

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

**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 2<sup>nd</sup> September 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of Response to Prosecution Request for Non-Disclosure  
of Certain Information Pertaining to Contacts with Witnesses**

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## I. INTRODUCTION

1. On Friday 29<sup>th</sup> January 2021, the Specialist Prosecutor's Office ('SPO') requested authorisation to withhold records of the SPO's contacts with witnesses and potential witnesses conducted during the investigation into the Accused's conduct ('the Request')<sup>1</sup>.
2. It is stated at paragraph 2 of the Request that as a consequence of the Accused's actions, the SPO undertook:

"[REDACTED]"

3. For the reasons set out below, it is submitted that the request for authorisation to withhold the Underlying Information should be refused and notification and/or disclosure under Rule 102(3) and/or Rule 103 should take place.

## II. LAW

4. Article 21(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office No.05/L-053 ('Law') enshrines the obligation of the SPO to disclose relevant material to the Accused:

"All material and relevant evidence or facts in possession of the Specialist Prosecutor's Office 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."

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<sup>1</sup> "Prosecution request for non-disclosure of certain information pertaining to contacts with witnesses", KSC-BC-2020-07/F00107

5. Rule 102(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('the Rules') requires the SPO, pursuant to Article 21(6) of the Law, to 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 shall be disclosed without delay.
6. Rule 103 provides that: "subject to ... 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.
7. Rule 108 states that:
  - (1) 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:
    - (a) prejudice ongoing or future investigations;
    - (b) cause grave risk to the security of a witness, victim participating in the proceedings or members of his or her family; or
    - (c) be contrary for any other reason to the public interest of 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.

(2) When making such an application the Specialist Prosecutor shall include the information in question, the reasons for non-disclosure, the proposed redactions, if any, and a statement relating to the proposed counterbalancing measures including:

(a) identification of new, similar information;

(b) submission of a summary of the information;

(c) submission of the information in a redacted form; or

(d) stipulation of the relevant facts regarding the reasons for non-disclosure.

8. Rule 80 additionally provides that the measures available to a Panel for the protection of witnesses may include, where consistent with the rights of the Accused, orders of:

(d) non-disclosure to the Accused by Specialist Counsel of any material or information that may lead to disclosure of the identity of a witness or victim participating in the proceedings; and

(e) in *exceptional circumstances*, and subject to any necessary safeguards: (i) non-disclosure to the Parties of any material or information that may lead to the disclosure of the identity of a witness or victim participating in the proceedings. [emphasis added]

9. Article 21(6) of the Law and Rules 80, 102, 103 and 108 must be applied in the context of the right to a fair trial, which includes an entitlement to disclosure of

exculpatory material<sup>2</sup>. The disclosure of exculpatory material to the defence is of paramount importance to ensure the fairness of proceedings<sup>3</sup>. The public interest is excluded where its application would deny to the accused the opportunity to establish his or her innocence<sup>4</sup>.

10. The right (i) to disclosure of evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused or which may affect the credibility of prosecution evidence and the right (ii) to inspect any book, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence, are fundamental rights of the accused<sup>5</sup>.
11. The obligation to disclose is as important as the obligation to prosecute<sup>6</sup>.
12. Restrictions on disclosure to the Accused in order to make it easier for the prosecution to present its other cases against other persons are to be rejected<sup>7</sup>. The rights of the accused in the case in which the order for non-disclosure is sought take priority over the protection of prospective victims and witnesses in other cases<sup>8</sup>. The rights of the accused are not to be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases<sup>9</sup>.

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<sup>2</sup> *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, 13 June 2008 at paragraph 77

<sup>3</sup> *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, 13 June 2008 at paragraph 78

<sup>4</sup> *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, 13 June 2008 at paragraph 80

<sup>5</sup> *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, 13 June 2008 at paragraph 42

<sup>6</sup> *Prosecutor v Kordic & Cerkez*, IT-95-14/2-A, 17 December 2004 at paragraph 242

<sup>7</sup> *Prosecutor v Brdjanin and Tadic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, paragraph 29

<sup>8</sup> *Prosecutor v Brdjanin and Tadic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, paragraph 30

*Prosecutor v Brdjanin and Tadic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, paragraph 30

13. An objectively founded fear of *some* danger or risk from *any* source, in addition to exceptional circumstances, may be sufficient for the grant of protective measures involving non-disclosure of the witness' identity to *the public*, but it is not sufficient to justify non-disclosure of that identity to the accused and the defence team<sup>10</sup>.
14. Notwithstanding the existence of other disclosed material that may be similar, fairness dictates that the accused should be provided with all of the exculpatory material<sup>11</sup>. The use of summaries containing information potentially exculpatory or otherwise material to the defence has been explicitly rejected as insufficient for discharging the Prosecution's obligations for the purposes of trial in other cases before the ICC<sup>12</sup>.

### III. SUBMISSIONS

15. The Underlying Information has been assessed as subject to notification and/or disclosure under Rule 102(3) and/or Rule 103.
16. It is only in exceptional circumstances that the entitlement to full disclosure may be restricted, and then only to such extent as is strictly necessary.
17. The Request does not establish anything close to exceptional circumstances.

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<sup>10</sup> *Prosecution v Brdjanin and Tadic*, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000 at paragraphs 16 & 17

<sup>11</sup> *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, 13 June 2008 at paragraph 60: "...the Chamber has grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items"; also paragraph 80: "...it cannot endorse the view that the Prosecution is not obliged to disclose material which meets the disclosure requirements provided for ... if there exists other information of a generally similar nature".

<sup>12</sup> *Prosecutor v Katanga and Chui*, ICC-01/04-01/07-621, 20 June 2008, at paragraphs 65-66.

18. The Request does not establish anything close to a '*grave risk*' to the security of a witness, victim participating in the proceedings or members of his or her family, posed by the Accused, arising out of disclosure to the accused and his defence team.
19. No witness or potential witness, according to the Declaration, [REDACTED].  
Other witnesses, according to the Addendum:
- (a) [REDACTED];
- (b) [REDACTED]; and
- (c) [REDACTED].
20. The public interest in ensuring effective investigations and prosecution of offences, referred to in paragraphs 15 and 16 of the SPO request, does not take priority over the rights of the accused to a fair trial. Nor does a concern about getting witnesses to testify in the other two cases at the pre-trial stage of proceedings before the Specialist Chambers.
21. The Accused is entitled to challenge the contents of the Declaration<sup>13</sup> and investigate further the exculpatory material identified in the Addendum<sup>14</sup>.
22. The Accused does not accept the contents of the Declaration. The Accused does not accept that it is admissible evidence<sup>15</sup>. The Accused seeks to scrutinise both:
- (i) the manner in which the SPO conducted its '[REDACTED]' to consider whether the SPO influenced, advertently or inadvertently, the witnesses as

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<sup>13</sup> Witness Security Officer's Declaration, 27 October 2020, 084008-08410

<sup>14</sup> Addendum to Witness Security Officer's Declaration, 27 January 2021, 090142-090143

<sup>15</sup> The Declaration is categorised on Legal Workflow as 'Evidence to be presented by the SPO'

regards the statements they provided; and (ii) the content [REDACTED] in the Declaration, [REDACTED]. The Declaration provides no means to the Accused of challenging its contents.

23. In relation to the Addendum, the Accused seeks to investigate the matters identified therein further, with a view to identification of potential defence witnesses to give oral evidence at trial. The Accused may or may not apply to admit the Addendum into evidence at trial – that decision can only be taken once the Accused has had the opportunity to investigate the matters contained therein and consider calling oral evidence from witnesses. As stated above, the manner in which the SPO conducted its [REDACTED] is a live issue in the case, and the proposed use of the Declaration and Addendum prevents the Accused from investigating that issue further with those whom the SPO [REDACTED] to.
20. The SPO does not appear to acknowledge that which has been made plain on earlier occasions – the Accused does not accept that the material contained within Batch 1, 2 and 3 (as referred to in the Investigator’s Declaration, 084515-084026) was confidential and non-public. The Addendum refers to evidence that undermines the SPO’s case that it was confidential and non-public. The Accused must be entitled to investigate that issue fully.
21. For the avoidance of doubt, the Accused repeats: the SPO is put to strict proof that the documentation seized and referred to as Batch 1, Batch 2 and Batch 3 is genuine and contains protected information. The SPO will be required to demonstrate the origin and provenance of the same, by way of an audit trail from the creation of each document to its arrival at the KLA WVA HQ. The defence will seek to scrutinise the same in detail, including, for example, the



authenticity of the alleged “[REDACTED]” referred to in paragraph 16 of the SPO’s Request.

22. To the extent that the person(s) making disclosure of the above documentation to the KLA WVA HQ was an agent of/working with/associated with the SPO, the defence put the SPO to strict proof of the absence of incitement and a breach of the right to a fair trial under Article 6 of the European Convention on Human Rights<sup>16</sup>.
23. If, contrary to the above submissions, some restriction to disclosure under Rules 102(3) and 103 is strictly necessary, withholding the documents in their entirety, to be substituted with cursory summaries only, is wholly disproportionate.
24. There are a range of other measures which involve a lesser degree of interference with the otherwise absolute entitlement to full disclosure including:
- (a) orders pursuant to Rule 80(d) which allow for full disclosure to be made to Specialist Counsel for the defence, but not to the Accused; and/or
  - (b) submission of the information in redacted form, in accordance with Rule 108(2)(c).
24. In accordance with the Framework Decision on Disclosure of Evidence and Related Matters<sup>17</sup> at paragraph 71(ii), where less restrictive measures are both sufficient and feasible, such protective measures must be chosen.

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<sup>16</sup> *Teixeira de Castro v Portugal*, 28 EHRR 1010, ECtHR

<sup>17</sup> “*Framework Decision on Disclosure of Evidence and Related Matters*”, KSC-BC-2020-07/F00104

25. Application of the redaction regime provided for in the Framework Decision on Disclosure of Evidence and Related Matters allows for the receiving Party to challenge any specific redaction it believes to be unwarranted (see paragraph 78 thereof). There is no reason why the Underlying Material cannot be dealt with in accordance with the redaction regime set out in paragraphs 72 to 84 of the Framework Decision on Disclosure of Evidence and Related Matters (including the requirement of individual risk assessments for each witness in relation to whom non-disclosure of identity is requested by the Witness Protection and Support Office (“WPSO”) set out at paragraph 83 thereof).
26. The burden to the SPO, the Registry or the Chambers in implementing redactions is not a permissible basis for restricting disclosure further<sup>18</sup>.

#### IV. CONCLUSION

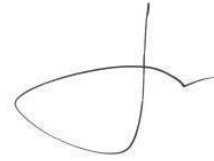
27. For the above reasons, and acknowledging that restrictions to the principle of full disclosure are only to be made (i) in exceptional circumstances, and then (ii) only where and to the extent strictly necessary, and (iii), in any event, to be assessed on a case-by-case basis<sup>19</sup>, the additional request in paragraph 20 of the Request that any ruling on the Request ‘should extend to such further information if/when it is generated’ should be rejected together with the main request for authority to withhold the Underlying Information.

Word count: 2480 words

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<sup>18</sup> *Prosecutor v Banda & Jerbo*, ICC-02/05-03/09-501, at paragraph 37: “... while as a general obligation the Trial Chamber has to ensure that proceedings are fair and expeditious ... considerations of expeditiousness are not explicitly found in rule 77 [of the ICC Rules of Procedure and Evidence] as a basis for restricting disclosure” – the position is the same with Rule 108 of the Rules

<sup>19</sup> “*Framework Decision on Disclosure of Evidence and Related Matters*”, KSC-BC-2020-07/F00104 at paragraph 70

A handwritten signature in black ink, appearing to be 'J. E. Rees', written in a cursive style.

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2 September 2021

Cardiff, UK