



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-07  
**Specialist 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 Prosecutor

**Date:** 27 August 2021

**Language:** English

**Classification:** Public

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**Public redacted version of 'Prosecution submissions on the disclosure of certain documents seized from the KLA War Veterans Association'**

**with strictly confidential and *ex parte* Annexes 1-2**

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## I. INTRODUCTION

1. As anticipated during the First Status Conference<sup>1</sup> and pursuant to the Framework Decision,<sup>2</sup> the Specialist Prosecutor's Office ('SPO') files these submissions concerning:

- a. the documents seized from the Kosovo Liberation Army War Veterans Association ('KLA WVA') on 8 ('Batch 1'), 17 ('Batch 2'), and 22 September 2020 ('Batch 3', collectively the 'Three Batches');<sup>3</sup> and
- b. CCTV footage, as referenced in the Framework Decision.<sup>4</sup>

2. Pursuant to Rule 102(3) of the Rules<sup>5</sup> and the procedure set out in the Framework Decision,<sup>6</sup> the SPO will provide the Defence with detailed notice of, and, as appropriate, access to the CCTV footage.<sup>7</sup> Further, pursuant to Rule 103, on 29 January 2021, the SPO disclosed portions of Batch 2 consisting of publicly available records from prior proceedings in Kosovo and before the International Criminal Tribunal for the former Yugoslavia ('ICTY').<sup>8</sup>

3. Consistent with a broad interpretation of its disclosure obligations, the SPO has determined that the remaining undisclosed portions of Batches 1 and 2 are subject to notification and/or disclosure under Rule 102(3). This material consists of confidential and non-public information relating to cooperation between the Special Investigative

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<sup>1</sup> See KSC-BC-2020-07, Transcript, Public, 8 January 2021, pp.96-97 ('First Status Conference').

<sup>2</sup> Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, Public, 22 January 2021 ('Framework Decision'), paras 57, 85(k).

<sup>3</sup> See paras 6-9 below.

<sup>4</sup> Framework Decision, KSC-BC-2020-07/F00104, para.56.

<sup>5</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>6</sup> Framework Decision, KSC-BC-2020-07/F00104, paras 45-48, 85(c)-(f).

<sup>7</sup> Based on a broad interpretation, the CCTV footage falls within the scope of Rule 102(3). The SPO notes that the Defence has already requested this material.

<sup>8</sup> Certain of these materials are only available on Kosovo government websites with redactions to identifying and personal information of accused in the relevant cases, as well as to certain other details. However, they appear to be otherwise publicly available in unredacted form from other sources. The identification of this material as potentially falling within Rule 103 is based solely on its public character.

Task Force ('SITF') and the Republic of Serbia.<sup>9</sup> Nonetheless, pursuant to Articles 23, 35(2)(f), and 39(1), (3) and (11) of the Law,<sup>10</sup> and Rules 80, 81, 95(2)(h), and 108, the Pre-Trial Judge should authorise the SPO to withhold the undisclosed portions of Batches 1 and 2 because: (i) disclosure poses an objective and grave risk to protected persons and interests;<sup>11</sup> (ii) non-disclosure is strictly necessary, *i.e.* no less restrictive measures are sufficient or feasible; and (iii) non-disclosure is proportionate, balancing the grave risks of disclosure with the minimal, if any, prejudice to the Defence.

4. Finally, pursuant to Rule 106, Batch 3 is not subject to disclosure, and does not fall within the scope of Rule 103.

5. Should Hysni GUCATI and Nasim HARADINAJ ('Accused') once more gain full access to the information in the Three Batches, there is a real risk that they will once again undertake actions which would prejudice ongoing or future investigations and proceedings, and threaten the security of potential witnesses and others.

## II. BACKGROUND AND PROCEDURAL HISTORY

6. On 7 September 2020, the Single Judge authorised the seizure of documents referred to at a KLA WVA press conference held earlier that day, recognised the confidential and non-public nature of information from SITF/SPO investigations, and ordered that any individual in possession of the documents or their contents refrain from copying, recording or disseminating them ('First Order').<sup>12</sup>

7. On 8 September 2020, the SPO served the First Order and seized Batch 1 from the KLA WVA premises.<sup>13</sup>

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<sup>9</sup> The scope and nature of Batches 1 and 2 are described in more detail below and in the Investigator's Declaration, 084015-084026, 29 October 2020. Batch 1 is attached at Annex 1 and the undisclosed portions of Batch 2 are attached at Annex 2. Both annexes are strictly confidential and *ex parte*.

<sup>10</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified

<sup>11</sup> Rule 108(1).

<sup>12</sup> URGENT Decision Authorising a Seizure, KSC-BC-2020-07/F00005, Public, 7 September 2020.

<sup>13</sup> Public Redacted Version of "'Prosecution report pursuant to decision KSC-BC-2018-01/F00121', filing KSC-BC-2020-07/F00008 dated 21 September 2020", KSC-BC-2020-07/F00008/RED, Public, 14 October 2020.

8. On 17 September 2020, the Single Judge authorised the seizure of documents referred to during a KLA WVA press conference held the previous day, once again recognised the confidential and non-public nature of information from SITF/SPO investigations, and ordered that any individual in possession of the documents or their contents refrain from copying, recording or disseminating them ('Second Order').<sup>14</sup> Later on 17 September 2020, the SPO served the Second Order and seized Batch 2 from the KLA WVA premises.<sup>15</sup>

9. On 22 September 2020, the SPO issued an order instructing the production of documents referred to by the KLA WVA during a press conference held earlier that day and that any individual in possession of the documents or their contents refrain from copying, recording or disseminating them ('Third Order').<sup>16</sup> That same day, the SPO served the Third Order and recovered Batch 3 from the KLA WVA premises.<sup>17</sup>

10. On 24 September 2020, pursuant to an SPO request,<sup>18</sup> the Single Judge found that there was a grounded suspicion that the Accused (then considered suspects) attempted to commit or committed crimes under the Kosovo Criminal Code referred to in Article 15(2).<sup>19</sup> In the same decision, the Single Judge also found that there are articulable grounds to believe that there is a risk that the Accused may flee, obstruct the progress of proceedings, or commit further crimes, thereby necessitating their arrest and detention in accordance with Article 41(6)(b), and granted a request for their arrest and transfer.<sup>20</sup> On the same day, the Single Judge also authorized a search and seizure of, *inter alia*, the KLA WVA premises, noting that it is reasonable to believe

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<sup>14</sup> Decision Authorising a Seizure, KSC-BC-2020-07/F00007, Public, 17 September 2020.

<sup>15</sup> Public Redacted Version of "Prosecution report pursuant to decision KSC-BC-2018-01-F00123", KSC-BC-2020-07/F00028 dated 29 September 2020', KSC-BC-2020-07/F00028/RED, Public, 14 October 2020.

<sup>16</sup> See Public Redacted Version of "Prosecution notice and related request", KSC-BC-2020-07/F00010 dated 23 September 2020', KSC-BC-2020-07/F00010/RED, Public, 14 October 2020 ('Prosecution notice and related request').

<sup>17</sup> See Prosecution notice and related request, KSC-BC-2020-07/F00010.

<sup>18</sup> Public Redacted Version of "URGENT Request for arrest warrants and related orders", filing KSC-BC-2020-07/F00009 dated 22 September 2020', KSC-BC-2020-07/F00009/RED, Public, 1 October 2020.

<sup>19</sup> Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-07/F00012, Public, 24 September 2020 ('Decision on arrest warrants'), paras 22, 24, 26.

<sup>20</sup> Decision on arrest warrants, KSC-BC-2020-07/F00012, paras 28-31, 36.

that the Accused's publicly expressed opposition to and non-recognition of the Specialist Chambers ('SC') and their willingness to obstruct proceedings through the offences on the basis of which the arrest warrants were granted is demonstrative of a willingness to interfere with evidence.<sup>21</sup>

11. On 27 October 2020, the Single Judge rejected separate applications for the Accused's release, finding, *inter alia*, that the risk of obstructing the progress of proceedings and committing further crimes by threatening, intimidating, or putting at risk (potential) witnesses through the disclosure or dissemination of confidential and non-public information persisted, and noting their public statements vowing to continue to disclose confidential and non-public information and their failure to abide by the Single Judge's orders.<sup>22</sup>

12. On 30 October 2020, the SPO filed a strictly confidential and *ex parte* indictment before the Pre-Trial Judge for confirmation.<sup>23</sup>

13. On 11 December 2020, the Pre-Trial Judge issued a decision largely confirming the indictment against the Accused.<sup>24</sup>

14. On 14 December 2020, the SPO filed strictly confidential<sup>25</sup> and (public) redacted<sup>26</sup> versions of the Confirmed Indictment.

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<sup>21</sup> Decision Authorizing Search and Seizure, KSC-BC-2020-07/F00013, Confidential and *Ex Parte*, 24 September 2020, para.18; Decision Authorizing Search and Seizure, KSC-BC-2020-07/F00014, Confidential and *Ex Parte*, 24 September 2020, para.18.

<sup>22</sup> Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, Public, 27 October 2020, paras 24, 26-27, 31-32; Decision on Application for Bail, KSC-BC-2020-07/F00059, Public, 27 October 2020, paras 16-20. On 9 December 2020, a Panel of the Court of Appeals Chamber rejected Mr GUCATI's appeal from the latter decision, *see* Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, Public, 9 December 2020 ('Gucati Appeal Decision').

<sup>23</sup> Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07/F00063, Strictly Confidential and *Ex Parte*, 30 October 2020.

<sup>24</sup> Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, Public, 11 December 2020 ('Decision on the Confirmation of the Indictment').

<sup>25</sup> Annex 1 to Submission of confirmed indictment, KSC-BC-2020-07/F00075/A01, Strictly Confidential, 14 December 2020, ('Confirmed Indictment').

<sup>26</sup> Annex 2 to Submission of confirmed indictment, KSC-BC-2020-07/F00075/A02, Public, 14 December 2020.

15. On 24 December 2020, the Pre-Trial Judge issued decisions once again rejecting requests for release of the Accused.<sup>27</sup> The Pre-Trial Judge noted that the risks that the Accused would obstruct the proceedings or commit further offences persisted, noting their failure to comply with orders of the Single Judge and their stated desire to continue disseminating confidential and non-public documents and information.<sup>28</sup>

16. On 5 January 2021, the SPO filed its submissions for the first Status Conference,<sup>29</sup> indicating, *inter alia*, that it intended to complete all remaining disclosure obligations by 19 February 2021<sup>30</sup> and noting that certain material would require redactions and appropriate protective measures.<sup>31</sup>

17. On 7 January 2021, the Defence for Mr GUCATI filed its submissions for the first Status Conference, noting that it expected that copies of the Three Batches would be disclosed.<sup>32</sup>

18. On 8 January 2021, during the first Status Conference, Defence Counsel for both Accused requested disclosure of the Three Batches.<sup>33</sup> In response, the SPO noted its intention not to disclose any excerpts from the Three Batches which do not contain public material,<sup>34</sup> and that written submissions on the matter would be filed in due course.<sup>35</sup>

19. On 22 January 2021, the Pre-Trial Judge issued the Framework Decision in which he, *inter alia*, ordered the SPO to indicate: (i) whether the Three Batches or parts

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<sup>27</sup> Decision on review of Detention of Hysni Gucati, KSC-BC-2020-07/F00093, Public, 24 December 2020 ('Decision on review of Detention of Hysni Gucati'); Decision on review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, Public, 24 December 2020 ('Decision on review of Detention of Nasim Haradinaj').

<sup>28</sup> Decision on review of Detention of Hysni Gucati, KSC-BC-2020-07/F00093, paras 29-37, 42-44; Decision on review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, paras 35-39, 41, 45-46.

<sup>29</sup> Prosecution Submissions for first Status Conference, KSC-BC-2020-07/F00096, Public, 5 January 2020 ('Prosecution Submissions').

<sup>30</sup> Prosecution Submissions, KSC-BC-2020-07/F00096, paras 9-15.

<sup>31</sup> Prosecution Submissions, KSC-BC-2020-07/F00096, paras 14, 15.

<sup>32</sup> Defence Submissions for the First Status Conference, KSC-BC-2020-07/F00100, Public, 7 January 2021, paras 5, 15 ('Defence Submissions for the First Status Conference').

<sup>33</sup> KSC-BC-2020-07, Transcript, Public, 8 January 2021, pp.94-95, 102-103.

<sup>34</sup> KSC-BC-2020-07, Transcript, Public, 8 January 2021, p.97.

<sup>35</sup> KSC-BC-2020-07, Transcript, Public, 8 January 2021, pp.97, 99-100, 104.



thereof will serve as evidence at trial; (ii) whether and what portions, if any, of the Three Batches have been identified for disclosure and which provision(s) of the Law and/or Rules mandates this disclosure; (iii) whether and what portions, if any, of this material have been identified for non-disclosure and which provisions of the Law and/or the Rules allow for this non-disclosure; (iv) the amount of material in question and the SPO's overall position with regard to the disclosure of the seized material; and (v) whether this material includes the CCTV footage of the alleged initial provision of the material.<sup>36</sup>

20. On 29 January 2021, the SPO disclosed portions of Batch 2 consisting of publicly available records from prior proceedings in Kosovo and before the ICTY.

### III. SUBMISSIONS

#### A. BATCHES 1 AND 2 SHOULD BE WITHHELD PURSUANT TO RULE 108

21. As set out in detail in the Investigator's Declaration, Batch 1 consists of 891 pages and includes: (i) [REDACTED] confidential requests for assistance in criminal investigations ('Requests') addressed by the SITF to the competent Serbian authorities [REDACTED], of which the vast majority contain confidential annexes with information related to potential witnesses; and (ii) documents from Serbian authorities including responses to the Requests<sup>37</sup> ('Serbian Documents'). Both the Requests and the Serbian Documents pertain to confidential SITF/SPO investigations and criminal proceedings.<sup>38</sup> Batch 1 includes [REDACTED] names of witnesses and potential witnesses [REDACTED] in relation to whom the SITF sought to obtain from the competent Serb authorities: (i) assistance in order to conduct witness interviews; and/or (ii) the record of previous witness statements and testimonies.<sup>39</sup>

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<sup>36</sup> Framework Decision, KSC-BC-2020-07/F00104, paras 57, 85(k).

<sup>37</sup> Investigator's Declaration, 084015-084026, 29 October 2020, paras 5-9.

<sup>38</sup> Investigator's Declaration, 084015-084026, 29 October 2020, para.7.

<sup>39</sup> Investigator's Declaration, 084015-084026, 29 October 2020, paras 8-9; *see also* Confirmed Indictment, KSC-BC-2020-07/F00075/A01, para.10.

22. Batch 2 consists of 937 pages in total. As set out above, 931 pages of Batch 2, which consist of publicly available records from prior proceedings in Kosovo and before the ICTY, were disclosed to the Defence on 29 January 2021, pursuant to Rule 103, on the basis of their public nature. The copies of these disclosed records do not bear any logo or marks typical of SITF or SPO documents.<sup>40</sup> In addition, Batch 2 also includes six pages from Requests and Serbian Documents already included in Batch 1, containing references to identities and contact details of protected persons.<sup>41</sup> These six pages have not been disclosed.

23. The SPO has reviewed the undisclosed portions of Batches 1 and 2 and determined that, consistent with a broad interpretation, they fall within the scope of Rule 102(3). Nevertheless, pursuant to Rule 108, the SPO should be authorised to withhold this information from notification and/or disclosure. Non-disclosure is a strictly necessary and – in light of available counter-balancing measures – proportionate measure to avoid objectively justifiable and grave risks to protected persons and interests, as set out below.

### **1. Disclosure poses objectively justifiable and grave risks to protected persons and interests**

24. The SPO is mandated to investigate and prosecute persons responsible for crimes falling within the jurisdiction of the SC.<sup>42</sup> There is additionally a public interest in ensuring effective investigation and prosecution of such offences.<sup>43</sup> The ability of the SPO to fulfil its mandate must not be sabotaged by persons such as the Accused, whose stated aim is to undermine and obstruct SC proceedings,<sup>44</sup> and who publicly

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<sup>40</sup> Investigator's Declaration, 084015-084026, 29 October 2020, para.21; *see also* Confirmed Indictment, KSC-BC-2020-07/F00075/A01, para.15.

<sup>41</sup> Investigator's Declaration, 084015-084026, 29 October 2020, paras 22-27; *see also* Confirmed Indictment, KSC-BC-2020-07/F00075/A01, para.15.

<sup>42</sup> Article 35(1).

<sup>43</sup> Gucati Appeal Decision, KSC-BC-2020-07/F00005, para.71.

<sup>44</sup> *See* Confirmed Indictment, KSC-BC-2020-07/F00075/A01, paras 5, 11(vii), 16(xiii), 20(v); Decision on the confirmation of the indictment, KSC-BC-2020-07/F00074/RED, para.120; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, para.38; Decision on review of Detention of Hysni Gucati, KSC-BC-2020-07/F00093, paras 33-35.



expressed that they have no concern for the well-being and security of SPO witnesses.<sup>45</sup> The SPO's investigations and proceedings are ongoing and at a critical juncture, including in relation to five other accused persons in two other cases which are also at the pre-trial stage.

25. The undisclosed portions of Batches 1 and 2 concern investigations in relation to persons and locations unrelated to the charges against the Accused. The Accused's conduct has already had a significant negative impact on the SPO's investigations, including by disseminating confidential and non-public information [REDACTED] to those who would never legally have been entitled to such information. Should the content of this material once again fall into the hands of the Accused, there is a real risk that they will once again undertake actions which would prejudice ongoing or future investigations.<sup>46</sup> In seeking three successive orders from the Single Judge to seize the Three Batches, the SPO acted expeditiously to protect the confidential information contained therein. It would be perverse if the SPO were now required to disclose the confidential contents of those same Three Batches to the Accused in the context of a prosecution for their wrongful dissemination of the confidential material.

26. Further, disclosure may also cause grave risk to the security of witnesses, victims participating in the proceedings, or members of their families. The responsibility to protect and respect the well-being and dignity of witnesses rests both with the SPO and the court.<sup>47</sup> As held by the Specialist Chamber of the Constitutional Court:

the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal trial, there may be important competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime and these must be weighed against the rights of the accused. The Court can accept that, in some cases, it may be necessary to withhold certain evidence from the Defence in

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<sup>45</sup> Decision on review of Detention of Hysni Gucati, KSC-BC-2020-07/F00093, para.34 (where the Pre-Trial Judge noted that Mr HARADINAJ, in Mr GUCATI's presence, stated that he did not 'care about the witnesses of the Hague court').

<sup>46</sup> See paras 11, 15 above.

<sup>47</sup> See, e.g., Articles 35(2)(f) and 39(11) and Rule 80; see also ICC, *Prosecutor v Lubanga*, Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, para.36.

order to preserve the fundamental rights of another individual or to safeguard an important public interest. Thus, it acknowledges that the principles of a fair trial guaranteed under Article 31 of the Constitution may also require that, in appropriate cases, the interests of the accused are balanced against those of witnesses or victims called upon to give evidence.<sup>48</sup>

27. For the reasons outlined above, providing the Accused with specific information pertaining to witnesses or potential witnesses in other investigations and/or proceedings, poses an objectively justifiable risk to their security, privacy and well-being.

28. Disclosure would also be contrary to the rights of third parties since the authorities with whom the SITF/SPO cooperated, as featured in Batches 1 and 2, have a reasonable expectation of confidentiality.<sup>49</sup> [REDACTED].<sup>50</sup>

29. In the circumstances, the SPO's and the SC's interests in fulfilling their respective mandates by ensuring that ongoing and future investigations are not prejudiced, the interests of witnesses and victims, the public interest and rights of third parties clearly outweigh any prejudice to the Accused which would be caused by non-disclosure of the portions of Batches 1 and 2 which have not already been disclosed.

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<sup>48</sup> *Referral of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law*, KSC-CC-PR-2017-01, Specialist Chamber of the Constitutional Court, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, Public, 26 April 2017, para.135, fn.77 citing ECtHR jurisprudence ('Judgement of the Specialist Chamber of the Constitutional Court').

<sup>49</sup> The Specialist Chamber of the Constitutional Court has acknowledged 'that the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be important competing interests, such as, national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases, it may be necessary to withhold certain evidence from the Defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest [...] It follows from the principles established in the case-law of the ECtHR, that, in view of the potential unfairness caused to the Defence by a limitation on the right to examine a witness, there must be adequate and sufficient justification for the non-disclosure of sources or the assertion of privilege by the prosecution. Such justification may include the effective protection of persons and State security as well as the effective prosecution of serious and complex crime', see Judgment of the Specialist Chamber of the Constitutional Court, KSC-CC-PR-2017-01, paras 178, 180. While this portion of the judgement related to what is now Rule 107 of the Rules, the general principles apply equally to Rule 108.

<sup>50</sup> Framework Decision, KSC-BC-2020-07/F00104, para.82(c), pp.31-32.

30. Finally, it is worth emphasising that the confidential contents of the Three Batches will not be introduced into evidence by the SPO, and they are not potentially exculpatory pursuant to Rule 103. It is difficult to see how the confidential contents of the Three Batches will assist the defence in its preparations as it is not the contents, but rather their confidential nature, that is at issue. As further set forth below, the SPO has provided sufficient information about the contents of the Three Batches for the Defence to advance its investigations.

## **2. Appropriate counterbalancing measures are available**

31. The Investigator's Declaration and these submissions provide, *inter alia*, a detailed review and description of the relevant information contained in the portions of Batches 1 and 2 which have not been disclosed. Further, a number of articles published in the media containing certain portions of Batch 1 have either already been disclosed to the Defence, or will be disclosed under Rule 102(1)(b). The Investigator's Declaration confirms that the portions of Batch 1 published in the media correspond with the pages of the seized materials. As such, the Defence already has, or will soon have, access to this information, and can directly see the nature of the material in question. Additionally, the Accused previously received and had the opportunity to review the material in the context of its unlawful dissemination, and therefore are clearly aware, at a minimum, of its general, and confidential, nature.

32. Consequently, the Defence has received, or will receive, material which is the same or similar to that contained in the withheld portions of Batches 1 and 2, in addition to the summary of relevant information provided by way of the Investigator's Declaration and this filing.<sup>51</sup> Through provision of such information, the Defence has received the information material to its preparations. In this regard, the SPO intends to rely on the Investigator's Declaration at trial, but does not intend to rely on the undisclosed portions of Batches 1 and 2. Accordingly, the information already provided to the Accused constitutes an appropriate counterbalancing

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<sup>51</sup> Rule 108(2)(a)-(b).

measure which ensures the Accused's right to a fair trial. Further, given that the SPO currently intends to call the author of the Investigator's Declaration to testify at trial, through cross-examination, the Defence will also have an opportunity to address any concerns about the nature of the materials contained in the Three Batches.

33. Finally, the Defence is being notified of, and given the opportunity to respond to, these submissions, which itself constitutes an appropriate safeguard.<sup>52</sup> The fact that, through these submissions and any responses filed by the Defence, the Pre-Trial Judge will be able to fully scrutinize the basis for the SPO's request, review the undisclosed portions of Batches 1 and 2, and make an informed assessment of the irreversible harm that disclosure would entail also constitutes an effective counterbalancing measure.<sup>53</sup>

#### B. BATCH 3 IS NOT SUBJECT TO DISCLOSURE

34. As set out in the Investigator's Declaration, Batch 3 is entirely composed of two incomplete copies, consisting of 244 and 245 pages, respectively, [REDACTED] analysing available evidence and applicable law in relation to five SPO suspects.<sup>54</sup> The document is clearly marked as confidential [REDACTED] and contains [REDACTED] names of SPO witnesses and potential witnesses [REDACTED].<sup>55</sup> [REDACTED].<sup>56</sup> Batch 3 further includes [REDACTED],<sup>57</sup> and references to information provided to the SPO by international organisations and other entities subject to confidentiality use restrictions.<sup>58</sup>

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<sup>52</sup> ECtHR, Grand Chamber, *Fitt v. UK*, 29777/96, Judgment, 16 February 2000, para.48.

<sup>53</sup> See ECtHR, Grand Chamber, *Jasper v. UK*, 27052/95, 16 February 2000, paras 54-55; ECtHR, Grand Chamber, *Fitt v. UK*, 29777/96, Judgment, 16 February 2000, para.49.

<sup>54</sup> Investigator's Declaration, 084015-084026, 29 October 2020, para.29; see also Confirmed Indictment, KSC-BC-2020-07/F00075/A01, para.19.

<sup>55</sup> Investigator's Declaration, 084015-084026, 29 October 2020, paras 29-31; see also Confirmed Indictment, KSC-BC-2020-07/F00075/A01, para.19.

<sup>56</sup> Investigator's Declaration, 084015-084026, 29 October 2020, para.32.

<sup>57</sup> Investigator's Declaration, 084015-084026, 29 October 2020, para.33.

<sup>58</sup> Investigator's Declaration, 084015-084026, 29 October 2020, para.34.

## 1. Batch 3 constitutes an internal document pursuant to Rule 106

35. Accordingly, by virtue of the content, function, purpose and source of the information,<sup>59</sup> Batch 3 falls squarely under Rule 106. The protections afforded by this Rule – which reflects the fact that it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies, and investigations, shall be privileged and not subject to disclosure<sup>60</sup> – are crucial to the SPO's ability to carry out its mandate.

36. It is logical that only the SPO or other appropriate authorities may waive Rule 106 protections applicable to Batch 3; it cannot be considered to have assumed a non-internal use merely because unidentified, unauthorised persons provided them to the KLA WVA and the Accused further unlawfully disseminated them. The SPO has not waived the Rule 106 protections applicable to Batch 3. Indeed, following the unlawful dissemination of Batch 3 by the Accused, the SPO took and continues to take necessary and appropriate steps, including acts initiating the present proceedings and these submissions, to maintain the confidentiality of Batch 3.

## 2. Batch 3 does not fall within the scope of Rule 103

37. Pursuant to its obligations under the Rules, the SPO considered whether Batch 3 contained information subject to disclosure pursuant to Rule 103. The SPO assessed<sup>61</sup> that such material may not reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of SPO evidence in any way, and, as such, is not subject to disclosure pursuant to Rule 103. Accordingly, the Defence

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<sup>59</sup> See ICC, *Prosecutor v. Lubanga*, Redacted Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information" of 5 December 2008, ICC-01/04-01/06-1924-Anx2, 2 June 2009, para.31.

<sup>60</sup> See ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Vidoje Blagojević's expedited motion to compel the prosecution to disclose its notes from plea discussions with the accused Nikolic & request for an expedited open session hearing, 13 June 2003.

<sup>61</sup> See Framework Decision, KSC-BC-2020-07/F00104, para.49.

indication that it considers the Three Batches – as a whole – material to its preparation,<sup>62</sup> is irrelevant since Rule 106 is not subject to Rule 102(3).

### 3. Disclosure should not otherwise be ordered

38. The SPO emphasises that even if *arguendo* Batch 3 or parts thereof were deemed subject to disclosure – which, by the plain language and purpose of Rule 106, they are not – disclosure poses an objectively justifiable and grave risk to protected persons and interests, including for reasons similar to those set out in Section A.1 above and in addition to the policy and public interest considerations outlined above in Section B.1.<sup>63</sup>

39. In particular, providing this material to the Accused, charged with the crimes of obstruction of official persons in performing official duties, intimidation during criminal proceedings, retaliation, and violating the secrecy of the proceedings,<sup>64</sup> and in relation to whom the Pre-Trial Judge has consistently found that the risk of obstructing the progress of proceedings and committing further crimes persists,<sup>65</sup> would be antithetical to the rationale underlying the criminalization of the conduct for which they have been charged and, as such, contrary to the public interest, prejudicial to ongoing and future investigations and would cause grave risk to the security of witnesses and others.

40. Significantly, the disclosure of the material would provide the Accused with the only thing standing between them and their ability to fulfil their repeated promises to publish any further confidential and non-public information relating to the SC/SPO

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<sup>62</sup> See Defence Submissions for the First Status Conference, KSC-BC-2020-07/F00100, paras 5, 15; KSC-BC-2020-07, Transcript, Public, 8 January 2021, Public, pp.94-95, 102-103.

<sup>63</sup> Indeed, were Batch 3 to be disclosed in the context of the present proceedings, there are at least some jurisdictions that would consider Rule 106 protections to have been waived, thereby severely jeopardising the ability of the SPO to effectively discharge its mandate. See, for example, ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 12 March 2010, para.38; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Inspection of Report on Interahamwe, 28 June 2007, para.14.

<sup>64</sup> See Confirmed Indictment, KSC-BC-2020-07/F00075/A01, Counts 1-6.

<sup>65</sup> Including by threatening, intimidating, or putting at risk (potential) witnesses through the disclosure or dissemination of confidential and non-public information, see paras 10-11, 15 above.



they receive.<sup>66</sup> Indeed, as previously held by the Pre-Trial Judge, '[t]he SPO' s seizure of the relevant confidential and non-public information, does not negate Mr Haradinaj's intent to disseminate such information should the opportunity arise'.<sup>67</sup> The same applies to Mr GUCATI.

41. The SPO emphasises that the provision of the Investigator's Declaration, which was relied on by the SPO as material supporting the indictment and which the SPO intends to rely on at trial instead of Batch 3 itself, is all that is necessary to assist the Defence in its preparation. Nonetheless, a number of articles published in the media containing certain portions of Batch 3 have already been disclosed to the Defence,<sup>68</sup> or will be disclosed under Rule 102(1)(b). The Investigator's Declaration confirms that the portions of Batch 3 published in the media correspond with the pages of the seized materials. As such, the Defence already has, or will soon have, access to this information. Additionally, the Accused previously received and had the opportunity to review the material in the context of its unlawful dissemination, and therefore are clearly aware, at a minimum, of its general, and confidential, nature.

42. Finally, there are adequate, procedural safeguards to ensure the fairness of the proceedings and the interests of the Accused, as set out in paragraphs 31-33. Consequently, even though Batch 3 is not subject to disclosure, adequate safeguards ensure that Defence preparations are not prejudiced.

## V. CONFIDENTIALITY

43. This filing is confidential because it contains sensitive, confidential, and non-public information relating to investigations and proceedings in this and other cases.

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<sup>66</sup> See Confirmed Indictment, KSC-BC-2020-07/F00075/A01, paras 16(x), 20 (iv) and 40 (vii).

<sup>67</sup> Decision on review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, para.36.

<sup>68</sup> See, e.g., [REDACTED], 081392-01 (and 081392-01-TR-ET); see also Investigator's Declaration, 084015-084026, 29 October 2020, paras 39-51.

## VI. RELIEF REQUESTED

44. For the foregoing reasons, the SPO requests that Pre-Trial Judge authorise the SPO to withhold the undisclosed portions of Batches 1 and 2, as identified above, pursuant to Rule 108.

**Word count: 5,036**



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**Jack Smith**

**Specialist Prosecutor**

Friday, 27 August 2021

At The Hague, the Netherlands.