

In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **The Trial Panel**
Judge Charles Smith III
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 17 January 2022

Language: English

Classification: **Public**

Public Redacted Version of Corrected Version of "Response to 'Prosecution second request for additions to its witness and exhibit lists'"

Specialist Prosecutor

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I. INTRODUCTION

1. Pursuant to an oral order made by the Trial Panel on 19 October 2021¹ (the “Oral Order”), the SPO submitted a request to (i) add W04876 to its Witness List, and (ii) add an item to its Exhibit List² (the “Request”). The Trial Panel ordered the Defence to respond by Thursday 28 October 2021.³
2. In accordance with the Trial Panel’s order, the Defence makes the following submissions on behalf of Mr Gucati.

II. SUBMISSIONS

3. The Request goes beyond the scope identified by the Trial Panel in the Oral Order. At page 939 of the Transcript on 19 October 2021, lines 12-15, the Trial Panel stated:

“The Trial Panel would make it clear 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 Prosecution case is concerned, for the limited purpose of questioning in respect of these three reports”.

At the outset, the Defence highlights that this is a direction and not “guidance”.⁴ W04876 is the author of P00092 MFI (ERN 083988-083991 RED) (the “Report”). The Report covers the seizure of documents from the KLA War Veteran’s Association on 8 September 2020 and related events. It does not cover

¹ KSC-BC-2020-07, *Transcript*, 19 October 2021, page 939, lns. 3 -5

² KSC-BC-2020-07/F00396, *Prosecution second request for additions to its witness and exhibit lists with confidential annexes 1-2*, 25 October 2021

³ KSC-BC-2020-07, *Transcript*, 26 October 2021, page 1546, lns. 20-24

⁴ *The Request* at paragraph 8

the seizures that occurred on 17 or 22 September 2020. W04876 can therefore only be called for the “limited purpose” of testifying to matters relating to the seizure on 8 September 2020.

4. Contrary to the Trial Panel’s direction, the Request seeks to go beyond the Scope of the Oral Order and seek to adduce testimony from W04876 “*in relation to all three seizures from the KLA WVA in September 2020*”⁵.
5. No witness statement (or declaration) has been taken or provided to the Defence in respect of the new matters on which it is proposed that W04876 would testify. Nor has W04876 produced an ‘Official Note’ setting out his recollection of events on 17 and/or 22 September 2020.
6. The SPO has provided no explanation for not seeking to call the author of P00103 MFI and P00105 MFI.
7. Asking W04876 to review P00103 MFI and P00105 in a ‘witness preparation session’ on 25 October 2021, before any witness statement (or declaration, or ‘Official Note’) has been taken from W04876 on the events of 17 and 22 September 2020, amounts to coaching⁶ in breach of paragraphs 44 and 50 of the Annex to the Order on the Conduct of the Proceedings.⁷ The witness should not be allowed to testify, in relation to the events of 17 and 22 September 2020, on this basis alone.
8. Paragraph 50 of the Annex to the Order on the Conduct of the Proceedings makes it plain that witness preparation sessions should take place only after

⁵ *The Request* at paragraph 4

⁶ *Ibid* at paragraph 3

⁷ *Annex to the Order of the Conduct of the Proceedings*, KSC-BC-2020-07/F00314/A01 at paragraph 44

the witness has provided a witness statement (or declaration or 'Official Note') so that any changes to the witness' account during or post a 'witness preparation session' can be assessed. Showing a witness the account of events by another prior to obtaining that witness' account carries a clear and obvious risk of contamination and should not be tolerated.

9. The SPO strays even further from the Oral Order in seeking to amend its Exhibit List.⁸ It states that W04876 should be authorised to testify on the SPO Official Note 102754-102755. Clearly this is not what was envisaged by the Trial Panel when it made its Oral Order on 19 October.
10. The SPO states that the Trial Panel should grant the Request because it "*would be in the interests of justice*" although the Request does not give any reasons (on the contrary, the SPO asserts that calling the witness is unnecessary and does not further their case⁹). "*An abundance of caution*" is not synonymous with the interests of justice.
11. According to the Request, calling the witness is unnecessary and does not further the SPO's case on continuity.
12. It is further stated that the witness cannot assist the court with evidence in relation to "*the ongoing investigation concerning the manner by which the documents were obtained by those who provided them to the KLA WVA*"¹⁰. Indeed, the SPO has not called, and asserts that it does not intend to call, a single witness able to assist with *the ongoing investigation concerning the manner by which the documents were obtained by those who provided them to the KLA WVA*.

⁸ Ibid at paragraph 13

⁹ The Request at paragraph 1

¹⁰ The Request at paragraph 5

13. In the circumstances of this Request, it is far from clear how calling this witness would be “*in the interests of justice*” (subject to any further disclosure relating to items 185-200 and 201 of the Rule 102(3) Notice).
14. Although no reasons are provided by the SPO for not seeking to call the author of P00103 MFI and P00105 MFI, [REDACTED], the SPO does assert that [REDACTED] undertakes a “*unique role and duties...within the SPO*”.¹¹ No explanation is provided as to what that “*unique role and duties*” involves and what relevance that “*unique role and duties*” has to their application to add W04876 to the witness list. If it is of any relevance, the SPO should set out what [REDACTED] “*unique role and duties*” are.
15. The four cases cited by the SPO in support of the Request¹² focus on whether ‘good cause’ was shown for the late addition of new witnesses and/or exhibits to the prosecution witness and exhibit lists.
16. Factors to be taken into account when assessing whether ‘good cause’ has been demonstrated include:
- a. the length of time that has elapsed since the deadline (9th April 2021 in the present case) for the submission of the witness list¹³;

¹¹ *The Request* at paragraph 5

¹² 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; *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; 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; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Motion for Leave to Amend its Exhibit List, 19 October 2011 at paragraph 37

¹³ 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 at paragraph 11

- b. whether good cause exists for not seeking to add the witnesses at an earlier stage of the proceedings¹⁴;
- c. whether the prosecution's explanation for why it has sought to add these witnesses do not qualify as 'reasons outside of its control'¹⁵;
- d. whether the proposed new witness/exhibit 'brings to light previously unknown facts'¹⁶; and
- e. the proper expectation that the prosecution will have a clear and cohesive view of its strategy and a view on how it would prove its case at an early stage.¹⁷

17. Each of the above factors in relation to the present Request points firmly towards refusal.

III. CLASSIFICATION

18. This filing is classified as confidential as it relates to a filing that bears the same classification.

IV. CONCLUSION

¹⁴ *Prosecutor v. Kenyatta*, ante at paragraph 11

¹⁵ *Prosecutor v. Kenyatta*, ante at paragraph 12

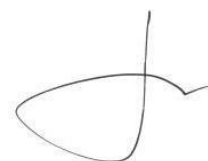
¹⁶ *Prosecutor v. Kenyatta*, ante at paragraph 13

¹⁷ *Prosecutor v. Nahimana et al*, ante at paragraphs 18 and 28

19. It is acknowledged that, pursuant to Rule 132, the Trial Panel may itself call additional evidence where it considers it necessary for the determination of the truth (for example, in relation to the investigation into the process by which material arrived at the KLA WVA HQ).

20. The Request, however, should be refused (subject to any further disclosure relating to items 185-200 and 201 of the Rule 102(3) Notice).

Word count: 1360 words



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28 October 2021

Cardiff, UK

Explanatory Note

The additions are clarifications in order to assist the Trial Panel.

Additions:

- Paragraph 7 – addition of “in relation to the events of 17 and 22 September 2020” to the final sentence of the paragraph;
- Paragraph 13 – addition of “(subject to any further disclosure relating to items 185-200 and 201 of the Rule 102(3) Notice)” at the end of the paragraph;
- Paragraph 20 – addition of “(subject to any further disclosure relating to items 185-200 and 201 of the Rule 102(3) Notice)” to the end of the paragraph; and
- Amending the word count to “1360”.