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SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
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| **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:** | 31 August 2021 |
| **Language**: | English |
| **Classification**: | Public |

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**Prosecution request for admission of items through the bar table**

**with confidential Annex 1**

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## I. Introduction

1. Pursuant to the invitation of the Trial Panel,[1] Article 40(2) and (6)(h) of the Law,[2] and Rules 137-139 of the Rules,[3] the Specialist Prosecutor's Office ('SPO') requests the admission of the items on the List of Exhibits set out in Annex 1. These items fall into the following categories of evidence addressed below and in Annex 1:

(i) Press conferences and interviews;

(ii) Further media concerning the Accused, including excerpts from Batches;[4]

(iii) Materials related to seizures;

(iv) Facebook posts; and

(v) Contact notes.

2. The items which the SPO seeks to admit into evidence are relevant, of high probative value, contain sufficient indicia of authenticity, and their admission would not be unduly prejudicial to the Accused.[5] For the reasons set out below, the

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[1] Order for Submissions and Scheduling the Trial Preparation Conference, KSC-BC-2020-07/F00267, 21 July 2021 (with annex) ('Order for Submissions'), para.10; Draft Order on the Conduct of Proceedings, KSC-BC-2020-07/F00267/A01, 21 July 2021, paras 22-23. The Order for Submissions also directed the SPO to provide a list of authorities for the purpose of oral submissions at the Trial Preparation Conference. The authorities provided correspond to those relied upon in the present request. List of Authorities, KSC-BC-2020-07/F00290, 31 August 2021 (with annex).

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

[3] 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.

[4] The 'Batches' concern the three batches of confidential material relating to the investigations of the Special Investigative Task Force ('SITF') and SPO ('Batch 1', 'Batch 2', 'Batch 3') as described in the Indictment. Redacted Indictment, KSC-BC-2020-07/F00251/A02, 5 July 2021 ('Indictment').

[5] *See* Rule 138(1); *See also* Rule 137(1). Admission of evidence does not require definitive proof of reliability or credibility of the evidence, but rather a showing of *prima facie* reliability on the basis sufficient indicia, *see* ICTY, *Prosecutor v. Prlić et al.*, Decision on Jadranko Prlić's Interlocutory Appeal Against the *Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, IT-04-74-AR73.16, 3 November 2009, paras 32-36; ICTY, *Prosecutor v. Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, IT-05-88-AR73.2, 30 January 2008, para.22; IRMCT, *Prosecutor v Nzabonimpa et al.*, Decision on Augustin

admissibility objections to these items in the tables accompanying the Defence Pre-Trial Briefs are meritless.[6]

## II. Submissions

3. As a preliminary matter, given that the present motion concerns over 400 items which must be factually and legally justified in accordance with the Trial Panel's directions,[7] the SPO requests extension of the word limit previously set at 3,000 words by the Trial Panel[8] to the standard 6,000 words.[9]

4. In light of the specific features of the crimes charged in the Indictment, the evidence to be presented in these proceedings is predominantly documentary in character. Unlike cases typically tried by international criminal tribunals, the Accused's criminal conduct in this case was public and documented in detail as it unfolded. In particular, most factual circumstances relevant to this case were broadcasted live, published by the press or on social networks, or documented through official reports of SPO officers who, through execution of judicial orders, prevented even graver consequences ensuing from the criminal conduct of the Accused.

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Ngirabatware's First Motion for Admission of Evidence from the Bar Table (Intercepted and Downloaded Communications), MICT-18-116-T, 29 April 2021, p.2.

[6] Annex 2 to Defence Pre-Trial Brief on behalf of Hysni Gucati: List of Objections to the Admissibility of Disclosed Evidentiary Material, KSC-BC-2020-07/F00258/A02, 12 July 2021, Confidential ('Gucati Defence Objections'); Annex 2 to Defence Pre-Trial Brief on behalf of Nasim Haradinaj: List of Objections to the Admissibility of Disclosed Evidentiary Material, KSC-BC-2020-07/F00260/A02, 12 July 2021, Confidential ('Haradinaj Defence Objections'). As the Defence objections are not always linked to the numbers on the most recent SPO list of exhibits, the items objected to were confirmed by the descriptions identified by the Defence and, in the case of the Gucati Defence, the ERNs indicated. In addition to any objections indicated for specific items, it is also noted that there are more general Defence objections to tendering items through the 'bar table' before the Trial Panel. *See* Submissions in Preparation for Trial Preparation Conference, KSC-BC-2020-07/F00287, 27 August 2021, paras 25-29.

[7] Order for Submissions, KSC-BC-2020-07/F00267, para.10.

[8] Order for Submissions, KSC-BC-2020-07/F00267, para.31.

[9] Such extensions are permitted for word limits set in the Practice Direction upon a showing of good cause. Article 36 of the the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15, 17 May 2019 ('Practice Direction').

5. The Trial Panel enjoys a broad discretion regarding the process for admissibility of evidence,[10] including through a bar table motion. There is no statistical or numerical limit to the number of documents which may be tendered by way of a bar table, so long as the requisite clarity and specificity is provided when explaining each document's relevance to the case.[11] There is likewise no requirement that evidence produced other than in open court may only be admitted if corroborated, noting that a legal requirement for corroboration cannot be imposed when assessing the standard of proof.[12] Whether evidence comes through a witness or via the bar table may be a factor to be considered when weighing the evidence at the end of trial. [13]

6. So long as the evidence is not subject to extra procedural requirements – such as those in Rules 153-155 – the Trial Panel may admit materials through the bar table in the exercise of its discretion.[14]

7. This framework is in accord with the European Convention of Human Rights, in particular the right of the accused under Article 6(3)(d) of the ECHR to confront the witnesses against them.[15]

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[10] Article 40(2) and (6)(h); Rule 138(1).

[11] IRMCT, *Prosecutor v. Turinabo et al.*, Decision on Prosecution Second Motion for Admission of Evidence from the Bar Table (Material Obtained from Registry and Seizures from Augustin Ngirabatware at the UNDF), MICT-18-116-T, 15 January 2021, p.3; IRMCT, *Prosecutor v Stanišić and Simatović*, Decision on Prosecution Motion for Admission of Documents from the Bar Table (Expert Reports), MICT-15-96-T, 11 February 2019, para.7.

[12] Rule 139(3).

[13] IRMCT, *Prosecutor v. Stanišić and Simatović*, Decision on Prosecution Motion for Judicial Notice of Authenticity and Admission of Documents from the Bar Table (Mladić Notebooks & Audio Files), MICT-15-96-T, 11 February 2019, para.7; ICTY, *Prosecutor v. Hadžić*, Decision on Prosecution Bar Table Motion, IT-04-75-T, 28 November 2013, para.8.

[14] As to the exercise of this discretion, *see generally* ICC, *Prosecutor v. Katanga and Ngudjolo*, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009 ('*Katanga and Ngudjolo* Conduct of Proceedings Decision'), para.100.

[15] The ECtHR has given the term 'witnesses' in this context a particular meaning, extending its application beyond those persons called by the parties at trial. ECtHR, *Laukkanen and Manninen v. Finland*, 50230/99, 3 February 2004 ('*Laukkanen and Manninen*'), para.32 ('[e]ven though police officers named by N. have not testified at a hearing they should, for the purposes of Article 6 § 3 (d), be regarded as witnesses – a term to be given an autonomous interpretation – because their statements, as referred to by the prosecutor in his submissions to the Court of Appeal, were in fact before the court, which took

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8. The European Court of Human Rights makes clear that evidentiary admissibility is primarily a matter for national authorities.[16] When considering whether any undue interference with the rights of the accused occurs under Article 6(3)(d) of the ECHR, what is considered is whether: (i) good reasons exist for not calling the witness in question; (ii) whether the evidence was the sole or decisive factor in convicting the accused, or otherwise carried significant weight and that its admission may have handicapped the defence; and (iii) whether sufficient counterbalancing measures were applied to ensure fairness.[17] The ECtHR does not consider this test cumulatively; a failure to meet one of these factors does not necessarily mean an Article 6 of the ECHR violation occurs,[18] making it premature to apply this test at the admissibility stage. Only the first of these three factors can have a bearing on admissibility at all; the other two go to weight and cannot be definitively determined until the end of the proceedings.[19]

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account of them when assessing their relevancy'); ECtHR, *Asch v. Austria*, 12398/86, 26 April 1991, para.25; ECtHR, *Jussi Uoti v. Finland*, 20388/02, 23 October 2007 ('*Jussi Uoti*'), para.30.

[16] ECtHR [GC], *García Ruiz v. Spain*, 30544/96, 21 January 1999, para.28; ECtHR, *Aigner v. Austria*, 28328/03, 10 May 2012, para.35.

[17] ECtHR [GC], *Schatschaschwili v. Germany*, 9154/10, 15 December 2015 ('*Schatschaschwili v. Germany*'), 9154/10, para.117, paras 100-31; ECtHR [GC], *Al-Khawaja and Tahery v. The United Kingdom*, 26766/05 and 22228/06, 15 December 2011 ('*Al-Khawaja and Tahery*'), paras 119-47; ECtHR, *Šmajgl v. Slovenia*, 29187/10, 4 October 2016, para.61.

[18] *Schatschaschwili v. Germany*, 9154/10, para.113; *Al-Khawaja and Tahery*, 26766/05 and 22228/06, para.147 ('[t]he Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, […] and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case'). *But see* Rule 140(4) (prohibiting the use of evidence of, *inter alia*, absent or anonymous witnesses being the sole or decisive basis for conviction).

[19] *Schatschaschwili v. Germany*, 9154/10, para.117 ('[t]he Court observes that in *Al-Khawaja and Tahery*, cited above, the requirement that there be a good reason for the non-attendance of the witness (first step), and for the consequent admission of the evidence of the absent witness, was considered as a preliminary question which had to be examined before any consideration was given as to whether that evidence was sole or decisive (second step – […]). "Preliminary", in that context, may be understood in

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### A. PRESS CONFERENCES AND INTERVIEWS

9. The first collection of documents consists of videos, along with transcripts and translations thereof, depicting the press conferences held by the Accused concerning the Three Batches and televised appearances and/or interviews conducted with them and/or other associates (namely Faton KLINAKU and Tomë GASHI) during the same period. Neither Accused raises any specific objection in relation to any items in this category.[20]

10. These materials are highly relevant to this case since they reproduce what the Accused said and did on camera; these words and actions are relevant to all counts and all *actus reus* and *mens rea* elements. In particular, the Indictment pleads material facts concerning all three press conferences, as well as statements made by the Accused following each of them.

11. The materials are authentic and highly probative. The words and actions of the Accused can be seen and heard, and the transcripts of what is tendered for admission ensures that everything said and done is presented with necessary context. These videos were obtained via open source, and are thus capable of independent verification.

12. No undue prejudice arises from the admission of these materials through the bar table. The Defence does not appear to contest that these press conferences and interviews were given, arguing instead that what is spoken is not illegal conduct.

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a temporal sense: the trial court must first decide whether there is good reason for the absence of the witness and whether, as a consequence, the evidence of the absent witness may be admitted. Only once that witness evidence is admitted can the trial court assess, at the close of the trial and having regard to all the evidence adduced, the significance of the evidence of the absent witness and, in particular, whether the evidence of the absent witness is the sole or decisive basis for convicting the defendant. It will then depend on the weight of the evidence given by the absent witness how much weight the counterbalancing factors (third step) will have to carry in order to ensure the overall fairness of the trial').

[20] *Compare* Annex 1 (Category 1) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

Further, the Defence will have the opportunity to present any evidence relevant to these items at trial.

B. FURTHER MEDIA CONCERNING THE ACCUSED, INCLUDING EXCERPTS FROM BATCHES

13. The second collection of materials concerns media articles and other content reproducing excerpts from Batches 1-3 and/or reporting assertions of the Accused relevant to the incidents set out in the Indictment. Neither Accused raises any specific objection in relation to any items in this category.[21]

14. The proffered materials are offered to prove: (i) that the Accused provided confidential documents to the media at the three press conferences; (ii) the kinds of information contained in the confidential materials disseminated by the Accused; and/or (iii) what the Accused said in relation to this dissemination as well as concerning their opposition towards the KSC and SPO, which is relevant to establishing their *mens rea* for the charged crimes. The SPO is not relying on the contents of these articles for the journalists' analysis or commentary on the events in question.

15. All these materials are authentic and probative on these points. Online letterhead and video graphics establish where the media materials originate. Most are dated or otherwise discuss current events which allow their date to be readily determined. The pictures of the Batches within these articles are presented with watermarks, signatures, and contents which give them indicia of reliability. As these materials are all open source, they are also all capable of independent verification.

16. No undue prejudice is caused from admitting the items in question. Defence arguments as to how quotations should be interpreted or challenging whether media portraying the batches came from the Accused are not matters of *prima facie*

[21] *Compare* Annex 1 (Category 2) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

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admissibility, but rather of weight to be assessed on the totality of the evidence at the end of trial. In any event, even a *prima facie* assessment of the evidence already shows that the Accused reiterated the same messages on multiple occasions.

## C. MATERIALS RELATED TO SEIZURES

17. The third collection of items includes material related to the collection of the Four Batches and to the contents thereof. In particular, this category includes:

i. *Orders.* The service of the two Pre-Trial Judge orders to Hysni Gucati and the KLA WVA to, *inter alia*, stop disseminating confidential information are plead as material facts in the Indictment. The same is true of the third order issued by the SPO following the distribution of Batch 3. These orders go to establishing the knowledge of the Accused of the confidentiality of the information they were disseminating and how, in conjunction with other evidence, they sought to violate the terms of these orders. They bear all hallmarks of being formal orders, and the First and Second Orders have formal filing numbers in the case record. All orders are signed. Neither Accused raise any specific objection in relation to this sub-category of materials.[22]

ii. *Investigative reports.* These are prepared by SPO staff members and contain all attendant hallmarks of SPO documents in the case record.[23] They provide information on search and seizure of confidential documents, most importantly the Batches. Objections raised to these items[24] are addressed below.

iii. *Delivery documents.* Delivery documents commemorate the formal handover of evidence by the SPO; they are prepared in the ordinary course of SPO business and have signatures formalising the transfer of information. Most of these are generated on a standard SPO form with official letterhead and dates, though this sub-category also includes a

[22] *Compare* Annex 1 (Category 3.1) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

[23] The only exception in this category is a report by an organisation other than the SPO (tendered in original and with English translation). This report describes the delivery of one of the batches, rather than its seizure. But the overall considerations applying to investigative reports apply to this additional report as well.

[24] *Compare* Annex 1 (Category 3.2) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

formal acknowledgement of delivery signed by Faton Klinaku. The Gucati Defence raises no specific objections in relation to these items, whereas the Haradinaj Defence objects on grounds that those who signed these documents are not on the SPO witness list.[25] These documents are not testimonial in character and no witness is required to contextualise their contents.

iv. *CCTV footage.* These are videos of the KLA War Veterans Association showing the delivery of the batches. The footage depicts the time periods when the documents were dropped off at the KLA WVA and contains clear dates and timestamps. The Gucati Defence presents no specific objection to these items, whereas the Haradinaj Defence challenges their provenance.[26] However, the footage matches the CCTV footage provided by media outlets also submitted in the present request.[27] Haradinaj posted this footage on his Facebook page,[28] and gave an on-site explanation of the delivery of Batches 1-2 to a journalist at what can be seen as the same office portrayed in the CCTV footage.[29] Haradinaj's explanation mirrors the contents of the footage. Furthermore, a copy of the entire CCTV footage seized at the premises of the KLA WVA has been disclosed to the Defence under Rule 102(3) and is available for further inspection.

v. *International organisation letters.* As is apparent on the face of them, these letters from international organisations confirm the confidential classification of information which they have provided to the SPO. This is relevant for, in particular, the counts of the indictment concerning violation of the secrecy of the proceedings (Counts 5 and 6). They are official documents prepared by these organisations, complete with formal letterhead, dates, and signatures. As to whether evidence in the batches emanated from these organisations, this evidence will be elicited by the SPO investigator to be called (W04841). Contrary to the Defence

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[25] *Compare* Annex 1 (Category 3.3) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

[26] *Compare* Annex 1 (Category 3.4) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

[27] 081926-01; 081926-02; 081926-03; 081926-04.

[28] SPOE00220783-SPOE00220783-ET Revised; 081979-10; 081979-13; 081979-14.

[29] 081979-05-TR-ET, pp.8-9 (081979-05, 17:28-19:24).

objections,[30] the relevance of these materials is clear and no undue prejudice is caused.[31]

18. The Defence challenge to the admissibility of the proffered investigative reports on grounds that they have been deprived of the right to challenge the investigator(s) in question should be dismissed.

19. The admissibility of evidence framework does not require the SPO to add these investigators to the witness list in order to tender their reports on investigative activities. These reports are prepared by official personnel in the ordinary course of their work and formally document acts they have carried out or assisted in the course of their official duties. The SPO staff in question were not tasked with taking any formal statements of witnesses, nor did they record any. Any comments of the Accused and other persons recorded in these reports were incidental to the operation which was being conducted in execution of judicial orders or to prevent more serious consequences caused by the conduct of the Accused. These reports are official documents which are not testimonial in nature.[32] They therefore do not fall under Rules 153-55.

20. In this regard, a distinction must be made between the investigative activities of the SPO (such as serving orders and seizing documents) and information from other persons (including statements of the accused). The Defence will get a chance to confront a witness on the former, because W04841 can speak to the investigative

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[30] *Compare* Annex 1 (Category 3.5) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

[31] In this regard, *see generally* Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2021, Confidential, paras 18-24.

[32] *See similarly* ICC, *Prosecutor v. Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, 18 November 2016 ('Ongwen Rule 68(2)(b) Decision'), para.60, n.111 (investigation report addressed in footnote); *Katanga and Ngudjolo* Conduct of Proceedings Decision, ICC-01/04-01/07-1665-Corr, para.98 ('[d]ocumentary evidence that is not a written record of testimonial evidence of a witness may be tendered without being introduced by a witness').

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activities conducted.[33] As to the latter context, statements of the accused do not implicate Rules 153-155 and there is no impediment to introducing them through the bar table.[34] To date, the Defence has not specifically indicated whether it disputes that the Accused made the statements reflected in these investigative reports,[35] which are consistent with statements that the Accused made elsewhere to the media.

21. No undue prejudice is caused from introducing these items reporting investigative activities, and their admission is consistent with the rights of the Accused.[36] The process by which the batches arrived at the KLA WVA is not criminally charged in this case.[37] That the batches were indeed seized by the SPO is confirmed by the Accused themselves in their public statements also submitted for admission.[38]

22. W04841 is competent to discuss how the SPO seized materials in this case, as well as what the SPO seized. W04841 will appear for questioning and can be fully examined by the Defence on these matters.[39] The Defence have and will continue to

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[33] In *Katanga and Ngudjolo*, the Chamber called the Prosecution's head of the investigations to summarise the investigation in that case. The witness was allowed to speak to the overall investigation, including the acts and conduct of other investigators. *See* ICC, *Prosecutor v. Katanga and Ngudjolo*, Decision on the Application by the Defence for Mathieu Ngudjolo for Postponement of the Commencement Date for the Hearings on the Merits (Rule 132(1) of the Rules of Procedure and Evidence), ICC-01/04-01/07-1603-tENG, 5 November 2009, para.17.

[34] In this regard, *see generally* ICTY, *Prosecutor v. Halilović*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, IT-01-48-AR73.2, 19 August 2005, paras 16-17 (confirming that statements of the accused could be admitted through the bar table, but finding the statement inadmissible on other grounds).

[35] The Defence does contest the admission of these reports, but not specifically on grounds that the Accused never said what is attributed to them.

[36] *Laukkanen and Manninen*, 50230/99, para.36 (finding no Article 6 ECHR violation when prosecution relied on statements of police officers; the identities of the officers were revealed and the contents of their discussion with the prosecution were explained).

[37] ECtHR, *Jakubczyk v. Poland*, 17354/04, 10 May 2011, paras 21, 47-52 (no violation of Article 6(3)(d) of the ECHR not to hear witness, a drug dealer, concerning illegal transport of psychotropic substances; applicant was convicted of offences related to production of drugs and storing equipment and substances for that purpose, and the evidence of the witness was not the sole or decisive evidence for determining those charges).

[38] *E.g.* 081931-01-TR-ET.

[39] The SPO intends to request that W04841 appear under Rule 154, but appearance under this rule does not affect the opportunity of the Defence to cross-examine the witness.

have a full opportunity to comment on and challenge these reports.[40] The Trial Panel can approach this information with any additional scrutiny it considers warranted when deliberating its judgment, including how much weight to give to these materials.

### D. FACEBOOK POSTS

23. Certain Facebook posts of the Accused include interviews or media articles which have been submitted under other categories. However, there are a variety of other Facebook posts for which admission is sought. In particular:

i. *Facebook posts linking to submitted evidence.* These posts establish the provenance of the interviews/media evidence submitted and demonstrate that the Accused intended to publicise their criminal activity to the maximum extent possible. This also includes Facebook posts relevant to seized materials, including a judicial order, delivery document, and CCTV footage.

ii. *Facebook comments of the Accused.* These are posts from the Accused on matters which go to their criminal intentions.

24. The Gucati Defence raises no specific objections in relation to this category, whereas the Haradinaj Defence objects to the admission of most of these posts on grounds that there is '[n]o statement exhibiting evidence and [these posts are] therefore hearsay'.[41]

25. This objection is misconceived - there is no provision in the statutory scheme preventing the admission of hearsay at the KSC, and no hearsay is tendered in the challenged posts.[42] These posts have all attendant indicia of coming from Facebook,

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[40] *Jussi Uoti*, 20388/02, para.35 (considering this factor as counterbalancing in a case finding no violation of Article 6 of the ECHR).

[41] *Compare* Annex 1 (Category 4) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

[42] National rules of admissibility of evidence do not apply at the KSC, as no such rules are included in the statutory scheme. This said, even in those jurisdictions which generally exclude hearsay, admissions of the accused are well-recognised as being non-hearsay. *E.g.* Rule 801(d)(2) of the United States Federal

and the sender and date of the posts is clearly identified in each. The posts contain information of direct interest to Mr Haradinaj, including interviews he gave and court orders served upon the KLA WVA. To the extent these posts link to media appearances, the media appearances are independently submitted and thus it is proven they occurred contemporaneous to the dated post. There is every indication that these posts are accurate and reliable. As they also constitute social media, they are available via open source and are thus capable of independent verification.

26. For these reasons, no undue prejudice is caused from admitting these materials. Defence challenges that the Accused did not have exclusive access to their Facebook accounts goes to the weight of the evidence,[43] not its *prima facie* admissibility. Challenges to the interpretation of the content of these posts likewise are matters going to how the posts should be relied upon rather than admissibility.

## E. Contact notes

27. The Prosecution seeks to tender contact notes between SPO staff members and persons whose were named in the batches disseminated by the Accused. These persons were contacted as part of an SPO office-wide initiative to check on the well-being of all persons named in the batches following their distribution by the Accused. The persons contacted are described as 'witnesses' within the meaning of this term in the Indictment.[44]

28. The contact notes all contain an official SPO letterhead and a standardised form giving them indicia of authenticity. They are prepared by SPO staff members for purposes of accurately recording security and other risks to those contacted.

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Rules of Evidence. Most of the challenged posts contain no statements of the accused at all, such as when Haradinaj links to media or documents without further comment.

[43] Defence Pre-Trial Brief on behalf of Hysni Gucati, KSC-BC-2020-07/F00258, 12 July 2021, Confidential, paras 153, 156-62.

[44] *See* Prosecution submissions on use of the term 'witness', KSC-BC-2020-07/F00281, 23 August 2021.

29. There are no procedural bars to admitting the evidence in question, including Rules 153-155. Rule 153 in particular is limited only to witness statements or transcripts provided in KSC proceedings,[45] understood as being only those statements prepared for the purposes of legal proceedings.[46] These contact notes were not taken for the purposes of a legal proceeding – the notes were not generated for any particular KSC case, a wide variety of SPO staff members produced them, and none of the persons contacted appear on the SPO witness list in this case. These persons were contacted to ensure that there were no security or well-being concerns to address after their confidential information was unlawfully revealed.[47] Such items may be admitted through the bar table - in *Lubanga*, for example, a table of Prosecution witness contacts concerning security matters was accepted via the bar table without engaging the ICC analogue of Rules 153-155 of the KSC Rules.[48]

30. The only testimonial statements regarding these contact notes were those produced by W04842, whose declarations prepared for these legal proceedings have been duly disclosed. W04842 will appear for questioning by all parties.[49]

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[45] Rule 153(1).

[46] ICTY, *Prosecutor v. Naletilić and Martinović*, Judgement, IT-98-34-A, 3 May 2006, para.223 (interpreting Rule 92 *bis* of the ICTY Rules, which is the ICTY's version of Rule 153); ICTY, *Prosecutor v. Galić*, Decision on Interlocutory Appeal Concerning Rule 92bis(C), IT-98-29-AR73.2, 7 June 2002, paras 28, 31 (from para.31, with reference to the ICTY analogue of Rule 153: 'Rule 92*bis* has no effect upon hearsay material which was not prepared for the purposes of legal proceedings'); *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para.9 (interpreting Rule 68 of the ICC Rules which contains the ICC's version of Rule 153).

[47] ICC, *Prosecutor v. Ongwen*, Decision on Defence Request to Submit 470 Items of Evidence, ICC-02/04-01/15-1670, 14 November 2019, paras 16-19 (finding the ICC analogue of Rule 153 not to be engaged when considering analytical reports of a prosecution psychiatrist after observing prosecution witnesses in court).

[48] ICC, *Prosecutor v. Lubanga*, Redacted Decision on the "*Quatrième requête de la Défense aux fins de dépôt de documents*", ICC-01/04-01/06-2693-Red, 7 March 2011, para.23. This decision pre-dates the amendment of ICC Rule 68, which more clearly introduces exceptions to the principle of orality akin to Rules 153-155. However, the former Rule 68 of the ICC Rules still governed the same subject matter (prior recorded testimony) it does today, and the amendment did not change the requirement that Rule 68 itself only extends to testimonial evidence.

[49] It is noted that W04842 is being called to testify, *inter alia*, on the scale of the resources the SPO had to devote to addressing security concerns following the dissemination of the Three Batches. He is also able to provide information on how official notes of SPO witness contacts were prepared, including

31. Contrary to the Defence submissions,[50] no undue prejudice is caused by the admission of these statements. It is premature to consider whether these items will be the sole or decisive evidence in relation to any of the offences charged, as this is not an admissibility consideration.[51] But it is emphasised at the outset that none of the elements of the charged counts require any of the contacted persons to have suffered any particular consequence:

i. The counts concerning obstructing of official persons (Counts 1 and 2) require that SPO personnel/SC officials be obstructed, not the persons contacted.

ii. Intimidation (Count 3) requires that the serious threat be directed at the person making or likely to make a statement to the authorities, but the SPO is not required to prove that this threat had any particular impact.[52]

iii. Retaliation (Count 4) likewise requires the Accused to have committed a 'harmful action' against a person. The act need not have 'caused harm' within the meaning of the crime. It is only required that the act itself can be qualified as harmful.[53]

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those he himself prepared for those persons he contacted. W04842 (and W04841, for that matter) are not presented as mere analysts of the information in evidence before the Trial Panel. They will provide facts not available from the remainder of the case record which go towards establishing the elements of the offences charged.

[50] *Compare* Annex 1 (Category 5) *with* Gucati Defence Objections, KSC-BC-2020-07/F00258/A02; Haradinaj Defence Objections, KSC-BC-2020-07/F00260/A02.

[51] *See* paragraphs 7-8 above.

[52] Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (redacted version notified 22 December 2020) ('Confirmation Decision'), para.62.

[53] *See* Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 52-53 (defining the element as 'harmful action', rather than, for instance, 'an action causing harm'). Article 70(1)(c) of the ICC Statute has a similar structure. The provision governs, *inter alia*, 'corruptly influencing' a witness, but ICC jurisprudence has determined that the witness need not have actually been influenced in order to sustain a conviction. It is the conduct that is 'corruptly influencing'; it is not required that the conduct 'corrupted' the witness. *See* ICC, *Prosecutor v. Bemba et al*., Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido Against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, 8 March 2018, para.737.

iv. Violating the secrecy of proceedings (Counts 5 and 6) is constituted by revealing the information indicated in those counts; no consequence is required to prove these offences.

32. The only aspect of the case where the consequences to protected persons must be proven is the sentencing enhancement under Count 6, which requires that protected persons suffered serious consequences and that the SPO substantially diverted investigative resources as a result of the acts and conduct of the Accused.[54] Indeed, the sole fact that the Accused's conduct brought about the need for this exercise by the SPO, as documented by the notes, is highly relevant to the latter factor. These materials are also evidentiary indicators that the conduct of the Accused was intimidating and/or retaliatory within the meaning of those crimes.

33. Whether or not the Accused is convicted does not depend on these contact notes. They are evidentiary indicators to establish that the acts and conduct of the Accused were directed at people like those contacted by the SPO, but they are one of many such indicators. All arguments that the SPO's case depends on absent, anonymous witnesses fundamentally misconceive and misrepresent the case the SPO is actually presenting.

34. The Pre-Trial Judge gave a reasoned decision as to why the persons concerned in these contact notes faced risks of such a nature that it was strictly necessary to withhold their identities from the Accused.[55] The Pre-Trial Judge also determined

[54] Had this evidence been tendered solely for sentencing, the right to confront the evidence would not be the same because the sentencing procedure is presumptively in writing. Rule 162(1), (4).

[55] Public Redacted Version of Decision on Non-Disclosure of Certain Witness Contacts, KSC-BC-2020-07/F00136/RED, 22 February 2021 (public redacted version notified 15 July 2021), para.24 ('[t]he Pre-Trial Judge considers that non-disclosure is strictly necessary under the circumstances in order to prevent any prejudice to ongoing or future investigations and to protect and respect the security, well-being, and dignity of witnesses, participating victims, or members of their family').

what counterbalancing measures were necessary to ensure the Defence could effectively challenge the evidence against them.[56]

35. The Trial Panel can apply all necessary caution to considering these notes as it evaluates the evidence at the end of trial. The Defence will be given an opportunity to challenge these notes in the present litigation, and can challenge W04842's evidence in relation to these notes.

36. There are therefore good reasons why the persons in these contact notes have not been called, and no undue prejudice is caused from admitting these notes.

## III. Classification

37. Pursuant to Rule 82(3), the annex to this filing is confidential in order to protect sensitive information of seized materials, the identities of SPO staff members, and the integrity of SPO investigations.

## IV. Relief sought

38. For the reasons above, the SPO requests: (i) the extension of the word limit requested at paragraph 3 above; and (ii) for the Trial Panel to admit the materials in Annex 1 into evidence.

**Word count: 5968**

**Jack Smith**

**Specialist Prosecutor**

Tuesday, 31 August 2021
At The Hague, the Netherlands

[56] Indeed, the notes themselves were disclosed as a counterbalancing measure ordered by the Pre-Trial Judge so as to enable the Defence the opportunity to meaningfully challenge W04842's evidence. KSC-BC-2020-07/F00136/RED, paras 29-30.