

**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 Christophe Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 10 September 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of Response to the Prosecution Request for Admission of  
Items through the Bar Table**

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## I. INTRODUCTION

1. On 31<sup>st</sup> August 2021, the Accused received notification of the 'Prosecution Request for Admission of Items through the Bar Table with Confidential Annex 1' ('Request')<sup>1</sup>.
2. The Accused responds as follows.

## II. SUBMISSIONS

### *Category 3.2: 'Materials Related to Seizures – Investigative Reports'*

3. The Accused objects to the admissibility of the items falling within this category through the Bar Table (that is, without being introduced by a witness).
4. The 'Official Notes' of [REDACTED], [REDACTED], and [REDACTED] and a 'Statement of Facts' from the [REDACTED]' amount to written statements of witnesses for the purposes of Rules 153-155 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (the Rules).
5. The accounts of events contained therein were provided in the context of or in anticipation of legal proceedings<sup>2</sup>, by three of the SPO investigators tasked with

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<sup>1</sup> Prosecution request for admission of items through the bar table with confidential Annex 1, KSC-BC-2020-07/F00291

<sup>2</sup> *Prosecutor v Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Record Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15, Trial Chamber IX, 18 November 2016 at paragraph 9

the investigation of the matters which give rise to the present indictment and by [REDACTED] in response to a 'Request for International Legal Assistance in Criminal Matters, Ref.SPO/SP/2021-1575-BK' from the Specialist Prosecutor's Office dated 19 January 2021.

6. There is no application by the SPO to adduce the above items through Rules 153 to 155 of the Rules.
7. The requirements of Rules 153 to 155 of the Rules are not to be simply circumvented by stating that the admission of a particular witness statement is sought under Rule 138(1) of the Rules<sup>3</sup>. Accordingly, the application to adduce these items from the bar table should be refused.
8. Even if these items did not fall under the scope of Rules 153 to 155, admission should be refused.
9. As a general rule, witnesses should give evidence orally and the best evidence rule is to be applied<sup>4</sup>.
10. The events to which the accounts relate are controversial (see, for example, the Gucati Pre-Trial Brief at paragraphs 54, 107, 131–136, 176, 252, 313, 337, 338–343, 347–349, 401–403) and no good reason has been provided for not calling the witnesses in question ([REDACTED], [REDACTED], [REDACTED] and any of the two [REDACTED] present on 22 September 2020)<sup>5</sup>.

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<sup>3</sup> *Prosecutor v Naletilic and Martinovic*, Judgement, IT-98-34-A, Appeals Chamber, 3 May 2006 at paragraph 223

<sup>4</sup> *Al-Khawaja and Tahery v UK* (26766/05 and 22228/06), ECtHR, Grand Chamber, 15 December 2011 at paragraph 120; *Prosecutor v Halilovic*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, IT-01-48-AR73.2, Appeals Chamber, 19 August 2005 at paragraphs 16 and 19

<sup>5</sup> *Schatschaschwili v Germany* (9154/10), ECtHR, Grand Chamber, 15 December 2015 at paragraphs 107(i) and 117: good reason for the absence of a witness is a precondition of admissibility

11. There is no comparison to be made with the admission of audio or video recorded interviews with suspects under caution in the presence of counsel<sup>6</sup>.
12. [REDACTED] (W04841) was not present at any of the events described in the 'Official Notes' of [REDACTED], [REDACTED], and [REDACTED] and the 'Statement of Facts' from the [REDACTED]' and cannot answer questions about those matters. The opportunity to cross examine a witness who may summarise the statements of others does not overcome the absence of the opportunity to cross-examine the persons who made them<sup>7</sup>.
13. Accordingly, the Trial Panel should refuse the application to adduce the same from the bar table:
- a. In the first instance, on the basis that the items fall within the scope of Rules 153-155 and, in the absence of any application to adduce them under those rules, should not permit the circumvention of those rules by use of a bar table motion under Rule 138(1); and
  - b. In any event, the prejudicial effect of the admission of that material in these circumstances (no good reason not to call the witnesses; controversial nature of the evidence; difficulties presented to the defence in challenging the evidence) would outweigh its probative value.
14. In relation to the Official Note of [REDACTED] at ERN 091909-091917 RED, the Accused understands that the SPO will in fact call the witness to give oral evidence (rather than adduce [REDACTED] report from the bar table). The evidence of [REDACTED] is subject to an outstanding objection to admissibility

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<sup>6</sup> *Prosecutor v Halilovic*, ante involved the admission of an interview conducted in accordance with the recording procedures in ICTY Rules 43 and 63 – see paragraph 19

<sup>7</sup> *Prosecutor v Slobodan Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraph 22

(see the Gucati Pre-Trial Brief, Annex 2: List of Objections to Admissibility of Disclosed Evidentiary Material). A separate motion challenging the admissibility of parts of the evidence of [REDACTED] will be filed in due course.

*Category 5: Contact Notes*

15. The Accused objects to the admissibility of the items falling within this category through the Bar Table (that is, without being introduced by a witness).
16. The 'Official Notes' of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], an anonymous SPO Officer(s), [REDACTED], [REDACTED] and [REDACTED] amount to written statements of witnesses for the purposes of Rules 153-155 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (the Rules).
17. The Official Notes record those SPO officers (the majority of whom are not witness security officers, but are Prosecutors or Associate Prosecutors), contacting other witnesses to ascertain their knowledge of the events which are the subject matter of this indictment, and the effect of those events upon them.
18. The Official Notes themselves were created and provided in the context of or in anticipation of legal proceedings<sup>8</sup> by the above SPO officers (Prosecutors, Associate Prosecutors, investigators or witness security officers).

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<sup>8</sup> *Prosecutor v Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Record Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15, Trial Chamber IX, 18 November 2016 at paragraph 9

19. Furthermore, the statements from the anonymous third party witnesses that are recorded within the Official Notes were provided in the context of or in anticipation of legal proceedings. The persons contacted were spoken to in their capacity as witnesses. The third party witnesses were aware that they were speaking to SPO officers, including prosecutors and associate prosecutors. It was explained that there was an investigation into the leaking of SPO material<sup>9</sup>. They were asked if they had any relevant information<sup>10</sup>. They were told that they might be called to testify as witness<sup>11</sup>. Contact in order to decide whether to further question the person is enough<sup>12</sup>.

20. The SPO has disclosed the transcripts of such contacts with witnesses (six) that were audio-video recorded (ERN 090141-TR-ET Part 1 RED, 090121-TR-ET Part 1 and 2 RED, 090125-TR-ET Part 1 and 2 RED, 090138-TR-ET Part 1 and 2 RED, 090134-TR-ET Part 1 and 2 RED, 090131-TR-ET Part 1 and 2 RED). Those audio-video recorded contacts were conducted on 20 and 21 January 2021 by [REDACTED] and [REDACTED], SPO officers involved in other witness contacts. Although fuller in detail, the transcripts follow a similar pattern to the contacts recorded in the 'Official Notes' and demonstrate exactly the nature of the contacts, namely that the SPO officers were interviewing the witnesses for any relevant information about the present investigation and how the events had affected them. Although previously on the SPO's List of Exhibits, it is noted

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<sup>9</sup> E.g. ERN 084247 at para.2, 089993 at para.2, 091813 at para.2, 091815 at para.2 and 4, 091817 at para.2, 091819 at para.2, 091821 at para.2, 091823 at para.2, 091826 at para.2, 091828 at para.2, 091830 at para.2, 091832 at para.2

<sup>10</sup> E.g. ERN 084245, 084247-084248 at paras.2 and 6, 088303 at para.2, 089934 at para.3, 089944 at para.4, 089948 at para.4, 089950 at para.3, 089951 at para.5, 089953 at para.6, 089955 at para.4, 089988 at para.2, 089989 at para.2, 089990 at para.2, 089991 at para.2, 089992 at para.6, 089993 at para.4, 090006 at para.1(a), 2 and 3, 090025 at para.2, 090058 at para.4, and 090067 at para.6

<sup>11</sup> E.g. ERN 084242

<sup>12</sup> *Prosecution v Ongwen*, Decision on the Defence Request to Submit 470 items of Evidence, Trial Chamber IX, 14 November 2019 at paragraph 15

that the SPO does not seek to adduce these transcripts through the bar table and it is assumed that the SPO no longer relies upon them accordingly.

21. There is no application by the SPO to adduce the contact notes in 'Category 5' through Rules 153 to 155 of the Rules.
22. The requirements of Rules 153 to 155 of the Rules are not to be simply circumvented by stating that the admission of a particular witness statement is sought under Rule 138(1) of the Rules<sup>13</sup>. Accordingly, the application to adduce these items from the bar table should be refused.
23. Even if these items did not fall under the scope of Rules 153 to 155, admission should be refused.
24. As a general rule, witnesses should give evidence orally and the best evidence rule is to be applied<sup>14</sup>.
25. Both the accounts from the SPO officers as to the nature and extent of their contact with the third party witnesses, and the statements attributed to the third party witnesses themselves, are in issue (see the Gucati Pre-Trial Brief at paragraph 389).
26. No good reason has been provided for not calling the authors of the notes to give oral evidence about nature and extent of their contact with the witnesses<sup>15</sup>.

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<sup>13</sup> *Prosecutor v Naletilic and Martinovic*, Judgement, IT-98-34-A, Appeals Chamber, 3 May 2006 at paragraph 223

<sup>14</sup> *Al-Khawaja and Tahery v UK* (26766/05 and 22228/06), ECtHR, Grand Chamber, 15 December 2011 at paragraph 120; *Prosecutor v Halilovic*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, IT-01-48-AR73.2, Appeals Chamber, 19 August 2005 at paragraphs 16 and 19

<sup>15</sup> *Schatschaschwili v Germany* (9154/10), ECtHR, Grand Chamber, 15 December 2015 at paragraphs 107(i) and 117: good reason for the absence of a witness is a precondition of admissibility

27. No good reason has been provided for not calling the third party witnesses to give oral evidence about their knowledge of the events relating to the indictment and how those events have affected them<sup>16</sup>.
28. The decision of the Pre-Trial Judge to order redacted versions of the contact notes to be disclosed<sup>17</sup>, contrary to the submissions of the SPO, has no bearing on the present issue – the Pre-Trial Judge did not address the issue of such witnesses giving evidence; he was not asked to consider protective measures relating to testimony under Rule 80 (including allowing a witness to give evidence in total anonymity in exceptional circumstances); he said nothing about whether any such witness could/should give oral evidence and if so under what circumstances.
29. No good reason has been provided for not calling any of the other persons participating in those witness contacts to give oral evidence<sup>18</sup> about the true nature and extent of their contact with the third party witnesses (such as [REDACTED]).
30. The two SPO Officers that the SPO will call to give oral evidence, [REDACTED] and [REDACTED], only participated in a limited number of the contacts (ERN 084232, 084303, 089886, 089908, 089909, 089910, 090066, 090264, 091902, 091907, 092914, 092918, 092945, 093379, 093386, 093388, 094748 and 094748). As they can give oral evidence about those contacts, there can be no justification to adduce those reports from the bar table (even if permissible). Whilst they can give oral

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<sup>16</sup> *Schatschaschwili v Germany* (9154/10), ECtHR, Grand Chamber, 15 December 2015 at paragraphs 107(i) and 117: good reason for the absence of a witness is a precondition of admissibility

<sup>17</sup> *Decision on Non-Disclosure of Certain Witness Contacts*, KSC-BC-2020-07/F00136, Pre-Trial Judge, 22 February 2021

<sup>18</sup> Except for [REDACTED] and [REDACTED] – see paragraph ? below in relation to the relevant Official Notes



evidence about those contacts, they cannot give evidence about the nature and extent of those contacts with witnesses when they were not present. The opportunity to cross examine a witness who may summarise the statements of others does not overcome the absence of the opportunity to cross-examine the persons who made them<sup>19</sup>.

31. As far as statements made in the presence of [REDACTED] and [REDACTED] during those contacts by third party witnesses, the objection to the admission of those statements remains.

32. None of the names of the third party witnesses in any of the contact notes have been disclosed to the Accused. Their identities are known only to the SPO. No disclosure has been made of the antecedents of those persons and the SPO has refused to confirm whether or not it has fully investigated their credibility<sup>20</sup>. The careful assessment of the credibility and veracity of the witnesses (albeit in their absence) which took place in *Jakubczyk v Poland* (17354/04), ECtHR, Chamber, 10 May 2011 cannot take place in the present case<sup>21</sup>.

33. Accordingly, the Trial Panel should refuse the application to adduce the contact notes from the bar table:

- a. In the first instance, on the basis that the items fall within the scope of Rules 153-155 and, in the absence of any application to adduce them

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<sup>19</sup> *Prosecutor v Slobodan Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Appeals Chamber, 30 September 2002 at paragraph 22

<sup>20</sup> In *inter partes* correspondence dated 11 June 2021, in response to the request to confirm that "the SPO has fully investigated the credibility of all anonymized 'witnesses' and 'potential witnesses' (as defined in the Prosecution Pre-Trial Brief, namely any person(s) likely to have information about a crime, the perpetrator, or important circumstances relevant to SC proceedings)", the SPO responded: "To protect the integrity and confidentiality of its investigations, the SPO is not in a position – nor is it obliged – to provide the information sought".

<sup>21</sup> *Jakubczyk v Poland* (17354/04), ECtHR, Chamber, 10 May 2011 at paragraph 50

under those rules, should not permit the circumvention of those rules by use of a bar table motion under Rule 138(1); and

- b. In any event, the prejudicial effect of the admission of that material in these circumstances (no good reason not to call the witnesses; controversial nature of the evidence; difficulties presented to the defence in challenging the evidence) would outweigh its probative value.

*Category 4: Facebook posts*

34. The relevance of these items depends upon their attribution to the Accused. Facebook is a medium which requires no verification of the identification of the individual creating and thereafter operating any particular account. In the absence of *prima facie* evidence of attribution to the Accused, the items are not relevant and have no probative value.

35. Accordingly, the items in Category 4 should not be admitted under Rule 138(1) of the Rules.

*Category 3.5: International Organisation Letters*

36. Any relevance in these letters is wholly dependent upon the evidence of [REDACTED]<sup>22</sup>.

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<sup>22</sup> See the Request at para 17.v

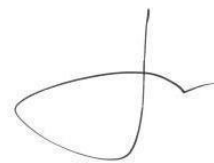
37. The evidence of [REDACTED], including as to whether evidence in the batches emanated from these organisations, is subject to an outstanding objection to admissibility in the absence of disclosure of the materials upon which [REDACTED] declaration and charts were prepared (see the Gucati Pre-Trial Brief, Annex 2: List of Objections to Admissibility of Disclosed Evidentiary Material). A separate motion challenging the admissibility of parts of the evidence of [REDACTED] will be filed in due course.

38. A decision on the admission of these letters from the bar table should thus await the determination of the objection to the evidence of [REDACTED].

### III. CLASSIFICATION

39. This filing is classified as confidential at the request of the SPO not to refer to SPO officers names in filings. A public redacted version, redacting such names, will also be filed.

Word count: 2743 words



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