



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

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Decision on Prosecution Requests in Relation to Proposed Defence Witnesses

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TRIAL PANEL II (“Panel”), pursuant to Articles 21(4)(f) and 40(2) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 116(1), 119, 127(1), 138(1) and 149 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders the full written reasons for the oral decision it gave at the Defence Preparation Conference on 2 December 2021.

I. PROCEDURAL BACKGROUND

1. On 12 July 2021, the Defence for Hysni Gucati and Nasim Haradinaj (“Gucati Defence” and “Haradinaj Defence” respectively) filed their Pre-Trial Briefs.¹ As envisaged by Rule 95(5)(c) of the Rules, the Defence annexed to their Pre-Trial Briefs lists of proposed witnesses to be called by the Defence at trial (“Gucati Provisional Witness List”, “Haradinaj Provisional Witness List”, and, collectively, “Defence Provisional Witness Lists”).² Therein, the Defence provided generic descriptions of the issue(s) said to be relevant to each proposed witness.

2. On 21 July 2021, the Panel ordered the Defence to file a summary of facts or circumstances in relation to which each witness on the Defence Provisional Witness Lists would testify, in particular in respect of the specific facts and circumstances said

¹ F00258, Gucati Defence, *Defence Pre-Trial Brief on Behalf of Hysni Gucati* (“Gucati Pre-Trial Brief”), 12 July 2021; F00260, Haradinaj Defence, *Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj* (“Haradinaj Pre-Trial Brief”), 12 July 2021.

² F00258/A01, *Annex 1 to Defence Pre-Trial Brief on behalf of Hysni Gucati: List of Potential Witnesses the Defence Intends to Call (Without Prejudice to Any Subsequent Amendment or Filing Thereof)* (“Gucati Provisional Witness List”), 12 July 2021; F00260/A01, *Annex 1 to Defence Pre-Trial Brief on behalf of Nasim Haradinaj: List of Potential Witnesses the Defence Intends to Call (Without Prejudice to Any Subsequent Amendment or Filing Thereof)*, 12 July 2021 (“Haradinaj Provisional Witness List”), (collectively “Defence Provisional Witness Lists”). On 2 September 2021, during the Trial Preparation Conference, the Defence of both Accused indicated that they might also seek to call the Accused as witnesses. See, in particular, Transcript, 2 September 2021, p. 536, lines 16-19, p. 539, lines 24-25, p. 540, lines 1-2.

to be relevant to the issue identified by the Defence as “public interest” (“21 July Order”).³

3. On 27 August 2021, pursuant to the 21 July Order, the Defence made additional submissions regarding the purported relevance of the proposed witnesses (collectively “Defence Provisional Witnesses Submissions”).⁴ The Haradinaj Defence made no submissions in relation to proposed Witness 21 on the Haradinaj Provisional Witness List.

4. On 1 September 2021, the Specialist Prosecutor’s Office (“SPO”) indicated that it intended to file a request to strike Defence witnesses and parts of the testimony of Defence witnesses that were said to be irrelevant to the trial.⁵

5. On 2 September 2021, the Panel ordered the SPO to file its request to strike Defence witnesses and parts of their testimony by 15 September 2021 (“2 September Order”).⁶

6. On 15 September 2021, the SPO filed its confidential requests in relation to Defence witnesses (“Request to Strike”).⁷

7. On 27 September 2021, consistent with the 2 September Order, the Defence responded to the Request to Strike (collectively “Responses”).⁸

8. On 30 September 2021, the Haradinaj Defence filed a request seeking a two-week extension to serve the expert report of Witness 17, Anna Myers (“Ms Myers”),⁹ which

³ F00266, Panel, *Order for Submissions and Scheduling the Trial Preparation Conference* (“21 July Order”), 21 July 2021, para. 12.

⁴ F00288/A01, Gucati Defence, *Annex 1 to Written Submissions for the Trial Preparation Conference and Related Matters* (“Gucati Provisional Witnesses Submissions”), 27 August 2021, confidential; F00289, Haradinaj Defence, *Submission on Witnesses* (“Haradinaj Provisional Witnesses Submissions”), 27 August 2021, confidential.

⁵ Transcript, 1 September 2021, p. 446, lines 11-14.

⁶ Transcript, 2 September 2021, p. 603, lines 6-8 (“2 September Order”).

⁷ F00312, Specialist Prosecutor, *Prosecution Requests in relation to Defence Witnesses* (“Request to Strike”), 15 September 2021, confidential.

⁸ F00329, Gucati Defence, *Response to Prosecution Requests in Relation to Defence Witnesses* (“Gucati Response”), 27 September 2021; F00330, Haradinaj Defence, *Defence Response to Prosecution Requests in Relation to Defence Witnesses* (“Haradinaj Response”), 27 September 2021.

⁹ F00339, Haradinaj Defence, *Request for an Extension of Time to Serve Expert Evidence*, 30 September 2021.

the Gucati Defence joined.¹⁰ On the same day, the Panel ordered the Haradinaj Defence to file the expert report of Ms Myers by 15 October 2021 and the SPO to file the related notice within seven days of disclosure of the report (“30 September Order”).¹¹

9. On 15 October 2021, the Haradinaj Defence filed the expert report of Ms Myers (“Myers Report”) in accordance with Rules 149(1) of the Rules and the 2 and 30 September Orders.¹²

10. On 18 October 2021, the Panel informed the Parties that a decision on the pending requests in relation to proposed Defence witnesses would be rendered after the Defence Preparation Conference and after receiving the Defence filings pursuant to Rule 119(2) of the Rules, if the Defence decided to call a case.¹³

11. On 20 October 2021, the Haradinaj Defence disclosed the instructions it gave to Ms Myers for the purpose of preparing the Myers Report.¹⁴

12. On 22 October 2021, the SPO filed its challenge to the Myers Report in accordance with Rule 149(2)(a) of the Rules (“Myers Challenge”).¹⁵

¹⁰ F00340, Gucati Defence, *Joinder re Application for an Extension of Time to Serve Expert Evidence* KSC-BC-2020-07-F00339, 30 September 2021.

¹¹ F00343, Panel, *Decision on Request for an Extension of Time to Serve Expert Evidence* (“30 September Order”), 30 September 2021.

¹² F00376, Haradinaj Defence, *Submission of Expert Report from the Defence for Mr. Haradinaj*, 15 October 2021; F00376/A01, Haradinaj Defence, *Annex 1 Expert Report of Ms. Anna Myers of the Whistleblowing International Network* (“Myers Report”), 15 October 2021. *See also* 2 September Order; 30 September Order.

¹³ Transcript, 18 October 2021, p. 817.

¹⁴ F00386, Haradinaj Defence, *Defence Submissions of Instructions to Expert Witness 17 with Confidential Annex 1*, 20 October 2021; F00386/A01, Haradinaj Defence, *Annex 1 Defence Instructions to Expert Witness 17*, 20 October 2021, confidential; 2 September Order; 30 September Order.

¹⁵ F00388, Specialist Prosecutor, *Prosecution Challenge to Proposed Defence Expert and Report* (“Myers Challenge”), 22 October 2021.

13. On 23 October 2021, the Haradinaj Defence filed a request to add a new expert to the Haradinaj Provisional Witness List (“Second Expert Witness”).¹⁶
14. On 26 October 2021, the Panel ordered the Haradinaj Defence to file the expert report of the Second Expert Witness by 9 November 2021 and instructed the SPO to file any related notice within seven days of notification of the report.¹⁷
15. On 1 November 2021, the Haradinaj Defence responded to the Myers Challenge.¹⁸
16. On 9 November 2021, the Haradinaj Defence filed the expert report of the Second Expert Witness (“Second Expert Witness Report”).¹⁹
17. On the same day, the Panel issued a scheduling order setting, *inter alia*, the date for the Defence Preparation Conference and reiterated that the pending requests in relation to proposed Defence witnesses would be addressed at the Defence Preparation Conference with any decision thereon being issued either orally or in writing by 3 December 2021.²⁰
18. On 16 November 2021, the SPO filed its challenge to the Second Expert Witness Report (“Second Expert Witness Challenge”).²¹

¹⁶ F00394, Haradinaj Request, *Defence Request for Addition of an Expert to its List of Potential Witnesses* (“Haradinaj Request for Additional Expert Witness”), 23 October 2021, confidential. The Panel notes that the Haradinaj Defence refers to this witness under the number 18, while in the Defence Provisional Witness Lists and in the Defence Provisional Witnesses Submissions another individual is listed under this number.

¹⁷ Transcript, 26 October 2021, p. 1412 line 21 to p. 1413 line 8.

¹⁸ F00410, Haradinaj Defence, *Defence Response to Prosecution Challenge to Proposed Defence Expert and Report* (“Response to Myers Challenge”), 1 November 2021, confidential. *See also* F00410/RED.

¹⁹ F00426, Haradinaj Defence, *Submission of Expert Report from the Defence for Mr Haradinaj*, 9 November 2021; F00426/A01, Haradinaj Defence, *Annex A to Submission of Expert Report from the Defence for Mr Haradinaj* (“Second Expert Witness Report”), 9 November 2021, confidential. *See also* Transcript, 5 November 2021, p. 1969 line 18 to p. 1970 line 9.

²⁰ F00428, Panel, *Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings* (“9 November Scheduling Order”), 9 November 2021, para. 14.

²¹ F00438, Specialist Prosecutor, *Prosecution Challenge to Proposed Defence Expert Witness 18 and Report* (“Second Expert Witness Challenge”), 16 November 2021, confidential.

19. On 22 November 2021, the Haradinaj Defence responded to the Second Expert Witness Challenge.²²

20. On 26 November 2021, the Panel issued its decision on the Defence motions to dismiss charges pursuant to Rule 130 of the Rules.²³

21. On 29 November 2021, the Defence filed their witnesses and exhibits lists pursuant to Rule 119(2) of the Rules and the Panel's order ("Rule 119(2) Filings").²⁴

22. On 1 December 2021, the SPO filed an additional request in relation to the Defence proposed witnesses and their proposed statements ("Additional Request").²⁵

23. On 2 December 2021, the Panel held a Defence Preparation Conference, during which, after having heard the Parties, the Panel determined the number of witnesses the Defence may call, determined the time available for the Defence for presenting evidence and gave further directions necessary to ensure a fair and expeditious trial. The Panel also issued an oral order in relation to the aforementioned challenges and indicated that written reasons would follow.²⁶

II. SUBMISSIONS

24. In the Request to Strike, the SPO seeks the Panel's order to: (i) remove five witnesses from the Defence Provisional Witness Lists ("First Request"); and (ii) not authorise the testimony of five witnesses appearing on the Defence Provisional

²² F00444, Haradinaj Defence, *Haradinaj Defence Response to F00438* ("Response to Second Expert Witness Challenge"), 22 November 2021, confidential.

²³ F00450, Panel, *Decision on Motion to Dismiss Charges*, 26 November 2021.

²⁴ F00460, Gucati Defence, *Defence Submission of List of Anticipated Witnesses* with Annex 1 ("Gucati Proposed Witness List") and Annex 2 ("Gucati Proposed Exhibit List"), 29 November 2021; F00461, Haradinaj Defence, *Defence Rule 119 Filing on Behalf of Nasim Haradinaj* with Annex 1 ("Haradinaj Proposed Witness List") and Annex 2 ("Haradinaj Proposed Witness Statements"), 29 November 2021, confidential. *See also*, 9 November Scheduling Order, para. 17(a).

²⁵ F00466, Specialist Prosecutor, *Prosecution Further Requests in Relation to Defence Witnesses* ("Additional Request"), 1 December 2021, confidential.

²⁶ Oral Order on Summary of Panel's Decision on SPO Motions to Strike Defence Witnesses, Draft Transcript, 2 December 2021, pp 2105-2107.

Witness Lists to the extent such testimony pertains to matters irrelevant to the charges against the Accused (“Second Request”).²⁷

25. In the Myers Challenge, the SPO seeks the non-admission of the Myers Report and that Ms Myers not be authorised to testify.²⁸

26. In the Second Expert Witness Challenge, the SPO seeks that the Panel rejects the admission of the Second Expert Report into evidence and does not authorise Second Expert to testify.²⁹

27. In the Additional Request, the SPO requests the Panel to strike one of the Gucati proposed witness and to not authorise improper opinion evidence irrelevant to the charges against the Accused contained in five of the proposed witnesses’ statements.³⁰

28. The Defence opposes all above requests and challenges.³¹

29. In relation to the Request to Strike, the Gucati Defence responds that this motion is premature noting, *inter alia*, that, at the time of its filing, the SPO case had not yet closed, and that the Defence had yet to decide whether to: (i) present a case; (ii) file its definitive list of witnesses; and (iii) provide the SPO with witnesses’ statements as envisaged in Rule 119 of the Rules.³² The Gucati Defence also submits that the discretion to exclude relevant evidence in Rule 138(1) of the Rules does not apply to defence evidence.³³ In addition to endorsing the position of the Gucati Defence, the

²⁷ Request to Strike, para. 1.

²⁸ F00388, Specialist Prosecutor, *Prosecution Challenge to Proposed Defence Expert and Report* (“Myers Challenge”), 22 October 2021.

²⁹ F00438, Specialist Prosecutor, *Prosecution Challenge to Proposed Defence Expert Witness 18 and Report* (“Second Expert Witness Challenge”), 16 November 2021, confidential.

³⁰ Additional Request, para. 1.

³¹ Gucati Response; Haradinaj Response; Response to Myers Challenge; Response to Second Expert Witness Challenge; Draft Transcript, 2 December 2021, pp 2071-2076.

³² Gucati Response, paras 19-25, 29, 57.

³³ Gucati Response, paras 16-18, 49-54.

Haradinaj Defence submits that the impugned witnesses are in fact relevant to the present proceedings.³⁴

30. In relation to the Myers Challenge, the Haradinaj Defence responds that the motion ought to be rejected as baseless.³⁵ In relation to the Second Expert Witness Challenge, the Haradinaj Defence responds that it ought to be rejected and the evidence of proposed Second Expert ought to be admitted as, it submits, it is relevant and will assist the Panel in making a determination.³⁶ In relation to the Additional Request, the Gucati Defence opposed the motion in its oral submissions during the Defence Preparation Conference.³⁷

III. APPLICABLE LAW

31. Pursuant to Article 21(4)(f) of the Law, in the determination of any charge against the Accused, the Accused shall be entitled, in full equality, to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.

32. Pursuant to Article 40(2) of the Law and Rule 116(1) of the Rules, the Panel may adopt procedures and modalities necessary to ensure that proceedings are fair and expeditious, with full respect for the rights of the Accused.

33. Rule 119(1) and (2) of the Rules provides that at the latest at the closing of the Specialist Prosecutor's case or following a decision pursuant to Rule 130, if any, the Defence shall decide whether a Defence case will be presented and notify the Panel accordingly. Should the Defence decide to present a case, the Panel shall order the filing of, *inter alia*, the list of witnesses the Defence intends to call together with a summary of the facts on which each witness is expected to testify. The Defence must

³⁴ Haradinaj Response, paras 3-11, 27-29, 42. *See also* Draft Transcript, 2 December 2021, p. 2073-2074.

³⁵ Response to Myers Challenge, paras 3, 39.

³⁶ Response to Second Expert Witness Challenge, paras 48-49.

³⁷ Draft Transcript, 2 December 2021, p. 2071.

also specify the allegations in the indictment on which each witness is expected to testify, including specific references to charges and relevant paragraphs of the indictment.

34. Pursuant to Rule 119(3) of the Rules, the Panel must hold a Defence Preparation Conference, during which, after having heard the Parties, the Panel may *inter alia* determine the number of witnesses the Defence may call, instruct the Defence to remove repetitive witnesses and give any further directions as necessary to ensure a fair and expeditious trial.

35. Pursuant to Rule 127(1) of the Rules, each Party is entitled to present evidence relevant to the case.

36. Pursuant to Rule 138(1) of the Rules, evidence shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.

37. In accordance with Rule 149 of the Rules, the Panel may hear expert evidence.

IV. DISCUSSION

A. TIMING OF THE DECISION

38. The Panel renders its consolidated decision on the aforementioned SPO requests at this time for several reasons. First, the Panel was mindful to the Defence request that the matter not be decided until it gave an indication pursuant to Rule 119 of the Rules that it would seek to call the witnesses subject to the Request to Strike. In this regard the Panel notes that, in accordance with Rule 95(5)(c) of the Rules, the Defence may file “a list of potential witnesses” and must, if it decides to present a case, file under Rule 119(2) a “list of witnesses”. The Defence may therefore elect to remove, at the Rule 119(2) stage, witnesses it had previously listed on the Rule 95(5)(c) list of potential witnesses. In the present case, the Defence did in fact elect to remove at the

Rule 119(2) stage several witnesses (that the SPO had challenged) from the Defence Provisional Witness Lists. The Panel considered it appropriate to await the Rule 119(2) Filings before determining the SPO requests in order to render a decision concerning that list. Secondly, the Panel considered it proper to afford the Defence a fair and full opportunity to outline the nature and the relevance to the allegations in the indictment of the proposed witnesses in their Rule 119(2) Filings. Thirdly, the Panel was mindful that the Rule 119(2) Filings would contain additional submissions and summaries that could assist the Panel's decision in relation to all challenged witnesses. Finally, in order for its decision to cause as little prejudice as possible to Defence preparations, the Panel has proceeded most expeditiously to render these full written reasons for the decision it made at the Defence Preparation Conference.

B. LEGAL STANDARDS ON THE ADMISSIBILITY OF PROPOSED TESTIMONY

39. The Panel notes at the outset that the decision of what witness to call is generally that of the Parties – with the possibility for Judges to call additional evidence.³⁸ While the Parties are entitled to a degree of deference in the selection and presentation of their evidence, their discretion is not unlimited and is subject to two general and partly overlapping qualifications, namely: (i) the relevance of the proposed evidence;³⁹ and (ii) the repetitive nature of the proposed evidence.⁴⁰

1. Relevance of Proposed Testimony

40. The calling Party must establish and the Panel must verify that the proposed evidence is relevant to the proceedings. This applies to both documentary and testimonial evidence.⁴¹ Evidence is relevant when it is connected, directly or indirectly,

³⁸ Rules 132 and 127(2)(c) of the Rules.

³⁹ Rule 127(1) of the Rules.

⁴⁰ Rule 119(3) of the Rules.

⁴¹ F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table* ("Bar Table Decision"), 29 September 2021, para. 11.

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.⁴²

41. The onus is on the calling Party to demonstrate, with clarity and specificity, that the proposed evidence is relevant and fits into that Party's case.⁴³ Demonstration of relevance requires more than a tenuous or remote connection to the facts and circumstances of a case.⁴⁴

42. Furthermore, the regime that regulates the presentation and admission of evidence applicable before this jurisdiction makes it clear that relevance is a basic and necessary condition that must be met by any evidence proposed by a Party.⁴⁵ For instance, Rule 95(5)(c) of the Rules requires the Defence to specify in its Pre-Trial Brief to which particular relevant issue the evidence relates.⁴⁶ Rule 127(1) of the Rules states that Parties are entitled to present evidence "relevant to the case".⁴⁷ The same requirement of relevance also applies, for instance, to unsworn statements by the

⁴² Bar Table Decision, paras 11-12.

⁴³ 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](#), 13 April 2010, para. 6.

⁴⁴ Bar Table Decision, para. 12. See also ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, [Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes](#), 1 September 2008, para. 6.

⁴⁵ See, generally, Articles 37(3)(a) and (5), 42(1) of the Law. See also, similarly ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-PT, [Decision on Prosecution's Rule 92 bis Motion](#), 4 July 2006, para. 5.

⁴⁶ Rule 119(2) of the Rules.

⁴⁷ Rules 137(1) and 138(1) of the Rules.

Accused,⁴⁸ to the calling of an expert witness,⁴⁹ to cross-examination of a witness,⁵⁰ to the possibility of compelling the testimony of a witness,⁵¹ to the admission of evidence relevant to sentencing,⁵² and in respect of the admission of additional evidence on appeal.⁵³ The requirement of relevance also applies to the proposed admission of written evidence of any witness,⁵⁴ the taking of judicial notice of an adjudicated fact,⁵⁵

⁴⁸ Rule 142(1) of the Rules.

⁴⁹ Rule 149(2)(a) of the Rules. *See similarly* ICTY, *Prosecutor v. Milošević*, IT-98/29-1-T, Trial Chamber, [Decision on Defence Expert Witnesses](#), 21 August 2007, paras 6-10; *Prosecutor v. Milošević*, IT-98/29-1-T, Trial Chamber, [Decision on Admission of Expert Report of Robert Donia](#), 15 February 2007, para. 10; *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Trial Chamber, [Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94bis](#), 18 March 2008, paras 7, 11; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, [Decision on the Admissibility of the Narratives of Expert Witness Richard Butler](#), 27 March 2008, para. 9; *Prosecutor v. Perišić*, IT-04-81-T, Trial Chamber, [Decision on Expert Reports by Richard Butler](#), 4 March 2009, para. 8; *Prosecutor v. Mladic*, IT-09-92-T, Trial Chamber, [Decision on Defence Request to Disqualify Richard Butler as an Expert and bar the Prosecution from Introducing his Reports](#), 19 October 2012, para. 7. For instance, in the *Slobodan Milošević* case, a purported expert report and testimony pertaining to the history of Serbo-Croatian conflicts was deemed inadmissible as not relevant to the issues of the trial: *Prosecutor v. Milošević*, IT-02-54-T, Trial Chamber, [Decision on Admissibility of Expert Report of Vasilije Krestić](#), 7 December 2005, para. 6.

⁵⁰ Rule 143(3) of the Rules. *Similarly* ICTY, *Prosecutor v. Krajišnik*, IT-00-39-T, [Decision on Cross Examination of Milorad Davidović](#), 15 December 2005, para. 8.

⁵¹ Article 42(1) of the Law; Rule 151(2)(b) of the Rules.

⁵² Rule 162(1) of the Rules.

⁵³ Rule 181(7) of the Rules. *See also, similarly* ICTY, *Prosecutor v. Galić*, IT-98-29-A, Appeals Chamber, [Decision on Defence Second Motion for Admission of Additional Evidence Pursuant to Rule 115](#), 21 March 2005, para. 14; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, [Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001](#), 11 April 2001, para. 6.

⁵⁴ Article 37(3)(a) of the Law; Rules 154 and 155 of the Rules. *Similarly*, ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber, [Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter](#), 16 February 2007, paras 3, 6; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber, [Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter](#), 5 March 2007, para. 6; *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Chamber, [Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 quarter](#), 5 February 2009, para. 5; *Prosecutor v. Tolimir*, IT-05-88/2-PT, Trial Chamber, [Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter](#), 25 November 2009, paras 27-28; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Prosecution Motion for Admission of the Evidence of KDZ172 \(Milan Babić\) Pursuant to Rule 92 Quarter](#), 13 April 2010, para. 7; *Prosecutor v. Delić*, IT-04-83-PT, Trial Chamber, [Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter](#), 9 July 2007, p. 4; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quarter](#), 20 August 2009, para. 6.

⁵⁵ Rule 157 of the Rules. *Similarly* ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, [Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94\(A\)](#), 26 September 2006, para. 11; *Prosecutor v. Stanišić & Župljanin*, IT-08-91-T, Trial Chamber, [Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94\(B\)](#), 1 April 2010, para. 29; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber, [Decision on Prosecution Motion to](#)

the calling of witnesses by victims' representatives,⁵⁶ the admission of evidence from the bar table,⁵⁷ and the issuance of orders or requests for cooperation in respect of the collection of evidence.⁵⁸ The aforementioned legal framework and standards apply to any evidence, regardless of whether it is presented by the Prosecution or the Defence.

43. In light of the above, a Party is not authorised under the Rules to offer evidence that is not relevant to the proceedings. The Panel will therefore exercise its responsibility to ensure that only evidence with a genuine claim of relevance to the proceedings is offered or tendered on the record.

[Admit Documentary Evidence](#), 10 October 2006, paras 16, 18, 30; *Prosecutor v. Milošević*, IT-98-29/1-T, Trial Chamber, [Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts](#), 26 June 2007, para. 13; *Prosecutor v. Šešelj*, IT-03-67-T, Trial Chamber, [Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94\(B\) of the Rules of Procedure and Evidence](#), 10 December 2007, para. 12.

⁵⁶ Rule 114(5) of the Rules. Similarly, ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Chamber II, [Decision on the Modalities of Victim Participation at Trial](#), 22 January 2010, para. 84; *Prosecutor v. Katanga*, ICC-01/04-01/07, Appeals Chamber, [Judgement on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled Decision on the Modalities of Victim Participation at Trial](#), 16 July 2010, para. 114.

⁵⁷ Bar Table Decision, paras 10-12. Similarly ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Chamber II, [Decision on the Prosecutor's Bar Table Motions](#), 17 December 2010, para. 16; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Chamber, [Decision on the Bar Table Motion of the Defence of Germain Katanga](#), 21 October 2011, para. 15; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Chamber II, [Directions for the Conduct of the Proceedings and Testimony](#), 20 November 2009, para. 100.

⁵⁸ Article 37(5) of the Law; Rule 111(6) of the Rules. Similarly, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Application for Binding Order \(French Republic\)](#), 30 June 2010; *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused's Motion for Binding Order \(United Nations and NATO\)](#), 11 February 2011; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on the Accused's Second Motion for Binding Order \(The Islamic Republic of Iran\) and Motion for Subpoena to Interview General Director Sadeghi](#), 10 May 2011, para. 14; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Motion for Binding Order \(The Kingdom of Saudi Arabia\)](#), 30 June 2011, paras 14, 18; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Fifth Motion for Binding Order \(United States of America\)](#), 22 August 2012; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Second Motion for Subpoena to Interview President Bill Clinton](#), 21 August 2012, para. 12; *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Trial Chamber, [Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 bis](#), 17 November 2005, para. 18; *Prosecutor v. Milutinović et al.*, IT-05-87-AR, [Decision on Request of United States of America for Review](#), 12 May 2006, para. 11.

2. Repetitive Nature of Proposed Testimony

44. Pursuant to Rules 118(1)(a) and 119(3)(a) of the Rules, the Panel has the authority to determine the number of witnesses a Party may call and instruct that Party to remove repetitive witnesses.⁵⁹ That includes the power, *a fortiori*, to order a Party not to call evidence that is otherwise relevant to the case but duplicative in nature.

3. Public Interest and Proposed Testimony

(a) Parties' Submissions

45. As part of their case, both Accused submit to have acted in pursuance of a "public interest".⁶⁰ To establish that claim, they seek to call a number of witnesses in relation to this issue.⁶¹

46. The Defence submit that the conduct attributed to the Accused amounted to the lawful exercise of their fundamental right to freedom of expression guaranteed under the Constitution of Kosovo and the European Convention on Human Rights ("ECHR").⁶² The Gucati Defence additionally relies upon the Accused's constitutional right to have access to documents of public institutions and organs of state authorities,⁶³ and submits that informing the public of the "collaboration" of the SPO and the Serbian authorities falls within the public interest to the extent that it raises

⁵⁹ Rules 118(1)(a) and 119(3)(a) of the Rules.

⁶⁰ Gucati Pre-Trial Brief, paras 72-73, 76, 140, 161, 184, 190, 222, 231, 237, 240, 256, 284, 297, 321, 334, 358; Haradinaj Pre-Trial Brief, paras 277 (d), 283-298.

⁶¹ The Defence Pre-Trial Briefs suggest that the following proposed witnesses would testify (at least in part) on that issue: *See* Defence Provisional Witnesses Lists, referring to witnesses 1 to 8, 10, 12 to 18. Some of these witnesses have been withdrawn in the Rule 119(2) Filings. *See infra* paras 67, 83.

⁶² Gucati Pre-Trial Brief, paras 21-22, *referring to* Articles 22, 40 of the Constitution of Kosovo, Article 19 of the International Covenant on Civil and Political Rights and its Protocols, Article 10 of the European Convention of Human Rights ("ECHR"); Haradinaj Pre-Trial Brief, paras 213, 221, 234.

⁶³ Gucati Pre-Trial Brief, paras 23, *referring to* Articles 41-42 of the Constitution of Kosovo and paras 188, 259-263, 279.

concerns about the SPO's independence and impartiality.⁶⁴ The Haradinaj Defence intends to raise as an "active defence" the fact that disclosures, if proven, were justified because they were done in the public interest, and were necessary to bring to the knowledge of the public controversies surrounding the Specialist Chambers ("SC"), thereby protecting "the public interest of the international and Kosovar public".⁶⁵

47. Based on these submissions, it is apparent that the Gucati Defence is not arguing that "public interest" would provide a "defence" in the strict, technical, sense,⁶⁶ while the Haradinaj Defence appears to make such a claim.⁶⁷ The Gucati Defence appears to be arguing that the fact that the Accused acted in pursuance of a "public interest" would nevertheless be relevant to evaluating the lawfulness of their conduct when considered from the point of view of the exercise of their fundamental rights, in particular in respect of Counts 5 and 6.

48. Regarding the fact(s) or circumstance(s) said to constitute a relevant "public interest" for the purpose of these proceedings, the Defence appears to suggest that revealing the existence of cooperation between, on the one hand, the Republic of Serbia and, on the other hand, the Special Investigative Task Force ("SITF") and/or the SPO was the "public interest" relevant to their case.⁶⁸ The Gucati Defence further submits that it was in the "public interest" to be informed that the SPO (and/or SITF) has collaborated with certain Serbian state officials (which the Gucati Defence goes on to name in its Pre-Trial Brief) as, it claims, it "raises questions about the independence

⁶⁴ See e.g. Gucati Pre-Trial Brief, paras 72, 124, 140, 161, 184, 190, 222, 231, 237, 240, 256, 284, 297, 321, 334, 358.

⁶⁵ Haradinaj Pre-Trial Brief, paras 277(d), 296, see also 283-298.

⁶⁶ See Transcript, 1 September 2021, p. 466, line 6.

⁶⁷ Haradinaj Pre-Trial Brief, para. 277 (d); Transcript, 1 September 2021, p. 475.

⁶⁸ See, generally, Gucati Pre-Trial Brief, paras 72, 124, 140, 160-161, 184, 196, 222, 256, 284, 297, 321, 334, 358; Haradinaj Pre-Trial Brief, paras 283-284. See also Transcript, 1 September 2021, p. 466, lines 17-22, p. 470, lines 23-25, p. 475, lines 2-3.

and impartiality of the SPO”.⁶⁹ The Defence further submits that revealing the involvement of certain Serbian officials in that cooperation also formed part of the claimed “public interest” insofar as, it is suggested, these individuals are thought to be responsible for serious crimes in Kosovo.⁷⁰ In addition, the Haradinaj Defence appears to suggest that the public disclosure of the impugned information was also justified in pursuit of a “public interest” to establish the purported ethnic bias of the Specialist Chambers.⁷¹

49. The SPO does not accept that “public interest” constitutes a defence to the charges and disputes that: (i) there was a public interest in publicising the cooperation between Serbia and the SITF/SPO or, if there was, that (ii) it would in any way excuse or justify the conduct attributed to the Accused.⁷² Further, even if “public interest” was to be considered a defence against the substantive charges, the SPO submits that the impugned witnesses should still not be authorised to testify because nothing indicates that they could assist the Panel in its fact-based determination, or that they have any specific knowledge of the cooperation of the SPO with Serbian authorities.⁷³

50. The Gucati Defence makes no submission in response to the SPO’s argument in relation to public interest. The Haradinaj Defence argues that the proposed evidence of DW1250 and DW1251 is directly relevant to the public interest defence raised by the Accused. The Haradinaj Defence submits that the proposed witnesses are capable of presenting evidence on the public interest defence, noting that both DW1250 and DW1251 were designated as whistle-blowers and that their particular knowledge as a result is relevant to the Accused public interest defence.⁷⁴

⁶⁹ See e.g., Gucati Pre-Trial Brief, paras 72, 124, 140, 160-161, 184, 196, 222, 256, 284. See also Transcript, 1 September 2021, p. 473, lines 2125, p. 474, lines 1-7.

⁷⁰ Gucati Pre-Trial Brief, paras 72-73, 75, 90-91.

⁷¹ Haradinaj Pre-Trial Brief, paras 283, 285.

⁷² Request to Strike, paras 13-14. Transcript, 1 September 2021, p. 459, lines 20-22, p. 460, lines 20-22.

⁷³ Request to Strike, para. 14.

⁷⁴ Haradinaj Response, paras 33-35.

(b) Definition of “Public Interest”

51. The Panel notes that the Law does not contain a reference or definition of the notion of “public interest”. Rule 108(1)(c) and 153(1)(b)(iv) of the Rules refer to “public interest” in respect of issues not relevant to the present discussion.⁷⁵ The Rules do not provide a definition of “public interest”. The Panel also observes that the Constitution of Kosovo refers to “public interest” in Articles 46 and 119, but in respect of issues not relevant to the present discussion.

52. While provisions of Kosovo law apply as substantive law before the SC only if expressly incorporated in the Law, other normative instruments applicable in Kosovo may be relied upon for the purpose of clarifying or interpreting the regime applicable before this jurisdiction. Accordingly, the Panel notes that Article 200(4) of the Kosovo Criminal Code (“KCC”) describes “public interest” (for the purposes of the offence of “Unauthorized disclosure of confidential information”) in the following terms: “the welfare of the general public outweighs the individual interest. The disclosure of confidential information is in the public interest if it involves plans, preparation or the commission of crimes against the constitutional order or territorial integrity of the Republic of Kosovo or other criminal offences that will cause great bodily injury or death to another person”.⁷⁶

53. The Panel notes that the Defence does not dispute the relevance of Article 200(4) of the KCC to the present context.⁷⁷ The Haradinaj Defence also submitted a number of additional instruments said to be relevant in this context without pointing to any

⁷⁵ See Rules 108(1)(c) and 153(1)(b)(iv) of the Rules.

⁷⁶ Article 200(4) of the Kosovo Criminal Code.

⁷⁷ F00302, Gucati Defence, *Written Submissions in Accordance with the Third Oral Order Made on 2 September 2021* (“Gucati Defence’s Submissions pursuant to the Oral Order”), 6 September 2021, paras 9-10; F00301, Haradinaj Defence, *Submissions in Respect of Trial Panel Case Status Hearing Oral Order Number 3* (“Haradinaj Defence’s Submissions pursuant to the Oral Order”), 6 September 2021, para. 34. See also Transcript, 1 September 2021, p. 469, lines 9-12.

other definition of “public interest” that would differ from or should prevail over that mentioned above.⁷⁸

54. The Panel notes, furthermore, that the definition of “public interest” contained in Article 200(4) of the KCC is generally consistent with, and does not differ in substance from, the definition of the notion of “public interest” relied upon by the European Court of Human Rights (“ECtHR”) in relation to Article 10 of the ECHR. Under the ECtHR’s jurisprudence, “public interest” ordinarily relates to matters which: (i) affect the public to such an extent that it may legitimately take an interest in them; (ii) attract the public’s attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community; (iii) are capable of giving rise to considerable controversy; (iv) concern an important social issue; or (v) involve a problem that the public would have an interest in being informed about.⁷⁹ According to the ECtHR, such a public interest could exist, for instance, in respect of criminal proceedings in general,⁸⁰ crimes committed,⁸¹ and the administration of justice.⁸² The ECtHR has also made it clear that the public interest cannot be reduced to the public’s curiosity or sensationalism.⁸³

⁷⁸ Transcript, 1 September 2021, p. 469, lines 13-17. See also F00300, *List of Legislation on Whistleblowing per Trial Panel II Oral Order Number 3*, 6 September 2021.

⁷⁹ ECtHR, Grand Chamber, [Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland](#), no. 931/13, *Judgment*, 27 June 2017, para. 171; [Castells v. Spain](#), no. 11798/85, *Judgment*, 23 April 1992, para. 43; Grand Chamber, [Von Hannover v. Germany no. 2](#), nos. 40660/08 and 60641/08, *Judgment*, 7 February 2012, para. 109; [Leempoel & S.A. ED. Ciné Revue v. Belgium](#), no. 64772/01, *Judgment*, 9 November 2006, para. 68; [Standard Verlags GmbH v. Austria](#), no. 21277/05, *Judgment*, 4 June 2009, para. 46; [Von Hannover v. Germany](#), no. 59320/00, *Judgment*, 24 June 2004, para. 60; [Wingrove v. the United Kingdom](#), no. 17419/90, *Judgment*, 25 November 1996, para. 58.

⁸⁰ ECtHR, [Dupuis and Others v. France](#), no. 1914/02, *Judgment*, 7 June 2007, para. 42; [Jully and SARL Libération v. France](#), no. 20893/03, *Judgment*, 14 February 2008, para. 66.

⁸¹ ECtHR, [White v. Sweden](#), no. 42435/02, *Judgment*, 19 September 2006, para. 29; [Egeland and Hanseid v. Norway](#), no. 34438/04, *Judgment*, 16 April 2009, para. 58; [Leempoel & S.A. ED. Ciné Revue v. Belgium](#), no. 64772/01, *Judgment*, 9 November 2006, para. 72; [Eerikäinen and Others v. Finland](#), no. 3514/02, *Judgment*, 10 February 2009, para. 62.

⁸² See e.g., ECtHR, Grand Chamber, [Morice v. France](#), no. 29369/10, *Judgment*, 23 April 2015, para. 128.

⁸³ ECtHR, Grand Chamber, [Couderc and Hachette Filipacchi Associés v. France](#), no. 40454/07, *Judgment*, 10 November 2015, para. 101.

55. In light of the above, for the purpose of making preliminary findings on “public interest” in the context of the admissibility of evidence, the Panel has taken notice of the definition of this term as provided in Article 200(4) of the KCC and of the ECtHR jurisprudence relevant to that issue.

(c) Panel’s Preliminary Findings Regarding “Public Interest”

56. The Panel notes at the outset that neither the Law nor the Rules provide an explicit legal basis for a defence of “public interest” in respect of any of the offences charged. It is further noted that the Parties do not dispute that the protection of the confidentiality of criminal investigations and of witnesses is a legitimate public interest that would warrant restrictions being made to certain fundamental rights, including as regards the exercise of freedom of expression and access to public records. The Defence claim, however, that a competing “public interest” existed that is relevant to deciding whether the curtailment of the Accused’s freedom of expression would be necessary and reasonable in the circumstances. The assessment of this claim is one that will be made by the Panel after it has heard all evidence relevant to that issue at trial.

57. At this stage, the Panel is in a position, however, to make preliminary findings on the Defence claims that the following constitute “public interest”: (i) the alleged ethnic bias of the SC; (ii) the cooperation between Serbia and the SITF/SPO; and (iii) the involvement of individual Serbian state officials in the aforementioned cooperation.

58. As regards the Haradinaj Defence submission that the alleged (ethnic) “bias” of this jurisdiction would constitute a “public interest”, the Panel notes the following. Firstly, the SC mandate and jurisdiction has been set out and adopted by the Kosovo Assembly and the Kosovo Constitutional Court in accordance with the relevant democratic and constitutional safeguards. Secondly, relevant safeguards of fair and expeditious proceedings are binding on the SC, including this Panel, regardless of the background, identity, ethnicity or nationality of the Accused. Thirdly, the Defence has

not pointed to any material contained in the information allegedly disclosed by the Accused that would support a claim of “bias” on the part of the SC. Accordingly, the Panel will not authorise the Defence to call or seek admission of evidence that purports to support this allegation.

59. As regards the cooperation between Serbia and the SITF/SPO, there can be no dispute that this was known to the public and that it is a lawful part of the mandates of the SITF and the SPO.⁸⁴ The Panel is also satisfied that neither the SITF nor the SPO had the authority or the practical possibility to choose or cherry-pick officials in the Republic of Serbia with whom to cooperate in respect of the fulfilment of their mandates.⁸⁵ Consistent with the aforementioned jurisprudence of the ECtHR, otherwise lawful cooperation would only raise an issue of public interest if and where there is evidence of improprieties that would affect the independence, impartiality or integrity of the SITF/SPO’s investigation(s).⁸⁶ Therefore, when assessing the claimed relevance of proposed witnesses said to be called in relation to the claimed “public interest”, the Panel will need to ascertain whether the proposed witnesses are capable of giving evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties in the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO.

60. As regards the involvement of individual Serbian state officials in the aforementioned cooperation, the Panel notes that it has not heard or received evidence on any of the individuals mentioned in the impugned material having been criminally

⁸⁴ See, generally, Gucati Defence’s Submissions pursuant to the Oral Order, paras 11-14; Haradinaj’s Defence Submissions pursuant to the Oral Order, paras 40, 43-44.

⁸⁵ Transcript, 1 September, 2021, p. 476, lines 1-16; Gucati Defence’s Submissions pursuant to the Oral Order, paras 11-23; Haradinaj’s Defence Submissions pursuant to the Oral Order, paras 36-47.

⁸⁶ See also Gucati Defence’s Submissions pursuant to the Oral Order, para. 12(c).

convicted of any related crime.⁸⁷ As such, they enjoy the presumption of innocence⁸⁸ and their reputation is protected under the general umbrella of their right to family life and privacy.⁸⁹ Furthermore, the Panel is not called upon and is in no position to pass judgment on the responsibility of any individual other than the two Accused. Accordingly, any suggestion by the Defence that any of these individuals' involvement in cooperation with SITF/SPO constitutes an indication of impropriety should account for the protection of their fundamental rights.

61. Based on the above, the claimed "public interest" in relation to which relevant evidence could be permissibly elicited is limited to evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation. The relevance of the evidence of the proposed witnesses subject to the present application will be considered in that light.

4. Admissibility of Expert Evidence

62. The Panel observes at the outset that neither the Law nor the Rules define an expert witness. Rule 149(2)(a) of the Rules implicitly requires that an expert witness

⁸⁷ The Panel notes that it has received and heard evidence of some of these individuals having been investigated or subjected to restrictive measures in relation to their past conduct. See e.g. Transcript, 20 October 2021, pp 1097-1098, 1133 et seq; P00124ET. This evidence does not point, however, to criminal convictions on any crime related to the public interest claims of the Defence. The Panel notes, furthermore, that some of these submissions are based on media articles.

⁸⁸ See e.g. ECHR, *Ismoilov and others v. Russia*, no. 2947/06, *Judgment*, 24 April 2008, para. 160; *Larrañaga Arando and others v. Spain*, no. 73911/16, *Decision*, 18 July 2019, para. 40.

⁸⁹ See e.g., ECtHR, *Ageyevy v. Russia*, no. 7075/10, *Judgment*, 18 April 2013, paras 238-239; Grand Chamber, *Von Hannover v. Germany (no. 2)*, nos. 40660/08 and 60641/08, *Judgment*, paras 95-99; Grand Chamber, *Axel Springer AG v. Germany*, no. 39954/08, *Judgment*, 7 February 2012, paras 82-84; *Pfeifer v. Austria*, no. 12556/03, *Judgment*, 15 November 2007, para. 35. See also *Iishkariani v. Georgia*, no. 18925/09, *Judgment*, 20 September 2018, paras 62-63.

have the requisite qualifications and that his or her evidence is relevant to the proceedings.

63. Expert evidence is admissible if: (i) the proposed witness can be regarded as an expert; (ii) the expert evidence meets the requirements of Rule 138(1) of the Rules, including in respect of minimum standards of reliability, relevance and probative value; and (iii) the content of the expert statements or reports fall within the accepted expertise of the expert witness and is permissible.⁹⁰

64. Regarding the first condition, an expert within the meaning of Rule 149 of the Rules may be defined as “[a] person who by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”.⁹¹

⁹⁰ Similarly, ICTY, *Prosecutor v. Milan Martić*, IT-95-11-T, Trial Chamber, [Decision on Defence’s Submission of the Expert Report of Milisav Sekulić Pursuant to Rule 94bis, and on Prosecution’s Motion to Exclude Certain Sections of the Military Expert Report of Milisav Sekulić, and on Prosecution Motion to Reconsider Order of 7 November 2006](#), 13 November 2006, pp 3-4; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Trial Chamber, [Decision on Admission of Expert Report of Robert Donia](#), 15 February 2007, para. 8; *Prosecutor v. Milan Martić*, IT-95-11-T, Trial Chamber, [Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94bis](#), 9 November 2006.

⁹¹ Similarly, ICTY, *Prosecutor v. Galić*, IT-98-29, Trial Chamber, [Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philips](#), 3 July 2002, p.2; *Prosecutor v. Brđanin*, IT-99-36-Y, [Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown](#), 3 June 2003, p. 4; *Prosecutor v. Strugar*, IT-01-42-PT, Trial Chamber, [Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94 bis](#), 1 April 2004, p. 4; *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Trial Chamber, [Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94 bis](#), 18 March 2008, para. 8; *Prosecutor v. Perišić*, IT-04-81-T, Trial Chamber, [Decision on Expert Reports by Richard Butler](#), 4 March 2009, para. 9; *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber, [Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92 bis \(D\) and of Expert Reports Pursuant to Rule 94 bis](#), 13 January 2006, para. 37; *Prosecutor v. Milošević*, IT-98-29/1-T, Trial Chamber, [Decision on Defence Expert Witnesses](#), 21 August 2007, para. 6; SCSL, *Prosecutor v. Taylor*, 03-01-T, Trial Chamber, [Decision on Defence application to exclude the evidence of proposed Prosecution expert witness Corinne Dufka or, in the alternative, to limit its scope and on urgent Prosecution request for decision](#), 19 June 2008, paras 7-8; *Prosecutor v. Brima et al.*, 04-16-T-365, Trial Chamber, [Decision on Prosecution Request for Leave to Call an Additional Witness \(Zainab Hawa Bangura\) Pursuant to Rule 73bis\(E\), AND on Joint Defence Notice to Inform the Trial Chamber of Its Position Vis-a-vis the Proposed Expert Witness \(Mrs. Bangura\) Pursuant to Rule 94bis](#), 5 August 2005, paras 23, 31; *Prosecutor v. Norman et al.*, 04-14-T, Trial Chamber [Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures](#), 21 June 2005; *Prosecutor v. Sesay et al.*, 04-15-T, Trial Chamber, [Decision on Prosecution Request for Leave to Call an Additional Expert Witness](#), 10 June 2005.

65. Regarding the second condition, as with other proposed evidence, the onus of establishing the conditions of admissibility is with the Party seeking to tender such evidence.⁹²

66. Regarding the third condition, permissible expert opinion necessarily involves specialised knowledge or experience that renders the individual concerned capable of providing evidence which would otherwise be outside the experience and knowledge of the Panel. In this sense, the purpose and justification for expert evidence is to enlighten or assist the Panel with specialised knowledge which the Panel does not possess.⁹³ Such specialised knowledge constitutes not just a pre-requisite for the possibility of expert evidence but also constitutes an intrinsic limitation upon it. Expert evidence is indeed confined to the area or areas of the expert's specialised knowledge and may not in principle stray outside that field of expertise.⁹⁴ If the evidence proposed to be elicited from an expert is within the knowledge of the Panel, or the issue is one which the court can decide of its own experience, expert evidence may not be admitted.⁹⁵ Therefore, expert evidence is not to be relied upon in order to place before the Panel facts or circumstances, which it could determine for itself or to guide that Panel upon matters which it was within the ordinary capacity of the judges to determine for themselves.⁹⁶ In particular, an expert witness shall not offer his or her

⁹² Similarly, ICTY, *Prosecutor v. Galić*, IT-98-29-A, Appeals Chamber, [Decision on the Expert Witness Statement Submitted by the Defence](#), 27 January 2003, p. 3; *Prosecutor v. Galić*, IT-98-29-A, Appeals Chamber, [Decision concerning the Expert Witness Ewa Tabeau and Richard Philipps](#), 3 July 2002, p. 3.

⁹³ Similarly, SCSL, *Prosecutor v Norman*, 2004-14-AR72(E), Appeals Chamber, [Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures](#), 21 June 2005, p. 4; ICTR, *Prosecutor v Akayesu*, ICTR-96-4-A, Appeals Chamber, [Decision by a Defence Motion for the Appearance of an Accused as an Expert Witness](#), 9 March 1998, p. 2.

⁹⁴ Similarly, ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Trial Chamber, [Decision on Expert Reports by Richard Butler](#), 4 March 2009, para. 9; *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber, [Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 bis](#), 9 November 2006, para. 7.

⁹⁵ F00314, Panel, *Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), para. 89.

⁹⁶ *Order on the Conduct of Proceedings*, para. 90. Similarly, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1159, Trial Chamber VI, [Decision on Defence Preliminary Challenges to Prosecution's Expert Witnesses](#), 9 February 2016, para. 8; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Trial Chamber, [Decision on](#)

opinion on the criminal liability of the Accused, which is a matter within the exclusive competence of the Panel.⁹⁷

C. PROPOSED TESTIMONY OF DW1241, 1242, 1246, 1250 AND 1251

1. Witnesses DW1246, 1250 and 1251

67. Pursuant to the First Request in the Request to Strike, the SPO seeks an order from the Panel to strike five witnesses off the Defence Provisional Witness Lists (Witnesses 11, 15, 16, 18 and 19).⁹⁸ The Panel notes that Witnesses 11 and 18 are no longer proposed to be called. The Panel shall not address submissions in their regard. The Panel further notes that Witnesses 15, 16 and 19 are now indicated as Witnesses DW1250, DW1251 and DW1246, respectively. The Panel will address submissions in their regard using the latter numbers.

(a) Parties' Submissions

68. In the Defence Provisional Witness Lists, DW1246 is described as a former high-ranking officer from the Kosovo police. The Defence submit that this witness is proposed to give evidence about the "effective investigation into securing the premises of the Kosovo Liberation Army War Veterans Association ("KLA WVA") and seeking to identify who was responsible for the drop offs and the leak".⁹⁹ In the same filing, DW1250 and DW1251 were identified as "public interest" witnesses.¹⁰⁰

[Prosecution motion for reconsideration of the decision on prospective experts Guichaoua, Nowrojee and Des Forges, or for certification](#), 16 November 2007, para. 21

⁹⁷ Similarly, ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-T, Trial Chamber [Decision on Report of Prosecution Expert Klaus Reinhardt](#), 11 February 2004, p. 4; *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Trial Chamber, [Decision on Prosecution's Submission of the Expert Report of Nena Tromp and Christiam Nielsen Pursuant to Rule 94 bis](#), 18 March 2008, para. 12; *Prosecutor v. Perišić*, IT-04-81-T, Trial Chamber, [Decision on Expert Reports by Richard Butler](#), 4 March 2009, para. 10.

⁹⁸ Request to Strike, para. 1.

⁹⁹ Defence Provisional Witnesses Lists, p. 2.

¹⁰⁰ Defence Provisional Witnesses Lists, p. 2.

69. In the Defence Provisional Witnesses Submissions, the Defence submits that DW1246 is being called to testify that “[t]he Kosovo Police received instructions from the Kosovo Special Prosecution Office not to investigate the deliveries”.¹⁰¹ In the same filing, in relation to DW1250, the Defence submits that he will be testifying in relation to practices of EULEX/SC, whether there is an atmosphere of political pressure, whether investigative files and protected witness details were provided to Serbian officials, whether there is a culture of leaking information and whether the Accused were acting in the public interest/can be classified as whistle-blower.¹⁰² In relation to DW1251, the Defence submits that she will testify on the practices of EULEX/SC, whether there is an atmosphere of political pressure, whether investigative files and protected witness details were provided to Serbian officials, whether there is a culture of leaking information and whether the Accused were acting in the public interest/can be classified as whistle-blower.¹⁰³

70. In the Request to Strike, the SPO submits that DW1246, DW1250 and DW1251 should not be allowed to testify on the ground that they are not relevant to any fact material to these proceedings.¹⁰⁴

71. The Haradinaj Defence responds that the proposed evidence of DW1246 is probative of the fact that despite having the authority and responsibility, the SPO did not sufficiently investigate these crimes which they accept fall within the SC jurisdiction.¹⁰⁵ In relation to DW1250 and DW1251, the Haradinaj Defence responds that they “are capable of presenting evidence relevant to the public interest defence”, noting that both have been designated “whistle-blowers” for disclosures they have made in the past and in particular the improper transfer of casefiles and protected witness details to Serbian officials. The Haradinaj Defence adds that the particular

¹⁰¹ Gucati Provisional Witnesses Submission, p. 5; Haradinaj Provisional Witnesses Submission, p. 8.

¹⁰² Gucati Provisional Witnesses Submission, p. 5; Haradinaj Provisional Witnesses Submission, pp 7-8.

¹⁰³ Gucati Provisional Witnesses Submission, p. 5; Haradinaj Provisional Witnesses Submission, pp 7-8.

¹⁰⁴ Request to Strike, paras 1-2, 8-16.

¹⁰⁵ Haradinaj Response, para. 36.

knowledge of DW1250 and DW1251 is relevant to the defence that the Accused may seek.¹⁰⁶

72. Further to the Rule 119(2) Filings, the Haradinaj Defence provided a proposed statement of DW1246,¹⁰⁷ giving a general account of some actions taken by the Kosovo police in respect of the leak of SITF/SPO information and interactions between the Kosovo police with the KLA WVA. The Haradinaj Defence also produced proposed statements in respect of DW1250 and DW1251.¹⁰⁸

73. At the Defence Preparation Conference, the SPO submitted that the statements of DW1246, DW1250, DW1251 – disclosed on 30 November and 1 December 2021 – bolstered its First Request insofar as the statements rendered even clearer the irrelevant nature of the prospective testimonies of these witnesses and the fact that they cannot assist the Panel.¹⁰⁹

74. At the same hearing, the Haradinaj Defence responded that DW1246 is relevant insofar as he deals with whether the SPO directed – or actively prevented – the Kosovo Police to conduct investigations, noting that DW1246 was a senior member of the Kosovo Police at the relevant time.¹¹⁰ Regarding DW1250 and DW1251, the Haradinaj Defence reiterated that their proposed testimonies were relevant and necessary to Mr Haradinaj's Defence of public interest.¹¹¹

¹⁰⁶ Haradinaj Response, para. 34.

¹⁰⁷ Haradinaj Proposed Witness Statements, pp 8-10.

¹⁰⁸ Haradinaj Proposed Witness Statements, pp 11-36; The proposed statement of DW1250 was sent by Counsel for Mr Haradinaj via email to the Panel on 1 December 2021 at 14:50 (CRSPD72).

¹⁰⁹ Draft Transcript, 2 December 2021, pp 2064-2066.

¹¹⁰ Draft Transcript, 2 December 2021, p. 2073.

¹¹¹ Draft Transcript, 2 December 2021, p. 2074.

(b) Panel's Findings

75. The Panel notes that the Haradinaj Defence has had at least five separate opportunities to explain and lay out the purported relevance of the impugned witnesses, namely:

- i. in their Pre-Trial Briefs, where the Defence were invited to specify, in relation to each witness, "to which particular relevant issue the evidence relates";¹¹²
- ii. in the Defence Provisional Witnesses Submissions, submitted pursuant to the Panel's 21 July Order to outline the nature of the proposed evidence of the witnesses listed on the Defence Provisional Witness Lists;¹¹³
- iii. at the Trial Preparation Conference when the Panel expressly asked the Defence to clarify their position on this matter;¹¹⁴
- iv. in their Responses to the Request to Strike;¹¹⁵ and
- v. in the lists of proposed witnesses filed with their Rule 119(2) Filings further to the requirement to indicate, for each witness, "the allegations in the indictment on which each witness is expected to testify, including specific references to charges and relevant paragraphs of the indictment" (Rule 119(2) of the Rules), and in the statements of witnesses filed further to the Rule 119(2) Filings.¹¹⁶

76. The Panel took into consideration all aforementioned submissions and finds as follows.

¹¹² Rule 95(5) of the Rules; *See also* Gucati Pre-Trial Brief; Haradinaj Pre-Trial Brief; Defence Provisional Witness Lists.

¹¹³ 21 July Order, paras 12, 34 (e); Gucati Provisional Witnesses Submission; Haradinaj Provisional Witnesses Submission.

¹¹⁴ *See e.g.* Transcript, 1 September 2021, pp 463-464.

¹¹⁵ Gucati Response; Haradinaj Response.

¹¹⁶ Haradinaj Proposed Witness Statements.

Witness DW1246

77. The Panel notes that the proposed evidence appears to be put forth as being relevant to the claim of “entrapment” advanced by the Defence. Without prejudice to the question of the availability of an entrapment defence under the applicable legal regime, the Panel considers that the proposed evidence could be relevant to that issue.

78. That being said, the Panel observes that the proposed statement of DW1246 contains much material of little or no relevance to the proceedings. Accordingly, the Panel directs the Parties to ensure that questioning is limited to issues and circumstances relevant to the present proceedings.

79. In light of the above, the Panel denies in part the First Request and declines to exclude the testimony of DW1246.

Witnesses DW1250 and DW1251

80. The Panel observes that the Defence’s previous descriptions of the anticipated testimony and the produced statements of DW1250 and DW1251 address generic allegations regarding the operations and functioning of EULEX, highlight alleged improprieties and/or misconduct in EULEX. Neither the Defence submissions nor the proposed statements offer any credible linkage to SITF/SPO investigations, the SITF/SPO’s contacts with Serbian authorities or SC proceedings. Furthermore, the statements of the proposed witnesses do not appear to pertain to any fact or circumstance relevant to this case. General allegations of improprieties or misconduct attributed by the proposed witnesses to various EULEX officials, unrelated to SITF/SPO investigations or SC proceedings, have not been shown by the Defence to be in any way relevant to an issue in the case. The Panel also notes that, insofar as the proposed evidence is relevant to a dispute between EULEX or any other employer and its former employees, the SC is not the proper forum for adjudication of such dispute.

81. The Panel further observes that neither of these witnesses has been shown to possess relevant expertise that would authorise them to give evidence under Rule 149

of the Rules that the Accused acted in the public interest and should be regarded as whistle-blowers. Furthermore, the claim that DW1250 and DW1251 are to be regarded as “whistle-blowers” for the purpose of Article 10 of the ECHR is undermined by the fact that, from the material provided by the Defence, it appears that neither DW1250 nor DW1251 was ever in a relationship of employment with the SPO or the SITF that would warrant recognition of whistle-blower status in the present context.¹¹⁷ The Panel is accordingly satisfied that the Haradinaj Defence has failed to demonstrate how either of these witnesses is capable of giving evidence regarding the claim of “public interest” as identified and defined above,¹¹⁸ and how their proposed evidence is relevant to these proceedings.

82. In light of the above, the Panel grants in part the First Request and declines to hear the evidence of DW1250 and DW1251.

2. Witnesses DW1241 and DW1242

83. Pursuant to the Second Request in the Request to Strike, the SPO seeks an order from the Panel not to authorise certain testimony of five witnesses from Defence Provisional Witness Lists (Witnesses 1, 3, 9, 12 and 14). The Panel notes that Witnesses 1, 9 and 14 are no longer proposed to be called. The Panel shall not address submissions in their regard. The Panel further notes that Witnesses 3 and 12 are now indicated as Witnesses DW1241 and DW1242. The Panel will address submissions in their regard using the latter numbers.

¹¹⁷ See e.g., ECtHR, Grand Chamber, [Guja v. Moldova](#), no 14277/04, Judgment, 12 February 2008, para. 70. The Trial Panel notes that a proposed Defence witness, DW1252, will offer evidence that such a requirement does not apply in these proceedings. See Myers Report, paras 11, 13, 20-21. The Panel will decide this matter in its decision at the conclusion of trial.

¹¹⁸ See *supra* paras 52-55.

(a) Parties' Submissions

84. In the Defence Provisional Witness Lists, DW1241 and DW1242 are described as public interest witnesses, who would give evidence on factual events regarding the delivery of material and press conferences as well as on alleged SPO incitement.¹¹⁹

85. In the Defence Provisional Witnesses Submissions, the Defence submits that DW1241 would provide evidence on the circumstances of the deliveries and the conduct of SPO officers present at the KLA WVA premises on 25 September 2020.¹²⁰ In the same filing, the Defence describes DW1242 as having witnessed and filmed the second delivery from outside the KLA WVA.¹²¹ The Defence submits that DW1242 would testify as to the "circumstances of the press conference" and "no contact from SPO investigating footage of second drop off".¹²²

86. In its Second Request, the SPO requests that the Panel not authorise testimony of DW1241 and DW1242 on issues irrelevant to the charges. In relation to DW1241, the SPO submits that evidence on the manner in which search and seizure was conducted by the SPO would not assist the Panel in its determination of the charges, but it would unnecessarily prolong the proceedings, placing an unnecessary strain on institutional resources.¹²³ In relation to DW1242, the SPO submits that evidence on steps which may or may not have been taken by the SPO in the context of its investigation into how the batches reached the KLA WVA is not on trial and is irrelevant to the charges.¹²⁴

87. The Gucati Defence did not make specific submissions in relation to DW1241 and DW1242 in its Response.

¹¹⁹ Gucati Provisional Witness List, pp 1-2; Haradinaj Provisional Witness List, p. 1.

¹²⁰ Gucati Provisional Witnesses Submissions, p. 4; Haradinaj Provisional Witnesses Submissions, p. 7.

¹²¹ Gucati Provisional Witnesses Submissions, p. 2; Haradinaj Provisional Witnesses Submissions, p. 5.

¹²² Gucati Provisional Witnesses Submissions, p. 2; Haradinaj Provisional Witnesses Submissions, p. 5.

¹²³ Request to Strike, paras 17-19.

¹²⁴ Request to Strike, paras 17-18.

(b) Panel's Findings

88. The Panel notes that DW1241 and DW1242 appear capable of giving evidence relevant to this case, in particular in respect of the circumstances in which the impugned material came into possession of the Accused and various search and seizure operations conducted to recover that material from the KLA WVA. While certain aspects of their proposed evidence might not be relevant and would therefore not be permissible, it is not possible at this stage to exclude in the abstract potential lines of inquiry that the Defence might wish to pursue with them.

89. In any event, the Panel directs the Defence to ensure that questioning is limited to issues and circumstances relevant to the present proceedings, including in respect of any issue of "public interest" as defined above.¹²⁵ Should the SPO take the view that irrelevant evidence is being elicited, it can object on that ground during examination and seek a ruling from the Panel at that time.

90. In light of the above, the Panel denies the Second Request as premature and declines to exclude, at this time, parts of the anticipated testimony of DW1241 and DW1242.

D. PROPOSED EXPERT EVIDENCE OF DW1252 AND DW1253

91. The Panel notes that Ms Myers is identified by the Haradinaj Defence as DW1252 and the Second Expert Witness as DW1253.¹²⁶ The Panel will address submissions in regard of these two witnesses using the latter numbers and, in respect of Ms Myers, also by reference to her name.

¹²⁵ See *supra* paras 52-55.

¹²⁶ Haradinaj Proposed Witness List, pp 5-6.

1. Witness DW1252 (Ms Myers)

(a) Parties' Submissions

92. The Defence submits that the Myers Report addresses the question whether the Accused can be described as acting in the public interest or classified as whistleblowers.¹²⁷

93. The SPO challenges the admissibility of the Myers Report on four grounds, namely that: (i) public interest cannot constitute a defence to the charges against the Accused; (ii) the Myers Report and/or the testimony of Ms Myers would not assist the Panel; (iii) the Myers Report and/or the testimony of Ms Myers would inappropriately usurp the Panel's functions; and (iv) the Myers Report was prepared on an improper basis.¹²⁸

94. In its response, the Haradinaj Defence disputes these grounds as a basis to refuse to hear Ms Myers as an expert in this case.¹²⁹

(b) Panel's Findings

95. The Panel notes at the outset that the Parties do not dispute its authority to refuse to hear a proposed expert if and where the witness' proposed evidence is not relevant, or where it pertains to issues that do not warrant recourse to an expert opinion. The question for the Panel, therefore, is whether any of the grounds advanced by the SPO warrant an order by the Panel prohibiting the Defence to call Ms Myers or to narrow the scope of the evidence that can validly be elicited from her.

96. In respect of the SPO's argument that public interest cannot constitute a defence to the charges against the Accused, the Panel reiterates that neither the Law nor the

¹²⁷ Gucati Provisional Witnesses Submissions, p. 5; Haradinaj Provisional Witnesses Submissions, p. 8.

¹²⁸ Myers Challenge, paras 4-11.

¹²⁹ Response to Myers Challenge. *See also* F00410/RED.

Rules provide an explicit legal basis for a defence of “public interest” in respect of any of the offences charged.¹³⁰ A “public interest” claim could be relevant, however, in line with Article 200(4) of the KCC and relevant ECtHR jurisprudence, as described in paragraphs 54-55 and 61 of this decision. On that basis, evidence that *could* assist in providing for an understanding of the legal parameters of application of that notion could be relevant to these proceedings. The fact that, as noted by the SPO, “public interest” is no defence to the charges would not, therefore, provide a basis on which to refuse to hear Ms Myers.

97. In respect of the SPO’s argument that the Myers Report and/or the testimony of Ms Myers would not assist the Panel, it is acknowledged that some of the legal issues addressed by Ms Myers are within the cognisance of the Panel and can be resolved without the assistance of an expert. The Panel also agrees with the SPO’s submission that legal issues are not normally subject to expert opinion, unless they pertain to foreign law or law outside the expertise of the Panel.¹³¹ However, considering the fact that the proposed expert witness has some particular expertise in regard to this field of law and that her expertise in relation to it is not being challenged, her proposed evidence might be of value to the Panel in coming to its decision. Furthermore, the Panel would not be bound by Ms Myers’ opinion on those issues and the SPO would get a fair opportunity to challenge those aspects of the Myers Report with which it takes issue.

98. In respect of the SPO’s arguments that the Myers Report and/or the testimony of Ms Myers would inappropriately usurp the Panel’s functions, the Panel agrees in part with those submissions. The Myers Report effectively consists of two elements: (i) general comments about the legal standard which Ms Myers states is applicable and relevant to a claim of “whistle-blowing”; and (ii) claims that Ms Myers makes that

¹³⁰ See *supra*, para. 56.

¹³¹ Similarly, ICTY, *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-T, Trial Chamber, [Decision on Prosecution’s 94 bis Notice re Expert Witness Sladjana Taseva](#), 8 February 2008, para. 8; *Prosecutor v. Stakic*, IT-97-24-A, Appeals Chamber, [Judgment](#), 22 March 2006, para. 164.

purport to apply that legal standard to what she understands to be the facts of this case. While the former element falls within the permissible scope of an expert opinion, the latter does not. Instead, Ms Myers' comments and conclusions regarding the status of the Accused as "whistle-blowers", and her conclusions regarding the lawfulness of their conduct, fall squarely within the Panel's competence and constitute an usurpation of the Panel's exclusive functions and responsibilities.¹³² For this reason, the Panel will disregard the following paragraphs of the Myers Report:

- a. paragraphs 23-25 (of Part IV);
- b. paragraph 32 (Principle 1; of Part V);
- c. paragraph 34 (Principle 2; of Part V), second sentence ("According to the information [...]") and last sentence ("The Defendants [...]");
- d. paragraph 36 (of Part V), second sentence ("In my opinion [...]"); and
- e. paragraph 40 (Conclusion).

99. For the same reason, the Parties are ordered to refrain from asking Ms Myers any question that would require her to comment on the evidence tendered in these proceedings, or to comment on how any of her legal analysis would apply to the facts of the present case.

100. In respect of the SPO's argument that the Myers Report was prepared on an improper basis, the Panel notes that this can be fully and properly addressed through cross-examination. The Panel finds that this would not, in the circumstances of this case, be a sufficient basis on which to refuse to hear the proposed expert. Furthermore, the Panel's direction to the Parties to avoid questions aimed at eliciting answers which

¹³² Similarly, ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, [Decision on Prosecution Objections Pursuant to Rule 94 bis to Expert Evidence of Radovan Radinović](#), 5 October 2007, para. 4; SCSL, *Prosecutor v. Taylor*, 03-01-T, [Decision on Defence application to exclude the evidence of proposed Prosecution expert witness Corinne Dufka or, in the alternative, to limit its scope and on urgent Prosecution request for decision](#), 19 June 2008, paras 21-22.

usurp the Panel's exclusive functions and responsibilities should satisfactorily address this objection.

101. In light of the above, the Panel denies the Myers Challenge and declines to exclude the testimony of DW1252, subject to limitations set out in paragraphs 98-99.

2. Witness DW1253

(a) Parties' Submissions

102. The Haradinaj Defence submits that DW1253 is a highly experienced police officer from Australia and a former Chief of Operations at the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia. The Haradinaj Defence further submits that he is "a leading expert with over thirty (30) years' experience on the investigative and legal sides of international criminal and humanitarian law so suitably qualified".¹³³ According to the Haradinaj Defence, DW1253 has become necessary because of the oral testimony of SPO Witness W04841.¹³⁴ The Haradinaj Defence submits that W04841 testified to certain practices and procedures followed for SITF/SPO investigators and prosecutors but that she was unable to give evidence or opine upon the suitability or appropriateness of the procedures in this case.¹³⁵ According to the Haradinaj Defence, "[t]he SPO procedures, their suitability and reliability in this case go to the core of the Prosecution's case and the Defence".¹³⁶ It is proposed that DW1253 should testify "directly to international investigative standards, practices and procedure, including those described by W04841, particularly search and seizure operations and the retention and securing of

¹³³ Haradinaj Request for Additional Expert Witness, para. 5.

¹³⁴ Haradinaj Request for Additional Expert Witness, para. 12.

¹³⁵ Haradinaj Request for Additional Expert Witness, para. 13.

¹³⁶ Haradinaj Request for Additional Expert Witness, para. 14.

evidential material".¹³⁷ Further or in the alternative, the proposed expert evidence is said to be necessary because:

- a. The information is directly relevant to several defences that the Accused seek to raise in this case, including challenges to the SPO's chain of custody, authentication of material deemed to be confidential and non-public, and the entrapment defence, and therefore, the addition of the expert is necessary in the interests of justice;
- b. The information on the practices and procedures of SITF/SPO investigators and prosecutors revealed by W04841's testimony is new information and thus requires a response;
- c. DW1253 will primarily respond to facts and matters raised in W04841's testimony and the expert evidence will therefore be limited in scope; and
- d. Addition of the expert evidence will not prejudice the SPO because they will have an opportunity to cross-examine DW1253 and will have more than adequate time to prepare.¹³⁸

103. In its Second Expert Witness Challenge, the SPO disputes the relevance of all parts of the proposed Second Expert Witness Report. According to the SPO, the proposed evidence, which purportedly concerns investigative standards and related international best practices, is irrelevant to the charges against the Accused.¹³⁹ The SPO adds that even if the Panel deemed the subject-matter of the Second Expert Witness Report to be relevant, that report addresses matters of law and fact squarely within the purview of the Panel to determine.¹⁴⁰ The SPO further submits that expert evidence is not required to enable Defence Counsel to make submissions on such matters or to

¹³⁷ Haradinaj Request for Additional Expert Witness, para. 15.

¹³⁸ Haradinaj Request for Additional Expert Witness, para. 16.

¹³⁹ Second Expert Witness Challenge, para. 2.

¹⁴⁰ Second Expert Witness Challenge, para. 2.

assist the Panel in its consideration of them.¹⁴¹ Rather than assisting the Panel, it is said that the proposed evidence “would run the risk of improperly usurping its functions as the ultimate arbiter of fact and law”.¹⁴² The SPO also criticises the Second Expert Witness Report for what it says are unsubstantiated claims.¹⁴³

104. In response, the Haradinaj Defence rejects the SPO’s claims that the proposed evidence is irrelevant to the charges against the Accused and that the Second Expert Witness Report would not be of assistance to the Panel and would inappropriately usurp the Panel’s functions.¹⁴⁴ The Haradinaj Defence argues that the Second Expert Witness Report and his evidence is not only reliable, relevant and of assistance to the Panel, but is also central to the legitimacy and adequacy of the SPO’s investigations, which the Defence regards as an important issue.¹⁴⁵ The Haradinaj therefore submits that the Second Expert Witness Challenge ought to be rejected.¹⁴⁶

(b) Panel’s Findings

105. The Panel notes that the Defence wishes to call DW1253 to provide an opinion on the following issues: (i) the lawfulness of search and seizure operations carried out by the SPO; (ii) the process of authentication used by one SPO witness (W04841) to establish the confidential/non-public character of certain documents and reliability thereof; and (iii) the adequacy – in terms of reliability and authenticity of the collected information – of the “chain of custody” (including the inventory) established by the SPO in respect of material collected from the KLA WVA.

106. The Panel emphasizes that DW1253 is unquestionably an experienced and highly qualified criminal investigator. There is no intention by any Party to impugn

¹⁴¹ Second Expert Witness Challenge, para. 2.

¹⁴² Second Expert Witness Challenge, para. 2.

¹⁴³ Second Expert Witness Challenge, para. 3.

¹⁴⁴ Response to Second Expert Witness Challenge, paras 11-46.

¹⁴⁵ Response to Second Expert Witness Challenge, paras 20-22, 26, 30-33, 49.

¹⁴⁶ Response to Second Expert Witness Challenge, para. 48.

the professionalism of the witness, and there is no dispute that he is and would be impartial in respect of issues he would be asked to testify to.¹⁴⁷ However, the question for the Panel to resolve is whether his proposed evidence comes within the scope of what is permissible “expert evidence”. For reasons outlined below, the Panel is not satisfied that this is the case.

107. First, the proposed evidence relates to issues which the Panel can determine for itself without the assistance of expert evidence.¹⁴⁸ They are legal, factual and evidential issues that the Parties have raised as part of their case. In order to give an opinion upon these, DW1253 does not appear to rely on any sort of expertise – in terms of knowledge or experience – that the Panel does not already possess. The Panel notes in this regard that the Defence has not directed the Panel to any precedent where expert evidence was admitted in relation to the general nature of the facts and circumstances which the Haradinaj Defence proposes to explore with DW1253.

108. Secondly, the proposed evidence of DW1253 would usurp, in several respects, the Panel’s responsibilities. In particular, the Panel notes that the issues upon which he would be asked to testify are matters that fall squarely within the responsibility of the Panel, insofar as it would result in evidence being elicited in respect of the weight, reliability or admissibility of evidence already on the record. The Defence also intends to ask DW1253 to opine upon the validity and lawfulness of search and seizure operations conducted by the SPO, which are matters within the scope of responsibility of the Panel. The Panel notes in that regard that DW1253 proposes to offer an opinion not just on the compatibility of the search and seizure operations with what he

¹⁴⁷ Similarly, ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber, [Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness](#), 9 March 1998.

¹⁴⁸ Similarly, SCSL, *Prosecutor v. Taylor*, 03-01-T, Trial Chamber, [Decision on Defence application to exclude the evidence of proposed Prosecution expert witness Corinne Dufka or, in the alternative, to limit its scope and on urgent Prosecution request for decision](#), 19 June 2008, paras 18-20; ICTR, *Prosecutor v. Karemera et al.*, 98-44-T, Trial Chamber, [Decision on Prosecution Motion for Reconsideration of the Decision on Prospective Experts Guichaoua, Nowrojee and Des Forges, or for Certification](#), 16 November 2007, paras 13-14.

characterizes as the “highest international investigative standards, practice and procedures” but also with the Rules.¹⁴⁹ This is the responsibility of the Panel and cannot validly be subject to expert opinion.

109. Thirdly, the Panel notes that DW1253 does not claim to have conducted a review similar to that which W04841 said that she conducted in order to establish and verify the confidential status of the impugned material. As such, DW1253 has no demonstrated expertise that would put him in a position to offer an expert opinion on that point. If he has an opinion, it is not one that would add to what the Panel can determine based on its own knowledge and experience. Furthermore, to the extent that the Defence sought to take issue with the method used by W04841 for that purpose, it did so as part of its cross-examination of that witness.¹⁵⁰

110. Finally, the Panel notes that most of what DW1253 would propose to say could be advanced by Counsel as submissions.¹⁵¹ In particular, the “best practices” to which DW1253 has pointed could be relevant and could be put forth by the Defence as part of its Final Trial Briefs and closing statements.

111. In light of the above, the Panel grants the Second Expert Witness Challenge and declines to hear the evidence of DW1253.

¹⁴⁹ See Second Expert Witness Report, paras 26-27, 30-31.

¹⁵⁰ See generally, F00427, Panel, *Decision on Admissibility of Deferred Exhibits and the Classification of Certain Admitted Exhibits*, 9 November 2021, para. 8.

¹⁵¹ Similarly, ICTR, *Prosecutor v. Nahimana et al.*, 99-52-A, Appeals Chamber, [Decision on the Expert Witnesses for the Defence](#), 24 January 2003, paras 21-22; *Prosecutor v. Nahimana et al.*, 99-52-A, Appeals Chamber, [Appeal Judgement](#), 28 November 2007, paras 293-294.

E. PROPOSED EVIDENCE OF DW1243, DW1244, DW1245, DW1247, DW1248 AND DW1254

1. Parties' Submissions

112. In its Additional Request, the SPO asks the Panel to: (i) not authorise the testimony of Gucati Defence Witness DW1248 ("First Additional Request"); and (ii) not authorise improper opinion evidence irrelevant to the charges, including that contained in the statements of five proposed witnesses (DW1243, DW1244, DW1245, DW1247, DW1254) ("Second Additional Request").¹⁵²

113. Regarding the First Additional Request, the Gucati Defence responds that, since the SPO does not challenge the fact that the impugned articles are still publicly available online – which is the sole purpose of DW1248's statement and proposed testimony – the Gucati Defence proposes to regard the matter as an agreed fact.¹⁵³ In reply, the SPO maintained that the proposed testimony is irrelevant but that, should the Panel decide otherwise, the SPO offers that DW1248's statement be tendered through Rule 153 of the Rules or, alternatively, be dealt with as an agreed fact.¹⁵⁴

114. Regarding the Second Additional Request, the Gucati Defence responds that there is no need for a "fine tooth comb" assessment of the relevance of the individual sentences of the witnesses' statements because witnesses will be called and cross-examined and because the Panel will determine the appropriate weight to be given to the statements (or parts thereof) in due course.¹⁵⁵ The SPO replies that Rule 154 of the Rules should not be used to circumvent Rule 138 of the Rules. The SPO maintains that some parts of the written statements are irrelevant and objects to their admission

¹⁵² See generally Additional Request.

¹⁵³ Draft Transcript, 2 December 2021, pp 2071-2072.

¹⁵⁴ Draft Transcript, 2 December 2021, p. 2076.

¹⁵⁵ Draft Transcript, 2 December 2021, p. 2071.

under Rule 154, noting that if such testimony was to be elicited *viva voce*, the SPO would regard it as inadmissible and would similarly object to it.¹⁵⁶

2. Panel's Findings

115. The Panel notes that the proposed testimony and statement of DW1248 concerns the online availability of a number of articles at the time that DW1248 made his written statement. It appears from the Parties' submissions that there is no dispute that the impugned articles were available online at the time that DW1248 made his statement.¹⁵⁷ As such, the Panel can take note of that fact as agreed between the Parties without the need to call DW1248. If the Defence wishes, however, to tender DW1248's statement in evidence, it can offer it for admission pursuant to Rule 153 of the Rules, as suggested by the SPO.¹⁵⁸

116. Regarding the Second Additional Request, the Panel agrees with the SPO submission that a trial is not the occasion for witnesses to speculate or to offer opinions that have no factual basis.¹⁵⁹ That being said, the application of that principle by the Panel calls for some caution. Witnesses might offer opinion evidence relevant to the determination of truth, in particular when the witness provides the facts which underlie that opinion, and when the opinion is corroborated by other evidence. Other evidence might be partly fact-based and partly opinion-based. This suggests that Parties should have *some* discretion in eliciting opinion evidence, as well as the facts underlying those opinions, and the Panel should exercise some restraint before disallowing the questioning of a witness as to his or her opinion.

117. The Panel agrees with the SPO that some of the propositions contained in the statements of the proposed witnesses amount to opinion and that some of these

¹⁵⁶ Draft Transcript, 2 December 2021, p. 2071.

¹⁵⁷ Additional Request, para. 4.

¹⁵⁸ Additional Request, para. 5.

¹⁵⁹ Additional Request, para. 2.

opinions appear to have little or no basis in facts.¹⁶⁰ At this stage, however, these statements have not been offered in evidence and the Defence has not sought to elicit these opinions from its prospective witnesses. If and when the Defence seeks to do so, the SPO could object to such opinions being elicited, or to the admission of a proposed statement, on that basis. In addition, or in the alternative, the SPO could opt to address these matters in cross-examination.

118. The Panel reiterates, however, its order that the Parties should not seek to elicit evidence from witnesses that is not relevant to the proceedings. In particular, the Panel has already pointed out that the “justness” of the war, or evidence pertaining to crimes committed by any party during the Kosovo conflict are not issues relevant to this case.¹⁶¹ The Panel also emphasises that opinion evidence elicited from a witness who is not an expert or who cannot point to any facts in support of his or her opinion will carry little weight, even if the Panel allows that evidence to be elicited.

119. In light of the above, the Panel denies the Second Additional Request as premature and declines to exclude, at this time, parts of the anticipated testimony and evidence of DW1243, DW1244, DW1245, DW1247 and DW1254.

V. LEAVE TO APPEAL

120. The Panel notes at the outset that the decision whether to request leave to appeal under Rule 77 of the Rules rests with the relevant Party. It is for Party concerned to assess the legal and practical considerations on whether to submit a request for leave to appeal. In this particular instance, the Panel considers that, should the Haradinaj Defence request leave to appeal under Rule 77 of the Rules, the Panel would be inclined to grant such leave in relation to the following issues arising from this decision:

¹⁶⁰ Additional Request, paras 7-8.

¹⁶¹ Oral Order on Reminder to the Defence Teams on the Questioning of Witnesses, Draft Transcript, 2 December 2021, pp 2109-2110.

- a. The Panel's findings in relation to the irrelevance of the proposed testimony of DW1250 and DW1251 and its decision not to hear these witnesses; and
- b. The Panel's findings in relation to the impermissible character of the proposed evidence of DW1253 under Rule 149 of the Rules and its decision not to hear this witness.

121. Accordingly, the Panel orders the Haradinaj Defence to indicate, by 6 December 2021, whether it intends to request leave to appeal any of the above issues. The Haradinaj Defence is not required to make submissions regarding the certification test under Rule 77(2) of the Rules in relation to the above issues.

122. Should the Haradinaj Defence wish to request leave to appeal other issues arising from this decision, the Panel orders that such submissions be made in the same filing and by the same deadline. For these submissions, the Haradinaj Defence should set out arguments in conformity with the certification test under Rule 77(2) of the Rules.

123. The Panel orders the SPO to respond by 8 December 2021. No reply shall be entertained.

VI. CLASSIFICATION

124. Regarding the Request to Strike (F00312), the Responses (F00329; F00330), the Second Expert Witness Challenge (F00438), the Response to the Second Expert Witness Challenge (F00444) and the Additional Request (F00466), the Panel observes that the filings contain no identifying information of the impugned witnesses and/or experts. The Panel further notes that, except for the Response to the Second Expert Witness Challenge which is silent on the question of reclassification, the filing Party

expressly stated that it did not oppose reclassification of the filings.¹⁶² In that light, the Panel will order the reclassification as public of F00312, F00329, F00330, F00438, F00444 and F00466 pursuant to Rule 82(5) of the Rules.

125. Regarding the Haradinaj Provisional Witnesses Submission (F00289) and Haradinaj Request for Additional Expert Witness (F00394), the Panel notes that they contain identifying information of the withdrawn and/or impugned witnesses. The Panel also notes that the Haradinaj Proposed Witness List (F00461/A01) was filed publicly containing the names of the impugned witnesses. The Panel therefore directs the Haradinaj Defence to file public redacted versions of these filings or request their reclassification as public.

126. Regarding the instructions to Ms Myers (F00386/A01), the Panel directs the Haradinaj Defence to file public redacted versions of these filings or request their reclassification as public.

VII. DISPOSITION

127. For the foregoing reasons, the Panel hereby:

- a. **DENIES** in part the First Request and declines to exclude the testimony of DW1246;
- b. **GRANTS** in part the First Request and declines to hear the evidence of DW1250 and DW1251;
- c. **DENIES** the Second Request as premature and declines to exclude, at this time, parts of the anticipated testimony of DW1241 and DW1242;
- d. **DENIES** the Myers Challenge and declines to exclude the testimony of DW1252, subject to limitations set out in paragraphs 98-99;

¹⁶² Request to Strike, para. 22; Gucati Response, para. 60; Haradinaj Response, para. 49; Second Expert Witness Challenge, para. 18; Additional Request, para. 10.

- e. **GRANTS** the Second Expert Witness Challenge and declines to hear the evidence of DW1253;
- f. **INSTRUCTS** the Gucati Defence to inform the Panel by **10 December 2021** whether the Panel can take note of an agreed fact in relation DW1248 or whether the Gucati Defence intends to offer the statement of DW1248 for admission pursuant to Rule 153 of the Rules;
- g. **DENIES** the Second Additional Request as premature and declines to exclude, at this time, parts of the anticipated testimony and evidence of DW1243, DW1244, DW1245, DW1247, DW1254;
- h. **ORDERS** the Haradinaj Defence to indicate, by **6 December 2021**, whether it intends to request leave to appeal in line with paragraphs 120-121 and/or submit further certification requests, in line with paragraph 122; and
- i. **ORDERS** the SPO to respond to any aforementioned request for leave to appeal by **8 December 2021**;
- j. **DIRECTS** the Registrar to reclassify as public F00312, F00329, F00330, F00438, F00444 and F00466; and
- k. **ORDERS** the Haradinaj Defence to file, by **10 December 2021**, public redacted version of F00289, F00386/A01 and F00394 or request their reclassification as public.



Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 3 December 2021
At The Hague, the Netherlands