



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**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:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 15 December 2021

**Language:** English

**Classification:** Confidential

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**Prosecution Response to Defence Request for Admission of Items through the Bar  
Table and Related Matters**

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**Specialist Prosecutor's Office**

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## I. Introduction

1. Most of the items submitted in the Request<sup>1</sup> are irrelevant to the crimes charged, lack probative value, and/or have procedural bars precluding their admissibility. These contested items should be declared inadmissible.

## II. Submissions

2. In order to be admitted through the bar table, evidence must meet the four cumulative requirements of Rule 138(1) of the Rules in that it must be relevant, authentic, have probative value, and admission would not cause undue prejudice.<sup>2</sup>

3. In this regard, the previous considerations of the Trial Panel must be emphasised, in particular: (i) the justness of the war or the commission of crimes by any party during that conflict are not issues relevant to this case;<sup>3</sup> (ii) cooperation between Serbia and the SITF/SPO was public and a lawful part of the mandates of the SITF/SPO;<sup>4</sup> and (iii) the Defence's 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'.<sup>5</sup> That people of interest in an SPO investigation are accused of committing crimes cannot be

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<sup>1</sup> Defence Request for Admission of Items through the Bar Table and Related Matters, KSC-BC-2020-07/F00487, 10 December 2021, Confidential ('Request').

<sup>2</sup> See Decision on the Prosecution Request for Admission of Items Through the Bar Table, KSC-BC-2020-07/F00334, 29 September 2021 ('BTM Decision'), paras 11-15.

<sup>3</sup> Transcript of Hearing, 2 December 2021, p.2110.

<sup>4</sup> Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/F00470, 3 December 2021, para.59.

<sup>5</sup> KSC-BC-2020-07/F00470, para.61.

inherently improper, noting that the Rules explicitly authorise the SPO to interview persons suspected of committing crimes.<sup>6</sup>

4. The SPO has no objection to the submitted CCTV footage,<sup>7</sup> and agrees that whether certain words appear in the Council of Europe Report is judicially noticeable<sup>8</sup> (though they are irrelevant). The admissibility of all remaining items is contested.

A. ITEMS CONCERNING ALLEGED SERBIAN CRIMES

5. The EU Decision of 10 May 1999<sup>9</sup> is well outside the charged timeframe and concerns adopting restrictive measures against certain individuals in the Federal Republic of Yugoslavia. The decision is primarily a list of names and affiliations, and no meaningful detail is provided for either of the persons of interest identified by the Gucati Defence.<sup>10</sup>

6. The NATO Press Briefing and a related media article<sup>11</sup> concern the alleged dishonesty of Serbia's media during and after the Kosovo war. The person of interest for the Defence is not even mentioned in these materials.<sup>12</sup>

7. The Kosovo Police Photo<sup>13</sup> and media article associated with the alleged crimes of this person<sup>14</sup> are also irrelevant. Whether or not the person in question is wanted has no connection to the elements of the charged offences or modes of liability or other

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<sup>6</sup> Rule 43 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>7</sup> 091925-01 to 091925-12.

<sup>8</sup> Request, KSC-BC-2020-07/F00487, para.4.

<sup>9</sup> DHG0001-DHG0009.

<sup>10</sup> Request, KSC-BC-2020-07/F00487, p.9.

<sup>11</sup> DHG0066; DHG0037-DHG0040.

<sup>12</sup> Request, KSC-BC-2020-07/F00487, pp.8-11.

<sup>13</sup> DHG0493.

<sup>14</sup> DHG0073.

facts and circumstances in the case. Whatever alleged crimes are charged for the person in question bear no connection to the crimes charged in this case.

8. The remaining articles and NGO reports about alleged Serbian crimes<sup>15</sup> also have no relevance to the case as charged. Whether persons of interest in SPO investigations may have committed crimes has no bearing on whether they were also 'witnesses' within the meaning of the Indictment.<sup>16</sup> The SPO is clearly authorised to speak with persons suspected of committing crimes, meaning that such materials provide nothing relevant for any public interest argument. The information provided by the Defence also does not even always conclusively allege any wrongdoing by the persons in question, noting that being in charge of civil protection<sup>17</sup> or being a mayor in an area where crimes are committed<sup>18</sup> does not in and of itself impute responsibility for those crimes.

9. The relevance of these items has not been established as they have no connection to the elements of the charged offences or modes of liability or other facts and circumstances in the case. These materials all concern alleged crimes by Serbian individuals around the time of the war. No evidence has been presented that any of these people have been convicted of any crime. Allegations of crimes in these media articles are of insufficient probative value to establish individual criminal responsibility or that anyone is an 'enem[y] of the state of Kosovo'.<sup>19</sup> That such allegations are publicly reported is, without more, irrelevant.<sup>20</sup>

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<sup>15</sup> DHG0041-DHG0065; DHG0073; DHG0074; DHG0082-DHG0091.

<sup>16</sup> Lesser Redacted Indictment, KSC-BC-2020-07/F00251/A01/RED, 4 October 2021 ('Indictment'), para.4.

<sup>17</sup> DHG0041-DHG0065, p.DHG0055.

<sup>18</sup> *Contra* Request, KSC-BC-2020-07/F00487, p.13 (DHG0074).

<sup>19</sup> *Contra* Transcript of Hearing, 15 December 2021, pp.19-20, 42-43 (RT).

<sup>20</sup> *Contra* Transcript of Hearing, 15 December 2021, p.43 (RT).

10. None of these materials reveal any impropriety in the cooperation between Serbia and the SITF/SPO, meaning none can be possibly relevant to any claim of public interest.

B. 2012 ARTICLE

11. The media article about a person of interest speaking with the prosecution has no relevance to the case as charged.<sup>21</sup> Noting the article is dated 2 February 2012, the 'Prosecution' in question is neither the SITF nor SPO. Whether someone identifies themselves as a prosecution witness in one proceeding has no bearing whether they may be protected in a subsequent proceeding. Nor does a person lose their protection under the law if they themselves compromise their own protected status, noting that persons may do so under duress or other improper influences.

12. The relevance of this item has not been established, as it has no connection to the elements of the charged offences or modes of liability or other facts and circumstances in the case.

C. INTERNAL INVESTIGATION REPORT EXTRACT<sup>22</sup>

13. The Internal Investigation Report is prepared by an external expert firm. While this report has been considered material to the defence's preparation,<sup>23</sup> this is a distinct question from whether it is admissible evidence. This report is irrelevant to the case as charged within the meaning of Rule 138(1) because it provides no information related to the Defence's proposed entrapment allegations. The one sentence offered by the Defence in support of the argument that this item has probative value<sup>24</sup> fails in

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<sup>21</sup> DHG0067-DHG0068.

<sup>22</sup> 104098-104100.

<sup>23</sup> Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413, 3 November 2021, Confidential, para.64.

<sup>24</sup> Request, KSC-BC-2020-07/F00487, pp.13-14.

this regard and only serves to show that the Defence is once again trying to advance claims which remain baseless.

D. W04796 MATERIALS<sup>25</sup>

14. W04796's SPO interview is clearly a statement taken in the context of or in connection with legal proceedings. It accordingly falls under Rules 153-55<sup>26</sup> and, by virtue of the criteria under these rules not being met, it should be declared inadmissible on this basis. The interview is in fact being tendered for the truth of its contents, as the form of the interview cannot be divorced from its contents when seeking to prove that it was a 'sham'.<sup>27</sup>

15. Further, this interview and associated materials have no relevance to the case as charged. Mr Gucati and Mr Haradinaj are not accused with delivering the batches charged to the KLA WVA. Rather, they are charged with what they did with those materials upon acquiring them. The materials tendered by the Defence are only relevant to the investigation into the delivery of the batches and, as made clear by the witness himself, W04796 has no information on these deliveries.<sup>28</sup>

### III. Classification

16. This filing is classified as confidential pursuant to Rule 82(4). The SPO has no objection to this filing being reclassified as public.

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<sup>25</sup> 089049-089053; 089647-089650; 088935-TR-ET Part 1; DHG0496 (see Transcript of Hearing, 15 December 2021, pp.19-20, 42-43 (RT)).

<sup>26</sup> BTM Decision, KSC-BC-2020-07/F00334, para.86.

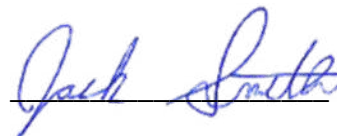
<sup>27</sup> *Contra* Request, KSC-BC-2020-07/F00487, paras 9-10, pp.15-17.

<sup>28</sup> 088935-TR-ET Part 1, p.8.

**IV. Relief sought**

17. For the foregoing reasons, and subject to paragraph 4, the SPO requests that the Request be rejected.

**Word count: 1349**



**Jack Smith**

**Specialist Prosecutor**

Wednesday, 15 December 2021

At The Hague, the Netherlands