



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: 7 September 2021

Language: English

Classification: **Public with confidential and *ex parte* annex**

Order on the Updated Rule 102(3) Detailed Notice

Specialist Prosecutor

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TRIAL PANEL II, pursuant to Articles 21(6) and 40(6)(b) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 102(3), 106 and 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 22 January 2021, the Pre-Trial Judge issued the "Framework Decision on Disclosure of Evidence and Related Matters", setting deadlines for disclosure, including for Rule 102(3) material.¹
2. On 23 February 2021, the Pre-Trial Judge issued a decision on the non-disclosure of documents seized from the Kosovo Liberation Army War Veterans' Association ("KLA WVA") on 8, 17 and 22 September 2020 (respectively, "Batch 1", "Batch 2" and "Batch 3"; and collectively, "Three Batches").²
3. On 1 April 2021, the Pre-Trial Judge set out a revised schedule for the disclosure of Rule 102(3) material and for any requests by the Specialist Prosecutor's Office ("SPO") for the non-disclosure of such material ("Decision on Rule 102(3) Material").³
4. On 14 April 2021, further to the Decision on Rule 102(3) Material, the SPO submitted a consolidated detailed notice of Rule 102(3) material in its possession ("Consolidated Rule 102(3) Notice").⁴
5. On 26 April 2021, the SPO submitted a request for the non-disclosure of certain items included on the Consolidated Rule 102(3) Notice and other material requested by the Defence, including: (i) all material held by the SPO which relates to the origin

¹ F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, para. 85.

² F00141, Pre-Trial Judge, *Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 23 February 2021.

³ F00172, Pre-Trial Judge, *Public Redacted Version of Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters* ("Decision on Rule 102(3) Material"), 1 April 2021.

⁴ F00183/A01, Specialist Prosecutor, *Annex 1 to Prosecution's Consolidated Rule 102(3) Notice*, 14 April 2021, confidential.

and provenance of the material contained within the Three Batches, including material as to the authorship and chain of custody from creation to its arrival at the KLA WVA headquarters (“HQ”), and specifically such material relating to Batch 3 (“Gucati Request B”);⁵ and (ii) all material held by the SPO which relates to attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA HQ and specifically such material relating to Batch 3 (“Gucati Request C”).⁶ The SPO sought for non-disclosure of the latter two categories on the grounds that they were not material to the Defence.⁷

6. On 26 May 2021, the Pre-Trial Judge issued a decision granting the SPO request for non-disclosure and finding that the Gucati Requests B-C were neither relevant to the case nor material for the Defence preparation.⁸

7. On 15 June 2021, further to Defence requests for certification, the Pre-Trial Judge granted leave to appeal his 26 May 2021 decision.⁹

8. On 29 July 2021, the Court of Appeals Panel rendered a decision on the Defence appeals finding that (i) the Pre-Trial Judge erred in finding that the process through which the information arrived to the KLA WVA HQ was not relevant to the case; (ii) based on the information before the Pre-Trial Judge and the SPO’s assertion that it had no relevant material in its possession, the Accused failed to show that the Pre-

⁵ F00190, Specialist Prosecutor, *Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172* (“Initial Non-Disclosure Request”), 26 April 2021, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*, paras 32(a), 33-34, 36-40, 42(d). *See also* F00190/RED, Specialist Prosecutor, *Public Redacted Version of Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172*, 18 May 2021.

⁶ Initial Non-Disclosure Request, para. 32(b), 33-40, 42(d).

⁷ Initial Non-Disclosure Request, para. 36.

⁸ F00210, Pre-Trial Judge, *Public Redacted Version of Decision on Prosecution Requests and Challenges Pursuant to F00172*, 26 May 2021, paras 62-64.

⁹ F00235, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on the Gucati Requests B-C*, 15 June 2021.

Trial Judge erred in finding that the information requested was not material to the preparation of the Defence.¹⁰

9. On 15 July 2021, the President assigned Trial Panel II (“Panel”) to the present case upon transmission of the case file,¹¹ and on 16 July 2021, the Pre-Trial Judge transmitted the case file to the Panel pursuant to Rule 98 of the Rules.¹²

10. On 1 September 2021, the Panel, taking in consideration the findings of the Court of Appeals Panel in its 29 July 2021 decision, ordered the SPO to, *inter alia*, submit, by 6 September 2021, an updated Rule 102(3) notice listing material in its possession falling under the Gucati Requests B-C.¹³ On the same day, the SPO requested to file an application for protective measures to be applied to the Updated Rule 102(3) Notice.¹⁴

11. On 2 September 2021, the Panel heard oral submissions from both Parties on the updated Rule 102(3) notice,¹⁵ including submissions from the SPO in an *ex parte* session. Further to those submissions, the Panel ordered the SPO to provide, by 3 September 2021, 12:00 hours, to the Panel only: (i) an un-redacted draft updated Rule 102(3) notice providing detailed notice of the relevant material, enabling a determination of materiality by the Defence; and (ii) a proposed redacted version of the same list (“Order”).¹⁶

12. On 3 September 2021, the SPO filed a draft, un-redacted updated Rule 102(3) notice (“Draft Updated Rule 102(3) Notice”) and a proposed redacted version thereof.¹⁷

¹⁰ IA005-F00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* (“Appeal Decision on Disclosure”), 29 July 2021.

¹¹ F00263, President, *Decision Assigning Trial Panel II*, 15 July 2021, public.

¹² F00265, Pre-Trial Judge, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021, public.

¹³ Oral Order on updated Rule 102(3) Notice, 1 September 2021, Draft transcript pages 442-443.

¹⁴ Trial Preparation Conference, 1 September 2021, Draft transcript page 443.

¹⁵ Trial Preparation Conference, 2 September 2021, Draft transcript pages 560-600.

¹⁶ Oral Order Regarding SPO Rule 102(3) List, 2 September 2021, Draft transcript page 638, line 6 to page 638, line 18.

¹⁷ F00296, Specialist Prosecutor, *Prosecution Proposed Redactions to Rule 102(3) Notice*, 3 September 2021, with Annexes 1-2, strictly confidential and *ex parte*.

II. DISCUSSION

A. GENERAL CONSIDERATIONS REGARDING THE SPECIALIST CHAMBERS' DISCLOSURE REGIME

13. Disclosure before the Specialist Chambers ("SC") is regulated by Articles 21(6), 35(2)(e) and 40(6)(b) of the Law and Rules 102 *et seq* of the Rules. It is also regulated, indirectly, by Articles 2, 3 and 21 of the Law and relevant provisions of the Kosovo Constitution and the European Convention on Human Rights,¹⁸ insofar as they provide for the right of the Accused to a fair trial and associated protections.

14. Disclosure constitutes an important element of the overall fairness of proceedings. It requires that the SPO treat its disclosure obligations as a genuine priority and as one of its core responsibilities. Because of the importance of disclosure to the fairness and expeditiousness of proceedings, the Panel will treat any attempt by a Party to evade its disclosure obligations as a matter of significant gravity that will call for a prompt and effective remedy.

15. The Panel emphasises that the SC disclosure regime is unlike that of international(ised) criminal tribunals.¹⁹ In particular, Article 21(6) of the Law makes it clear that the SC disclosure regime is based on a presumption of disclosure with limited exceptions set out in the Rules.²⁰ Furthermore, it is for the SPO rather than the Defence to establish the existence of an exception to its general obligation of disclosure.

16. The regime of disclosure has been described by both the Pre-Trial Judge and the Court of Appeals Panel as a three-step system.²¹ The first of these – the provision of a "detailed notice" of the material in possession of the SPO – precedes the process of disclosure. This step constitutes a practical and procedural step by which the SPO

¹⁸ Article 31 Kosovo Constitution; Article 6 European Convention on Human Rights.

¹⁹ Appeal Decision on Disclosure, paras 39-40; Decision on Rule 102(3) Material, para. 23, fn. 29.

²⁰ *See also*, reflecting the same logic, Rule 108 of the Rules.

²¹ Appeal Decision on Disclosure, para. 39; Decision on Rule 102(3) Material, para. 22

informs the Defence of what material is in its possession so as to place the Defence in a position to: (i) determine in a meaningful way which of the items listed in the notice could be material to its case; and (ii) make a disclosure request to the SPO for any such items.

17. In relation to the first step, the Panel notes that neither the Law nor the Rules qualify or restrict the type and categories of material and information in relation to which the Prosecution must give detailed notice to the Defence. Instead, they refer to “all” or “any” material and relevant evidence or facts in possession of the SPO. The introduction of an element of “relevance” by the Pre-Trial Judge²² – endorsed by the Appeals Chamber²³ – could not have the effect of amending the Law or the Rules nor add a requirement not foreseen in those instruments. Instead, it signifies that material in relation to which no reasonable claim of relevance could be made (*e.g.*, material pertaining to another case) does not have to be subject to the duty of notice. This requirement of “relevance” cannot and must not, however, be used by the SPO as a means to distort the logic of the regime of disclosure. It is for the Defence to determine materiality in the first place with the possibility given to the SPO then to challenge that claim. In other words, the SPO’s evaluation of “relevance” must necessarily be broad, erring on the side of disclosure, and account for the nature of the case put forward by the Defence.

18. The fact that the SPO does not agree with or accept a part of the Defence case is, therefore, no ground to take the view that the material in question is not “relevant” and need not be notified. The opposite is in fact true: the SPO is expected to carefully consider the arguments advanced by the Defence to ensure that all information in relation to which a reasonable claim of relevance could be made is included in the Rule 102(3) notice.

²² Decision on Rule 102(3) Material, para. 23.

²³ Appeal Decision on Disclosure, para. 44.

19. The Panel notes that the Rules do not specifically provide for the possibility of redactions being made to the detailed notice which the SPO must give to the Defence. The Panel considers, however, that such redactions may be authorized where it is strictly necessary to preserve the possibility for the SPO to later seek measures pursuant to Rules 105, 107 or 108 of the Rules in respect of material sought by the Defence. Redactions must be kept to what is absolutely necessary for that limited purpose and must not deprive the Defence of the ability to make an informed determination on materiality in respect of the listed documents. Furthermore, any such redaction is subject to the prior authorisation of a Judge or the Panel.

20. Once the Defence is placed in a position to determine materiality based on the Rule 102(3) notice, the second step of the process comes into play, *i.e.*, the Defence asks the SPO to disclose the relevant items. This triggers the third step of the process, whereby the SPO can challenge before the Panel the claim of materiality or seek non-disclosure of otherwise disclosable material pursuant to Rules 105, 107 or 108 of the Rules. Any such challenge should, however, account for the importance of disclosure to the fairness of proceedings and for the fact that the regime in force before the Specialist Chambers is one that is based on a presumption of disclosure of relevant material.

21. The Panel also notes that Rule 102 of the Rules does not contain an exception to disclosure for internal work product in accordance with Rule 106 of the Rules. That is because, as apparent from Rule 106, such material is not subject to disclosure (or notification) in the first place. That being said, the SPO's interpretation of the notion of "internal work product" must be consistent with the letter and the spirit of the Rules. In particular, classification as "internal work product" should not serve to circumvent the SPO's obligation to disclose information not amounting to "internal work product".

22. Parties should therefore ensure that their interpretation of the disclosure provisions (including Rule 106 of the Rules) is fully consistent with the purpose they serve and do not diminish their effectiveness in promoting fair proceedings.

B. DRAFT UPDATED RULE 102(3) NOTICE AND RELEVANT MATERIAL

23. Having reviewed the Draft Updated Rule 102(3) Notice and the redactions proposed by the SPO, the Panel finds that documents nos. 185-190 and 192-200 appear, at least *prima facie*, to be subject to disclosure under Rules 102 and/or 103 of the Rules.

24. As regards document no. 191, the SPO asserts in footnote 2 of its Draft Updated Rule 102(3) Notice that the document is “internal work product”. As pointed out above, material that qualifies as work product under Rule 106 of the Rules is not subject to disclosure or notification. That being said, the Panel is not in a position to determine whether Rule 106 applies to this particular item. Should the Defence seek disclosure of this item, the Panel will not regard the fact that the SPO has included it in the Draft Updated Rule 102(3) Notice as a waiver of the SPO’s claim that it constitutes internal work product and should not be disclosed.

25. As regards the proposed redactions to the Draft Updated Rule 102(3) Notice, the Panel is not satisfied that the Defence would be in a position to make a fair and informed request for disclosure based on the proposed redactions. The extensive redactions proposed by the SPO are likely to result in a generic request from the Defence to inspect all documents so as to enable it to acquaint itself with their content. Therefore, the Panel will authorise redactions to the limited extent and with the edits indicated in Annex 1 of this Order.

III. DISPOSITION

26. Based on the above, pursuant to Articles 21(6) and 40(6)(b) of the Law and Rules 102 *et seq* of the Rules, the Trial Panel hereby **ORDERS**:

- a. the SPO to transmit, by **9 September 2021**, a redacted updated Rule 102(3) notice to the Defence, as set out in Annex 1;
- b. the Defence not to make public the redacted updated Rule 102(3) notice or any parts thereof and to guarantee the confidential nature of all information contained therein;
- c. the Defence to indicate to the SPO, by **13 September 2021**, which items among those listed in the redacted updated Rule 102(3) notice they seek to have access to by way of disclosure or inspection;
- d. the SPO to seize the Panel, by **17 September 2021**, with any request for non-disclosure of any of the requested material pursuant to Rules 105, 107 and/or 108 of the Rules or any associated request based on Rule 106;
- e. the Defence to respond to any such application by **24 September 2021**; and
- f. the SPO to disclose to the Defence, by **17 September 2021**, any of the material listed in the redacted updated Rule 102(3) notice and requested by the Defence that is not subject to requests for non-disclosure by the SPO.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 7 September 2021
At The Hague, the Netherlands