



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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Language: English

Classification: Public

Decision on Proposed Redactions of Certain Admitted Exhibits

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21 and 40(6)(d) and (f) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 84(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 9 November 2021, the Panel ordered the Specialist Prosecutor’s Office (“SPO”) to submit, by 23 November 2021, proposed redactions, if any, to the English version of admitted exhibits P00086, P00087, P00088, P00089, P00090, and P00091; and to admitted exhibits P00092, P00104 and P00138 (“Admissibility Decision”).¹
2. On 23 November 2021, pursuant to the Admissibility Decision, the SPO filed proposed redactions to the English version of admitted exhibits P00086, P00087, P00089, P00090, and P00091, as well as to P00092 and P00104 (“Proposed Redactions”).²
3. On 13 December 2021, the SPO submitted an amended proposed public redacted version of P00104 (“P00104 Amended Redactions”).³
4. On 15 December 2021, the Panel observed that none of the Defence teams responded to the Proposed Redactions. The Panel ordered the Defence to file on the same day any objections to the P00104 Amended Redactions (“Order for Submissions”).⁴ On the same day, both Defence respectively filed submissions.⁵

¹ F00427, Panel, *Decision on the Admissibility of Deferred Exhibits and the Classification of Certain Admitted Exhibits* (“Admissibility Decision”), 9 November 2021, para. 68 (j).

² F00445, Specialist Prosecutor, *Submissions Pursuant to the Trial Panel’s Decision F00427 with Confidential Annex 1*, 23 November 2021.

³ F00492, Specialist Prosecutor, *Submission of Amended Proposed Public Redacted Version of P00104 with confidential Annex 1* (“P00104 Amended Redactions”), 13 December 2021.

⁴ Draft Transcript, 15 December 2021, p. 2644.

⁵ F00497, Haradinaj Defence, *Defence Submissions on Proposed SPO Redactions to Exhibits* (“Haradinaj Submissions”), 15 December 2021; F00498, Gucati Defence, *Response to SPO Submission of Amended Proposed Public Redacted Version of P00104* (“Gucati Submissions”), 15 December 2021.

II. SUBMISSIONS

5. The SPO submits that the Proposed Redactions are consistent with the criteria previously approved by the Panel.⁶ The SPO explains that the P00104 Amended Redactions contains additional redactions proposed to fully mirror the redactions applied to materials currently accessible online.⁷ The SPO submits that exhibits P00088 and P00134 may be reclassified as public.⁸ The SPO makes no submissions in relation to P00138.

6. The Haradinaj Defence objects to the Proposed Redactions on the basis that they cover: (i) public decisions of Kosovan courts; (ii) known names of Serbian officials; (iii) publicly known information published in news outlet still available; and (iv) that no reason is given for the proposed redactions of certain columns of “Ms Pumper’s Annexes”.⁹ The Haradinaj Defence makes no submissions on the P00104 Amended Redactions.

7. The Gucati Defence objects the P00104 Amended Redactions on the basis that the documents contained in the exhibit are public documents.¹⁰

III. APPLICABLE LAW

8. Pursuant to Article 21(2) of the Law, subject to Article 23 of the Law, the Accused shall be entitled to a public hearing subject to any measures ordered by the Specialist Chambers for the protection of victims and witnesses.

9. Pursuant to Article 40(6)(d) and (f) of the Law, the Panel may provide for the protection of confidential information as well as for the protection of the Accused, witnesses and victims.

⁶ Proposed Redactions, para. 2.

⁷ Amended Version of P00104, para. 2.

⁸ Proposed Redactions, para. 3.

⁹ Haradinaj Submissions, paras 4-6.

¹⁰ Gucati Submissions, para. 2.

10. Pursuant to Rule 84(1) of the Rules, the Panel shall review on an ongoing basis the classification of evidence and, where applicable, order their reclassification.

IV. DISCUSSION

A. PRELIMINARY MATTER

11. The Panel notes at the outset that the Haradinaj Defence misread the Order for Submissions, which exclusively concerned the P00104 Amended Redactions. If the Haradinaj Defence had wished to respond to the Proposed Redactions, it should have done so within the ten-day period prescribed by Rule 76 of the Rules or file an application for extension of time sufficiently in advance. The Panel further notes that no good cause was shown as to the late nature of the submissions of the Haradinaj Defence on the Proposed Redactions.

12. For these reasons and considering that the Haradinaj Defence made no submissions on the P00104 Amended Redactions, the Panel will not entertain the submissions of the Haradinaj Defence.

B. PROPOSED REDACTIONS

13. As regards the English version of P00086, P00087, P00089, P00090 and P00091, the Panel observes that the proposed redactions cover information identifying individuals and media outlets, titles and descriptions of media publications identifying persons named in the Batches, details of cooperation requests and court documents, details of evidentiary material and/or details provided in annexes describing the seized documents. As a result, the Panel is satisfied that the redactions proposed to the English version of P00086, P00087, P00089, P00090 and P00091 are consistent with the fundamental rights of the Accused and the principle of publicity, insofar as they pursue the legitimate aim of protecting witnesses, the privacy of other

individuals and confidential operations, and are proportionate and necessary for that purpose.

14. As regards P00092, the Panel observes that the proposed redactions cover information identifying individuals, including SPO staff members who did not appear as witnesses as well as technical details regarding SPO operations. As a result, the Panel is satisfied that the redactions proposed to P00092 are consistent with the fundamental rights of the Accused and the principle of publicity, insofar as they pursue the legitimate aim of protecting witnesses, the privacy of other individuals and confidential operations, and are proportionate and necessary for that purpose.

15. As regards the P00104 Amended Redactions, the Panel notes the submissions of the Gucati Defence that the amended proposed redactions cover documents which are public.¹¹ The Panel notes that P00104 contains documents issued by authorities in Kosovo, including judgments of the Court of Appeals of Kosovo, and indictments of the Special Prosecution Office of the Republic of Kosovo. The Panel recalls earlier SPO submissions that certain portions of this item are only available on Kosovo government websites with redactions to identifying and personal information of accused in the relevant cases, as well as to certain other details, but that they appear to be otherwise publicly available in un-redacted form from other sources.¹²

16. The Panel observes that the amended proposed redactions for P00104 cover information identifying individuals connected to other judicial proceedings and personal details of such individuals as well as information related to ongoing SPO investigations or SC proceedings. The Panel further notes that the proposed redactions to P00104 are, for several pages, unclear. Namely, on certain pages, the SPO has marked for redaction parts of the names of certain individuals, but also the entire

¹¹ Gucati Submissions, para. 2.

¹² F00110, Specialist Prosecutor, *Public Redacted Version of Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans' Association*, 27 August 2021, fn. 8.

page. The Panel has previously cautioned against the application of extensive redactions.¹³

17. The Panel notes that the SPO has previously made submissions regarding P00104 MFI:

Besides six pages which have been redacted, as they contain confidential information pertaining to SITF and SPO investigation, the remaining materials do not pertain to SITF and SPO investigation and the charges in the indictment do not encompass the dissemination of such materials by the accused. As such, the SPO has no objections to the reclassification of this material as public.

It is highlighted, however, for the Trial Panel's consideration of the opportunity to publish this item on the web site of the Kosovo Specialist Chambers that not all of the public judgements contained in Batch 2 are available in the same format on open sources. In particular, it is noted that the practice of Kosovo courts is to apply redactions to public judgements prior to their publication online, for example, by including only the initials of accused persons; although, these accused have been tried in the course of public trials - or, only the initials of witnesses, although these witnesses have previously testified in public proceedings.

So the SPO submits that the materials included in Batch 2 should not be uploaded in this format on the KSC web site in order to mirror the policy online publication of the Kosovo courts that issued these public judgements.¹⁴

18. In light of the above, the Panel considers that, in order to render a decision on the amended proposed redactions, it needs further submissions from the SPO as to the following: (i) which of the documents included in P00104 are publicly available from official sources in Kosovo, and whether they are publicly available from those sources in redacted or un-redacted form; (ii) further details concerning the practice of the Kosovo courts and the Special Prosecution Office of the Republic of Kosovo to apply redactions to public documents, and the legal basis for applying such redactions; (iii) for each document included in P00104, specific reasons to justify the request by the SPO for redactions, especially where such redactions go beyond those applied by Kosovo courts and the Special Prosecution Office of the Republic of Kosovo; and

¹³ F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table*, 29 September 2021, paras 15, 90.

¹⁴ Transcript, 28 October 2021, pp 1659-1660.

(iv) where the SPO has marked for redaction both specific parts of a page and the entire page, clarity from the SPO as to what it is seeking to redact.

C. RECLASSIFICATIONS

19. As regards P00088, the Panel notes that the SPO request the reclassification of this exhibit as public. The Panel therefore finds it appropriate to reclassify P00088 as public.

20. As regards P00134, the Panel notes that this exhibit was classified as confidential in the Admissibility Decision,¹⁵ and was not included in the Panel's order to the SPO to propose redactions. The Panel presumes that reference by the SPO to P00134 is a typographical error and that the correct reference is instead to P00138, included in the Panel's order and addressed below. The Panel therefore decides to maintain the confidential classification of P00134.

21. As regards P00138, the Panel notes that it contains clarifications to W04876's statements following his witness preparation session. Considering that W04876 testified publicly and confirmed in open session the information contained in P00138, the Panel considers that the exhibit may be reclassified as public.

¹⁵ Admissibility Decision, paras 66, 68(h).

V. DISPOSITION

22. For these reasons, the Panel:

- a. **AUTHORISES** the proposed redactions for the English version of P00086, P00087, P00089, P00090 and P00091, and:
 - i. **ORDERS** the SPO to provide, by **31 January 2022**, public redacted versions of the English versions of P00086, P00087, P00089, P00090, P00091;
 - ii. **ORDERS** the SPO to provide, by **31 January 2022** or as soon as possible, if the translations require more time, public redacted versions of the Albanian translations of P00086, P00087, P00089, P00090, P00091;
 - iii. **ADMITS** the public redacted version of the said exhibits, including any translations, by virtue of the admission of their un-redacted version;
 - iv. **DIRECTS** the Registrar to assign to each of these public redacted versions the same exhibit number as to its confidential, admitted version and to mark it as redacted (*i.e.* P[number]_RED);
- b. **AUTHORISES** the proposed redactions for P00092, and:
 - i. **ORDERS** the SPO to provide, by **31 January 2022**, a public redacted version of P00092;
 - ii. **ADMITS** the public redacted version of the said exhibit, including any translations, by virtue of the admission of its un-redacted version;

- iii. **DIRECTS** the Registrar to assign to this public redacted version the same exhibit number as to its confidential, admitted version and to mark it as redacted (*i.e.* P[number]_RED);
- c. **DEFERS** decision on the P00104 Amended Redactions and **ORDERS** the SPO to file further submissions as provided in paragraph 18 by **24 January 2022**;
- d. **MAINTAINS** the classification of P00134 as confidential; and
- e. **DIRECTS** the Registrar to reclassify admitted exhibits P00088 and P00138 as **public**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 17 December 2021

At The Hague, the Netherlands