



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**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 Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 23 September 2021

**Language:** English

**Classification:** **Public**

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**Decision on Prosecution's Request for Leave to Amend its List of Exhibits**

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**TRIAL PANEL II** (“Panel”), pursuant to Article 40(6) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 116(4) and 118(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 6 July 2021, the Specialist Prosecutor’s Office (“SPO”) filed a confidential, updated list of proposed exhibits (“Exhibit List”).<sup>1</sup>

2. On 21 July 2021, the Panel issued its order scheduling the Trial Preparation Conference for 2 September 2021.<sup>2</sup> Therein, the Panel ordered, *inter alia*, the SPO to seek, by 23 August 2021, verification of part of the transcript of one of its proposed exhibits (“081358-01-TR”), with which the Defence for Hysni Gucati (“Gucati Defence”) raised an issue in its Pre-Trial Brief.<sup>3</sup>

3. On 1 and 2 September 2021, the Panel held the Trial Preparation Conference. During the conference, the Panel, *inter alia*, ordered:

- (i) the SPO to file a request to amend its list of proposed witnesses, and to disclose any related evidentiary material and request its addition to its Exhibit List, by 7 September 2021, and the Defence to respond during the SPO Preparation Conference if it so wished (“Fourth Order”);<sup>4</sup>
- (ii) the SPO to file a request for adding revised transcripts to its Exhibit List and to disclose any outstanding relevant evidentiary material by

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<sup>1</sup> F00254/A01, Specialist Prosecutor, *Annex 1 to Submission of Updated Exhibit List – Updated List of Exhibits* (“Exhibit List”), 6 July 2021, confidential.

<sup>2</sup> F00267, Panel, *Order for Submissions and Scheduling the Trial Preparation Conference* (“Trial Preparation Conference Order”), 21 July 2021.

<sup>3</sup> Trial Preparation Conference Order, paras 14, 34(c), *referring to Exhibit List, Item No. 33: ERN 081358-01-TR-ET* at page 8; F00258, *Defence Pre-Trial Brief on behalf of Hysni Gucati*, 12 July 2021, para. 98.

<sup>4</sup> Oral Order on setting deadline for SPO request to add one witness to its witness list, 2 September 2021, p. 602, lines 11-20.

13 September 2021, and the Defence to respond by 20 September 2021 if it so wished.<sup>5</sup>

4. On 6 September 2021, the SPO filed a request seeking authorisation to add witness W04866 to its witness list (“First Request”) and 29 items to its Exhibit List (“Second Request”), (together “Request”).<sup>6</sup>

5. On 8 September 2021, the Panel held the SPO Preparation Conference during which, pursuant to its Fourth Order, it heard the Defence on the Request. Noting, *inter alia*, that the Defence did not object to the addition of W04866 to the SPO witness list, the Panel granted the First Request.<sup>7</sup> The Panel indicated that it would decide the Second Request after receiving the SPO request for adding revised transcripts to its Exhibit List.<sup>8</sup>

6. On 13 September 2021, the SPO disclosed revised transcripts of W04866’s interview.<sup>9</sup>

7. On 15 September 2021, two days after the applicable time limit, the SPO filed its request to add revised transcripts of W04866’s interview to its Exhibit List and sought leave to do so (“Further Request”).<sup>10</sup>

8. The Defence filed no submissions in response.

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<sup>5</sup> Oral Order Setting Deadline for SPO to Submit a Request for Adding Transcripts to Exhibit List, 2 September 2021, p. 602, line 21 to p. 603, line 4.

<sup>6</sup> F00299, SPO, *Prosecution Request for Additions to its Witness and Exhibit Lists with Confidential Annex 1* (“Request”), 6 September 2021, with Annex 1 (“Annex”), confidential.

<sup>7</sup> Oral Order on SPO Witness and Exhibit List, 8 September 2021, p. 707, line 21 to p. 708, line 14. *See also* Transcript, 8 September 2021, p. 692, line 4, p. 694, line 21, p. 707, lines 22-25.

<sup>8</sup> Oral Order on SPO Witness and Exhibit List, 8 September 2021, p. 707, l. 21, p. 708, l. 14.

<sup>9</sup> SPO, *Disclosure 45*, 13 September 2021 (“*Disclosure 45*”).

<sup>10</sup> F00313, SPO, *Prosecution Request to Add Revised Transcripts of W04866 Interview to List of Exhibits*, 15 September 2021.

## II. SUBMISSIONS

9. The SPO submits that the Second Request should be granted because the proposed additions to its Exhibit List 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.<sup>11</sup>

10. The SPO submits arguments for the four categories of additional exhibits which it seeks to add to its Exhibit List, namely: (i) the transcripts and translations of W04866's interview and associated exhibits;<sup>12</sup> (ii) the revised transcript and translation of 081358-01-TR;<sup>13</sup> (iii) the transcripts and translation of video 081991-04;<sup>14</sup> and (iv) the excerpts from Batches 1 and 3 reproduced in media articles and videos.<sup>15</sup>

11. The Defence raised a number of objections in respect of the addition of certain exhibits to the List. These are considered below.

## III. APPLICABLE LAW

12. Pursuant to Rule 116(4) of the Rules, the Panel may issue orders or decisions on any matter as necessary to ensure a fair and expeditious trial, including in relation to disclosure obligations and any other preparatory matters, as necessary.

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<sup>11</sup> Request, paras 1, 8.

<sup>12</sup> Request, fn. 5 (i), 17 referring to 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.

<sup>13</sup> Request, fn. 20 referring to 081358-01-TR-ET 081358-01-TR-AT Revised 01; 081358-01-TR-ET-Revised.

<sup>14</sup> Request, fn. 24 referring to 081991-04-TR-ET; 081991-04-TR-AT.

<sup>15</sup> Request, fn. 27, referring to 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. Batches 1 and 3 refer to documents seized by the SPO from the Kosovo Liberation Army War Veterans' Association ("KLA WVA") on 8 and 22 September 2020. See F00141, Pre-Trial Judge, *Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 23 February 2021.

13. Rule 95(4)(a) of the Rules provides that the Pre-Trial Judge may order the SPO to file within a set time limit the list of proposed exhibits the SPO intends to present. Pursuant to Rule 118(2) of the Rules, the Panel may permit, upon timely notice and a showing of good cause, the amendment of the list of exhibits.

#### IV. DISCUSSION

##### A. THE FILING OF THE FURTHER REQUEST

14. As a preliminary matter, and noting that there is no objection from the Defence, the Panel recognises the Further Request as validly made despite being submitted after the set deadline.

##### B. LEGAL STANDARD

15. At the outset, the Panel emphasises that the primary purpose of the Exhibit List is to give notice to the Defence of the documents the SPO intends to use during its case, which will allow timely and effective Defence preparation and ensure the efficient presentation of evidence during trial.<sup>16</sup>

16. The Panel will assess, whether, at the current stage of proceedings: (i) the proposed evidence is *prima facie* relevant and of sufficient importance to justify the late addition;<sup>17</sup> (ii) the proposed additions provide the Accused sufficient notice and do not adversely affect their ability to prepare for trial;<sup>18</sup> and (iii) the SPO has

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<sup>16</sup> Similarly ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Prosecution's Motion for Leave to Amend its Exhibit List](#) ("Karadžić Decision"), 19 October 2011, para. 10.

<sup>17</sup> Similarly ICTY, [Karadžić Decision](#), para. 9; *Prosecutor v. Hadzić*, IT-04-75-T, [Decision on Fifth Defence Motion for Leave to Amend its Rule 65 ter Exhibit List](#) ("Hadzić Decision"), 19 February 2015, para. 5; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, [Decision allowing the Prosecution to Add to Its Exhibit List a Statement by Mr Andrew Donaldson \(Witness PRH230\)](#) ("Ayyash Decision"), 28 April 2017, para. 18.

<sup>18</sup> Similarly ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, [Decision on Prosecution's Third Motion for Leave to Amend Its Rule 65 ter Exhibit List](#) ("Milošević Decision"), 23 April 2007, p. 3; [Karadžić Decision](#), para. 9; STL, [Ayyash Decision](#), para. 18.

shown good cause for the late request.<sup>19</sup> In deciding whether to grant leave to add a particular item to a Party's exhibit list, the Panel need not assess its authenticity, relevance and probative value in the same way as it would when determining its admission at trial.<sup>20</sup> Accordingly, a decision authorising the addition of an item to a Party's exhibit list is without prejudice to the Panel's subsequent decision on whether that item should be admitted into evidence. That being said, a Party should not be granted leave to add to its list of exhibits items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.<sup>21</sup>

17. In the present case, the Defence did not suggest that any of the proposed additional exhibits are irrelevant and the Panel is satisfied that they are all *prima facie* relevant to the case. With this in mind, the Panel will now examine each of the four categories of exhibits which the SPO seeks to add to its Exhibit List.

#### C. TRANSCRIPTS AND TRANSLATIONS OF W04866'S INTERVIEW AND ASSOCIATED EXHIBITS

18. The six items under this category consist of (i) the transcripts and translations of W04866's interview; and (ii) copies of articles authored by W04866 and their English translation.<sup>22</sup>

19. In relation to these items, the SPO submits that they are relevant and highly probative with regard to the alleged actions of the Accused, and that the associated exhibits are not prejudicial to the Accused given that they mirror information already in the Defence's possession.<sup>23</sup> The Gucati Defence objects to the addition

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<sup>19</sup> Rule 118(2) of the Rules. *Similarly*, ICTY, [Milošević Decision](#), p. 3.

<sup>20</sup> *Similarly*, ICTY, [Karadžić Decision](#), para. 10; [Hadžić Decision](#), para. 5.

<sup>21</sup> *Similarly*, ICTY, [Karadžić Decision](#), para. 10; [Hadžić Decision](#), para. 5.

<sup>22</sup> Request, fn. 17 referring to 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.

<sup>23</sup> Request, para. 9.

of these items, on the basis that W04866 will be giving evidence orally.<sup>24</sup> The Defence for Nasim Haradinaj joined the Gucati Defence's position on this matter.<sup>25</sup>

20. As regards their *prima facie* relevance and sufficient importance, the Panel notes that these items relate to events surrounding the alleged delivery and publication of SPO/SITF material in September 2020, including W04866's attendance at the first press conference on 7 September 2020. Accordingly, the Panel finds that the items are *prima facie* relevant and sufficiently important to justify the late addition.

21. As regards the impact of the requested addition on the Accused's preparation for trial, the Panel observes that: (i) the Defence was already in possession of disclosure mirroring the content of the associated exhibits;<sup>26</sup> (ii) the number and volume of the items are such that they allow timely and meaningful preparation for trial, especially in light of the Panel's oral order to hear W04866 as the last of the SPO's three witnesses;<sup>27</sup> and (iii) the Defence will, in any event, have the opportunity to cross-examine W04866.<sup>28</sup> In relation to the objection raised by the Gucati Defence, the Panel re-emphasizes that the addition of items to the Exhibit List serves the purpose of providing notice to the Defence of what the SPO intends to use during the presentation of its case and does not, at this stage, bear upon the admission of the items into evidence. The Panel finds that the requested addition provides the Accused sufficient notice and does not adversely affect their ability to prepare for trial.

22. As regards good cause for the late request to amend its Exhibit List, the Panel notes that the Request was made twelve days after W04866's interview and one

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<sup>24</sup> Transcript, 8 September 2021, p. 694, lines 4-11.

<sup>25</sup> Transcript, 8 September 2021, p. 694, lines 19-21.

<sup>26</sup> See SPO, *Disclosure 7*, 19 February 2021; Request, para. 9, fn. 11.

<sup>27</sup> Oral Order on SPO Witness and Exhibit List, 8 September 2021, p. 707, line 21 to p. 708, line 14

<sup>28</sup> Oral Order on SPO Witness and Exhibit List, 8 September 2021, p. 707, line 21 to p. 708, line 14. See also Transcript, 8 September 2021, p. 692, line 24, p. 694, line 21, p. 707, lines 22-25

month prior to the commencement of the SPO case. The Panel also notes that the Request concerned the unrevised transcripts of W04866 and that the SPO filed its Further Request in relation to the revised transcripts two days after the deadline set by the Panel. While cautioning the SPO as to the importance of timely filings, the Panel observes that the SPO disclosed the revised transcripts within the applicable deadline.<sup>29</sup> It is in the interest of all Parties that the Exhibit List reflects the most accurate version of a proposed exhibit. As a result, the Panel finds that the SPO has shown good cause for the late request.

23. In light of the above, the Panel authorises the addition of the revised transcripts and translations of W04866's interview and the associated exhibits to the Exhibit List.

#### D. REVISED TRANSCRIPT AND TRANSLATION OF 081358-01-TR

24. The two items under this category are the revised Albanian transcript and its corresponding English translation of a YouTube clip featuring Hysni Gucati on 7 September 2020. Previous versions of these transcripts were already part of the Exhibit List.<sup>30</sup>

25. In relation to these items, the SPO submits that they cannot be prejudicial to the Defence as the revisions contained therein result from the Panel's order to the SPO to seek verification of the said transcript and translation and that such order was prompted by the Defence.<sup>31</sup> The Defence made no submissions in this regard.

26. The SPO seeks to add revised versions of these two items<sup>32</sup> which, as recalled above, arose from the Trial Preparation Conference Order, itself prompted by the

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<sup>29</sup> *Disclosure 45.*

<sup>30</sup> Request, fn. 20 referring to 081358-01-TR-ET 081358-01-TR-AT Revised 01; 081358-01-TR-ET-Revised.

<sup>31</sup> Request, para. 10. See also Trial Preparation Conference Order, paras 14, 34(c).

<sup>32</sup> Request, para. 11.



Gucati Defence's submissions.<sup>33</sup> For this reason, the Panel finds that the two items are *prima facie* relevant and of sufficient importance to justify their late addition and that such addition does not adversely affect the Defence preparation. For the same reasons as mentioned above, the Panel finds that the SPO has shown good cause for the late request to amend its Exhibit List in respect of these items.

27. The Panel therefore authorises the addition of both revised transcripts to the Exhibit List.

#### E. TRANSCRIPTS AND TRANSLATION OF VIDEO 081991-04

28. The two items under this category are the Albanian transcript and its English translation of video 081991-04 ("Video") containing an interview with Nasim Haradinaj.<sup>34</sup>

29. In relation to these items, the SPO submits that they were inadvertently omitted from the Exhibit List and that their addition would cause minimal prejudice to the Defence because: (i) these items have already been disclosed pursuant to Rule 102(1)(b) of the Rules; (ii) the corresponding video is on the Exhibit List; and (iii) the video and corresponding transcripts have been referred to in the SPO Pre-Trial Brief.<sup>35</sup> The Defence made no submissions in this regard.

30. The Panel finds these items are *prima facie* relevant and of sufficient importance to justify their late addition and that such addition does not adversely affect the Defence preparation. The Panel observes that: (i) the Video was already on the Exhibit List;<sup>36</sup> (ii) the Defence received disclosure of the transcript and translation of

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<sup>33</sup> See *supra*, para. 2.

<sup>34</sup> Request, fn. 24 referring to 081991-04-TR-ET; 081991-04-TR-AT.

<sup>35</sup> Request, para. 11.

<sup>36</sup> Exhibit List, Item 130.

the Video pursuant to Rule 102(1)(b) of the Rules;<sup>37</sup> and (iii) the SPO referred to both the Video and its corresponding transcripts in its Pre-Trial Brief.<sup>38</sup>

31. The Panel therefore authorises the addition of both items to the Exhibit List.

F. EXCERPTS FROM BATCHES 1 AND 3 REPRODUCED IN MEDIA ARTICLES AND VIDEOS

32. The 19 items under this category appear to be excerpts from documents contained in Batches 1 and 3, which were allegedly reproduced in media articles and videos (“Excerpts”).<sup>39</sup>

33. In relation to these items, the SPO submits that they should be added to the Exhibit List because they: (i) will assist the Panel in determining the charges against the Accused; (ii) are relevant to the testimony of W04841, who authored a declaration in this regard; (iii) will not prejudice the Defence, which is already in possession of W04841’s declaration and of the articles and videos featuring these excerpts.<sup>40</sup> The Defence made no submissions in this regard.

34. As regards their *prima facie* relevance and sufficient importance, the Panel notes that these items appear to relate to the alleged dissemination of SITF/SPO material by various media outlets and may therefore be pertinent to the testimony

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<sup>37</sup> SPO, *Disclosure 7*, 19 February 2021.

<sup>38</sup> F00181/A01, SPO, *Specialist Prosecutor’s Pre-Trial Brief in the case against Hysni Gucati and Nasim Haradinaj*, 9 April 2021, para. 72, fn. 195, para. 175, fn. 408.

<sup>39</sup> Request, fn. 27, referring to 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.

<sup>40</sup> Request, para. 13 referring to ERN 084015-084026 (Declaration of W04841, 29 October 2020).

of W04841, as described by the SPO.<sup>41</sup> Accordingly, the Panel finds that these items are *prima facie* relevant and sufficiently important to justify their late addition.

35. As regards the impact of the requested addition on the Accused's preparation for trial, the Panel notes that: (i) the Defence is already in possession of the declaration of W04841 which refers to the alleged dissemination of material by media outlets; (ii) the number and volume of the Excerpts are such that they allow timely and meaningful preparation for trial; and (iii) the Defence will have an opportunity to cross-examine W04841 on these items.<sup>42</sup> The Panel thus finds that the requested additions provide the Accused sufficient notice and do not adversely affect their ability to prepare for trial.

36. As regards good cause for the late request, the Panel observes that the SPO disclosed the Excerpts on 6 September 2021 only as a result "of certain issues raised by the Defence and the Trial Panel" and indicated that it has been authorised not to disclose Batches 1 and 3.<sup>43</sup> However, the SPO has failed to provide specific reasons why the Excerpts could be disclosed on 6 September 2021, but not at any earlier date. That being said, the Panel notes that the Defence has not objected to the addition of the Excerpts to the Exhibit List and that they will have opportunity to cross-examine W04841 on these items.

37. The Panel therefore authorises the addition of the Excerpts to the Exhibit List.

## V. RECLASSIFICATION

38. Considering that the SPO does not oppose the reclassification of the Request and its annex, and given that the First Request was granted,<sup>44</sup> the Panel will order their reclassification to public pursuant to Rule 82(5) of the Rules.

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<sup>41</sup> F00181/A02, Specialist Prosecutor, Annex 2 to Submission of Pre-Trial Brief, Witness and Exhibits Lists, and Rule 109(c) Chart – List of Witnesses, 9 April 2021, p. 2, para. 2.

<sup>42</sup> See ERN 084015-084026 (Declaration of W04841, 29 October 2020), pp 2-4, 7-11.

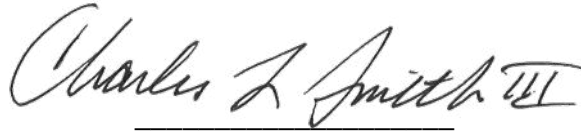
<sup>43</sup> Request, para. 12; SPO, *Disclosure 44*, 6 September 2021.

<sup>44</sup> Request, para. 14.

## VI. DISPOSITION

39. For the foregoing reasons, the Panel hereby:

- a. **GRANTS** the Second Request;
- b. **ORDERS** the SPO to file an amended list of exhibits in accordance with the present decision by 28 September 2021; and
- c. **ORDERS** the Registry to reclassify the Request (F00299) and its annex (F00299/A01) to public.



**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Thursday, 23 September 2021  
At The Hague, the Netherlands