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 Guenael Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Defence Response to Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice

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I. INTRODUCTION

1. On 7 September 2021, the Trial Panel issued a number of orders in respect of an updated Rule 102(3) notice.[1]

2. In compliance with that order, the Specialist Prosecutor's Office ("SPO") has transmitted an updated and redacted Rule 102(3) notice.

3. Further in compliance with that order, the Defence indicated to the SPO which of those items listed to which it sought disclosure.

4. The SPO, in its filing of 17 September 2019,[2] opposes the disclosure of all of those items on the basis that they are not material to the preparation of the defence, to disclose would prejudice ongoing and future investigations, and that to disclose would be to jeopardise the security of witnesses.

5. At the outset, the Defence maintains that the SPO appear content to ignore the position of the Trial Panel, where the trial panel has found that certain items are at the least *prima facie* disclosable,[3] and further, that the SPO have not demonstrated how that which has been requested would jeopardise any investigation and/or the security of witnesses if disclosed.[4]

[1] KSC-BC-2020-07/F00304
[2] KSC-BC-2020-07/F00316/RED
[3] KSC-BC-2020-07/F00304 at paragraph 23
[4] KSC-BC-2020-07/F00304

6. The SPO in reality, are adopting the well-rehearsed position, that they believe it is the SPO that is the arbiter of what is and what is not relevant, and further, that it is the SPO that determines what it should and what it should not disclose to the Defence.

7. The SPO are again respectfully reminded, that their cavalier approach to disclosure has already been found to be inappropriate, and further, if it is that the SPO cannot disclose evidence and in being unable is undermining the fair trial rights of the Defendant, in that the Defendant cannot properly be afforded a fair trial in the absence of disclosure, then it is quite clear that it would constitute an abuse of the court's process for the trial to continue.

II. BACKGROUND

8. The Defence do not seek to provide a detailed background for the purposes of this submission, instead relying on that which has been provided previously.

9. If it is that any individual element of the procedural background falls to be specifically raised, it will be done so within the context of the submissions below.

III. SUBMISSIONS

That the Materials Sough are not Material to the Preparation of the Defence

10. The Trial Panel has previously ruled that the items 185-190 and 192-200 are *prima facie* disclosable under Rules 102 and/or 103 of the Rules and thus with respect, the issue of materiality appears to have already been satisfied.[5]

11. The SPO now seek to suggest that the position is more nuanced[6] and that materiality cannot be considered until a request for disclosure has been made.

12. It is with regret that this process appears to be going around in circles, in that the SPO deny that an item is material and that the Defence cannot have sight of the same until the Defence demonstrate how that item is material, when the SPO refuses to provide further information in respect of the item(s) that would allow a detailed analysis of its relevance or materiality to take place.

13. This position would appear to be borne out in the recent decision of the Trial Panel[7] that refers to the panel being able to make an 'informed decision', and being able to exercise 'due diligence'.

14. The SPO cannot criticise the Defence for not developing its arguments on materiality sufficiently in their opinion, when the sole reason as to why it cannot develop the argument further, is solely because of the SPO's own refusal to provide sufficient information.

[5] KSC-BC-2020-07/F00304 at para. 23
[6] KSC-BC-2020-07/F00316/RED at para. 15-21
[7] KSC-BC-2020-07/F00320

15. Such a position is untenable and arguably creates a 'double prejudice' for the Defendant(s) who is in the first instance prevented from making the application, and secondly, prevented from seeing the evidence because of the first.

16. The submission of the SPO at paragraph 20, that "*The SPOs submissions in this regard must be presumed to be made in good faith*", is noted, however, as per the submissions of Counsel for Gucati at the Trial Panel status conference,[8] that is not an irrebuttable presumption, particularly when faced with a situation where disclosure has been drip fed at best, often only when forced to do so.

17. In terms of the argument raised at paragraph 21, in that the Pre-Trial Judge has rejected the Defence arguments, this is submitted to be an irrelevance. The Trial Panel is not bound by the decisions of the Pre-Trial Judge as has been made clear by the Defence in oral submissions.

Rule 108 Objections that Ongoing and Future Investigations would be Prejudiced

18. The SPO are simply asking the Trial Panel to accept their position in terms of the prejudice that may or may not be caused to ongoing or future investigations, and have not demonstrated <u>how</u> any such investigation would be prejudiced.

19. Accordingly, their arguments under this head ought to be summarily dismissed.

[8] KSC-BC-2020-07, Trial Preparation Conference, Transcript, 2 September 2021, page 594, lines 2-3.

20. To the extent that the argument is considered, there would appear to be a competing interest, in terms of ongoing and potential future investigations, and the fairness of the proceedings against the Defendant.

21. With respect, and as has been submitted on numerous occasions by the Defence, where the fairness of a trial cannot be guaranteed, then no trial should be held.

22. The SPO notes at paragraph 33 that "*the nature of what is sought by the Defence will lead to a disclosure path which cannot be reasonable limited or controlled*". It is unclear as to the position the SPO is taking and to go on to suggest that "*[O]rdering disclosure of the Materials will lead to almost every investigative development in the SPO's interference investigations…*" is wholly without foundation.

23. The Defence are only seeking disclosure of what it deems to be relevant and what it knows, or has reason to believe, the SPO has in its possession.

24. The fact that the SPO, if it discovers something relevant in the future, may have to again update the list, is wholly appropriate. The SPO cannot seek to abrogate its responsibilities simply because it results in more work.

25. Regardless of the SPO position on the issue, the means by which the documents were taken from SPO offices and delivered to the KLA WVA offices <u>is</u> relevant; it is relevant to the indicted offences, it is relevant to the defences that are to be advanced, and therefore, any and all evidence that relates to the same falls to be disclosed unless an exception applies.

26. The SPO has not demonstrated how the Rule 108 exception applies in the instant case.

27. Further, to in effect rely on the fact that the Defendant(s) have been indicted with offences against the administration of justice as reason for not disclosing evidence is quite frankly Kafkaesque.

28. At paragraph 36 the SPO maintain "*There should be no doubt that if highly sensitive investigations can be made subject to disclosure to these Accused on the basis of unsubstantiated assertions and mere speculation, it will be impossible to conduct effective investigations of acts of obstruction*". The Defence rejects this assertion and requires the SPO to prove this allegation as currently there is no basis for making such a wild accusation.

That Disclosure of certain Materials cause grave risk to the security of witnesses

29. At paragraph 37 of the of the SPO submission, there is what appears to be an acceptance that the notes and 'witness interview' provide information concerning allegations of 'witness intimidation', this being the case, the documents are quite clearly material to the matters before the Chamber, taking into account the indicted charges.

30. In any event, the SPO have been content to redact names previously and still disclose the information and therefore it is questionable as to why this approach cannot be taken now.

31. The Defence, although not necessarily accepting, acknowledge that redaction of individual names may be appropriate, it being the information that is of interest and necessitates disclosure, not necessarily the names of those providing the information.

32. The Defence would seek to challenge the position raised at paragraph 42 of the SPO submissions noting that it appears to criticise protestors. The Defence are unaware of the specifics of that which is said to have occurred, however, there is a right to protest in any democratic state and therefore it is unclear as to the premise of the SPO submissions on this point.

That the Report is Internal Work Product

33. The Defence can go no further than simply highlighting the SPO are asking the Panel to simply accept it is what the SPO says it is, a fact raised by the panel's recent order for it to be disclosed to the panel for further scrutiny.

34. It may be that the Defence seeks to make further submissions, subject to the Panel's determination on this point.

IV. CONCLUDING REMARKS

35. The items have been ruled as *prima facie* disclosable and therefore it is respectfully submitted that the materiality point is a red herring. If it is that the Trial Panel has determined that certain items are on the face of it disclosable, then this is interpreted to mean that the Trial Panel has found the materiality threshold to have been passed.

36. Accordingly, the submissions of the SPO on this point ought to be dismissed.

37. In any event, the materiality threshold has been satisfied and the defence has demonstrated as to how.

38. In terms of 'risk' that may become apparent on disclosure, in the first instance, the SPO has not sufficiently demonstrated that those risks exist, and secondly, should those risks be deemed to exist, the SPO has not adequately demonstrated why a simple redaction of names does not allay concerns.

39. The Defence again raises the issue of fair trial. The Defendant must be allowed to have sight of evidence and challenge or advance where appropriate. To curtail his ability to do so, undermines his fair trial rights, and by extension, if those rights cannot be guaranteed, then no trial ought to take place.

40. Finally, the Defence reserves the right to make further submissions in respect of items 191 and 195-200 until the Trial Panel has had opportunity to analyse the same, noting the order for the SPO to provide 191 and the factual basis underpinning its assertion in respect of 195-200 by 28 September 2021.

V. CLASSIFICATION

41. Pursuant to Rule 82(4), this filing is confidential since it refers to filings bearing the same classification. We have not referred to any witnesses by name or provided any information which could identify these witnesses in this filing. Accordingly, the Defence would not oppose the reclassification of the filing to public should the Trial Panel deem it appropriate to do so. No redactions would be required.

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