen conducting witness preparation, the lawyer should be accompanied by at least one other lawyer of the calling Party's team unless exceptional circumstances render this impossible').

would need to be read back to the witness. This process may need to be repeated multiple times should amendments be required. The note would then need to be processed for upload into Legal Workflow.

31. Translation is a significant obstacle to the expeditiousness running of such a procedure, noting that many witnesses do not speak or understand English. All readbacks for these witnesses would need to be done through translators and – unless the witness is put in an unreasonable position to sign a statement he/she cannot read – the final version of the note would need to be translated prior to disclosure.

32. Noting that preparation sessions can happen as late as 24 hours prior to the witness's testimony,²² taking the functional equivalent of a formal recorded statement in such a timeframe substantially reduces the amount of time all parties and participants have to review the results of a preparation session and prepare for the witness.

33. It is not necessary to adopt this as the general procedure for all witnesses in the case. As done in *Gucati and Haradinaj*, it is generally sufficient to provide the opposing Party and the Trial Panel with all of the information that is subject to the calling Party's disclosure obligations, including: a) any clarifications, changes or corrections made by the witness to his or her previous statements and the reasons advanced by the witness, if any, to justify the change or correction; and b) any new information obtained from the witness.²³ This information can be provided unsigned and in any appropriate form.²⁴ The witness can verify the accuracy of these witness preparation notes in the course of his/her testimony whenever necessary, and signed preparation notes can still be prepared

²² Draft Order, KSC-BC-2020-07/F01178/A01, para.93.

²³ See *G&H* Conduct Order, KSC-BC-2020-07/F00314/A01, para.53.

²⁴ In order to provide the results of *Gucati and Haradinaj* preparation sessions as quickly as possible, the calling party would send the results of those sessions to the other parties and Trial Panel via email. Signed preparation session notes were only required when they were corrections to written statements or declarations of witnesses which were to be used and/or tendered in evidence.

whenever there are procedural advantages in doing so (as may be the case for Rule 154 witnesses with a large number of corrections/clarifications).

E. Order of Questioning

34. *Proposal*: Revision to para.100 as follows (changes in emphasis):

Where counsel for an Accused calls a witness, the order of questioning the witness is:

- Counsel for the Accused
- *Remaining counsel for the Accused*
- SPO.
- *Victims' Counsel, with leave of the Trial Panel*²⁵

35. *Justification*: When defence witnesses are called, the flow and efficiency of the proceedings would be best preserved if the remaining accused question the witness before the SPO. It is anticipated that the defence teams in this case will have very similar questions for defence witnesses. Splitting the defence teams' questioning permits the Defence what is effectively a redirect examination as of right.²⁶ This will lead to an attendant increase in the need for multiple rounds of cross-examination.

36. As adopted in *Gucati and Haradinaj*,²⁷ examination of defence witnesses will proceed far more efficiently if the defence teams collectively ask all questions they wish

²⁵ *Proposed amendment to Draft Order, KSC-BC-2020-07/F01178/A01, para.100* ('Where counsel for an Accused calls a witness, the order of questioning the witness is:

- Counsel for the Accused
- SPO
- Victims' Counsel, with leave of the Trial Panel
- Remaining counsel for the Accused').

²⁶ *Contra* Rule 127(3) (on a witness called before the Trial Panel; in relevant part: '[d]irect examination and cross-examination shall be allowed in each case. The Panel may allow redirect examination as deemed necessary').

²⁷ *G&H Conduct Order, KSC-BC-2020-07/F00314/A01, para.69.*

to ask before the SPO's cross-examination. This would facilitate making any further redirect examination the focused, limited inquiry it should be.

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At The Hague, the Netherlands