

**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:** 3<sup>rd</sup> September 2021

**Language:** English

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**Public Redacted Version of Response to Prosecution Submissions on the  
Disclosure of Certain Documents Seized from the KLA War Veterans Association**

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## I. INTRODUCTION

1. On Monday 1st February 2021, the Accused received notification that the Specialist Prosecutor's Office ('SPO') had filed submissions requesting authorisation to withhold undisclosed portions of Batches 1 and 2 pursuant to Rule 108 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('the Request')<sup>1</sup>.
2. The Request also stated the SPO's view that Batch 3 is not subject to disclosure, pursuant to Rule 106.
3. For the reasons set out below, it is submitted that the request for authorisation to withhold undisclosed portions of Batches 1 and 2 should be refused and notification and/or disclosure under Rule 102(3) and/or Rule 103 should take place.
4. Further, for the reasons it is set out below, it is submitted that the Pre-Trial Judge should order the disclosure or notification of Batch 3.

## II. LAW

5. 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:

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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

“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.”

6. 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.
7. 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.
8. Rule 106 provides that “subject to Rule 103, 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 under these Rules”.
9. 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.

10. 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]

11. 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>.

12. 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>.

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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

13. The term “material to the preparation of the defence” should be interpreted broadly<sup>6</sup>. The standard for inspection of prosecution material, namely that it be “material to the preparation of the defence” denotes a lower standard than relevance<sup>7</sup>.
14. The obligation to disclose is as important as the obligation to prosecute<sup>8</sup>.
15. 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>9</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>10</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>11</sup>.
16. 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>12</sup>.

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<sup>6</sup> *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1433, 11 July 2008, paragraphs 77-81

<sup>7</sup> *Prosecutor v Karadzic*, Decision on the Accused’s Motion for Postponement of Trial, 26 February 2010, paragraph 36

<sup>8</sup> *Prosecutor v Kordic & Cerkez*, IT-95-14/2-A, 17 December 2004 at paragraph 242

<sup>9</sup> *Prosecutor v Brdjanin and Tadic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, paragraph 29

<sup>10</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

<sup>12</sup> *Prosecution v Brdjanin and Tadic*, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000 at paragraphs 16 & 17

17. 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>13</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>14</sup>.

### III. SUBMISSIONS

18. The Accused is in detention.

19. In refusing to release the Accused pending trial, the Pre-Trial Judge has stated that the *risks* of obstructing proceedings or committing further offences *can be effectively managed from detention*<sup>15</sup>.

20. It is frankly staggering that the SPO, having sought the Accused's detention pre-trial in order to manage such risks as they complain of, now seeks additionally to withhold disclosure from the Accused and his defence team, causing prejudice to his right to a fair trial in due course.

21. 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).

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<sup>13</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>14</sup> *Prosecutor v Katanga and Chui*, ICC-01/04-01/07-621, 20 June 2008, at paragraphs 65-66.

<sup>15</sup> "*Decision on Review of Detention of Hysni Gucati*", KSC-BC-2020-07/F00093 at paragraph

22. The material contained within Batch 3 clearly also falls within the scope of Rule 102(3) and Rule 106 has no application. Rule 106 applies to non-evidential reports, memoranda or other internal documents prepared in connection with the investigation or preparation of a case. Rule 106 does not apply to evidential material, which, in this case, forms the very foundation of the indictment.
23. Batches 1, 2 and 3 are on any proper analysis to be regarded as exhibits and should be made available to the Accused under Rule 102(1)(b)(iii). The SPO should not be allowed to unfairly subvert the trial process, and the proper operation of Rule 102, by improperly seeking to rely on summaries of Batches 1, 2 and 3 instead of exhibiting the material itself (whether redacted or unredacted).
24. 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.
25. The Request does not establish anything close to exceptional circumstances.
26. 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.
27. [REDACTED], according to the Witness Security Officer's Declaration dated 27 October 2020<sup>16</sup>, [REDACTED]. [REDACTED], according to the Addendum to Witness Security Officer's Declaration of 27 January 2011<sup>17</sup>:
- (a) [REDACTED];

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<sup>16</sup> Witness Security Officer's Declaration, 27 October 2020, 084008-084010

<sup>17</sup> Addendum to Witness Security Officer's Declaration, 27 January 2011, 090142-090143



(b) [REDACTED]; and

(c) [REDACTED].

28. The public interest in ensuring effective investigations and prosecution of offences, referred to in paragraphs 24 and 25 of the 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.

29. The Accused is entitled to challenge the contents of the Declaration<sup>18</sup>.

30. The Accused does not accept the contents of the Declaration. The Accused does not accept that it is admissible evidence<sup>19</sup>.

31. The SPO does not fully 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 was confidential and non-public and *authentic*.

32. 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 34 of the SPO’s Request.

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<sup>18</sup> Declaration of [REDACTED], 29 October 2020, 084015-084026

<sup>19</sup> The Declaration is categorised on Legal Workflow as ‘Evidence to be presented by the SPO’

20. The proposition by the SPO that “[REDACTED]” is both circular and absurd:

- (i) It is in issue that the ‘[REDACTED]’ are indeed confidential, as the SPO concedes; and
- (ii) it is only by consideration of the contents of the Three Batches that the issue of confidentiality can be challenged, and thereafter determined.

21. Similarly, it is only by considering the contents of the Three Batches, and any specific document therein, that it can be challenged whether the documents therein are authentic and display sufficient indicia of reliability. The factors to be considered will include: the extent to which the document’s content is corroborated elsewhere, proof or absence of proof of authorship, signed/unsigned, stamped/unstamped, evidence as to the origin of the document, handwriting, the chain of custody, legibility/illegibility<sup>20</sup>. The Accused must be permitted to investigate these matters and cannot do so without disclosure of the contents of the Three Batches.

22. Further, 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>21</sup>.

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<sup>20</sup> *Prosecutor v Bagosora*, Decision on Admission of Tab 19 of Binder Produced in Connection with the Appearance of Witness Maxwell and Nkole, 13 September 2004, para.10

<sup>21</sup> *Teixeira de Castro v Portugal*, 28 EHRR 1010, ECtHR

23. Indeed, if Batch 3 contains an authentic “[REDACTED]”, as alleged, that indeed suggests that an agent of the SPO was closely involved in the disclosure of the above documentation to the KLA WVA HQ. Only an agent of the SPO would have access to privileged material of the nature alleged (if genuine). The Accused awaits details of the attempts made by the SPO, if any, to identify and trace the person(s) making disclosure of the Three Batches to the KLA WVA HQ, as requested at the First Status Conference.
24. The Accused does not accept the continuity between alleged dissemination of the contents of the Three Batches and appearances of material in the media. Only through disclosure to the defence of the Three Batches can the alleged continuity asserted in the Declaration be challenged, and thereafter determined. Cross-examination of the author of the Declaration is pointless in the absence of disclosure to the Accused of the material upon which he prepared his report. Calling the author of the Declaration is no counterbalance measure at all.
20. In relation to privilege, only an authentic document can be privileged. As stated above, authenticity is in issue.
21. In any event, any privilege that might have otherwise attached to Batches 1, 2 and 3 has been waived by the SPO’s attempted reliance on summaries of the material therein as evidence against the Accused. The contents of Batches 1, 2 and 3 should be notified and/or disclosed in full accordingly.
22. As stated above, Batches 1, 2 and 3 are properly to be regarded as exhibits and should be made available in full to the Accused under Rule 102(1)(b)(iii). The SPO should not be allowed to subvert the trial process, and the proper

operation of Rule 102, by improperly seeking to rely on summaries of Batches 1, 2 and 3 instead of exhibiting the material itself.

23. If, in spite of the fact that the Accused has been detained pre-trial for the purposes of managing any such risk of dissemination of confidential material, and contrary to the above submissions, some restriction to disclosure under Rule 102 is strictly necessary, withholding the documents in their entirety, to be substituted with cursory summaries only, is wholly disproportionate.
33. 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>22</sup> at paragraph 71(ii), where less restrictive measures are both sufficient and feasible, such protective measures must be chosen.
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 Three Batches cannot be dealt with in accordance with the redaction regime set out in paragraphs 72 to 84 of the

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<sup>22</sup> "Framework Decision on Disclosure of Evidence and Related Matters", KSC-BC-2020-07/F00104

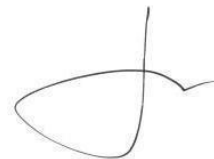
Framework Decision on Disclosure of Evidence and Related Matters (including the requirement of individual risk assessments for each witness in relation to whom non-disclosure of identity is requested by the Witness Protection and Support Office (“WPSO”) set out at paragraph 83 thereof).

26. The burden to the SPO, the Registry or the Chambers in implementing redactions is not a permissible basis for restricting disclosure further<sup>23</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>24</sup>, the request for authority to withhold the undisclosed portions of Batches 1 and 2 should be refused, and notification and/or disclosure of Batch 3 ordered.

Word count: 3054 words



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<sup>23</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>24</sup> “*Framework Decision on Disclosure of Evidence and Related Matters*”, KSC-BC-2020-07/F00104 at paragraph 70

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3 September 2021

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