



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

In: KSC-BC-2020-05
Specialist Prosecutor v. Salih Mustafa

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding
Judge Roland Dekkers
Judge Gilbert Bitti
Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 1 July 2021

Language: English

Classification: Public

Public Redacted Version of 'Prosecution Request to amend its Exhibit List and Witness List', dated 30 June 2021 [KSC-BC-2020-05/F00145]

Specialist Prosecutor's Office

Jack Smith

Counsel for the Accused

Julius von Bóné

Counsel for Victims

Anni Pues

I. INTRODUCTION

1. Pursuant to Rules 9(5) and 118(2) of the Rules,¹ and to the Trial Panel's Decision,² the Specialist Prosecutor's Office ('SPO') hereby files a request to amend its List of Exhibits and its List of Witnesses ('Request').
2. This submission is filed as confidential, and with a strictly confidential and *ex parte* annex (Annex 2), in accordance with Rules 80(3) and 108(1). A public redacted version will be filed.

II. SUBMISSIONS

A. AMENDMENT OF THE LIST OF EXHIBITS AND LIST OF WITNESSES

3. The SPO seeks to amend its List of Exhibits to add the following items:
 - i. Maps of the Prishtinë/Priština area;³
 - ii. Photographs of the current location of the former Zllash/Zlaš Detention Compound,⁴ with accompanying official note;⁵
 - iii. Transcripts of supplemental SPO interviews of W01679 and W03593, and associated exhibits;⁶
 - iv. Transcripts of SPO interview of W04849;⁷
 - v. [REDACTED].⁸
4. Further, the SPO seeks to amend its List of Witnesses to add witness W04849. The Rule 95 summary for W04849 is provided in Annex 3 to this Request.

¹ 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.

² Decision setting the date for the commencement of the trial and related matters, KSC-BC-2020-05/F00138, Public, 18 June 2021 ('Decision'), paras 10 and 22(b).

³ See Annex 1, item 1.

⁴ See Annex 1, item 2.

⁵ See Annex 2, item 1.

⁶ See Annex 2, items 2-5.

⁷ See Annex 1, item 3.

⁸ See Annex 1, item 4; and Annex 2, items 6-8.

5. The addition of the items listed in Annexes 1-2 of this Request to the SPO's List of Exhibits, as well as the addition of W04849 to the SPO's List of Witnesses, would not cause any undue prejudice to the Defence, and granting the Request would be in the interests of justice.⁹ In particular:

(i) maps and photographs reflect publicly accessible information, assist the understanding of all parties and participants, as well as the Panel, and will enhance the presentation of the evidence;

(ii) the supplemental interviews of witnesses W01679 and W03593 were conducted to explore [REDACTED], which was filed after the deadline for submitting the SPO's Exhibit and Witness Lists. These supplemental interviews are brief, and only discuss photographs of the Zllash/Zlaš Detention Compound, [REDACTED];

(iii) W04849 was interviewed to better explore [REDACTED]. W04849 is in fact [REDACTED],¹⁰ [REDACTED];

(iv) the processing of the material [REDACTED] was only finalised after the deadline for submitting the Exhibit List, and the Accused is familiar with it, [REDACTED];¹¹

⁹ It is within a chamber's discretion to authorise requested amendments to an exhibit list if satisfied that it is in the interests of justice to do so, *see* ICTY, *Prosecutor v. Popović et al.*, 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. Karadžić*, Decision on Prosecution's Motion for Leave to Amend Its Exhibit List, IT-95-5/18-T, 19 October 2011, paras 9-10 (relevant citations: '[w]hen exercising this discretion, the Chamber examines whether the Prosecution has shown good cause for its request and whether the items sought to be added are relevant and of sufficient importance to justify their late addition. The Chamber may also take into account other factors which militate in favour of, or against, a requested addition, including whether the proposed evidence is *prima facie* relevant and of probative value to the charges against an accused, the complexity of the case, on-going investigations, and translation of documents and other materials. Finally, the Chamber must carefully balance any amendment to the Prosecution's exhibit list with an adequate protection of the rights of the accused. That is, the Chamber must be satisfied that amendments to the exhibit list at that stage of the proceedings provide an accused sufficient notice and do not adversely affect his ability to prepare for trial. The Chamber emphasises again that there is a clear difference between the addition of an item to the Prosecution's list of potential exhibits pursuant to Rule 65 *ter* of the Rules and its admission into evidence. [...] Thus, in deciding whether to grant leave to add a particular item to the Rule 65 *ter* exhibit list the Chamber need not assess its authenticity, relevance, and probative value in the same way as it would when determining its admission at trial. [...]').

¹⁰ [REDACTED].

¹¹ [REDACTED].

(v) the Request is being made more than two months before the date set by the Trial Panel for the commencement of the trial;¹² and

(vi) the Defence has been put on timely notice of these intended additions.¹³

B. MATERIALS FOR WHICH PROTECTIVE MEASURES ARE REQUIRED

6. Annex 2 lists a number of items for which protective measures, in the form of limited redactions¹⁴ or provisional withholding, are required. Some items concern, or contain references to, victims and witnesses for whom delayed disclosure and in-court protective measures in this case have been granted. Other items pertain to [REDACTED].

7. Item 1 of Annex 2 requires very limited redactions, which are necessary in order to protect information currently undisclosed to the Accused, [REDACTED]. The SPO requests authorisation to disclose the unredacted version of this item 30 days before the testimony of the first witness at trial.

8. With regard to the transcripts of interviews of W01679 and W03593,¹⁵ and related associated exhibits,¹⁶ the SPO requests authorisation from the Panel to disclose the materials in redacted form in order to safeguard the protective measures previously granted to W01679 and W03593.¹⁷ The proposed redactions¹⁸ are minimal and strictly necessary to protect the identity of the two witnesses. In line with the current disclosure regime concerning these witnesses, the SPO would disclose the unredacted

¹² See Decision setting the date for the commencement of the trial and related matters, KSC-BC-2020-05/F00138, 18 June 2021, paras.17, 20.

¹³ See Prosecution Submissions pursuant to KSC-BC-2020-05/F00123, KSC-BC-2020-05/F00130, 2 June 2021, paras.5-7; Trial Preparation Conference, KSC-BC-2020-05, 9 June 2021, Transcript of the Hearing, pp.210-212.

¹⁴ The items with the proposed redactions are contained in Annex 2 to this Request. The proposed redactions are identified in the English versions of the materials, but equivalent redactions will be applied to the Albanian versions, as applicable.

¹⁵ Annex 2, items 2 and 4.

¹⁶ Annex 2, items 3 and 5.

¹⁷ First Decision on Specialist Prosecutor's Request for Protective Measures, KSC-BC-2020-05/F00041, 20 October 2020, para.39.

¹⁸ The materials (interview transcripts and associated exhibits) with the proposed redactions are contained in Annex 2 to this Request. The proposed redactions are identified in the English versions of the materials, but equivalent redactions will be applied to the Albanian versions, as applicable.

versions of the materials listed in Annex 2 30 days before the testimony of W01679 and W03593, respectively.

9. Further, the SPO seeks authorisation from the Panel to temporarily withhold items 6-8 of Annex 2, in order to protect [REDACTED].¹⁹ The SPO would disclose these materials to the Defence 30 days before the testimony of the first SPO witness, or request an appropriate modification should the reasons justifying non-disclosure be ongoing at that time.

10. The requested protective measures for items listed in Annex 2 are necessary, as there are no less restrictive measures available to provide appropriate protection for the concerned witnesses and to safeguard the measures previously granted or [REDACTED].

11. The requested measures are also proportionate and consistent with the rights of the Accused, as the Accused and the Defence will have access to the full and unredacted documents as soon as the identity of the concerned witnesses is disclosed, and/or a month before the testimony of the first SPO witness. The Defence will thus be able to fully explore the documents ahead of the witnesses' testimony in court.

III. RELIEF REQUESTED

12. For the foregoing reasons, the SPO requests the Trial Panel to:

- a. authorise the SPO to add to its List of Exhibits the items listed in Annexes 1 and 2;
- b. authorise the SPO to add W04849 to its List of Witnesses;
- c. authorise the SPO to disclose to the Defence the materials listed in Annex 2, items 1-5, in redacted form, with the redactions proposed by the SPO;
- d. authorise the SPO to delay disclosure of the unredacted version of item 1 of Annex 2 until 30 days before the testimony of the first SPO witness;

¹⁹ See Annex 2 for an explanation of the reasons why these measures are necessary.

- e. authorise the SPO to delay disclosure of the unredacted versions of items 2-3 of Annex 2 to the Defence until 30 days before the testimony of W01679;
- f. authorise the SPO to delay disclosure of the unredacted versions of items 4-5 of Annex 2 to the Defence until 30 days before the testimony of W03593;
- g. authorise the SPO to temporarily withhold items 6-8 of Annex 2 and to delay their disclosure to Defence to 30 days before the testimony of the first SPO witness.

13. Should the Request be granted, the SPO will file an amended Exhibit List and Witness List shortly thereafter.

Word count: 1,498



Jack Smith
Specialist Prosecutor

Thursday, 1 July 2021
At The Hague, the Netherlands.