In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Pre-Trial Judge**
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
Date:	10 May 2021
Language:	English
Classification:	**Confidential**

Defence Response to SPO Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', and F00190

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I. CLASSIFICATION

1. **NOTE:** This submission has been filed as 'Confidential' so as to mirror the position of the Special Prosecutor's Office ('SPO'). The position of the Defence however is that it can be re-categorised as public.

II. INTRODUCTION

2. On 28 April 2021, the SPO filed its 'Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2021.[1]

3. That document, in short, rejects the applications made by the Defence in respect of certain items of evidence known to be in possession of the SPO on the basis of materiality, or the lack thereof.

4. Further, the document also rejects the submission of the Defence for Gucati in terms of other items requested that have not been disclosed by the SPO in any of the charts thus far.

[1] KSC-BC-2020-07/F00190/CONF/RED

5. The below submissions demonstrate how the documents requested are material and therefore ought to be disclosed.

6. Further, in the context of the separate submissions made by the Defence for Gucati, the Defence for Haradinaj joins those submissions filed and adopts their position. We would however seek to make general observations in respect of the request for the same, and the approach adopted by the SPO in terms of those documents.

III. Submissions

7. For the purposes of this response, the issues are to be addressed in the order highlighted in that which has been submitted by the SPO.

8. For the avoidance of doubt, unless otherwise specified, any reference to paragraph numbers refers to those numbers of the SPO submissions.

Medical Documentation

9. The Defence interpretation of the position is that the SPO intends, as part of its case, to submit that the witness, as a consequence of the alleged actions of the Defendant(s) suffered a demonstrable effect, or demonstrable harm, to the extent that he sought medical assistance.

10. This position is then, in turn, evidenced in the medical documentation noted on the 'list'.

11. The position of the SPO at paragraph 4, is that non-disclosure "*would cause no prejudice to the Defence since it is already in possession of an item clearly stating that the witness informed the SPO that he has felt stressed following the Accused's actions and visited a hospital*".

12. With the utmost respect, 'an item', is not evidence of the fact.

13. Further, stating that a witness has suggested he has suffered 'stress' is not enough to prove it as fact.

14. If the SPO is to seek to rely on an alleged consequence, namely that an alleged witness, who it does not seek to call at trial, had to seek medical treatment, then the record of that medical treatment must be evidenced.

15. In the alternative, if the SPO maintains the position that the confirmation of a visit and/or diagnosis cannot be disclosed, the Pre-Trial judge ought to then rule that the same is inadmissible, as are all references to the alleged diagnosis and/or the alleged witness.

16. To act otherwise results in the Defendant having evidence against him adduced that he has not seen, nor is he able to challenge.

17. As matters currently stand, without any proof or verification, the contention could simply be made up. The Court is being asked to accept, at face value and without further scrutiny, a matter that can neither be established, challenged nor scrutinised.

18. In the first instance therefore, the evidence is quite evidently material to the facts being alleged, and further, there is clear material prejudice to the Defendant if that evidence is not disclosed.

19. It is respectfully submitted that the SPO cannot have its cake and eat it, in that it cannot seek to rely on what it says is a fact, and then refuse to disclose evidence of the fact.

20. To maintain such a position is, with respect, nonsensical, and runs contrary to the SPO's disclosure obligations and fundamentally undermines the right of the Accused to know the case against him and being able to properly prepare his defence effectively.

21. Again therefore, the approach must be one or the other in that the SPO either discloses the evidence, subject to reasonable and necessary redactions, that it seeks rely upon, or, it refuses to disclose that evidence and therefore is prevented from relying on not only that evidence, but any assertions surrounding that evidence, i.e. the allegation itself. The Pre-Trial Judge

Items Concerning Protective Measures Ordered by Kosovo Courts

22. [……..]

Search and Seizure Videos

23. At paragraph 16, the SPO submits that the video of the search is merely duplication of that which is contained within the reports available and therefore "*there is no basis for concluding that the video, recording the items being seized, is material to the preparation of the defence*".

24. This is a confusing, and somewhat concerning, position to adopt.

25. If the video supports the report, it is abundantly clear that it be fundamentally material so as to enable consideration to be given as to whether the report is accurate or otherwise.

26. By way of extension, this then leads to the question of credibility being answered.

27. It is of some considerable concern that the Defence, and also the Chamber, is being asked to take the SPO at its word and that if the SPO states something as being fact, then this is not subject to challenge and ought to be accepted.

28. With respect, this is not how the adversarial process works.

29. If the SPO seeks to advance a position, it is for the SPO to justify that position, and conversely, the Defence have a right and an obligation to consider and where appropriate, challenge that position.

30. If the video evidence is as innocuous as the SPO suggest, there would appear to be no reason to refuse to disclose the same.

31. In any event, the Defence are not prepared to accept something as being a fact where they have not had opportunity to critically analyse the same, nor can they be expected to do so.

32. At paragraph 17, the SPO makes a submission in the alternative, that non-disclosure ought to be granted per Rule 108 as SPO staff members can be identified from the video.

33. It is difficult to ascertain how this submission can be maintained.

34. The searches were undertaken in normal working hours, in a public building, with members of the public present, and further, with members of the press present.

35. Anyone present therefore is capable of being identified.

36. There is no basis to suggest that each and every staff member ought to enjoy anonymity, and if this is adopted as being the appropriate position, why is the same courtesy not afforded to the Defence teams.

37. The submission that ongoing or future investigations would be put at risk is not substantiated, and therefore ought to be summarily rejected.

38. Further, the submission that the "*redaction of video evidence is highly complicated and time-consuming*" is with respect, irrelevant. The costs of the investigation are to be borne by the SPO, and those costs include ensuring that evidence is disclosed is an appropriate form.

39. As per the previous submission, however, if it is that the refusal to disclose is maintained, it must accordingly be ordered that evidence seized as a result of that search must be rendered inadmissible, given the inability of the Defence to ascertain whether it was legally obtained otherwise.

Correspondence with International Organisations

40. Similarly to the previous argument, if the foundation of the evidence to be adduced is not disclosed, the Defence are preventing from assessing whether the evidence has been appropriately obtained, and therefore again, the Defence is being asked to simply accept a position at face value with no further scrutiny.

41. This is wholly inappropriate.

42. It is noted that the information requested of those other organisations was for the use of 'lead generation'; however, it is wholly unclear as to whether any such evidence was obtained as a result of that which was requested and considered, and therefore, whether any 'leads' were generated.

43. If the evidence obtained by the SPO is not to be disclosed, then the evidence obtained arising from that correspondence must also be rendered inadmissible.

44. Any evidence obtained at this stage is akin to Schrodinger's cat, or rather, Schrodinger's Evidence, in that the evidence is both illegally obtained, and legally obtained at the same time, until such time as an actual assessment can be undertaken.

45. A position where evidence straddles the plane of legality and illegality in some form of evidential limbo cannot be tolerated.

46. In *Lubanga,*[2] the ICC Appeals Chamber found that the Trial Chamber rightly came to the conclusion that "*in the circumstances of the case, where a large number of potentially exculpatory information or information material to the preparation of the defence had neither been disclosed to the accused person nor to the Chamber, there was no prospect of a fair trial*".

47. The ICC Appeals Chamber went on to propose an appropriate scheme for the proper use of confidentiality agreements and the evidence arising as a consequence of such agreements being entered into.

[2] *Prosecutor v. Lubanga*, Appeals Chamber Judgment, 21 October 2008

48. In essence, it is for the Chamber to determine whether, but for the confidentiality agreement, that evidence would have been disclosed to the defence. If the Chamber concludes that it would have, the SPO will then seek the consent of the information provider.

49. If the provider still does not consent to disclosure, the Chamber *"will then have to determine whether, and if so, which counter-balancing measures can be taken to ensure that rights of the accused are protected, and that the trial is fair, in spite of the non-disclosure of the information."*[3]

50. In the instant case, it is unclear as to whether any scrutiny has been given to the documents in questions in terms of whether they are potentially exculpatory, or material to the Defence.

51. Again, we are being asked to accept at face value, the position adopted by the SPO.

52. It would appear to be incumbent upon the Pre-Trial Judge therefore to assess the information and consider the test as per *Lubanga*, and even where it is not incumbent as a matter of law, it is submitted to incumbent insofar as the fairness of proceedings is concerned.

[3] *Ibid* at 48

53. In the alternative, in circumstances where evidence is to be withheld, it must naturally follow that that same evidence must be deemed inadmissible, or not capable of being relied upon given the lack of opportunity to challenge, and thus resulting in material prejudice to the Defendant.

The Gucati Request

54. The Defence for Haradinaj acknowledges that it merely joined with the position advanced by the Gucati team, and therefore the submissions of the SPO on this point are for the Gucati team to address in full.

55. However, as much as the Gucati response is adopted for the purposes of the Haradinaj Defence team, there are general issues that fall to be addressed.

56. At paragraph 29 the SPO states "*It is unknown to which 'witnesses' the Defence is referring*", this purported lack of specificity being a theme that runs throughout the SPO submissions under this head.

57. Without dealing with the irony of the SPO raising an objection on the basis of a purported lack of specificity, the SPO fails to acknowledge the basis of the request itself.

58. There cannot be a request with respect to a 'specific' witness as the Defence are entirely unaware as to what which witnesses the SPO may have spoken to and/or taken statements from.

59. The SPO is therefore criticising the defence for making a request that is overly broad when the reality is that it is on account of the SPO's reluctance to be transparent that such a position has arisen.

60. The Defence cannot be expected to resolve an issue that is of the SPO's making, much the same as the SPO would not be expected to resolve an issue of the Defences' making.

61. It is for the SPO to be transparent in terms of the evidence it holds and the individuals that it may have spoken to and/or taken statements from, so as to enable the Defence to then make an assessment as to whether such information is to be requested.

62. Without the above being done, the Defence are left with no alternative but to make a broad request, it being impossible to narrow the request further.

63. The points raised at paragraphs 30 and 31 are noted, however, contrary to the position advanced by the SPO, "*the relevant information*" has not been disclosed, given that the Defence are being forced to justify their request for items of that evidence, including the video evidence of any search.

64. It is of concern that the SPO suggest that no such notes exist, and thus the SPO are requested to disclose information to demonstrate the chain of custody concerning the 'Batches' of evidence, again, this request is broad as the

Defence are unclear as to what evidence exists to show a clear chain of custody in terms of the evidence seized as a result of those searches.

65. The remainder of the SPO submission seeks to dispute the relevance of the 'leak' itself and seeks to suggest that the circumstances surrounding the leak are irrelevant to the offences charged.

66. In reality, the converse is true.

67. The leak, and the circumstances as to how the leak happened go to the very heart of the case, as it is the catalyst for the allegations themselves.

68. It is wholly unclear, and of the utmost concern, why the SPO is reluctant to disclose what investigative steps were taken, if any, to ascertain who was responsible for that leak, given it is a criminal offence in itself.

69. The Specialist Prosecutor has stated publicly on at least one occasion that he is certain the leak did not come from his office. This certainly raises the question that such certainty must been the result of conducting a thorough investigation and if there is such certainty as to who it was not there must be certainty as to who it was.

70. Whether it was a member of the SPO or otherwise, the fact is, the leak occurred, on three separate occasions, and seemingly, no proper steps have been taken to identify who is responsible for the same.

71. Further concern is raised at the suggestion of the SPO in paragraph 40 that "*the information sought is intended to impermissibly gain an understanding of facts and allegations that, while irrelevant to the Indictment, are nevertheless subject to the jurisdiction of the SC pursuant to Article 15 of the Law and, therefore, subject to the SPO's ongoing investigative mandate*."

72. The SPO are reminded that they are not the arbiter of what ought to be disclosed or otherwise, nor are they the arbiter of what is fair or otherwise.

IV. CONCLUSION

73. The requests made of the SPO are, for the reasons already given, appropriate and substantiated, and thus there is no reason why those items cannot be disclosed.

74. In the alternative, it must naturally follow that were certain items are ruled as not being capable of disclosure, that any evidence that may be adduced arising from that not-disclosed must be ruled as being non-admissible for the reasons already given.

75. The most paramount of considerations in any trial, is the fairness of proceedings, and where evidence is to be adduced that cannot be the subject of scrutiny or challenge, the proceedings cannot be said to be fair.

76. Further, where evidence has been obtained through means that are not disclosed, or, following other investigative steps and/or evidence that has not been disclosed, no argument can be raised as to whether that evidence was obtained legally or otherwise, and therefore again, its credibility cannot be tested.

77. Such issues materially prejudice the Defendant, and therefore the proceedings cannot be said to be fair unless steps are taken to ensure that right, in the instant case, those steps being either disclosure, or inadmissibility.

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