



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:** 23 February 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of**  
**Decision on Disclosure of Certain Documents Seized from the KLA War Veterans**  
**Association**

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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 106 and 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 7 and 17 September 2020, respectively, the Single Judge authorised the seizure of two sets of documents ("Batch 1" and "Batch 2", respectively, and collectively "Batches 1 and 2") referred to during two press conferences held by the Kosovo Liberation Army War Veterans Association ("KLA WVA").<sup>2</sup> Batches 1 and 2 were subsequently seized on 8 and 17 September 2020, respectively.<sup>3</sup>

2. On 22 September 2020, the Specialist Prosecutor's Office ("SPO") issued an order instructing the production of certain documents ("Batch 3") referred to during a KLA WVA press conference held earlier that day, which were obtained that same day.<sup>4</sup>

3. On 25 and 26 September 2020, Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") (collectively, "Accused") were arrested<sup>5</sup> in Kosovo and transferred

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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, F00005, Single Judge, *Urgent Decision Authorising a Seizure*, 7 September 2020, public; F00007, Single Judge, *Decision Authorising a Seizure*, 17 September 2020, public.

<sup>3</sup> KSC-BC-2020-07, F00008/RED, Specialist Prosecutor, *Public Redacted Version of 'Prosecution Report Pursuant to Decision KSC-BC-2018-01/F00121'*, Filing KSC-BC2020-07/F0008 dated 21 September 2020, 21 September 2020, public, with Annex 1, confidential; F00028/RED, Specialist Prosecutor, *Public Redacted Version of 'Prosecution Report Pursuant to Decision KSC-BC-2018-01/F00123'*, Filing KSC-BC2020-07/F00028 dated 29 September 2020, 29 September 2020, public, with Annex 1, confidential.

<sup>4</sup> KSC-BC-2020-07, F00010/RED, Specialist Prosecutor, *Public Redacted Version of 'Prosecution Notice and Related Request'*, Filing KSC-BC-2020-07/F00010 dated 23 September 2020, 23 September 2020, public, with Annex 1, confidential.

<sup>5</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.

to the Specialist Chambers (“SC”)’ detention facilities in The Hague, the Netherlands,<sup>6</sup> pursuant to warrants of arrest and orders for their transfer.<sup>7</sup>

4. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment submitted by the SPO<sup>8</sup> and ordered the SPO to submit a revised indictment, as confirmed (“Confirmed Indictment”).<sup>9</sup>

5. 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 and ordering the SPO to make submissions on certain matters related to: (i) Batches 1 and 2 and Batch 3 (collectively, “Three Batches”); and (ii) the close-circuit television (“CCTV”) footage of an individual delivering said batches to the KLA WVA.<sup>10</sup>

6. On 29 January 2021, the SPO disclosed portions of Batch 2 under Rule 103 of the Rules, consisting mainly of publicly available records from prior proceedings.<sup>11</sup>

7. On 1 February 2021, the SPO filed its submissions in relation to the Three Batches and the CCTV footage, as ordered in the Framework Decision on Disclosure,

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<sup>6</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>7</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 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>8</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>9</sup> KSC-BC-2020-07, F00075/A02, Specialist Prosecutor, *Redacted Indictment*, 14 December 2020, public.

<sup>10</sup> KSC-BC-2020-07, F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, public.

<sup>11</sup> KSC-BC-2020-07, Disclosure Package 5.

requested authorisation to withhold the undisclosed portions of Batches 1 and 2 (“Request”), and averred that Batch 3 is not subject to disclosure under the Rules.<sup>12</sup>

8. On 9 February 2021, the SPO submitted further information concerning certain documents contained in Batch 1.<sup>13</sup>

9. On 11 February 2021, the Defence for Mr Gucati (“Gucati Defence”) responded to the Request (“Gucati Response”).<sup>14</sup>

10. On 12 February 2021, the Defence for Mr Haradinaj (“Haradinaj Defence”) responded to the Request (“Haradinaj Response”).<sup>15</sup>

11. On 19 February 2021, the SPO submitted a consolidated reply (“Reply”) to the Gucati Response and the Haradinaj Response (collectively, “Responses”).<sup>16</sup>

12. On 23 February 2021, in its submissions for the upcoming status conference, the Gucati Defence made certain observations in relation to one point referred to in the Reply.<sup>17</sup>

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<sup>12</sup> KSC-BC-2020-07, F00110, Specialist Prosecutor, *Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 1 February 2021, confidential, with Annexes 1-2, strictly confidential and *ex parte*.

<sup>13</sup> KSC-BC-2020-07, F00118, Specialist Prosecutor, *Submission of Additional Information Relevant to Filing KSC-BC-2020-07/F00110* (“Further Submission”), 9 February 2021, confidential, with Annex 1, confidential.

<sup>14</sup> KSC-BC-2020-07, F00122, Defence for Mr Gucati, *Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 11 February 2021, confidential.

<sup>15</sup> KSC-BC-2020-07, F00123, Defence for Mr Haradinaj, *Defence Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the 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)*, 12 February 2021, confidential.

<sup>16</sup> KSC-BC-2020-07, F00130, Specialist Prosecutor, *Prosecution Consolidated Reply to Defence Responses to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 19 February 2021, confidential.

<sup>17</sup> KSC-BC-2020-07, F00137, Defence for Mr Gucati, *Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters* (“Gucati Defence Submissions”), 23 February 2021, confidential.

## II. APPLICABLE LAW

13. 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.

14. Pursuant to Rule 102(1)(b) of the Rules, within a time limit set by the Pre-Trial Judge, and no later than 30 days prior to the opening of the Specialist Prosecutor's case, the SPO shall make available to the Defence the following material: (i) the statements of all witnesses whom the SPO intends to call to testify at trial, in a language the Accused understands and speaks; (ii) all other witness statements, expert reports, depositions, or transcripts that the SPO intends to present at trial; and (iii) the exhibits that the SPO intends to present at trial.

15. 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 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.

16. Rule 103 of the Rules provides that, subject to Rules 107 and 108 of the Rules, 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.

17. Pursuant to Rule 106 of the Rules, subject to Rule 103 of the Rules, and unless otherwise ordered by a Panel, reports, memoranda or other internal documents prepared by a Party in connection with the investigation or preparation of a case are not subject to disclosure or notification.

18. Pursuant to Rule 108(1) of the Rules, where information in the custody, control, or actual knowledge of the Specialist Prosecutor is subject to disclosure under Rules 102 or 103 of the Rules, 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.

19. Pursuant to Rule 108(3) and (4) of the Rules, 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.

### III. SUBMISSIONS

#### A. REQUEST

20. As regards the CCTV footage, the SPO submits that, pursuant to Rule 102(3) of the Rules and the procedure set out in the Framework Decision on Disclosure, it will provide the Defence with detailed notice of such footage and, as appropriate, access thereto.<sup>18</sup>

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<sup>18</sup> Request, para. 2.

21. As regards the Three Batches, the SPO submits that the confidential contents of the Three Batches will not be introduced into evidence by the SPO and do not fall under Rule 103 of the Rules.<sup>19</sup> It further avers that it is not the contents of the Three Batches, but rather their confidential nature that is at issue, and that the SPO has provided sufficient information about their contents for the Defence to advance their investigations.<sup>20</sup>

22. As regards the undisclosed portions of Batches 1 and 2, the SPO submits that they fall within the scope of Rule 102(3) of the Rules, but should nevertheless be withheld from the Defence pursuant to Rule 108 of the Rules.<sup>21</sup> In particular, it avers that disclosure thereof may: (i) prejudice ongoing or future investigations;<sup>22</sup> (ii) cause a grave risk to the security of witnesses, victims participating in the proceedings, or members of their family;<sup>23</sup> and (iii) be contrary to the rights of third parties referred to in some of the documents, which have a reasonable expectation of confidentiality.<sup>24</sup> The SPO further submits that the requested non-disclosure is strictly necessary and proportionate, in light of available counterbalancing measures, including the provision of an SPO's investigator's declaration ("Declaration"), summarising the information contained in the Three Batches, and the disclosure of a number of media articles containing portions of Batch 1.<sup>25</sup>

23. As regards Batch 3, the SPO submits that: (i) by virtue of its [REDACTED], it falls under Rule 106 of the Rules;<sup>26</sup> (ii) based on its assessment, it is not subject to disclosure

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<sup>19</sup> Request, paras 30, 32, 37.

<sup>20</sup> Request, para. 30.

<sup>21</sup> Request, paras 3, 23, 44.

<sup>22</sup> Request, paras 3, 5, 24-25.

<sup>23</sup> Request, paras 3, 5, 26-27.

<sup>24</sup> Request, paras 3, 28.

<sup>25</sup> Request, paras 3, 23, 31-33.

<sup>26</sup> Request, paras 4, 34-36.

pursuant to Rule 103 of the Rules;<sup>27</sup> and (iii) the fact that the Defence may consider it material to their preparation is irrelevant since Rule 106 is not subject to Rule 102(3) of the Rules.<sup>28</sup> Alternatively, should Batch 3 or parts thereof be deemed subject to disclosure, the SPO avers that: (i) its disclosure poses an objectively justifiable and grave risk to protected persons and interests;<sup>29</sup> and (ii) the requested non-disclosure is proportionate in light of available counterbalancing measures.<sup>30</sup>

## B. GUCATI RESPONSE

24. The Gucati Defence submits that the Request should be denied and notification and/or disclosure of the undisclosed portions of the Three Batches should take place under Rule 102(1)(b)(iii) and/or (3), and/or Rule 103 of the Rules.<sup>31</sup> In particular, the Gucati Defence submits that: (i) the Request does not establish the existence of exceptional circumstances warranting non-disclosure;<sup>32</sup> (ii) the Request does not establish the existence of a grave risk to the security of a witness, victim, or member of their family;<sup>33</sup> and (iii) the SPO's interest in ensuring effective investigations and prosecution of offences or obtaining witnesses' testimonies in other cases does not take priority over the Accused's fair trial rights.<sup>34</sup> It also submits that the Accused does not accept the contents of the Declaration and is entitled to challenge its contents,

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<sup>27</sup> Request, para. 37.

<sup>28</sup> Request, para. 37.

<sup>29</sup> Request, paras 38-40.

<sup>30</sup> Request, paras 41-42.

<sup>31</sup> Gucati Response, paras 3-4, 22-23, 40 [22], 46 [27]. The Pre-Trial Judge notes that the paragraphs in the Gucati Response are not numbered in numerical order. Therefore, when referring to the Gucati Response, the Pre-Trial Judge refers to the paragraphs in numerical order and indicates in square brackets the paragraph number as set forth in the Gucati Response.

<sup>32</sup> Gucati Response, paras 24-25.

<sup>33</sup> Gucati Response, paras 26-27.

<sup>34</sup> Gucati Response, para. 28.



including whether the documents contained in the Three Batches are genuine and authentic, contain protected information, and display sufficient indicia of reliability.<sup>35</sup> The Gucati Defence further asserts that withholding the Three Batches in their entirety and substituting them with a summary is disproportionate, in light of lesser restrictive measures which can achieve the same goal, namely: (i) disclosure to Specialist 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>36</sup>

### C. HARADINAJ RESPONSE

25. The Haradinaj Defence submits that the Request should be denied and requests that the Pre-Trial Judge stay the proceedings until such time as the SPO has complied with its disclosure obligations involving the Three Batches, noting that the Accused cannot be guaranteed a fair trial without disclosure of the remainder of the material contained therein (“Request for Stay of Proceedings”).<sup>37</sup> Should the SPO nevertheless consider that the material in question ought not to be disclosed, the Haradinaj Defence contends that the SPO should be directed to either amend the indictment accordingly or, if this is refused, stay the proceedings in their entirety (“Alternative Request”).<sup>38</sup> Moreover, the Haradinaj Defence: (i) joins the submissions of the Gucati Defence as regards the disclosability of the Three Batches;<sup>39</sup> and (ii) disputes the SPO’s position that it is not the contents of the Three Batches that is of relevance, but rather their

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<sup>35</sup> Gucati Response, paras 29-32, 33-34 [20-21], 38 [20].

<sup>36</sup> Gucati Response, paras 41 [23], 42 [33], 43-44 [24-25].

<sup>37</sup> Haradinaj Response, paras 10-13, 49, 72-75, 77-78, 97-98.

<sup>38</sup> Haradinaj Response, paras 13, 99.

<sup>39</sup> Haradinaj Response, paras 40, 82.

confidential nature.<sup>40</sup> It further avers that: (i) the Request does not establish the existence of exceptional circumstances or the existence of a grave risk to the security or safety of witnesses or victims;<sup>41</sup> (ii) the proposed counterbalancing measures are insufficient;<sup>42</sup> and (iii) considering the availability of lesser restrictive measures, the requested non-disclosure is disproportionate.<sup>43</sup> Specifically as regards Batch 3, the Haradinaj Defence argues that, whilst the information at stake may have started as Rule 106 information, upon constituting the basis of one or more counts within the indictment, it has become disclosable under Rule 102 of the Rules.<sup>44</sup>

#### D. REPLY

26. The SPO submits that the Request for Stay of Proceedings misapprehends the questions currently at issue, is unsubstantiated, and should be dismissed *in limine*.<sup>45</sup> It further avers that its proposed counterbalancing measures provide the Defence with access to evidence demonstrating the authenticity and confidential nature of the Three Batches, and that the Defence will have ample opportunity to challenge such evidence.<sup>46</sup> The SPO further submits that disclosure of the Three Batches to Specialist Counsel only or in redacted form do not constitute adequate counterbalancing measures, noting that: (i) Batch 3 is not subject to disclosure pursuant to Rule 106 of the Rules; (ii) the Three Batches cannot be redacted in a manner which would render them meaningful to the Defence while also protecting the confidential and non-public information contained therein; and (iii) disclosure to Specialist Counsel would not

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<sup>40</sup> Haradinaj Response, paras 54-62, 76.

<sup>41</sup> Haradinaj Response, para. 96.

<sup>42</sup> Haradinaj Response, paras 79-87.

<sup>43</sup> Haradinaj Response, paras 9, 41.

<sup>44</sup> Haradinaj Response, paras 91-95.

<sup>45</sup> Reply, para. 2.

<sup>46</sup> Reply, paras 4-5.

serve the general purposes set out in the Responses.<sup>47</sup> Should the Pre-Trial Judge nevertheless consider it necessary, the SPO does not object to the appointment of an independent counsel unaffiliated with the SPO or with any defence team before the SC to inspect the contents of Batches 1 and 2 as a further counterbalancing measure, but requests the opportunity to make further submissions as concerns such independent counsel's nomination and the procedure to be followed.<sup>48</sup>

#### IV. DISCUSSION

##### A. CCTV FOOTAGE

27. The Pre-Trial Judge takes note that the CCTV footage was included in the SPO's detailed notice under Rule 102(3) of the Rules,<sup>49</sup> and considers that no further ruling is required in this respect.

##### B. BATCHES 1 AND 2

28. At the outset, the Pre-Trial Judge notes that admissibility considerations with respect to individual items, such as the Declaration, are not relevant for the purposes of the present decision.

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<sup>47</sup> Reply, para. 6.

<sup>48</sup> Reply, paras 7-8. The Pre-Trial Judge notes that the Gucati Defence also submits that, should the Pre-Trial Judge consider the instruction of independent counsel, it also requests the opportunity for the Parties to make further submissions on this point (Gucati Defence Submissions, para. 49).

<sup>49</sup> KSC-BC-2020-07, F00133/A01, Specialist Prosecutor, *Annex 1 to Prosecution's Rule 102(3) Notice*, 19 February 2021, confidential, items 11-13.

## 1. Material Subject to Disclosure

29. The Pre-Trial Judge takes note of the SPO's submission that it does not intend to present any of the documents contained in Batches 1 and 2 at trial.<sup>50</sup> Therefore, contrary to the Gucati Defence's averment, Batches 1 and 2 do not fall under Rule 102(1)(b)(iii) of the Rules.

30. Moreover, having reviewed the undisclosed contents of Batches 1 and 2, and considering the charges brought against the Accused, as contained in the Confirmed Indictment,<sup>51</sup> the Pre-Trial Judge notes that what is at stake for the purposes of the present case is not the content, as such, of the documents contained in Batches 1 and 2, but rather whether it is apparent that: (i) such documents are confidential; and (ii) the [REDACTED].

31. That being said, the Pre-Trial Judge considers that the aforementioned information contained in Batches 1 and 2 may be material to the preparations of the Defence and/or be exculpatory in nature. Therefore, Batches 1 and 2 are subject to disclosure under Rules 102(3) and/or 103 of the Rules, as the case may be.

## 2. Non-Disclosure of Material

32. The Pre-Trial Judge recalls the legal test for non-disclosure of information to the opposing Party, as set out in the Framework Decision on Disclosure.<sup>52</sup>

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<sup>50</sup> Request, paras 30, 32.

<sup>51</sup> Confirmed Indictment, para. 48.

<sup>52</sup> Framework Decision on Disclosure, para. 71.

(i) Objectively Justifiable Risk

33. The Pre-Trial Judge notes that the undisclosed portions of Batches 1 and 2 contain [REDACTED].<sup>53</sup>

34. With regard to prejudice to ongoing or future investigations, the Pre-Trial Judge recalls the Accused's statements indicating an aim to undermine and obstruct SC proceedings<sup>54</sup> and public expressions that they do not care about witnesses.<sup>55</sup> These statements indicate that, should the Accused gain further access to confidential and non-public information contained in Batches 1 and 2, there is a risk that they may attempt to disseminate it, thereby prejudicing ongoing or future investigations.

35. With regard to causing grave risk to the security of witnesses, the Pre-Trial Judge recalls that Mr Haradinaj, in the presence of Mr Gucati, publicly named [REDACTED].<sup>56</sup> Should the Accused be provided with specific information pertaining to [REDACTED] contained in Batches 1 and 2, there is a risk that they will attempt to publicly disseminate such information, thereby causing grave risk to the security of witnesses or members of their family.

36. With regard to the public interest or the interests of third parties, the Pre-Trial Judge notes that there is a public interest in the SC fulfilling its mandate through, *inter alia*, effective investigations and the prosecution of crimes and offences under its jurisdiction. Therefore, any prejudice caused to ongoing or future investigations would be contrary to the public interest. Moreover, noting that some of the

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<sup>53</sup> Request, paras 3, 21-22, 25; 084015-084026, paras 5-9, 19-20, 22-27

<sup>54</sup> Confirmation Decision, para. 120; KSC-BC-2020-07, F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati* ("Gucati Detention Review Decision"), 24 December 2020, public, paras 33-35; F00094, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* ("Haradinaj Detention Review Decision"), 24 December 2020, public, para. 38.

<sup>55</sup> Gucati Detention Review Decision, para. 34.

<sup>56</sup> Gucati Detention Review Decision, para. 30; Haradinaj Detention Review Decision, para. 38.

undisclosed documents contained in Batches 1 and 2 [REDACTED] their unauthorised dissemination would be contrary to the rights of such third parties.

37. As a result, disclosure of Batches 1 and 2 to the Defence would pose a justifiable risk to the interests set out above.

*(ii) Necessity*

38. Having reviewed the undisclosed contents of Batches 1 and 2, the Pre-Trial Judge is of the view that non-disclosure of most of the information contained therein is necessary to ensure that (i) ongoing or future investigations are not prejudiced; and (ii) the security, well-being and dignity of witnesses or members of their family, and the public interest or the rights of third parties are protected. However, to achieve this goal, Batches 1 and 2 require extensive redactions which would make the documents contained therein incomprehensible to the Defence.<sup>57</sup> In these circumstances, the Pre-Trial Judge considers that non-disclosure of the undisclosed contents of Batches 1 and 2 is strictly necessary as there are no less restrictive measures available.

*(iii) Proportionality*

39. The Pre-Trial Judge notes that: (i) the Declaration, the Request, and the additional declaration submitted on 9 February 2021<sup>58</sup> provide a summary description of relevant information contained in the undisclosed portions of Batches 1 and 2; and (ii) [REDACTED].<sup>59</sup> These are adequate counterbalancing measures under Rule 108(2)

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<sup>57</sup> Similarly, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-145-Red2, Pre-Trial Chamber II, [Redacted Second Decision on the Prosecutor's Requests for Redactions](#), 3 July 2014, para. 25.

<sup>58</sup> Annex 1 to Further Submission.

<sup>59</sup> Request, para. 32.

of the Rules. However, in order to further assist the Defence's preparations for trial, the Pre-Trial Judge considers it appropriate, as an additional counterbalancing measure, to order the SPO to provide to the Defence by Friday, 19 March 2021, a chart containing further information as regards each of the undisclosed documents contained in Batches 1 and 2. This chart shall be organised as follows:

- (a) First column: type of document (e.g., letter, report, email, etc);
- (b) Second column: as applicable, title and date of document;
- (c) Third column: as applicable, origin/author of document (e.g., [REDACTED], etc);
- (d) Fourth column: indicia suggesting the confidential nature of the document (e.g., logo(s), stamp(s), letterhead(s), markings or other specific references to confidentiality); and
- (e) Fifth column: whether the document contains [REDACTED] (yes/no).

40. Furthermore, as concerns the information referred to in the fourth column, the SPO shall endeavour to attach to the chart a relevant sample of supporting documentation, such as, e.g., screenshots of portions of documents containing logos, stamps, and/or apparent markings and other specific references to confidentiality.

41. Having reviewed the undisclosed contents of Batches 1 and 2, and mindful of the above-mentioned counterbalancing measures, the Pre-Trial Judge does not consider that other counterbalancing measures<sup>60</sup> are necessary.

42. In the view of the Pre-Trial Judge, these are appropriate counterbalancing measures, in the present circumstances, to uphold the Accused's rights under the Law. As a result, the non-disclosure of Batches 1 and 2 is proportionate.

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<sup>60</sup> Gucati Response, para. 42 [33]; Haradinaj Response, paras 9, 41; Reply, paras 7-8.

### C. BATCH 3

43. The Pre-Trial Judge notes that, according to the SPO, Batch 3 consists of [REDACTED].<sup>61</sup> He further notes the SPO's submissions that Batch 3 does not reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of SPO evidence and that the SPO does not intend to introduce its contents as evidence at trial.<sup>62</sup> In light of its [REDACTED], the Pre-Trial Judge finds that Batch 3: (i) does not fall under Rule 102(1)(b)(iii) of the Rules; (ii) constitutes [REDACTED], and therefore falls under Rule 106 of the Rules; and (ii) is not subject to disclosure pursuant to Rule 103 of the Rules.

44. In light of the foregoing, the Pre-Trial Judge finds that Batch 3 is not subject to disclosure to the Defence under the Rules.

45. The Pre-Trial Judge further notes that non-disclosure pursuant to Rule 106 of the Rules does not, as such, require the application of counterbalancing measures. However, in the circumstances of the present case, where disclosure of and references to the contents of Batch 3 constitute one of the means by which the Accused are alleged to have committed the offences charged in the Confirmed Indictment,<sup>63</sup> the Pre-Trial Judge considers it appropriate for the Defence to be provided with certain additional information with regard to Batch 3. Specifically, the SPO shall provide to the Defence by Friday, 19 March 2021, the following information with respect to [REDACTED] Batch 3, as applicable: (i) type of document; (ii) date of the document; (iii) brief explanation of how it is apparent that the document is confidential (e.g., logo, stamp, letterhead, markings or other specific references to confidentiality etc); and (iv) [REDACTED].

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<sup>61</sup> Request, para. 34; 084015-084026, paras 29-31.

<sup>62</sup> Request, paras 30, 37.

<sup>63</sup> Confirmed Indictment, paras 17-22.



## D. REQUEST FOR STAY OF PROCEEDINGS AND ALTERNATIVE REQUEST

46. Having found that non-disclosure of the undisclosed portions of the Three Batches is permissible under Rules 106 and 108 of the Rules, the Pre-Trial Judge finds that the Request for Stay of Proceedings is without merit. Equally, the Alternative Request must be dismissed as premature.

## V. DISPOSITION

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

- a. **GRANTS** the Request;
- b. **ORDERS** the SPO to provide to the Defence by **Friday, 19 March 2021**, further information concerning the documents contained in the Three Batches, as set out in paragraphs 39 and 45 above; and
- c. **REJECTS** the Request for Stay of Proceedings and **DISMISSES** the Alternative Request.



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

Dated this Tuesday, 23 February 2021

At The Hague, the Netherlands.