KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA 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 Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Fidelma Donlon
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Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect

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TRIAL PANEL II ("Panel"), pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 3 November 2021, the Panel issued its decision on the Specialist Prosecutor's challenges to disclose items in the Rule 102(3) notice ("Impugned Decision").[1]

2. On 5 November 2021, Counsel for the Specialist Prosecutor's Office ("SPO") informed the Panel and the Defence that the SPO would be filing a request for leave to appeal the Impugned Decision ("Request").[2] Counsel for the SPO also indicated that a request for the suspensive effect of the Impugned Decision would also be filed ("Suspensive Effect Request").[3] On the same day, the Panel orally extended the deadline for the disclosure set out in the Impugned Decision to 8 November 2021 ("Oral Order on Extension of Disclosure Deadline").[4]

3. Later that day, the SPO filed its Request, including its Suspensive Effect Request.[5]

4. On the same day, the Panel issued an agenda for the 8 November 2021 hearing, informing the Parties that, to facilitate the expeditious conduct of the proceedings, it would hear oral submissions in response from the Defence to the Request and in reply from the SPO.[6]

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[1] F00413, Panel, *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice* ("Impugned Decision"), 3 November 2021, confidential.
[2] Draft Transcript, 5 November 2021, pp 1962-1963.
[3] Draft Transcript, 5 November 2021, p. 1963.
[4] Oral Order Extending Rule 102(3) Disclosure Deadline, 5 November 2021, Transcript, p. 1968.
[5] F00420, Specialist Prosecutor, *Prosecution Requests for Leave to Appeal Decision KSC-BC-2020-07/F00413 and Suspensive Effect* ("Request"), 5 November 2021, confidential.
[6] F00417, Panel, *Agenda for the 8 November 2021 Hearing*, 5 November 2021, para. 4(a).

5. On 8 November 2021, the Panel heard oral submissions on the Request and associated Suspensive Effect Request.[7]

II. SUBMISSIONS

6. The SPO submits that the Impugned Decision results in ordering disclosure to enable the Defence to investigate its claim that the SPO entrapped the Accused ("Entrapment Allegations"), thereby granting the Defence access to sensitive information in contravention of the statutory framework.[8] The SPO seeks leave to appeal the Impugned Decision in respect of four issues (collectively, "Issues"), namely:

(i) whether, as a matter of law, an assessment of materiality to the preparation of the Defence can be done in the abstract or whether it requires assessing materiality in relation to the facts and circumstances of the case ("First Issue");

(ii) whether information can be disclosed solely in relation to allegations of entrapment without assessing whether the entrapment allegations advanced by the Defence are wholly improbable ("Second Issue");

(iii) whether, as a matter of law, disclosure can be ordered to show a failure to investigate entrapment where underlying allegations of entrapment are unsubstantiated and wholly improbable to the point of being fanciful ("Third Issue"); and

(iv) whether the SPO's proposed countermeasures can be exceeded to assist an investigation into whether the SPO investigated a wholly improbable entrapment claim ("Fourth Issue").[9]

[7] Draft Transcript, 8 November 2021, pp 1974-2029.
[8] Request, para. 1.
[9] Request, para. 2.

7. The SPO requests suspensive effect of the part of the Impugned Decision ordering these further disclosures until determination of the Request, and any potential resulting appeals.[10]

8. The SPO submits that the Issues all qualify as appealable issues[11] and significantly affect the fair and expeditious conduct of the proceedings.[12] The SPO avers that granting leave to appeal would materially advance the proceedings.[13]

9. The Gucati Defence opposes the Request and submits that it does not meet the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules.[14] The Gucati Defence argues that the Issues are not "appealable issues", as they are hypothetical and abstract, and merely amount to disagreeing with the Impugned Decision.[15] The Gucati Defence also avers that the Issues are based on the false premise that the Panel assessed the materiality of the items discussed in the Impugned Decision in the abstract.[16] The Gucati Defence submits that the Panel provided specific reasons for its finding of materiality in consideration of the context and circumstances of the case.[17] The Gucati Defence further submits that Rules 102 and 103 of the Rules do not require the Defence to establish a *prima facie* showing of a defence.[18]

10. The Haradinaj Defence also opposes the Request and joins the submissions made by the Gucati Defence.[19] The Haradinaj Defence submits that the Request illustrates the SPO's conduct seeking to circumvent its disclosure obligations and positioning itself as an arbiter of the scope of disclosure and of materiality.[20] The Haradinaj

[10] Request, para. 6 *referring to* Impugned Decision, para. 95(b).
[11] Request, paras. 7-22.
[12] Request, paras 21-23.
[13] Request, para. 24.
[14] Draft Transcript, 8 November 2021, p. 1974.
[15] Draft Transcript, 8 November 2021, pp 1977-1979, 1987.
[16] Draft Transcript, 8 November 2021, p. 1977.
[17] Draft Transcript, 8 November 2021, p. 1980.
[18] Draft Transcript, 8 November 2021, pp 1984-1985.
[19] Draft Transcript, 8 November 2021, p. 1991.
[20] Draft Transcript, 8 November 2021, p. 1991.

Defence avers that the SPO reverses the legal framework applicable to disclosure.[21] The Haradinaj Defence contends that the evidence supports the position of the Defence that the Accused were entrapped.[22] Lastly, it submits that, through the Request, the SPO is merely disagreeing with the Impugned Decision, which is insufficient to meet the test for certification of leave to appeal.[23]

III. APPLICABLE LAW

11. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

12. Rule 77(2) of the Rules further provides that the Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

13. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been

[21] Draft Transcript, 8 November 2021, p. 1992.
[22] Draft Transcript, 8 November 2021, p. 1992.
[23] Draft Transcript, 8 November 2021, p. 1992-1993.

met.[24] Interlocutory appeals, interrupting the continuity of the proceedings, are the exception.[25] Instead, the Party seeking leave to appeal an issue must establish in relation to it the requirements set by the Law and by the Rules to the Panel's satisfaction.[26]

14. Considerations that an interlocutory appeal would address fundamental questions of law or fact or would be to the benefit of the Specialist Chambers do not *per se* warrant certifying the appeal.[27] There is no authority relevant to the present proceedings to support the existence of an "inherent power" to certify matters for appeal that do not meet the requirements of Rule 77(2) of the Rules.[28] In other words,

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[24] F00169, Pre-Trial Judge, *Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions* ("F00169"), 1 April 2021, para. 10.

[25] F00169, para. 10. *Similarly*, ICTR, *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-T, *Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of the Witnesses RV and QBZ Inadmissible"*("Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal"), 18 March 2004, para. 15; ICC, *Situation in Uganda*, ICC-02/04-01/05-20, *Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58* ("ICC-02/04-01/05-20, Decision on Prosecutor's Application for Leave to Appeal"), 19 August 2005, paras 18-19; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, *Decision Denying Certification to Appeal Decision Under Rule 167 Not to Acquit Hussein Hassan Oneissi and to Stay the Trial – With a Short Separate Opinion of Judge David Re* ("*Oneissi* Decision Denying Certification to Appeal"), 14 May 2018, para. 8.

[26] *See generally*, ICTY, *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution's Request for Certification of Appeal Under Rule 73(B)*, 18 January 2006, p. 1; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, *Decision on Prosecution's Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić's Preliminary Motions on Form of the Indictment*, 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding* ("*Milošević* Decision"), 20 June 2005, para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, *Decision on Prosecution Request for Certification for Interlocutory Appeal of "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment*" ("*Halilović* Decision"), 12 January 2005, p. 1; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, *Decision on Defence Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds*", 16 July 2003, p. 3; *Prosecutor v. Delić*, Case No. IT-04-83-PT, *Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend*, 14 July 2006 ("*Delić* Decision"), p. 1.

[27] F00169, para. 10. *Similarly*, ICTY, *Prosecutor v. Milutinović et al*, No. IT-05-87-T, *Decision Denying Prosecution's Request for Certification of Rule 73 bis Issue for Appeal* ("*Milutinović* Decision"), 30 August 2006, para 4. *See also* Halilović Decision, p. 1; Delić Decision, p. 1; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-529, *Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521* ("*Ongwen* Decision on Defence Request for Leave to Appeal"), 2 September 2016, para. 8; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-532, *Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"*, 18 September 2009, para. 12.

[28] *Similarly*, ICTY, *Milutinović* Decision, para 5.

Rule 77(2) is the exclusive basis for the Panel to certify an issue for discretionary appeal so that leave to appeal can only be granted if and where the requirements of this Rule are met.[29]

15. Pursuant to a combined reading of Article 45(2) of the Law and Rule 77(2) of the Rules, the following requirements must be met:

a. the issue at hand would significantly affect

i. the fair and expeditious conduct of the proceedings, or

ii. the outcome of the trial; and

b. an immediate resolution by the Court of Appeals Panel may materially advance the proceedings ("Certification Test").[30]

16. The Panel notes that the Pre-Trial Judge has set out a preliminary step in the Certification Test, addressing whether an issue is appealable.[31] The Panel notes that Article 45(2) of the Law and Rule 77(2) of the Rules do not provide for such a preliminary step and therefore it does not appear to constitute a separate and distinct requirement under the Rules. Nonetheless, in order for the Panel to be in a position to verify whether the requirements of Rule 77(2) of the Rules have been met, a Party must identify the issue(s) for which leave to appeal is sought in a way that these requirements can be established by the Party seeking certification and verified by the Panel. Such issues must emanate from the ruling concerned and cannot amount to abstract questions or hypothetical concerns.[32]

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[29] Ibid. *See also* ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Decision on Prosecution Request for Certification for Appeal of Decision of 25 May 2006 on Lead Counsel's Assignment of Mr Orsat Miljenić as Pro Bono Co-Counsel for the Accused Petković*, 23 June 2006, p. 3; *Halilović* Decision, p. 1.

[30] *See also* F00169, para. 12.

[31] F00169, para. 11.

[32] *See also* F00169, para. 12. *Similarly*, ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-75, *Decision on the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber III's Decision on Disclosure* ("*Bemba* Decision on Prosecutor's Application for Leave to Appeal"), 25 August 2008, para. 11; ICC, *Ongwen* Decision on Defence Request for Leave to Appeal, para. 6; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-596, *Decision on the Joint Defence Request for Leave to Appeal the Decision on Witness Preparation*, 11 February 2013,

17. The first prong of the Certification Test, as set out in (a), contains two alternatives. The issue must be shown to significantly affect (i) "the fair and expeditious conduct of proceedings" or (ii) "the outcome of the trial".[33] Use of the term "significantly" in the wording of the first prong of the Certification Test indicates that an applicant must not only show how the issue affects (i) the fair and expeditious conduct of proceedings, or (ii) the outcome of the trial, but must also demonstrate the (significant) degree to which these factors are affected.[34] The issue must be one likely to have repercussions on either of the above two elements.[35]

18. The "fair and expeditious conduct of proceedings" is generally understood as referencing the general requirement of fairness.[36] One of the fundamental aspects of this requirement is that proceedings should be adversarial in nature and that there should be equality of arms between the parties.[37] Expeditiousness is an attribute of a fair trial and is closely linked to the requirement that proceedings should be conducted within a reasonable time.[38]

19. Alternatively, the first prong of the Certification Test may be met if the issue significantly affects the outcome of the trial. Thus, it must be considered whether a

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para. 11. The Panel notes that, before the ICC, this requirement appears to have been regarded as a distinct requirement rather than an element of other, more general requirements to be met for leave to appeal to be granted.

[33] *Similarly*, ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal* ("ICC-01/04-168, Judgment on Extraordinary Review"), 13 July 2006, para. 10.

[34] F00169, para. 13. *Similarly*, ICTR, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal, para. 16.

[35] F00169, para. 13. *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 10.

[36] F00169, para. 14. *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 11.

[37] Articles 21(4)(f) and 37(2) of the Law. *See also* European Court of Human Rights ("ECtHR"), *Bannikova v Russia*, no. 18757/06, *Judgment* ("*Bannikova* Judgment"), 4 November 2010, paras 57-58; *Barberà, Messegué and Jabardo v. Spain*, no. 10590/83, Judgment, 6 December 1988, para. 78; *Brandstetter v. Austria*, nos 11170/84; 12876/87; 13468/87; 28 August 1991, *Judgment*, paras 66-67; *Ruiz-Mateos v. Spain*, no. 12952/87, *Judgment*, 23 June 1993, para. 63; *Colozza v. Italy*, no. 9024/80, *Judgment*, 12 February 1985, para. 27; ICC, Pre-Trial Chamber III, *Prosecutor v. Bemba*, ICC-01/05-01/08, *Decision on Prosecutor's Application for Leave to Appeal Pre-Trial Chamber III's Decision on Disclosure*, 25 August 2008, para. 14.

[38] F00169, para. 14.

claimed error is likely to impact the outcome of the case. The exercise involves a forecast of the consequence of such an occurrence.[39]

20. The second prong of the Certification Test is an additional limiting factor. Because of the test's cumulative nature, the failure of an applicant to establish the first prong of the test would normally exempt the Panel from considering whether the second prong has been met.[40] The second prong of the test for certification requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the "judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial" thereby moving the proceedings forward along the right course.[41]

21. Lastly, certification is not concerned with whether a decision is correctly reasoned, but whether the Certification Test has been met.[42] The decision examining a request for leave to appeal is not an opportunity to explain the contested decision to the parties or to express disagreement with the views of the Panel. However, where necessary, the Panel will provide clarification of its decision, including where misrepresentation of the decision so warrants.[43]

[39] F00169, para. 15.
[40] F00169, para. 16.
[41] F00169, para. 17.
[42] F00169, para. 18. *Similarly*, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, *Decision Denying Certification to Appeal Decision under Rule 167 not to Acquit Hussein Hassan Oneissi and to Stay the Trial – with a Short Separate Opinion of Judge David Re, 14 May 2018*, para. 8; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 Bis*, 18 July 2012, para. 6; ICTR, *Prosecutor v. Nzabonimana,* ICTR-98-44D-T, *Decision on Defence Motion for Leave to Appeal the Trial Chamber' Decision on the Defence Request to Call Prosecution Investigators*, 10 May 2011, para. 12; *Milošević* Decision, paras 3-4; *Milutinović* Decision, para. 4.
[43] F00169, para 18.

IV. DISCUSSION

A. THE FOUR ISSUES

1. Preliminary Observations

22. The Panel observes, as a preliminary matter, that the SPO has failed to identify clearly the findings in the Impugned Decision which it seeks to appeal. From the Request and the SPO's oral submissions of 8 November 2021, it appears that the SPO does not contest large parts of the Impugned Decision. While the SPO appears to contest the test under which the Panel assessed the materiality of all relevant items in relation to the Entrapment Allegations ("Materiality Test"), as a whole, it only objects to the orders set out in paragraph 95(b) of the Impugned Decision. The Panel further notes that instead of clearly identifying findings made by the Panel in relation to which appeal is sought, the SPO has put forth as issues propositions that do not constitute findings made by the Panel. As such, these propositions are not appealable issues capable of meeting the requirements of Rule 77(2) of the Rules.

23. The Panel recalls that, in paragraph 95(b) of the Impugned Decision, it ordered the SPO to disclose to the Defence extracts of Item 191 as set out in the strictly confidential and *ex parte* annex to the Impugned Decision and a summary of the steps and verifications taken by the SPO in relation to Items 195-200 ("Summary of Verifications"). The Panel observes that the SPO has refrained from identifying the particular sentences or passages in the extracts of Item 191, or in the Summary of Verifications, with which it takes issue and the disclosure of which it resists.

24. The Panel considers that this lack of specificity substantially affects the requirement that a Party requesting certification must clearly identify the findings which it seeks to appeal. The Panel will nevertheless address whether any of the four Issues meet the Certification Test.

2. The First Issue

25. The SPO submits that neither the Materiality Test nor the Panel's subsequent reasoning fully considered the circumstances of or evidence in the case when determining materiality.[44] The SPO avers that a materiality determination necessarily requires a preliminary assessment of how a piece of information might or might not advance an asserted defence in a case.[45] The SPO states that even where the weight, reliability or credibility of a particular piece of evidence is not considered, the materiality determination cannot be made in the complete abstract, but requires some assessment of the nature and scope of the asserted defence.[46] On this basis, the SPO argues that the Panel's reasoning makes clear that, not only were the facts and circumstances of the case not fully considered to determine if the Entrapment Allegations or the information purportedly linked to them were fanciful, but the Panel considered that it legally could not do so when determining materiality.[47]

26. The Gucati Defence responds that the First Issue is hypothetical and based on the erroneous premise that, in the Impugned Decision, the Panel assessed the materiality of the items for which disclosure is challenged in the abstract.[48]

27. The Haradinaj Defence endorses the Gucati Defence's submissions.[49] It adds that there is nothing in the SPO submissions demonstrating that the Panel's approach was incorrect or incompatible with the Rules.[50]

28. The SPO replies that the relevant findings of the Panel do not take into consideration the viability of an entrapment defence. The SPO submits that one cannot just say the word "entrapment" and receive disclosure. Whether or not the Panel

[44] Request, para. 8.
[45] Request, para. 8.
[46] Request, para. 8.
[47] Request, para. 9.
[48] Draft Transcript, 8 November 2021, pp 1977, 1980-1981.
[49] Draft Transcript, 8 November, pp 1992-1993.
[50] Draft Transcript, 8 November, pp 1992-1993.

assessed materiality in the abstract or on the basis of the facts and circumstances of the case, arises from the Impugned Decision.[51]

29. The Panel notes that the First Issue is based on the SPO's assumption that the Panel assessed materiality to the preparation of the Defence in the abstract and not in relation to the facts and circumstances of this case.[52] The Panel recalls that, in the Impugned Decision, it first set out the Materiality Test and then proceeded to apply that test to Items 185-200 and made specific findings as to materiality per categories of those items.[53] On this basis alone, the SPO's assertion that the Panel made a materiality assessment "in the abstract" could be set aside.

30. The Panel notes that the extent to which it was able to apply the Materiality Test to the circumstances of this case was constrained by the extent to which the SPO was prepared to meet its onus under Rule 102(3) of the Rules to establish the non-materiality of the information in question.[54] The Panel further notes in that respect that the SPO's efforts in advancing specific arguments in its challenge to the materiality of Items 185-200 remained most generic in character and fell short of the threshold under Rule 102(3) of the Rules.[55] Appeals are not to be used by a Party as a way to remedy its own failures.

31. The Panel considers therefore that the SPO's assertion that the Impugned Decision did not fully consider the circumstances of or evidence in the case when determining materiality is based on an erroneous assumption and misrepresents the Panel's reasoning and findings. As a result, the First Issue does not amount to an identifiable,

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[51] Draft Transcript, 8 November, pp 1997-1998.
[52] Request, paras 2, 8.
[53] Impugned Decision, paras 49-57, 59-61 (Items 185-190 and 192-194), 63-68 (Item 191), 70-74 (Items 195-200).
[54] Draft Transcript, 8 November 2021, pp 2011-2015.
[55] F00316/COR, Specialist Prosecutor, *Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice*, 17 September 2021, paras 19-20, 44-48. *See also* F00316/CONF/RED, confidential and F00316/RED, public. F00389, Specialist Prosecutor, *Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures*, 22 October 2021, strictly confidential and *ex parte*, with confidential annex, paras 14-15. *See also* F00389/CONF/RED.

specific issue emanating from the Impugned Decision and cannot therefore have any bearing on the fair and expeditious conduct of the present proceedings or the outcome of the trial.

32. The Panel accordingly finds that the First Issue does not meet the first prong of the Certification Test.

3. The Second Issue

33. The SPO submits that the Panel's decision not to decide on whether the Entrapment Allegations were wholly improbable means that the SPO arguments that entrapment was factually and legally impossible were not considered.[56] The SPO further avers that the Accused have not alleged either that an SPO official or person acting on behalf of an SPO official was in contact with the Accused, or that the will of the Accused was somehow overborne, both of which are essential elements of an entrapment defence.[57] According to the SPO, by the time Batch 3 was delivered, the Accused were well into the course of their alleged criminal conduct, such that it was impossible to influence them to commit the same crimes.[58] The SPO also states that by any definition of entrapment, an official person influencing the Accused must exist.[59] While the SPO concedes that the wholly improbable nature of entrapment must be assessed differently when considering disclosure as opposed to the merits of a case at the end of trial, it submits that the circumstances and facts of the case are contrary to any possibility of entrapment, and therefore the Accused should be required to make some *prima facie* showing of how entrapment could have occurred in this case before broad disclosure is ordered.[60]

[56] Request, para. 10.
[57] Request, para. 12.
[58] Request, para. 12.
[59] Request, para. 13.
[60] Request, para. 14.

34. The Gucati Defence responds that the Second Issue ignores the previous findings of the Pre-Trial Judge, the Court of Appeals Panel and the Panel that (i) the assessment as to whether the entrapment allegations are wholly improbable or not is to be determined at trial; and (ii) there is no other condition to disclosure other than the materiality to the Defence preparation of its case and/or the exculpatory nature of the material.[61] The Gucati Defence further submits that the Panel rightly found that the Entrapment Allegations are to be determined after having heard the evidence at the end of the case, and that such a determination is irrelevant to the question of disclosure.[62] The Gucati Defence reiterates that if the Entrapment Allegations are anything other than wholly improbable, the SPO bears the onus to disprove incitement.[63] The Gucati Defence rejects any other additional requirement that, it argues, the SPO seeks to add to incitement, emphasizing that these requirements are absent from the jurisprudence of the European Court of Human Rights ("ECtHR").[64] Lastly, the Gucati Defence rejects the SPO's assertion that the Entrapment Allegations are wholly improbable.[65]

35. The Haradinaj Defence endorses the submissions of the Gucati Defence, adding that the SPO seeks to "second guess" the position of the Defence prior to it being formally adduced through evidence.[66]

36. The SPO replies that the Panel's failure to address the factual and legal impossibility of the Entrapment Allegations is a potential error emanating from the Impugned Decision, which should be resolved on appeal.[67]

37. The Panel notes that the Second Issue concerns the procedural test the Panel applied in relation to the Entrapment Allegations. In particular, it concerns the

[61] Draft Transcript, 8 November 2021, p. 1977.
[62] Draft Transcript, 8 November 2021, p. 1981.
[63] Draft Transcript, 8 November 2021, p. 1981.
[64] Draft Transcript, 8 November 2021, pp 1982-1983.
[65] Draft Transcript, 8 November 2021, p. 1983.
[66] Draft Transcript, 8 November 2021, p. 1993.
[67] Draft Transcript, 8 November 2021, p. 1998.

question whether the Panel must decide whether the Entrapment Allegations are not wholly improbable before it orders disclosure in relation to those allegations.[68]

38. In order to assess whether the Second Issue meets the Certification Test, the Panel must refer to the normative guidance provided by the ECtHR in relation to this matter. The Panel notes at the outset that the ECtHR has made it clear that the principles of adversarial proceedings and equality of arms are indispensable in the determination of an entrapment claim, particularly in the context of non-disclosure of information.[69] This is intended to ensure that a claim of entrapment – even if it is eventually rejected – is not set aside prematurely simply because the Prosecution denied the Defence access to material that would have allowed it to make its claim more credible.

39. The Panel further notes that ECtHR jurisprudence does not advance a set procedure to address a plea of incitement that would be binding on all (domestic) judicial authorities, regardless of their legal culture or procedural regime. Instead, it requires that such a procedure be adversarial, thorough, comprehensive and conclusive on the issue of entrapment.[70] The Panel recalls that the ECtHR has ruled that "[i]t falls to the [P]rosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable".[71] Nowhere did the ECtHR rule, however, that *disclosure* by the Prosecution in the context of a claim of entrapment *presupposes* a finding that such a claim is not "wholly improbable". The SPO's suggestion to the contrary has no basis in law and tries to import into the disclosure regime a requirement that does not exist in that context. In fact, the ECtHR has made clear that "in the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement."[72]

[68] Request, paras 2(ii), 14-15.
[69] ECtHR, *Bannikova* Judgment, paras 57-58.
[70] ECtHR, *Bannikova* Judgment, para. 57.
[71] ECtHR, *Ramanauskas v Lithuania*, no. 74420/01, *Judgment*, 5 February 2008, para. 70.
[72] Ibid.

40. In light of this jurisprudence, the Panel found that the question whether the Entrapment Allegations were "wholly improbable" could only be answered after the Defence was permitted to receive, as part of the disclosure process, relevant and disclosable information.[73] Likewise, questions as to whether an official person exercised influence over the Accused or whether the will of the Accused was somehow overborne[74] are issues that might be relevant to the findings that the Panel will be asked to make at the end of the trial, but they have no bearing on the question whether the Defence is permitted to receive relevant disclosure.

41. For the above reasons, the Second Issue cannot affect the fair and expeditious conduct of the present proceedings, as it does not raise issues regarding the adversarial nature of the proceedings or the equality of arms. In fact, if, as the SPO maintains, there is "no shred of evidence" for the Entrapment Allegations, then the disclosure ordered by the Impugned Decision cannot, by definition, affect the conduct of these proceedings or the outcome of this trial.

42. The Panel accordingly finds that a determination of the Second Issue would not affect the fair and expeditious conduct of the present proceedings or the outcome of this trial and therefore does not meet the first prong of the Certification Test.

4. The Third Issue

43. The SPO submits that the Panel's findings in relation to the materiality of Items 191 and 195-200 broaden the notion of materiality well beyond the breaking point to an examination of whether the SPO expended resources to investigate fanciful and unsubstantiated allegations of entrapment, a showing that both invades the authorities and powers of the SPO and exceeds any burden of proof that the SPO bears in this prosecution.[75]

[73] Impugned Decision, para. 53.
[74] Request, para. 12.
[75] Request, para. 17.

44. The Gucati Defence responds that the Third Issue is hypothetical and based on the assumption that the Entrapment Allegations are wholly improbable to the point of being fanciful, which the Defence rejects. The Gucati Defence argues that the fanciful nature of the allegations is irrelevant, recalling that unless demonstrated to be "wholly improbable", the SPO bears the burden of proving that there was no incitement.[76] The Gucati Defence argues that the SPO's submission that the incitement plea must not be fanciful is an unsupported "additional requirement".[77]

45. The Haradinaj Defence submits that once the Panel has seen the impugned material, there is an obligation for such material to be disclosed to the Defence to ensure the fairness of the proceedings.[78] The Haradinaj Defence avers that it follows that, were the disclosure of such material was to be refused, it would violate the Accused's right to a fair trial.[79]

46. The SPO replies that the issue it intends to appeal is precisely whether an unsubstantiated, fanciful threshold in relation to the Entrapment Allegations is enough to justify disclosure.[80]

47. The Panel notes that the Third Issue is based on the assumption that part of the second limb of the Materiality Test[81] leads to the consequence that "investigative acts of the SPO into the process by which the batches were delivered to the KLA WVA are disclosable *because they did not show* that any entrapment occurred."[82] The Panel also reiterates that the onus to establish non-materiality under Rule 102(3) is with the Prosecution.[83]

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[76] Draft Transcript, 8 November 2021, p. 1978.
[77] Draft Transcript, 8 November 2021, p. 1985.
[78] Draft Transcript, 8 November 2021, p. 1993.
[79] Draft Transcript, 8 November 2021, p. 1993.
[80] Draft Transcript, 8 November 2021, p. 1999.
[81] Impugned Decision, para. 56: "(ii) the information, interpreted in the relevant context, suggested that the SPO failed to take adequate investigative steps to exclude the possibility that a member of its staff or someone under its control entrapped the Accused by disclosing the impugned information."
[82] Request, para. 17.
[83] *See supra* para. 29.

48. The Panel recalls that the second limb of the Materiality Test was found to be applicable in relation to two categories of items. Regarding Item 191, the Panel found that part of its content pertained to the question whether the SPO took reasonable steps to exclude the possibility that entrapment occurred and what those steps consisted of.[84] Regarding Items 195-200, the Panel found that information contained therein provided relevant context of the SPO's efforts to exclude the possibility of an intentional leak.[85] At the same time, in relation to Items 185-190 and 192-194, the Panel found that "none of the items contain any information or opinion regarding any role or involvement the SPO would have had in the provenance […] of the Batches."[86] On this basis, the Panel found that Items 185-190 and 192-194 were not material to the Defence.[87]

49. The Panel considers therefore that the assertion of the SPO that the Impugned Decision leads to the disclosability of material that does not show entrapment is erroneous and misrepresents the Panel's findings. The Panel specifically excluded from disclosure under Rule 102(3) of the Rules material that could not reasonably advance the Entrapment Allegations. Items 191 and Item 195-200 were found to be material under the same Rule because they provide context into steps taken by the SPO to exclude the possibility of entrapment. In this regard, the Panel notes that, in its Entrapment Allegations, the Defence maintains that the SPO's investigations into the circumstances of the leak were inadequate and draws on this basis an inference that the Accused must have been entrapped by the SPO.[88] While the merit of these submissions will be decided at the end of this case, the SPO has failed to establish: (i) the unreasonableness of the logic underlying those arguments; and (ii) that the

[84] Impugned Decision, para. 64.
[85] Impugned Decision, para. 71.
[86] Impugned Decision, para. 59.
[87] Impugned Decision, para. 61.
[88] F00288, Gucati Defence, *Public Redacted Version of Written Submissions on behalf of Hysni Gucati for the Trial Preparation Conference and Related Matters*, 27 August 2021, para. 20.

information of which disclosure is sought for that purpose is not material to the Entrapment Allegations.

50. As a result, the Third Issue does not identify a discrete topic emanating from the Impugned Decision and cannot therefore have any bearing on the fair and expeditious conduct of the proceedings or the outcome of the trial.

51. The Panel accordingly finds that the Third Issue does not meet the first prong of the Certification Test.

5. The Fourth Issue

52. The SPO submits that its principal concern in providing any counterbalancing measures that, as ordered by the Panel, would "put the Defence in a position to ascertain the relevant context of the SPO's efforts to exclude the possibility of the information having been intentionally leaked by one of its staff"[89], was that they would serve as stepping stones for future disclosure.[90] The SPO further avers that, had the Panel subjected the Entrapment Allegations to any scrutiny, the SPO's counterbalancing measures would not have been exceeded.[91]

53. The Gucati Defence responds that the Fourth Issue does not amount to a discrete issue and is equally hypothetical and drafted upon the premise that the Entrapment Allegations are wholly improbable.[92] The Gucati Defence avers that counterbalancing measures are to ensure fairness to the Accused as an alternative to non-disclosure – not to disclosure.[93]

54. The Haradinaj Defence responds that the disclosure is an ongoing process that the SPO ought to keep under constant review. The Haradinaj Defence submits that the

[89] Impugned Decision, para. 67.
[90] Request, para. 20.
[91] Request, para. 20.
[92] Draft Transcript, 8 November 2021, pp 1978-1979.
[93] Draft Transcript, 8 November 2021, pp 1978, 1986.

SPO cannot seek to hold the Panel to ransom by agreeing to the counterbalancing measures only if no further disclosure applications can be made.[94]

55. The SPO replies that it does not argue that the Panel cannot exceed counterbalancing measures proposed by the SPO. It is rather how and why those counterbalancing measures were exceeded in this instance that is the basis of the Fourth Issue.[95]

56. The Panel observes that the Fourth Issue appears to imply that the Panel ordered counterbalancing measures in excess of those proposed by the SPO in relation to an entrapment claim that it found to be "wholly improbable" ("to assist an investigation into whether the SPO investigated a wholly improbable entrapment claim").[96] In this respect, the Fourth Issue appears to contradict the Second Issue, which maintains that the Panel ordered disclosure without assessing whether the Entrapment Allegations were wholly improbable.[97] In any event, the Panel emphasizes that it made no such finding in the Impugned Decision.

57. Furthermore, the Panel notes that the Fourth Issue stems from the Third Issue and concerns the question whether the Panel can order disclosure in excess of counterbalancing measures proposed by the SPO to assist an investigation into whether the SPO investigated a wholly improbable entrapment claim.[98] The Panel addressed above the scope of application of the second limb of the Materiality test.[99] The same finding is valid in relation to the Fourth Issue: the Panel specifically excluded from disclosure under Rule 102(3) of the Rules material that could not reasonably advance the Entrapment Allegations. Accordingly, the Fourth Issue shall not be further addressed insofar as it relies on the SPO's assertion that the Panel

[94] Draft Transcript, 8 November 2021, p. 1994.
[95] Draft Transcript, 8 November 2021, pp 1999-2000.
[96] Request, para. 2(iv).
[97] Request, para. 2(ii).
[98] Request, para 2(iv).
[99] *See supra* para. 48.

determined "that an absence of information related to entrapment [was] relevant to the Entrapment Allegations".[100]

58. The Panel further notes that the SPO's concern as regards the Fourth Issue is that the Panel's counterbalancing measures would serve as stepping stones for future disclosure,[101] which would in turn compromise the SPO's investigations into obstruction of justice and threaten its mandate.[102] The Panel notes that the SPO repeatedly failed and declined to point to any particular piece of information contained in the material ordered to be disclosed in the Impugned Decision that would lead to the consequences proffered by the SPO. Furthermore, the Panel observes that the SPO's submissions rely, to a certain extent, on the consequences of possible future decisions of the Panel in application of the Materiality Test. Moreover, the SPO's assertions seem to raise concerns in relation to other cases or investigations of the SPO and considerations of an institutional nature.

59. The Panel notes that none of these considerations amount to grounds of appeal under the Certification Test. First, the Panel is not bound by the SPO's proposals for counterbalancing measures under Rule 108 of the Rules. Where counterbalancing measures proposed by the SPO are insufficient to effectively protect the rights of the Accused and the ability of the Defence to prepare, the Panel may go beyond those and order additional counterbalancing measures as was done in this case. Secondly, such measures are not assessed against the probability of an underlying claim advanced by the Defence as part of its case, but based on the prejudicial effect caused to the Defence by the non-disclosure of material to which they might otherwise have been entitled to. Thirdly, the SPO's submissions that the counterbalancing measures ordered in the Impugned Decision would trigger unmanageable disclosure requests are wholly theoretical and hypothetical rather than grounded in the disclosure orders of the

[100] Request, para. 19.
[101] Request, paras 2(iv), 19-20.
[102] Request, paras 21-23.

Impugned Decision. Lastly, references to other proceedings or trials may be made in addition to and not in place of the necessary demonstration of an existing impact on the present proceedings, as required by Rule 77(2) of the Rules.[103] Appeal proceedings are not to be triggered based on hypothetical scenarios, but must address issues that have already arisen and that are capable of having a particular sort of effect on the proceedings. None of the arguments advanced by the SPO under its Fourth Issue meet that threshold.

60. The Panel accordingly finds that the Fourth Issue does not affect the fair and expeditious conduct of the present proceedings or the outcome of the trial and therefore does not meet the first prong of the Certification Test.

6. Conclusion

61. For the reasons set out above, the Panel finds that none of the four Issues meets the first prong of the Certification Test.

62. Having found that the first prong of the Certification Test is not met, the Panel need not address the second prong of the Certification Test. The Panel notes, however, that, in light of the above findings regarding the four Issues and the ECtHR jurisprudence relied upon by the Panel, the SPO has also failed to show that an immediate resolution by the Court of Appeals Panel in relation to the Issues, as formulated in the Request, may materially advance the proceedings.

B. SUSPENSIVE EFFECT

63. Given the Oral Order on Extension of Disclosure Deadline and the issuance of the present decision on 8 November 2021, the Panel considers that it need not further address and rule on the Suspensive Effect Request.

[103] *Similarly*, ICC, ICC-02/04-01/05-20, Decision on Prosecutor's Application for Leave to Appeal, para. 54.

64. In light of the Panel's decision to deny the Request, the SPO is ordered to provide the material indicated in paragraph 95(b) of the Impugned Decision by 9 November 2021.

V. CLASSIFICATION

65. Given that oral submissions on the Request were made in open session without defeating the purpose of the confidential classification of the Impugned Decision, the Panel considers it appropriate to order the SPO to request reclassification as public or file a public redacted version of the Request. A public redacted version of the Impugned Decision will be issued shortly.

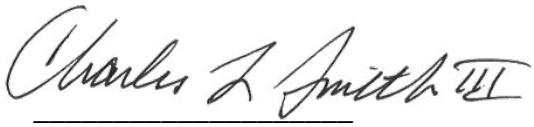
VI. DISPOSITION

66. For these reasons, the Panel:

a. **DENIES** the Request;

b. **ORDERS** the SPO to provide the material indicated in paragraph 95(b) of the Impugned Decision on **9 November 2021**; and

c. **ORDERS** the SPO to request reclassification or file a public redacted version of the Request by **15 November 2021**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 8 November 2021

At The Hague, the Netherlands