



In: **KSC-BC-2020-07**
The 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: Fidelma Donlon

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Decision on the Prosecution Request for Protective Measures

Specialist Prosecutor

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TRIAL PANEL II, acting pursuant to Articles 2-3, 21, 23(1), 40(2), 40(6)(f) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 80, 116(4)(b), 120 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 21 July 2021, Trial Panel II (the "Panel" or "Trial Panel") issued an "Order for Submissions and Scheduling the Trial Preparation Conference" ordering the Specialist Prosecutor's Office ("SPO") to file its intended request for protective measures by 23 August 2021 and the Defence to respond by 27 August 2021.¹
2. On 23 August 2021, the SPO filed its request for protective measures in respect of both of its proposed witnesses: W04841 and W04842 ("Witnesses").²
3. On 27 August 2021, the Accused Hysni Gucati ("Mr. Gucati") and Nasim Haradinaj ("Mr Haradinaj") responded to and opposed the Request.³
4. On 1 and 2 September 2021, during the Trial Preparation Conference, the Panel heard oral submissions from the Parties in relation to the Request.⁴ At the end of that Conference, the Panel denied the Request and indicated that written reasons for its decision would follow.⁵ The Panel hereby provides its reasons.

¹ F00267, Panel, *Order for Submissions and Scheduling the Trial Preparation Conference*, 21 July 2021, paras 7-8, 34(a).

² F00282, Specialist Prosecutor, *Prosecution Request for Protective Measures* ("Request"), 23 August 2021.

³ F00288, Defence for Mr. Gucati, *Written Submissions on behalf of Mr Hysni Gucati for the Trial Preparation Conference and Related Matters with Confidential Annexes 1 and 2*, 27 August 2021, para. 3 (indicating that oral submissions will be made at the Trial Preparation Conference); F00287, Defence for Mr. Haradinaj, *Submissions in Preparation for Trial Preparation Conference* ("Haradinaj Response"), 27 August 2021, paras 9-22.

⁴ Draft Transcript, 1 September 2021, pp. 395-423.

⁵ Oral Order on SPO Request for Protective Measures for Witnesses, Draft Transcript, 2 September 2021, p. 604, lines 3-7.

II. SUBMISSIONS

5. The SPO requests the Panel to authorise the following protective measures for its Witnesses: (i) assigning them pseudonyms throughout all public proceedings; and (ii) redacting their names and identifying information from the Specialist Chambers' public records (the "Measures").⁶ The Witnesses are investigators working for the SPO.

6. The SPO submits that the Measures are: (i) necessary to safeguard the effectiveness of SPO investigations as well as the safety of the Witnesses and those with whom they interact, in light of their frequent travels to the field and interactions with other witnesses and potential witnesses;⁷ (ii) consistent with the Accused's rights, noting that the Accused already know the Witnesses' identities and will have access to their complete testimony;⁸ (iii) proportionate, limited and balanced with regard to the Accused's rights and the principle of public proceedings, considering that the Measures only seek to protect identification by the broader public and that the Accused and the public will see and hear the Witnesses during their testimony.⁹

7. Mr Haradinaj submits that the Measures cannot be justified under Rule 80 of the Rules, given that no evidence suggests that SPO employees or investigators need protection of their safety, physical, and psychological well-being, dignity or privacy.¹⁰ He contends that the Measures are inconsistent with the rights of the Accused and that granting them would violate the principle of equality of arms and his fair trial rights.¹¹ Mr Haradinaj also submits that the professional capacity of the Witnesses requires that the test for granting the Measures be applied in a more stringent form.¹² He argues that the Measures are akin in effect to anonymity and would prevent

⁶ Request, paras 1, 7.

⁷ Request, paras 3-4.

⁸ Request, para. 2.

⁹ Request, para. 5.

¹⁰ Haradinaj Response, paras 11, 22.

¹¹ Haradinaj Response, paras 11, 14.

¹² Haradinaj Response, paras 12-13.

effective cross-examination of the Witnesses.¹³ In his view, granting the Measures would set a precedent that SPO investigators and witnesses other than victims or civilian witnesses ought to enjoy anonymity as of right, which would jeopardise the transparency of proceedings.¹⁴

8. Mr Gucati responded to the Request orally at the Trial Preparation Conference,¹⁵ during which he adopted, in essence, the position of the Haradinaj Defence.¹⁶

III. APPLICABLE LAW

9. The legal and regulatory framework of the Specialist Chambers (“SC”) provides that proceedings shall in principle be public, unless the pursuit of a competing legitimate interest warrants an exception to that principle.¹⁷ The Panel notes that the principle of publicity not only safeguards the fundamental rights of the Accused to a public and fair trial, but also ensures trust in the judicial process through transparency, thereby constituting an important safeguard against arbitrariness.¹⁸ As a result, exceptions to this principle must be commensurate to the importance of the interests and rights that it seeks to protect. Therefore, exceptions to public proceedings must not only pursue a legitimate public interest, but must also be strictly necessary and proportionate and not undermine the essence of the right of the Accused to a

¹³ Haradinaj Response, paras 18-19.

¹⁴ Haradinaj Response, paras 20-21.

¹⁵ F00288, Defence for Mr. Gucati, *Written Submissions on behalf of Mr Hysni Gucati for the Trial Preparation Conference and Related Matters with Confidential Annexes 1 and 2*, 27 August 2021, paras 1(a), 3.

¹⁶ Draft Transcript, 1 September 2021, p. 396.

¹⁷ See, generally, Articles 31(2), 22(2), 53 of the Constitution of the Republic of Kosovo; Article 6(1) of the European Convention of Human Rights (“ECHR”); Articles 21(2), 23, 39(6), 40(4) of the Law; Rule 120 of the Rules.

¹⁸ See e.g. European Court of Human Rights (“ECtHR”), *Riepan v. Austria*, no. 35115/97, [Judgment](#), 14 November 2000, para. 27; *Krestovskiy v. Russia*, no. 140440/03, [Judgment](#), 28 October 2010, para. 24; *Sutter v. Switzerland*, no. 8209/78, [Judgment](#), 22 February 1984, para. 26.

public trial.¹⁹ In every case, the fundamental right of the Accused to a fair trial and the essence of other fundamental rights shall be preserved.

10. Pursuant to Rule 80 of the Rules, the Panel may, *proprio motu* or upon request by a Party, the Witness Protection and Support Office, a witness, or Victims' Counsel, order appropriate measures for the protection, safety, well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the Accused.²⁰ Protective measures may include the redaction of names and identifying information from the public records of proceedings and the assignment of a pseudonym.²¹

11. In the absence of clear guidance in the Rules, the Panel has given consideration to the test and standard set by other jurisdictions in the application of the same or comparable standard. This reveals a general uniformity of approach in respect of circumstances generally comparable to the ones being faced in this jurisdiction. A party seeking protective measures for one or more of its witnesses must demonstrate that there is a real likelihood that the witness for whom the protective measure is sought may be in danger, or risk being interfered with or intimidated; this requires proof of some objective basis underlying the claim that the safety or security of the

¹⁹ See F00104, Pre-Trial Judge, [Framework Decision on Disclosure of Evidence and Related Matters](#) ("Framework Decision on Disclosure"), 22 January 2021, para. 71, referencing these as authorities: ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 (OA5), Appeals Chamber, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended requests for Redactions under Rule 81"*, 14 December 2006, paras 21, 33-34; *Prosecutor v. Katanga*, ICC-01/04-01/07-475 *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, paras 95-99; ECtHR, *Rowe and Davis v. United Kingdom*, no. 2890/95, [Judgment](#), 16 February 2000, para. 61; *Botmeh and Alami v. United Kingdom*, no. 15187/03, [Judgment](#), 7 June 2007, para. 37; *Yam v. the United Kingdom*, no. 31295/11, [Judgment](#), 16 January 2020, para. 54; *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, [Judgment](#), 24 April 2001, para. 37; *Krestovskiy v. Russia*, no. 14040/03, [Judgment](#), 28 October 2010, para. 29; *Mechelen et al. v. The Netherlands*, nos. 21363/93, 21364/93, 21427/93 and 22056/93, [Judgment](#), 23 April 1997, para. 58.

²⁰ Rule 80(1)(5) of the Rules.

²¹ Rule 80(4)(a)(i) and (vi) of the Rules.

individual concerned is at risk.²² This standard reflects not only the importance of public proceedings but also the principle that exceptions thereto should be strictly necessary.²³ Accordingly, a general expression of fear that is not substantiated by concrete, objective elements or the hypothetical possibility that the safety or security of an individual could be affected by the public disclosure of certain information, would not normally warrant the granting of protective measures.²⁴

12. The burden of establishing that the conditions for protective measures are met lies with the party seeking those measures.²⁵ Where the moving party fails to substantiate

²² See ICTY, *Prosecutor v. Popović et al.*, IT-95-5/18-T, *Decision on Urgent Prosecution Motion for Additional Protective Measures for Witness KDZ084*, 10 May 2012, p. 3, referring to *Prosecutor v. Popović et al.*, IT-95-5/18-T, *Decision on Urgent Prosecution Motion for Augmentation of Protective Measures for a Witness Due to Testify in the Tolimir Case*, 6 July 2010, p. 3; *Prosecutor v. Boskoski*, IT-04-82-T, *Decision on Prosecution's Motion for Protective Measures*, 2 May 2007, para. 2; *Prosecutor v. Brđjanin and Talić*, IT-99-36/1, *Decision on Motion by Prosecution for Protective Measures*, 3 July 2000, paras 26, 52; ICTR, *Prosecutor v. Simba*, ICTR-01-76-I, *Decision on Defence Request for Protection of Witnesses*, 25 August 2004, para. 5; *Prosecutor v. Nzirorera*, ICTR-98-44-I, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses*, 12 July 2000, para. 9; *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, *Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses*, 27 June 2005, para. 8; *Prosecutor v. Renzaho*, ICTR-97-31-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment*, 17 August 2005, para. 10; *Prosecutor v. Nchamihigo*, ICTR-2001-63-T, *Decision on Defence Motion for Protection of Defence Witnesses*, 20 March 2007, paras 3-4; *Prosecutor v. Setako*, ICTR-04-81-I, *Decision on Prosecution Motion for Protective Measures*, 18 September 2007, para. 4; *Prosecutor v. Nshogoza*, ICTR-07-91-PT, *Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses*, 24 November 2008, para. 6. See also Draft Transcript, 1 September 2021, pp. 413-414.

²³ ECtHR, *P.S. v. Germany*, [Judgment](#), no. [33900/96](#), 20 December 2001, paras 22-23. See also Framework Decision on Disclosure, para. 71.

²⁴ See e.g., ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements*, 22 November 2006, para. 2; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, *Order on Milan Lukić's Request for Protective Measures*, 23 July 2008, pp. 3-4; ICTR, *Prosecutor v. Nshogoza*, ICTR-07-91-PT, *Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses*, 24 November 2008, para. 7; *Prosecutor v. Nizeyimana*, ICTR-2001-55C-PT, *Decision on Prosecutor's Motion for Protective Measures for the Victims and Witnesses to Crimes Alleged in the Indictment*, 9 June 2010, para. 6.

²⁵ See, similarly, ICTY, *Prosecutor v. Gotovina*, IT-01-45-PT, *Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68*, 14 July 2006, pp. 6-7; ICTR, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses*, 2 February 2005, para. 13; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, *Decision on Nyiramasuhuko's Strictly Confidential Ex-Parte-Under-Seal Motion for Additional Protective Measures for Defence Witness BK*, 15 June 2005, para. 17; *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses*, 29 August 2005, para. 9; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for No Contact Order*

its claim, protective measures may be denied.²⁶ In deciding whether to grant protective measures, the Panel will take into account the effect that those measures would have on the fairness of the proceedings.²⁷

IV. DISCUSSION

13. The SPO argues that the Measures should be granted because disclosing the Witnesses' names to the public risks attracting heightened scrutiny to their professional activities in the field which, in turn, could compromise the effectiveness of SPO investigations, and put the Witnesses and those with whom they interact at risk.²⁸

14. The Panel first observes that operational effectiveness (described by the SPO as safeguarding the "effectiveness of SPO investigations") is not one of the grounds pursuant to which protective measures may be granted under Rule 80(1) of the Rules.²⁹ The reliance which the SPO seeks to place on Rule 108 is inapposite.³⁰ Rule 108(1) of the Rules does not pertain to protective measures for witnesses but regulates the non-disclosure of otherwise disclosable material and information, which is a different and unrelated matter.

15. The SPO's further submission that the public disclosure of the Witnesses' names would create a risk for their safety, or that of third parties, has not been established to the requisite standard. The Trial Panel notes that the SPO provides neither specific

and "*Requête urgente de Matthieu Ngirumpatse aux fins d'interdire au Procureur de contacter toute personne figurant sur la liste de témoins sans l'accord préalable de ses conseils*", 21 August 2008, para. 8

²⁶ See, e.g., ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, *Decision on Motion for Protective Measures for Witness KW456*, 12 October 2012, para. 11

²⁷ Rule 80(1) of the Rules. See similarly, *Prosecutor v. Karemera et al*, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for No Contact Order and "Requête urgente de Matthieu Ngirumpatse aux fins d'interdire au Procureur de contacter toute personne figurant sur la liste de témoins sans l'accord préalable de ses conseils"*, 21 August 2008, para. 5

²⁸ Request, paras 3-4.

²⁹ See similarly ICTY, *Prosecutor v. Brđjanin and Talić*, IT-99-36/1, *Decision on Motion by Prosecution for Protective Measures*, 3 July 2000, paras 29-31.

³⁰ Request, para. 4.

personal or contextual circumstances, nor concrete or verifiable information relating to specific individual(s) with respect to whom the likelihood of danger or risk standard could effectively be assessed. In particular, the SPO has failed to submit objective, concrete indications that the public disclosure of the names of the Witnesses means that there is a real likelihood that they may be in danger, or risk being interfered with or intimidated. In the absence of specific indications to that effect, the Panel cannot satisfy itself that the fear of risk expressed has any objective factual foundation.

16. The hypothetical nature of the risk alleged by the SPO is also apparent from the fact that the SPO decided to call these two particular witnesses and asked them to prepare to give evidence on the assumption that they may be required to do so without protective measures.³¹

17. The Panel also notes that the Witnesses, as SPO investigators, fall into the category of witnesses who are members of the police or associated investigative authorities, and that “it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court”.³²

18. The Panel recognises that undercover police officers who testify at trial before domestic courts will often do so using protective measures, and that the European Court of Human Rights has recognised that “the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards”.³³ Nonetheless, in the present case, the SPO has not asserted that the Witnesses are undercover officers.

³¹ Draft Transcript, 1 September, pp. 410-411.

³² ECtHR, *Mechelen et al. v. The Netherlands*, nos. 21363/93, 21364/93, 21427/93 and 22056/93, [Judgment](#), 23 April 1997, para 56.

³³ ECtHR, *Ramanauskas v. Lithuania*, Grand Chamber, no. 74420/01, [Judgment](#), 5 February 2008, para. 54, citing *Teixeira de Castro v. Portugal*, no. 44/1997/828/1034, [Judgment](#), 9 June 1998, paras 35-36, 39; *Khudobin v. Russia*, no. 59696/00, [Judgment](#), 26 October 2006, para. 128; *Vanyan v. Russia*, no. 53203/99, [Judgment](#), 15 December 2005, paras 46-47.

19. The SPO's argument that a risk will be created by the public disclosure of the Witnesses' names is undermined by the fact that the SPO is not asking that the physical appearance of the Witnesses should be concealed from the public. This indicates that the possibility of the Witnesses being publicly identified as SPO staff does not create a sufficient enough risk to warrant the sought measures.

20. The Trial Panel is also mindful that the Witnesses may be asked to testify about issues and circumstances in respect of which the underlying evidence is in some respects not available to the Defence and, to some extent, to the Trial Panel. These circumstances will involve an erosion of the publicity of the proceedings. Adding yet another level of confidentiality through the granting of the Measures is, in the Panel's assessment, unnecessary and disproportionate.

21. The Trial Panel also notes that the approach proposed by the SPO does not appear to find support in the law of Kosovo or in the practice of its courts. Furthermore, in the one international jurisdiction that has dealt with crimes committed in Kosovo (namely, the International Criminal Tribunal for the former Yugoslavia), investigators of the Office of the Prosecutor (who frequently travelled to Kosovo as part of their duties) testified in Kosovo-related trials in open court, under their own names. The decisions cited by the SPO in support of its Request from the International Criminal Court,³⁴ which permit investigators to testify under pseudonym and with other protective measures, arise from factually different circumstances, and do not identify any precedent or authority for the approach taken.

22. The support placed by the SPO on the Practice Direction on Files and Filings before the Kosovo Specialist Chambers ("Practice Direction") is of limited relevance.³⁵ The Practice Direction does not regulate the imposition of protective measures, which

³⁴ See Request, para. 4, fn. 7.

³⁵ Request, para 4; see also Draft Transcript, 1 September 2021, pp. 400, 402-403; Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15, 17 May 2019, Article 33.

falls within the responsibility of the Judges, rather than the Registry. As acknowledged by the SPO, while the Practice Direction seeks to protect the privacy and security of staff in the exercise of their employment with the SPO or SC, it does not regulate the question of protection if and when they give evidence *as witnesses*.³⁶ To the extent that the interests protected by the Practice Direction overlap in part with the interests underlying protective measures, the Practice Direction must be interpreted and applied in a manner that is consistent with the Constitution of Kosovo, the Law, the Rules and relevant human rights instruments. This means that considerations of publicity and fairness of proceedings will normally prevail over considerations of good management and practical convenience.

23. In light of the above, the Trial Panel finds that the SPO has failed to demonstrate the existence of a real likelihood of danger or risk to the safety, physical and psychological well-being, dignity and privacy of its Witnesses or to the safety of the persons with whom they are likely to interact. The Panel concludes that the Measures are an unnecessary and disproportionate curtailment of the Accused's right to a public trial.

³⁶ Draft Transcript, 1 September 2021, pp. 415-417.

V. DISPOSITION

24. It was for the foregoing reasons that the Panel dismissed the Request in its 2 September 2021 oral order.

A handwritten signature in cursive script, reading "Charles L. Smith III", is written above a horizontal line.

Judge Charles L. Smith, III

Presiding Judge

Dated this Tuesday, 7 September 2021

At The Hague, the Netherlands