



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: 7 October 2021

Language: English

Classification: Confidential

Order for an Addendum to the Updated Rule 102(3) Detailed Notice

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21(6), 40(2) and 6(b) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 102(3) 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 Specialist Prosecutor’s Office (“SPO”) filed a redacted updated Rule 102(3) notice (“Updated Rule 102(3) Notice”).²
2. On 29 September 2021, the SPO filed a transmission of an official note on a strictly confidential and *ex parte* basis (“Transmission”).³
3. On 4 October 2021, the Panel held an *ex parte* hearing only with the SPO to hear further submissions on the Transmission.⁴ The Defence was notified that such a hearing would take place but was not made privy of the nature of the material subject to that procedure.⁵

II. APPLICABLE LAW

4. Article 21(6) of the Law provides that all material and relevant evidence or facts in possession of the SPO, which are for or against the Accused shall be made available to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

¹ F00304, Panel, *Order on the Updated Rule 102(3) Detailed Notice* (“Rule 102(3) Order”) with confidential and *ex parte* annex, 7 September 2021.

² F00307, Specialist Prosecutor, *Prosecution Addendum to its Consolidated Rule 102(3) Notice* with confidential annex, 9 September 2021.

³ F00337, Specialist Prosecutor, *Prosecution Transmission of Official Note of Contact and Related Request*, 29 September 2021.

⁴ F00346, Panel, *Scheduling Order for Ex Parte Hearing*, 1 October 2021, confidential.

⁵ *Ibid.*

5. Rule 102(3) of the Rules provides that the Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession.

6. The Panel recalls that the regime of disclosure under Rule 102(3) of the Rules is a three-step system.⁶ The first of these – the provision of a “detailed notice” of the material in possession of the SPO – precedes the process of disclosure.⁷ This step constitutes a practical and procedural step by which the SPO 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.⁸

III. DISCUSSION

7. The Panel notes that the Transmission contains information recently provided by an individual to the SPO about alleged events connected to the present proceedings. At this juncture, the Panel is not in a position to assess whether the Transmission contains any information falling under the scope of Rule 103 of the Rules. The Panel finds, however, that Annex 1 of the Transmission is subject to the requirement under Rule 102(3) of the Rules to provide detailed notice to the Defence of any material and evidence in the SPO’s possession.

8. The Panel emphasises that the first step of the disclosure regime under Rule 102(3) of the Rules does not involve any assessment of reliability of the material or evidence in the SPO’s possession. “Material” can refer to any information, idea, data or document emanating from a witness or another source, regardless of whether that

⁶ Rule 102(3) Order, para. 16; IA005-F00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision*, 29 July 2021, para. 39; F00172, Pre-Trial Judge, *Public Redacted Version of Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, para. 22.

⁷ Rule 102(3) Order, para. 16.

⁸ Rule 102(3) Order, para. 16.

information has any factual basis.⁹ The source, accuracy, reliability or subjectivity of information in the SPO's possession may inform the admissibility of the relevant evidence or its weight if admitted, but should not inform a decision on whether to give notice to the Defence of such material under Rule 102(3) of the Rules. The Rules do not provide for the possibility for the SPO to refrain from giving notice of information in its possession on grounds of reliability or credibility.

9. The Panel notes that the requirement of notice foreseen by Rule 102(3) of the Rules enables the Defence to seek disclosure of information thought to be material to its case. At the same time, it ensures that a Rule 108 decision not to disclose evidence deemed material under Rule 102(3) is subject, as far as possible, to an adversarial process in which the competing interests of both Parties can be evaluated.¹⁰

10. In the present instance, the SPO's suggestion that the material contained in the Transmission does not constitute "information" for the purpose of disclosure has no merit. First, the SPO cited no authority to support its interpretation of "information". Secondly, such a suggestion is contradicted by the very nature of the material in question, its origin, and the circumstances in which it was gathered. Moreover, as regards the content of the material contained in the Transmission, the aforementioned Rules do not require the SPO to satisfy itself that the information is true before having to give notice of it to the Defence. Rather, the SPO's notice and disclosure obligation under Rule 102 of the Rules applies to the material contained in the Transmission even if the SPO considers it to be false or misleading. The underlying principle of the disclosure regime applicable before this jurisdiction is that information must be disclosed unless an exception is made to it pursuant to Rules 105, 106, 107 or 108 of the Rules.

⁹ See B. A. Garner (ed.), *Black's Law Dictionary*, 11th edition, 2019, defining "material" as "[i]nformation, ideas, data, documents, or other things that are used in reports, books, films, studies, etc.".

¹⁰ The Panel is mindful that under Rule 108(1) of the Rules, the SPO may make an application confidentially and *ex parte*. However, a request for a decision under Rule 108 for the non-disclosure of evidence deemed material under Rule 102(3) would typically be privy to the Defence, even if only in part.

11. In light of the above, the Panel finds it appropriate to order the SPO to submit a further addendum to its Updated Rule 102(3) Notice, listing the document contained in Annex 1 of the Transmission and providing detailed notice of its content so as to enable the Defence to: (i) determine in a meaningful way whether this document could be material to its case; and, if so, (ii) make a disclosure request to the SPO. The detailed notice need not provide information identifying the individual who provided the material contained in the Transmission if doing so could put the individual's security at risk and undermine the possibility for the SPO to later seek protective measures and/or redactions in respect of that information should disclosure be requested and/or ordered.

IV. DISPOSITION

12. For these reasons, the Trial Panel hereby **ORDERS**:

- a. the SPO to transmit, by **13 October 2021**, an addendum to the Updated Rule 102(3) Notice to the Defence ("Addendum");
- b. the Defence not to make public the Addendum or any parts thereof and to guarantee the confidential nature of all information contained therein;
- c. the Defence to indicate to the SPO, by **15 October 2021**, whether they seek access to the document listed in the Addendum;
- d. the SPO to seize the Panel, by **22 October 2021**, with any request for non-disclosure of the document pursuant to Rule 108 of the Rules;

- e. the Defence to respond to any such application by **29 October 2021**; and
- f. the SPO to reply, if it so wishes, by **4 November 2021**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Thursday, 7 October 2021
At The Hague, the Netherlands