



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

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Public Redacted Version of
Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201

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TRIAL PANEL II (“Panel”), pursuant to Article 40(6)(b) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 102(3) and 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this order.

I. PROCEDURAL BACKGROUND

1. On 29 September 2021, the SPO filed an official note on a strictly confidential and *ex parte* basis (“F00337”) containing information provided by an individual (“Witness”) to the SPO about alleged events connected to the present proceedings.¹
2. On 4 October 2021, the Panel held an *ex parte* hearing only with the SPO to hear further submissions on F00337.² The Defence was notified of the hearing, but was not made privy to the detailed nature of the material subject to that procedure. During that *ex parte* hearing, the Panel underlined that material relevant to the claim of entrapment should be made available to the Defence so as to assist them in their claim.³
3. On 7 October 2021, further to the *ex parte* hearing, the Panel ordered the SPO to file an addendum to its updated Rule 102(3) notice.⁴
4. On 13 October 2021, the SPO filed an addendum to its updated Rule 102(3) notice adding an item listed in Annex 1 of F00337 (“Item 201”).⁵
5. On 21 October 2021, the Panel held a further *ex parte* hearing only with the SPO to hear submissions on pending Rule 102(3) disclosure issues and potential

¹ F00337, Specialist Prosecutor, *Prosecution Transmission of Official Note of Contact and Related Request*, 29 September 2021, with two strictly confidential and *ex parte* annexes. Annex 1 of F00337 contained a summary of contact with a witness.

² F00346, Panel, *Scheduling Order for Ex Parte Hearing*, 1 October 2021, confidential.

³ Transcript, 4 October 2021, confidential and *ex parte*, p. 721.

⁴ F00354, Panel, *Order for an Addendum to the Updated Rule 102(3) Detailed Notice*, 7 October 2021, confidential.

⁵ F00361, Specialist Prosecutor, *Prosecution Update to Rule 102(3) Notice Addendum*, 13 October 2021, confidential.

counterbalancing measures.⁶ The Panel underlined the importance of effective counterbalancing measures under Rule 108 of the Rules so as to enable the Defence to investigate and present the “entrapment” part of its case in an effective manner.⁷

6. On 3 November 2021, further to the SPO’s challenge to disclosure and proposed counterbalancing measures under Rule 102(3) of the Rules, Defence responses and the SPO’s reply,⁸ the Panel issued a decision on the pending Rule 102(3) matters, including on Item 201 (“Rule 102(3) Decision”).⁹ The Panel decided to stay consideration on Item 201 and ordered the SPO to implement its proposed measures and report back to the Panel by 12 November 2021.¹⁰

7. On 12 November 2021, the SPO submitted a report related to Item 201 and requested that proposed redactions be applied prior to any disclosure to the Defence of annexed materials (“Request”).¹¹

II. SUBMISSIONS

8. The SPO submits that the disclosure of the material annexed to the Request provides all relevant and material information under the Panel’s test of materiality in

⁶ F00382, Panel, *Scheduling Order for Ex Parte Hearing*, 19 October 2021, confidential, with strictly confidential and *ex parte* annex.

⁷ Transcript, 21 October 2021, confidential and *ex parte*, pp 1254-1256, 1265-1280, 1281-1289.

⁸ 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. See also F00389/CONF/RED; F00404, Haradinaj Defence, *Defence Response to ‘Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures’*, 27 October 2021, confidential; F00407, Gucati Defence, *Response to ‘Public Redacted Version Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures’ and Ancillary Application*, 29 October 2021, confidential; F00409, Specialist Prosecutor, *Prosecution Consolidated Reply to Responses to Challenge to Disclosure and Proposed Counterbalancing Measures*, 1 November 2021, confidential.

⁹ F00413, Panel, *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice* (“Rule 102(3) Decision”), 3 November 2021, confidential.

¹⁰ Rule 102(3) Decision, paras 76-78, 95(c).

¹¹ F00433, Specialist Prosecutor, *Prosecution Report Related to Rule 103(2) Notice Item 201* (“F00433”), 12 November 2021, strictly confidential and *ex parte*. See also F00433/CONF/RED.

the context of allegations raised by the Defence that the SPO entrapped the Accused (“Entrapment Allegations”).¹²

9. The SPO further submits that none of the information proposed for redaction has any bearing on the Entrapment Allegations. The SPO maintains that, with only the proposed redactions applied, the Defence and Accused would be able to see, *inter alia*: (i) the name of the witness; and (ii) everything he says about [REDACTED], [REDACTED].¹³

III. APPLICABLE LAW

10. Pursuant to Rule 102(3) of the Rules, 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. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the materiality of the information exist.

11. The Panel further recalls that the regime of disclosure under Rule 102(3) of the Rules is a three-step system.¹⁴ The first 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

¹² F00433, para. 10.

¹³ F00433, para. 11.

¹⁴ F00304, Panel, *Order on the Updated Rule 102(3) Detailed Notice (“Rule 102(3) Order”)* with confidential and *ex parte* annex, 7 September 2021, 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.

request to the SPO for any such items.¹⁵ Once the Defence is placed in a position to determine materiality based on the Rule 102(3) notice, the second step of the process comes into play, *i.e.*, the Defence asks the SPO to disclose the relevant items.¹⁶ This triggers the third step of the process, whereby the SPO can challenge before the Panel the claim of materiality or seek non-disclosure of otherwise disclosable material pursuant to Rules 105, 107 or 108 of the Rules.¹⁷

12. The Panel also recalls that, in its assessment under the third step, the Panel considered that information was material under Rule 102(3) of the Rules in the context of the Entrapment Allegations if: (i) the information could assist the Defence claim or its investigations of entrapment (without assessing the weight, reliability or credibility of that information); or (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 (“Materiality Test”).¹⁸

IV. DISCUSSION

A. PRELIMINARY MATTER

13. The Panel rules on the Request without having heard from the Defence as part of its inherent discretion to determine a matter without awaiting responses or replies, where its determination is in favour of or causes no prejudice to the Party whose response or reply is pending.¹⁹ The Panel further notes that it rules on this matter expeditiously, so that the Defence can gain access to the relevant material before they are due to submit any motions to dismiss charges.

¹⁵ Rule 102(3) Order, para. 16.

¹⁶ Rule 102(3) Order, para. 20.

¹⁷ Rule 102(3) Order, para. 20.

¹⁸ Rule 102(3) Decision, para. 56.

¹⁹ F00353, Panel, *Decision on the Defence Requests for Reconsideration of Decision F00328*, 7 October 2021, para. 20.

14. The Panel further observes that the Defence does not have access to the material annexed to the Request and for that reason they are not in a position to make informed submissions on materiality and proposed redactions. In view of this and in order to preserve the effectiveness of the rights of the Accused in this matter, the Panel has exercised particular caution in reviewing the material annexed to the Request and the proposed redactions.

B. ASSESSMENT OF MATERIALITY

15. The Panel notes that the annexes to the Request pertain to: (i) an SPO official note recording that a formal interview was conducted with the Witness (“Annex 1”);²⁰ (ii) an SPO official note [REDACTED] recording information provided by the Witness which was previously referred to as Item 201 (“Official Note”);²¹ (iii) the SPO interview conducted with the Witness on [REDACTED] (“Interview”);²² and (iv) extracts of an SPO interview conducted with the Witness on [REDACTED] (“Interview Extracts”).²³

16. The Panel recalls that the Official Note (Item 201) has already been added to an updated Rule 102(3) detailed notice.²⁴ Following the three-step process under Rule 102(3) of the Rules, the Panel ought to decide at this juncture whether the other aforementioned materials (Annex 1, the Interview and Interview Extracts) should be added to a further updated Rule 102(3) notice, triggering the next steps of the disclosure process. Nonetheless, in order to expedite matters and also noting the SPO’s submissions in the Request,²⁵ the Panel will exceptionally assess the first and third steps together in relation to all aforementioned materials.

²⁰ F00433, Annex 1.

²¹ F00433, Annex 2.

²² F00433, Annex 3.

²³ F00433, Annex 4.

²⁴ F00361, Specialist Prosecutor, *Prosecution Update to Rule 102(3) Notice Addendum*, 13 October 2021, confidential.

²⁵ F00433, paras 1, 10.

17. As regards the third step, the Panel recalls the above Materiality Test as applied in relation to the Entrapment Allegations and notes that, both in the Rule 102(3) Decision and in the present order, it interprets the first limb of that test without assessing the weight, reliability or credibility of the information in question. Likewise, the Panel interprets the second limb of the Materiality Test broadly, so as to cover information pertaining to the question whether the SPO took reasonable investigative steps to exclude the possibility that entrapment occurred.²⁶ The Panel notes, in this regard, that the Defence is mainly seeking to rely upon what, it says, are investigative shortcomings in respect of the circumstances of the leak as circumstantial indications of its claim of entrapment.²⁷

18. In relation to Annex 1, the Panel notes that it records the occurrence of the [REDACTED] interview, the procedure followed in this regard and personal details related to the Witness. It contains therefore no information covered by the Materiality Test. The Panel accordingly finds that Annex 1 is not disclosable under Rule 102(3) of the Rules. The Panel also finds that Annex 1 contains no further incriminating or exculpatory evidence nor does it relate to any existing issue and does not raise any new issue in the present proceedings.

19. In relation to the Official Note, the Interview and the Interview Extracts, the Panel finds that they contain information: (i) provided by the Witness regarding his opinion [REDACTED]; and (ii) the steps taken by the SPO to verify the source of this information. The Panel accordingly finds that the aforementioned materials are covered by the Materiality Test and are disclosable under Rule 102(3) of the Rules.

²⁶ Rule 102(3) Decision, paras 64, 71, 73.

²⁷ 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.

C. PROPOSED REDACTIONS

20. Having found that the Official Note, the Interview and the Interview Extracts are disclosable under Rule 102(3) of the Rules, the Panel shall determine whether the redactions proposed by the SPO for these materials fall under the scope of Rule 108 of the Rules.

21. In relation to the Official Note, the Panel observes that the proposed redactions cover identifying information of [REDACTED], both unrelated to the present case, including to the Entrapment Allegations.

22. In relation to the Interview, the Panel observes that the proposed redactions cover identifying information of [REDACTED], details regarding the location of the interview and personal details related to the Witness and his family. The proposed redactions also cover information related to [REDACTED], both unrelated to the present case, including to the Entrapment Allegations.

23. In relation to the Interview Extracts, the Panel observes that the proposed redactions cover personal details related to the Witness and his acquaintances as well as details pertaining to the Witness's [REDACTED] interview, unrelated to the present case, including to the Entrapment Allegations. The Panel also notes that the SPO proposes to redact a specific statement on page 15, line 19 but does not propose to redact the same information at page 14, line 9.

24. The Panel recalls the Pre-Trial Judge's finding that there was a well-grounded suspicion, *inter alia*, that the Accused: (i) intentionally participated in the unauthorised dissemination of protected information;²⁸ (ii) published on repeated occasions SPO/SITF-related documents received by the KLA WVA;²⁹ and (iii) vowed to continue to publish such information in the future,³⁰ despite being ordered by the Single Judge

²⁸ F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment* ("Confirmation Decision"), 11 December 2020, paras 100, 102-103, 105, 108-109, 111-113, 115-117.

²⁹ Confirmation Decision, paras 101-102, 106, 108.

³⁰ Confirmation Decision, paras 101-102, 106-108.

to refrain from doing so.³¹ The Panel is mindful that its current determination must take as a starting point the Accused's presumption of innocence. Nevertheless, the Panel finds that the above findings show a risk that, if the Accused gained access to the un-redacted portions of the Official Note, Interview and Interview Extracts, they may attempt to disseminate the information contained therein. The Panel considers therefore that full disclosure of the Official Note, Interview and Interview Extracts could negatively impact the security, well-being and privacy of the Witness and other individuals and prejudice ongoing SPO investigations, unrelated to the present case. The Panel considers therefore that the proposed redactions are consistent with the fundamental rights of the Accused as they pursue the legitimate aim of protecting witnesses, third parties and ongoing SPO investigations, and are proportionate and necessary for that purpose.

25. For this reason, the Panel authorises the redactions proposed by the SPO for the Official Note, the Interview and the Interview Extracts. In relation to the Interview Extracts, for consistency purposes, the Panel directs the SPO to either maintain unredacted both statements on pages 14 and 15 or to redact both.

³¹ Confirmation Decision, paras 101-102, 106-108.

V. DISPOSITION

26. For these reasons, the Panel:

- a. **AUTHORISES** the redactions proposed by the SPO to the Official Note, the Interview and the Interview Extracts, with the caveat set out in paragraph 25; and
- b. **ORDERS** the SPO to disclose to the Defence the redacted Official Note, the Interview and the Interview Extracts by **16 November 2021, COB**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 15 November 2021

At The Hague, the Netherlands