



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Before: Trial Panel II
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

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**Decision on the Prosecution Request for Admission of Items
Through the Bar Table**

Specialist Prosecutor

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TRIAL PANEL II ("Panel"), pursuant to Articles 40(2) and (6)(h) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 138(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 21 July 2021, the Panel invited the Specialist Prosecutor's Office ("SPO") to consider the possibility of filing bar table motions in respect of (a) SPO official notes; (b) newspaper articles in respect of which the author will not be called; and (c) Facebook postings attributed to the Accused.¹
2. On 31 August 2021, the SPO filed a request for admission of items through the bar table ("Request").²
3. On 6 September 2021, further to an oral order of the Panel,³ the SPO also made written submissions on the classification of the exhibits in the Request.⁴
4. On 10 September 2021, pursuant to the aforementioned oral order,⁵ the Defence for Hysni Gucati ("Gucati Defence") and the Defence for Nasim Haradinaj ("Haradinaj Defence") filed their respective confidential responses to the Request.⁶

¹ F00267, Panel, *Order for Submissions and Scheduling the Trial Preparation Conference* ("21 July Order"), 21 July 2021, paras 10, 34(k).

² F00291, Specialist Prosecutor, *Prosecution Request for Admission of Items Through the Bar Table* ("Request"), 31 August 2021.

³ Oral Order to Parties Regarding Classification of SPO Bar Table Exhibits, 2 September 2021, p. 601 lines 3-16.

⁴ F00298, Specialist Prosecutor, *Prosecution Submissions on Classification of Exhibits in Bar Table Request* ("Request on Classification of Exhibits"), 6 September 2021.

⁵ Oral Order to Parties Regarding Classification of SPO Bar Table Exhibits, 2 September 2021, p. 601 lines 3-16.

⁶ F00308, Gucati Defence, *Response to the Prosecution Request for Admission of Items Through the Bar Table* ("Gucati Response"), 10 September 2021, confidential. *See also* F00308RED, public. F00309, Haradinaj Defence, *Defence Response to SPO Bar Table Motion Submissions* ("Haradinaj Response"), 10 September 2021, confidential. *See also* F00309RED, public.

5. On 14 September 2021, pursuant to the same oral order, the SPO filed a reply to the responses of the Defence.⁷

6. On 24 September 2021, the SPO made submissions on consultations with the Defence regarding the classification of the bar table exhibits and proposed redactions.⁸

II. SUBMISSIONS

7. The SPO requests the admission through the bar table of items falling into five categories: (i) press conferences and interviews (Category 1); (ii) further media concerning the Accused, including excerpts from the Batches⁹ (Category 2); (iii) materials related to seizures (namely, orders, investigative reports, delivery documents, CCTV footage and international organisation letters (Categories 3.1-3.5)); (iv) Facebook posts (Category 4); and (v) contact notes (Category 5).¹⁰

8. The Gucati Defence opposes the admission through the bar table of the investigative reports and international organisation letters related to seizures, the Facebook posts and the contact notes.¹¹

9. The Haradinaj Defence opposes the admission through the bar table of the investigative reports, delivery documents and international organisation letters related to seizures, the Facebook posts and the contact notes.¹²

⁷ F00311, Specialist Prosecutor, *Prosecution Reply to Defence Responses to Request for Admission of Items Through the Bar Table* ("Reply"), 14 September 2021.

⁸ F00324, Specialist Prosecutor, *Submissions Pursuant to the Trial Panel's Third Oral Order of 8 September 2021*, 24 September 2021.

⁹ "Batches" refer to the documents seized by the SPO from the KLA WVA on 8, 17 and 22 September 2020.

¹⁰ Request, para. 1.

¹¹ Gucati Response, paras 3, 15, 34, 36.

¹² Haradinaj Response, para. 24.

III. APPLICABLE LAW

10. Pursuant to Article 40(6)(h) of the Law, the Panel may prior to or during trial rule on the admissibility of evidence. Pursuant to Rule 138(1) of the Rules, unless challenged or *proprio motu* excluded, evidence submitted by the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.

11. In order to be admitted through a witness or a bar table, evidence must meet the four cumulative requirements of Rule 138(1) of the Rules. The purpose of this rule is to ensure that the Panel is not burdened by evidence that is irrelevant, lacks indicia of authenticity or probative value or is more prejudicial than probative. It is for the tendering Party to demonstrate, with clarity and specificity, that each proposed exhibit meets the aforementioned requirements and how it fits into its case.¹³

12. *Relevance*. Evidence is deemed to be relevant if it is connected, directly or indirectly, to elements of the offence(s) or mode(s) of liability pleaded in the indictment or other facts or circumstances material to the case of the Parties.¹⁴ Demonstration of relevance requires more than a tenuous or remote connection to the facts and circumstances of a case.¹⁵

¹³ Similarly, ICTR, *Prosecutor v Bagosora et al.*, ICTR-98-41-T, Trial Chamber, [Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole](#), 13 September 2004, paras 7-8; ICTY, *Prosecutor v Prlić et al.*, IT-04-74-AR73.13, Appeals Chamber, [Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence](#), 12 January 2009, para. 17; *Prosecutor v Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on the Prosecution's First Bar Table Motion](#) ("Karadžić 13 April 2010 Decision"), 13 April 2010, para. 6.

¹⁴ Similarly, ICTR, *Prosecutor v Bagosora et al.*, ICTR-98-41-T, Trial Chamber, [Decision on Admissibility of Proposed Testimony of Witness DBY](#) ("Bagosora 18 September 2003 Decision"), 18 September 2003, para. 4; *Prosecutor v Karemera et al.*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice](#), 16 June 2006, para. 48; *Prosecutor v Karemera et al.*, ICTR-98-44-T, Trial Chamber, [Decision on Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment](#), 18 March 2008, para. 3.

¹⁵ Similarly, ICTY, *Prosecutor v Perišić*, IT-04-81-PT, Trial Chamber, [Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes](#), 1 September 2008, para. 6.

13. *Authenticity*. Evidence is deemed to be authentic if it is what it professes to be in origin or authorship.¹⁶ Absolute proof of authenticity is not required for admissibility, but is a matter for the weight of the evidence to be given by the Panel in its deliberations.¹⁷ It is for the tendering Party to provide indicators of a proposed exhibit's authenticity, where that document does not, on its face, contain sufficient indicators of authenticity.¹⁸ A *prima facie* case of authenticity must be made out in order for evidence to be deemed reliable and so that it can be admitted.¹⁹

14. *Probative value*. Evidence has probative value when it tends to prove or disprove an issue, which is relevant to the case.²⁰ Probative value is determined by two primary factors: (i) the *prima facie* reliability of the tendered evidence;²¹ and (ii) the measure by which that evidence is likely to influence the determination of a particular issue in dispute in the case.²² As with authenticity, definite proof of reliability is not required at the admissibility stage; rather it is an issue that will again be assessed in greater depth in the course of determining the weight to be attached to the evidence after its admission.²³ It is for the tendering Party to ensure that the evidence placed before the

¹⁶ Similarly, ICTY, *Prosecutor v Prlić et al.*, IT-04-74-AR73.16, Appeals Chamber, [Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence](#) ("Prlić 3 November 2009 Appeals Decision"), 3 November 2009, para. 32.

¹⁷ Similarly, ICTY, [Prlić 3 November 2009 Appeals Decision](#), para. 34.

¹⁸ F00314, Panel, *Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), 17 September 2021, para. 23(iii).

¹⁹ Similarly, ICTY, [Prlić 3 November 2009 Appeals Decision](#), para. 34.

²⁰ Similarly, ICTR, [Bagosora 18 September 2003 Decision](#), para. 15; ICTY, *Prosecutor v Delalić et al.*, IT-96-21, Trial Chamber, [Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 Into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample](#) ("Delalić 19 January 1998 Decision"), 19 January 1998, para. 29.

²¹ Similarly, ICTY, *Prosecutor v Tadić*, IT-94-1-T, Trial Chamber, [Decision on Defence Motion on Hearsay](#), 5 August 1996, paras 9, 15-16; [Delalić 19 January 1998 Decision](#), para. 32; [Prlić 3 November 2009 Appeals Decision](#), para. 33; *Prosecutor v Milutinović et al*, IT-05-87-T, [Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams](#), 1 September 2006, para. 9.

²² Similarly, ICC, *Prosecutor v Katanga and Ngudjolo Chui*, Trial Chamber II, [Decision on the Prosecutor's Bar Table Motions](#) ("Katanga and Ngudjolo Chui 17 December 2010 Decision"), ICC-01/04-01/07-2635, 17 December 2010, para. 20.

²³ Similarly, ICTY, *Prosecutor v Popović et al.*, IT-05-88-AR73.2, Appeals Chamber, [Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness](#), 30 January 2008, para. 22; [Prlić 3 November 2009 Appeals Decision](#), para. 33.

Panel is capable of reasonable belief for the purpose for which it is being offered.²⁴ While it is generally desirable that a witness should speak to the origins and/or content of a document to be tendered into evidence,²⁵ a *prima facie* showing of a document's reliability for the purpose of admissibility may be made without showing the document to a witness at trial.²⁶ The method by which such evidence is tendered might, however, affect its weight, in particular if it is not corroborated by evidence that has been subject to a more searching adversarial process.²⁷ Evidence is likely to influence the determination of a particular issue in dispute when it may assist the Panel in (i) reaching a conclusion about a fact or a circumstance material to the case; or (ii) assessing the reliability of other evidence in the case.²⁸

15. *Prejudice*. Evidence may be excluded at any stage of the proceedings if its probative value is outweighed by its prejudicial effect. The Panel notes that Rule 138(1) of the Rules does not require that the prejudicial effect *substantially* outweighs the probative value. Prejudicial effect should not be confused with any negative impact on the Defence case; rather the admission of the item in question must adversely impact the fairness or expeditiousness of the proceedings.²⁹ In assessing whether an item's probative value is outweighed by its prejudicial effect, the Panel must maintain and guarantee the effectiveness of the right of the Accused to confront

²⁴ Order on the Conduct of Proceedings, para. 15. Similarly, ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#), para. 26.

²⁵ Similarly, ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Guidelines for the Admission of Evidence Through Witnesses](#), 19 May 2010, para. 11.

²⁶ Similarly, ICTY, *Prosecutor v Prlić et al*, IT-04-74-T, Trial Chamber, [Decision on Admission of Evidence](#) ("Prlić 13 July 2006 Decision"), 13 July 2006, p. 5. See also *Prosecutor v Boškoski & Tarkulovski*, IT-04-82-T, Trial Chamber, [Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table](#) ("Boškoski & Tarkulovski 14 May 2007 Decision"), 14 May 2007, paras 10, 13.

²⁷ Similarly, IRMCT, *Prosecutor v Stanišić & Simatović*, MICT-15-96-T, Trial Chamber, [Decision on Prosecution Motion for Judicial Notice of Authenticity and Admission of Documents from the Bar Table \(Mladić Notebooks & Audio Files\)](#) ("Stanišić & Simatović 11 February 2019 Decision"), 11 February 2019, para. 7; ICTY, *Prosecutor v Hadžić*, IT-04-75-T, [Decision on Prosecution Bar Table Motion](#), 28 November 2013, para. 8.

²⁸ Similarly, ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#), para. 34.

²⁹ Similarly, ICTR, *Prosecutor v Bagosora et al.*, ICTR-98-41-A, Appeals Chamber, [Decision on the Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence](#), 19 December 2003, paras 16-17.

the case that is presented against them. For the purposes of the present case, the Panel emphasises that the principle of a public trial and the right of confrontation are both dependent on the trial record being as accessible as possible to the Accused and to the public. The Panel recognises that redactions to exhibits could be necessary in some cases to protect the security or privacy of specific individuals or to account for other public interests. Nonetheless, the Panel expects that as a general matter exhibits tendered for admission will be unredacted or will contain only those redactions that are absolutely necessary to safeguard the relevant protected interest(s).

IV. DISCUSSION

A. PRELIMINARY MATTERS

16. In the Request, the SPO seeks an extension of the 3,000 word limit set by the Panel in its 21 July order to 6,000 words.³⁰ The SPO submits that such a relief is warranted given that the Request concerns over 400 items the proposed admission of which must be factually and legally justified.³¹

17. The Panel notes that the Request indeed concerns a high number of items across five wide categories of evidence. Likewise, the Panel recalls that the Defence was granted a 6,000 word limit for their responses to the Request and that the SPO was granted a 2,000 word limit for its reply.³²

18. For these reasons, the Panel finds good cause for varying the previously set word limit to 6,000 words and for accepting the Request as validly made in this regard.

³⁰ Request, para. 3, referring to the 21 July Order, paras 10, 31.

³¹ Request, para. 3.

³² Oral Order to Parties Regarding Classification of SPO Bar Table Exhibits, 2 September 2021, p. 601 lines 3-16.

B. GENERAL CONSIDERATIONS

19. Before addressing the merits of the Request, the Panel shall set out some general considerations regarding (1.) the use of bar table motions in the legal framework of the Specialist Chambers (“SC”); (2.) the timing of the present decision; and (3.) the admission of evidence related to third parties.

1. The Use of Bar Table Motions in the SC Legal Framework

20. The “bar table” is an established procedure at internationalised criminal courts to submit evidence by means of a written motion rather than during the testimony of a witness.³³ Neither the SPO nor the Defence disputes the fact that a Party can tender evidence through a motion rather than having to do so through a witness.³⁴ Nonetheless, the Haradinaj Defence has submitted that the Panel should make use of that possibility with caution so as not to deprive the Accused of the possibility of a fair and effective confrontation of the evidence presented against him.³⁵

21. The procedural possibility of tendering evidence by means of a motion is authorised by the Rules and is consistent with that of international(ised) criminal jurisdictions that are based on a similar procedural model.³⁶

³³ Similarly, ICTY, [Karadžić 13 April 2010 Decision](#), para. 5; ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#), para. 12; STL, *Prosecutor v Al Jadeed*, STL-14-05/PT/CJ, Contempt Judge, [Decision on Amicus Curiae Prosecutor’s Motion for Admission of Evidence Pursuant to Rule 154](#) (“Al Jadeed 9 April 2015 Decision”), 9 April 2015, para. 5.

³⁴ Transcript, 1 September 2021, p. 438, lines 15-25. See also Haradinaj Response, para. 7.

³⁵ Haradinaj Response, paras 7-22, 100.

³⁶ Similarly, ICTY, [Boškoski & Tarkulovski 14 May 2007 Decision](#); *Prosecutor v Đorđević*, IT-OS-87/I-T, [Decision on Prosecution’s Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table](#), 7 December 2009; *Prosecutor v. Popović et al.*, IT-OS-88-T, [Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit](#), 14 March 2008; [Prlić 13 July 2006 Decision](#); [Karadžić 13 April 2010 Decision](#); IRMCT, [Stanišić & Simatović 11 February 2019 Decision](#); IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-T, Trial Chamber, [Decision on Prosecution Second Motion for Admission of Evidence from the Bar Table \(Material Obtained from Registry and Seizures from Augustin Ngirabatware at the UNDF\)](#), 15 January 2021; STL, *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, [Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events](#), 30 December 2014, para. 29; *Prosecutor v*

22. The Trial Panel agrees, however, with the submission of the Defence that bar table applications should not be used as a way to undermine the prevailing principle of orality underlying the proceedings. While the bar table procedure is in the interest of judicial economy,³⁷ it should not become an alternative to presenting the most important exhibits through witnesses who are in a position to speak to them and to be cross-examined about them. The denial of admission of a proposed exhibit from the bar table is generally without prejudice, and does not preclude the Party offering the exhibit from tendering it during the evidence of a witness who is in a position to speak to that exhibit. Nonetheless, as addressed further below, some of the exhibits proposed for admission by the SPO, including those which it has offered for admission in heavily redacted form, are unlikely to meet the admissibility standard set out in Rule 138(1) of the Rules even if tendered through a witness at trial.

23. The Panel also emphasises that admission through the bar table of an exhibit does not render its use during testimony of witnesses unnecessary as doing so might provide valuable context relevant, for instance, to the weight or reliability of that exhibit.

2. Timing of Decision

24. Pursuant to Article 40(6)(h) of the Law, the Panel may rule upon the admissibility of evidence either *prior to or during trial*. In this case, the Panel invited the SPO to consider making use of the possibility of filing “bar table” applications prior to the start of trial. This was intended to ensure that Parties have adequate notice of the

Ayyash et al., STL-11-01/T/TC, Trial Chamber, [Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass' Character, Religious Beliefs And Associates](#) (“*Ayyash et al.* 25 September 2017 Decision”), 25 September 2017; ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#); *Prosecutor v Ongwen*, Trial Chamber IX, [Decision on the Prosecution's Application for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), ICC-02/04-01/15-596-Red, 18 November 2016; *Prosecutor v Bemba Gombo*, Appeals Chamber, [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”](#), ICC-01/05-01/08-1386, 3 May 2011.

³⁷ Similarly, STL, [Al Jadeed 9 April 2015 Decision](#), para. 5.

Panel's position regarding the admissibility of certain categories of proposed evidence and so as to guarantee the fairness and expeditiousness of proceedings.³⁸ The SPO responded to this invitation by filing a bar table motion pertaining to approximately four hundred (400) proposed exhibits.

25. The Trial Panel notes, furthermore, that both the SPO and the Defence are in agreement regarding the desirability for the Panel to resolve the present application before the commencement of trial.³⁹ The relatively short anticipated duration of the trial process in this case strongly militates for that view. Providing guidance in respect of the admissibility of general categories of proposed exhibits is in the interest of the Parties so that they are aware before trial of the Panel's determination of what evidence the Panel finds to be relevant. Such a course of action will therefore also serve to promote the fairness and expeditiousness of the proceedings.

3. Admission of Evidence Related to Third Parties

26. The SPO has tendered evidence that pertains not just to the alleged conduct of the Accused but also to the actions of third parties, in particular two individuals said to have been associated with the Accused.

27. Consistent with the requirements of Article 6(2) of the European Convention on Human Rights, the Panel will not enter a finding of guilt in relation to either of these individuals or anyone not indicted in this case.⁴⁰ The evidence tendered in respect of these *other* individuals will be relied upon, if at all, for the sole purpose of determining the guilt or innocence of *the Accused* and will not serve to suggest that other individuals are or might be responsible for committing a crime.⁴¹

³⁸ Transcript, 1 September 2021, p. 428 lines 19-25.

³⁹ Transcript, 1 September 2021, p. 442, lines 15-17 (Gucati); Haradinaj Response, para. 22; Reply, para. 2.

⁴⁰ ECtHR, *Karaman v Germany*, no. 17103/10, [Judgment](#), 27 February 2014, paras 63-64.

⁴¹ Transcript, 1 September 2021, p. 498, lines 6-25 to p. 499, lines 1-8.

C. CATEGORIES OF PROPOSED EVIDENCE

28. The Panel will now address the SPO requests for the admission through the bar table of items falling into the five aforementioned categories.

1. Category 1: Press Conferences and Interviews

29. The Panel notes that the first category of items tendered through the bar table contains videos, along with Albanian transcripts and English translations thereof, depicting the three press conferences held by the Accused and televised appearances and/or interviews conducted with them and/or other Associates during the same period.⁴²

30. The SPO submits that these items are highly relevant, authentic and highly probative and that no undue prejudice arises from their admission.⁴³ The Defence do not object to the admission of items in this category.⁴⁴

31. The Panel is satisfied that the items under this category are relevant to this case as they pertain to and record the actions which underlie the offences for which the Accused have been charged. They contain information that may be relevant, *inter alia*, to establishing the *actus reus* and *mens rea* elements of some or all of the charged offences. In particular, they contain the records of statements and observations made by the Accused regarding the content and alleged protected status of the material of concern to these proceedings.

32. There is no apparent dispute between the Parties regarding the authenticity of these items. They appear to be an accurate and complete record of conferences and

⁴² Request, para. 9, referring to Category 1, Items 10-38, 70-84, 92-94, 98-104, 108-113, 116-118, 121-130, 137-166, 168-173, 197-226, 244-249. The item numbers correspond to those on the SPO list of exhibits, F00254/A01, 6 July 2021.

⁴³ Request, paras 10-12.

⁴⁴ Haradinaj Response, para. 23. The Gucati Response does not address this category of items.

media events in which one or more of the Accused (and/or other individuals said to be associated with them) participated and which were contemporaneously recorded.

33. These items have clear probative value. Their reliability is apparent, *inter alia*, from the existence of video- and audio-recordings in some cases, and the corroboration of the substance and times of the events depicted.

34. The Panel is satisfied that no undue prejudice is caused by the admission of these documents through the bar table. The Panel further notes that the Defence will be able to put the contents of any of these documents to witnesses and to the Accused should they be called to testify.⁴⁵

35. The Panel therefore admits in evidence all items under this category.

2. Category 2: Further Media Concerning the Accused

36. The Panel notes that the second category contains different types of documents, namely: (a) media articles about or containing excerpts from the Batches;⁴⁶ (b) media copies of CCTV footage of the delivery of the Batches;⁴⁷ (c) a video posted on the Facebook page allegedly used by one of the Accused comparing a public person to Slobodan Milošević;⁴⁸ (d) a video of a representative of the Kosovo Liberation Army War Veterans' Association ("KLA WVA") purporting to hold a journalist responsible for the arrest of the Accused;⁴⁹ (e) the KLA WVA Statute;⁵⁰ and (f) pre-Indictment media articles quoting the Accused or relating their actions.⁵¹

37. The SPO submits that these items are offered to prove (i) that the Accused provided confidential documents to the media at the three press conferences; (ii) the

⁴⁵ Transcript, 2 September 2021, p. 536, lines 5-7, 12-19 (Haradinaj), p. 539, lines 17-25 to p. 540, lines 1-2 (Gucati).

⁴⁶ Category 2, Items 39-63, 89-91, 424-426, 429-452.

⁴⁷ Category 2, Items 64-69, 85-88, 105-107, 114-115.

⁴⁸ Category 2, Items 95-97.

⁴⁹ Category 2, Items 131-133.

⁵⁰ Category 2, Items 453-454.

⁵¹ Category 2, Items 467-473.

kinds of information contained in the confidential materials disseminated by the Accused; and (iii) what the Accused said in relation to this dissemination as well as concerning their opposition towards the SC and SPO.⁵² The SPO indicates that it is not relying on the contents of these articles for the journalists' analysis or commentary on the events in question.⁵³ The SPO also submits that these items are authentic, probative and cause no undue prejudice if admitted.⁵⁴

38. The Defence do not object to the admission of items in this category.⁵⁵

39. As regards the items listed under points (a)-(c) of paragraph 36,⁵⁶ the Panel is satisfied that they could be relevant to the conduct of the Accused as well as to the nature of the allegedly disseminated material. Likewise, the Panel considers that these items appear to be authentic. That being said, the Panel considers that the probative value and, in particular, the reliability of these items may be more accurately determined through the testimony of a witness who can contextualise their contents. In particular, the SPO will have the opportunity to question W04841 as to whether the media articles indeed pertain to excerpts from the Batches or material said to have been disseminated by the Accused. Furthermore, the SPO will have the opportunity to question witnesses as to whether the media copies of the CCTV footage listed in this category are consistent with and corroborative of the CCTV and other footage listed under another category of the Request.⁵⁷ In light of this, the Panel finds that the admission of these items through the bar table is premature, and denies their admission at this time.

40. As regards the items listed under points (d)-(e) of paragraph 36,⁵⁸ the Panel considers that the relevance of these items has not been established as they have no

⁵² Request, para. 14.

⁵³ Request, para. 14.

⁵⁴ Request, 15-16.

⁵⁵ Haradinaj Response, para. 23. The Gucati Response does not address this category of items.

⁵⁶ Category 2, Items 39-63, 89-91, 424-426, 429-452; Items 64-69, 85-88, 105-107, 114-115 and Items 95-97.

⁵⁷ These are items under Category 3.4: 176, 326-337.

⁵⁸ Category 2, Items 131-133; Items 453-454.

apparent connection to the elements of the charged offences or modes of liability or other facts and circumstances in the case. In relation to the KLA WVA Statute, the SPO has failed to demonstrate, with clarity and specificity, the relevance of this exhibit and how it fits into its case. The Panel notes that the Accused are prosecuted for their alleged acts and conduct and not for their membership in an organisation. The Panel therefore denies admission of the items listed under points (d)-(e).

41. As regards the media articles listed under point (f) of paragraph 36,⁵⁹ the Panel is satisfied that they may be relevant to the case as they may provide evidence of the conduct and opinions of the Accused prior to the period of the charges, and might thus be circumstantially relevant to findings sought by the SPO. The Panel also considers that these items appear to be authentic. Nonetheless, the Panel has concerns as to their reliability and prejudicial effect, as they contain statements attributed to the Accused, which the Defence is not in a position to verify, as none of the authors of the articles, where known, have been listed to testify as to the truth of their content. The Panel therefore denies admission of the items listed under point (f).

3. Category 3: Materials Related to Seizures

42. Under this category, the Prosecution offers five subcategories of items: (a) SC and SPO orders (Category 3.1); (b) investigative reports (Category 3.2); (c) SPO delivery documents (Category 3.3); (d) CCTV footage (Category 3.4); and (e) international organisation letters (Category 3.5).

(a) Categories 3.1 and 3.3: Orders and Delivery Documents

43. The Panel notes that these two sub-categories contain (a) two orders of the Single Judge and one order of the SPO to Hysni Gucati and the KLA WVA to, *inter alia*, stop disseminating confidential information;⁶⁰ (b) SPO delivery documents acknowledging

⁵⁹ Category 2, Items 467-473.

⁶⁰ Category 3.1, Items 340-343, 455.

receipt of documents seized from the KLA WVA as a result of the three aforementioned orders;⁶¹ and (c) an SPO delivery document acknowledging receipt of documents from a media outlet.⁶²

44. The SPO submits that the service of the three orders are pleaded as material facts in the Indictment.⁶³ The SPO further avers that 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.⁶⁴ The SPO also submits that the delivery documents accompanying these orders record the formal handover of evidence by the SPO and are prepared in the ordinary course of SPO business.⁶⁵

45. The Gucati Defence raises no objections to the admission of the orders and delivery reports related to seizures. The Haradinaj Defence objects to the admission of the delivery reports,⁶⁶ but offers no specific reasons for that objection, other than maintaining that there is no justification for adducing reports through the bar table where the witnesses are giving oral evidence.⁶⁷

46. The Panel is satisfied that these items are relevant to this case as they pertain to the knowledge of the Accused of the nature of the allegedly disseminated information. They thus contain information that may be relevant, *inter alia*, to establishing the *mens rea* elements of some or all of the charged offences.

47. There is no apparent dispute regarding the authenticity of these items. The three orders bear the markings of official SC or SPO documents and the delivery documents appear to be standard SPO forms.

⁶¹ Category 3.3, Items 5, 7-9, 456.

⁶² Category 3.3, Item 2.

⁶³ Request, para. 17(i).

⁶⁴ Request, para. 17(i).

⁶⁵ Request, para. 17(iii).

⁶⁶ Haradinaj Response, para. 24.

⁶⁷ Haradinaj Response, para. 31.

48. The Panel is further satisfied that the items listed under points (a)-(b) of paragraph 43⁶⁸ have probative value. They could be relevant to establishing the receipt of the orders by the Accused and/or the seizure of the relevant material from them, which in turn may go to their knowledge of the content of these orders and the nature and status of the material concerned.

49. The Panel is satisfied that no undue prejudice is caused by the admission of the items listed under points (a)-(b) through the bar table. The Panel further notes that the Defence will be able to put the contents of any of these documents to witnesses and to the Accused should they be called to testify.⁶⁹

50. As regards the item listed under point (c) of paragraph 43,⁷⁰ the Panel considers that its probative value may be more accurately determined following the testimony of W04866, who could testify as to the truth of its content

51. In light of the above, the Panel admits in evidence the items listed under points (a)-(b) and denies admission of the item listed under point (c) at this time.

(b) Category 3.2: Investigative Reports

52. The Panel notes that this sub-category contains (a) SPO official notes (reports) prepared by SPO staff members and one accompanying redacted document on the search and seizure or receipt of material by the SPO;⁷¹ and (b) a statement of facts by an international organisation regarding the delivery of one of the Batches to the KLA WVA.⁷²

53. The SPO submits that these items are probative of the search and seizure of confidential documents, most importantly the Batches and that, with the exception of

⁶⁸ Category 3.1, Items 340-343, 455 and Category 3.3, Items 5, 7-9, 456.

⁶⁹ Transcript, 2 September 2021, p. 536, lines 5-7, 12-19 (Haradinaj), p. 539, lines 17-25 to p. 540, lines 1-2 (Gucati).

⁷⁰ Category 3.3, Item 2.

⁷¹ Category 3.2, Items 134, 135, 174, 175, 177, 178, 325.

⁷² Category 3.2, Items 356-357.

the items listed under point (b) above, they were prepared by SPO staff members and bear all attendant hallmarks of SPO documents in the case record.⁷³ The SPO further submits that the SC's admissibility of evidence framework does not require the SPO to add the SPO staff members who authored the official notes to the witness list in order to tender their reports. The SPO avers that the reports were 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 argues that the staff in question were not tasked with taking any formal statements of witnesses and that any comments of the Accused or 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.⁷⁴ The SPO further maintains that the Defence will get a chance to confront a witness on the statements attributed to the Accused in the reports, because W04841 can speak to the investigative activities conducted and is competent to discuss how the SPO seized material in this case, as well as what the SPO seized.⁷⁵ The SPO also avers that statements of the Accused do not implicate Rules 153-155 of the Rules and can be introduced through the bar table.⁷⁶

54. The Gucati Defence objects to the admissibility of all items under this sub-category through the bar table.⁷⁷ The Gucati Defence challenges the admission of specific items within this sub-category either on the ground that they constitute witness statements under Rules 153-155 of the Rules, or because their admission without effective

⁷³ Request, para. 17(ii), fn. 23.

⁷⁴ Request, para. 19.

⁷⁵ Request, paras 20, 22.

⁷⁶ Request, para. 20.

⁷⁷ Gucati Response, para. 3.

confrontation would cause undue prejudice to the Defence.⁷⁸ The Haradinaj Defence joins these submissions of the Gucati Defence.⁷⁹

55. The SPO replies that the reports under this sub-category were prepared by SPO staff in the context of the present legal proceedings, but their contents and the circumstances of their creation make clear that they are not testimonial evidence.⁸⁰ The SPO further submits that officer reports on seizures, and receipt of emails from journalists, are documentary records merely certifying activities carried out by officers in the course of their official duties. The SPO avers that the report from the international organisation is an institutional account of the activities of the organisation.⁸¹

56. As regards the items listed under point (a) of paragraph 52,⁸² the Panel is satisfied that they appear relevant to the case as they pertain to the search and seizure or receipt of material allegedly disseminated by the Accused. Likewise, the Panel considers that these items appear to be authentic, as they bear the markings of standard SPO forms. The Panel is also satisfied that these items could be probative of the Accused's awareness of the alleged unlawfulness of their actions and/or of the alleged dissemination of material. That being said, the Panel notes that these reports describe (i) specific events at which one or both of the Accused or their Associates were present,⁸³ and, in some cases, attribute statements to the former;⁸⁴ or (ii) the manner in which the SPO received from media outlets allegedly disseminated material.⁸⁵ Out of these reports, only one⁸⁶ is authored by an SPO staff member due to testify. In light of

⁷⁸ Gucati Response, paras 4-14, referring to official notes prepared by three SPO staff (Items 134, 135, 174, 175, 177, 178) and a 'Statement of Facts' from the KFOR German Contingent' (Items 356-357).

⁷⁹ Haradinaj Response, para. 25.

⁸⁰ Reply, para. 10.

⁸¹ Reply, para. 10.

⁸² Category 3.2, Items 134, 135, 174, 175, 177, 178, 325.

⁸³ Category 3.2, Items 134, 135, 175.

⁸⁴ Category 3.2, Items 134, 135.

⁸⁵ Category 3.2, Items 174, 177, 178, 325.

⁸⁶ Category 3.2, Item 325.

the above, the Panel considers that the Defence must be put in a position to effectively confront the evidence and challenge the truth and reliability of the accounts thus recorded. For that reason, the Panel finds that the admission of these items through the bar table is premature. The SPO will have an opportunity to examine its witnesses as to the truth of the items' content. The Panel therefore denies admission of these items at this time.

57. As regards the item listed under point (b) of paragraph 52,⁸⁷ the Panel is satisfied that it may be relevant to the case as it pertains to the delivery of one of the Batches to the KLA WVA. Nonetheless, the Panel has concerns as to its reliability, as there is no information whether the person who prepared the statement of facts was present during the described events and whether he or she recorded his or her observations or those of another person. Moreover, the statement records the purported reaction of the Accused to the delivery of the documents and their conduct in its aftermath, including the reading of the delivered documents. The Panel has concerns as to the Defence's right to confront this evidence. Given that none of the SPO witnesses listed to testify can attest to the truth and reliability of this document, the Panel considers that its probative value, if any, is outweighed by its prejudicial effect. The Panel therefore denies admission of the item listed under point (b).

(c) Category 3.4: CCTV Footage

58. The Panel notes that this sub-category contains CCTV footage of the KLA WVA showing the delivery of the Batches and one related video footage.⁸⁸

59. The SPO submits that these items match the CCTV footage provided by media outlets also submitted in the Request, and discussed above in Category 2.⁸⁹

⁸⁷ Category 3.2, Items 356-357.

⁸⁸ Category 3.4, Items 176, 326-337.

⁸⁹ Request, para. 17(iv), referring to Category 2, Items 64-69, 85-88, 105-107, 114-115. *See also supra* para. 39.

60. The Defence did not object to the admission of items in this category in their responses, although the Haradinaj Defence challenged the provenance of these items in its Pre-Trial Brief.⁹⁰

61. The Panel is satisfied that the items under this sub-category could be relevant as they depict the time and general circumstances of the delivery of the Batches to the KLA WVA. The Panel is also satisfied that these items appear to be authentic, since they contain clear dates and time stamps. That being said, as found above in relation to the media copies of the apparently matching CCTV footage, the Panel considers that the SPO will have an opportunity to explore the probative value of these items through the testimony of a witness who can contextualise and corroborate the CCTV footage under this sub-category with the media copies.

62. The Panel therefore denies admission of these items at this time.

(d) Category 3.5: International Organisation Letters

63. The Panel notes that this sub-category contains letters from international organisations confirming the confidential classification of materials provided to the SPO.⁹¹

64. The SPO submits that these items are relevant in particular in respect of the counts of the Indictment concerning alleged violation of the secrecy of the proceedings (Counts 5 and 6).⁹² The SPO further submits that these are official documents prepared by international organisations and that W04841 will testify as to whether evidence in the Batches emanated from these organisations.⁹³ The SPO also submits that relevance of these materials is clear and no undue prejudice is caused.⁹⁴

⁹⁰ F00260/A02, Haradinaj Defence, *Annex 2 to Defence Pre-Trial Brief on behalf of Nasim Haradinaj: List of Objections to the Admissibility of Disclosed Evidentiary Material* (“Haradinaj PTB Objections”), 12 July 2021, pp 56-57.

⁹¹ Category 3.5, Items 361, 363-368.

⁹² Request, para. 17(v).

⁹³ Request, para. 17(v).

⁹⁴ Request, para. 17(v).

65. The Gucati Defence submits that the relevance of this material is dependent on the evidence of W04841.⁹⁵ On that basis, the Gucati Defence submits that decision on admissibility should be deferred until this witness gives evidence.⁹⁶ The Haradinaj Defence objects to the admission of these items through the bar table, but provides no specific submissions in this regard.⁹⁷

66. The SPO replies that the weight to be given to these items is indeed interconnected with W04841's testimony, but that this is not a consideration of admissibility and that deferring such considerations to a later time is unnecessary and inappropriate.⁹⁸

67. The Panel is satisfied that the items under this sub-category are relevant to this case as they pertain to the alleged confidentiality of information contained in the Batches. The Panel is also satisfied that the letters appear to be authentic, as they bear the letterheads and reference numbers of the organisations that issued them. That being said, the Panel considers that the SPO will have an opportunity to further explore the probative value of these items through the testimony of W04841.

68. The Panel therefore denies admission of these items at this time.

4. Category 4: Facebook Posts

69. The Panel notes that this category contains posts and comments allegedly made by the Accused on their respective Facebook accounts.⁹⁹

70. The SPO submits that the Facebook posts linked to interviews or media articles submitted under other categories establish the provenance of those items and demonstrate that the Accused intended to publicise their criminal activity to the maximum extent possible.¹⁰⁰ The SPO adds that some of these posts are also relevant

⁹⁵ Gucati Response, para. 36.

⁹⁶ Gucati Response, para. 38.

⁹⁷ Haradinaj Response, para. 24.

⁹⁸ Reply, para. 8.

⁹⁹ Category 4, Items 119, 120, 373-375, 380, 381, 386-423, 427, 428, 457, 458, 474, 475.

¹⁰⁰ Request, para. 23(i).

to seized materials, including a judicial order, delivery document, and CCTV footage.¹⁰¹ The SPO further avers that Facebook comments of the Accused go to proof of their criminal intentions.¹⁰² The SPO submits that all these items have indicia of that they are genuine Facebook posts and are capable of independent verification as open source materials.¹⁰³ The SPO further maintains that Defence challenges that the Accused did not have exclusive access to their Facebook accounts goes to the weight of the evidence and not its admissibility.¹⁰⁴

71. The Gucati Defence submits that this material should not be admitted as the relevance of these items depends upon their attribution to the Accused, which has not been established at this stage.¹⁰⁵ The Haradinaj Defence does not make submissions in its response regarding these items, but it objects in its Pre-Trial Brief to their admission on the grounds that they constitute hearsay evidence in relation to which no direct evidence will be led.¹⁰⁶

72. The SPO replies that it is manifest that the Facebook posts are attributable on a *prima facie* basis to the Accused, because: (i) the accounts are in the name of the Accused; (ii) the posts concern content of direct interest to the KLA WVA; (iii) the posts mirror the public statements of the Accused; (iv) there is no evidence that the Accused ever deleted or otherwise distanced themselves from any of the posts submitted; (v) no new posts were published following the Accused's arrest; and (vi) the Gucati Defence itself admits that Hysni Gucati did access the account in question.¹⁰⁷

73. The Panel is aware that the Defence disputes that the Accused were the exclusive users of these accounts. Whether the Accused were responsible for placing some of

¹⁰¹ Request, para. 23(i).

¹⁰² Request, para. 23(ii).

¹⁰³ Request, para. 25.

¹⁰⁴ Request, para. 26.

¹⁰⁵ Gucati Response, paras 34-35.

¹⁰⁶ Haradinaj PTB Objections, pp 63-65.

¹⁰⁷ Reply, para. 7, referring, *inter alia*, to the Gucati Pre-Trial Brief, paras 153, 156.

the impugned posts on their accounts and/or were aware of their presence on those accounts is a matter to be determined at trial. At this stage, the Panel is satisfied that the items under this category are relevant to this case as they purportedly pertain to and record the statements and acts of the Accused, which could in turn, be relevant to establishing the *actus reus* and *mens rea* elements of some or all of the charged offences. In particular, these items purportedly contain the records of statements and observations made by the Accused regarding the content and alleged dissemination of the material of concern to these proceedings.

74. The Panel is also satisfied that these items appear to be authentic, as they bear the markings of the Facebook platform and the purported sender and date of the posts are clearly identified for each item.

75. The items have probative value. Their reliability is apparent from the fact that the accounts appear *prima facie* attributable to the Accused. In particular, the Panel notes that the accounts appear to be in the name of the Accused. The Panel has not received evidence that the Accused deleted or otherwise distanced themselves from any of the posts submitted.

76. The Panel is further satisfied that no undue prejudice is caused by the admission of the items through the bar table. The Panel further notes that the Defence will be able to put the contents of any of these posts to witnesses and to the Accused should they be called to testify.¹⁰⁸

77. The Panel admits therefore all items under this category without prejudice to any determination to be made at trial as regards the identity of the person(s) who posted and commented on the Facebook accounts and whether the posts were made by the Accused or with the Accused's knowledge.

¹⁰⁸ Transcript, 2 September 2021, p. 536, lines 5-7, 12-19 (Haradinaj), p. 539, lines 17-25 to p. 540, lines 1-2 (Gucati).

5. Category 5: Contact Notes

78. The Panel notes that this category contains so-called contact notes, which appear to be SPO records of telephone and other conversations between SPO officials – investigators, prosecutors and/or witness security personnel – and individuals characterised generically by the SPO as “witnesses”.¹⁰⁹ The notes consist of summaries of verbal exchanges between the SPO officials and the witnesses, and include statements attributed to the witnesses.

79. The SPO submits that 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.¹¹⁰ The SPO further submits that the persons contacted are “witnesses” within the meaning of this term in the Indictment and that the notes were prepared by SPO staff members for purposes of accurately recording security and other risks to those contacted.¹¹¹ The SPO maintains that these notes do not fall under Rule 153 of the Rules, as that provision is limited only to witness statements or transcripts provided in SC proceedings, while the contact notes were not taken for the purposes of legal proceedings.¹¹² In particular, the SPO avers that the contact notes were not generated for any particular SC 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.¹¹³ The SPO also submits that none of the elements of the charged counts require any of the contacted persons to have suffered any particular consequence, and that the only aspect of the case where the consequences to protected persons must be proven is the sentencing enhancement under Count 6.¹¹⁴

¹⁰⁹ Request, para. 27. See also Request on Classification of Exhibits, para. 9, where the SPO submits that “these notes contain *statements* of witnesses who spoke to the SPO about [...] (emphasis added).” Category 5, Items 1, 136, 167, 183-196, 227-243, 250-273, 285-291, 294-324, 344-355, 360, 362.

¹¹⁰ Request, para. 27.

¹¹¹ Request, paras 27-28.

¹¹² Request, para. 29.

¹¹³ Request, para. 29.

¹¹⁴ Request, paras 31-32.

80. In response, the Gucati Defence objects to the admission of these documents through the bar table on the ground that they are written statements of witnesses, created and provided in the context of or in anticipation of legal proceedings, which therefore fall under Rules 153-155 of the Rules.¹¹⁵ The Haradinaj Defence joins the submissions of the Gucati Defence.¹¹⁶ It further submits that the opportunity of cross-examining W04841 and W04842 does not overcome the lack of opportunity to cross-examine the persons who took the statements and/or the witnesses who provided the statements.¹¹⁷

81. The SPO replies that there is no statutory requirement that documentary evidence can only be admitted through the bar table when no available witness can speak of it.¹¹⁸ The SPO further maintains that the contacted persons are not witnesses in the present case and the notes are not interviews previously foreshadowed by the SPO.¹¹⁹

82. The first question to be answered is whether these contact notes constitute written statements which are subject to the specific requirements for admission set out in Rules 153-155 of the Rules.

83. The Panel notes at the outset that the SPO seeks to rely on the contact notes: (i) to establish the alleged consequences of the Accused's conduct on protected persons and SPO resources for the sentencing enhancement under Count 6; and (ii) as evidentiary indicators that the conduct of the Accused was intimidating and/or retaliatory within the meaning of those offences.¹²⁰ The SPO therefore seeks to rely upon the contact notes, in part, for the truth of the content of the statements attributed to those witnesses with a view, *inter alia*, to establishing elements of the offences charged or

¹¹⁵ Gucati Response, paras 15, 18.

¹¹⁶ Haradinaj Response, paras 25, 28, 29.

¹¹⁷ Haradinaj Response, para. 31.

¹¹⁸ Reply, para. 2.

¹¹⁹ Reply, para. 12.

¹²⁰ Request, para. 32.

aggravating factors for purpose of sentencing.¹²¹ These issues lie at the core of the SPO's case against the Accused.

84. The Panel emphasises that what constitutes a written statement for the purpose of legal proceedings is determined not by its form or the name given to it, but by its content, function, purpose and source.¹²² Such an interpretation ensures that the procedural safeguards provided in the Rules and the associated rights of the Accused are effectively protected and complied with.¹²³ Accordingly, the SPO may not, by labelling the record of an interview as "contact note", exempt written statements of witnesses from the scope of Rules 153-155 of the Rules.¹²⁴

85. Furthermore, the Panel notes that Rules 153-155 of the Rules contain no explicit restriction pursuant to which a statement would only come within their scope if taken "for the purpose of legal proceedings".¹²⁵ The requirements under these rules are whether the statement: (i) goes to proof of a matter other than the acts and conduct of the Accused (Rule 153); goes to proof of the acts and conduct of the Accused (Rule 154); or (iii) belongs to a person who has died or who can no longer be traced with reasonable diligence, or who is by reason of physical or mental impairment or

¹²¹ Request, para. 32. Similarly, ICC, *Prosecution v Ongwen*, Trial Chamber IX, [Decision on the Defence Request to Submit 470 items of Evidence](#) ("Ongwen 14 November 2019 Decision"), ICC-02/04-01/15-1670, 14 November 2019, para. 15.

¹²² Similarly, STL, *In the matter of El Sayed*, CH/AC12011/01, Appeals Chamber, [Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011](#) ("El Sayed 19 July 2011 Appeals Decision"), 19 July 2011, paras 72-73, 85-86; *Prosecutor v Ayyash et al*, STL-11-01-T/TC, Trial Chamber, [Public Redacted Version Of "Decision On The Prosecution Application For Non-Disclosure Of Certain Statements Of Witnesses Pursuant To Rule 116" Dated 20 December 2012](#) ("Ayyash et al. 28 May 2013 Decision") 28 May 2013, paras 8, 14; [Ongwen 14 November 2019 Decision](#), para. 15.

¹²³ F00210, Pre-Trial Judge, *Decision on Prosecution Requests and Challenges Pursuant to F00172*, 26 May 2021, para. 54. Similarly, ICTR, *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Appeals Chamber, [Judgement](#), 9 July 2004, paras 33-34; ICTY, *Prosecutor v Haradinaj et al.*, IT-04-84bis-T, [Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81](#), 18 November 2011, para. 32; STL, [El Sayed 19 July 2011 Appeals Decision](#), paras 83, 89; [Ayyash et al. 28 May 2013 Decision](#), paras 8, 9-14; *Prosecutor v Ayyash et al*, STL-11-01-T/TC, Trial Chamber, [Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155](#), 30 May 2013, paras 22-23; ICC, [Ongwen 14 November 2019 Decision](#), para. 15.

¹²⁴ Similarly, STL, [El Sayed 19 July 2011 Appeals Decision](#), para. 85.

¹²⁵ Similarly, ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#), para. 48.

other compelling reason unable to testify orally (Rule 155). The SPO has not shown how the contact notes fall outside the scope of any of these alternative requirements.¹²⁶

86. Nonetheless, the Panel recognises that a written statement under Rules 153-155 of the Rules ought to be taken *in the context of or in connection with* legal proceedings to come within the scope of these Rules so as to distinguish such a statement from a statement made and recorded in a context unrelated to such proceedings. In particular, the Panel notes that a key factor in deciding whether an out-of-court statement took place in the context of or in connection with legal proceedings is whether that statement was given to a person or body authorised to collect evidence for use in such proceedings.¹²⁷ In this regard, the Panel notes that the information recorded in the contact notes was collected by the SPO over several months,¹²⁸ with the knowledge that legal proceedings against the Accused for their alleged conduct were forthcoming or ongoing. Considering the nature of proceedings in this case, it would have been apparent to the SPO officials collecting this information that it could constitute evidence relevant to the prosecution of an offence against either or both of the Accused. Furthermore, witnesses were being called by the SPO to ascertain their security concerns following the publication of information and the need for action in response thereto. This falls squarely within the scope of issues relevant to their possible or prospective testimony in legal proceedings. The notes were not, therefore, prepared by the SPO in a legal vacuum but in connection with (and at least some of them obviously for the purposes of) legal proceedings.

87. In light of the above, the Panel is satisfied that the so-called contact notes constitute written statements of witnesses within the meaning of Rules 153-155, which are *leges speciales* vis-à-vis Rule 138(1) of the Rules. The stringency of Rules 153-155

¹²⁶ Transcript, 1 September 2021, p. 433, lines 5-25 to p. 435, lines 1-14.

¹²⁷ Similarly, ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#), para. 47.

¹²⁸ Earliest contact note appears to be dated 18 September 2020 (Item 1) and the latest is 18 March 2021.

cannot be avoided by referring to written statements of witnesses on which the SPO intends to rely as “contact notes”.¹²⁹

88. Even if the contact notes had been tendered under Rule 138(1), the Panel would have decided not to admit them for the following reasons.

89. In relation to probative value, the Panel has concerns regarding the indicia of reliability of the contact notes. In particular, the contact notes provide no information in respect, for instance, of: (i) steps taken to verify the identity of the interviewee; (ii) the accuracy and reliability of the translation, if any, of the verbal exchange and of the record itself; (iii) whether the interviewee confirmed, in any form, the words attributed to him or her in the contact note. These deficiencies significantly impact the Panel’s ability to verify the reliability of the contact notes at this stage.

90. In relation to prejudicial effect, the Panel first observes that the SPO has tendered for admission versions of the contact notes which contain extensive redactions withholding information from the Defence regarding, for instance, the name of the interviewee, those who conducted the interview, or the author of the note, as well as some of the substance of what was being said. Some of the contact notes have been offered for admission in a form which is so heavily redacted that their content and meaning cannot be fully and clearly apprehended. As a result, the Defence is not in a position to establish the identity of authors, interviewees and other persons involved in the interview, which in turn undermines its ability effectively to confront the evidence and challenge the truth and reliability of the information recorded. The redactions are in many cases so extensive that, if admitted, they would seriously erode

¹²⁹ Similarly, ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, Appeals Chamber, [Decision on Interlocutory Appeal Concerning Rule 92bis\(C\)](#), 7 June 2002, para. 31; *Prosecutor v Milošević*, IT-02-54-AR73.2, Appeals Chamber, [Decision on Admissibility of Prosecution Investigator’s Evidence](#), 30 September 2002, p. 10; *Prosecutor v Milošević*, IT-02-54-T, Trial Chamber, [Decision On Prosecution Motion For The Admission Of Evidence-In-Chief Of Its Witnesses In Writing](#), 16 April 2003, p. 2; STL, [Ayyash et al. 25 September 2017 Decision](#), para. 19.

the rights of the Accused to a public trial, to confrontation and to understand the evidence adduced against them.

91. Secondly, the Panel observes that the witnesses who were contacted by the SPO and whose words are recorded in these notes are not to be called at trial to give evidence. The Defence will therefore be denied an opportunity to explore their various statements, including those which the SPO says are incriminating for the Accused, and to verify with them the accuracy and reliability of the written records of what they purportedly said. As regards the notes authored by W04842, the Panel considers that this witness would not be in a position to comment on the truth or reliability of the information provided by the witnesses to whom the SPO spoke, but could only provide direct evidence of the process by which the information given was recorded.

92. Thirdly and in contrast to the prejudice that would be caused to the Accused by the admission of these notes, the Panel recalls that the SPO has made it clear that this evidence is, in effect, supplementary or corroborative in nature and that, according to the SPO, its case does not depend on its admission.¹³⁰

93. In light of these considerations, the Panel finds that the probative value of the content of the contact notes, if any, is outweighed by their prejudicial effect, and that, consequently, their admission in evidence for their content would severely erode the right of the Accused to confront in an effective fashion the case presented against them. For these reasons, and considering its obligation to guarantee the fairness of proceedings, the Panel denies admission of the proposed contact notes to establish the truth of the matters asserted in those notes by the witnesses with whom the SPO spoke.

94. The present ruling is without prejudice to the possibility for the SPO to use and request admission of certain contact notes (i) through the testimony of a witness who

¹³⁰ Request, para. 31; Transcript, 1 September 2021, p. 493, lines 17-25, p. 520, lines 16-25 to p. 522, lines 1-19.

authored the notes; (ii) for the limited purpose of describing the procedures followed by the SPO in interviewing these witnesses as well as the resources used and time spent on such interviews, to the extent that such witness(es) have knowledge of such matters; and (iii) provided that any redactions in the notes allow for effective confrontation of their content and meaningful inferences on the aforementioned SPO procedures.

D. CLASSIFICATION OF ADMITTED EVIDENCE

95. The Panel notes the submissions of the SPO regarding the classification of the exhibits and the proposed redactions and shall decide on this matter separately, in due course. For the time being, the admitted exhibits shall be classified as confidential. This is without prejudice to any subsequent decision of the Panel in this regard.

V. DISPOSITION

96. For the foregoing reasons, the Panel hereby:

- a. **GRANTS** in part the Request;
- b. **ADMITS** in evidence the following items, as numbered in the SPO exhibit list of 6 July 2021 (F00254/01):
 - i. Items 10-38, 70-84, 92-94, 98-104, 108-113, 116-118, 121-130, 137-166, 168-173, 197-226, 244-249 (Category 1);
 - ii. Items 340-343 and 455 (Category 3.1);
 - iii. Items 5, 7-9 and 456 (Category 3.3); and
 - iv. Items 119, 120, 373-375, 380, 381, 386-423, 427, 428, 457, 458, 474, 475 (Category 4);
- c. **DIRECTS** the Registrar to assign Exhibit Numbers to the aforementioned items, following the order listed above;

- d. **DIRECTS** the Registrar to classify these exhibits as confidential;
- e. **DENIES** the admission of
 - i. Items 131-133, 453, 454, 467-473 (Category 2); and
 - ii. Items 356, 357 (Category 3.2); and
- f. **DENIES** without prejudice the admission of all other items in the Request, and defers a decision on their admission until such time as they are tendered through a witness at trial.



Judge Charles L. Smith, III

Presiding Judge

Dated this Wednesday, 29 September 2021
At The Hague, the Netherlands