



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 L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Prosecution reply to 'Joint Urgent Preliminary Defence Response to SPO Application for Admission of Material through the Bar Table'

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I. INTRODUCTION

1. The Bar Table Motion¹ fully complies with the requirements set out in the Order on the Conduct of Proceedings,² the Trial Panel's Fourth Oral Order,³ and the jurisprudence of the Specialist Chambers.⁴ The Defence has all the necessary information needed to meaningfully respond thereto. While, in view of the number and range of items included therein, the SPO does not oppose a reasonable extension of the time limit for the Defence to file its full response to the Bar Table Motion, the Preliminary Response⁵ provides no basis for granting the further relief sought.⁶ Rather, it seeks to reinvent and/or prolong established processes, and to add unnecessary and undue burdens on the SPO. The further relief sought by the Defence is, therefore, unwarranted and will indisputably lead to significant delays to the proceedings.

II. SUBMISSIONS

2. The admission of evidence which the SPO requests in the Bar Table Motion does not require definitive proof of reliability or credibility of the evidence, but rather a showing of *prima facie* reliability on the basis of sufficient indicia.⁷ A decision on the admissibility of an item is not a final decision on its ultimate relevance, reliability, or weight. Such final evaluations are made in light of all evidence, typically in the trial

¹ Prosecution application for admission of material through the bar table with public Annexes 5 and 8, and confidential Annexes 1-4, 6 and 7, KSC-BC-2020-06/F01268, 8 February 2023 ('Bar Table Motion').

² Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, Public, 25 January 2023 ('Order on the Conduct of Proceedings'), Annex 1, paras 60-62.

³ Transcript, KSC-BC-2020-06, Public, 16 December 2022 ('Fourth Oral Order'), pp.1775-1776.

⁴ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Prosecution Request for Admission of Items Through the Bar Table, KSC-BC-2020-07/F00334, Public, 29 September 2021 ('*Gucati and Haradinaj* Bar Table Decision'); *Specialist Prosecutor v. Mustafa*, Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, KSC-BC-2020-05/F00281, Confidential, 13 December 2021 ('*Mustafa* Bar Table Decision').

⁵ Joint Urgent Preliminary Defence Response to SPO Application for Admission of Material through the Bar Table, KSC-BC-2020-06/F01289, 14 February 2023 ('Preliminary Response').

⁶ Preliminary Response, KSC-BC-2020-06/F01289, para.38.

⁷ *Gucati and Haradinaj* Bar Table Decision, KSC-BC-2020-07/F00334, paras 10-14; *Mustafa* Bar Table Decision, KSC-BC-2020-05/F00281, paras 9-13.

judgement.⁸ Entering into such discussions at this stage would cause unnecessary, lengthy delays and disrupt the expeditiousness of the proceedings.

3. The Bar Table Motion clearly sets out, per item, the relevant ERN, indicia of authenticity, and the item's relevance and probative value. The Defence fails to establish any prejudice in relation to the manner in which the SPO refers, for each item, to the primary paragraphs of the Indictment to which such item relates. The SPO fully complied with the Trial Panel's order in this regard. Further, the indication of paragraphs is, logically, but one of the factors intended to assist the Defence and Trial Panel; it must be read in conjunction with all other information provided on the item and, needless to say, the item itself.

4. Further, the items are organised by type into six separate categories⁹ to facilitate Defence review and the Trial Panel's ruling. Pursuant to the Fourth Oral Order, these items pertain to evidentiary material the SPO considers important to the clear and effective presentation of its case at this stage, including exhibits the SPO intends to use with its first 40 witnesses. Given the nature of the case and the SPO's first 40 witnesses, the tendered items are relevant to multiple witnesses and crime sites. Moreover, for the first 12 witnesses, the documents the SPO intends to use, some of which are also being tendered through the Bar Table Motion, have been itemised per witness.¹⁰

5. There is no further information the Defence requires to articulate its views on the items.

6. The Preliminary Response contains unclear arguments, and others that make it evident that the Defence is seeking to turn the bar table process on its head.

⁸ See *Prosecutor v Bošković & Tarkulovski*, IT-04-82-T, Trial Chamber, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table, 14 May 2007, para.11. See also *Specialist Prosecutor v. Mustafa*, Decision on the submission and the admissibility of evidence, KSC-BC-2020-05/F00169, 25 August 2021, Public, para.19.

⁹ Fourth Oral Order, p.1775.

¹⁰ Prosecution submission of list of first 12 witnesses and associated information with confidential Annex 1, KSC-BC-2020-06/F01243/A01, 1 February 2023.

7. The Order on the Conduct of Proceedings does not prohibit a Party from seeking to admit lengthier items, such as books, in whole. The SPO has exercised due caution in this regard, providing adequate reasons as to why the entirety of a certain item is being sought for admission. In relation to books in particular, many are authored by KLA members and contain invaluable, extensive excerpts relevant to specific KLA members, units, or objectives, and the necessary context for the Trial Panel to be able to appreciate such excerpts. In such cases, requesting that only certain excerpts be admitted would deprive the Trial Panel of necessary information. Indeed, the Defence itself seems to acknowledge the importance of context for a holistic assessment of an item.¹¹ When the SPO only seeks to rely on specific excerpts of lengthier documents, such excerpts are identified.¹² For items for which a full translation has not been provided, the SPO intends to rely, at this stage, only on those parts for which a translation is available.

8. The Defence makes generic assertions under Rule 138(2) of the Rules¹³ in relation to unspecified items. Assertions as to what would be required from the SPO 'in the context of challenges of the legality of the collection of evidence'¹⁴ and the proclamation that 'on cursory review of the Annexes, it would appear that there are multiple items that could fall within the ambit of this provision'¹⁵ are hypothetical and speculative. Contrary to what the Defence seems to claim, 'suspect interviews' or 'statements from other suspects or co-accused',¹⁶ are not being tendered through Annexes 1-6 of the Bar Table Motion.

9. SPO searches and seizures have been carried out in accordance with authorisation from the Specialist Chambers, with relevant reports being filed in accordance with the

¹¹ Preliminary Response, KSC-BC-2020-06/F01289, para.9.

¹² *See, for example*, Annex 6 to the Bar Table Motion, item 625, ERN 043900-044239.

¹³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

¹⁴ Preliminary Response, KSC-BC-2020-06/F01289, para.24.

¹⁵ Preliminary Response, KSC-BC-2020-06/F01289, para.25.

¹⁶ Preliminary Response, KSC-BC-2020-06/F01289, paras 23, 25.

applicable framework.¹⁷ To the extent that such authorisation and related reports are classified as Confidential and *Ex Parte* and have thus only been disclosed to each respective Defence team, the SPO does not oppose reclassification of these items to enable all Defence teams' access to these filings. In addition, a large volume of items related to the search and seizure of the Accused's residences were added to the Rule 102(3) Notice and could be requested by all Defence teams.¹⁸

10. As regards Article 37 of the Law,¹⁹ the language of this provision is clear and the Defence fails to provide any reasons warranting the Trial Panel's departure from this norm. Moreover, in relation to expert evidence, by referring to 'extensive reliance upon such evidence by the SPO in the Bar Table Motion',²⁰ the Defence distorts reality - only a handful of such items were tendered.

11. The Defence's reference to experts assisting in understanding expert reports does not impact on the time required to provide submissions on admissibility under Rule 138. The evidence's admissibility can be assessed now, and an expert can be instructed to challenge the reports' conclusions in due course.

12. The Panel should proceed to decide on the admission of the material concerned, as foreseen in Article 37 and Rule 138.²¹ The mere admission of these materials has no specific bearing on weight, and will not adversely impact the fairness or expeditiousness of the proceedings. None of the items in Annexes 1-6, including those falling under Article 37, would cause undue prejudice if admitted through the bar table, as the Defence

¹⁷ Authorisation was granted in four separate Decisions: *see* Decision on Authorising Search and Seizure, KSC-BC-2020-06/F00028, KSC-BC-2020-06/F00029, KSC-BC-2020-06/F00030, KSC-BC-2020-06/F00031COR, 26 October 2020, Confidential and *Ex Parte*. Four separate SPO reports relate to the executing of each search and seizure: Prosecution report on search and seizure, KSC-BC-2020-06/F00095, KSC-BC-2020-06/F00096, KSC-BC-2020-06/F00098, KSC-BC-2020-06/F00100.

¹⁸ *See, e.g.*, Annex 1 to Prosecution Rule 102(3) notice, KSC-BC-2020-06/F00421, 30 July 2021, Confidential, including photographs under item numbers 64622-64671, 64679-64898, and items 64890-65047.

¹⁹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

²⁰ Preliminary Response, KSC-BC-2020-06/F01289, para.34.

²¹ *Specialist Prosecutor v. Mustafa*, Decision on the submission and the admissibility of evidence, KSC-BC-2020-05/F00169, 25 August 2021, Public, para.36.

will be able, *inter alia*, to respond to the Bar Table Motion, thereby setting forth its views for the Panel's consideration. It will also be able to put the contents of any of the documents to witnesses and to the Accused, should they decide to testify, lead evidence to the contrary if deemed necessary, and make arguments to the Trial Panel about their weight and probative value. In this respect, the rights and interests of the Accused are fully protected by the established process.

III. RELIEF REQUESTED

13. For the foregoing reasons, the Trial Panel should reject the relief sought by the Defence other than a reasonable extension of the time limit to respond to the Bar Table Motion.

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Friday, 17 February 2023

At The Hague, the Netherlands.