



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 22 October 2021

Language: English

Classification: Public

Public redacted version of

**Prosecution challenge to disclosure and proposed Rule 102(3) Notice
counterbalancing measures**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Item 201 selected by the Gucati Defence and Haradinaj Defence from the 13 October 2021 update to the Rule 102(3) Notice ('Updated Rule 102(3) Notice Addendum')¹ – an official note reflecting a contact with a witness ('Note')² - is not material to the preparation of the defence. If the Note is disclosed, it would cause grave witness security risks and irremediably prejudice sensitive, ongoing Specialist Prosecutor's Office ('SPO') investigations into obstruction of justice. Such investigations are crucial to the ability of the KSC and SPO to effectively undertake their mandates. For this and the other reasons set out in more detail below, pursuant to the Updated Rule 102(3) Notice Order³ and with regard to Articles 23, 35 and 40 of the Law⁴ and Rules 102-03 and 108 of the Rules,⁵ this item selected by the Gucati Defence⁶ and Haradinaj Defence⁷ should not be disclosed.

2. Further, following the *ex parte* hearing of 21 October 2021, the SPO proposes counterbalancing measures for non-disclosure of the Note, as well as the CDRs and Report from the Rule 102(3) Notice Addendum.⁸

¹ Prosecution update to Rule 102(3) Notice Addendum, KSC-BC-2020-07/F00361, 13 October 2021, Confidential ('Updated Rule 102(3) Notice Addendum').

² KSC-BC-2020-07/F00337/A01 (103283-103288).

³ Order for an Addendum to the Updated Rule 102(3) Detailed Notice, KSC-BC-2020-07/F00354, 7 October 2021, Confidential ('Updated Rule 102(3) Notice Order').

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁶ Annex 1.1.

⁷ Annex 1.2.

⁸ Annex 1 to Prosecution addendum to its Consolidated Rule 102(3) Notice, 9 September 2021, KSC-BC-2020-07/F00307/A01, Confidential ('Rule 102(3) Notice Addendum'), Item 191 ('Report'), Items 195-200 (call data records, or 'CDRs').

II. SUBMISSIONS

A. NON-DISCLOSURE OF THE NOTE

3. The Note is similar in kind to the other items on the Rule 102(3) Notice Addendum whose non-disclosure is pending a Trial Panel determination. The SPO incorporates by reference its procedural background, materiality, and Rule 108 submissions set out previously.⁹ The present request will focus on the disclosure arguments particular to the Note.

4. The Note is an official note of a contact with witness [REDACTED] [REDACTED]. [REDACTED]. A summary of the Note is as follows:

- [REDACTED]. [REDACTED]. [REDACTED].
- [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].
- [REDACTED]. [REDACTED]. [REDACTED].
- [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

5. In relation to its three-step disclosure framework,¹⁰ the Trial Panel has determined 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'.¹¹ But the Updated Rule 102(3) Notice Order made no clear ruling on whether the speculative nature of evidence can affect whether the information is material to the preparation of the defence under the *second* step of the Rule 102(3) disclosure framework.

⁹ Corrected version of Prosecution challenges to disclosure of items in updated Rule 102(3) Notice, KSC-BC-2020-07/F00316/COR, 17 September 2021, Strictly confidential and *ex parte* (with seven annexes) ('Rule 102(3) Notice Addendum Challenge'), paras 2-13 (procedural history), 14-21 (on materiality), 22-36 (on Rule 108(1)(a)).

¹⁰ Order on the Updated Rule 102(3) Detailed Notice, KSC-BC-2020-07/F00304, 7 September 2021 (with annex), KSC-BC-2020-07/F00304, paras 16-20.

¹¹ Updated Rule 102(3) Notice Order, KSC-BC-2020-07/F00354, para.8 (emphasis added).

6. Such an argument would not traverse the Trial Panel's order, and in fact could not, given that the sequencing of the statutory framework gives the SPO the right to challenge the materiality of items selected from the Rule 102(3) Notice.¹² In this regard, it is well recognised that information 'material to the preparation of the defence' must hold out a real, as opposed to a fanciful, prospect of providing a lead on possibly relevant evidence or new issues.¹³ Fanciful information should likewise fall outside the ambit of Rule 103. The quality of the information in question also affects what counterbalancing measures are necessary, if any, under the third step of the framework.

7. The remark in the Note about [REDACTED] is weak even for speculation. [REDACTED]¹⁴ [REDACTED]. [REDACTED]. [REDACTED].¹⁵ [REDACTED] [REDACTED] entirely without factual basis, when asked he admitted this was the case.

8. Such information is not of high enough quality to prove or disprove any fact at issue in this case to even a *prima facie* standard, meaning it cannot be material to the defence's preparation. Absent further information, such information cannot reasonably be disclosable. Further, allowing bald assertions to justify disclosure also

¹² See Rule 102(3) Notice Addendum Challenge, KSC-BC-2020-07/F00316/COR, paras 14-15.

¹³ ICTY, *Prosecutor v. Karadžić*, Decision on Accused's Motion to Compel Inspection of Witness Material (Christian Nielson) and Prosecution's Motion to Reclassify Public Motion, IT-95-5/18-T, 7 July 2011, Para.6; *Prosecutor v. Stanišić and Simatović*, Decision on Stanišić Request for Order of Disclosure of Materials Related to the Admissibility of Expert Report of Reynaud Theunens, IT-03-69-T, 11 March 2011, para.12; ICTY, *Prosecutor v. Delalić et al.*, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, IT-96-21-T, 27 September 1996; ICC, *Prosecutor v. Al Hassan*, Public redacted version of 'Decision on the Defence request to terminate the proceedings and related requests', ICC-01/12-01/18-1009-Red, 24 August 2020 (redacted version notified 29 October 2020), para.37 ("the Chamber notes the Defence's submission that the items sought "may be evidence of concerted action between the Prosecution and the [REDACTED]", in as far as they 'demonstrate a link and ongoing connection between the factual basis for Mr. Al Hassan's arrest and detention at the DGSE, and the investigations conducted by the [...] Prosecution against Mr. Al Hassan' and that they "may be evidence of failure to comply with 'rule of speciality'" under Article 101(1) of the Statute. In the view of the Chamber, the suggested materiality is speculative and hypothetical').

¹⁴ [REDACTED].

¹⁵ [REDACTED].

allows for bad faith manipulation of the disclosure framework, as this would allow for third parties to prompt SPO disclosure for Accused they support by sharing guesses on sensitive matters they know nothing about. [REDACTED].¹⁶

9. All the SPO's pending submissions on disclosure prejudicing ongoing and future investigations¹⁷ apply to the Note as well. [REDACTED]. [REDACTED].

10. Disclosure of the note also causes grave risks to the security [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

B. COUNTERBALANCING MEASURES

11. Pursuant to the Trial Panel's direction at the *ex parte* hearing, the SPO provides a consolidated regime of countermeasures for the Note, CDRs, and Report. The SPO's position remains that no disclosure is required and no counterbalancing measures are necessary, for all the reasons set forth by the Prosecution in its written and oral submissions on this matter.¹⁸ These proposals are made to ensure beyond all doubt that this trial will proceed in a fair and expeditious fashion.

12. The Trial Panel expressed on several occasions during the *ex parte* hearing its interest in bringing this matter to a close through the provision to the Defence of information regarding the SPO's internal investigation. Accordingly, the Prosecution consents to the following counterbalancing measures only in the interest of resolving this matter and on the understanding that no further disclosures will be required, [REDACTED], and that these measures will not themselves be used as a basis to justify further disclosure. The proposals below are sufficient to meet the legitimate needs of the defence.

¹⁶ [REDACTED].

¹⁷ Rule 108(1)(a).

¹⁸ See especially Rule 102(3) Notice Addendum Challenge, KSC-BC-2020-07/F00316/COR, paras 14-48.

1. Note

13. The SPO proposes [REDACTED]. [REDACTED]. [REDACTED].

2. CDRs

14. Revealing the identifying information of the persons to whom the CDRs belong reveals the potential subjects or targets of the SPO's investigations, and redacting this information would reduce the CDRs to a string of phone numbers without context. [REDACTED].¹⁹ The information actually required to understand the meaning of these CDRs is the SPO's analysis of their contents. As a counterbalancing measure to not disclosing the CDRs, the SPO provides the following summary of its analysis:

[REDACTED]. [REDACTED]. [REDACTED].

[REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

[REDACTED].²⁰ [REDACTED].

[REDACTED].

3. Report

15. The sensitivity of the Report concerns revealing [REDACT]. The SPO has an investigative imperative to not reveal the information set out in the Report, including: [REDACTED]. The necessary and proportionate redactions needed to remove such information from the Report would render the remainder unintelligible.

16. Therefore, the SPO proposes to provide extracts of the Report setting out [REDACTED]:

[REDACTED]

[[REDACTED]]

[REDACTED]. [REDACTED]. [REDACTED].

¹⁹ Rule 102(3) Notice Addendum Challenge, KSC-BC-2020-07/F00316/COR, para.30.

²⁰ [REDACTED]. [REDACTED].

[REDACTED]

[REDACTED] [.]

[REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]²¹ [REDACTED].

[REDACTED]

[REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

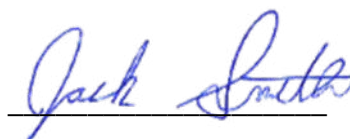
III. CLASSIFICATION

17. This filing is submitted strictly confidential and *ex parte* in order to protect sensitive and ongoing SPO investigations and witnesses. Annex 1 is submitted confidentially for these same reasons. Confidential and public redacted versions of this request will be filed.

IV. RELIEF REQUESTED

18. Because the information sought is immaterial and falls under Rule 108, the SPO requests that the Trial Panel deny disclosure of the Note. In the alternative, the SPO requests that the counterbalancing measures indicated in Section 0.B be adopted for the Note, as well as for the CDRs and Report.

Word count: 1496



Jack Smith

Specialist Prosecutor

Friday, 22 October 2021

At The Hague, the Netherlands

²¹ [REDACTED].