

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 Counsel for Hysni Gucati

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Language: English

Classification: **Public**

**Public Redacted Version of Defence Request for Admission of Items through the
Bar Table
and Related Matters**

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I. INTRODUCTION

1. Pursuant to the invitation of the Trial Panel¹, Article 40(2) and (6)(h) of the Law², and Rules 137-139 of the Rules³, the Accused requests the admission of the following items on the List of Exhibits⁴:

- i. ERN DHG0037 – DHG0040
- ii. ERN DHG0001 – DHG0009
- iii. ERN DHG0066
- iv. ERN DHG0067-DHG0068
- v. ERN DHG0041 – DHG0065
- vi. ERN DHG0069 – DHG0072
- vii. ERN DHG0073
- viii. ERN DHG0074
- ix. ERN DHG0082- DHG0091
- x. ERN DHG0493
- xi. ERN 104098-104100
- xii. ERN 089049-089053
- xiii. ERN 089647-089650
- xiv. ERN 088935-TR-ET Part 1
- xv. ERN 091925-01

¹ KSC-BC-2020-07/F00314/A01, *Annex to Order on the Conduct of Proceedings*, Trial Panel II, Public at paragraphs 22 and 23

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law')

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules')

⁴ KSC-BC-2020-07/F00460/A02/COR, *List of Proposed Exhibits that the Defence Intends to Present*, Gucati, 6 December 2021, Public; and KSC-BC-2020-07/F00478, *Application for Leave to Add Five Exhibits to the Rule 119(2)(b) List of Exhibits*, Gucati, 7 December 2021, Public at paragraph 3

- xvi. ERN 091925-02
- xvii. ERN 091925-03
- xviii. ERN 091925-04
- xix. ERN 091925-05
- xx. ERN 091925-06
- xxi. ERN 091925-07
- xxii. ERN 091925-08
- xxiii. ERN 091925-09
- xxiv. ERN 091925-10
- xxv. ERN 091925-11
- xxvi. ERN 091925-12

2. In accordance with paragraph 23 of the *Annex to Order on the Conduct of Proceedings*⁵ the Accused sets out below in relation to each item:

- a. a short description of each proposed exhibit;
- b. the relevance of the proposed exhibit by reference to the relevant paragraph(s) of the Indictment and the probative value of each proposed exhibit; and
- c. indicators of the proposed exhibit's authenticity, where the document does not on its face contain sufficient indicators thereof.

3. The items which the Accused seeks to admit into evidence are relevant, of probative value, and contain sufficient indicia of authenticity.

⁵ KSC-BC-2020-07/F00314/A01, *Annex to Order on the Conduct of Proceedings*, Trial Panel II, Public at paragraph 23

II. CATEGORIES

CCTV (Items ERN 091925-1 to 091925-12)

5. Items ERN 091925-01 to 091925-12 are extracts of the CCTV recovered by the SPO during their search of the KLA WVA HQ on 25 September 2020. The extracts were prepared by the SPO and show the delivery of the three Batches taking place on 7, 16 and 22 September 2020. The CCTV is date and time stamped, and the times of the deliveries are consistent with the approximate times set out by the Accused at the outset of the 1st, 2nd and 3rd Press Conferences⁶.
6. Admission of these extracts clarify the issue as to the date, time and duration of the three deliveries.

Re Plea of Police Incitement/Entrapment (Items ERN 104098-104100, 089049-089053, 089647-089650, 088935-TR-ET Part 1)

7. As the Trial Panel has acknowledged previously, the Defence seeks to rely *inter alia* upon what, it says, are investigative shortcomings in respect of the circumstances of the leak as circumstantial indications of its claim of entrapment⁷.

⁶ See Exhibits P00001ET, P00002ET and P00035ET

⁷ KSC-BC-2020-07/F00435, *Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201*, Trial Panel II, 15 November 2021, Confidential at paragraph 17

8. The circumstances relied upon are set out at paragraphs 20(a) to (c) of the KSC-BC-2020-07/F00288, *Public Redacted Version of Written Submissions on behalf of Hysni Gucati for the Trial Preparation Conference and Related Matters, Gucati, 27 August 2021, Confidential* (which paragraphs are herein incorporated).
9. Those circumstances include, it will be submitted, that: (a) [REDACTED] was provided with the index number of an involved vehicle on 16 September 2020, but no attempt to trace it was undertaken by the SPO until 25 November 2020; and (b) that a sham interview of the owner was conducted months later on 18 December 2020 (the inference to be drawn is that the SPO knew the identity of the person making the delivery of Batch 2 all along and was not concerned about stopping a further delivery).
10. Items 089049-089053, 089647-089650 and 088935-TR-ET Part 1 are directly relevant to establishing the above circumstances; they have probative value in that they are capable of demonstrating those circumstances; and they are authentic in that they are materials produced or obtained by the SPO themselves. In relation to 088935-TR-ET Part 1, the Accused does not rely at all upon the truth of the content of the answers provided by W04796. Instead, it is the fact of the interview, and the approach taken by the SPO officers during the course of the interview, which is relied upon. To that extent, there can be no question that the SPO transcript of an interview which was recorded on tape is reliable and authentic.
11. In relation to ERN 104098-104100, the report and the disclosed extract of it were prepared by or at the request of the SPO and their authenticity should not be questionable. The item is clearly relevant - the extract of the report was

disclosed upon the order of the Trial Panel because it directly bears upon the investigative steps the SPO took to exclude the possibility that entrapment occurred⁸. Moreover, the extract has clear probative value in that it does not exclude the possibility that there was an intentional action by a member of SPO staff to leak the “Leaked Document”.

Contextual Evidence as to the Background of Named Individuals (Items ERN DHG0037-DHG0040, DHG0001-DHG0009, DHG0066, DHG0041-DHG0065, DHG0069-DHG0072, DHG0073, DHG0074, DHG0082-DHG0091, DHG0493)

12. The Prosecution complains of the reference to certain names during the course of the press conferences⁹ and of the Accused’s alleged use of the word ‘enemy’ to describe the same.
13. The material sought to be adduced demonstrates why those persons can reasonably be described as enemies of Kosovo and why the public interest justifies the collaboration of the SPO with such persons to be known¹⁰.
14. The material is open source material and the authenticity of each item can be verified accordingly. The sources are professional and reputable.

Re Status of [REDACTED] as a publicly declared witness (Item ERN DHG0067-DHG0068)

⁸ KSC-BC-2020-07/F00413, *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Confidential at paragraph 64

⁹ KSC-BC-2020-07/F00181/A01, *Specialist Prosecutor’s Pre-Trial Brief in the case against Hysni Gucati and Nasim Haradinaj*, Prosecutor, 9 April 2021, Confidential at paragraphs 12, 38, 72

¹⁰ KSC-BC-2020-07/F00258, *Defence Pre-Trial Brief on behalf of Hysni Gucati*, Gucati, 12 July 2021, Confidential at paragraphs 72

15. The SPO criticises the alleged disclosure of non-public identities of persons who had cooperated with the SITF/SPO.
16. The identity of [REDACTED] as a person who has cooperated with the SITF/SPO is a well-known, public fact and has been revealed by [REDACTED] himself.
17. The article DHG0067-DHG0068 demonstrates the above. The article quotes directly from [REDACTED] himself and has been in circulation since 2012. It is both reliable and has probative value in relation to the issue whether such identities as were disclosed were non-public.

ERN Reference	Description of proposed exhibit	Relevant paragraphs of indictment	Relevance & probative value	Indicators of proposed authenticity
DHG0037 – DHG0040	The New York Times Article – “[REDACTED]”	All paras (public interest issue; mens rea of Gucati)	[REDACTED]. The article exposes the dishonesty of RTS and its reporters.	132 times Pulitzer prize-winning newspaper, New York Times published article; there can be no real dispute that Serbian Television and Radio (RTS) were a propaganda tool of the Milosevic regime
DHG0001 – DHG0009	10 May 1999; COUNCIL DECISION of 10 May 1999 implementing Common Position 1999/318/CFSP concerning additional restrictive measures against the	All paras (public interest issue; mens rea of Gucati)	Identifies [REDACTED], [REDACTED] and a banned person; identifies	EU official decision

	Federal Republic of Yugoslavia English		[REDACTED] and a banned person	
DHG0066	Excerpt from Britain, NATO and the Lessons of the Balkan Conflicts, 1991 - 1999, edited by Stephen Badsey, and Paul Latawski, Taylor & Francis Group, 2004. ProQuest Ebook Central - Kosovo: The Air Campaign	All paras (public interest issue; mens rea of Gucati)	[REDACTED], [REDACTED]	Excerpt quotes from NATO press briefings
DHG0067- DHG0068	Article dated 2 February 2012 entitled "[REDACTED]"	6;7;10;14;15;16;18;19;20;23;41 (revealing of non-public information) and; all paras (public interest issue; mens rea of Gucati)	Article demonstrates that [REDACTED] has been open in the press about the fact that he has given a statement to prosecutors	Open source and public. SPO can verify with [REDACTED] if disputed

DHG0041 – DHG0065	27 April 2020; Balkans Transitional Justice Article - Evidence Reveals Serbian Officers' Role in Kosovo Massacre was Ignored English	All paras (public interest issue; mens rea of Gucati)	Article provides detail as to the Meja massacre involving [REDACTED] and others	Open source and public – published by respected organisation
DHG0073	Under Orders: War Crimes in Kosovo”, Human Rights Watch Article [REDACTED] English	All paras (public interest issue; mens rea of Gucati)	Refers to the mass expulsion carried out in Ferizaj in April 1999 – [REDACTED]	Open source and public – published by respected organisation
DHG0493	Screen Print from Kosovo Police website dated [REDACTED] remains wanted	All paras (public interest issue; mens rea of Gucati)	Shows that [REDACTED] remains wanted by Kosovo Police as of [REDACTED]	Open source and public – official website of Kosovo Police
DHG0074	Under Orders: War Crimes in Kosovo”, Human Rights Watch Article [REDACTED] English	All paras (public interest issue; mens rea of Gucati)	Refers to robberies, extortion and mass expulsion carried out in ([REDACTED])	Open source and public – published by respected organisation

DHG0082- DHG0091	Under Orders: War Crimes in Kosovo”, Human Rights Watch Article [REDACTED]	All paras (public interest issue; mens rea of Gucati)	Names [REDACTED]	Open source and public – published by respected organisation
104098-104100	Extract of ‘Stroz Friedberg’ Report	All paras (plea of incitement/entrapment)	Directly bears upon the investigative steps the SPO took to exclude the possibility that entrapment occurred. It has probative value in that the extract of report does not exclude the possibility that there was an intentional action by a member of SPO staff to leak the “Leaked Document”	Report prepared for the SPO and extract disclosed by them

089049-089053	Civil Registration Agency check on index plate [REDACTED] dated [redacted] with delivery records	All paras (plea of incitement/entrapment)	(a) [REDACTED] was provided with the index number of an involved vehicle on 16 September 2020, but no attempt to trace it was undertaken by the SPO until 25th November 2020 (the inference to be drawn is that the SPO knew the identity of the person making the delivery of Batch 2 all along and was not concerned about stopping a further delivery).	SPO disclosed exhibits (official records) with SPO delivery records establishing provenance
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089647-089650	Official Note re observation of W04796, the registered keeper of [REDACTED], with an identifiable gait (right foot goes upwards and outwards to the right before it goes down to the ground again)	All paras (plea of incitement/entrapment)	Observation of gait of W04796 is consistent with the footage of 'Lightning 2' recorded on 16 September 2021 (Exhibit 1D00006) – yet no other investigative steps taken to pursue other than the sham interview on the same day	SPO report – authenticity should not be questionable
088935-TR-ET Part 1	Interview of W04796	All paras (plea of incitement/entrapment)	(a) [REDACTED] was provided with the index number of an involved vehicle on 16 September 2020, but no attempt to trace it was	The interview was recorded by the SPO and the transcript prepared by the SPO from the recording.

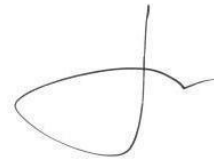
			undertaken by the SPO until 25th November 2020; and (b) that a sham interview of the owner was conducted months later on 18th December 2020 (the inference to be drawn is that the SPO knew the identity of the person making the delivery of Batch 2 all along and was not concerned about stopping a further delivery)	
091925-01 to 091925-12	Extracts of CCTV from KLA WVA HQ showing delivery of	8;13;17.	The CCTV is date and time stamped, and the	Items 091925-01 to 091925-12 are extracts

	<p>the Three Batches recovered by SPO on 25 September 2021</p>		<p>times of the deliveries are consistent with the approximate times set out by the Accused at the outset of the 1st, 2nd and 3rd Press Conferences. Admission of these extracts clarify the issue as to the date, time and duration of the three deliveries.</p>	<p>of the CCTV recovered by the SPO during their search of the KLA WVA HQ on 25 September 2020. The extracts were prepared by the SPO and show the delivery of the three Batches taking place on 7, 16 and 22 September 2020.</p>
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III. CLASSIFICATION

18. This filing is classified as confidential.

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10 December 2021

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