

Case No.: KSC-BC-2020-04
Before: Pre-Trial Judge
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 24 July 2022
Filing Party: Defence Counsel
Original Language: English
Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of
Response to the “Prosecution request pursuant to Rule 102(2), to amend its
witness and exhibit lists, and for protective measures”

Specialist Prosecutor’s Office:
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I. INTRODUCTION

1. On 23 June 2022, the Specialist Prosecutor's Office ("SPO") filed a request for leave to disclose additional incriminating material related to W04305, amend its witness and exhibit lists pursuant to Rules 95(4) and 102(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), and for in-court protective measures for W04305, in the event that its request to add the witness to its witness list is granted.¹
2. Specifically, the SPO requested: (i) that the Pre-Trial Judge grant the SPO leave to disclose W04305's SPO interview, the transcripts of hearings in the [REDACTED] *et al.* case, previous statements, and associated exhibits;² (ii) leave to amend its Rule 95(4) witness and exhibit lists by adding W04305 and related materials;³ and (iii) that the Pre-Trial Judge grant W04305 in-court protective measures, including pseudonym, face and voice distortion, non-disclosure of any identifying information to the public, and use of closed or private sessions as appropriate for any in-court discussion or testimony identifying him.⁴
3. The Defence for Mr Pjetër Shala ("Defence") opposes the request for leave to add W04305 and related material to the SPO's Rule 95(4) witness and exhibit lists as there has been no timely notice of the intention to rely on the evidence of W04305 at trial and the SPO has not shown good cause for putting him forward as proposed witness at such a late stage of the proceedings, particularly given the prejudice that granting the Request would create for the Accused.

¹ KSC-BC-2020-04, F00225, Prosecution request pursuant to Rule 102(2), to amend its witness and exhibit lists, and for protective measures, 23 June 2022 (confidential)("Request"), para. 1. All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Request, paras. 1, 21.

³ Request, paras. 1, 21.

⁴ Request, paras. 1, 17, 21(a)-(c).

4. In light of its position set out above, the Defence opposes the request for leave to disclose the material concerning W04305 under Rule 102(2) of the Rules as evidence the Prosecution intends to rely on at trial. As to the requested in-court protective measures, the Defence reiterates the right of Mr Shala to a public trial and underlines that any limitation of this right needs to remain “strictly necessary” in the relevant circumstances.⁵

II. APPLICABLE LAW

5. Pursuant to Article 21(6) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”), “[a]ll material and relevant evidence or facts in possession of the Specialist Prosecutor’s Office which are for or against the accused shall be made available to the accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.”
6. Pursuant to Rules 95(2) and 95(4)(b) and (c) of the Rules, the Pre-Trial Judge must ensure that the proceedings are not unduly delayed and must order the SPO to file, within a set time limit: “the list of witnesses the Specialist Prosecutor intends to call” and “the list of proposed exhibits the Specialist Prosecutor intends to present”.
7. Pursuant to Rule 102(2) of the Rules, “[a]ny statements of additional Specialist Prosecutor witnesses, which have not been disclosed within the time limit pursuant to paragraph 1(b) and whom the Specialist Prosecutor intends to call to testify at trial, shall be made available to the Defence as soon as possible and shall be accompanied by the reasons for the late disclosure.”
8. Pursuant to Rule 102(1)(b), “the Specialist Prosecutor shall make available to the Defence [...] within the time limit set by the Panel [...]: (i) the statements of all

⁵ ECtHR, *P.S. v. Germany*, no. 33900/96, Judgment, 20 December 2001, paras. 22, 23.

witnesses whom the Specialist Prosecutor intends to call to testify at trial; (ii) all other witness statements, expert reports, depositions, or transcripts that the Specialist Prosecutor intends to present at trial; and (iii) the exhibits that the [SPO] intends to present at trial.”

9. Rule 118(2) of the Rules allows the Panel to permit the amendment of the lists of witnesses and exhibits filed pursuant to Rule 95(4)(b) of the Rules only “upon timely notice and a showing of good cause”.
10. Well-established jurisprudence of international criminal tribunals indicates that an approval of a party’s request to vary its witness list must be in the interests of justice and take into account the potential prejudice to the Defence.⁶ A chamber considering such requests must balance the Prosecution’s duty to present available evidence to prove its case with the right of the accused to have adequate time and facilities to prepare his defence.⁷
11. In accordance with jurisprudence of the International Criminal Court, “additions to a list of witnesses after the relevant deadline may, in principle, be made when the terms of [the Regulations] are met or, even where the terms of that regulation have not been met, where to do so would nonetheless be in the interest of justice and the determination of the truth, and be consistent with the Chamber’s obligation to ensure the fairness of the proceedings, under [...] the [ICC] Statute. [...] Pursuant to Regulation 35(2), in addition to showing ‘good cause’ for a

⁶ See, for instance, ICTY, *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution’s Motion for Leave to Amend the Rule 65 *ter* Witness List and for Disclosure of an Expert Witness Report Pursuant to Rule 94 *bis*, 31 August 2010, para. 4; ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution’s Motion for Leave to Amend its Witness List to Add Witness KDZ597, 30 June 2010, para. 5; ICTY, *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Prosecution’s Motion to Substitute Expert Witness, 30 October 2009 (“*Perišić Decision*”), para. 6; ICTY, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion to Add Milan Đaković to the Rule 65 *ter* Witness List, 21 May 2009, para. 6; ICTR, *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis*(E), 21 May 2004, para. 13.

⁷ *Perišić Decision*, para. 6.

variation of the time limit, the Prosecution is required to demonstrate that it was 'unable to file the application within the time limit for reasons outside [its] control', which, as held by the Appeals Chamber, requires the existence of 'exceptional circumstances'.⁸

12. According to established jurisprudence of the International Criminal Tribunal of the former Yugoslavia ("ICTY"): (i) "a Trial Chamber may grant a motion requesting an amendment of the witness list if it is satisfied that doing so is in the interests of justice. In exercising its discretion, the Trial Chamber must balance the Prosecution's duty to present available evidence to prove its case with the right of the Accused [...] to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence"; (ii) "[i]n making its determination, the Trial Chamber shall take into consideration several factors, including whether, in accordance with [...] the Rules, the proposed evidence is *prima facie* relevant and of probative value, and whether its probative value is substantially outweighed by the need to ensure a fair trial. When assessing whether it is indeed in the interests of justice to permit the Prosecution to vary its witness list the Chamber should also consider whether any prejudice would be caused to the defence by the amendment of the witness list, whether the Prosecution has shown good cause for the amendment of the witness list, the repetitive or cumulative nature of the proposed testimony, and whether the defence has adequate time to prepare its cross-examination of the proposed new witness"; and (iii) "[t]he Trial Chamber may further consider the stage of the trial, whether the witness sought to be added is of sufficient importance to justify his or her inclusion on the witness list, whether granting the amendment would

⁸ ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1733, Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, paras. 6, 7.

result in undue delay in the proceedings, and other circumstances specific to the case.”⁹

III. SUBMISSIONS

13. The requirements of Rule 118(2) of the Rules are clear. The Prosecution’s out-of-time amendment of its witness and exhibit lists is permitted *only* “upon timely notice and a showing of good cause”.

(i) *The SPO’s Failure to Provide Timely Notice*

14. The SPO fails altogether to justify its request for amending its witness and exhibit lists on the basis of the criteria set out in the Rules. As to the requirement to provide timely notice, the SPO merely alleges that the request is filed “at this time” in light of the evidence provided in March 2022 by other proposed witnesses and the fact that it had to await a decision by a Single Judge of the International Residual Mechanism for Criminal Tribunals (“IRMCT”) for variation of the protective measures that would enable disclosure of the relevant material to the Defence and their use in proceedings before the KSC.¹⁰
15. However, the SPO fails altogether to explain or purport to justify the delay in interviewing the other proposed witnesses, whose potential importance for the Prosecution case has been known throughout the Prosecution’s investigation, as well as the delay in seeking leave to use material related to W04305 from the

⁹ ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution’s Motion for Leave to Amend its Witness List to Add Witness KDZ597, 30 June 2010, paras. 4, 5 (footnotes omitted); referring, *inter alia*, to ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65ter List to Add Michael Phillips and Shaun Byrnes, 12 March 2007, para. 18; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on the Prosecution’s Request to Add Two Witnesses to its Witness List and to Substitute One Witness for Another, 1 November 2007 (“*Haradinaj Decision*”), para. 4; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin’s Questioning, 14 December 2007, para. 37; ICTY, *Prosecutor v. Dornević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion for Leave to Amend its Rule 65 ter Witness List, 14 May 2009, para. 5.

¹⁰ Request, para. 2.

IRMCT at such late stage. The fact that the Prosecution has recently decided to change its case, ultimately rely on W04305, and has sought leave to do so on 23 June 2022, while the Defence is expected to indicate any objections to the admissibility of evidentiary material by 22 July 2022 and its Pre-Trial Brief is due on 15 August 2022,¹¹ cannot, in any sense, be considered “timely notice”.

16. The Defence is expected to file its pre-trial brief merely 54 days after receiving notice of the fact that the Prosecution intends to rely on W04305. The proposed evidence and related material have *not* as yet been disclosed to the Defence while the SPO alleges that “the evidence in question is relevant to the case and would contribute to the establishment of the truth”.¹² This evidently results in prejudice and unfairness that the Pre-Trial Judge is obliged under the KSC Law and Rules to prevent.

(ii) *The SPO’s Failure to Show Good Cause*

17. The SPO has also entirely failed to demonstrate good cause for its out-of-time request. On 23 September 2021, the Pre-Trial Judge had ordered the SPO to “submit its pre-trial brief by no later than 28 January 2022; and to submit its Rule 109(c) chart by no later than 11 February 2022”.¹³ On 8 and 11 February 2022, the SPO submitted, respectively, its Pre-Trial Brief, Witness and Exhibits Lists, and Rule 109(c) chart.¹⁴ The Pre-Trial Judge has ordered the SPO to “complete all pre-trial disclosure obligations by no later than 27 May 2022”.¹⁵
18. No good cause is shown by the SPO in seeking the proposed additions. The SPO simply states that “[t]he necessity of adding W04305 as a witness in this case

¹¹ T. 14 April 2022 p. 299.

¹² Request, para. 2.

¹³ T. 23 September 2021 p. 92.

¹⁴ F00136, Submission of the confidential redacted version of the Pre-Trial Brief, Witness List, and Exhibits List, 31 January 2022; F00144, Prosecution submission of Rule 109(c) chart with strictly confidential and *ex parte* Annex 1 and confidential Annex 2, 11 February 2022.

¹⁵ T. 14 April 2022 pp. 298-300.

became apparent after the recent interviews of [REDACTED].”¹⁶ However, the SPO fails to indicate how W04305’s testimony relates to the alleged crimes as charged in the Indictment. The incident that W04305’s evidence concerns, according to the SPO’s description of such evidence, is entirely unrelated to the alleged crimes committed at the Kukës Metal Factory. The proposed evidence is therefore neither relevant nor probative of the crimes alleged in the Indictment.

19. Most importantly and as set out above, the SPO fails to provide any reason as to why it interviewed these proposed witnesses at such a late stage. The [REDACTED] of a witness is not an unforeseeable event in cases relating to events occurring more than twenty years before the charges are drawn. The [REDACTED] of the particular proposed witness was known to the SPO for a considerable amount of time. Had the SPO been diligent, it would have interviewed the [REDACTED] at an earlier stage and potentially discover (to the extent that it was not already aware from W04305’s testimony from the [REDACTED] trials) of the potential usefulness of W04305’s account for the Prosecution’s case. The Pre-Trial Judge cannot allow prejudice for the Defence to be caused as a result of the SPO’s lack of due diligence.
20. The SPO was aware of the fact that W04305 had testified in the [REDACTED], where he “was known as Witness [REDACTED]” and was notified of the contents of such testimony and potential relevance to the present case.¹⁷ The SPO knew about W04305’s testimony at least since 17 May 2020, which is the date of its interview with W04305. The SPO now argues that W04305’s evidence “provides context and corroboration to the evidence of W04733 and his family members, including regarding the Accused’s history of involvement of the

¹⁶ Request, para. 8 (footnotes omitted).

¹⁷ Request, paras. 10, 11.

targeting and mistreatment of perceived collaborators, and provides significant and probative evidence relevant to the Accused's character and intent".¹⁸

21. The Defence submits that the SPO had ample time and opportunity to add the proposed evidence of W04305 and related material, to its witness list and exhibit lists prior to W04733's [REDACTED]. If the evidence of W04305 is so important as to provide "significant and probative evidence relevant to the Accused's character and intent", why has the SPO not included any portions of it—or at least the material that did not require prior authorization from a third party—into the material disclosed or in its Rule 102(3) notice?¹⁹ The SPO's submission that "the necessity of adding W04305 as a witness [...] became apparent after the recent interviews of [REDACTED]" is plainly unjustified.²⁰ In addition, the SPO could have sought leave from the IRMCT to include such evidence in its Rule 102(3) notice at a much earlier stage.²¹

(iii) The SPO's request to revise its witness and exhibit lists at such late stage of the proceedings is highly prejudicial

22. Mr Shala is entitled to have adequate time and facilities to prepare his defence and to know the case against him. The proposed last-minute additions to the SPO's witness and exhibit lists cause prejudice in that the Defence simply does not have sufficient time to prepare its case in line with the time limits set by the Pre-Trial Judge.
23. The Pre-Trial Judge has ordered the Defence to submit, pursuant to Rule 95(2)(e), any objections to the admissibility of evidentiary material that has been disclosed

¹⁸ Request, para. 12.

¹⁹ Request, para. 12.

²⁰ Request, para. 8.

²¹ Such request for leave would have taken the form of a request for variation of applicable protective measures.

on the basis of Rule 102 by 22 July 2022 and to submit a pre-trial brief by 15 August 2022, in view of a tentative date set for transmitting the case-file to trial on 31 August 2022.²²

24. The present request for proposed additions to the witness and exhibit lists is made 30 days from the aforesaid time limit for the Defence to submit any objections to the admissibility of evidentiary material and 54 days from the time limit set for submission of the Defence pre-trial brief.
25. This is the second time the SPO has requested to amend its witness and exhibit lists pursuant to Rule 102(2) of the Rules, despite the expiry of the relevant time limits which were set by the Pre-Trial Judge and provided by the Rules.²³
26. Following the Pre-Trial Judge's Decision of 30 May 2022 which granted the SPO's request to add four new witnesses, and as recently as on 7 June 2022, the SPO disclosed to the Defence Disclosure Package 61 containing 25 items under Rule 102(2) of the Rules.²⁴ In the event that the present Request is granted, as many as five out of a total of 19 Prosecution witnesses will have been added to the SPO witness list, representing an addition of more than one fourth of the total number of proposed witnesses. The SPO seeks to do so last minute and a few days prior to the time limit which binds the Defence and forces it to present the basis of its case.

²² T. 14 April 2022 pp. 298-300.

²³ See F00169, Prosecution request pursuant to Rule 102(2) and to amend its witness and exhibit lists, 25 March 2022 (confidential); F00175, Response to the 'Prosecution Request Pursuant to Rule 102(2) and to amend its witness and exhibit lists', 6 April 2022 (confidential); F00205, Decision on Specialist Prosecutor's Rule 102(2) Request, 30 May 2022 (confidential). See also, T. 14 April 2022 pp. 298-300 ("[t]he SPO shall, with the exception of material subject to any request regarding protective measures or otherwise requiring judicial authorisation, complete all pre-trial disclosure obligations by no later than 27 May 2022"); T. 23 September 2021 p. 92 ("I hereby order the SPO to submit its pre-trial brief by no later than 28 January 2022; and to submit its Rule 109(c) chart by no later than 11 February 2022").

²⁴ Email of the SPO to Defence Counsel, 7 June 2022, at 5:53 pm. See also F00205, Decision on Specialist Prosecutor's Rule 102(2) Request, 30 May 2022 (confidential), para. 22.

27. The Defence further submits that the SPO's submission that the evidence of W04305 evidence "provides context and corroboration to the evidence of W04733 and [REDACTED]" is controversial. The evidence of W04733 contradicts that of [REDACTED], the accounts of these witnesses appear contaminated and influenced by each other and the purported identification of the Accused is weak and based on multiple hearsay evidence. The inconsistencies between the respective accounts of these witnesses undermine the Prosecution's allegation that W04305 simply corroborates other proposed evidence. In addition, the Accused was not the only person referred to as [REDACTED], which further weakens the probative value of the purported identification.²⁵
28. For instance, W04733 stated that: [REDACTED].²⁶
29. W04882 ([REDACTED]) stated [REDACTED].²⁷
30. W04881 ([REDACTED]) stated [REDACTED].²⁸
31. W04276 ([REDACTED]) stated that [REDACTED] Subsequently, [REDACTED] stated that [REDACTED]."²⁹ [REDACTED] further stated that [REDACTED].³⁰
32. W04880 ([REDACTED]) stated that [REDACTED] .³¹ [REDACTED] added that [REDACTED].³² [REDACTED] also stated [REDACTED].³³
33. In addition, to the extent that the SPO seeks to rely on W04503 to identify the Accused, his proposed evidence is highly prejudicial for another important reason. W04503's memory may have been affected after the Accused's testimony

²⁵ See, for instance, ERN 078004-TR-ET Part 3 (Interview of W01193 Dated 8 September 2020), p. 18.

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ [REDACTED]

³² [REDACTED]

³³ [REDACTED]

in public sessions without any protective measures before the [REDACTED] in the [REDACTED] *et. al* trial.³⁴

34. The Prosecution had ample time and opportunity to choose the evidence it will rely on at trial and was obliged to disclose such evidence in due time, allowing thus the Defence sufficient time to prepare its case. The Prosecution should not be allowed to seek to change and/or attempt to develop the evidence it will present at trial at such late stage. The last-minute changes to its case result in real prejudice for the Defence and the Pre-Trial Judge's most fundamental duty is to prevent such prejudice. Any probative value that the proposed evidence may have is outweighed by such prejudice and the need to maintain the fairness of these proceedings.

IV. CLASSIFICATION

35. Pursuant to Rule 82(3) and 82(4) of the Rules, the present Response is filed as confidential as it relates to confidential filings.

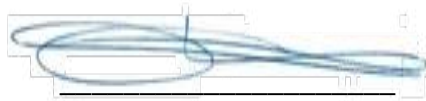
V. RELIEF REQUESTED

36. The Defence invites the Pre-Trial Judge to balance with caution the SPO's duty to timely present evidence in support of its case with the rights of the Accused to a fair trial and to have adequate time and facilities for the preparation of his defence. The Defence invites the Pre-Trial Judge to dismiss the request as out of time, plainly unjust and highly prejudicial.

Word count: 4543

³⁴ [REDACTED].

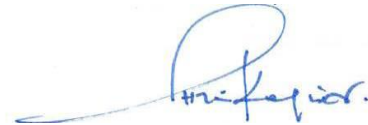
Respectfully submitted,



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Sunday, 24 July 2022

The Hague, the Netherlands