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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 Guenael Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Publicly Redacted Defence Response to SPO Bar Table Motion Submissions

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I. INTRODUCTION

1. On 31 August 2021 the Specialist Prosecutor's Office ("SPO") filed its submissions concerning a Bar Table Motion, and sought to admit the majority, if not all, of its evidence through this process.[1]

2. On 1 and 2 September 2021, the Trial Panel convened a Trial Preparation Hearing,[2] at the conclusion of which a number of 'Oral Orders' were made.[3]

3. At that hearing, the Defence confirmed that it would respond to the SPO submissions in the usual way, that being in writing within ten (10) days.

4. The Trial Panel, by way of its 'Second Oral Order', "*orders the Defence to respond to the bar table motions and the submissions on classification by 10 September 2021.*"[4]

5. The Defence for Mr. Haradinaj seeks to file the following submissions in compliance with that Oral Order.

6. The Defence do not seek to include a detailed chronology or background for the purposes of this submission, not being relevant in terms of a specific

[1] KSC-BC-2020-07/F00291.

[2] KSC-BC-2020/07/F00267, Trial Panel II, Order for Submissions and Scheduling the Trial Preparation Conference, 21 July 2021, Public, para. 34(h)

[3] KSC-BC-2020-07, Transcript, Trial Preparation Hearing, 1-2 September 2021.

[4] KSC-BC-2020-07, Transcript, Trial Perpetration Hearing, 1-2 September 2021, Second Oral Order, Page 601 Line 03 and Page 601 Line 16.

section, but rather, will raise any pertinent dates and/or issues arising as when they may become relevant, within the body of the substantive submissions.

II. SUBMISSIONS

The Use of a Bar Table

7. As a general premise, it is accepted that the admission of evidence in the absence of live testimony *may* be appropriate, as a method of expediting a trial. However, it is submitted that particular care must be had to any decision to admit evidence as such, given to do so undermines the purposes of cross-examination, and might immediately prejudice the Defendant, and risk impeding a fair trial.

8. Further, it is a tool that ought not to be abused, in that, it ought not to be used as a means by which to adduce evidence that could be admitted through a witness, or to simply 'dump' large amounts of evidence on the opposing party through which it has no, or at least limited, opportunity to challenge.

9. In the instant case, it is notable that the majority of a party's evidence is subject to a Bar Table Motion.

10. The Defence for Haradinaj submits that the Trial Chamber ought not to allow such a process to proceed in such a manner.

11. In *Prosecutor v. Ongwen*,[5] the International Criminal Court ("ICC") Trial Chamber set out a comprehensive list of issues when determining whether witness statements *in lieu* of testimony ought to be considered:

a. Whether the testimony relates to matters not materially in dispute;

b. Whether the interests of justice are better served by the introduction of the disputed testimony;

c. Whether the written statement possess sufficient indicia of reliability; and

d. Whether the evidence is of such nature that it is unnecessary to call the witness to testify.

12. It is submitted that none of the criteria above are met.

13. Prior to *Ongwen*, in *Prosecutor v. Blagojević & Jokić*,[6] the ICTY Trial Chamber admitted evidence where it found that each of the "*written statement or transcript did not go to the acts and conduct of the Accused; was relevant to the present case; had probative value under Rule 89(c) of the Rules; and was cumulative in nature*". (emphasis added).

[5] *Prosecutor v. Ongwen*, ICC-02/04-01/15, 'Decision on the Prosecution's Application for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016.

[6] *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Judgement, 17 January 2005, para 26.

14. Again prior to *Ongwen*, in *Prosecutor v. Jean-Pierre Bemba Gombo*,[7] the ICC found that a number of factors ought to be taken into account, including:

a. Whether the evidence relates to issues that are not materially in dispute;

b. Whether that evidence is not central to core issues in the case, but only provides relevant background information; and

c. Whether the evidence is corroborative of other evidence.

15. Again, it is noted that none of these criteria are met.

16. In *Bemba*,[8] it was argued that rapidly or habitually "*[t]endering documents in an evidential vacuum – i.e. before any evidence has been received – does not accord with ICC practice*".

17. Numerous Chambers have encouraged the use of Bar Tables to foster judicial economy;[9] however, they have done so only in as far as it is not prejudicial to the accused, a position that has further been reflected in the approach of the *ad hoc* tribunals.

[7] *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 OA 5 OA 6, 'Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, para 78.

[8] The Prosecutor v. Jean-Pierre Bemba Gombo et al., ICC-01/05-01/13, Response to "Prosecution's Third Request for the Admission of Evidence from the Bar Table" 7 October 2015

[9] Gbago, Decision on Documentary Evidence, fn. 63 and references cited therein.

18. Further, Bar Table motions should not be used to admit prior testimony that ought to be admitted through other more appropriate means.[10]

19. Motions that attempt to admit evidence of a testimonial nature will therefore be denied. Documentary evidence of a testimonial nature that will be denied includes testimony taken by state authorities on events which are the subject of trial;[11] witness statements made to the Office of the Prosecutor/Police;[12] affidavits;[13] screening notes prepared by the Office of the Prosecutor after interview;[14] police reports relating witness accounts;[15] and statements made to international bodies by witnesses in relation to crimes observed by them.[16]

20. The 'Mechanism for International Criminal Tribunals' ("MICT") adopts a similar position to that expanded above, noting in *Mladić* "*tendering documents from the bar table is a supplementary method of introducing evidence which should be used sparingly*"[17] (emphasis added)

[10] As a comparator, Rule 68 of the ICC Rules of Procedure and Evidence.

[11] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014 ('Ruto, Decision on Admission of Evidence 10 June 2014'), paras 85-87.

[12] The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Decision on Defence Request to Submit 470 Items of Evidence, 14 November 2019 ('Ongwen, Decision on Request to Submit 470 Items of Evidence 14 November 2019'), para. 11.

[13] Ruto, Decision on Admission of Evidence 10 June 2014, para. 83.

[14] Ongwen, Decision on Request to Submit 470 Items of Evidence 14 November 2019, para. 15.

[15] The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017 ('Ongwen, Decision on Request to Submit 1006 Items of Evidence 28 March 2017'), para. 20.

[16] Ongwen, Decision on Request to Submit 470 Items of Evidence 14 November 2019, paras 9-10.

[17] S&S, Mladić Notebooks and Audio Files, para. 9.

21. The position specific to the arguments raised by the SPO in both oral and written submissions is dealt with below. However, it would appear clear, that a Bar Table should not provide the SPO *carte blanche* to adduce what it sees fit into evidence, particularly where such evidence is not agreed and is subject to challenge, both in terms of the substance and the manner in which it was taken or acquired, and where a witness is able to attend trial.

The Admission of the Items

22. The Defence acknowledges that the admission of certain items in the instant case, through the Bar Table, is justified, so as to assist with the trial being heard expeditiously. Items such as media recordings can quite properly be admitted through the Bar Table, if it is that the Trial Panel is satisfied the application is correctly made and appropriately justified.

23. The Defence for Mr. Haradinaj makes clear at the outset therefore, that it does not raise objections to the admission of those items through the Bar Table as highlighted at paragraphs 9 and 13 of the submission of the SPO.[18] In raising no objection to their admission, it ought to be clear that the Defence limits this lack of objection to just the Bar Table motion, and it ought not to be deemed as accepting the evidence in terms of reliability or probative value. That is a matter for trial.

[18] KSC-BC-2020-07/F00291.

24. The Defence do not accept however, and therefore oppose, the admission of the 'Contact Notes'[19] and all evidence arising from and related to those notes through the Bar Table including summaries of the note taker, the Defence further objects to the admission of the investigative reports,[20] delivery documents,[21] international organisation letters,[22] Facebook posts,[23] the application in respect of those matters being ill-founded, premature, and in any event, a mischaracterisation of that evidence, or 'class' of evidence.

25. As noted in the submissions by the Gucati Defence, and endorsed by the Haradinaj Defence, the 'Official Notes' of [REDACTED], [REDACTED], and [REDACTED] and the 'Statement of Facts' by [REDACTED] constitute witness statements pursuant to Rules 153-155 of the Rules.

26. Further, the Defence has previously requested, and been denied, details of, and statements produced, the SPO staff members (investigators, security officers and prosecutors) involved in the search and seizure operations conducted by the SPO on 8, 17, 22 and 25 September 2020. The SPO has served an Official Note[24] that addresses the operation conducted on 25 September 2020 and additionally the statements of [REDACTED] (Witness W04841).

[19] KSC-BC-2020-07/F00291, Public with Confidential Annex 1, paras. 27-36.

[20] KSC-BC-2020-07/F00291, Public with Confidential Annex 1, para,17(ii).

[21] KSC-BC-2020-07/F00291, Public with Confidential Annex 1, para,17(iii).

[22] KSC-BC-2020-07/F00291, Public with Confidential Annex 1, para,17(v).

[23] KSC-BC-2020-07/F00291, Public with Confidential Annex 1, paras. 23-26.

[24] Disclosure 42, ERN 102754.

However, [REDACTED] was not present on the three earlier occasions, although it is clear that [REDACTED], [REDACTED], and [REDACTED] were on some if not all of those dates and other persons unknown to the Defence. As the Gucati Defence points out, these matters are controversial and in dispute and no good reason has been given for not calling them.

27. The Defence does object to any attempt to introduce evidence, contact notes or investigative reports related to those operations held on 8, 17, 22 and 25 September 2021 without having the opportunity to cross-examine the authors of those reports or statements. This relates equally to Prosecutors, Investigators, Operational Security Officers or other support staff that have been involved in the collection and collation of such information relied upon by the SPO.

28. For the avoidance of doubt, and as noted by the Gucati Defence, the 'Official Notes' recorded by [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], constitute written witness statements under Rules 153-155 of the Rules.

29. The Defence for Haradinaj takes note of and endorses the position put forward by the Gucati Defence that the statements of anonymous third parties recorded in the Official Notes were provided in the context of or in

anticipation of legal proceedings. That must follow from any sensible reading of what was discussed. The contact was not part of any regular procedure, it was directly related to the leaks of purportedly confidential material and the impact, if any, it might have had on the witnesses. The Gucati Defence makes reference to the transcripts of contact with six witnesses contacted on 20 and 21 July 2021 by two SPO Officers,[25] although the transcripts are not included in the Bar Table Motion and seemingly no longer relied upon.

30. Both the Haradinaj and Gucati Defence have previously set out that the contact with witnesses and the statements that stem from that contact is at issue in this case. The SPO seeks to only call [REDACTED] and [REDACTED], and as noted previously, they have had limited contact.[26]

31. The Defence for Haradinaj takes note and endorses the position put forward by the Gucati Defence that (a) there is no justification for adducing reports from the Bar Table where the witnesses are giving oral evidence; (b) those SPO Officers cannot give evidence as to what other SPO Officers have recorded; and (c) the opportunity of cross-examining [REDACTED] and [REDACTED]

[25] 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.

[26] ERN 084232, 084303, 089886, 089908, 089909, 089910, 090066, 090264, 091902, 091907, 092914, 092918, 092945, 093379, 093386, 093388, 094748 and 094748.

does not overcome the lack of the opportunity to cross-examine the persons who took the statement and/or the witness who provided the statement.[27]

32. The Defence therefore ***does*** object to the motion to admit those items noted at paragraph 17, 23, and 27 of the SPO's submission.[28]

33. The basis of the objection is summarised within Annex 2 filed with the Defence's Pre-Trial Brief[29] and the Trial Panel should rule on the Bar Table Motion in this regard only after having ruled on the objection to the admissibility of evidence.

34. In terms of the specific submissions in respect of the Bar Table, the simplistic position of the Defence is that the sought admission of what is essentially the significant majority, if not all, of the SPO case through a Bar Table is wholly prejudicial to the Defendant. It is so to such an extent that any trial will not and cannot adhere to the fair trial guarantees as per Articles 3 and 21 of the Law on Specialist Chambers and Specialist Prosecutor's Office (the "Law")[30] and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").

[27] *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.

[28] *Ibid.*

[29] KSC-BC-2020-07/F00260, Annex 2.

[30] Law No. 05/L-053.

35. The voluminous nature of the motion is inappropriate, following the ICTY ruling in *Karadžić*, in that it removes the much-needed contextualisation from the disclosed material,[31] and effectively shifts the burden from the Prosecution to the Defence in respect of highlighting the reliability of the evidence.[32]

36. Consequently, parties are expected to admit documents through witnesses where possible and to renew Bar Table motions in order to 'fill in' gaps at the end of proceedings.[33]

37. Of particular relevance in terms of the instant case is, again, the position in *Karadžić* and further, that of *Stanišić and Župljanin* where it was noted that written media reports will not generally be admitted through a Bar Table without a witness to testify as to the accuracy of their content,[34] nor will photographs or maps (which are of limited functional utility without a corroborating witness) and/or intercepts (which carry no *prima facie* indicia of authenticity or reliability).[35]

38. The submissions of the SPO at paragraph 2[36] of its filing are noted, however, in reciting Rule 138 of the Rules, the SPO have failed to include the opening

[31] Karadžić, Decision on Accused's Bar Table Motion 02 April 2014, para. 6.

[32] Karadžić, Decision on Prosecution's First Bar Table Motion 13 April 2010, para. 8.

[33] Karadžić, Decision on Prosecution's First Bar Table Motion 13 April 2010, paras 8-9.

[34] Stanišić and Župljanin, Decision Granting Supplemental Bar Table Motion 1 February 2011, para. 20.

[35] Karadžić, Decision on Prosecution's First Bar Table Motion 13 April 2010, paras 12-13.

[36] KSC-BC-2020-07/F00291, further, footnote 5.

position, in that the Rule reads "*Unless challenged or proprio motu excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect*".

39. In the instant case, not only is the submission of the Defence that evidence admitted in the manner proposed prejudicial, but in any event, the evidence itself is challenged. Accordingly, the evidence ought not to be simply admitted in the manner suggested; Rule 138 does not provide that any and all evidence can be admitted regardless.

40. The proposed admission of evidence through the Bar Table in the instant case is a clear attempt by the SPO to circumvent the usual rules concerning the admission of evidence, there being clear deficiencies and gaps in the way in which that evidence has been collated.

41. The SPO is in effect seeking to use the Bar Table as a means by which those gaps can be filled, without there being a challenge to the same.

42. The Defence readily accepts what the SPO refers to as its "*broad discretion regarding the process for admissibility of evidence*",[37] however, in the same vein, this discretion does not give the power to circumvent the normally accepted

[37] *Ibid* at paragraph 5.

rules of evidence where such circumvention gives rise to prejudice to the Defendant, as would be the situation arising in the instant case.

43. In *Prosecutor v. Karadžić*[38] the ICTY Trial Chamber noted that it must:

> "*ensure the proper balance between an expeditious and a fair trial and it considers that the admission into evidence at this stage of proceedings, prior to any oral evidence being presented, of a large number of items, many of which go directly to the charges against the Accused, as discussed further below, is not consistent with a fair trial.*"[39]

44. Further, and importantly for the purposes of the instant case, the ICTY Trial Chamber went on to note:

> "*…a significant consequence of the admission of evidence from the bar table is that it is then incumbent upon the opposing party to identify the most appropriate witness with whom to challenge a particular document instead of being able to cross-examine the witness who the offering party has determined is best able to speak to that document in the context of its case.*"[40]

45. The position in the instant case is perhaps even more stark, in that the SPO only intends on calling three witnesses at this stage,[41] two at the time of filing

[38] *Prosecutor v. Karadžić,* Decision on the Prosecution's First Bar Table Motion, ICTY, IT-95-5/18-T, 13 April 2010.

[39] *Ibid.* at paragraph 8.

[40] *Ibid.*

[41] Noting that the SPO seeks to amend its witness list to include a third witness.

the Bar Table motion, neither of whom are the individuals who provide evidence within the context of the 'contact notes' for instance, in that neither witness is the subject of those notes.

46. Accordingly, the Defendant does not have any opportunity to cross-examine anyone about the evidence in question.

47. It is noted that the SPO has consistently sought to assert that counter-balancing measures have been put into place as two of their 'investigators' will be giving evidence and therefore they can be cross-examined. This however is simply a fallacy in the current context.

48. The two investigators can be cross-examined on an extremely limited basis, they cannot be cross-examined on what others said, they can only be cross-examined on what ***they*** did, or ***they*** said.

49. To admit this 'class' of evidence through the Bar Table therefore admits the evidence and precludes the Defence from having any effective opportunity to challenge the individuals making the statement and the contents thereof.

50. This is wholly prejudicial to the Defendant.

51. Considering the position of the ICC, any Bar Table Motion should justify why the document is not tendered through a witness; where they fail to do so, as

the Defence would submit is occurring in the instant case, the Court may refuse to admit that evidence.[42]

52. The SPO at paragraph 6 of its submission acknowledge that evidence can be admitted through the Bar Table in the exercise of discretion "*so long as the evidence is not subject to extra procedural requirements – such as those in Rules 153-155*".

53. Here arises a further issue of contention between the parties, one that led to both contradictory submissions on the part of the SPO at the recent Trial Preparation Hearing, and further, the exercising of a startling degree of mental gymnastics when defining what is and what is not a witness, and further to that, whether the comments of those individuals contained within the contact notes were "*incidental to the operation which was being conducted…*", whether they were taken in the course of an investigation, whether they were testimonial in nature, and what the purpose of such notes was.

54. Again, this is an example of the SPO seemingly seeking to deliberately 'game the system' so as to avoid its disclosure responsibilities, and therefore continue with what, at best, is a cavalier approach to disclosure by the SPO.

55. The underlying intention of the SPO would appear to be clear, but particularly so at para. 29 of its submissions where it notes "*Rule 153 in particular is limited*

[42] Ntaganda, Decision on Prosecution's Request for Admission of Documentary Evidence 28 March 2017, para. 13.

only to witness statements of transcripts provided in KSC proceedings, understood as being only those statements prepared for the purposes of legal proceedings. 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 on the SPO witness list this case" (emphasis added).

56. A number of issues arise following this statement:

a. Who is a witness and when does an individual become a witness;

b. What are 'legal proceedings'; and

c. Why were the contact notes generated in the first instance.

57. The Defence maintains that those who were contacted by the SPO after the three batches of documents were leaked were contacted following those leaks, and as a direct consequence of those leaks, seeking to illicit evidence concerning the impact, if any, on those individuals.

58. At page 42 of the provisional transcript, the SPO sought to suggest that the individuals in question "*…are not witnesses in the Gucati Haradinaj case*". This submission is without foundation and cannot be maintained.

59. If we consider the transcript of the Status Conference before the Pre-Trial Judge on 8 January 2021, at pages 100-101, the SPO refers to witness

statements being taken and pertinently, at lines 1-6 of page 101 of the transcript, the SPO submits "*…the interviews that I have made reference to, those are among the group of undertakings which we are currently undertaking as we speak and also ones which, by 19 February deadline, we aim to provide all relevant evidence. So the 19 February deadline, subject to the caveats I mentioned earlier, is when the Defence should have everything*."[43]

60. Again, in that same Status Conference, at lines 14-15 of page 108 of the transcript, the SPO submits: "*The interviews could lead to witness statements and of course those will be disclosed.*"[44] Further on that same page, at lines 20-24, the SPO submits "*I can give a little bit of further indication, perhaps also to appease counsel who raised this matter earlier, in terms of the witness interviews we are conducting. And keeping it very general, I can say that that will go to the impact of the actions or the alleged actions of the accused.*"[45] (emphasis added)

61. The position would therefore appear to have been settled some seven months ago, however, the position changed at the Status Conference of 24 February 2021, where the SPO determined that they would in fact not be conducting

[43] It is of note, that quite separate from the issue of categorisation of an individual as a witness, the Defence did not receive disclosure by 19 February.

[44] Status Conference Transcript, 8 January 2021.

[45] *Ibid*.

any interview to take statements,[46] despite confirming that this process was already ongoing at the conference of January.

62. Turning back to the Trial Preparation Hearing, and again the provisional transcript of the 1 September 2021 hearing, at line 22 of page 42, the SPO go on to suggest that "*The statement of the witness was not taken in the context of legal proceedings.*"

63. It is of note that at this juncture, the SPO seemingly accepts that it was in fact a statement, although contradictory submissions are made later.

64. The suggestion that the statements were not taken in the context of legal proceedings, however, is with respect, nonsensical.

65. The SPO reveal their motive at line 1-3 of page 43 of the Provisional Transcript of the Trial Preparation Hearing on 1 September 2021, however where they state: "*not only would this impact protective measures, but <u>it would also impact disclosure. We have an obligation to disclose all the statements of our witnesses</u>.*" (emphasis added).

66. It is submitted that the SPO do not want to disclose, nor do they want to call any such witness, and therefore have taken deliberate steps in their use of terminology to try and avoid this.

[46] KSC-BC-2020-07, Transcript, Status Conference Transcript, 24 February 2021, at paras 16-19, page 137.

67. This is in turn impacts upon the Bar Table motion, as per the Defence submissions above, in that the motion appears to be a deliberate ploy to seek to avoid disclosure obligations, and the ordinary rules for adducing evidence.

68. Contrary to the submissions of the SPO, the Defence submits that the contact, and the information ascertained as a consequence was not "*incidental*", referring to paragraph 44 of the Trial Preparation Hearing Transcript of 1 September at line 3, the SPO again refer to it being a "*statement*".

69. The simple fact remains that information was taken from individuals, that information is now adduced as evidence by the SPO, and therefore the Defence must be given the opportunity to cross-examine the individual(s) who provided that information. Failure to do so actively prevents the Defendant from challenging evidence being adduced, and therefore the Defendant's right to a fair trial is being positively undermined.

70. At page 95 of the Trial Preparation Hearing Provisional Transcript, lines 5-14, the SPO submits "*you can see it from the contact notes of witnesses.*[47] *There is a lot of fear. There are a lot of struggles that they're having, and these people had to be systematically contacted on an office-wide level in a way that was never contemplated under the criminal investigation within the Court's core mandate.*"

[47] It ought to be noted that the SPO has reverted from referring to 'Statements' and again gone back to the use of 'contact notes', however, the SPO still categorises these individuals as 'Witnesses'.

71. The evidence offered therefore goes, in the submission of the Defence, to the very heart of offences indicted, including those relating to 'intimidation' and/or 'retaliation'.

72. Having regard to *Limaj:*[48]

> *"[W]hen a written statement touches upon the very essence of the prosecution case against the accused, the witness should be available for cross-examination."*[49]

73. This position was acknowledged further in *Martić*, where the ICTY Trial Chamber acknowledged that cross-examination was a necessary counterbalance whenever Rule 92 *bis* statements include evidence that is pivotal to the prosecution's case:[50]

> *"[W]here the individual, whose acts and conduct are described in the statement, is so proximate to the accused and where the evidence is so pivotal to the Prosecution case, the Trial Chamber may decide (i) not admit the statement at all, or (ii) to require the witness to appear for cross-examination."*[51]

[48] *Prosecutor v. Limaj*, IT-03-66-T, 'Decision on Prosecutor's Third Motion for Provisional Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*', 9 March 2005.

[49] *Ibid*, para 6.

[50] *Prosecutor v. Milan Martić*, IT-95-11-T, 'Decision on Prosecution's Motions for the Admission of Written Evidence pursuant to Rule 92 *bis* of the Rules', 16 January 2006.

[51] *Ibid*, para 14.

74. The contact with these witnesses formed part of the investigation, as the contact was not part of a periodic 'welfare check' for instance, but rather, instigated by what the SPO submits is the criminal conduct of the Defendant(s), and therefore sought to elicit evidence from these individuals – evidence that the SPO now seeks to adduce. But rather than have that evidence adduced by a witness and therefore allow the same to be challenged, the SPO seeks to adduce through the Bar Table and therefore prejudice the Defendant.

75. The fact that the SPO maintains, at page 108 of the Provisional Transcript of the Trial Preparation Hearing of 1 September 2021, that "*no witness statements were taken during these operations*", is a deficiency in terms of the SPO's investigation. It is a deficiency that the SPO seek to remedy by avoiding its obligations, and further, avoiding Rules 153-155 of the Rules of Evidence and Procedure which dictates when evidence can be adduced in lieu of witness testimony.

76. The evidence at issue does not accord with either of those three Rules and therefore the reasoning behind the use of terminology by the SPO has become apparent.

77. Having regard to decisions of previous tribunals on analogous issues, the Panel's attention is drawn to the ICC case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.[52]

78. The Chamber in *Katanga* considered the issue of whether out-of-court statements qualified as testimony.

79. The Chamber highlighted an initial 'key factor' of whether the out-of-court statement was given to a representative of the Office of the Prosecutor.[53]

80. In the instant case, in their request for the admission of items through the Bar Table,[54] the SPO states that "*[t]hese persons were contacted as part of an SPO office-wide initiative to check on the well-being of all persons named in the batches*", and further went on to submit that the notes and/or contact were not taken and/or made, for the purposes of legal proceedings.

81. However, the ICC in *Katanga* went on to observe:

> "*[I]n principle, statements given to private persons or entities will not be considered as testimony unless there are exceptional reasons for doing so. By contrast, a statement given to representatives of an intergovernmental organisation with a specific fact-finding mandate may be considered as*

[52] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 'Decision on the Prosecutor's Bar Table Motions', 17 December 2010.

[53] *Ibid.*

[54] KSC-BC-2020-07/F00291, paras. 27 and 29.

testimony if the manner in which the statement was obtained left no doubt that the information might be used in future legal-proceedings."[55]

82. In *Gbabgo*,[56] the ICC Prosecutor sought to admit the written statements of three witnesses and multiple associated documents, informing the Trial Chamber that the examination of the three proposed witnesses was unnecessary.

83. The ICC Prosecutor's application also devalued the importance of the sub-rule's listed factors in favour of admission, such as the cumulative nature of the statement, and that its contents are not in dispute, thereby maintaining that these are simply designed to guide the Court in the exercise of its discretion and "*are not prerequisites for admission under the rule*."[57] The ICC Prosecutor argued that the Court should exercise its discretion in admitting all three statements, because the statements did "*not relate to disputed issues at the core of [the] case*"[58] and were "*of a cumulative and corroborative nature*."[59]

[55] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 'Decision on the Prosecutor's Bar Table Motions', 17 December 2010, para 48.

[56] *Prosecutor v. Gbagbo*, ICC-02/11-01/15, 'Public Redacted Version of "Prosecution Application to Conditionally Admit the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(2)(b) and the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(3)', 26 April 2016.

[57] *Ibid*, para 15. Note para 19 of the aforementioned referenced case, which states that the Appeals Chamber has provided guidance as to factors to be taken into account: "(i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence."

[58] *Ibid*, paras 24, 28 and 32.

[59] *Ibid*.

84. However, the Chamber in *Gbabgo* disagreed with all the Prosecution's characterisations. It noted that two of the statements amounted to "*one of the core and disputed issues*" in the case and that the proposed evidence could "*reasonably assist the Chamber in the resolution of this matter*".[60] Further to this, the Chamber rejected the ICC Prosecution's claims that the statements were cumulative and corroborated by other evidence.

85. The second key factor, in determining whether an out-of-court statement qualifies as testimony, is that "*the person making the statement understands when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings. It is not necessary for the witness to know against whom his or her testimony may be used, or even for the witness to know which particular crime is being investigated or prosecuted.*"[61]

86. It is clear that the contact notes were generated following the leaks, and therefore, they were generated in the context of legal proceedings: specific proceedings, namely the instant case.

87. It is nonsensical to suggest otherwise, given that but for the leaks of the three batches, and what the SPO allege the Defendant(s) did following those leaks, the contact with those witnesses would never have been made.

[60] *Prosecutor v. Gbagbo*, ICC-02/11-01/15, 'Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3)', 9 June 2016, para 15.

[61] *Ibid* at para. 49.

88. During the Trial Preparation Conference on 1 September 2021, Judge Mettraux, at line 18 onwards of page 114 of the Provisional Transcript, asked of the SPO:

> "*…whether you have inquired with any of the persons concerned whether they are the author of either notes, or the individual or the witnesses to whom they spoke whether they would be prepared to testify, and whether you have received an indication by some or all of them that they are…*".

89. The answer given by the SPO was not altogether clear, and upon the question being repeated, the SPO responded "*I think I'm stating it correctly, that once we got the ruling of the Pre-Trial Judge, that we did not need to disclose their names, we did not have any further discussions about which ones should be on our witness list because it was never our position that they would be.*"

90. Again, and with respect, this did not answer the question.

91. The short answer to the Judge's question is yes. This question was asked, and was asked of the witnesses being questioned. It is wholly unclear as to why the SPO felt unable to give this very straightforward answer to a straightforward and clear question.

92. The Trial Panel's attention is draw to Disclosure 8, where 13 individuals appearing in contact notes appear to have been asked this question, a

variation of this question, or at the very least, having expressed a position in relation to the issue.

93. Specifically, the following is noted:

a. KSC-BC-2020-07-084236-084242 RED at para. 18 – reference is made to the fact that if there should be a trial the witness would be called to testify who in turn confirm that he plans to remain cooperative with the SPO;

b. KSC-BC-2020-07-089990-089990 RED at para. 5 – says he is a public witness;

c. KSC-BC-2020-07-090041-090042 RED at para. 3 – the witness confirms that he is not an anonymous witness;

d. KSC-BC-2020-07-090125-TR-ET Part 2 RED at p. 16, paras. 10-11 – the witness confirms that he is happy to go to The Hague and therefore intends on giving evidence;

e. KSC-BC-2020-07-090131-TR-ET Part 1 RED at p. 10, paras. 11-14 – says he/she is available, and therefore confirmation that the witness views themselves as a witness.

f. KSC-BC-2020-07-091813-091814 RED at para. 3 – the witness confirms that the 'leaks' did not affect his willingness to participate in the process;

g. KSC-BC-2020-07-091819-091820 RED at para. 3 – the witness confirms that they are willing to participate in the process, presumably in answer to a question concerning whether the leaks have changed this position or otherwise;

h. KSC-BC-2020-07-091821-091822 RED at para. 4 – the witness confirms that they are willing to testify in order to assist the SPO;

i. KSC-BC-2020-07-091826-091827 RED at para. 3 – the witness confirms that the 'leaks' did not affect his willingness to participate as a witness;

j. KSC-BC-2020-07-091830-091831 RED at para. 4 – the witness confirms that the 'leaks' did not affect his willingness to participate in the proceedings;

k. KSC-BC-2020-07-091850-091851 at para. 4 – the witness stated she was willing to testify, presumably in response to a question concerning whether they would be willing to do so or otherwise;

l. KSC-BC-2020-07-091854-091855 RED at para. 3 – the witness confirmed that he would be willing to testify if needed;

m. KSC-BC-2020-07-091904-091905 RED at para. 8 – said if called as a witness, he will be genuine and tell what he has said before.

94. The position is more developed than this however, in that, particularly in terms of at least one witness, the witness had been told that they ***would*** be required to give evidence before the Trial Chamber.

95. When the SPO met with witness A.7 B.5E on 9 October 2020 in order to discuss the witness's current security situation, it is noted:[62]

> "*He was informed that, should there be a trial before the Specialist Chambers, he would be called to testify as a witness.*"

96. It would appear abundantly clear therefore that the SPO deemed these individuals witnesses of fact, and the witnesses themselves understood this to be the case, and further, that specific questions were asked of those witnesses with regard to whether they would attend Court to give evidence.

97. Accordingly, those individuals subject to those contact notes are witnesses.

[62] 084236-084242 RED, para. 18.

98. The SPO is now trying to change their categorisation on a wholly inappropriate and disingenuous basis, and use a justifiable mechanism to ensure expeditiousness to avoid its disclosure obligations.

III. CONCLUSION

99. The SPO's application is premature, in that in seeking to admit virtually the entirety of its case through the Bar Table, it does so trying to avoid testing and challenging of its evidence.

100. This is not the purpose of the Bar Table, noting *Karadžić:*

> *"The bar table should not generally be the first port of call for the admission of evidence. It is rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party fill specific gaps in its case at a later stage in the proceedings. […] Notwithstanding that it may result in the saving of time inside the courtroom, in the circumstances of the present case, the Chamber considers that it is essential to view the bar table as mechanism to be used on an exceptional basis and simply as another means by which evidence may be introduced wholesale into the court record*".[63] (emphasis added)

[63] Karadžić, Decision on Prosecution's First Bar Table Motion 13 April 2010, para. 15.

101. The contact notes are clearly evidence of fact, the difference in terminology and the mental gymnastics on display is noted; however, these individuals who are the subject of the contact notes were contacted regarding at least two of the offences as indicted.

102. They were contacted as witnesses, and have the status of witnesses.

103. The SPO deems them to be witnesses, and initially, in oral submissions before the Pre-Trial Judge, referred to them as such, and further noted that statements would be, or were in the process of being taken.

104. The SPO for an unknown reason has now decided to depart from this position and categorisation, as is its right, however, it is still seeking to adduce the evidence obtained.

105. The Bar Table, for the reasons given, is not the appropriate method by which this evidence ought to be adduced; those witnesses should be called to give evidence so that that evidence can be challenged.

106. In the instant case, the admission of a statement without cross-examination infringes upon the right to a fair trial. Therefore, in compliance with the overriding obligation to ensure a fair trial, cross-examination must be allowed given that:

> *"the [statements touch] upon a critical element of the prosecution's case, or goes to a live and important issue between the parties, as opposed to peripheral or marginally relevant issue."*[64]

107. If it is the SPO's position that the evidence is not required to prove the offences indicted, then the position advanced by the Presiding Judge must hold, in that the evidence within the contact notes is '*irrelevant*'.

108. Accordingly, if this is the position, the application must fall foul of *Ntaganda*,[65] in that if the SPO cannot demonstrate "*with clarity and specificity, the relevance of each item and where and how it fits into its case, the document cannot be admitted*" (emphasis added).

109. If the evidence is not required, then it ought not to be admitted at all.

110. In any event, the Bar Table motion as currently argued must fail, on the basis that the same is wholly prejudicial to the Defendant, and other, appropriate methods of adducing that evidence are readily available.

Word Count: 5,995 words

[64] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony, 1 May 2008, para 19.

[65] Ntaganda, Decision on Prosecution's Request for Admission of Documentary Evidence 28 March 2017 para. 9.

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