



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 Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 9 November 2021

**Language:** English

**Classification:** Public

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**Decision on the Admissibility of Deferred Exhibits  
and the Classification of Certain Admitted Exhibits**

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**Specialist Prosecutor**

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**TRIAL PANEL II** (“Panel”), pursuant to Article 40(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. Between 18 and 26 October 2021, the Panel heard the testimony of W04841,<sup>1</sup> during which a number of exhibits were marked for identification pending a decision on their admissibility.
2. On 25 October 2021, the Specialist Prosecutor’s Office (“SPO”) filed submissions on “associated exhibits”, which were presented for admission together with W04841’s declarations pursuant to Rule 154 of the Rules (“F00397/A01”).<sup>2</sup>
3. On 28 October 2021, the Panel heard the oral submissions of the Parties on the admissibility of the items that were marked for identification.<sup>3</sup>
4. On 5 November 2021, the Panel issued an oral order on the admissibility of the deferred exhibits and indicated that a written decision will follow.<sup>4</sup>

## II. APPLICABLE LAW

5. 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

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<sup>1</sup> Transcript, 18 October 2021, p. 827; Transcript, 26 October 2021, p. 1491.

<sup>2</sup> F00397, *Prosecution Submission on Associated Exhibits for W04841* (“F00397”), 25 October 2021, with one confidential annex (“F00397/A01”).

<sup>3</sup> Transcript, 28 October 2021, pp 1654-1686.

<sup>4</sup> Oral Order on the Admission of Exhibits Through Witness W04841, Draft Transcript, 5 November 2021, pp 1912-1914.

admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.

6. The Panel recalls the legal standards that it set out in its 29 September 2021 decision on the admission of items through the bar table (“Bar Table Decision”).<sup>5</sup> In particular, the Panel held that, 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.<sup>6</sup>

### III. DISCUSSION

#### A. GENERAL ADMISSIBILITY OBJECTION

7. The Gucati Defence requests the Panel to exclude the entirety of W04841’s testimony.<sup>7</sup> The Gucati Defence asserts that as an SPO investigator, W04841’s assessment of the Batches is not independent and should not be regarded as reliable or as having probative value unless the material itself were in evidence so the Panel may make its own assessment as to the content.<sup>8</sup> For this reason, the Gucati Defence submits that the probative value of W04841’s testimony is outweighed by its prejudicial effect.<sup>9</sup>

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<sup>5</sup> F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table* (“Bar Table Decision”), 29 September 2021, paras 11-15.

<sup>6</sup> Bar Table Decision, para. 11.

<sup>7</sup> Draft Transcript, 28 October 2021, p. 1674.

<sup>8</sup> Draft Transcript, 28 October 2021, pp 1675-1676; *see also* F00317, Gucati Defence, *Motion to challenge the admissibility of evidence pursuant to Rule 138(1)*, 17 September 2021.

<sup>9</sup> Draft Transcript, 28 October 2021, p. 1678.

8. The Panel notes that the admissibility of the *viva voce* testimony of W04841 has already been addressed by the Panel.<sup>10</sup> Furthermore, the Panel notes that the Defence had an opportunity to confront W04841 and challenge the probative value and reliability of exhibits tendered through her. The Defence was also permitted to object to the admissibility of exhibits through her testimony. Accordingly, the Panel considers that the Defence failed to establish any valid grounds for the inadmissibility of W04841's evidence, nor has it pointed to any legal basis authorising the Panel to grant the relief sought at this point in the proceedings.

9. The Panel finds therefore the general admissibility objection without merit.

#### **B. CATEGORY 1: DECLARATIONS AND OFFICIAL NOTE OF W04841**

10. The Panel notes that the items under this category are the declarations of W04841 (P00086 MFI, P00088 MFI, P00089 MFI, P00090 MFI and P00091 MFI), a correction by W04841 to some of her declarations (P00087 MFI) and one official note authored by W04841 (P00098 MFI).

11. In relation to P00086 MFI, P00087 MFI, P00088 MFI, P00089 MFI, P00090 MFI and P00091 MFI, the SPO submits that these items should be admitted under Rule 154 of the Rules.<sup>11</sup> W04841 confirmed that she authored the items and was (i) present in court; (ii) available for cross-examination and questioning by the Panel; and (iii) confirmed that the declarations reflected what she would say if examined.<sup>12</sup> The SPO asserts that the Defence's objections only address the weight to be attributed to these items which does not impact their admissibility.<sup>13</sup> The SPO maintains that the items should be classified as confidential because they contain specific references to

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<sup>10</sup> F00328, Panel, *Order on Rule 117 Defence Motions*, 27 September 2021, para. 11; F00353, Panel, *Decision on the Defence Requests for Reconsideration of Decision F00328*, 7 October 2021, paras 23-25.

<sup>11</sup> Draft Transcript, 28 October 2021, p. 1655.

<sup>12</sup> Draft Transcript, 28 October 2021, p. 1655.

<sup>13</sup> Draft Transcript, 28 October 2021, p. 1655.

the contents of confidential material disclosed without authorisation by the Accused.<sup>14</sup> The SPO indicates that it is available to submit public redacted versions of the English version of each item within ten days from the Panel's decision on the admission of these items.<sup>15</sup> It further seeks to provide the Albanian redacted version of these items once the redactions on the English versions have been approved by the Panel.<sup>16</sup>

12. In relation to P00098 MFI, the SPO submits that W04841 confirmed the authenticity of this item and the correspondence attached to it has been also confirmed by W04866.<sup>17</sup> The SPO submits that the classification of P00098 MFI should remain confidential as it contains references to the identity of third parties and could, therefore, impact on the right to privacy.<sup>18</sup> The SPO indicates that proposed redactions for the English public redacted version have already been submitted by the SPO with F00324/A01.<sup>19</sup>

13. The Gucati Defence responds that its submissions on the inadmissibility of W04841's oral testimony apply equally to the items under Category 1.<sup>20</sup> The Gucati Defence submits that if W04841's oral evidence is admitted, there is little point in admitting the declarations as an exhibit as well.<sup>21</sup> It further avers that the SPO did not explore with the witness the charts attached to two of her declarations and therefore these annexes should not be admitted.<sup>22</sup> In relation to P00098 MFI, the Gucati Defence submits that the relevant part has already been admitted as P00098.1 and the remainder of that item should be excluded as it deals with matters outside of W04841's

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<sup>14</sup> Draft Transcript, 28 October 2021, pp 1655-1656.

<sup>15</sup> Draft Transcript, 28 October 2021, p. 1655.

<sup>16</sup> Draft Transcript, 28 October 2021, pp 1655-1656.

<sup>17</sup> Draft Transcript, 28 October 2021, p. 1656.

<sup>18</sup> Draft Transcript, 28 October 2021, p. 1656.

<sup>19</sup> Draft Transcript, 28 October 2021, p. 1656, referring to F00324/A01, Specialist Prosecutor, *Annex 1 to Submissions Pursuant to the Trial Panel's Third Oral Order of 8 September 2021* ("F00324/A01"), 24 September 2021, confidential.

<sup>20</sup> Draft Transcript, 28 October 2021, p. 1678.

<sup>21</sup> Draft Transcript, 28 October 2021, p. 1678.

<sup>22</sup> Draft Transcript, 28 October 2021, pp 1678-1679.

direct knowledge.<sup>23</sup> The Haradinaj Defence adopts these submissions and adds that the declarations of W04841 are meaningless in the areas where she seeks to comment on a significant amount of matters for which she was not present.<sup>24</sup>

14. The Panel is satisfied that all items under this category are admissible under Rules 138(1) and 154 of the Rules. All items are relevant to this case as they analyse material at the core of the offences for which the Accused have been charged. The declarations and the official note are also authentic, as W04841 confirmed that she authored these items and that they reflected what she would have said if examined. They also have probative value, as they indicate the number and nature of records that contain alleged confidential information and what the witness described as indicators of confidentiality. This in turn may be relevant to establishing the Accused's knowledge of the content and status of the material concerned. It might also be relevant to the question of the (non-)confidential nature of the material in question. The Panel is further satisfied that no undue prejudice is caused by the admission of these items, as the Defence was in a position to put their content and the accuracy of information recorded therein to W04841 through cross-examination.

15. The Panel is also satisfied that the items under this category should remain, for the time being, confidential, as they contain information which had not been placed in the public domain before the events relevant to the charges in the Indictment. In relation to P00086 MFI, P00087 MFI, P00088 MFI, P00089 MFI, P00090 MFI and P00091 MFI, the Panel orders the SPO to submit proposed redactions to the English versions of these items. In relation to P00098 MFI, the Panel notes that the proposed redactions cover details relating to media outlets and identifying information of their employees as well as identifying information of SPO staff members.<sup>25</sup> The Panel is therefore satisfied that the proposed redactions are consistent with the fundamental

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<sup>23</sup> Draft Transcript, 28 October 2021, p. 1679.

<sup>24</sup> Draft Transcript, 28 October 2021, p. 1683.

<sup>25</sup> F00324/A01, pp 267-269.

rights of the Accused insofar as they pursue the legitimate aim of protecting confidential information and the privacy of third parties, and are proportionate and necessary for that purpose.

### C. CATEGORY 2: EXCERPTS OF BATCH 1

16. The Panel notes that the items under this category (P00093 MFI, P00094 MFI, P00095 MFI, P00096 MFI and P00097 MFI) are excerpts of documents allegedly seized by the SPO on 8 September 2020 (“Batch 1”).

17. The SPO submits that all items falling under this category were authenticated by W04841 as part of the documents seized from the Kosovo Liberation Army War Veterans’ Association (“KLA WVA”) on 8 September 2020. The SPO affirms that the relevance and probative value of these items appear evident, as they are excerpts of the material disseminated by the Accused on 7 September 2020.<sup>26</sup> The SPO submits that the proposed classification for these items should remain confidential, since the present proceedings should not become an avenue for the publication of information contained in the Batches which had not been placed in the public domain before the events relevant to the charges in the Indictment.<sup>27</sup>

18. The Gucati Defence objects to the admission of these items because there is no proper evidence of continuity.<sup>28</sup> The Gucati Defence submits that W04841 has not provided any evidence to prove the origin, the provenance and the chain of custody of Batch 1.<sup>29</sup> The Haradinaj Defence adopts these submissions.<sup>30</sup>

19. The Panel is satisfied that all items under this category are admissible under Rules 138(1) of the Rules. All items are relevant to this case as they constitute material

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<sup>26</sup> Draft Transcript, 28 October 2021, pp 1656-1657.

<sup>27</sup> Draft Transcript, 28 October 2021, p. 1657.

<sup>28</sup> See also F00317, *Motion to challenge the admissibility of evidence pursuant to Rule 138(1)*, 17 September 2021.

<sup>29</sup> Draft Transcript, 28 October 2021, p. 1679, lines 15-25, p. 1680, p. 1881, lines 1-3.

<sup>30</sup> Draft Transcript, 28 October 2021, p. 1684, lines 7-9.

at the core of the offences for which the Accused have been charged. W04841 authenticated these items in the course of her testimony as excerpts of Batch 1. Issues raised by the Defence in relation to the chain of custody of these items have not been shown to have had any impact on the integrity of that process such that they would raise questions about the reliability and/or authenticity of the material. The items also have probative value, as W04841 testified that they contain alleged confidential information. This in turn may go to the question of the Accused's knowledge of the content and status of the material concerned. The Panel is further satisfied that no undue prejudice is caused by the admission of these items, as the Defence was in a position to put their content and the accuracy of information recorded therein to W04841.

20. The Panel is also satisfied that the items under this category should remain, for the time being, confidential, as they contain information which had not been placed in the public domain before the events relevant to the charges in the Indictment.

#### **D. CATEGORY 3: OFFICIAL NOTES ON THE RECEIPT OF MATERIAL FROM THE MEDIA**

21. The Panel notes that the items under this category are the official notes authored by SPO staff members on the receipt of material from the media (P00099 MFI and P00101 MFI) and a redacted version of an email sent to the SPO by a media outlet with questions regarding material published by the KLA WVA (P00102 MFI).

22. In relation to P00099 MFI, the SPO submits that W04841 authenticated this item as part of the SPO official records. The SPO asserts that this item is relevant because it corroborates W04866's testimony on the delivery of Batch 4 and is probative of the events documented therein.<sup>31</sup> The SPO submits that the classification of P00099 MFI should remain confidential as it contains names of SPO staff members. The SPO

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<sup>31</sup> Draft Transcript, 28 October 2021, p. 1657.



indicates that proposed redactions for the English public redacted version of this item have already been submitted by the SPO with F00324/A01.<sup>32</sup>

23. In relation to P00101 MFI and P00102 MFI, the SPO argues that these items corroborate the dissemination of confidential information by the Accused on 7 September 2020 within the press and were authenticated by W04841 during her testimony.<sup>33</sup> The SPO submits that these items should remain confidential as they contain references to the identity of third parties and SPO staff members.<sup>34</sup> The SPO indicates that a proposed public redacted version has already been submitted with F00324/A01.<sup>35</sup>

24. The Gucati Defence objects to the admissibility of these items as they are authored by witnesses who are not being called to give evidence. The Gucati Defence submits that W04841 cannot give evidence as to the truth and accuracy of the content of these items.<sup>36</sup> The Haradinaj Defence adopts these submissions.<sup>37</sup>

25. The Panel is satisfied that all three items under this category are admissible under Rules 138(1) of the Rules. They are relevant to this case as they record the receipt of documents from media outlets allegedly as a result of the publication (*i.e.* distribution) of material by the KLA WVA. Such materials are at the core of the offences for which the Accused have been charged. While W04841 did not author any of these items, she was able to corroborate the receipt by the SPO of material from media outlets. The three items also have probative value, as they indicate that media outlets may have been in receipt of material allegedly published by the KLA WVA and may have further distributed such information. This in turn may go to the alleged conduct of the Accused regarding the publication of the material concerned. The Panel is further

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<sup>32</sup> Draft Transcript, 28 October 2021, pp 1657-1658.

<sup>33</sup> Draft Transcript, 28 October 2021, p. 1658.

<sup>34</sup> Draft Transcript, 28 October 2021, p. 1658.

<sup>35</sup> Draft Transcript, 28 October 2021, p. 1658.

<sup>36</sup> Draft Transcript, 28 October 2021, p. 1681.

<sup>37</sup> Draft Transcript, 28 October 2021, pp 1684-1685.

satisfied that no undue prejudice is caused by the admission of these items, as the Defence was in a position to put their content and the accuracy of information recorded therein to W04841.

26. The Panel is also satisfied that the three items under this category should remain confidential, as they contain references to the identity of third parties and/or SPO staff members. The Panel notes that the redactions proposed to the English versions of these items cover details relating to media outlets and identifying information of their employees of media outlets.<sup>38</sup> The Panel is therefore satisfied that the proposed redactions are consistent with the fundamental rights of the Accused insofar as they pursue the legitimate aim of protecting confidential information and the privacy of third parties, and are proportionate and necessary for that purpose.

#### **E. CATEGORY 4: BATCH 2**

27. The Panel notes that the item under this category (P00104 MFI) is the collection of documents allegedly seized by the SPO on 17 September 2020 (“Batch 2”). The SPO tendered this item on 18 October 2021, in a form that included six fully redacted pages.

28. On 28 October 2021, the SPO made submissions on the admissibility of P00104 MFI. It noted that all disclosed pages of Batch 2 were authenticated by W04841 as documents seized from the KLA WVA on 17 September 2020 and constituted evidence of the material found in the Accused’s possession following the 16 September 2020 press conference. The SPO also indicated that besides the six fully redacted pages containing confidential information pertaining to SPO investigations, it had no objections to the reclassification of this material as public.<sup>39</sup> The SPO submitted, however, that the practice of Kosovo courts had been to include only the initials of accused persons and witnesses for the purposes of online publication. The

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<sup>38</sup> F00324/A01, pp 258-259, 264-266.

<sup>39</sup> Draft Transcript, 28 October 2021, p. 1659.

SPO proposed that the Panel adopted this practice and did not order the publication of the materials included in Batch 2 in its current format on the Specialist Chambers (“SC”) website.<sup>40</sup> The Gucati Defence objected to the admission of P00104 MFI because there was no proper evidence of continuity.<sup>41</sup> The Gucati Defence submitted that W04841 had not provided any evidence to prove the origin, the provenance and the chain of custody of Batch 2.<sup>42</sup> The Haradinaj Defence adopted these submissions.<sup>43</sup>

29. On 5 November 2021, in an oral order, the Panel found that, in light of the complete redaction of the six pages containing relevant information, it was not in a position to make findings in respect of the authenticity, reliability, and probative value of P00104 MFI.<sup>44</sup> In the same oral order, the Panel varied, in part, the decision of the Pre-Trial Judge rendered on 23 February 2021,<sup>45</sup> regarding the undisclosed part of Batch 2, and invited the SPO to produce an un-redacted or lesser redacted version of P00104 MFI.<sup>46</sup>

30. On the same day, the SPO disclosed a new version of P00104 MFI containing the six relevant pages in a lesser redacted form (“Lesser Redacted Version of P00104 MFI”).<sup>47</sup> The SPO requested their admission together with English translations.<sup>48</sup> Given that, according to the SPO, the same six pages also appear in Batches 1 and 4, the SPO also disclosed the corresponding pages from these Batches

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<sup>40</sup> Draft Transcript, 28 October 2021, pp 1659-1660.

<sup>41</sup> See also F00317, *Motion to Challenge the Admissibility of Evidence Pursuant to Rule 138(1)*, 17 September 2021.

<sup>42</sup> Draft Transcript, 28 October 2021, pp. 1679-1680.

<sup>43</sup> Draft Transcript, 28 October 2021, p. 1685, lines 13-15.

<sup>44</sup> Oral Order on Admission of Exhibits Tendered Through Witness W04841, 5 November 2021, pp 1912-1914.

<sup>45</sup> F00141, Pre-Trial Judge, *Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 23 February 2021, confidential. See also F00141/RED.

<sup>46</sup> Oral Order on Admission of Exhibits Tendered Through Witness W04841, 5 November 2021, pp 1912-1914.

<sup>47</sup> Disclosure Package 59, ERN 079512-080448 RED2. The English translations are 080128-080128-ET and 080130-080131-ET.

<sup>48</sup> F00421, Specialist Prosecutor, *Prosecution Notification of Disclosure and Request for Admission of Evidence* (“Notification of Disclosure”), 5 November 2021, para. 1.

with identical redactions (“Corresponding Pages”).<sup>49</sup> The SPO requested admission of these items for the same reasons set out in relation to P00104 MFI.<sup>50</sup> The SPO requests that the six relevant pages in the Lesser Redacted Version of P00104 MFI and the Corresponding Pages remain confidential.<sup>51</sup>

31. On 8 November 2021, the Panel heard the Parties’ submissions on the admissibility of the Lesser Redacted Version of P00104 MFI and the Corresponding Pages. The Gucati Defence submitted that there was no bar table motion in relation to these items and that they were not produced by a witness.<sup>52</sup> The Haradinaj Defence joined that position.<sup>53</sup> The SPO replied that the request for admission of the Lesser Redacted Version of P00104 MFI and the Corresponding Pages amounted to a bar table motion.<sup>54</sup> The SPO further averred that the authenticity of these items had been established through the testimony of W04841, who also highlighted all matters relevant to the authenticity of Batches 1 and 4, which contain the corresponding six pages.<sup>55</sup>

32. In relation to the Lesser Redacted Version of P00104 MFI, the Panel is satisfied that it is admissible under Rules 138(1) of the Rules. The Lesser Redacted Version of P00104 MFI is relevant to this case as it constitutes material at the core of the offences for which the Accused have been charged. W04841 authenticated this item, including the six pages that had been previously fully redacted, as Batch 2. Issues raised by the Defence in relation to the chain of custody of this item have not been shown to have had any impact on the integrity of that process such that they would raise questions about the reliability and/or authenticity of the material. The Lesser Redacted Version

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<sup>49</sup> Disclosure Package 59, Batch 1: 080705-080705 RED; 080706-080706 RED; 080757-080757 RED; 080763-080763 RED; 080776-080776 RED; 081209-081209 RED. Batch 4: 078590-078590 RED; 078592-078592 RED; 078867-078867 RED; 079159-079159 RED; 079160-079160 RED; 079200-079200 RED.

<sup>50</sup> Notification of Disclosure, para. 2.

<sup>51</sup> Notification of Disclosure, para. 3.

<sup>52</sup> Draft Transcript, 8 November 2021, p. 2038.

<sup>53</sup> Draft Transcript, 8 November 2021, p. 2038.

<sup>54</sup> Draft Transcript, 8 November 2021, p. 2038.

<sup>55</sup> Draft Transcript, 8 November 2021, pp 2038-2039.

of P00104 MFI also has probative value, as W04841 testified that the six aforementioned pages contain alleged confidential information. This in turn may go to establishing the Accused's of the content and status of the material concerned. The Panel is further satisfied that no undue prejudice is caused by the admission of this item, as the Defence has now access to the lesser redaction versions of the aforementioned six pages and was invited by the Panel to request further cross-examination of W04841 in this regard, if it so wishes.<sup>56</sup>

33. In relation to the Corresponding Pages, the Panel is satisfied that they indeed mirror the content of the relevant six pages in the Lesser Redacted Version of P00104 MFI.<sup>57</sup> In light of the above findings regarding the admissibility of the Lesser Redacted Version of P00104 MFI, the Panel finds that the Corresponding Pages are admissible under Rule 138(1) of the Rules for the same reasons.

34. The Panel further finds that the classification of the Lesser Redacted Version of P00104 MFI and the Corresponding Pages should remain, for the time being, confidential, as they contain information which had not been placed in the public domain before the events relevant to the charges in the Indictment. The Panel orders the SPO to submit proposed redactions to the Lesser Redacted Version of P00104 MFI, taking in consideration the practice of the Kosovo courts as set out by the SPO.

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<sup>56</sup> Oral Order on Admission of Exhibits Tendered Through Witness W04841, Draft Transcript, 5 November 2021, pp 1912-1914; Oral Order on Deadline for Request for Further Cross-Examination, Draft Transcript, 5 November 2021, pp 1970-1971.

<sup>57</sup> The Corresponding Pages are as follows: ERN 080126 (Batch 2) corresponds to ERN 080757 (Batch 1) and ERN 078590 (Batch 4). ERN 080127 (Batch 2) corresponds to ERN 080776 (Batch 1) and ERN 078592 (Batch 4). ERN 080128 (Batch 2) corresponds to ERN 080705 (Batch 1) and ERN 079160 (Batch 4). ERN 080129 (Batch 2) corresponds to ERN 080763 (Batch 1) and ERN 078867 (Batch 4). ERN 080130 (Batch 2) corresponds to ERN 080706 (Batch 1) and ERN 079159 (Batch 4). ERN 080131 (Batch 2) corresponds to ERN 081209 (Batch 1) and ERN 079200 (Batch 4).

## F. CATEGORY 5: EXCERPTS OF BATCH 3

35. The Panel notes that the items under this category (P00106 MFI, P00107 MFI, P00108 MFI, P00109 MFI, P00110 MFI, P00111 MFI, P00112 MFI, P00113 MFI, P00114 MFI, P00115 MFI, P00116 MFI, P00117 MFI, P00118 MFI and P00119 MFI) are excerpts of documents allegedly seized by the SPO on 22 September 2020 (“Batch 3”).

36. The SPO submits that all items falling under this category were authenticated by W04841 as part of the documents seized from the KLA WVA on 22 September 2020. The SPO affirms that the relevance and probative value of these items appears evident, as they are excerpts of the material disseminated by the Accused on 22 September 2020. The SPO submits that the proposed classification for these items should remain confidential as the present proceedings should not become an avenue for the publication of information contained in the Batches which had not been placed in the public domain before the events relevant to the charges in the Indictment.<sup>58</sup>

37. The Gucati Defence objects to the admission of these items because there is no proper evidence of continuity.<sup>59</sup> The Gucati Defence submits that W04841 has not provided any evidence to prove the origin, the provenance and the chain of custody of Batch 3.<sup>60</sup> The Haradinaj Defence joins these submissions.<sup>61</sup>

38. The Panel is satisfied that all items under this category are admissible under Rules 138(1) of the Rules. All items are relevant to this case as they constitute material at the core of the offences for which the Accused have been charged. W04841 authenticated these items in the course of her testimony as pairs of excerpts of the two documents allegedly forming Batch 3. Issues raised by the Defence in relation to the chain of custody of these items have not been shown to have had any impact on the

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<sup>58</sup> Draft Transcript, 28 October 2021, p. 1660, lines 7-16.

<sup>59</sup> See also F00317, *Motion to challenge the admissibility of evidence pursuant to Rule 138(1)*, 17 September 2021.

<sup>60</sup> Draft Transcript, 28 October 2021, p. 1679, lines 15-25, p. 1680, p. 1881, lines 1-3.

<sup>61</sup> Draft Transcript, 28 October 2021, p. 1685, lines 16-18.

integrity of that process such that they would raise questions about the reliability and/or authenticity of the material. The items also have probative value, as W04841 testified that they contain alleged confidential information and what she regarded as clear and multiple indicators of confidentiality. This in turn may go to establishing the Accused's knowledge of the content and status of the material concerned. The Panel is further satisfied that no undue prejudice is caused by the admission of these items, as the Defence was in a position to put their content and the accuracy of information recorded therein to W04841.

39. The Panel is also satisfied that the items under this category should remain, for the time being, confidential, as they contain information which had not been placed in the public domain before the events relevant to the charges in the Indictment.

#### G. CATEGORY 6: CORRESPONDENCE FROM AN INTERNATIONAL ORGANISATION

40. The Panel notes that the item under this category is a letter from an international organisation regarding its cooperation with the SPO (P00126 MFI).

41. The SPO submits that the correspondence is relevant as it explains the framework of cooperation between the SPO and the relevant international organisation. The SPO further asserts that the correspondence was authenticated by W04841 and that it corroborates her testimony that certain information included in Batch 3 was subject to confidentiality and use restrictions. The SPO requests that the confidential classification of the item be maintained, as it had been classified as such by its provider.<sup>62</sup>

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<sup>62</sup> Draft Transcript, 28 October 2021, pp 1660-1661.

42. The Gucati Defence submits that the relevance of this item has not been established given that the correspondence post-dates by six months the events with which the Panel is concerned.<sup>63</sup> The Haradinaj Defence adopts these submissions.<sup>64</sup>

43. The Panel is satisfied that P00126 MFI is admissible under Rules 138(1) of the Rules. The item is relevant to this case as it sets out the frameworks and certain conditions of cooperation between the SPO and the international organisation, which may be a circumstance relevant to the charged offences regarding publication of confidential material. While the letter post-dates the events at the core of the present case, it appears to refer to previous cooperation of the SPO and its predecessor organisations with the international organisation. The item appears to be authentic, as it bears the letterhead and reference number of the organisation that issued it. P00126 MFI also has probative value, as concerns the alleged confidential nature of published material, which in turn may go to establishing the status of the published material and the Accused's knowledge in that regard. The Panel is further satisfied that no undue prejudice is caused by the admission of this item, as the Defence was in a position to put its content to W04841.

44. The Panel is further satisfied that the classification of P00126 MFI should remain confidential, as it is a classification set by the international organisation in order to protect its cooperation with the SPO.

#### H. CATEGORY 7: ITEMS THE SPO CONSIDERS JUDICIALLY NOTICEABLE

45. The Panel notes that the items under this category are public redacted versions of four decisions issued in other SC cases (KSC-BC-2020-04/F00007/RED, KSC-BC-2020-05/F00008/RED, KSC-BC-2020-05/F00043/A02, and KSC-BC-2020-06/F0005/RED; collectively "Decisions").

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<sup>63</sup> Draft Transcript, 28 October 2021, p. 1681.

<sup>64</sup> Draft Transcript, 28 October 2021, p. 1685.



46. The SPO submits that the dates and contents of publicly available SC records are judicially noticeable.<sup>65</sup> In the alternative, the SPO requests that the Decisions be admitted into evidence.<sup>66</sup> The SPO submits that the classification of these items should be public.<sup>67</sup>

47. The Gucati Defence objects to the SPO's interpretation that filings are judicially noticeable. The Gucati Defence submits that if the filings are to be relied upon, they should properly be admitted as exhibits.<sup>68</sup> The Haradinaj Defence adopts these submissions.<sup>69</sup>

48. The Panel notes that Rule 157 of the Rules permits the Panel to take judicial notice of (i) facts of common knowledge (Rule 157(1)); and (ii) adjudicated facts from, *inter alia*, other SC proceedings. The Panel does not consider that the Decisions fall under either of the two categories. While the Decisions are public filings, they do not contain facts of common knowledge; they contain the findings and orders of the Pre-Trial Judge. Likewise, the findings and orders contained therein do not amount to adjudicated facts as they are set out in interlocutory decisions during the pre-trial stage of proceedings. The Panel therefore finds that the Decisions are not judicially noticeable.

49. The Panel is satisfied, however, that the Decisions are admissible, as individual exhibits, under Rule 138(1) of the Rules. The Decisions are relevant to this case as they record protective measures ordered by the SC, which may be a circumstance relevant to the charged offences regarding publication of confidential material. The Decisions are authentic, as they bear the markings of official SC documents. They also have probative value, as they concern alleged confidential content in the published

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<sup>65</sup> F00357, *Prosecution submission of weekly list of witnesses with Confidential Annex 1*, 11 October 2021, para. 4.

<sup>66</sup> Draft Transcript, 28 October 2021, p. 1661.

<sup>67</sup> Draft Transcript, 28 October 2021, p. 1661.

<sup>68</sup> Draft Transcript, 28 October 2021, p. 1682.

<sup>69</sup> Draft Transcript, 28 October 2021, p. 1685.

material, which in turn may go to establishing the status of the published material as well as the Accused's knowledge in that regard. The Panel is further satisfied that no undue prejudice is caused by the admission of the Decisions, as the Defence was in a position to put their content to W04841.

50. The Panel also finds that the classification of the Decisions should be public.

#### I. CATEGORY 8: "ASSOCIATED EXHIBITS" (F00397/A01)

51. The Panel notes that the items under this category are exhibits that the SPO presented for admission together with W04841's declarations pursuant to Rule 154 of the Rules.<sup>70</sup>

52. The SPO submits that the admission of the so-called associated exhibits is necessary to understand the contents of the statement and therefore form an integral part of it.<sup>71</sup> In the alternative, the SPO requests the individual admission of these items. In relation to Items 45-46, 50-51 and 55-56, the SPO submits that they were all authenticated by W04841 during her testimony and are all relevant and probative as they contain references and pictures of confidential information included in Batch 3.<sup>72</sup> In relation to Item 369, the SPO submits that W04841 referred to it in her declaration (P00086 MFI) and it has also been addressed in the course of her testimony.<sup>73</sup> The SPO submits that Item 369 is relevant as it relates to protective measures for witnesses referred to by name and pseudonym in Batch 3.<sup>74</sup> In relation to Items 47-49, 52-54 and 57-59, the SPO avers that W04841 refers to them in her declaration (P00086 MFI) and these items contain information and images of materials included in Batch 3.<sup>75</sup> The SPO maintains that the classification of all aforementioned items should be

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<sup>70</sup> F00397, F00397/A01.

<sup>71</sup> F00397, para. 3.

<sup>72</sup> Draft Transcript, 28 October 2021, p. 1661, lines 21-25, p. 1662, lines 1-9, 15-21.

<sup>73</sup> Draft Transcript, 28 October 2021, p. 1663.

<sup>74</sup> Draft Transcript, 28 October 2021, p. 1662, lines 23-25, p. 1663, lines 1-9.

<sup>75</sup> Draft Transcript, 28 October 2021, p. 1663, lines 18-25, p. 1664, lines 1-11.

confidential.<sup>76</sup> The SPO indicates that proposed redactions for Items 45-46, 47-49, 50-51, 52-54, 55-56, 57-59 have been submitted in F00324/A01.<sup>77</sup> Lastly, the SPO seeks admission of Items 3-4 as part of the materials that were received from Gazeta Infokus, and proposes that the classification can be public.<sup>78</sup>

53. The Gucati Defence objects to the admission into evidence of any exhibits that were not referred to the witness.<sup>79</sup> The Haradinaj Defence adopts these submissions.<sup>80</sup>

54. The Panel notes that Rule 154 of the Rules does not expressly provide for the notion of “associated exhibits”, *i.e.*, exhibits tendered by means of their association to a witness statement or declaration. At the same time, Rule 154 of the Rules does not exclude the possibility of annexes or other documents, which are used or explained by the witness and which, as such, form an integral part of the declaration or statement itself, to be admitted through the same Rule.<sup>81</sup> The Panel considers, however, that such a possibility exists only insofar as the requirements for admissibility of evidence provided in Rule 138 of the Rules are met in relation to each of the “associated exhibits” presented together with a statement or declaration. It would, therefore, appear that the admission of exhibits by means of their “association” with a witness statement might in some cases be permissible and could in fact be desirable as a way to guarantee the expeditiousness of the process.

55. In the present case, the Panel notes that the exhibits presented for admission together with W04841’s declarations pursuant to Rule 154 of the Rules are self-standing items and have a clear and probative value distinguishable from that of the declaration to which they are associated. For this reason, the Panel shall exercise its

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<sup>76</sup> Draft Transcript, 28 October 2021, p. 1662, lines 10-12, p. 1663, lines 10-14, p. 1664, lines 12-14.

<sup>77</sup> Draft Transcript, 28 October 2021, pp 1663-1664.

<sup>78</sup> Draft Transcript, 28 October 2021, p. 1664, lines 15-25, p. 1665, lines 1-4.

<sup>79</sup> Draft Transcript, 28 October 2021, p. 1682, lines 9-14.

<sup>80</sup> Draft Transcript, 28 October 2021, p. 1685, lines 23-25.

<sup>81</sup> *Similarly, ICC, Prosecutor v. Ongwen, ICC-02/04-01/15-596-Red, Trial Chamber IX, Decision on the Prosecution’s Applications for Introduction of Prior Recorded testimony under Rule 68(2)(b) of the Rules, 18 November 2016, public, para. 10.*

discretion to decide on the admission of each proposed exhibit individually rather than as associated exhibits.

56. In relation to Items 45-46, 47-49, 50-51, 52-54, 55-56, 57-59, the Panel is satisfied that they are admissible under Rule 138(1) of the Rules. These items are media articles or videos about or containing excerpts from Batch 3 and are therefore 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. Their probative value and reliability was corroborated by W04841 who contextualised their content and testified as to whether these excerpts pertained to Batch 3. What weight might be given to some of their content – in particular, editorial commentary – is a matter to be decided by the Panel at the end of the case in light of the evidence as a whole. The Panel is further satisfied that no undue prejudice is caused by the admission of these items, as the Defence was in a position to put their content to W04841.

57. In relation to Item 369, the Panel is satisfied that it is admissible under Rule 138(1) of the Rules. The item is relevant to this case as it records an order for protective measures, which may be a circumstance relevant to the charged offences regarding publication of confidential material. Item 369 appears to be authentic, as it bears the markings of the specific court. It also has probative value, as it concerns alleged confidential content in the published material, which in turn may go to establishing the Accused's knowledge of the content and status of the material concerned. The Panel is further satisfied that no undue prejudice is caused by the admission of Item 369, as the Defence was in a position to put their content to W04841.

58. In relation to Items 3-4, the Panel notes that they were not used with W04841. While the Panel notes that these items were identified by W04841 in her declaration (P00086 MFI) as being of a different nature than the confidential materials included in Batch 4, their relevance and probative value was not established through the

testimony of W04841. For this reason, the Panel does not admit these items into evidence.

59. The Panel is satisfied that Items 45-46, 47-49, 50-51, 52-54, 55-56, 57-59 and 369 should remain confidential. In relation to Items 45-46, 47-49, 50-51, 52-54, 55-56, 57-59 the Panel notes that the corresponding proposed redactions are substantial, as they cover detailed descriptions of the content of Batch 3, including names of individuals.<sup>82</sup> While the Panel has previously held that the admissibility of evidence may be significantly impacted by the application of substantial redactions,<sup>83</sup> the Panel is mindful that the present proceedings should not become an avenue for the publication of information contained in the Batches which had not been placed in the public domain before the events relevant to the charges in the Indictment. The Panel is therefore satisfied that the proposed redactions are consistent with the fundamental rights of the Accused insofar as they pursue the legitimate aim of protecting confidential information and the security and privacy of potential witnesses and other individuals, and are proportionate and necessary for that purpose.

#### J. CATEGORY 9: ITEM TENDERED BY THE DEFENCE

60. The Panel notes that the item under this category is the transcript of an interview with a witness other than W04841 that the Gucati Defence tendered for admission through W04841 (1D00001 MFI).

61. The SPO submits that the Defence has not established the relevance of this item, as W04841 explained she was not competent to speak about this particular witness interview. For this reason, the SPO requests the Panel to reject its admission into evidence.<sup>84</sup>

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<sup>82</sup> F00324/A01, pp 112-114, 115-116, 117-120, 121-122, 123-124, 125.

<sup>83</sup> Transcript, 7 October 2021, p. 782.

<sup>84</sup> Draft Transcript, 28 October 2021, p. 1669, lines 22-25, p. 1670, lines 1-2.

62. The Gucati Defence submits that in the case of an objection to the admission of this item, it would address its admissibility at a later stage in the proceedings alongside other potential Defence exhibits.<sup>85</sup> The Haradinaj Defence joins these submissions.<sup>86</sup>

63. The Panel notes that 1D00001 MFI amounts to a witness statement under Rules 153-154 of the Rules and it is therefore not admissible through any of the SPO witnesses. The Panel therefore denies its admission into evidence at this stage.

#### K. CLASSIFICATION OF PREVIOUSLY ADMITTED EXHIBITS

64. The Panel notes it deferred the classification of a number of exhibits admitted through W04842 (P00130-P00137).

65. The SPO submits that the classification of these items should remain confidential. The SPO indicates that these items, while they already contain redactions of names of contacted individuals, contain dates and other specificities that should not become public. The SPO avers that making these items publicly available on the SC website would mean that the contacted individuals themselves could be able to recognise the information they provided.<sup>87</sup>

66. The Panel considers that P00130-P00137 contain confidential information regarding contacts of the SPO with individuals in the aftermath of the publication of their names. Making these items publicly available, even with further redactions, would not preclude information regarding the occurrence of contacts to be identified by the individuals themselves and others. The Panel considers that the public interest in having these items available is outweighed by the need to protect the safety,

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<sup>85</sup> Draft Transcript, 28 October 2021, p. 1682, lines 19-25.

<sup>86</sup> Draft Transcript, 28 October 2021, p. 1687, lines 1-4.

<sup>87</sup> Transcript, 28 October 2021, pp 1717-1718, 1745.

security and well-being of individuals referred to in these items. The Panel therefore finds that P00130-P00137 should retain their confidential classification.

67. Furthermore, in relation to the testimony of W04876, the Panel recalls that it ordered the SPO to propose redactions, if any, to admitted exhibits P00092 and P00138.<sup>88</sup>

#### IV. DISPOSITION

68. For these reasons, the Panel:

- a. **ADMITS** into evidence the following deferred exhibits, marked for identification, including any translations thereof: P00086, P00087, P00088, P00089, P00090, P00091, P00093, P00094, P00095, P00096, P00097, P00098, P00099, P00101, P00102, P00106, P00107, P00108, P00109, P00110, P00111, P00112, P00113, P00114, P00115, P00116, P00117, P00118, P00119, P00126;
- b. **ADMITS** into evidence the Lesser Redacted Version of P00104 MFI, including any translations thereof, and **ORDERS** the Registrar to mark as P00104 the document with ERN 079512-080448 RED2;
- c. **ADMITS** into evidence the Corresponding Pages, including any translations thereof: ERN 080757, ERN 080776, ERN 080705, ERN 080763, ERN 080706, ERN 081209, ERN 078590, ERN 078592, ERN 079160, ERN 078867, ERN 079159 and ERN 079200, and **ORDERS** the Registrar to assign Exhibit Numbers to each of these items;
- d. **ADMITS** into evidence the Decisions, including any translations thereof: KSC-BC-2020-04/F00007/RED, KSC-BC-2020-05/F00008/RED,

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<sup>88</sup> Draft Transcript, 5 November 2021, pp 1935-1936.

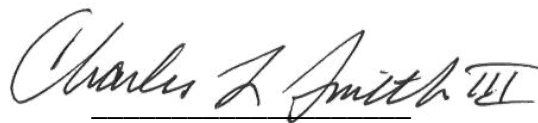
- KSC-BC-2020-05/F00043/A02 and KSC-BC-2020-06/F0005/RED and **ORDERS** the Registrar to assign Exhibit Numbers to each of these items;
- e. **ADMITS** into evidence the following items, as identified in F00397/A01, including any translations thereof: Items 45-46, 47-49, 50-51, 52-54, 55-56, 57-59 and 369 and **ORDERS** the Registrar to assign Exhibit Numbers to each of these items;
- f. **DENIES** admission of Items 3-4, as identified in F00397/A01, and of 1D00001 MFI;
- g. **ORDERS** that the admitted exhibits corresponding to KSC-BC-2020-04/F00007/RED, KSC-BC-2020-05/F00008/RED, KSC-BC-2020-05/F00043/A02 and KSC-BC-2020-06/F0005/RED be classified as **public**;
- h. **ORDERS** that the following admitted exhibits remain **confidential**:
- i. P00086, P00087, P00088, P00089, P00090, P00091, P00093, P00094, P00095, P00096, P00097, P00098, P00099, P00101, P00102, P00104,<sup>89</sup> P00106, P00107, P00108, P00109, P00110, P00111, P00112, P00113, P00114, P00115, P00116, P00117, P00118, P00119, P00126, P00130, P00131, P00132, P00133, P00134, P00135, P00136, P00137;
  - ii. the admitted exhibits matching the Corresponding Pages;
  - iii. the admitted exhibits corresponding to Items 45-46, 47-49, 50-51, 52-54, 55-56, 57-59 and 369, as identified in F00397/A01;
- i. **AUTHORISES** the SPO's proposed redactions as set out in F00324/A01 for the following admitted exhibits: P00098, P00099, P00101, P00102, Items 45-46, 47-49, 50-51, 52-54, 55-56, 57-59 (as identified in F00397/A01)

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<sup>89</sup> Lesser Redacted Version of P00104 MFI (ERN 079512-080448 RED2).



- i. **ORDERS** the SPO to provide, by **23 November 2021**, public redacted versions of the English and Albanian versions;
  - ii. **ADMITS** these redacted versions into evidence by virtue of their un-redacted versions having been admitted through W04841;
  - 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.
- j. **ORDERS** the SPO to submit, by **23 November 2021**, proposed redactions, if any, to:
- i. the English versions of the following admitted exhibits: P00086, P00087, P00088, P00089, P00090, P00091; and
  - ii. admitted exhibits P00092, P00104<sup>90</sup> and P00138.



**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Tuesday, 9 November 2021

At The Hague, the Netherlands

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<sup>90</sup> Lesser Redacted Version of P00104 MFI (ERN 079512-080448 RED2).