



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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 1 November 2021

Language: English

Classification: Confidential

**Prosecution consolidated reply to responses to challenge to disclosure and
proposed counterbalancing measures**

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I. SUBMISSIONS

1. The Specialist Prosecutor's Office ('SPO') hereby replies to the Gucati Response¹ and Haradinaj Response² to the Request³ concerning the SPO's challenge to disclosure of Item 201 from the 13 October 2021 update to the Rule 102(3) Notice⁴ and proposed counterbalancing measures. This reply concerns three new issues⁵ raised by the Gucati Defence and Haradinaj Defence.

2. Preliminarily, there is no basis for ordering the reclassification of the *ex parte* status conference referenced in the Request.⁶ The SPO referenced this hearing in a manner compliant with the Trial Panel's Conduct of Proceedings Decision,⁷ noting that the general subject matter of the hearing was publicly announced in the order convening the *ex parte* hearing.⁸ The classification of this status conference should be maintained, and the Gucati Defence arguments on this point should be dismissed.

¹ Response to 'Public Redacted Version of Prosecution Challenge to Disclosure and Proposed Rule 102(3) Counterbalancing Measures' and Ancillary Application, KSC-BC-2020-07/F00407, 29 October 2021, Confidential ('Gucati Response').

² Defence Response to 'Prosecution challenge to disclosure and proposed Rule 102(3) Notice counterbalancing measure', KSC-BC-2020-07/F00404, 27 October 2021, Confidential ('Haradinaj Response').

³ Confidential redacted version of Prosecution challenge to disclosure and proposed Rule 102(3) Notice counterbalancing measures, KSC-BC-2020-07/F00389/CONF/RED, 22 October 2021, Confidential (with annex) ('Request').

⁴ Prosecution update to Rule 102(3) Notice Addendum, KSC-BC-2020-07/F00361, 13 October 2021, Confidential.

⁵ Rule 76 of the Rules Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁶ *Contra* Gucati Response, KSC-BC-2020-07/F00407, paras 24-26.

⁷ See Annex to Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, 17 September 2021 ('Conduct of Proceedings Decision'), para.4.

⁸ Scheduling Order for *Ex Parte* Hearing, KSC-BC-2020-07/F00382, 19 October 2021 (with annex).

A. REJECTING DISCLOSURE REQUESTS PREMISED ON FANCIFUL ARGUMENTS IS FULLY COMPLIANT WITH THE ECHR⁹

3. The entrapment jurisprudence of the ECtHR requires that the allegations must not be ‘wholly improbable’.¹⁰ This threshold is a pre-requisite.¹¹ The disclosure of sensitive information on the SPO’s internal processes and unrelated investigations would only be warranted if the Defence allegations were not wholly improbable.

4. Both Defence teams misleadingly quote the Trial Panel in indicating that the credibility and reliability of evidence is not relevant when assessing whether information is material to the preparation of the defence.¹² The quality of the information was found not to be relevant when listing materials in the Rule 102(3) Notice, but if entrapment is wholly improbable, then disclosure is unjustified under the plain language of the Rules and the ECtHR. Pure speculation cannot be material to the preparation of the defence.

5. It is recalled that, as defined by the ECtHR, police incitement occurs when the officers involved – whether members of the security forces or persons acting under their instructions – do not confine themselves to investigating criminal activities in an essentially passive manner, but ‘exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute the prosecution’.¹³ The conduct of the Accused in the present case is inherently

⁹ *Contra* Gucati Response, KSC-BC-2020-07/F00407, paras 7-10; Haradinaj Response, KSC-BC-2020-07/F00404, paras 14-17, 36-42.

¹⁰ Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021, para.52.

¹¹ ECtHR [GC], *Ramanauskas v. Lithuania*, 74420/01, 5 February 2008, para. 70 (emphasis added: ‘[i]t falls to the prosecution to prove that there was no incitement, *provided that the defendant’s allegations are not wholly improbable*’).

¹² Gucati Response, KSC-BC-2020-07/F00407, para.8; Haradinaj Response, KSC-BC-2020-07/F00404, para.13. See Request, KSC-BC-2020-07/F00389/CONF/RED, paras 5-6, *citing* Order for an Addendum to the Updated Rule 102(3) Detailed Notice, KSC-BC-2020-07/F00354, 7 October 2021, Confidential, para.8.

¹³ ECtHR [GC], *Ramanauskas v. Lithuania*, 74420/01, 5 February 2008, para.55.

incompatible with any police incitement possibly taking place.¹⁴ As the 'wholly improbable' threshold is not met in the present proceedings, the disclosure of sensitive information on the SPO's internal processes and unrelated investigations is unwarranted.

B. W04841 AND W04842'S TESTIMONY ADD NOTHING TO JUSTIFY DISCLOSURE¹⁵

6. The question of whether or not the Entrapment Allegations are 'wholly improbable' – such as to justify disclosure - requires a limited assessment of whether the evidence presented in the case affects the wholly improbable nature of an entrapment defence. No factfinding beyond this procedural question is required, even on a preliminary basis.

7. On any reasonable reading of W04841 and W04842's evidence, no such information exists.

8. W04841 made it clear she is unaware of the investigation into the process by which protected information in this case got to the KLA War Veterans Association ('KLA WVA').¹⁶ That the Deputy Specialist Prosecutor authorised providing her with the internal document most closely matching Batch 3¹⁷ provides no support for the proposition that the SPO incited or entrapped the Accused ('Entrapment Allegations').¹⁸ The authorisation in question being given by the Deputy Specialist Prosecutor reflects that access was being granted to an item from a separate and sensitive investigation pertaining to the process by which the batches arrived at the KLA WVA. That the SPO's senior leadership had this document and authorised access

¹⁴ See Confidential redacted version of Prosecution challenges to disclosure of items in updated Rule 102(3) Notice, KSC-BC-2020-07/F00316/CONF/RED, 17 September 2021, Confidential, para.17. See also Transcript, 27 October 2021, pp.1641-42.

¹⁵ *Contra* Gucati Response, KSC-BC-2020-07/F00407, paras 11-15.

¹⁶ Transcript, 21 October 2021, p.1249.

¹⁷ The Indictment concerns three batches of confidential material related to SITF/SPO investigations, the third of which is 'Batch 3'.

¹⁸ *Contra* Gucati Response, KSC-BC-2020-07/F00407, para.11.

to it, and directed the investigation into the acts of the KLA WVA from the beginning, also cuts against claims that the investigation was a 'sham' and the possibility of a 'rogue agent' entrapping the Accused. Reading the Entrapment Allegations into this evidence is entirely fanciful.

9. W04842's testimony is ongoing, but he gave clear and direct denials as to whether he had any information supporting the Entrapment Allegations.¹⁹ The Gucati Defence's insinuation that W04842's answers are somehow evasive or incomplete cannot reasonably withstand scrutiny.

C. THE COUNTERBALANCING MEASURES PROPOSED ARE NOT HOLDING THE TRIAL PANEL 'TO RANSOM'²⁰

10. The SPO's proposed counterbalancing measures are calibrated to provide the Defence with further information, while also protecting competing interests in favour of non-disclosure. For the SPO to volunteer such measures only to have them serve as stepping stones for further disclosure defeats this balancing exercise.

11. It is the Trial Panel's prerogative to rule on the countermeasures proposed.²¹ The SPO's qualification should only to be understood as an acknowledgement of the scope of counterbalancing information to which the SPO is in a position to consent, and nothing more.

II. Classification

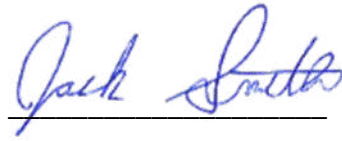
12. The present submission is filed confidentially in accordance with Rule 82(4). The SPO has no objection to reclassifying this filing as public.

¹⁹ Transcript of Hearing, 28 October 2021, p.1756.

²⁰ *Contra* Haradinaj Response, KSC-BC-2020-07/F00404, paras 24-26.

²¹ Rule 108.

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Monday, 1 November 2021

At The Hague, the Netherlands