



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Date: 22 September 2021

Language: English

Classification: Confidential

**Order for Further Submissions in Relation to the Prosecution Challenges to
Disclosure of Items in the Updated Rule 102(3) Notice**

Specialist Prosecutor

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TRIAL PANEL II ("Panel"), pursuant to Articles 21 and 40 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 102(3), 106, 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 9 September 2021, further to the Panel's order,¹ the SPO filed an addendum to its Consolidated Rule 102(3) Notice ("Rule 102(3) Addendum") containing sixteen items ("Items 185-200").²

2. On 17 September 2021, further to the Defence request for disclosure of all sixteen items on the Rule 102(3) Addendum,³ the SPO requested the Panel to, *inter alia*, authorise the withholding of that information pursuant to Rules 102(3), 106 and 108 ("Request").⁴ The SPO provided to the Panel Items 185-190 and 192-200.⁵

II. DISCUSSION

3. For the purposes of deciding on the Request, the Panel must be in a position to make an informed determination as to whether the material in question is subject

¹ F00304, Panel, *Order on the Updated Rule 102(3) Detailed Notice* ("Order"), 7 September 2021; F00304/A01, *Annex 1 to the Order on the Updated Rule 102(3) Detailed Notice*, 7 September 2021, confidential and *ex parte*.

² F00307, SPO, *Prosecution Addendum to its Consolidated Rule 102(3) Notice with Confidential Annex 1* ("Rule 102(3) Addendum"), 9 September 2021, strictly confidential and *ex parte*.

³ See F00316, SPO, *Prosecution challenges to disclosure of items in updated Rule 102(3) Notice with one confidential annex and six strictly confidential and ex parte annexes*, ("Request"), 17 September, para. 13.

⁴ Request, para. 56.

⁵ F00316/A01, SPO, *Annex 1 to Prosecution challenges to disclosure of items in updated Rule 102(3) Notice*, confidential; F00316/A02, SPO, *Annex 2 to Prosecution challenges to disclosure of items in updated Rule 102(3) Notice*, strictly confidential and *ex parte*; F00316/A03, SPO, *Annex 3 to Prosecution challenges to disclosure of items in updated Rule 102(3) Notice*, strictly confidential and *ex parte*; F00316/A04, SPO, *Annex 4 to Prosecution challenges to disclosure of items in updated Rule 102(3) Notice*, strictly confidential and *ex parte*; F00316/A05, SPO, *Annex 5 to Prosecution challenges to disclosure of items in updated Rule 102(3) Notice*, strictly confidential and *ex parte*; F00316/A06, SPO, *Annex 6 to Prosecution challenges to disclosure of items in updated Rule 102(3) Notice*, strictly confidential and *ex parte*.

to disclosure. In order to do so, the Panel considers it necessary to receive further information and submissions from the SPO on (i) Item 191 and (ii) Items 195-200.

4. Item 191 is a report which the SPO listed on the Rule 102(3) Addendum,⁶ but which it has not provided to the Panel. The SPO provided to the Panel an extract of three sentences from the report and submitted:

48. As internal work product, the SPO was not obliged to notify the existence of the Report to the Accused. For the reasons outlined above pertaining to Rules 106 and 108, the Trial Panel is requested to not order disclosure of the Report.⁷

5. In order to make an informed decision on whether the document in question constitutes internal work product under Rule 106 of the Rules and whether that document should nevertheless be disclosed in whole or in part pursuant to that Rule, the Panel must be able to inspect the item in its entirety.

6. For that purpose, the Panel orders the SPO to provide Item 191 to the Panel, *ex parte* and strictly confidentially. The SPO may, if it deems necessary, redact from Item 191 the names and contact information (such as telephone numbers or addresses) of any persons prior to providing it to the Panel.

7. With regard to Items 195-200, the Panel notes that the SPO asserts that “all known information to date confirms that the Materials contain no information material to the Entrapment Allegations”.⁸

8. The Panel acknowledges that the SPO’s submissions must be presumed to be made in good faith.⁹ Notwithstanding this, the Panel must properly exercise due diligence with regard to the allegations of entrapment raised by both Defence teams and verify whether any of the information subject to the present application could be material to the Defence’s claim of entrapment. To do so, the Panel

⁶ See also Order, para. 24.

⁷ Request, para. 48.

⁸ Request, para. 20.

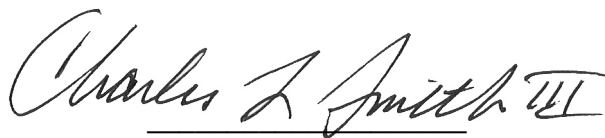
⁹ IA005/F00008, Appeals Chamber Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision*, 29 July 2021, para. 53.

considers it necessary to receive from the SPO the factual basis underpinning the SPO's assertion that Items 195-200 contain no information material to the entrapment allegations. In this respect, the Panel orders the SPO to provide the Panel with the steps and verifications taken to exclude the possibility that these records contain indications that current or former SPO staff or any person acting under the SPO's instruction or control voluntarily disclosed the impugned information to the Accused.

III. DISPOSITION

9. For the foregoing reasons, the Panel hereby **ORDERS** the SPO to provide to the Panel only, in an *ex parte* and strictly confidential filing, by Tuesday 28 September 2021:

- a. Item 191, subject only to redactions in accordance with paragraph 6;
and
- b. the factual basis underpinning its assertion that Items 195-200 contain no information material to the entrapment allegations, in accordance with paragraph 8.



Judge Charles L. Smith, III

Presiding Judge

Dated this Wednesday, 22 September 2021
At The Hague, the Netherlands