



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

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 6 September 2021
Language: English
Classification: Public

Prosecution submissions on classification of exhibits in bar table request

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

1. Pursuant to the order of the Trial Panel,¹ as well as Rules 83-84² and Articles 23 and 33 of the Practice Direction,³ the SPO hereby justifies the classification level of the exhibits submitted in the Bar Table Request.⁴
2. All evidence submitted in the Bar Table Request is currently classified as confidential.⁵ With reference to the numbered categories in the Bar Table Request, the materials in Categories 1, 2, 3.4, and 4 are all available via open sources, derived from them, and/or functionally identical to what appears in open source materials. The same is true for the First Order and Second Order in Category 3.1.⁶ Accordingly, they may be generally reclassified as public, with the exception of materials reproducing the images or the contents of confidential documents that were illegally disseminated.
3. These exceptional items consist of open source materials reproducing the confidential information illegally distributed by the Accused.⁷ Although such images have irreversibly entered the public domain since the time of their publication, the SPO submits that the present proceedings should not become an additional tool through which confidential information is publicly echoed, authenticated, emphasised and further disseminated. As such, it is requested that all evidentiary

¹ Oral Order, Transcript of Hearing, 2 September 2021, p.601.

² 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.

³ Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15, 17 May 2019 ('Practice Direction').

⁴ Prosecution request for admission of items through the bar table, KSC-BC-2020-07/F000291, 31 August 2021 (with annex) ('Bar Table Request').

⁵ These submissions apply to the initial classification level of the evidence submitted. When items can be safely provided to the public only in redacted form, the initial classification of the item itself would still be 'confidential'.

⁶ Annex to Bar Table Request, KSC-BC-2020-07/F000291, pp.87-88 (items 340-43). *See also* Decision Authorising a Seizure, KSC-BC-2020-07/F00005, 7 September 2020 (reclassified 30 September 2020); Decision Authorising a Seizure, KSC-BC-2020-07/F00007, 17 September 2020 (reclassified 30 September 2020).

⁷ Annex to Bar Table Request, KSC-BC-2020-07/F000291 (items 10-16; 32-34; 36-61; 89-94; 98-103; 116-18; 158-60; 244-49; 424-26; 429-52).

items including illegally disseminated confidential information should maintain a confidential classification throughout the present proceedings.

4. The confidential classification of materials reproducing confidential documents assumes particular importance in light of the SPO's publicly stated intention to link excerpts from Batches 1 and 3 to pages reproduced in media articles and videos. While the introduction of such materials at trial is intended to allow the Trial Panel to make all necessary comparisons, if the general public could engage in a similar exercise then unnecessary resonance would be given to the content of information that was meant to remain confidential (but for the illegal conduct of the Accused).⁸

5. The SPO will introduce at trial evidence concerning the impact of the illegal dissemination of confidential materials on the SPO's (potential) witnesses and on the SPO's ability to carry out its mandate. In this light, it is requested that the Trial Panel maintains the confidential classification of the requested items until after having had the opportunity to further assess the negative impact that would be caused by any further propagation of confidential information.⁹

6. The Third Order in Category 3.1 reveals the name of an SPO staff member.¹⁰ Not revealing the staff member's identity is consistent with the general rule in the Practice Direction and is necessary to protect this staff member's activities in the field.¹¹ Accordingly, the confidential classification of this item should be maintained.

⁸ See Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00141/RED, 23 February 2021, paras 44, 47 (authorising the SPO to withhold confidential information contained in the seized Batches).

⁹ See Rule 84.

¹⁰ Annex to Bar Table Request, KSC-BC-2020-07/F000291, p.88 (item 455).

¹¹ The SPO is mindful that the Trial Panel has rejected this argument in the context of justifying protective measures for SPO staff witnesses. The reasoning of this determination is yet to be provided, but it is noted that the public's interest in knowing the identities of testifying SPO staff witnesses is unquestionably stronger than for other staff members who are simply referenced in materials.

7. The materials in Categories 3.2 and 3.3 also name SPO staff members throughout and implicate these same considerations.¹² Further, the investigative reports in Category 3.2 reveal investigative methodology which may compromise future investigations if publicly known. Certain of these reports also mention innocent third parties with no connection to these proceedings. Confidential classification should therefore be maintained.

8. For Category 3.5, these letters from international organisations concern confidential cooperation arrangements. Revealing the framework the SPO has with these organisations risks significantly compromising future cooperation with them.¹³ Given that the role of these items in this case is dependent upon W04841's testimony – a witness who will now testify without protective measures – the publicity of the proceedings is sufficiently preserved while maintaining a confidential classification.

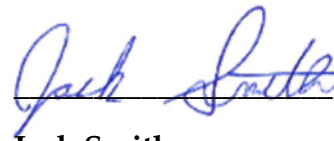
9. For Category 5, many of these notes identify current SPO staff members and thus implicate considerations identified for other categories. Further, these notes contain statements of witnesses who spoke to the SPO about, *inter alia*, their security concerns. They did so in strict confidence outside the scope of legal proceedings. Even with their names redacted, revealing their words to the public risks retraumatizing them and losing trust in the SPO. Given the secondary role these notes play in the SPO's case, they are not necessary for the public in order to follow the proceedings.

10. For the foregoing reasons, the SPO requests reclassification of the materials identified at paragraph 2 above.

¹² Except for the investigative report from an international organization included within this category. Annex to Bar Table Request, KSC-BC-2020-07/F000291, p.91 (items 356-57). See footnote 13 below.

¹³ Similar concerns attach to the international organization report in Category 3.2.

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Jack Smith

Specialist Prosecutor

Monday, 6 September 2021

At The Hague, the Netherlands