



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA 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

**Date:** 3 February 2022

**Language:** English

**Classification:** **Public**

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**Decision Pursuant to Rule 132 of the Rules**

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**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 Article 40(6)(e) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 132 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## **I. PROCEDURAL BACKGROUND**

1. On 20 January 2022, the Panel issued an agenda for Parties’ submissions on the next steps of the proceedings (“Agenda”) and invited submissions in relation to, *inter alia*, material to be produced or admitted under Rule 132 of the Rules.<sup>1</sup>
2. On 28 January 2022, the Defence for Hysni Gucati (“Gucati Defence”) and the Defence for Nasim Haradinaj (“Haradinaj Defence”) filed written submissions in advance of a status conference scheduled for 31 January 2022, addressing, *inter alia*, the questions posed by the Panel in relation to Rule 132 of the Rules.<sup>2</sup>
3. On 31 January 2022, the Panel held a status conference on the next steps in the proceedings and heard further submissions on, *inter alia*, the questions posed by the Panel in relation to Rule 132 of the Rules.<sup>3</sup>
4. On 2 February 2022, the Gucati Defence and the Haradinaj Defence submitted written notices formally closing their respective cases.<sup>4</sup>

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<sup>1</sup> F00527, Panel, *Agenda for Parties’ Submissions on the Next Steps in the Proceedings* (“Agenda”), 20 January 2022.

<sup>2</sup> F00538, Haradinaj Defence, *Haradinaj Defence Written Submissions for the Next Status Conference* (“Haradinaj Submissions”), 28 January 2022; F00540, Gucati Defence, *Provisional Written Submissions re Agenda for Parties’ Submissions on the Next Steps in the Proceedings F00527* (“Gucati Submissions”), 28 January 2022.

<sup>3</sup> Transcript, 31 January 2022, pp 3389-3391.

<sup>4</sup> F00549, Gucati Defence, *Defence Notice of the Closing of Its Case*, 2 February 2022; F00550, Haradinaj Defence, *Defence Notice of the Closing of its Case*, 2 February 2022.

## II. SUBMISSIONS

5. In the Agenda, the Panel informed the Parties that, for the time being, it did not intend to call additional evidence *proprio motu* as provided by Rule 132 of the Rules. The Panel reserved, however, its right to revisit this decision once the presentation of the Defence case was finalised. In the same Agenda, and in line with Rule 132 of the Rules, the Panel invited the Parties to consider, including through *inter partes* communication, the submission into evidence of three items, which were either used in court but not tendered or were listed by one of the Parties but not used (“Three Items”).<sup>5</sup> The Three Items were:

- a. the 29 July 2014 statement of the Chief Prosecutor of the Special Investigative Task Force, DHG0075-DHG0081 (“2014 SITF Chief Statement”);
- b. paragraph 6 of the ICTY judgment in case IT-04-84-T, rendered on 3 April 2008 (“ICTY Haradinaj Judgment Excerpt”);<sup>6</sup> and
- c. one passage on pages 16-17 (ERN SPOE00248318-00248319) of the Prizren District Court judgment in case no. 85/2005, dated 10 August 2006, ERN SPOE00248303-00248404 (“Kosovo Court Judgment Excerpt”).

6. In its written submissions, the Haradinaj Defence indicated that it did not anticipate presenting any further evidence and did not advance any submissions in respect of the Three Items.<sup>7</sup> In its written submissions, the Gucati Defence indicated that it did not seek the submission of the 2014 SITF Chief Statement into evidence, as it was not used or tendered with any witness.<sup>8</sup> The Gucati Defence further averred that it did not seek the submission into evidence of portions of the Kosovo Court Judgment Excerpt, because the first two sentences of the passage put to Mr Gucati during his cross-examination related

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<sup>5</sup> Agenda, para. 4.

<sup>6</sup> Paragraph 6 of the ICTY judgment in case IT-04-84-T was referred to by the SPO in the cross-examination of Mr Gucati. Transcript, 7 December 2021, p. 2311.

<sup>7</sup> Haradinaj Submissions, para. 4.

<sup>8</sup> Gucati Submissions, para. 6.

specifically to individuals giving evidence in the case to which the judgment pertained, which occurred fifteen (15) years before the current events. The Gucati Defence further submitted that the remaining part of the passage simply recited a quotation from an earlier judgment of the ICTY in the *Limaj* case, IT-03-66-T. The Gucati Defence added that, in the current proceedings, the Defence had had no opportunity to challenge the accuracy of this passage. It was further submitted that neither statement could fairly be said to be probative of an environment of witness intimidation in Kosovo in 2020.<sup>9</sup>

7. At the 31 January 2022 status conference, the Specialist Prosecutor's Office ("SPO") indicated that it had conveyed to the Defence on 21 January 2022 its willingness to have the Three Items admitted into evidence, but that it did not receive a response before the written submissions of the Defence.<sup>10</sup> As regards the judgments that have been read in court, the SPO submitted that if their admission was necessary to confirm that the portions read into the record had been accurately quoted and that the judgments actually exist, they should be admitted into evidence.<sup>11</sup> The Gucati Defence reiterated its submissions made in writing.<sup>12</sup>

### III. APPLICABLE LAW

8. Pursuant to Article 40(6)(e) of the Law, the Panel may, as necessary, order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the Parties.

9. Pursuant to Rule 132 of the Rules, after hearing the Parties, the Panel may invite the submission of or *proprio motu* call additional evidence not produced by the Parties, including expert evidence, where it considers it necessary for the determination of the truth.

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<sup>9</sup> Gucati Submissions, para. 8.

<sup>10</sup> Transcript, 31 January 2022, p. 3390.

<sup>11</sup> Transcript, 31 January 2022, p. 3390.

<sup>12</sup> Transcript, 31 January 2022, p. 3390.

## IV. DISCUSSION

### A. PRELIMINARY OBSERVATION

10. The Panel notes at the outset the ICTY Haradinaj Judgment Excerpt was admitted into evidence on 28 January 2022 as an SPO exhibit.<sup>13</sup> The Panel will therefore not address this item any further.

### B. THE STANDARD OF ADMISSION UNDER RULE 132

11. The Panel notes that, under Rule 132 of the Rules, it is within its discretion to *proprio motu* call additional evidence not produced by the Parties, where it considers it necessary for the determination of the truth. The Panel interprets this rule as allowing the calling of additional witnesses and the admission of additional evidentiary material, not produced by the Parties.

12. The Panel observes that Rule 132 of the Rules makes no reference to other provisions governing the admission of evidence, namely Rules 138 and 153-155 of the Rules. Rule 137(1) of the Rules, placed under the heading “Admissibility and Assessment of Evidence”, reiterates the Panel’s authority under Rule 132 of the Rules.

13. That being said, Rule 132 requires that the evidence in question should be considered necessary for the determination of the truth. The Panel understands this requirement to imply that the evidence in question must be capable of assisting the Panel in determining correctly an issue that forms part of the case. For these reasons, the Panel considers that additional evidence called *proprio motu* by the Panel under Rule 132 of the Rules should be relevant and authentic and have probative value. The admission of evidence pursuant to Rule 132 of the Rules does not mean, however, that the Panel has already determined what weight, if any, such evidence would be given when considered in the overall context of the evidentiary record of proceedings.

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<sup>13</sup> Transcript, 28 January 2022, pp 3370-3372; P00166.

14. Finally, the Panel must ensure that the admission of evidence pursuant to Rule 132 of the Rules does not cause unfair prejudice to the Accused and is consistent with their fundamental rights as guaranteed under the Kosovo Constitution and the Law.

15. For these reasons, when considering the *proprio motu* admission of the 2014 SITF Chief Statement and the Kosovo Court Judgment Excerpt, the Panel will assess whether the admissibility requirements are met and whether their admission would cause unfairness to the Accused.

### C. THE 2014 SITF CHIEF STATEMENT

16. The Panel recalls that the 2014 SITF Chief Statement was included in the list of proposed exhibits of the Gucati Defence.<sup>14</sup> It was also included in the presentation queue of the Gucati Defence for SPO witness W04841. The document was, however, not used or tendered with any witness.

17. The Panel notes that the 2014 SITF Chief Statement appears to be relevant, as it relates *inter alia* to cooperation between the SITF and the Government of Serbia in the context of SITF investigations, which is connected with the Defence claim of “public interest”. The document appears to be a reproduction of the former Chief Prosecutor’s statement, it bears the SITF logo and no party has challenged its authenticity. The statement also has probative value as it describes the context in which investigations were conducted, cooperation with other entities and public findings of the SITF. The Panel further notes that the 2014 SITF Chief Statement was in the public domain at the time relevant for the charges.<sup>15</sup> The Panel notes, however, that there is no evidence that either Accused knew of this document or its content at the time relevant to the charges. The Panel is also mindful that the 2014 SITF Chief Statement was not used

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<sup>14</sup> F00486/A01, Gucati Defence, *Annex to Defence Submission of Updated List of Exhibits*, 9 December 2021, item no. 9, p. 3.

<sup>15</sup> Press Conference by SITF Chief Prosecutor, 29 July 2014, <https://newsroom.consilium.europa.eu/permalink/174028>; <https://newsroom.consilium.europa.eu/videos/press-conference-by-stif-chief-prosecutor-part-2>.

with any witness to establish or challenge the truth of its content and that no witness was produced that could meaningfully have done so.

18. That being said, the Panel views the 2014 SITF Chief Statement also as a record of the SITF publicly acknowledging its cooperation with the Serbian Government and Serbian Chief War Crimes Prosecutor as early as 2014. As said above, this aspect of the 2014 SITF Chief Statement is linked to the Defence claim of “public interest”. Therefore, the Panel considers that the 2014 SITF Chief Statement, as a record of the SITF’s public acknowledgment of cooperation with Serbian authorities, is a necessary component for the determination of the truth in this case. For the reasons provided in paragraph 17, the Panel is also satisfied that the admission of this document would not cause unfairness to the Accused.

19. For this reason, the Panel *proprio motu* admits the 2014 SITF Chief Statement under Rule 132 of the Rules solely as a record of the SITF’s public acknowledgment of cooperation with Serbian authorities.

#### **D. THE KOSOVO COURT JUDGMENT EXCERPT**

20. The Panel recalls that the Kosovo Court Judgment Excerpt was referred to by the SPO during the cross-examination of Mr Gucati.<sup>16</sup> The aforementioned excerpt was read into the transcript of these proceedings.<sup>17</sup>

21. The Panel notes that the Kosovo Court Judgment Excerpt appears to be relevant, as it relates to witness intimidation in the context of Kosovo criminal proceedings, which is connected with facts and circumstances of the present case insofar as it might provide context to certain allegations made by the SPO. The Kosovo Court Judgment Excerpt is contained in a redacted version of the Prizren District Court judgment in case no. 85/2005; the record therefore appears to be authentic. The Kosovo Court

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<sup>16</sup> Transcript, 8 December 2021, pp 2343-2349.

<sup>17</sup> Transcript, 8 December 2021, p. 2347; ERN SPOE00248318-00248319.

Judgment Excerpt also has probative value as it describes the context in which witnesses in that case testified and the considerations expressed by the judges in that case as regards witness intimidation, in light of specific findings made in the ICTY *Limaj* judgment rendered on 30 November 2005 (IT-03-66-T). The Panel notes the submissions of the Gucati Defence that the judgment was rendered more than fifteen (15) years ago, but considers this to be a matter going to the weight of the item rather than its admission. The Panel further recalls that the Defence had an opportunity to re-examine Mr Gucati on this issue, but they elected not to do so.<sup>18</sup>

22. For these reasons and in order to confirm the existence and accurate quoting of the excerpt read into the transcript, the Panel considers that the Kosovo Court Judgment Excerpt, as a separate documentary item, is a necessary component for the determination of the truth in this case. For the reasons provided in paragraph 21, the Panel is also satisfied that the admission of this document would not cause unfairness to the Accused.

23. For this reason, the Panel *proprio motu* admits the Kosovo Court Judgment Excerpt under Rule 132 of the Rules.

## V. DISPOSITION

24. In light of the foregoing and pursuant to Rule 132 of the Rules, the Panel:

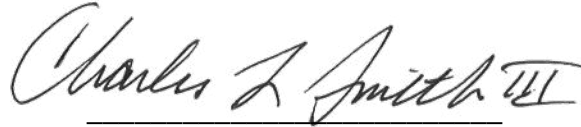
- a. **ADMITS** in evidence the 2014 SITF Chief Statement (DHG0075-DHG0081) for the purposes and within the limits set out in paragraphs 18-19;
- b. **ADMITS** in evidence the Kosovo Court Judgment Excerpt (ERN SPOE00248318-00248319);

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<sup>18</sup> Transcript, 8 December 2021, p. 2402.



- c. **DIRECTS** the Registrar to assign Exhibit Numbers to the  
aforementioned two items; and
- d. **DIRECTS** the Registrar to classify the admitted exhibits as public.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style and is positioned above a horizontal line.

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

Dated this Thursday, 3 February 2022  
At The Hague, the Netherlands