

**In:** KSC-CA-2022-01  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Court of Appeal Panel  
Judge Michele Picard, Presiding Judge  
Judge Kai Ambos  
Judge Nina Jorgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 18 January 2023

**Language:** English

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**Public Redacted Version of Haradinaj Defence Response to ‘Prosecution notice of additional item 206 and challenge to disclosure’**

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## I. INTRODUCTION

1. On 19 September 2022 the Specialist Prosecutor's Office (SPO) filed its "Prosecution notice of additional item 206 and challenge to disclosure"<sup>1</sup> in which it notified the Defence of a further item of evidence within its possession, namely Item 206, which it deemed as being relevant to the case. The SPO go on to pre-emptively challenge the disclosure of the item, on the basis that the item is "*immaterial*";<sup>2</sup> and, "*even if Item 206 was deemed material, disclosing the identity of the Author would prejudice ongoing or future investigations and case grave risks to his security.*"<sup>3</sup>
2. On 20 September 2022, the Defence for Mr. Haradinaj ("Haradinaj Defence") wrote to the SPO requesting disclosure of Item 206. No response has been received *inter partes* or through any further filing.
3. The Haradinaj Defence hereby seek to firstly, respond to SPO submission, secondly request the disclosure of Item 206 pursuant to Rule 102(3) and/or Rule 103 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules")<sup>4</sup>, thirdly, confirm that it is material to the defence and lastly to request the Appeal Panel to stay any determination of the appeal pending the resolution of this disclosure.

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<sup>1</sup> KSC-CA-2022-01/F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022.

<sup>2</sup> *Ibid* at paragraph 3

<sup>3</sup> *Ibid* at paragraph 4

<sup>4</sup> KSC-BD-03/Rev3/2020

## II. BACKGROUND

4. The background to this case is well-known and is therefore not addressed as a separate section. It will instead be referred to, and cited specifically, where appropriate.

## III. LAW

5. The Haradinaj Defence adopts paragraphs 4-11 of the “Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure” (“Gucati Response”) for the purpose of setting out the applicable legal framework and is not repeated here.

## IV. SUBMISSIONS

### On Materiality and Relevance

6. The Haradinaj Defence notes the recently disclosed items, the filings of the SPO,<sup>5</sup> and the rulings of the Appeals Panel<sup>6</sup> and wishes to reiterate that the inexplicably late disclosure of materials that have been in possession of the SPO at such a late stage in

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<sup>5</sup> KSC-CA-2022-01/F00028/CONF/RED, Confidential Redacted Version of Notification on [REDACTED] [REDACTED] with two confidential and *ex parte* annexes, 23 September 2022; KSC-CA-2022-01/F00038/CONF/RED, Confidential redacted version of Notification on communication received by the SPO with Confidential and *Ex Parte* Annex 1, 23 September 2022.

<sup>6</sup> KSC-CA-2022-01/F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 15 September 2022; KSC-CA-2022-01/F00049/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures, 23 September 2022.

these proceedings, notably post-conviction, and post the filing of the Defence Appeal Brief, constitutes a flagrant denial of justice.

7. Firstly, the Haradinaj Defence wishes to highlight that it has had no sight of Item 206 and that it is therefore, as previously recognised by the Trial Panel at a significant disadvantage in making informed submissions on relevant issue(s), namely materiality and whether any redactions are necessary or otherwise<sup>7</sup> in response to the SPO on this matter. Instead, the Defence are being asked to simply rely on the assessment of the SPO that: *"[t]he only possible relevance Item 206 could have for the Defence is with respect to its ungrounded allegations that the SPO entrapped the Accused. But this item contains no information or opinion regarding any role or involvement the SPO would have had in the provenance of the Batches. Such an item could not have been a decisive factor in reaching a decision at trial."*<sup>8</sup>
8. The SPO position is that *"this item contains no information or opinion regarding any role or involvement the SPO would have had in the provenance of the Batches"*,<sup>9</sup> however, and again, the Defence are being asked to simply rely on the position being advanced by the SPO, rather than having the opportunity of making its own enquiries.
9. The Defence would submit that it is not for the SPO to determine what is material or relevant, particularly when the Appellant, at such a late stage in the proceedings, is

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<sup>7</sup> KSC-BC-2020-07/F00435, Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201, 15 November 2021, at para. 14

<sup>8</sup> KSC-CA-2022-01/F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022, at paragraph 3

<sup>9</sup> KSC-CA-2022-01/F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022, at paragraph 3.

only disclosed a 'note' or 'interpretation' of what that evidence contains without any information about the source, or how that information is known by that source.

10. Nonetheless, on the face of the little information it has had access to, the Haradinaj Defence takes a different view on the matter and maintains that Item 206 is material. The SPO has disclosed that a witness has specific information in respect of 'how' information came to be in the possession of those other than the SPO, and further, the 'goal' of taking those items. The process through which the "Batches", as noted in the Gucati Response, arrived at the KLA WVA premises is a relevant issue in the case.<sup>10</sup>

11. It will, in this regard, be recalled that the Haradinaj Defence raised the possibility of Serb involvement in the disclosure of the documents relevant to the indicted offences<sup>11</sup> as well as its concerns in respect of the potential involvement of Serbian officials in the Appellant's own evidence.<sup>12</sup> A fact that was by and large denied and objected to by the SPO, despite the fact that they were in possession of evidence to the contrary at the very time opposition to the proposition was raised. The Panel will also be reminded that the SPO even objected to the credible evidence demonstrating that Senator Dick Marty had been subject to 'armed police protection' since December 2020 following an alert by the Swiss intelligence services that his life was

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<sup>10</sup> KSC-BC-2020-07/IA005-00008, Decision on the Appeals Against Disclosure Decision, 29 July 2021, para. 47.

<sup>11</sup> KSC-BC-2020-07, 'Closing Statements', Transcript 16 March 2022, page 3713, lines 23-25; page 3714, lines 1-12; page 3714, lines 13-18; KSC-BC-2020-07/F00566, Final Trial Brief on Behalf of Nasim Haradinaj, 3 March 2022, paras 24-26; KSC-CA-2022-01/F00035, Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 19 August 2022, paras 122-124 and 138.

<sup>12</sup> KSC-BC-2020-07, 'Trial Hearing', Transcript 11 January 2022, page 2710, lines 2-25; page 2711, lines 1-25; page 2713, lines 23-25; page 2714, lines 1-19; KSC-BC-2020-07/F00509, Annex 2 to Submission of Statement of Nasim Haradinaj, Confidential, 28 December 2021, paras 21, 32, 34-35, 45, 52, 132-134.

under threat by Serbian intelligence agencies,<sup>13</sup> a threat that was intended to implicate Kosovo Albanians.<sup>14</sup> In fact, Senator Marty is quoted of having said:

“The threat apparently comes from certain circles of the Serbian intelligence services, who asked the underworld, professional killers, to liquidate me simply to put the blame on the Kosovars.”<sup>15</sup>

12. The description of Item 206 offers no information concerning who has been identified as providing the information from “The Hague”, or indeed if anyone has been identified as being, simply suggesting that “*This item contains no information or opinion regarding any role or involvement the SPO would have had in the provenance of the Batches*”.<sup>16</sup> However, if for the purposes of this application it is taken as credible that “*Belgrade took the files from The Hague*”, those files were removed from the relevant SPO offices by someone at some point and therefore it remains unclear as to who gave an individual access to take those files, or alternatively, removed those files personally.
13. In this regard, it is noted that WO4841 (Zdenka Pumper) clearly stated in the course of her evidence that the information leaked in Batch 3<sup>17</sup> was not held on the SPO’s evidence management system but rather came into her possession upon being sent

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<sup>13</sup> Swissinfo.ch, ‘Former Swiss prosecutor ‘targeted by Serbian assassins’’, 12 April 2022, <https://www.swissinfo.ch/eng/former-swiss-prosecutor--targeted-by-serbian-assassins-/47506812>; Balkan Transitional Justice, ‘Serbian Spy Agency Denies Swiss Report of Assassination Plot’, 11 April 2022, <https://balkaninsight.com/2022/04/11/serbian-spy-agency-denies-swiss-report-of-assassination-plot/>

<sup>14</sup> *Ibid.*

<sup>15</sup> <https://www.rts.ch/info/suisse/13007228-menace-de-mort-dick-marty-vit-sous-haute-protection-depuis-seize-mois.html>.

<sup>16</sup> *Op. cit.* fn 14.

<sup>17</sup> KSC-BC-2020-07, ‘Trial Hearing’, Transcript 25 October, page 1368, lines 9-12.

to her by e-mail by the Deputy Prosecutor. This in fact corroborates the information in Item 206 since it would confirm that the leaked material must have been in fact removed by a member of the SPO, present or former.

14. This latest disclosure therefore cannot be said to be anything other than relevant and/or material. It is in fact central to one of the limbs of defence advanced at trial.
15. If the Appeals Panel upholds the position of the SPO, it will in effect allow the SPO to usurp the power of the Trial Panel to determine what is deemed to be relevant, and to become the arbiter of what can and cannot be disclosed. If that is the case, the SPO will also become the arbiter of what the Defendant can and cannot raise in terms of his defence at trial. In this regards, the Haradinaj Defence echoes the position of the Trial Panel where it reminded the SPO that: *“It is the Defence who determines, as part of the second step [of the Materiality Test], what is material to its preparation.”*<sup>18</sup> Further, the Trial Panel considered the second limb of the Materiality Test to be one that ought to be considered broadly, and regardless of any position adopted by the SPO, this refers to *“information pertaining to the question whether the SPO took reasonable investigative steps to exclude the possibility that entrapment occurred”*.<sup>19</sup>
16. The above is with the background that the SPO has consistently denied the existence of any investigatory shortcomings, despite there being clear evidence to challenge this position, including evidence from the SPO’s own investigators, and including

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<sup>18</sup> KSC-BC-2020-07/F00413, Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, Confidential, at para.42

<sup>19</sup> KSC-BC-2020-07/F00435, at para. 17, and KSC-BC-2020-07/F00304, Order on the Updated Rule 102(3) Detailed Notice with confidential and *ex parte* annex, 7 September 2021, Confidential, at paras. 64, 71, and 73

expert evidence being adduced by the Defence on the subject, such is the disparity between positions.

17. The SPO is not mandated to restrict or preclude a Defendant from raising a defence and to do so is a flagrant violation of the Appellant's fair trial rights pursuant to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). The Trial Panel, and Court of Appeals Panel have considered this position, ruling: "[T]he circumstances through which material seized by the SPO came into possession of the Kosovo Liberation Army War Veterans' Association (KLA WVA) is "relevant" for the purposes listed under Rule 102(3) of the Rules."<sup>20</sup>
18. Such a question was directly within the purview of the Trial Panel and in avoiding the scrutiny of the trial panel, it can only be seen as usurping the authority of that panel. The limited description provided by the SPO in terms of Item 206 is suggestive of that item relating to information concerning the circumstances by which material seized came into the possession of the KLA WVA, and therefore, absent any further information, or any further scrutiny at this time, the item listed simply must satisfy the relevance test, again, highlighting it is not for the SPO to determine relevance.
19. Further, the SPO is in no position to state that the items are not capable of either assisting the Defence in terms of the investigations concerning entrapment, or

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<sup>20</sup> KSC-BC-2020-07/F00413, Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, Confidential, at para 51; IA005-F00008, Court of Appeals Panel, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021, at para. 47.



suggestive of the fact that the SPO have failed to take adequate investigative steps, per its offered submissions.

20. Secondly, the Haradinaj Defence wishes to highlight that the decision of the Appeals Panel at paragraph 38<sup>21</sup> orders disclosure of the subject matter of those applications, namely the witness interview(s) of [REDACTED] subject to any further request for non-disclosure and/or protective measures. The Defence highlights that as noted in the Gucati Response to the Prosecution Notice of Additional Item 206, [REDACTED] had previously alleged that another Senior Serbian official [REDACTED] was a key participant in the leaks and also suggested that there would be an attempt to frame [REDACTED] as now confirmed in Item 206.<sup>22</sup>
21. Item 206, subject to the instant submission is of a similar subject matter, or is at least analogous in that substance although not in form, in it relates to the manner by which the documents subject to Counts 1 and 2 on the Indictment came to be 'leaked'.
22. It therefore naturally follows that if the items subject to the decision in KSC-CA-2022-01/F00049 and KESC-CA-2022-01/F00044 have been deemed to be relevant, it must be the case that item 206 is similarly relevant and thus the submissions of the SPO that "*this item is immaterial*",<sup>23</sup> and/or irrelevant is misguided. To rule otherwise than

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<sup>21</sup> KSC-CA-2022-01/F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 15 September 2022.

<sup>22</sup> Disclosure 1, 082095-TR-ET Part 1 at page 14 and 082095-TR-ET Part 3 at page 13.

<sup>23</sup> KSC-CA-2022-01/F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022, at paragraph 3.

in favour of the Defence with regards to the relevance of this material would be inconsistent with a position already adopted by the Appeals Panel.

23. Secondly, taking into account that the document in question was received while the trial was ongoing, on 27 January 2022,<sup>24</sup> it constitutes a fundamental failure by the SPO to meet its disclosure obligations. They further inexplicably have failed to address or explain why a document that has been in their possession while the defence was presenting its case, has only fallen to be added some eight (8) months later, and in any event, post-conviction, material that was relevant to a central issue at trial.
24. This most recent notice further compounds the failures of the SPO with regards to its disclosure obligations, and the fair trial rights of the Appellant. As the Defence has previously submitted in its Appeal Brief,<sup>25</sup> the trial process has been replete with disclosure failings by the SPO, including late disclosure, up until just prior to the verdict being rendered, noting the SPO position in respect of Item 204<sup>26</sup> and Item 205<sup>27</sup> and the applications made thereafter.

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<sup>24</sup> *Ibid* at paragraph 1

<sup>25</sup> KSC-CA-2022-01/F00035, Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 19 August 2022, paras 13, 65, 67, 125-126, 165-168, 172; KSC-BC-2020-07, Final Trial Brief on Behalf of Nasim Haradinaj, 3 March 2022, paras 16, 31, 39, 410-411, 435.

<sup>26</sup> KSC-BC-2020-07/F00520/CONF, Prosecution notice of additional item 204 and challenge to disclosure with one strictly confidential and *ex parte* annex.

<sup>27</sup> KSC-BC-2020-07/F00534/CONF, Prosecution notice of additional item 205 and challenge to disclosure with one strictly confidential and *ex parte* annex, 25 January 2022.

25. Further, at paragraph 3 of the Prosecution notice, the SPO seeks to rely in anticipation on Rule 181(3)<sup>28</sup> of the Rules arguing that *“such an item could not have been a decisive factor in reaching a decision at trial.”*<sup>29</sup>
26. The Haradinaj Defence maintains that it is not appropriate to apply Rule 181(3) to the present circumstances since the ‘trial’ did not in fact close until 17 March 2022.<sup>30</sup> Accordingly, at the time that Item 206 came into existence, that being 22 January 2022, the trial was still ‘ongoing’ with the presentation of defence evidence.
27. Furthermore, at the Status Conference of 31 January 2022, the issue of disclosure, and in particular a previous item, “Item 205”, was addressed in open court,<sup>31</sup> just four (4) days after the SPO had received the information, and yet no updated notice was served by the SPO and no mention of Item 206 during the Status Conference, no updated notice to the Defence, nor any *ex parte* application to the Trial Panel. Discovery of the item by the SPO as required by Rule 181(3) is in this sense moot since it was within the SPO’s knowledge that this material was in its possession. Accordingly, it is submitted that Rule 181(3) does not apply, the same test ultimately prejudicing the Defendant, and further, if applied, tolerating the SPO’s cavalier approach to disclosure and adherence to the spirit and letter of the Rules.

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<sup>28</sup> Rule 181(3): “Where the Court of Appeals Panel finds that the additional evidence was not available at the time of trial and could not have been discovered with the exercise of due diligence, it shall determine whether it could have been a decisive factor in reaching a decision at trial and render a decision.”

<sup>29</sup> KSC-CA-2022-01/F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022, paragraph 3.

<sup>30</sup> KSC-BC-2020-07, ‘Closing Statements’, Transcript 17 March 2022, page 3855, lines 14-16.

<sup>31</sup> KSC-BC-2020-07, ‘Trial Hearing’, Transcript 31 January 2022, page 3380, lines 16-17; page 3383, lines 9-25; page 3384, lines 1-9.

28. The Appellant would therefore request that the Appeals Panel considers the imposition of relevant measures pursuant to Rule 110, noting that given the notice and the date of Item 206, the SPO have summarily failed to comply with its disclosure obligations.
29. Overall, the Haradinaj Defence is simply not in a position to accept the updated notice as being reflective, nor can it accept that the item is potentially innocuous as purported by the SPO.
30. The Defence therefore submits that the information must be considered to be *prima facie* disclosable, since it addresses how the documents came to be disclosed, and thus it cannot be said to be anything other than relevant. In the alternative, this question cannot be resolved, given the lack of information contained within the updated notice, and therefore again, it must be disclosed to enable that determination to be made.
31. In light of the above, the Haradinaj Defence further urges the Appeal Panel to stay any determination pending the resolution of the issue of disclosure.

On Security Risks

32. The SPO maintains that “disclosing the identity of the Author would prejudice ongoing or future investigations and cause grave risks to his security.”<sup>32</sup> However, the SPO fails to offer any details as to how such investigations would be prejudiced. It is not enough,

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<sup>32</sup> KSC-CA-2022-01/F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022, at paragraph 3

nor is it justified, for the SPO to hide behind the veil of prejudice of investigations without it substantiating the position.

33. The SPO consistently raise the argument that allegations made by the Defence are unsubstantiated, and as much as this is not accepted at any level, the SPO are engaging in that which it complains of in that it has made a statement and expects the position to simply be accepted. In any event, the SPO has failed to consider any 'counter-balancing' measures.

34. The Haradinaj Defence do not accept that any such measures are warranted, however, on a without prejudice basis, it is notable that the SPO have not sought to suggest any such potential measures.

35. It would appear to be trite, that if there is a credible and justifiable specific threat to the individual providing the information, that a simple redaction of the name of such an individual would assuage or mitigate that threat, the witness still be able to retain anonymity, but the information being provided can still be analysed.

36. It is of note that no such measures have been suggested by the SPO, and further, no reason has been offered as to why no consideration has been given to such measures.

Private Entrapment

37. The Haradinaj adopts the Gucati Response at paragraphs 29-34 in respect of the submissions on "private entrapment".

## **V. CONCLUSION**

38. The Defence invites the Appeals Panel to rule as follows:

- a. An order that the SPO have failed to adhere to their disclosure obligations;
- b. That an order is made under Rule 110;
- c. An order that the Appellate proceedings are stayed pending the resolution of this most recent disclosure issue including the exhaustion of any appellate remedy or subsequent application to amend the Grounds of Appeal where deemed appropriate to make such an application;
- d. An order the disclosure of item 206, on the basis that the same is clearly material and relevant to the preparation of the Defence case.

## **VI. CLASSIFICATION**

39. This filing is classified as confidential in accordance with Rule 82(4).

Word Count: 2748 words



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