

**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:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 3 November 2021

**Language:** English

**Classification:** Public

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**Publicly Redacted Version of Defence Response to ‘Prosecution Second Request  
for Additions to its Witness and Exhibit Lists with Confidential Annexes 1-2’**

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## I. INTRODUCTION

1. On 19 October 2021, the Trial Panel, by way of an Oral Order,<sup>1</sup> rejected the admission of P00092 MFI, P00103 MFI, and P00105 MFI, sought to be adduced through Prosecution Witness W04841 (Zdenka Pumper), on the basis that they constitute written statements falling under Rules 153-154 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).
2. In response to that Order, the Specialist Prosecutor’s Office (“SPO”) now seeks authorisation to belatedly add witness W04876 to its Witness List, and further, add an item to the exhibits list, by way of written submissions.<sup>2</sup>
3. The Defence for Mr. Haradinaj seeks to oppose the application of the SPO for the reasons set out in this submission.

## II. BACKGROUND

4. The Procedural Background is well documented and not rehearsed here beyond that outlined above, and that which is contained within paragraphs 1 and 2 of the SPO application.<sup>3</sup>

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<sup>1</sup> KSC-BC-2020-07, Oral Order, 19 October 2021, p. 937, In. 20 – p. 939, In. 2.

<sup>2</sup> KSC-BC-2020-07/F00396.

<sup>3</sup> *Ibid.*

### III. SUBMISSIONS

#### *Addition to Witness List*

5. The SPO appear to remain of the position that they are not required to call a witness to adduce evidence, but rather, that they can rely upon a witness who is not the author of the statement to give that evidence.
6. The Order of the Trial Panel was clear, in that the 'reports' "*constitute written statements falling under Rules 153 or 154 of the Rules and are, therefore, not admissible through the current witness*".<sup>4</sup>
7. At paragraphs 3-5 of the SPO request, there is an acknowledgment that the witness subject to the application, W04876, is not the author of P00103MFI and P00105MFI.<sup>5</sup>
8. To now seek to adduce these exhibits through witness W04876, is exactly the same position that gave rise to the aforementioned Oral Order of the Trial Panel that gives rise to this submission.
9. Therefore, the position of the SPO still remains at odds with the Oral Order of the Trial Panel.

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<sup>4</sup> KSC-BC-2020-07, Oral Order, 19 October 2021, p. 937, In. 20 – p. 939, In. 2.

<sup>5</sup> KSC-BC-2020-07/F00396, paras. 3-5.

10. The Defence notes that the SPO maintain that the evidence can be admitted *viva voce* without the formal admission of the aforementioned documents as exhibits, however, this is yet again, a clear attempt by the SPO to circumvent the Rules, and further, the clear Oral Order of the Trial Panel.
11. The SPO to a great extent acknowledge this fact at paragraph 9 of the application: “...*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*”.<sup>6</sup>
12. This is contrary to the Oral Order.
13. Further, it is precisely the same position that the SPO sought to advance during the examination-in-chief of Witness W04842 (Miro Jukić).<sup>7</sup>
14. The Trial Panel issued a clear Oral Order on the admissibility of items, and a clear Order as to what ought to happen should the SPO seek to rely upon evidence where the author of those documents is not to be called.
15. Again, to refer to the specifics of the Order of the Trial Panel, it was noted, in the context of the previous witness and the three ‘notes’, that “*The Panel understands that the SPO investigators are available to testify and their reports do not fall under Rule 155. Even if these reports were considered as exhibits falling only*

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<sup>6</sup> KSC-BC-2020-07/F00396, para. 9.

<sup>7</sup> KSC-BC-2020-07, Provisional Transcript, 28 October 2021, pp. 104-106,

*under Rule 138(1) of the Rules, the Panel notes that the Defence cannot effectively confront the evidence and challenge the truthfulness and reliability of the accounts thus recorded through the current witness”.*<sup>8</sup>

16. If the proposal of the SPO is accepted, the above position will remain, in that the SPO is seeking to adduce other exhibits through oral testimony that cannot be challenged given the absence of the witness/author of the note himself.
17. As submitted above, the current request is merely a further attempt to adduce evidence without calling a witness, through alternative means.
18. The previous position giving rise to the Trial Panel’s Order also remains, in that the SPO are seeking to admit evidence that cannot be tested and subjected to scrutiny by either the Defence or the Trial Panel, given the refusal to call the author of those documents and therefore the witness.
19. Such an approach causes prejudice to the Defendant as it cannot test the evidence properly.
20. Further, the suggested course of action as put forward by the SPO is not in accordance with the Rules.
21. Rules 153-155 clearly dictate the circumstances in which written statements can be admitted *in lieu* of oral testimony.

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<sup>8</sup> KSC-BC-2020-07, Oral Order, 19 October 2021, p. 937, In. 20 – p. 939, In. 2.

22. The SPO quite evidently have not satisfied the requirements of those Rules and thus the SPO Application ought to be rejected.
23. Secondly, the double standard adopted by the SPO in respect of prolonging the SPO's 'case-in-chief' is noted.
24. Reference is made to the SPO's objection to the Expert Evidence the Defence seeks to adduce,<sup>9</sup> wherein at paragraph 3, the SPO seeks to submit: *"Such intervention is warranted in relation to the Report and Witness 17, inter alia, since authorising the admission of the Report or any evidence by this witness would not be conducive to the efficiency of proceedings and would constitute an undue consumption of time and resources, thereby running contrary to the interests of justice"*(emphasis added).
25. The Defence submits that the SPO cannot adopt one position in terms of the Defence case, and then a wholly contradictory position in terms of its own.
26. If the admission of a Defence witness is going to unduly prolong matters, then the same must hold true for the SPO.
27. Further, it is notable that this application is being made at the '11<sup>th</sup> hour', an issue to which the SPO took great exception during oral submissions of 28 October 2021,<sup>10</sup> and therefore again, the SPO is seeking to adopt a double

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<sup>9</sup> KSC-BC-2020-07/F00388.

<sup>10</sup> KSC-BC-2020-07, Provisional Transcript, 28 October 2021, p.2

standard in terms of the way it presents its case, and the way in which it seeks to dictate how the Defence case ought to be presented.

28. In terms of the timeframe, and in anticipation of the SPO position that it merely reacted to the Order of the Trial Panel and has therefore made its Application within the required timeframe, the Defence would highlight that the issue raised by the Trial Panel in its Oral Order is not new and is a matter that has been on record throughout these proceedings for some considerable time.
29. The Defence have raised and protested the admission of evidence through Witness W04841 (Zdenka Pumper) repeatedly throughout the duration of these proceedings.
30. The SPO have therefore been on notice for some months that this is an issue that would be addressed at trial, and yet adopted a position of belligerence, in that it was not required to change the manner in which it sought to present its case, as Rules 153-155 did not apply, despite it being patently obvious to any informed observer that they did.
31. The Defence would therefore respectfully submit that the SPO Application is not timely, it is made at an excessively late stage, when the issue could have in fact, been addressed many months before the commencement of this trial.
32. Again therefore, the application of the SPO ought to be rejected.

33. Further, the Defence note Annex 2 of the SPO Application which is an Official Note authored by [REDACTED], Associate Prosecutor, and therefore the note is not the evidence of the witness, and is in fact the evidence of [REDACTED], him being the author, and it being his account.
34. In the first instance therefore, any evidence arising out of that Note authored by [REDACTED] cannot be given by the proposed witness, as the evidence is not his. If it is that the SPO seek to adduce the evidence contained within that note, then [REDACTED] ought to be called to give evidence, the real risk of which was noted by the Defence at the beginning of the prosecution case.<sup>11</sup>
35. Further, the Defence wishes to highlight that no Official Note has been provided detailing the involvement of [REDACTED], Deputy Specialist Prosecutor, in that meeting and therefore again, there is information that has not been disclosed to the Defence.

*Addition to Exhibits List*

36. Similar to the position espoused above in respect of the timing of the Application, the SPO seek to add a further exhibit at the latest of stages in proceedings.

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<sup>11</sup> KSC-BC-2020-07/F00374



37. The SPO note at paragraph 13 of their Application that they were aware of the issue in terms of the Defence contention that there was communication that the KLA WVA “*could keep the documents for up to one month*”, and were aware of the same, at the latest, at the submission of the Gucati Pre-Trial Brief,<sup>12</sup> and therefore, have been aware of the issue for some three months as a minimum.
38. No reason, or justification, has been provided for why the SPO only seek to deal with the issue now, and have been content not to address the position in the intervening three months.
39. It is noted that in Disclosure 42, an Official Note dated 31 August 2021, seeks to address this issue, however, that note is still some six weeks after filing the pre-trial brief, and in any event, the SPO have waited until the ‘11<sup>th</sup> hour’ and the end of October of 2021, some 2 months, until properly seeking to adduce evidence of their position.
40. Again, as per paragraph 33 above, no justification or reasoning has been provided for this extended delay.
41. Further, the Order of the Trial Panel is clear, in that “*if these witnesses are to be called at this late stage as part of the Prosecution case, they would be called, as far as*

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

*the Prosecution case is concerned, for the limited purpose of questioning in respect of these three reports".<sup>13</sup>*

42. The application of the SPO seeks to amend and widen the ambit of its evidence, and therefore an Application is being made that is not in accordance with the Order of the Trial Panel, and again, without any reasoning or justification.

## V. Conclusion

43. The Defence maintains that leave for the SPO to call a further witness at this late stage ought to be refused, for the following reasons:
- a. The Application is not in accordance with the Oral Order of the Trial Panel;
  - b. The application seeks to further circumvent the Rules;
  - c. No justification or reasoning has been provided for why the Application is made at such a late stage despite being on notice of the issue to be taken with the admission of exhibits for some months;

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<sup>13</sup> KSC-BC-2020-07, Oral Order, 19 October 2021, p. 937, In. 20 – p. 939, In. 2.

d. The Application seeks to widen the ambit of the Oral Order of the Trial Panel without justification and again, without providing any reasoning as to why the issue has not been addressed months ago.

44. For those reasons given at paragraph 43 above and for the expanded reasons as aforesaid, the application of the SPO ought to be refused.

Word Count: 1,932 words



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