



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: 1 November 2021

Language: English

Classification: **Public**

**Decision on the Prosecution's Second Request for
Additions to Its Witness and Exhibit Lists**

Specialist Prosecutor

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TRIAL PANEL II, pursuant to Articles 21(4)(a), (c) and 40(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 95(4)(b)-(c) 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 19 October 2021, the Panel issued an oral order rejecting the admission of P00092 MFI, P00103 MFI and P00105 MFI ("Three Reports") through W04841 on the ground that the Three Reports constitute written statements, and their admission was governed by Rules 153 and 154 of the Rules. The Panel noted that W04841 was not the author of the reports, and indicated that the SPO could call as witnesses the two authors of those reports, who are SPO staff members, and tender the Three Reports through them. The Panel indicated that if the witnesses were "called at this late stage as part of the Prosecution case, they would be called, as far as [the] Prosecution case is concerned, for the limited purpose of questioning in respect of these three reports".¹ The Panel ordered the SPO to inform the Defence and the Panel by 25 October 2021 of, *inter alia*, any decision by the SPO to call the authors of the reports as witnesses ("Order").² The Panel ordered the Defence to respond by 26 October 2021.³

2. On 25 October 2021, the Specialist Prosecutor's Office ("SPO") submitted a request for additions to its witness and exhibit lists ("Request") with two confidential annexes (Annex 1 containing information regarding W04876, a tentative list of proposed exhibits and summaries of items to be tendered through W04876 pursuant to Rule 154

¹ Oral Order on the Admissibility of Certain Exhibits (P92MFI, P103MFI and P105MFI), 19 October 2021, Transcript, pp. 937-939.

² Oral Order on the Admissibility of Certain Exhibits (P92MFI, P103MFI and P105MFI), 19 October 2021, Transcript, p. 939.

³ Oral Order on the Admissibility of Certain Exhibits (P92MFI, P103MFI and P105MFI), 19 October 2021, Transcript, p. 939.

of the Rules; Annex 2 containing an official note dated 25 October 2021 with ERN 103811-103812).⁴

3. On 28 October 2021, further to an extension of time limit by the Panel,⁵ the Defence for Nasim Haradinaj (“Haradinaj Defence”) and the Defence for Hysni Gucati (“Gucati Defence”) filed their respective responses.⁶

II. SUBMISSIONS

A. SPO

4. The SPO requests the addition of W04876 to its witness list and seeks to elicit his testimony pursuant to Rule 154 of the Rules and *viva voce*.⁷ The SPO submits that W04876, an SPO staff member,⁸ is the author of P00092 MFI and is referred to in P00103 MFI and P00105 MFI.⁹ The SPO elected not to request leave to call as a witness the author of P00103 MFI and P00105 MFI.

5. The SPO indicates that W04876 recalls, in relation to each of the seizures from the Kosovo Liberation Army War Veterans’ Association (“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.¹⁰ In

⁴ F000396, Specialist Prosecutor, *Prosecution Second Request for Additions to Its Witness and Exhibit Lists* (“Request”), 25 October 2021, confidential, with confidential annexes (“Annex 1”, “Annex 2”).

⁵ Oral Order Setting Deadline for Defence Written Response to F396, 26 October 2021, Transcript, p. 1546.

⁶ F00405, Haradinaj Defence, *Defence Response to ‘Prosecution Second Request for Additions to Its Witness and Exhibit Lists with Confidential Annexes 1-2’* (“Haradinaj Response”), 28 October 2021, confidential; F00406, Gucati Defence, *Response to “Prosecution Second Request for Additions to Its Witness and Exhibit Lists”* (“Gucati Response”), 28 October 2021, confidential. The Gucati Defence filed a corrected version of its response on 29 October 2021 adding clarifications to its submissions, see F00406/COR.

⁷ Request, paras 2, 9, 17.

⁸ Request, Annex 1, p. 2.

⁹ Request, para. 4.

¹⁰ Request, para. 4.

addition, the SPO requests that it be permitted to examine W04876 not only about P00092 MFI, but also in relation to the following issues: (i) the contents of SPO Official Note 102754-102755 (dated 31 August 2021), which was authored by W04876 and contains additional information concerning the seizures described in the Three Reports (“First Additional Request”);¹¹ and (ii) the contents of SPO Official Note 083986-083987 RED (dated 21 October 2020), which was authored by W04876 and concerns the seizure of items from a media outlet on 9 September 2020 (“Second Additional Request”).¹² The SPO indicates that it intends to submit, pursuant to Rule 154 of the Rules, P00092 MFI as well as Official Notes 102754-102755 and 083986-083987 RED.¹³ The witness’s knowledge of the events addressed in P00103 MFI and P00105 MFI would be elicited *viva voce* and the SPO would not seek to admit these items.¹⁴

6. Further to the First Additional Request, the SPO also seeks authorisation to add Official Note 102754-102755 to its exhibit list.¹⁵

7. The SPO requests no protective measures for W04876.¹⁶

B. HARADINAJ DEFENCE

8. The Haradinaj Defence responds that the SPO request to elicit the knowledge of W04876 regarding the events addressed in P00103 MFI and P00105 MFI is contrary to the Panel’s finding that the Defence cannot effectively confront the evidence and challenge the truthfulness and reliability of accounts recorded through W04841.¹⁷ The Haradinaj Defence avers that the SPO is in fact seeking to

¹¹ Request, para. 8.

¹² Request, para. 8.

¹³ Request, para. 9.

¹⁴ Request, para. 9.

¹⁵ Request, paras 13-14.

¹⁶ Request, para. 6.

¹⁷ Haradinaj Response, paras 11-15.

adduce other exhibits through oral testimony that cannot be challenged given the absence of the witness/author of the note himself.¹⁸

9. The Haradinaj Defence further submits that the Request is not timely as it is made at an excessively late stage, when the issue could have been addressed many months before the commencement of trial.¹⁹

10. The Haradinaj Defence also maintains that Annex 2 of the Request is an official note authored by an Associate Prosecutor and that any evidence arising from that note cannot be given by W04876.²⁰

11. In relation to the First Additional Request, the Haradinaj Defence submits that the SPO provided no justification for why it seeks to deal with the issue only now and not in the intervening three months.²¹ The Haradinaj Defence maintains that the Request seeks to amend and widen the ambit of the SPO evidence and it is therefore contrary to the Order.

C. GUCATI DEFENCE

12. The Gucati Defence responds that the Request seeks to go beyond the scope of the Order and seeks to adduce testimony from W04876 in relation to all three seizures from the KLA WVA in September 2020.²²

13. The Gucati Defence further avers that no witness statement has been provided in respect of the new matters on which it is proposed that W04876 would testify,

¹⁸ Haradinaj Response, para. 16.

¹⁹ Haradinaj Response, para. 31.

²⁰ Haradinaj Response, paras 33-34.

²¹ Haradinaj Response, paras 37-40.

²² Gucati Response, paras 3-4.

and nor has W04876 produced an “official note” setting out his recollection of events on 17 and/or 22 September 2020.²³

14. The Gucati Defence maintains that the 25 October 2021 meeting with W04876 (as documented in Annex 2 of the Request) amounts to coaching in breach of the Panel’s instructions on witness preparation sessions.²⁴ It further maintains that paragraph 50 of the Panel’s 17 September 2021 order on the conduct of proceedings (“Order on the Conduct of Proceedings”) makes it plain that witness preparation sessions should take place only after the witness has provided a statement.²⁵

15. The Gucati Defence also submits that the First Additional Request goes beyond what was envisaged in the Order. It argues that the SPO’s submission that the Trial Panel should grant the request in the interests of justice is undermined by the SPO’s position that it wishes to call the witness out of an abundance of caution, rather than necessity.²⁶

16. The Gucati Defence further avers that factors to be taken into account when assessing whether good cause for the late addition to the witness list has been demonstrated include: (i) the length of time that has elapsed since the deadline (9 April 2021) for the submission of the witness list; (ii) whether good cause exists for not seeking to add the witnesses at an earlier stage of proceedings; (iii) whether the SPO’s explanation for why it has sought to add these witnesses do not qualify as reasons outside of its control;²⁷ whether the proposed witness bring to light

²³ Gucati Response, para. 5.

²⁴ Gucati Response, para. 7, referring to F00314, Panel, Order on the Conduct of Proceedings, paras 44, 50.

²⁵ Gucati Response, para. 10.

²⁶ Gucati Response, paras 9-10.

²⁷ ICC, *Prosecutor v. Kenyatta*, Trial Chamber V(B), [Decision on Prosecution Request to Add P-548 and P-66 to Its Witness List](#), 23 October 2013, ICC-01/09-02/11-832, para. 15.

previously unknown facts;²⁸ and the proper expectation that the SPO will have a clear and cohesive view of its strategy and a view on how it would prove its case at an early stage.²⁹

III. APPLICABLE LAW

17. A combined reading of Article 21(4)(a) and (4)(c) of the Law and Rule 95(4)(b)-(c) of the Rules require that the Accused be given fair notice of evidence to be presented by the Prosecution.

18. In accordance with Article 40(6) of the Law and Rule 118(2) of the Rules, the Panel may permit, upon timely notice and a showing of good cause, the amendment of the SPO's witness and exhibit lists.

IV. DISCUSSION

A. GOOD CAUSE

19. The Panel recalls that in its decision on the SPO's request for admission through the bar table it found that the admission of investigative reports through the bar table was premature and that the SPO would have an opportunity to examine its witnesses as to the truth of the items' content.³⁰ While the Panel noted that the Defence had to be put in a position to effectively confront the evidence and challenge the truth and reliability of the accounts recorded in the investigative reports, it did not specifically state at that time that such reports could only be admitted through their authors.³¹

²⁸ Ibid., para. 13.

²⁹ Gucati Response, para. 16.

³⁰ F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table* ("Bar Table Decision"), 29 September 2021, para. 56.

³¹ Bar Table Decision, para. 56.

20. The Panel observes that the SPO could have elected to add W04876 or other relevant SPO staff members to its witness list submitted on 9 April 2021, or to request the addition of these witnesses before or at the Trial Preparation Conference (1-2 September 2021) or the SPO Preparation Conference (8 September 2021). However, it is not for the Panel to dictate how the SPO presents its case.

21. That being said, the Panel notes that it was only in the Order that it specifically found, further to a renewed objection by the Gucati Defence on 18 October 2021,³² that the Three Reports were inadmissible through W04841. Given the stage of the SPO case at which the Order was rendered, the Panel indicated in the Order that a request to call the authors of the Three Reports as witnesses would be entertained.³³

22. In light of the above, the Panel considers that the Order constitutes, in itself, good cause for the SPO's request to add W04876 to its witness list.

B. SCOPE OF W04876'S PROPOSED TESTIMONY

23. The Panel recalls that in the Order it indicated that if the authors of the Three Reports were to be called at this late stage as part of the Prosecution case, they would be called, as far as the Prosecution case was concerned, "for the limited purpose of questioning in respect of these three reports".³⁴ The Panel notes that the Defence construes this indication to mean that any additional witness could only testify as to matters expressly referred to in reports that he or she authored.³⁵

³² Transcript, 18 October 2021, pp. 845-846. A similar objection was made by the Gucati Defence in relation to the admission of investigative reports through the bar table. *See* F00308, Gucati Defence, *Response to the Prosecution Request for Admission of Items through the Bar Table*, 10 October 2021, paras 4-14.

³³ Oral Order on the Admissibility of Certain Exhibits (P92MFI, P103MFI and P105MFI), 19 October 2021, Transcript, pp. 937-939.

³⁴ Oral Order on the Admissibility of Certain Exhibits (P92MFI, P103MFI and P105MFI), 19 October 2021, Transcript, pp. 937-939.

³⁵ Haradinaj Response, paras 11-16; Gucati Response, paras 3-4.

24. The Panel finds this interpretation excessively narrow for the following reasons. By adding the qualification “in respect of these three reports”, the Panel intended to confine questioning to the *events* addressed in the Three Reports, namely the three seizures of 8, 17 and 22 September 2020. The Panel notes that W04876 was present at all three seizures, and can testify in relation to what he recalls regarding each of these events. The fact that W04876 did not author some of the notes that recorded those events does not exclude the possibility for him to give *viva voce* evidence about those events.

25. The Panel notes the SPO’s request that it elicit W04876’s knowledge of the three seizures *viva voce*, and that it does not intend to tender P00103 MFI and P00105 MFI.³⁶

26. The Panel considers that this part of the Request is within the scope of the Order. No prejudice is caused to the Defence as the content of the Three Reports have been known to them for months.³⁷ Furthermore, questions pertaining to the manner in which seizures were conducted and the reliability of the resulting “chain of custody” of material collected during those events have been raised by the Defence.³⁸ Insofar as these issues form part of their case, both Defence teams will have an opportunity to cross-examine W04876 on the three seizures and seek to elicit from him evidence relevant to their case on that point.

27. The Panel therefore finds it appropriate and in the interests of justice to authorise the addition of W04876 to the witness list in order to testify in relation to what he recalls of the events addressed in the Three Reports.

³⁶ Request, para. 9.

³⁷ The Three Reports were disclosed to the Defence on 26 March 2021 (Disclosure Package 18).

³⁸ F00258/RED, Gucati Defence, *Public Redacted Version of Defence Pre-Trial Brief on Behalf of Hysni Gucati* (“Gucati Pre-Trial Brief”), 12 July 2021, paras 100, 103, 109, 131, 173, 313, 337, 338, 347; F00260, Haradinaj Defence, *Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj*, paras 17, 73, 188-194.

1. The First Additional Request

28. The Panel notes that the First Additional Request arises from an allegation raised by the Gucati Defence in its 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 (“Gucati Allegation”).³⁹ The Panel further notes that Official Note 102754-102755 was authored by W04876, and was disclosed to the Defence on 3 September 2021.⁴⁰

29. The Panel observes that the Gucati Allegation concerns an event addressed in P00092 MFI, authored by W04876. The Panel therefore considers that the First Additional Request does not go beyond the scope of the Order. That being said, the Panel notes that the SPO could have elected to request the addition of W04876 to the witness list shortly after the filing of the Gucati Pre-Trial Brief, or at least at the time Official Note 102754-102755 was disclosed. The Panel therefore accepts that the First Additional Request should have been filed earlier in respect of this matter. Nonetheless, the Panel considers that it is in the interests of justice to permit direct examination by the SPO and cross-examination by the Defence on this point. This will ensure that the issue is subject to an adversarial process enabling the Panel to have all relevant evidence in respect of this matter. It would also reduce the risk of delays that would have arisen from an application to call rebuttal evidence on that point. In addition, the Panel considers that no prejudice is caused to the Defence as the information has been known to them for two months, the Defence can cross-examine W04876 on this issue, and the Defence can also call evidence on this point.

30. The Panel therefore finds it appropriate to grant the First Additional Request and authorise the examination of W04876 (by both the SPO and the Defence) on the events addressed in Official Note 102754-102755. The Panel also authorises the SPO to add

³⁹ Request, para. 14, referring to Gucati Pre-Trial Brief, para. 102.

⁴⁰ Disclosure Package 42, 3 September 2021.

Official Note 102754-102755 to its exhibit list. This is without prejudice to the question of this item's admission.

2. The Second Additional Request

31. The Panel notes that the Second Additional Request concerns the handover of documents, referred to as Batch 4,⁴¹ by a media outlet to W04876 on 9 September 2020. This request is not related to the events addressed in the Three Reports and therefore falls outside of the scope of the Order. The Panel further notes that evidence has already been given in respect of this matter by the first two witnesses called by the SPO.⁴² Considering this fact and the belated nature of the Request on that point, the Panel considers it not to be in the interests of justice to grant this request.

32. The Panel therefore finds it appropriate to reject the Second Additional Request.

C. ANNEX 2

33. The Panel notes that Annex 2 contains the records of a meeting between W04876 and two prosecutors, indicating that W04876 was asked to review the Three Reports and another document before the meeting, noting the extent of W04876's recollection of the events addressed in the Three Reports and noting the duration of the meeting.

34. The Panel further observes that the SPO does not seek authorisation to add this document to its exhibit list, nor does it intend to seek its admission into evidence. It simply seeks authorisation to disclose the document if the Request is granted.⁴³ Accordingly, the Panel finds that the Haradinaj arguments in relation to Annex 2 misconstrue the SPO's submissions and are without merit.

⁴¹ Transcript, 18 October, pp. 889-890.

⁴² *See, for example*, Transcript, 18 October, pp. 889-890.

⁴³ Request, para. 6.

35. Furthermore, the Panel rejects the argument by the Gucati Defence that the meeting amounted to coaching of a witness. First, the Panel recalls that while Rule 102 of the Rules requires that the statements of witnesses whom the SPO intends to call must be disclosed to the Defence, this does not mean that witnesses who have not provided a (written) statement cannot testify.⁴⁴ It is open to the SPO to call W04876 as a witness and hold a witness preparation session without having obtained any witness statements from him. The Gucati Defence, therefore, misconstrues paragraph 50 of the Order on the Conduct of Proceedings, which reads “[t]he calling Party shall conduct its preparation session after witness statements have been taken, *if applicable*, and disclosed to the opposing Party.” Furthermore, as the Panel made it clear, the official notes which W04876 authored and in respect of which he will testify constitute statements for the purpose of Rules 153-155 of the Rules.⁴⁵ These official notes predate the meeting recorded in Annex 2.⁴⁶ The SPO is accordingly entitled to hold one or more witness preparation sessions with W04876.

36. Secondly, the meeting between W04876 and the prosecutors, as recorded in the document in Annex 2, falls within the scope of witness preparation as set out in paragraph 43 of the Order on the Conduct of Proceedings, and does not amount to coaching. The SPO was thus entitled to ask W04876 to review relevant documents before the meeting, and elicit his recollection of events, in order to decide whether he would be a suitable witness to call.

⁴⁴ Oral Order on Application by Gucati Defence re Witness W04842 New Information, 27 October 2021, pp. 1550-1553. The Panel notes that the oral order contains a typo and should read: “To be clear, while Rule 102 does ~~not~~ require that the statement of all witnesses whom the SPO intends to call to testify must be disclosed, this does not mean that the witnesses who do not have statements cannot testify.”

⁴⁵ Oral Order on the Admissibility of Certain Exhibits (P92MFI, P103MFI and P105MFI), 19 October 2021, Transcript, pp. 937-939.

⁴⁶ P00092 MFI is dated 21 October 2020, while Official Note with ERN 102754-102755 is dated 31 August 2021.

37. The Panel, therefore, finds the Defence arguments regarding Annex 2 to be without merit.

V. RECLASSIFICATION

38. The Panel notes that the SPO does not oppose the reclassification of the Request and the two annexes to public in the event that W04876 is authorised to testify.⁴⁷ In light of the above, the Panel finds it appropriate to reclassify the Request and its two annexes as public.

39. The Panel orders the Defence to submit public redacted versions or request reclassification as public of their respective responses.

40. The Panel further recalls that the classification of P00100 and P00129 has been deferred pending a ruling on the Request.⁴⁸ In light of the present decision, the Panel finds it appropriate that P00100 and P00129 be reclassified as public.

VI. DISPOSITION

41. For the above-mentioned reasons, the Panel hereby:

- a. **GRANTS** the Request to the extent set out in paragraphs 25-27 and 30 of the present decision;
- b. **AUTHORISES** the SPO to add Official Note ERN 102754-102755 to its exhibit list;

⁴⁷ Request, para. 16.

⁴⁸ Draft Transcript, 26 October 2021, confidential, pp 1536-1537; Draft Transcript, 27 October 2021, confidential, p. 1574.

- c. **ORDERS** the SPO to disclose to the Defence, by **2 November 2021, 16:00 hours**:
- i. Albanian translations of the items for which it intends to seek admission through W04876, taking into consideration the present decision; and
 - ii. the 25 October 2021 official note, as contained in Annex 2;
- d. **ORDERS** the Registry to reclassify as **public**:
- i. the Request (F00396) and its two annexes (F00396/A01; F00396/A02); and
 - ii. admitted exhibits P00100 and P00129;
- e. **ORDERS** the Defence to submit public redacted versions or request reclassification as public of their respective responses (F00405 and F00406/COR) by **5 November 2021**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Monday, 1 November 2021

At The Hague, the Netherlands