



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

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

Registrar: Fidelma Donlon

Date: 5 October 2021

Language: English

Classification: **Public**

**Decision on the Classification and Public Redacted Versions of
Exhibits Admitted Through the Bar Table**

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 40(6)(d), (f) and (h) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 84(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 31 August 2021, further to the Panel’s invitation,¹ the SPO filed a request for admission of items through the bar table (“Bar Table Request”).²
2. On 6 September 2021, further to an oral order of the Panel,³ the SPO made written submissions on the classification of the exhibits in the Bar Table Request (“Classification Request”).⁴
3. On 24 September 2021, further to an oral order and an extension of time by the Panel,⁵ the SPO made submissions on consultations with the Defence regarding the classification of the bar table exhibits and proposed redactions (“Proposed Redactions”) and appended a confidential annex with its proposed redactions and the Defence responses thereto (“Proposed Redactions Annex”).⁶

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

² F00291, Specialist Prosecutor, *Prosecution Request for Admission of Items Through the Bar Table* (“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* (“Classification Request”), 6 September 2021.

⁵ Oral Order to Parties on Classification of Exhibits, 8 September 2021, p. 709 line 25 to p. 710, lines 1-7; F00315, Specialist Prosecutor, *request for an Extension of Time* (“Extension Request”), 17 September 2021; F00319, Panel, *Decision on Request for an Extension of Time*, 20 September 2021.

⁶ F00324, Specialist Prosecutor, *Submissions Pursuant to the Trial Panel’s Third Oral Order of 8 September 2021* (“Proposed Redactions”) with confidential annex (“Proposed Redactions Annex”), 24 September 2021.

4. On 29 September 2021, the Panel issued a decision granting in part the SPO's bar table request ("Bar Table Decision").⁷ The Panel indicated that it would decide on the classification of admitted exhibits and relevant proposed redactions separately.⁸

II. SUBMISSIONS

5. In the Classification Request, the SPO submits that items under Categories 1, 2, 3.4 and 4 as well as Items 340-343 in Category 3.1, as identified in the Bar Table Request, may be generally reclassified as public,⁹ with the exception of material reproducing the images or the contents of confidential documents that were illegally disseminated.¹⁰ The SPO avers that although such images have irreversibly entered the public domain since the time of their publication, the present proceedings should not become an additional tool through which confidential information is publicly echoed, authenticated, emphasised and further disseminated.¹¹ The SPO therefore requests that all evidentiary items that contain illegally disseminated confidential information should maintain a confidential classification throughout the present proceedings.¹² The SPO also submits that Item 455 in Category 3.1 reveals the name of an SPO staff member and should therefore remain confidential.¹³

6. The SPO further submits that all other items identified in the Bar Table Request should remain confidential.¹⁴

⁷ F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table* ("Bar Table Decision"), 29 September 2021.

⁸ Bar Table Decision, para. 95.

⁹ Classification Request, paras 2, 10.

¹⁰ Classification Request, para. 3, referring to Items 10-16, 32-34, 36-61, 89-94, 98-103, 116-118, 158-160, 244-249, 424-426 and 429-452 of the Bar Table Request.

¹¹ Classification Request, para. 3.

¹² Classification Request, para. 3.

¹³ Classification Request, para. 6.

¹⁴ Classification Request, paras 3-

7. In the Proposed Redactions, the SPO informs the Panel that the Parties are not in agreement on the justifications underlying the Classification Request, and in particular: (a) on the SPO's request that exhibits obtained from open sources and reproducing images or the contents of confidential documents that were illegally disseminated be redacted in the relevant parts prior to being made public; and (b) on the SPO's request that names and personal details of SPO staff members and innocent third parties, as well as information on investigative methodology, be redacted from exhibits under Categories 3.1, 3.2 and 3.3 of the Bar Table Request prior to being made public.¹⁵

8. The Defence did not make submissions on these matters other than the responses provided directly to the SPO and recorded in the Proposed Redactions.¹⁶

III. APPLICABLE LAW

9. Pursuant to Article 40(6)(d) and (f) of the Law, the Panel may provide for the protection of confidential information as well as for the protection of the Accused, witnesses and victims.

10. Pursuant to Rule 84(1) of the Rules, on an ongoing basis and before rendering its Judgment, the Panel shall review the classification of records of proceedings and evidence and, where applicable, order their reclassification.

IV. DISCUSSION

11. The Panel recalls its finding in the Bar Table Decision to admit in evidence: (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

¹⁵ Proposed Redactions, para. 3.

¹⁶ Extension Request, para. 2; Proposed Redactions, para. 3.

and 456 (Category 3.3); and (iv) Items 119, 120, 373-375, 380, 381, 386-423, 427, 428, 457, 458, 474, 475 (Category 4).

12. The Panel further recalls that it directed the Registrar to assign Exhibit Numbers to these items, in the order listed above and to classify these exhibits as confidential, without prejudice to any further decision of the Panel.¹⁷

13. In light of the above, the Panel will only address below the classification of exhibits already admitted in evidence. The SPO submissions and Defence responses as regards items under Categories 2, 3.2, 3.3 (where not admitted), 3.4, 3.5 and 5 shall not be addressed. Their classification and any corresponding proposed redactions shall be determined if and when they are admitted in evidence.

14. The Panel further notes that, in the absence of separate Defence submissions on these matters, the indications provided directly to the SPO are regarded as substantive responses.

A. CATEGORY 1

15. The Panel recalls that it admitted under Category 1 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.¹⁸

16. In relation to Items 17-31, 35, 70-84, 104, 108-113, 121-130, 137-157, 161-166, 168-173, 197-226, 244-249 of Category 1, the Panel notes that the SPO does not propose any redactions. The Panel therefore finds it appropriate to reclassify these exhibits as public.

¹⁷ Bar Table Decision, paras 95, 96(c), (d).

¹⁸ Bar Table Decision, paras 29, 96.

17. In relation to Items 10-16, 32-34, 36-38, 92-94, 98-103, 116-118 and 158-160 of Category 1,¹⁹ the Panel notes that the proposed redactions cover information identifying individuals and other information related to SPO investigations as allegedly mentioned in the material received by the Kosovo Liberation Army War Veterans' Association ("KLA WVA"). The Panel observes that the Defence objects to the proposed redactions.

18. The Panel agrees with the SPO that the present proceedings should not become an avenue for publication of information allegedly contained in the Batches,²⁰ which had not been placed in the public domain before the events relevant to the charges in the Indictment. The Panel is further satisfied that the proposed redactions are consistent with the fundamental rights of the Accused insofar as they pursue the legitimate aim of protecting confidentiality and/or witnesses, and are proportionate and necessary for that purpose. For this reason, the Panel finds that the proposed redactions for Items 10-16, 32-34, 36-38, 92-94, 98-103, 116-118 and 158-160 are reasonable and consistent with the effective protection of the rights of the Accused.

19. The Panel accordingly orders the SPO to provide public redacted versions of the Albanian and English transcripts, which will be considered as admitted by virtue of their un-redacted versions having been admitted through the Bar Table Decision. The Panel accordingly directs the Registrar to assign to each of these public redacted versions the same exhibit number as to its confidential, un-redacted version, and to mark it as redacted (*i.e.* "P[number]_RED"). The Panel further orders that the portions of the videos corresponding to the redacted information are not to be broadcast to the public during the present proceedings.

¹⁹ Proposed Redactions Annex, pp 2-3, 4-107, 133-181. The Panel notes that Item numbers 93, 98, 101, 116, 158, 244 in the Proposed Redactions Annex do not correspond to the items in the Bar Table Request and the SPO exhibit list (F00254/A01, as updated by F00332/A01). Nonetheless, the Panel took into consideration the ERN numbers of the documents listed in that annex, which correctly correspond to those in the Bar Table Request and the SPO exhibit list.

²⁰ "Batches" refer to the documents seized by the SPO from the KLA WVA on 8, 17 and 22 September 2020.

B. CATEGORY 3.1

20. The Panel recalls that it admitted under Category 3.1 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.²¹

21. In relation to Items 340-343 of Category 3.1, the Panel notes that the SPO does not propose any redactions. The Panel further notes that these exhibits are (translations of) public versions of the Single Judge's 7 and 17 September 2020 orders. The Panel therefore finds it appropriate to reclassify these exhibits as public.

22. In relation to Item 455 of Category 3.1,²² the Panel notes that the proposed redaction covers the name of an SPO investigator who is not listed as a witness.²³ The Defence has objected to the proposed redaction. The Panel notes that the public disclosure of the name of this investigator could impact his right to privacy and have security implications. Considering that the individual concerned is not being called to give evidence in this case and that the Defence has been provided with his name, the Panel considers that, on balance, the proposed redaction is justified as it pursues the legitimate aim of protecting confidentiality and privacy, and is necessary and proportionate for that purpose. For this reason and in accordance with Article 33 of the Practice Direction on Files and Filings,²⁴ the Panel finds the proposed redaction reasonable and consistent with the effective protection of the rights of the Accused. The Panel accordingly orders the SPO to provide a public redacted version of this exhibit, which will be considered as admitted by virtue of its un-redacted version

²¹ Bar Table Decision, paras 43, 96.

²² Proposed Redactions Annex, pp 3, 250. The Panel notes that the Proposed Redactions Annex lists the item corresponding to number 455 (as identified in the Bar Table Request and the SPO exhibit list F00254/A01, as updated by F00332/A01) by the correct ERN, but with incorrect item number. Nonetheless, the Panel took into consideration the ERN numbers when reviewing the proposed redactions.

²³ See in this regard, F00303, Panel, *Decision on the Prosecution Request for Protective Measures*, 7 September 2021, para. 22.

²⁴ KSC-BD-15, 17 May 2019.

having been admitted through the Bar Table Decision. The Panel further directs the Registrar to assign to the public redacted version the same exhibit number as to its confidential, un-redacted version, marking it as redacted.

C. CATEGORY 3.3

23. The Panel recalls that it admitted under Category 3.3 SPO delivery documents acknowledging receipt of documents seized from the KLA WVA.²⁵

24. In relation to these items (5, 7-9, 456), the Panel notes that the proposed redactions cover the names of SPO investigators not listed as witnesses and those of independent observers. The Panel further observes that the Defence objects to the redaction of the investigators' identifying information, but does not object to the redaction of the names of the independent observers.²⁶ The Panel notes, as above, that the public disclosure of the names of these investigators could impact their right to privacy and have security implications. Considering that the individuals concerned are not being called to give evidence in this case and that the Defence has been provided with their names, the Panel considers that, on balance, the proposed redactions are justified as they pursue the legitimate aim of protecting confidentiality and privacy, and are necessary and proportionate for that purpose. For these reasons and in accordance with Article 33 of the Practice Direction on Files and Filings,²⁷ the Panel finds the proposed redactions reasonable and consistent with the effective protection of the rights of the Accused. The Panel accordingly orders the SPO to provide public redacted versions of these exhibits, which will be considered as admitted by virtue of their un-redacted versions having been admitted through the Bar Table Decision. The

²⁵ Bar Table Decision, paras 43, 96.

²⁶ Proposed Redactions Annex, pp 3, 277-280. The Panel notes that the Proposed Redactions Annex lists the items corresponding to numbers 5, 7-9 and 456 (as identified in the Bar Table Request and the SPO exhibit list F00254/A01, as updated by F00332/A01) by the correct ERN, but with incorrect item numbers. Nonetheless, the Panel took into consideration the ERN numbers when reviewing the proposed redactions.

²⁷ KSC-BD-15, 17 May 2019.

Panel further directs the Registrar to assign to each of these public redacted versions the same exhibit number as to its confidential, un-redacted version, and to mark it as redacted.

D. CATEGORY 4

25. The Panel recalls that it admitted under Category 4 posts and comments allegedly made by the Accused on their respective Facebook accounts.²⁸

26. In relation to these items (119, 120, 373-375, 380, 381, 386-423, 427, 428, 457, 458, 474, 475), the Panel notes that the SPO does not propose any redactions. The Panel therefore finds it appropriate to reclassify these exhibits as public.

V. DISPOSITION

27. For the foregoing reasons and further to its disposition in paragraph 96(b)-(d) of the Bar Table Decision, the Panel hereby issues the following orders.

28. As regards the admitted exhibits corresponding to **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)**, as referred to in paragraph 96(b)(i) of the Bar Table Decision, the Panel:

- a. **DIRECTS** the Registrar to reclassify the admitted exhibits corresponding to Items 17-31, 35, 70-84, 104, 108-113, 121-130, 137-157, 161-166, 168-173, 197-226, 244-249 as **public**;
- b. **AUTHORISES** the SPO's proposed redactions for the admitted exhibits corresponding to Items 10-16, 32-34, 36-38, 92-94, 98-103, 116-118 and 158-160; and

²⁸ Bar Table Decision, paras 69, 96.

- i. **ORDERS** the SPO to provide, by **13 October 2021**, public redacted versions of the Albanian and English transcripts;
- ii. **ADMITS** these redacted versions into evidence by virtue of their un-redacted versions having been admitted through the Bar Table Decision;
- iii. **DIRECTS** the Registrar to assign to each of these versions the same Exhibit Number as to its confidential, un-redacted version, and to mark it as redacted (*i.e.* "P[number]_RED"); and
- iv. **ORDERS** that the portions of the videos corresponding to the redacted information are not to be broadcast to the public during the present proceedings.

29. As regards the admitted exhibits corresponding to **Items 340-343 and 455 (Category 3.1)**, as referred to in paragraph 96(b)(ii) of the Bar Table Decision, the Panel:

- a. **DIRECTS** the Registrar to reclassify the admitted exhibits corresponding to Items 340-343 as **public**;
- b. **AUTHORISES** the SPO's proposed redaction for the admitted exhibit corresponding to Item 455; and
 - i. **ORDERS** the SPO to provide, by **13 October 2021**, a public redacted version of this exhibit;
 - ii. **ADMITS** the redacted version into evidence by virtue of its un-redacted version having been admitted through the Bar Table Decision; and

- iii. **DIRECTS** the Registrar to assign the same Exhibit Number as that assigned to its confidential, un-redacted version, marking it as redacted (*i.e.* "P[number]_RED").

30. As regards the admitted exhibits corresponding to **Items 5, 7-9 and 456 (Category 3.3)**, as referred to in paragraph 96(b)(iii) of the Bar Table Decision, the Panel:

- a. **AUTHORISES** the SPO's proposed redaction for the admitted exhibits corresponding to Items 5, 7-9 and 456; and
 - i. **ORDERS** the SPO to provide, by **13 October 2021**, public redacted versions of these exhibits;
 - ii. **ADMITS** these redacted versions into evidence by virtue of their un-redacted versions having been admitted through the Bar Table Decision; and
 - iii. **DIRECTS** the Registrar to assign to each of these versions the same Exhibit Number as to its confidential, un-redacted version, and to mark it as redacted (*i.e.* "P[number]_RED").

31. As regards the admitted exhibits corresponding to **Items 119, 120, 373-375, 380, 381, 386-423, 427, 428, 457, 458, 474, 475 (Category 4)**, as referred to in paragraph 96(b)(iv) of the Bar Table Decision, the Panel **DIRECTS** the Registrar to reclassify these exhibits as **public**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 5 October 2021
At The Hague, the Netherlands