



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: Confidential

Prosecution request for additions to its witness and exhibit lists

with Confidential Annex 1

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I. INTRODUCTION

1. Pursuant to the Trial Panel's orders,¹ Article 40(6) of the Law² and Rules 9(5), 116(4), and 118(2) of the Rules,³ the Specialist Prosecutor's Office ('SPO') seeks authorisation to add: (i) W04866 to its Witness List⁴ ('First Request'); and (ii) 29 items⁵ to its Exhibit List⁶ ('Second Request').⁷ The Trial Panel should grant the Requests, *inter alia*, since the requested additions are limited in scope, would be in the interests of justice, and would not be prejudicial to or inconsistent with the rights of the Accused, in particular in view of their nature and the stage of proceedings.

II. SUBMISSIONS

A. Addition to Witness List

2. As indicated on 1 September 2021,⁸ the SPO seeks to add one witness to its Witness List. The witness is W04866, Halil BERISHA, who initially indicated his

¹ KSC-BC-2020-07, 2 September 2021 Transcript, pp.602-603.

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

³ 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.

⁴ Annex 2 to Submission of Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A02, 9 April 2021, Confidential ('Witness List').

⁵ (i) Transcripts and translations of interview with W04866 and associated exhibit: 102781-TR-ET Part 1 RED; 102781-TR-ET Part 2 RED; 102781-TR-AT Part 1 RED; 102781-TR-AT Part 2 RED; 102766-102780; 102766-102780-ET; (ii) Transcript and translation revised pursuant to the Trial Panel's order: 081358-01-TR-AT Revised 01; 081358-01-TR-ET-Revised; (iii) Transcript and translation inadvertently omitted from Exhibit List: 081991-04-TR-ET; 081991-04-TR-AT; and (iv) Excerpts from Batches 1 and 3 reproduced in media articles and videos: 080464-080464; 080565-080565 RED; 080992-080992; 081031-081031; 081083-081083 RED; SPOE00220920-SPOE00220928; SPOE00220946-SPOE00220947 RED; SPOE00220961-SPOE00220961; SPOE00221063-SPOE00221063 RED; SPOE00221065-SPOE00221066 RED; SPOE00221072-SPOE00221072 RED; SPOE00221078-SPOE00221078 RED; SPOE0022289-SPOE0022297; SPOE00222315-SPOE00222316 RED; SPOE00222330-SPOE00222330; SPOE00222433-SPOE00222433 RED; SPOE00222435-SPOE00222436 RED; SPOE00222442-SPOE00222442 RED; SPOE00222448-SPOE00222448 RED.

⁶ Annex 1 to Submission of updated exhibit list, KSC-BC-2020-07/F00254/A01, 6 July 2021, Confidential ('Exhibit List').

⁷ The First Request and Second Requests are collectively referred to as the 'Requests'.

⁸ See KSC-BC-2020-07, 1 September 2021 Transcript, pp.484-485.

reluctance to participate in the proceedings,⁹ and only recently confirmed to the SPO that he would not oppose testifying should he be compelled to do so.

3. As set out in Annex 1, containing the relevant Rule 95 Information for W04866, should the Request be granted, the SPO would seek to elicit W04866's testimony *viva voce*. The SPO estimates that W04866's direct examination would last three hours. W04866's evidence primarily relates to one specific series of events: attending the press conference held by the Accused on 7 September 2020, being provided with a copy of the confidential documents discussed during this press conference, subsequently informing the SPO of such possession, handing over these confidential documents to SPO representatives, and his coverage as a journalist of the press conferences held in September 2020.

4. Accordingly, W04866's evidence is not duplicative with the evidence of other proposed witnesses, brings to light facts which have a significant bearing on the case, and would be of relevance in determining the questions at issue in this case.¹⁰ Granting the request would be in the interests of justice and would not be prejudicial to or inconsistent with the rights of the Accused.

5. First, the request is being made over a month prior to the envisaged commencement of the SPO's case, allowing the Accused ample time to conduct any necessary further investigation or preparation should this request be granted. Further, the Defence have been on notice of the facts which would be addressed by W04866 since at the latest 19 February 2021 when the SPO first disclosed documents underlying the main aspects of W04866's proposed evidence.¹¹ The SPO's Pre-Trial

⁹ See 090185-090186 RED, SPO Official Note on contact with W04866, para.5.

¹⁰ See, e.g. ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-832, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, paras 11, 13; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para.20.

¹¹ The following items were disclosed to the Defence on 19 February 2021 (KSC-BC-2020-07 Disclosure 7): (i) 091880-091880, an extraction from an SPO internal document noting, *inter alia*, that W04866

Brief, dated 9 April 2021, also refers to the specific facts which W04866 would testify about should the First Request be granted.¹² That this witness and the information he has previously provided to the SPO is already known to the Defence is also evident from Defence submissions.¹³

6. Second, the requested addition is limited in scope, such that any necessary further Defence investigation or preparation would be limited should the First Request be granted. The addition concerns only one witness in relation to whom 32 pages of transcript were disclosed on 3 September 2021, along with the translation thereof, and one 15-page item, and translation thereof, containing articles provided by the witness.¹⁴ The rejection of the requested addition would not relieve the Defence from the need to examine the evidence relevant to the series of events W04866 would address since the SPO would nevertheless rely on other material already on its Exhibit List concerning such events.¹⁵

7. Finally, the requested addition would only prolong the SPO's estimate for its case-in-chief by one or two days.

B. Additions to Exhibit List

8. The Trial Panel should authorise the SPO to add the following items to its Exhibit List. Such addition would not cause any undue prejudice to the Defence and

contacted the SPO stating that he had received documents from the KLA War Veterans Association ('WVA') and that these documents were subsequently handed over to the SPO; (ii) 078569-078569, an SPO delivery document acknowledging receipt of documents from Gazeta Infokus on 9 September 2020, signed by W04866; (iii) 091932-091941 RED, an extraction from an SPO internal document noting the receipt of emails from W04866 and including copies thereof, including an email in which W04866 informed the SPO that a copy of documents referred to during a KLA WVA press conference was provided to Gazeta Infokus and other media representatives.

¹² Annex 1 to Submission of Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A01, 9 April 2021, Confidential ('SPO Pre-Trial Brief'), paras 24, 34.

¹³ See Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters, KSC-BC-2020-07/F00137, 23 February 2021, Confidential, para.7(y).

¹⁴ KSC-BC-2020-07 Disclosure 43.

¹⁵ For example, items 2 and 174 on the Exhibit List.

would be in the interests of justice,¹⁶ in particular since the additions are limited in scope and given the stage of the proceedings.

(i) Transcripts and translations of interview with W04866 and associated exhibit¹⁷

9. As set out above, W04866's SPO interview provides a relevant, highly probative account concerning the alleged actions of the Accused in the relevant period of time. The associated exhibit¹⁸ was provided by W04866. The fact that the Defence is already in possession of information mirroring that in these items¹⁹ constitutes another reason why the addition of these items to the Exhibit List would not be prejudicial to the Defence.

(ii) Transcript and translation revised pursuant to the Trial Panel's order²⁰

10. As set out in the Bar Table Motion Annex,²¹ pursuant to the Trial Panel's order,²² the SPO sought verification from the Registry of the accuracy of a limited excerpt of one transcription and one translation and subsequently disclosed revised versions thereof.²³ The fact that these items were revised pursuant to the Trial Panel's order which was prompted by a Defence request means that the issue of prejudice does not arise in relation thereto.

¹⁶ 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*, IT-95-5/18-T, Decision on Prosecution's Motion for Leave to Amend its Exhibit List, 19 October 2011, para.9.

¹⁷ 102781-TR-ET Part 1; 102781-TR-ET Part 2; 102781-TR-AT Part 1; 102781-TR-AT Part 2; 102766-102780; 102766-102780-ET.

¹⁸ 102766-102780; 102766-102780-ET, including press articles authored by W04866 or otherwise published by the media outlet Gazeta Infokus in September 2020 on events relevant to these proceedings.

¹⁹ See fn.11.

²⁰ 081358-01-TR-AT Revised 01; 081358-01-TR-ET-Revised.

²¹ Annex 1 to Prosecution request for admission of items through the bar table, KSC-BC-2020-07/F00291/A01, Confidential, 31 August 2021 ('Bar Table Motion Annex'), fns.8-9.

²² Order for Submissions and Scheduling the Trial Preparation Conference, KSC-BC-2020-07/F00267, 21 July 2021 ('Order'), paras 14, 34(c).

²³ See KSC-BC-2020-07 Disclosure 40.

(iii) Transcript and translation inadvertently omitted from Exhibit List²⁴

11. As set out in the Bar Table Motion Annex,²⁵ the transcript and translation of video 081991-04 were inadvertently omitted from the Exhibit List. The fact these items have already been disclosed pursuant to Rule 102(1)(b), that the corresponding video is on the Exhibit List, and that the video and corresponding transcripts have been referred to in the SPO Pre-Trial Brief²⁶ means that the prejudice caused by their addition would be minimal, if any.

(iv) Excerpts from Batches 1 and 3 reproduced in media articles and videos²⁷

12. Although the SPO has been authorised not to disclose Batch 1 to the Defence and it has been confirmed that Batch 3 is not subject to disclosure to the Defence,²⁸ in view, *inter alia*, of certain issues raised by the Defence and the Trial Panel,²⁹ on 6 September 2021 the SPO disclosed certain excerpts from Batches 1 and 3 which were reproduced in media articles and/or videos pursuant to Rule 102(1)(b).³⁰

13. Such excerpts will assist the Trial Panel in its determination of the charges against the Accused and are relevant to the testimony of W04841, who authored a

²⁴ 081991-04-TR-ET; 081991-04-TR-AT.

²⁵ Bar Table Motion Annex, KSC-BC-2020-07/F00291/A01, fn.10.

²⁶ SPO Pre-Trial Brief, 2020-07/F00181/A01, para.72 fn. 195, para.175, fn. 408.

²⁷ 080464-080464; 080565-080565 RED; 080992-080992; 081031-081031; 081083-081083 RED; SPOE00220920-SPOE00220928; SPOE00220946-SPOE00220947 RED; SPOE00220961-SPOE00220961; SPOE00221063-SPOE00221063 RED; SPOE00221065-SPOE00221066 RED; SPOE00221072-SPOE00221072 RED; SPOE00221078-SPOE00221078 RED; SPOE00222289-SPOE00222297; SPOE00222315-SPOE00222316 RED; SPOE00222330-SPOE00222330; SPOE00222433-SPOE00222433 RED; SPOE00222435-SPOE00222436 RED; SPOE00222442-SPOE00222442 RED; SPOE00222448-SPOE00222448 RED. When the corresponding pages were published by the media with redactions, these redactions have been maintained.

²⁸ 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.

²⁹ See, e.g. Order, KSC-BC-2020-07/F00267, para.23; KSC-BC-2020-07, 1 September 2021 Transcript, pp.527-528.

³⁰ KSC-BC-2020-07 Disclosure 44. The remainder of Batch 3 continues to constitute internal work product, see STL, *Prosecutor v. Ayyash et al.*, Reasons for the Trial Chamber's Decision Dismissing the Sabra Defence Application to Order Prosecution Disclosure of Documents Related to Mr Michael Taylor, STL-11-01/T/TC F3710, 13 July 2018, paras 54-57.

declaration noting that a number of media articles and/or videos corresponded to the excerpts from Batches 1 and 3 which the SPO is seeking to add to its Exhibit List.³¹ That the Defence is already in possession of this declaration as well as of the articles and videos featuring these excerpts means that no undue prejudice to the Accused will be caused.

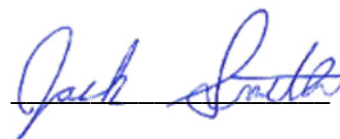
III. CLASSIFICATION

14. Pursuant to Rule 82(3), this filing and its annex are confidential since they refer to an individual the SPO proposes to add as a witness. Should the First Request be granted, the SPO would not oppose reclassification of the filing and annex to public.

IV. RELIEF REQUESTED

15. For the foregoing reasons, the SPO asks that the Trial Panel grant the Requests. Should the Requests be granted, the SPO would file amended Exhibit and Witness Lists shortly thereafter.

Word count: 1889



Jack Smith

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Monday, 6 September 2021

At The Hague, the Netherlands

³¹ 084015-084026, paras 13-18, 36-74.