



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:** 25 October 2021  
**Language:** English  
**Classification:** Confidential

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**Prosecution second request for additions to its witness and exhibit lists**

**with Confidential Annexes 1-2**

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**Specialist Prosecutor's Office**

Jack Smith

**Counsel for Mr Gucati**

Jonathan Elystan Rees

**Counsel for Mr Haradinaj**

Toby Cadman

## I. INTRODUCTION

1. The evidence already admitted by the Trial Panel and elicited by the Specialist Prosecutor's Office ('SPO') thus far is sufficient to establish the relevant facts pertaining to the seizure of documents from the Kosovo Liberation Army War Veterans Association ('KLA WVA') on 8, 17 and 22 September 2020.

2. Nevertheless, out of an abundance of caution and mindful of certain Defence submissions and the Trial Panel's Oral Decision,<sup>1</sup> pursuant to the Oral Decision, Article 40(6) of the Law,<sup>2</sup> and Rules 9(5), 116(4), and 118(2) of the Rules,<sup>3</sup> the SPO seeks authorisation to add: (i) W04876 to its Witness List<sup>4</sup> ('First Request'); and (ii) one item previously disclosed pursuant to Rule 102(3)<sup>5</sup> to its Exhibit List<sup>6</sup> ('Second Request').<sup>7</sup> 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 prior notice thereof.

## II. SUBMISSIONS

### A. Addition to Witness List

3. In its Oral Decision, the Trial Panel rejected the admission of P00092 MFI (083988-083991 RED), P00103 MFI (082010-082013 RED), and P00105 MFI (082014-

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<sup>1</sup> KSC-BC-2020-07, 19 October 2021 Transcript, p.937, ln.20 – p.939, ln.16 ('Oral Decision').

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

<sup>3</sup> 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.

<sup>4</sup> Prosecution submission of list of anticipated witnesses, KSC-BC-2020-07/F00347, 1 October 2021 ('Witness List').

<sup>5</sup> 102754-102755, SPO Official Note of Daniel Moberg on Seizure of Documents from KLA War Veterans Association.

<sup>6</sup> Annex 1 to Prosecution submission of updated exhibit list, KSC-BC-2020-07/F00332/A01, 28 September 2021, Confidential ('Exhibit List').

<sup>7</sup> The First Request and Second Requests are collectively referred to as the 'Requests'.

082016, collectively, the 'SPO Official Notes'), through W04841, finding that they constitute written statements falling under Rules 153 or 154, go to issues that are important to the SPO case, and would not be admissible pursuant to Rule 138(1) either.<sup>8</sup> The Trial Panel instructed the SPO to notify the Defence and Trial Panel of any decision to call the authors of the SPO Official Notes by 25 October 2021.<sup>9</sup>

4. W04876 is the author of P00092 MFI and is referred to in P00103 MFI and P00105 MFI since he participated in the seizures described therein. As set out in Annex 2, W04876 recalls, in relation to each of the seizures from the KLA WVA on 8, 17 and 22 September 2020, the relevant orders being read or given, the handover document being received, and documents being placed into evidence bags. As such, W04876 is capable of testifying in relation to all three seizures from the KLA WVA in September 2020.

5. Having considered the latter factors, interests in the efficiency of the proceedings, and the unique role and duties undertaken by the author of P00103 MFI and P00105 MFI within the SPO,<sup>10</sup> as well as the Trial Panel's previous rulings on protective measures in relation to SPO staff members,<sup>11</sup> the SPO has elected to seek to add W04876 to its Witness List. It should be noted that neither W04876 nor the author of P00103 MFI and P00105 MFI was or is involved in the ongoing investigation concerning the manner by which the documents were obtained by those who provided them to the KLA WVA.

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<sup>8</sup> Oral Order, p.937, ln.20 – p.939, ln.2.

<sup>9</sup> Oral Order, p.939, lns.3-8.

<sup>10</sup> In particular, an important role performed by this person is locating, identifying, and liaising with witnesses in Kosovo. This work would be compromised if he were required to testify in this case.

<sup>11</sup> Decision on the Prosecution Request for Protective Measures, KSC-BC-2020-07/F00303, 7 September 2021; Decision on the WPSO Request for Protective Measures, KSC-BC-2020-07/F00373, 15 October 2021.

6. No protective measures would be requested in relation to W04876 and, with the exception of the SPO Official Note contained in Annex 2, no further items would need to be disclosed in relation to this witness.<sup>12</sup>

7. Annex 1 contains the information required in relation to W04876 pursuant to Rule 95(4)(b) and paragraph 60 of the Order on the Conduct of Proceedings,<sup>13</sup> including: (i) the issues, facts and circumstances in relation to which W04876 will testify; (ii) a tentative list of (proposed) exhibits that the SPO intends to use with this witness; and (iii) a concise summary of the evidence the SPO intends to tender for admission through W04876 pursuant to Rule 154.

8. While the SPO is mindful of the Trial Panel's guidance that the authors of the SPO Official Notes could only be called to testify in relation to the SPO Official Notes,<sup>14</sup> the SPO submits that a further limited direct examination of W04876 in relation to the following issues would also be appropriate: (i) the contents of SPO Official Note 102754-102755, which was authored by W04876 and contains additional information concerning the seizures described in the SPO Official Notes; and (ii) the contents of SPO Official Note 083986-083987 RED, which was authored by W04876 and concerns the seizure of items from Gazeta Infokus on 9 September 2020.

9. As set out in Annex 1, should the First Request be granted, the SPO would seek to elicit W04876's testimony pursuant to Rule 154 and *viva voce*. Consistent with the Trial Panel's guidance, Rule 154 would be used for the admission of P00092 MFI, 102754-102755 and 083986-083987 RED. The witness' knowledge of the incidents addressed in P00103 MFI and P00105 MFI would be elicited *viva voce* and the SPO would not seek to admit these items in view of the Trial Panel's Oral Decision.

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<sup>12</sup> See Oral Order, p.939, lns.3-8.

<sup>13</sup> Annex to Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, 17 September 2021 ('Order on the Conduct of Proceedings').

<sup>14</sup> Oral Order, p.939, lns.12-16.

10. W04876's evidence brings to light facts which have a bearing on the case and would be of relevance in determining the questions at issue in this case.<sup>15</sup> Granting the request would be in the interests of justice and would not be prejudicial to or inconsistent with the rights of the Accused.

11. First, the request is being made as a result of the Oral Ruling and the Defence are on notice of the main facts which would be addressed by W04876 since all relevant material concerning his proposed evidence has been disclosed. Second, the requested addition is limited in scope, such that no further Defence investigation should be necessary, and any Defence preparation would be limited should the First Request be granted. Finally, the requested addition would only prolong the SPO's estimate for its case-in-chief by one or two days.

12. Should the First Request be granted, W04876 would be available to testify no later than three days following the date of such decision. This would allow the SPO to undertake a witness preparation session pursuant to the Order on the Conduct of Proceedings.<sup>16</sup> The SPO would also prepare Albanian translations of the items it intends to seek admission of pursuant to Rule 154, which could be disclosed within one day of the Trial Panel's decision.

## **B. Addition to Exhibit List**

13. As set out above, W04876 should also be authorised to testify concerning the contents of SPO Official Note 102754-102755, which was authored by W04876 and contains additional information concerning the seizures from the KLA WVA described in the SPO Official Notes.

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<sup>15</sup> 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.

<sup>16</sup> Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, para.93.

14. The information contained in 102754-102755 was obtained from W04876 following the unsupported assertion in the GUCATI Pre-Trial Brief that SPO officers told those who were present during the 8 September 2020 seizure that the KLA WVA could keep the documents for up to one month.<sup>17</sup> This item was disclosed pursuant to Rule 102(3) on 3 September 2021.<sup>18</sup> Should the First Request be granted, the SPO seeks authorisation to add this item to its Exhibit List in view of the SPO's intention to admit this item through W04876.

15. The Trial Panel should authorise the SPO to add this item to its Exhibit List since such addition would not cause any undue prejudice to the Defence and would be in the interests of justice,<sup>19</sup> in particular since the addition is limited in scope.

### III. CLASSIFICATION

16. Pursuant to Rule 82(3), this filing and its annexes 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 annexes to public.

### IV. RELIEF REQUESTED

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


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<sup>17</sup> Public redacted version of Defence Pre-Trial Brief on behalf of Hysni Gucati, KSC-BC-2020-07/F00258/RED, 12 July 2021, para.102.

<sup>18</sup> Disclosure Package 42.

<sup>19</sup> 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.

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**Jack Smith**

**Specialist Prosecutor**

Monday, 25 October 2021

At The Hague, the Netherlands