



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:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 22 February 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of  
Decision on Non-Disclosure of Certain Witness Contacts**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 39(13) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 102(3), 103 and 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 25 and 26 September 2020, Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") (collectively, the "Defence" or "Accused") were arrested<sup>2</sup> in Kosovo and transferred to the Specialist Chambers' ("SC") detention facilities in The Hague, the Netherlands,<sup>3</sup> pursuant to warrants of arrest and orders for their transfer.<sup>4</sup>

2. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment submitted by the Specialist Prosecutor's Office ("SPO")<sup>5</sup> and ordered the SPO to submit a revised indictment, as confirmed ("Confirmed Indictment").<sup>6</sup>

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<sup>1</sup> KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public. Prior to this decision, the President had assigned the same Judge as Single Judge; see KSC-BC-2020-07, F00003, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

<sup>2</sup> KSC-BC-2020-07, F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; F00016, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public.

<sup>3</sup> KSC-BC-2020-07, F00018, Registrar, *Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers*, 25 September 2020, public, with Annex 1, confidential; F00020, Registrar, *Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers*, 26 September 2020, public, with Annex 1, confidential.

<sup>4</sup> KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati*, 24 September 2020, public; F00012/A03/COR/RED, Single Judge, *Public Redacted Version of the Corrected Version of Arrest Warrant for Nasim Haradinaj*, 24 September 2020, public; F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00012/A04/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public.

<sup>5</sup> KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment* ("Confirmation Decision"), 11 December 2020, public.

<sup>6</sup> KSC-BC-2020-07, F00075/A02, Specialist Prosecutor, *Redacted Indictment* ("Confirmed Indictment"), 14 December 2020, public.

3. On 22 January 2021, the Pre-Trial Judge issued the “Framework Decision on Disclosure of Evidence and Related Matters” (“Framework Decision on Disclosure”), setting deadlines for disclosure.<sup>7</sup>

4. On 29 January 2021, the SPO filed a request for the non-disclosure of certain information pertaining to contacts with witnesses (“Request”).<sup>8</sup> On 10 February 2021, Mr Gucati responded to the Request.<sup>9</sup> On 11 February 2021, Mr Haradinaj filed his response to the Request.<sup>10</sup>

5. On 16 February 2021, the SPO submitted additional information in relation to the Request.<sup>11</sup>

## II. SUBMISSIONS

6. During the SPO’s investigations, certain contacts were made with witnesses or potential witnesses who addressed the impact of the Accused’s actions on them (“Underlying Information”).<sup>12</sup> The SPO submits that the Underlying Information is subject to disclosure under Rule 102(3) and/or Rule 103 of the Rules, but should

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<sup>7</sup> KSC-BC-2020-07, F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, public, para. 85.

<sup>8</sup> KSC-BC-2020-07, F00107, Specialist Prosecutor, *Prosecution Request for Non-disclosure of Certain Information Pertaining to Contacts with Witnesses*, 29 January 2021, confidential.

<sup>9</sup> KSC-BC-2020-07, F00119, Defence, *Response to Prosecution Request for Non-Disclosure of Certain Information Pertaining to Contacts with Witnesses* (“Gucati Response”), 10 February 2021, confidential.

<sup>10</sup> KSC-BC-2020-07, F00123, Defence, *Defence Response to Prosecution Submission on the Disclosure of Certain Documents Seized from KLA War Veterans Association (KSC-BC-2020-07/F00110) and Prosecution Request for Non-Disclosure of Certain Information Pertaining to Contact with Witnesses (KSC-BC-2020-07/F00107)* (Haradinaj Response), 11 February 2021, confidential. The Pre-Trial Judges notes that Mr Haradinaj’s response is filed one day late. The Pre-Trial Judge accepts the response on an exceptional basis. However, the Pre-Trial Judge emphasises that, pursuant to Rule 76 of the Rules, applications for an extension of time should be filed sufficiently in advance to enable a ruling on the application before the expiry of the relevant time-limit.

<sup>11</sup> KSC-BC-2020-07, F00127, Specialist Prosecutor, *Submission of Additional Information Relevant to Filing KSC-BC-2020-07/F00107*, 16 February 2021, confidential, with Annex 1, strictly confidential and *ex parte*.

<sup>12</sup> Request, para. 2

nevertheless be withheld from the Defence pursuant to Rule 108 of the Rules.<sup>13</sup> The SPO submits that: (i) disclosure poses objective and grave risks; (ii) non-disclosure is strictly necessary; (iii) sufficient counterbalancing measures are available; and (iv) non-disclosure is proportionate.<sup>14</sup> The SPO submits that it provided appropriate counterbalancing measures, including disclosure of: (i) a declaration which provides non-exhaustive examples of information provided by witnesses regarding feelings of intimidation in the wake of alleged dissemination of confidential and non-public information by the Accused (“Declaration”)<sup>15</sup> and (ii) an addendum which provides non-exhaustive examples of other witnesses who did not convey the feelings expressed by the witnesses referenced in the Declaration (“Addendum”).<sup>16</sup>

7. Mr Gucati responds that the Request should be rejected.<sup>17</sup> He argues that the Request does not establish that: (i) there are exceptional circumstances warranting non-disclosure; (ii) non-disclosure is strictly necessary;<sup>18</sup> or (iii) there is a “grave risk” to the security of a witness, victim participating in proceedings, or members of their family.<sup>19</sup> Mr Gucati argues that the SPO’s interest in ensuring effective investigations and prosecutions or obtaining the testimonies of witnesses in other cases does not take priority over fair trial rights.<sup>20</sup> In particular, Mr Gucati argues that he has a right to challenge the contents of the Declaration and investigate material identified in the Addendum.<sup>21</sup> Mr Gucati submits there are a number of other, less restrictive,

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<sup>13</sup> Request, paras 2, 14.

<sup>14</sup> Request, para. 3.

<sup>15</sup> Request, para. 11, *referring to* 084008-084010.

<sup>16</sup> Request, para. 13, *referring to* 090142-090143

<sup>17</sup> Gucati Response, para. 27.

<sup>18</sup> Gucati Response, paras 16-17.

<sup>19</sup> Gucati Response, paras 18-19.

<sup>20</sup> Gucati Response, para. 20.

<sup>21</sup> Gucati Response, paras 21-23.

measures that can and should be taken such as orders pursuant to Rule 80(4)(d) of the Rules and the application of redactions.<sup>22</sup>

8. Mr Haradinaj responds that the Request is “broadly stated, and largely unsubstantiated”.<sup>23</sup> Mr Haradinaj argues that non-disclosure fundamentally impacts his right to receive a fair trial and counterbalancing procedures put forward by the SPO are insufficient.<sup>24</sup> In this regard, Mr Haradinaj notes that he stands accused of, not just disseminating confidential material, but further, the intimidation of witnesses and the offence of retaliation; the SPO must therefore prove, *inter alia*, that witnesses were intimidated.<sup>25</sup>

### III. APPLICABLE LAW

9. Article 21(6) of the Law provides that all material and relevant evidence or facts in possession of the SPO, which are for or against the Accused shall be made available to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

10. Rule 102(3) of the Rules provides that the Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which

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<sup>22</sup> Gucati Response, paras 24-26.

<sup>23</sup> Haradinaj Response, para. 1.

<sup>24</sup> Haradinaj Resposne, para. 3.

<sup>25</sup> Haradinaj Response, paras 56, 61.

are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay.

11. Rule 103 of the Rules provides that, subject to Rule 107 and Rule 108, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control, or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence.

12. Pursuant to Rule 108 of the Rules, where information in the custody, control, or actual knowledge of the Specialist Prosecutor is subject to disclosure under Rule 102 or Rule 103, but such disclosure may: (i) prejudice ongoing or future investigations; (ii) cause grave risks to the security of a witness, victim participating in proceedings or members of his or her family; or (iii) be contrary for any other reason to the public interest or the rights of third parties the Specialist Prosecutor may apply confidentially and *ex parte* to the Panel to withhold the information in whole or in part.

13. Rule 108(3) and (4) of the Rules further provides that a Panel may order appropriate counterbalancing measures. If no measures ensure the Accused's right to a fair trial, the Specialist Prosecutor shall be given the option of either disclosing the information, or amending or withdrawing the charges to which the information relates.

#### IV. DISCUSSION

##### A. MATERIAL SUBJECT TO DISCLOSURE

14. The Parties agree that the Underlying Information is subject to disclosure under Rules 102(3) and/or 103 of the Rules.<sup>26</sup>

15. The Pre-Trial Judge considers that the Underlying Information relates to the alleged adverse impact, or lack of such impact, of the charged conduct of the Accused on witnesses, potential witnesses, or victims. Accordingly, the Underlying Information may be material to the preparations of the Defence or amount to exculpatory material, which is subject to disclosure under Rules 102(3) and 103 of the Rules.

##### B. NON-DISCLOSURE OF MATERIAL

16. The Pre-Trial Judge recalls the legal test for non-disclosure of information to the opposing Party, in particular identifying information related to witnesses whose identity must be withheld from the opposing Party, as set out in the Framework Decision on Disclosure.<sup>27</sup>

#### **1. Objectively justifiable and grave risk**

17. The SPO submits that disclosure of the Underlying Information will prejudice ongoing or future investigations, cause grave risk to the security of witnesses, victims, or their families, and is against the public interest.<sup>28</sup>

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<sup>26</sup> Request, para. 14; Gucati Response, para. 15.

<sup>27</sup> Framework Decision on Disclosure, para. 71.

<sup>28</sup> Request, paras 15-18.

18. Mr Gucati responds that the SPO does not establish “exceptional circumstances” or “grave risks” as no witnesses or potential witnesses were subject to direct or grave threats and other witnesses have expressed that they have no cause for concern.<sup>29</sup> As concerns the public interest, Mr Gucati argues that such concerns do not take priority over the Accused’s right to a fair trial.<sup>30</sup>

19. The Pre-Trial Judge considers that the Underlying Information relates to, and identifies, certain witnesses or potential witnesses and their specific security concerns, [REDACTED].<sup>31</sup>

20. With regard to prejudice to ongoing and future investigations, the Pre-Trial Judge recalls the Accused’s statements indicating an aim to undermine and obstruct SC proceedings<sup>32</sup> and public expressions that they do not care about witnesses.<sup>33</sup> These statements indicate that, if the Accused gain access to confidential and non-public information in the Underlying Information, there is a risk that they may attempt to disseminate it and thereby prejudice ongoing or future investigations or proceedings.

21. With respect to the grave risk to the security of witnesses, the Pre-Trial Judge recalls that Mr Haradinaj, in the presence of Mr Gucati, publicly named potential accused persons and a potential witness by name.<sup>34</sup> Should the Accused be provided with specific information pertaining to witnesses or potential witnesses in the

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<sup>29</sup> Gucati Response, para 16-19.

<sup>30</sup> Gucati Response, para. 20.

<sup>31</sup> Request, para. 16.

<sup>32</sup> Confirmation Decision, para. 120; KSC-BC-2020-07, F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati*, 24 December 2020, public, paras 33-35; F00094, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj*, 24 December 2020, public, para. 38.

<sup>33</sup> KSC-BC-2020-07, F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati*, 24 December 2020, public, para. 34.

<sup>34</sup> KSC-BC-2020-07, F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati*, 24 December 2020, public, para. 30; F00094, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj*, 24 December 2020, public, para. 38.



Underlying Information, there is a risk that the Accused will attempt to publicly disseminate such information thereby causing grave risk to the security of a witness, potential witnesses, or members of their family.

22. Finally, the Pre-Trial Judge notes that there is a public interest in the SC fulfilling its mandate through effective investigations and the prosecution of offences. Any unauthorized dissemination of the Underlying Information by the Accused, could potentially hinder SPO investigations and would thereby be contrary to this public interest.

## **2. Necessity**

23. The SPO submits that non-disclosure is necessary as disclosure would pose objective and grave risks to protected persons and interests.<sup>35</sup> Mr Gucati responds that full disclosure can only be restricted in exceptional circumstances, and then only when strictly necessary, and argues that the Request does not establish anything close to exceptional circumstances.<sup>36</sup>

24. The Pre-Trial Judge considers that non-disclosure is strictly necessary under the circumstances in order to prevent any prejudice to ongoing or future investigations and to protect and respect the security, well-being, and dignity of witnesses, participating victims, or members of their family.

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<sup>35</sup> Request, para. 24.

<sup>36</sup> Gucati Response, paras 16-17.

### 3. Proportionality

25. The SPO submits that counterbalancing measures make non-disclosure proportional in the circumstances.<sup>37</sup> The SPO argues that disclosure of the Declaration and the Addendum and its stipulation that it will not oppose the Addendum being admitted into evidence at trial, or its contents becoming agreed facts, constitute appropriate counterbalancing measures which ensure the Accused's rights to a fair trial.<sup>38</sup> The SPO further argues that the Defence's involvement in the current litigation over non-disclosure further safeguards fairness.<sup>39</sup>

26. Mr Gucati responds that withholding documents in their entirety is wholly disproportionate.<sup>40</sup> Mr Gucati argues that he is entitled to challenge the contents of the Declaration and investigate the matters contained in the Addendum.<sup>41</sup> Mr Gucati further argues that the SPO's proposed counterbalancing measures prevent him from mounting such challenges or carrying out such investigations.<sup>42</sup> Mr Gucati asserts that withholding documents in their entirety, and substituting them with cursory summaries, is unwarranted when the following less restrictive measures achieve the same goal: (i) disclosure to counsel, but not the Accused, pursuant to Rule 80(4)(d) of the Rules or (ii) the use of redactions pursuant to Rule 108(2)(c) of the Rules according to the procedure set out in the Framework Decision on Disclosure.<sup>43</sup>

27. The Pre-Trial Judge notes that the Confirmed Indictment includes, *inter alia*, the charge of "intimidation during criminal proceedings",<sup>44</sup> which requires a showing of

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<sup>37</sup> Request, paras 22-24.

<sup>38</sup> Request, paras 21-22.

<sup>39</sup> Request, para. 23.

<sup>40</sup> Guacti Response, para. 23 (p. 8).

<sup>41</sup> Gucati Response, para. 21 (p. 7).

<sup>42</sup> Gucati Response, paras 22-23 (p. 7).

<sup>43</sup> Gucati Response, paras 22-26 (pp. 8-9).

<sup>44</sup> Confirmed Indictment, para. 29.

the use of force, serious threats, and/or other means of compulsion to induce or attempt to induce witnesses to refrain from making a statement or make a false statement or otherwise fail to state true information to the SPO or the SC.<sup>45</sup> The Accused must have an opportunity to effectively challenge and investigate these allegations and material related to these allegations. The Pre-Trial Judge considers that the contents of the Addendum and Declaration in addressing whether the alleged actions of the Accused affected witnesses, victims, or their family members, involve matters pertinent to the charges in the Confirmed Indictment. The Accused must therefore be given effective means of investigating the contents of these documents. Less restrictive measures, such as disclosing the Underlying Information in redacted form, balances the grave risks enumerated above and the rights of the Accused. The Pre-Trial Judge therefore considers that the counterbalancing measures proposed by the SPO are not sufficient, in the present circumstances.

28. As the redactions enable the Accused to have access to the essential parts of the Underlying Information, while addressing the grave risks to protected persons and the various other interests at stake, the Pre-Trial Judge finds that provision of the Underlying Information in redacted form is proportionate under the circumstances.

### C. IMPLEMENTATION OF REDACTIONS

29. The Pre-Trial Judge has reviewed the SPO proposed redactions to the Underlying Information.<sup>46</sup> The Pre-Trial Judge recalls that redactions should be applied to the

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<sup>45</sup> Confirmation Decision, paras 114, 117.

<sup>46</sup> KSC-BC-2020-07, F00127/A01, *Annex 1 to Submission of Additional Information Relevant to Filing KSC-BC-2020-07/F00107* ("Underlying Information"), 16 February 2021, strictly confidential and *ex parte*.

extent they are strictly necessary.<sup>47</sup> In addition, redactions should be applied consistently.<sup>48</sup>

30. In order to provide the Defence with a meaningful opportunity to investigate the contents of the Declaration and the Addendum, redactions generally should not extend to information relating to the leaked batches and their effect on a particular witness or victim, unless and to the extent such information would identify the concerned witness or victim.<sup>49</sup> To this end, sentences should also be kept intact to the extent possible so that the context of information provided is understood.<sup>50</sup>

31. The SPO shall therefore disclose to the Defence a redacted version of the Underlying Information, in conformity with paragraphs 29-30 above, by Thursday, 4 March 2021.

## V. DISPOSITION

32. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **GRANTS** the Request, in part; and
- b. **ORDERS** the SPO to disclose to the Defence a redacted version the Underlying Information, in conformity with paragraphs 29-30 above, by Thursday, 4 March 2021.

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<sup>47</sup> Article 21(6) of the Law.

<sup>48</sup> For example, if a witness pseudonym is redacted, then it should be redacted throughout the statement. *See e.g.*, Underlying Information, para. 3, p. 6 (083960).

<sup>49</sup> Over-redacting relevant information should be avoided. *See e.g.*, Underlying Information, para. 3, p. 6 (083960).

<sup>50</sup> *See e.g.*, Underlying Information, paras 3, 5, p. 11 (084237).



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Monday, 22 February 2021

At The Hague, the Netherlands.