



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:** 9 December 2021  
**Language:** English  
**Classification:** Public

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**Prosecution requests in relation to re-calling W04841 and W04842**

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**Specialist Prosecutor's Office**

Jack Smith

**Counsel for Mr Gucati**

Jonathan Elystan Rees

**Counsel for Mr Haradinaj**

Toby Cadman

1. On 5 November 2021, the Trial Panel issued the following oral order in response to a Defence request concerning further examination of SPO witnesses W04841 and W04842 in light of potential future disclosure under Rule 102(3) of the Rules:<sup>1</sup>

Mr. Rees, further to your request to defer any cross-examination of Witnesses 4841 and 4842, the Panel rules as follows.

The SPO is required to come back with a report on the outstanding Rule 102(3) matter by November 12th, and that may end up being changed because of these matters that we've just discussed. [...] Once all of the matters are ruled upon, you will have five to eight days to decide whether you want to request [...] [w]hether you want to request further cross-examination, and then the Panel will hear your request at that time.

2. On 15 November 2021, the then outstanding Rule 102(3) matter was resolved.<sup>2</sup> Disclosure of all Rule 102(3) materials whose disclosability was pending a determination at the time of W04841 and W04842's testimony was provided, at the latest, by 16 November 2021 ('Rule 102(3) Materials').

3. On 8 December 2021, the Gucati Defence requested to recall W04841 and W04842 following the Trial Panel's decision on a different Rule 102(3) matter for which no disclosure was ultimately ordered.<sup>3</sup> The Trial Panel accepted this Gucati Defence request, indicating that the question of re-calling W04841 and W04842 had been previously decided by the Trial Panel.<sup>4</sup>

4. As seen from the terms of the 5 November 2021 order above, the Trial Panel only previously permitted a *request* to re-call W04841 and W04842. The view of the SPO is that there is at present no basis to re-call either W04841 or W04842. First, as indicated

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<sup>1</sup> Rules of 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.

<sup>2</sup> Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201, KSC-BC-2020-07/F00435, 15 November 2021, Confidential, *following* Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413, 3 November 2021, Confidential.

<sup>3</sup> Transcript of Hearing, 8 December 2021, p.2338, *following* Decision on Item 202 Disclosure, KSC-BC-2020-07/F00479, 7 December 2021, Confidential.

<sup>4</sup> Transcript of Hearing, 8 December 2021, p.2338 (in response to the SPO's objection: '[w]e understand that's your position, but we gave them permission to re-call those witnesses if they needed to.').

by the Gucati Defence itself, there is no indication that either W04841 or W04842 have any personal knowledge of the information in the Rule 102(3) Materials.<sup>5</sup> In fact, both witnesses testified repeatedly that they had no involvement in the investigation into how the disclosed materials were obtained and then transmitted to the KLA WVA. Further, to date the Trial Panel has resisted making any assessment of the so-called 'entrapment defence', indicating that this was a matter for trial. The Defence have now submitted their witnesses and exhibits to the Trial Panel and one of the two Accused has testified. On the basis of the Defence evidence submitted, it is now established that neither Accused was entrapped, as neither one claims to have been compelled or coerced into committing the alleged crimes.<sup>6</sup> There is now no possibility of entrapment, as both Accused have disavowed the factual predicates of such a defence. There is no basis to permit further inquiry into how the documents were obtained and then transmitted to the KLA WVA, as it has no bearing on the issues to be decided by the Trial Panel.

5. If the Trial Panel nevertheless allows for the re-call of W04841 and W04842,<sup>7</sup> the modalities of their questioning should, at a minimum, reflect that: (i) they are being called after the SPO's case closed to provide further information for the Defence; (ii) there is no basis for revisiting any matters for which W04841/W04842 previously testified; and (iii) the information in the Rule 102(3) Materials is highly sensitive and risks compromising ongoing SPO investigations. Importantly, recalling

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<sup>5</sup> Transcript of Hearing, 2 December 2021, pp.2089-91.

<sup>6</sup> Statement of Hysni Gucati, DHG0472-DHG0493, paras 12-52; Transcript of Testimony of Hysni Gucati, 6 December 2021, pp.2162-2202, 2216 (from p.2216: '[o]nly God can force me to do something. I'm the chairman of that organisation, and not a single person can force me to hold a press conference on certain issue. Only God can order me to do that, if you believe in God'); Summary of Nasim Haradinaj's Evidence, DNH0333-DNH0352, paras 33-119 (see also paras 31-32: 'Mr. Haradinaj will state that instead of doing this, doing what they should be doing, the SPO want to punish him for exposing their flaws and exercising his right to freely criticise their working methods. Mr. Haradinaj will state that, for example, the SPO do not even know who brought the material to the WVA, but still seek to punish him. Mr. Haradinaj felt then, and feels now, that he is obligated to share this information with his people in the public interest as any process must be fair and transparent.').

<sup>7</sup> W04841 and W04842 are available on 15-16 December 2021.

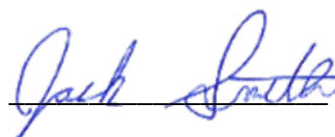
W04841/W04842 should not be a further opportunity for the Defence in this case to seek to improperly push confidential and sensitive information into the public record.<sup>8</sup>

Accordingly, at minimum, the Trial Panel should order:

- (i) That the Defence provide a summary in advance of the scope of questioning it intends to elicit through W04841/W04842 and the relevance of the intended subject matter to the issues before the Trial Panel;
- (ii) All evidence concerning the Rule 102(3) Materials should be elicited in private session; and
- (iii) Questioning on all other subjects should be disallowed, noting that both Defence teams had a full opportunity to cross-examine these witnesses during the SPO's case.

6. For the foregoing reasons, the SPO requests that the Trial Panel, pursuant to Rules 116 and 143(4), either preclude any further questioning of W04841/W04842 or, alternatively, regulate any re-call of W04841 and/or W04842 in line with paragraph 5 above.

**Word count: 1025**



**Jack Smith**

**Specialist Prosecutor**

Thursday, 9 December 2021

At The Hague, the Netherlands

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<sup>8</sup> The Prosecution would note that Defence counsel, as well as the Accused in his testimony, have repeatedly resisted, and in some cases openly defied, Trial Panel orders regarding confidential information.