



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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Language: English

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**Decision on the Defence Request for Admission of Items through the Bar Table
and Related Matters**

Specialist Prosecutor

Jack Smith
Valeria Bolici
Matthew Halling
James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees
Huw Bowden
Eleanor Stephenson

Counsel for Nasim Haradinaj

Toby Cadman
Carl Buckley
Jonathan Peter Worboys

TRIAL PANEL II ("Panel"), pursuant to Articles 40(2) and (6)(h) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 118(4), 138(1) and 156 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 17 September 2021, the Panel issued the Order on the Conduct of Proceedings¹ and invited the Parties to consider seeking the admission of evidence through bar table motions.²
2. On 2 December 2021, the Panel ordered the Defence to file a bar table motion, if any, by 10 December 2021, and the SPO to respond, if it so wished, by 15 December 2021.³
3. On 10 December 2021, the Defence for Hysni Gucati ("Gucati Defence") filed a request for admission of items through the bar table ("Request").⁴ On the same day, the Defence for Nasim Haradinaj filed a joinder to the Request.⁵
4. On 15 December 2021, the Gucati Defence orally requested the admission of one additional item through the bar table.⁶ The SPO did not object to this item being added to the Request.⁷

¹ F00314, Panel, *Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), 17 September 2021.

² F00314/A01, Panel, *Annex to Order on the Conduct of Proceedings* ("Annex to Order on the Conduct of Proceedings"), 17 September 2021, para. 22.

³ Transcript, 2 December 2021, p. 2112, lines 16-20.

⁴ F00487, Gucati Defence, *Defence Request for Admission of Items through the Bar Table and Related Matters* ("Request"), 10 December 2021, confidential.

⁵ F00488, Haradinaj Defence, *Haradinaj Defence Joinder of the Gucati Defence Request for Admission of Items through the Bar Table and Related Matters*, 10 December 2021.

⁶ Draft Transcript, 15 December 2021, confidential, pp. 2637, lines 5-25, 2638, lines 1-12.

⁷ Draft Transcript, 15 December 2021, confidential, p. 2638, lines 14-16.

5. On 15 December 2021, the SPO filed its response to the Request.⁸

II. SUBMISSIONS

6. The Gucati Defence requests the admission through the bar table of items falling into five categories: (i) extracts of the CCTV footage recovered by the SPO during its search of the headquarters of the Kosovo Liberation Army War Veterans' Association ("KLA WVA") on 25 September 2020 ("Category 1"); (ii) material said to be relevant to the Gucati Defence's claim of police incitement/entrapment ("Category 2"); (iii) open source material as to the background of named individuals ("Category 3"); (iv) an article regarding the status of an individual as a publicly declared witness ("Category 4"); and (v) a social-media post ("Category 5").⁹

7. The SPO has no objection to the admission of the items listed under Category 1 and opposes the admission through the bar table of all remaining items.¹⁰

III. APPLICABLE LAW

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

⁸ F00496, Specialist Prosecutor, *Prosecution Response to Defence Request for Admission of Items through the Bar Table and Related Matters* ("Response"), 15 December 2021, confidential.

⁹ Request, paras 1, 5-17. Draft Transcript, 15 December 2021, confidential, pp. 2637, lines 15-25, 2638, lines 1-12.

¹⁰ Response, paras 4, 17.

9. In order to be admitted through a witness or a bar table motion, evidence must meet the four cumulative requirements of Rule 138(1) of the Rules.¹¹ The purpose of this rule is to ensure that the Panel is not burdened by evidence that is irrelevant, lacks indicia of authenticity or probative value or is more prejudicial than probative. It is for the tendering Party to demonstrate, with clarity and specificity, that each proposed exhibit meets the aforementioned requirements and how it fits into its case.¹²

10. *Relevance*. Evidence is deemed to be relevant if it is connected, directly or indirectly, to elements of the offence(s) or mode(s) of liability pleaded in the indictment or other facts or circumstances material to the case of the Parties.¹³ Demonstration of relevance requires more than a tenuous or remote connection to the facts and circumstances of a case.¹⁴

11. *Authenticity*. Evidence is deemed to be authentic if it is what it professes to be in origin or authorship.¹⁵ Absolute proof of authenticity is not required for admissibility, but is a matter for the weight of the evidence to be given by the Panel in its

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

¹² SPO Bar Table Decision, para. 11. *Similarly*, ICTR, *Prosecutor v Bagosora et al.*, ICTR-98-41-T, Trial Chamber, [Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole](#), 13 September 2004, paras 7-8; ICTY, *Prosecutor v Prlić et al.*, IT-04-74-AR73.13, Appeals Chamber, [Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal Against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence](#), 12 January 2009, para. 17; *Prosecutor v Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on the Prosecution’s First Bar Table Motion](#) (“Karadžić 13 April 2010 Decision”), 13 April 2010, para. 6.

¹³ SPO Bar Table Decision, para. 12. *Similarly*, ICTR, *Prosecutor v Bagosora et al.*, ICTR-98-41-T, Trial Chamber, [Decision on Admissibility of Proposed Testimony of Witness DBY](#) (“Bagosora 18 September 2003 Decision”), 18 September 2003, para. 4; *Prosecutor v Karemera et al.*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice](#), 16 June 2006, para. 48; *Prosecutor v Karemera et al.*, ICTR-98-44-T, Trial Chamber, [Decision on Joseph Nzirorera’s Motion to Exclude Evidence of Material Facts Not Charged in the Indictment](#), 18 March 2008, para. 3.

¹⁴ SPO Bar Table Decision, para. 12. *Similarly*, ICTY, *Prosecutor v Perišić*, IT-04-81-PT, Trial Chamber, [Decision on Prosecution’s Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes](#), 1 September 2008, para. 6.

¹⁵ SPO Bar Table Decision, para. 13. *Similarly*, ICTY, *Prosecutor v Prlić et al.*, IT-04-74-AR73.16, Appeals Chamber, [Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence](#) (“Prlić 3 November 2009 Appeals Decision”), 3 November 2009, para. 32.

deliberations.¹⁶ It is for the tendering Party to provide indicators of a proposed exhibit's authenticity, where that document does not, on its face, contain sufficient indicators of authenticity.¹⁷ A *prima facie* case of authenticity must be made out in order for evidence to be deemed reliable and so that it can be admitted.¹⁸

12. *Probative value.* Evidence has probative value when it tends to prove or disprove an issue which is relevant to the case.¹⁹ Probative value is determined by two primary factors: (i) the *prima facie* reliability of the tendered evidence;²⁰ and (ii) the measure by which that evidence is likely to influence the determination of a particular issue in dispute in the case.²¹ As with authenticity, definite proof of reliability is not required at the admissibility stage; rather it is an issue that will again be assessed in greater depth in the course of determining the weight to be attached to the evidence after its admission.²² It is for the tendering Party to ensure that the evidence placed before the Panel is capable of reasonable belief for the purpose for which it is being offered.²³ While it is generally desirable that a witness should speak to the origins and/or content of a document to be tendered into evidence,²⁴ a *prima facie* showing of a document's

¹⁶ SPO Bar Table Decision, para. 13. Similarly, ICTY, [Prlić 3 November 2009 Appeals Decision](#), para. 34.

¹⁷ SPO Bar Table Decision, para. 13. Order on the Conduct of Proceedings, para. 23(iii).

¹⁸ SPO Bar Table Decision, para. 13. Similarly, ICTY, [Prlić 3 November 2009 Appeals Decision](#), para. 34.

¹⁹ SPO Bar Table Decision, para. 14. Similarly, ICTR, [Bagosora 18 September 2003 Decision](#), para. 15; ICTY, *Prosecutor v Delalić et al.*, IT-96-21, Trial Chamber, [Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 Into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample](#) ("Delalić 19 January 1998 Decision"), 19 January 1998, para. 29.

²⁰ SPO Bar Table Decision, para. 14. Similarly, ICTY, *Prosecutor v Tadić*, IT-94-1-T, Trial Chamber, [Decision on Defence Motion on Hearsay](#), 5 August 1996, paras 9, 15-16; [Delalić 19 January 1998 Decision](#), para. 32; [Prlić 3 November 2009 Appeals Decision](#), para. 33; *Prosecutor v Milutinović et al*, IT-05-87-T, [Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams](#), 1 September 2006, para. 9.

²¹ SPO Bar Table Decision, para. 14. Similarly, ICC, *Prosecutor v Katanga and Ngudjolo Chui*, Trial Chamber II, [Decision on the Prosecutor's Bar Table Motions](#) ("Katanga and Ngudjolo Chui 17 December 2010 Decision"), ICC-01/04-01/07-2635, 17 December 2010, para. 20.

²² SPO Bar Table Decision, para. 14. Similarly, ICTY, *Prosecutor v Popović et al.*, IT-05-88-AR73.2, Appeals Chamber, [Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness](#), 30 January 2008, para. 22; [Prlić 3 November 2009 Appeals Decision](#), para. 33.

²³ SPO Bar Table Decision, para. 14. Order on the Conduct of Proceedings, para. 15. Similarly, ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#), para. 26.

²⁴ SPO Bar Table Decision, para. 14. Similarly, ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Guidelines for the Admission of Evidence Through Witnesses](#), 19 May 2010, para. 11.

reliability for the purpose of admissibility may be made without showing the document to a witness at trial.²⁵ The method by which such evidence is tendered might, however, affect its weight, in particular if it is not corroborated by evidence that has been subject to a more searching adversarial process.²⁶ Evidence is likely to influence the determination of a particular issue in dispute when it may assist the Panel in (i) reaching a conclusion about a fact or a circumstance material to the case; or (ii) assessing the reliability of other evidence in the case.²⁷

13. *Prejudice*. Evidence may be excluded at any stage of the proceedings if its probative value is outweighed by its prejudicial effect. The Panel notes that Rule 138(1) of the Rules does not require that the prejudicial effect *substantially* outweighs the probative value. Prejudicial effect should not be confused with any negative impact on the Defence case; rather the admission of the item in question must adversely impact the fairness or expeditiousness of the proceedings.²⁸ In assessing whether an item's probative value is outweighed by its prejudicial effect, the Panel must maintain and guarantee the effectiveness of the right of the Accused to confront the case that is presented against them.²⁹

²⁵ SPO Bar Table Decision, para. 14. Similarly, ICTY, *Prosecutor v Prlić et al*, IT-04-74-T, Trial Chamber, [Decision on Admission of Evidence](#) ("Prlić 13 July 2006 Decision"), 13 July 2006, p. 5. See also *Prosecutor v Boškoski & Tarkulovski*, IT-04-82-T, Trial Chamber, [Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table](#) ("Boškoski & Tarkulovski 14 May 2007 Decision"), 14 May 2007, paras 10, 13.

²⁶ SPO Bar Table Decision, para. 14. Similarly, IRMCT, *Prosecutor v Stanišić & Simatović*, MICT-15-96-T, Trial Chamber, [Decision on Prosecution Motion for Judicial Notice of Authenticity and Admission of Documents from the Bar Table \(Mladić Notebooks & Audio Files\)](#) ("Stanišić & Simatović 11 February 2019 Decision"), 11 February 2019, para. 7; ICTY, *Prosecutor v Hadžić*, IT-04-75-T, [Decision on Prosecution Bar Table Motion](#), 28 November 2013, para. 8.

²⁷ SPO Bar Table Decision, para. 14. Similarly, ICC, [Katanga and Ngudjolo Chui 17 December 2010 Decision](#), para. 34.

²⁸ SPO Bar Table Decision, para. 15. Similarly, ICTR, *Prosecutor v Bagosora et al.*, ICTR-98-41-A, Appeals Chamber, [Decision on the Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence](#), 19 December 2003, paras 16-17.

²⁹ SPO Bar Table Decision, para. 15.

IV. DISCUSSION

A. AGREED FACTS

14. In accordance with Rules 118(4) and 156 of the Rules and paragraph 10 of the Order on the Conduct of Proceedings, the Panel takes note of the agreement between the Parties that the following words appear in paragraph 8 of the Council of Europe Report:

[...] Nazim Bllaca, the “whistleblower” who publicly admitted to having carried out murders upon the orders of some of today’s high-ranking politicians [...].³⁰

B. CATEGORIES OF PROPOSED EVIDENCE

1. Category 1: Extracts of CCTV Footage

15. The Panel notes that the first category of items tendered through the bar table contains extracts of the CCTV footage showing the delivery of the three Batches³¹ on 7, 16 and 22 September 2020.³²

16. The Gucati Defence submits that these extracts clarify the issue as to the date, time and duration of the three deliveries.³³ The SPO does not object to the admission of items in this category.³⁴

17. The Panel is satisfied that the items under this category could be relevant to this case as they contain information in relation to the date, time and circumstances of the three deliveries. There is no dispute between the Parties regarding the authenticity of these items. They have probative value in that they appear to be an accurate record of the delivery of the three Batches on 7, 16 and 22 September 2020. Their reliability is

³⁰ Request, para. 4, citing the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011. *See also* Response, para. 4.

³¹ “Batches” refer to the documents seized by the SPO from the KLA WVA on 8, 17 and 22 September 2020.

³² Category 1, Items ERN 091925-01 to 091925-12.

³³ Request, para. 6.

³⁴ Response, para. 4.

apparent, *inter alia*, from their having been recovered by the SPO during its search of the headquarters of the KLA WVA on 25 September 2020. The Panel notes that the SPO has no objection, and is also satisfied that no undue prejudice is caused by the admission of these documents through the bar table.

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

2. Category 2: Material Pertaining to the Claim of Entrapment

19. The Panel notes that the second category of items tendered through the bar table contains different types of documents, namely: (a) a document issued by the Kosovo Civil Registration Agency in November 2020, containing information on the owner of a vehicle, with delivery records;³⁵ (b) an SPO official note regarding the observation of a witness, the registered owner of the aforementioned vehicle;³⁶ (c) the transcript of an interview with a witness;³⁷ and (d) an extract of a report prepared at the request of the SPO.³⁸

20. The Gucati Defence submits that the items under points (a)-(c) above have probative value insofar as they are relevant to establishing that: (i) an SPO staff member was provided with the license plate number of a vehicle that was involved in the delivery of documents to the KLA WVA on 16 September 2020, but no attempt to trace the vehicle was undertaken by the SPO until 25 November 2020; and (ii) a sham interview of the owner of the vehicle was conducted on 18 December 2020.³⁹ The Gucati Defence also submits that these items are authentic in that they were produced or obtained by the SPO.⁴⁰ In relation to the item under point (d), the Gucati Defence submits that it is relevant and has probative value as it pertains to the investigative

³⁵ Category 2, Item ERN 089049-089053 (only available in Albanian).

³⁶ Category 2, Item ERN 089647-089650.

³⁷ Category 2, Item ERN 088935-TR-ET Part 1.

³⁸ Category 2, Item ERN 104098-104100.

³⁹ Request, paras 9, 10.

⁴⁰ Request, para. 10.

steps undertaken by the SPO to exclude the possibility that entrapment occurred.⁴¹ The SPO objects to the admission of all items in this category. It submits that they are not relevant to the case.⁴² Moreover, the SPO asserts that the item under point (c) is inadmissible as it falls under Rules 153-155 of the Rules and the criteria set forth by these Rules have not been met.⁴³

21. In relation to the items under points (a) and (b), the Panel finds that they relate to the Defence claim of SPO investigative shortcomings in respect of the circumstances of the leak and are therefore relevant to the allegations raised by the Defence that the SPO entrapped the Accused (“Entrapment Allegations”). The items appear to be authentic since they have been produced or obtained by the SPO and they bear relevant official markings. The items also have probative value, as they point to steps taken by the SPO to investigate the delivery of the Batches. The Panel is also satisfied that no undue prejudice is caused by the admission of these documents through the bar table.

22. The item under point (c) is a transcript, prepared by the SPO, of an interview by SPO officers with a witness. The Panel notes that the Defence seeks its admission to prove the fact of the interview and the approach taken by the SPO during the course of the interview.⁴⁴ The Defence submits that it does not rely upon the truth of the content of the answers provided by the witness.⁴⁵ The Panel observes that, in order to rely on the approach taken by the SPO during the interview, the content of the interview is of essence. The Panel further notes that the SPO interviewed the witness, and prepared the transcript, in the context of a criminal investigation. For this reason, the Panel considers that the item under point (c) is a written statement of a witness and falls within the scope of Rules 153-155 of the Rules. The Panel reiterates that a

⁴¹ Request, para. 11.

⁴² Response, paras 13, 15.

⁴³ Response, para. 14.

⁴⁴ Request, para. 10.

⁴⁵ Request, para. 10.

request for the admission of evidence through the bar table is not intended to provide an avenue for the admission of written statements of witnesses, which are governed by the specific requirements of Rules 153, 154 or 155 and can only be admitted in evidence if the conditions set forth by those rules are satisfied.⁴⁶ For this reason, the Panel holds that the item under point (c) cannot be admitted through the bar table. The Panel invites the Defence to discuss with the SPO with a view to reaching agreement on the fact that this interview took place on the said date, and on any other matters on which the Parties wish to reach agreement.

23. In relation to the item under point (d), the Panel has previously found that it contained information that directly bears upon the investigative steps the SPO took to exclude the possibility that entrapment occurred.⁴⁷ While this finding was made in the context of a Rule 102(3) disclosure, the Panel is satisfied that the item is relevant to the case presented by the Defence, because it pertains to the Entrapment Allegations. The item appears to be authentic as it bears relevant official markings of the entity that prepared it. The item also has probative value, as it points to steps the SPO took to investigate the circumstances in which the material in question was accessed. The Panel is also satisfied that no undue prejudice is caused by the admission of this item through the bar table.

24. In light of the above, the Panel admits in evidence the items listed under points (a), (b) and (d) and denies admission of the item listed under point (c).

25. The Panel notes that the Guwati Defence has not submitted a translation for the item under point (a). In accordance with paragraph 20 of the Order on the Conduct of Proceedings, untranslated documents are either marked for identification pending translation or denied admission. The Panel exceptionally admits this item,

⁴⁶ SPO Bar Table Decision, paras 83-84.

⁴⁷ F00413, Panel, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, 3 November 2021, para. 64.

notwithstanding the absence of an English translation, and orders the Defence to produce an English translation of the first three pages.

3. Category 3: Open Source Material as to the Background of Named Individuals

26. The Panel notes that the third category of items tendered through the bar table contains different types of open source documents, namely: (a) an article published by 'The New York Times' on 10 August 1997;⁴⁸ (b) an excerpt from the book "Britain, NATO and the Lessons of the Balkan Conflicts, 1991 – 1999";⁴⁹ (c) a Decision of the Council of the European Union dated 10 May 1999;⁵⁰ (d) two articles published by 'Balkan Transitional Justice' in 2020;⁵¹ (e) three excerpts from a Human Rights Watch report;⁵² and (f) a screenshot from the Kosovo Police website.⁵³

27. The Gucati Defence submits that the above-mentioned items demonstrate why persons named during the course of the press conferences can reasonably be described as enemies of Kosovo and why the public interest justifies the collaboration of the SPO with those persons to be known.⁵⁴ The SPO objects to the admission of all items in this category. It submits that their relevance and probative value have not been established.⁵⁵

28. The Panel notes at the outset that the items under this category are tendered in support of the Defence's public interest claims.⁵⁶ The Panel has previously found that admissible evidence supporting a "public interest" claim 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

⁴⁸ Category 3, Item ERN DHG0037-DHG0040.

⁴⁹ Category 3, Item ERN DHG0066.

⁵⁰ Category 3, Item ERN DHG0001-DHG0009.

⁵¹ Category 3, Items ERN DHG0041-DHG0065, DHG0069-DHG0072.

⁵² Category 3, Items ERN DHG0073, DHG0074, DHG0082-DHG0091.

⁵³ Category 3, Item ERN DHG0493.

⁵⁴ Request, paras 12-14.

⁵⁵ Response, paras 9-10.

⁵⁶ Request, para. 13.

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.⁵⁷ The Panel will rely on this interpretation in assessing the admissibility of the items under this category ("Public Interest Evidence").

29. In relation to the items under points (a) and (b), the Panel notes that they concern the alleged bias and/or propaganda of the Serbian media during and after the war in Kosovo.⁵⁸ While the Defence submits that the items point to the bias of one of the individuals named during the course of the press conferences, the Panel observes that this person is not explicitly mentioned in the items. In any event, even if the Panel were to accept that this individual is implicitly included in the items' analysis, the items contain no information as regards the SITF or the SPO. The Panel accordingly considers that the items fall outside the scope of the Public Interest Evidence and that their relevance to the case has not been established. Furthermore, the Defence has failed to point to relevant indicators of reliability and credibility of the information contained in the aforementioned items.

30. In relation to the item under point (c), the Panel notes that it concerns restrictive measures of a political nature imposed by the Council of the European Union on a number of individuals in the (former) Federal Republic of Yugoslavia.⁵⁹ The Panel has previously found in this regard that, in the absence of any evidence regarding the criminal conviction of these individuals of any related crime, they enjoy the presumption of innocence before this Panel.⁶⁰ The Panel further notes that this item, which dates from May 1999, long precedes the establishment of the SITF or the SPO and does not suggest that any of the individuals named in it is responsible for the commission of a crime. The basis on which the list was drawn has not been established

⁵⁷ F00470, Panel, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses* ("Decision on Defence Witnesses"), 3 December 2021, para. 61.

⁵⁸ DHG0037-DHG0040, DHG0066.

⁵⁹ DHG0001-DHG0009.

⁶⁰ Decision on Defence Witnesses, para. 60.

and it has not been shown that those measures were still in place in respect of the relevant officials at the time relevant to this case. The Panel accordingly considers that the item falls outside the scope of the Public Interest Evidence and that its relevance to the case has not been established.

31. In relation to the items under points (d) and (e), the Panel notes that they concern media articles and an NGO report about alleged Serbian crimes committed during the Kosovo war.⁶¹

32. Preliminarily, the Panel notes that the Gucati Defence did not provide an individual description for one of the Balkan Transitional Justice articles.⁶² The Panel recalls its direction in the Order on the Conduct of Proceedings that in any request for the admission of evidence, the requesting Party must provide for each exhibit a short description, clear specification of its relevance and probative value, and indicators of authenticity, where the document does not on its face contain sufficient indicators thereof.⁶³ The Panel reminds the Parties to comply with these directions.

33. The Panel notes that one or more of these items: (i) refer to locations of alleged crimes;⁶⁴ (ii) mention individuals named during the course of the press conferences as alleged participants in the reported crimes;⁶⁵ (iii) refer to criminal convictions at the ICTY;⁶⁶ and/or (iv) mention the cooperation between the Serbian War Crimes Prosecutor's Office and the Special Investigative Task Force.⁶⁷ As said above, in the absence of any evidence regarding related criminal convictions, individuals named in these items as alleged perpetrators enjoy the presumption of innocence before this Panel. In any event, the SPO is free to collect evidence from any person of interest, including suspects or convicted persons. Public Interest Evidence pertains to

⁶¹ DHG0041-DHG0065, DHG0069-DHG0072, DHG0073, DHG0074, DHG0082-DHG0091.

⁶² DHG0069-DHG0072.

⁶³ Order on the Conduct of Proceedings, para. 23.

⁶⁴ See e.g. DHG0073, DHG0074, DHG0082-DHG0091.

⁶⁵ See e.g. DHG0041-DHG0065; DHG0082-DHG0091.

⁶⁶ See e.g. DHG0041-DHG0065.

⁶⁷ See e.g. DHG0069-DHG0072, pp. 2-3.

references or suggestions of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO. The mere fact of interviewing or seeking to interview a person who is alleged to have committed a crime does not amount to an impropriety in the context of that cooperation. The Panel accordingly considers that the items fall outside the scope of the Public Interest Evidence and that their relevance to the case has not been established. Furthermore, the Defence has failed to point to relevant indicators of reliability and credibility of the information contained in these documents.

34. In relation to the item under point (f), the Panel notes that it contains no information except for the name and photograph of an individual and an indication that he is a “wanted person”.⁶⁸ The Panel further notes that the Defence connects this item with one of the NGO reports analysed above, which in fact contains no explicit reference to this person.⁶⁹ The Panel considers that its assessment in paragraph 33 also applies to this item and finds therefore that the relevance of this item to the case has not been established. Furthermore, the Defence has provided no information regarding the basis on which this document was prepared, or when it was prepared. As a result, the Panel would not be in a position to evaluate the reliability and credibility of the information it reflects.

35. In light of the above, the Panel denies admission of the items under this category.

⁶⁸ DHG0493. The translation of “Personat në kërkim” has been confirmed by the Language Services Unit to mean “wanted person”. Email sent by LSU to the legal officer of the Panel on 17 December 2021 at 11:33.

⁶⁹ DHG0073.

4. Category 4: Article Regarding the Status of an Individual as a Publicly Declared Witness

36. The Panel notes that the fourth category tendered through the bar table contains one item, an article published in February 2012 regarding an individual named during the course of the press conferences.⁷⁰

37. The Gucati Defence submits that this article shows that the identity of a witness as a person who has cooperated with prosecutors is a well-known, public fact and has been revealed by the witness himself.⁷¹ The Gucati Defence further submits that the item is both reliable and has probative value.⁷² The SPO objects to the admission of the item in this category as it submits that its relevance has not been established.⁷³ The SPO further submits that the reference in the article to the “Prosecution” cannot refer to the SITF or the SPO because of the time the article was published (February 2012).⁷⁴

38. The Panel sees merit in the SPO’s submission that the date of the article casts serious doubt on whether the reference to the “Prosecution” was to the SITF, which had no prosecutorial responsibilities. This could have been a reference to a local prosecutor or the ICTY. Moreover, the date of the article excludes the possibility that the reference was to the SPO. In other words, the article has no connection with the functioning or work of the SITF, the SPO or the SC. The Panel accordingly considers that the relevance of the item to the case has not been established. Furthermore, the Panel notes that the Defence has provided no basis on which to assess the reliability and credibility of the information contained in this article, in particular in respect of the statement attributed to the individual concerned.

⁷⁰ Category 4, Item ERN DHG0067-DHG0068.

⁷¹ Request, p. 11.

⁷² Request, para. 17.

⁷³ Response, para. 12.

⁷⁴ Response, para. 11.

39. In light of the above, the Panel denies the admission in evidence of the item under this category.

5. Category 5: Social-Media Post

40. The Panel notes that the last category of items tendered through the bar table contains a Facebook-post dated 15 September 2020, originating from the account of Mr Gucati.⁷⁵

41. The Gucati Defence submits that this item is relevant to support Mr. Gucati's account in both his testimony and in his statement admitted under Rule 154 of the Rules, that before the second delivery on 16 September 2020 he became aware or suspicious at least of being under surveillance.⁷⁶ The SPO objects to the admission of the item in this category.⁷⁷ It submits that the item is not relevant to the case, but provides no further reasons for this submission.⁷⁸

42. The Panel is satisfied that this item appears to be relevant and has some probative value insofar as it pertains to circumstances referred to by Mr Gucati in both his testimony and his statement admitted under Rule 154 of the Rules and related to the Entrapment Allegations. The Panel is also satisfied of the apparent authenticity of this item. The Panel notes, however, that this item was not shown to Mr Gucati during his testimony. This fact will be considered by the Panel when deciding what weight, if any, to give to that information. The Panel is further satisfied that no undue prejudice is caused by the admission of this item through the bar table.

43. The Panel therefore admits in evidence the item under this category.

⁷⁵ Category 5, Item ERN DHG0496.

⁷⁶ Draft Transcript, 15 December 2021, confidential, p. 2638, lines 3-8.

⁷⁷ Draft Transcript, 15 December 2021, confidential, p. 2638, lines 16-17.

⁷⁸ Response, para. 15.

C. CLASSIFICATION OF ADMITTED EVIDENCE

44. Admitted exhibits listed under Categories 1 and 5 shall be classified as public. Admitted exhibits listed under Category 2 shall be classified as confidential. This is without prejudice to any subsequent decision of the Panel in this regard.

V. CLASSIFICATION

45. The Panel notes that the Gucati Defence and the SPO filed their submissions confidentially. The SPO has no objection to the reclassification of its response as public. This decision is issued publicly, as it contains no references revealing confidential information. The Panel orders the Gucati Defence to file a public redacted version of the Request.

VI. DISPOSITION

46. For the foregoing reasons, the Panel hereby:

- a. **GRANTS in part** the Request;
- b. **ADMITS** in evidence the following items:
 - i. Items ERN 091925-01 to 091925-12 (Category 1);
 - ii. Items ERN 089049-089053, 089647-089650 and 104098-104100 (Category 2); and
 - iii. Item ERN DHG0496 (Category 5);
- c. **ORDERS** the Defence to produce a translation of Item ERN 089049-089053 by **31 January 2022**;
- d. **DIRECTS** the Registrar to assign Exhibit Numbers to the aforementioned items, following the order listed above, including to any translations;

- e. **DIRECTS** the Registrar to classify the admitted exhibits listed under Categories 1 and 5 as public and the admitted exhibits listed under Category 2 as confidential, including any translations;
- f. **DENIES** the admission of Item ERN 088935-TR-ET Part 1 (Category 2) and of all items in Category 3 and Category 4;
- g. **DIRECTS** the Registrar to reclassify F00496 as public; and
- h. **ORDERS** the Gucati Defence to file a public redacted version of the Request (F00487) by **17 January 2022**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Friday, 17 December 2021

At The Hague, the Netherlands