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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 Guenael Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
Date:	27 October 2021
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Public Redacted Defence Response to 'Prosecution challenge to disclosure and proposed Rule 102(3) Notice counterbalancing measure

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I. INTRODUCTION

1. On 7 October 2021, the Trial Panel issued its 'Order for an Addendum to the Updated Rule 102(3) Detailed Notice'.[1]

2. That order directed:

   a. That the SPO transmits by 13 October 2021 an addendum to the Updated Rule 102(3) Notice to the Defence'

   b. That the Defence to indicate to the SPO by 15 October 2021, whether they seek access to the document listed within that addendum;

   c. That the SPO seize the panel, by 22 October 2021, with any request for non-disclosure of the document pursuant to Rule 108 of the Rule; and

   d. That the Defence are to respond to any such application by 29 October 2021.

3. The Defence submitted a request on an *inter partes* basis, for sight of that document contained within the addendum notice.

[1] KSC-BC-2020-07/F00354

4. On 22 October 2021, the Specialist Prosecutor's Office ("SPO") filed its 'Prosecution challenge to disclosure and proposed Rule 102(3) Notice counterbalancing measures'.[2]

5. The Defence now seeks to respond to that Prosecution submission, in accordance with the aforementioned order of the Trial Panel.

II. BACKGROUND

6. The Procedural Background is well known, and thus there is no intention to go into detail at this stage, save to confirm that the background adopted by the Trial Panel at paragraphs 1-3 of its decision are adopted for the purposes of this submission.[3]

III. THE LAW

7. Further to the position adopted at paragraph 6 above, the Defence for Mr. Haradinaj adopts the outline of the law at paragraphs 4-6 of the Order of the

[2] KSC-BC-2020-07/F00389/RED

[3] KSC-BC-2020-07/F00354

Trial Panel,[4] and seeks to make no further submissions in respect of that which is applicable or otherwise.

IV. SUBMISSIONS

8. The Defence have sought disclosure of Item 201 from the 13 October 2021 update to the Rule 102(3) Notice,[5] that being described as 'an official note reflecting a contact with a witness'.[6]

9. The basis of that application being, that given the limited content disclosed to the Defence it was abundantly clear that the item was material to the preparation of the Defence case.

10. The justification for this position being that the Defence has, on numerous occasions, raised the issue of 'Entrapment' as a Defence to be pursued at trial.

11. The SPO have consistently challenged this position on the basis that there was no evidence of any such action and therefore the position of the Defence was merely fanciful.

12. Item 201 [REDACTED].

[4] Ibid

[5] Prosecution update to Rule 102(3) Notice Addendum, KSC-BC-2020-07/F00361, 13 October 2021, Confidential ('Updated Rule 102(3) Notice Addendum').

[6] KSC-BC-2020-07/F00337/A01 (103283-103288).

13. The position of the SPO is noted, in particular that at paragraphs 6-8 of its submissions;[7] however, this is in reality, [READCTED], in its order, where it notes at paragraph 8 that:

> "*[REDACTED]*."[8]

14. The SPO maintains "*Fanciful information should likewise fall outside the ambit of Rule 103*".[9]

15. Such a submission cannot be sustained in our respectful submission as this then places the SPO in the position of the arbiter of what is credible evidence and what is not.

16. As the Trial Panel has previously referred, the question of credibility and/or weight, is one for the Panel after admission if it is that that evidence is to be admitted.

17. To empower the SPO to make this determination renders the SPO as being in a position to make a determination on what the Defence can, and cannot consider and/or use, a suggestion that does, in the submission of the Defence, constitute a flagrant violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").

[7] KSC-BC-2020-07/F00389/RED

[8] KSC-BC-2020-07/F00354

[9] KSC-BC-2020-07/F00389/RED at paragraph 6

18. Whether the SPO deems the 'note' to be of "*high enough quality*"[10] is wholly irrelevant.

19. Further, the submission that "*allowing bald assertions to justify disclosure also allows for bad faith manipulation of the disclosure*",[11] is wholly without foundation, and borders on the objectionable.

20. The SPO is reminded that it is they that have brought this note to the attention of the Trial Panel, as they should, and the Defence in accordance with its obligations, and yet it is the SPO now seeking to prevent disclosure.

21. The Defence are merely exercising their professional obligations and seeking disclosure of that which it is entitled to receive.

22. The Defence note the submissions at paragraphs 9 and 10 of the SPO application and again note the suggestion that disclosure would prejudice ongoing investigations and prejudice the security of [REDACTED].

23. Again, therefore, the SPO is to be reminded that the central concern is that the Defendant is to be afforded a fair trial, and if it is that this cannot be guaranteed, it is quite clear, that no trial should take place. The refusal to disclose evidence that is clearly material to the Defence and the defences that

[10] Ibid at paragraph 8

[11] Ibid

have been idenitified as to be raised, clearly infringes on that right without any justification.

24. In terms of the suggested counter balancing measures, the Defence raises a significant concern in the position adopted by the SPO at paragraph 12:

> *"[The] Prosecution consents to the following counterbalancing measures only in the interest of resolving this matter and on the understanding that no further disclosures will be required, and that these measures will not themselves be used as a basis to justify further disclosure."*

25. The SPO is quite evidently seeking to hold either, or both, the Defence and the Trial Panel to ransom by seeking to offer an ultimatum in terms of the circumstances under which it will agree to disclose. This is wholly improper and ought to be dismissed without further consideration.

26. The position the SPO adopts in terms of the circumstances under which it will agree to disclosure is not provided for within the Rules, nor is it provided for within the Rules of any current or previous tribunal, national or international. It would appear therefore that the SPO is attempting to read into the three-stage test as provided for by the Trial Panel, an extra limb that must be met, and again, does so without any proper legal foundation.

Counter Balancing Measures

27. At the risk of repeating previous submissions in respect of previous applications that have been required so as to ensure that the SPO comply with their disclosure obligations, the proposed 'Counter-Balancing' measures are not accepted as being appropriate in terms of this application, in particular, the level of redaction renders such information bordering on the useless to the Defence.

28. The Defence notes the following:

a. that there has been no application for protective measures for the [REDACTED];

b. the proposition that to disclose would endanger ongoing investigations has not been substantiated sufficiently, or at all;

c. the proposition that to disclose would endanger the safety [REDACTED] has not been substantiated sufficiently, or at all.

29. The SPO seeks to advance the argument that the material is unreliable and then go on to assert that it would compromise ongoing investigations. Clearly such an approach is unsustainable as both arguments cannot be properly advanced.

30. Accordingly, at this stage, the submissions of the SPO are nothing more than unsubstantiated bald assertions and thus ought to be dismissed in the absence of any further evidence.

31. It is of note that much of the discussion concerning these exhibits has been held during an *ex parte* hearing and thus the Defence are wholly unaware as to the nature of those discussions.

Ex Parte Hearing

32. The Defence is aware of the *ex parte* hearing, in the absence of the Defence, previously scheduled so as to enable the SPO to make certain submissions on the documents.

33. This in itself raises a significant issue in terms of whether those documents ought to be disclosed or otherwise.

34. The Defence therefore seeks confirmation of whether, during that *ex parte* hearing, or at any time prior to or since, the Trial Panel has seen the evidence/contact note, that is the subject of these submissions.

35. This point is essential in considering the next step to take in terms of disclosure.

36. Reference is drawn to the European Court of Human Rights Case of *Edwards & Lewis v. United Kingdom*,[12] wherein, on considering an analogous issue, the European Court noted:

[12] ECtHR, App. Grand Chamber, No. 3947/98 and 40461/98, 22 July 2003,

> *"The applicants alleged that they had been denied fair trials, contrary to article 6 of the Convention, as a result of the incitement of offences by agents provocateurs and the procedure concerning the non-disclosure of evidence followed by the domestic courts."*[13]

37. The Grand Chamber went on to consider: "*In the present case, however, it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge*", and further "*In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police.*"[14]

38. Further, the Chamber observed "*despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue to the case on entrapment in full before the judge.*"[15]

39. In making the above observations, the Chamber noted "*in each case the judge, who subsequently rejected the defence submissions on entrapment had already seen prosecution evidence which may have been relevant to the issue*."[16]

[13] *Ibid*. para. 3.

[14] *Ibid*. para. 58.

[15] *Ibid*.

[16] *Ibid*.

40. The Chamber, in making its final ruling found:

> *"In these circumstances, the Court does not consider that the procedure employed to determine the issues f disclosure of evidence and entrapment employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6(1) in this case."*[17]

41. The position in the instant case therefore seems to a degree, to have been taken out of the hands of the SPO, if it is that the Trial Panel have had sight of the evidence subject to the application.

42. Again, if it is that the Trial Panel have had sight of the evidence in question during that *ex parte* hearing, or at any other time, then that same evidence must be disclosed to the defence so as to accord with Article 6(1) of the Convention, the Trial Panel being in a position to make a determination of fact on matters to which the Defendant, otherwise, is not privy.

V. Conclusion

[17] *Ibid*. para. 59

43. The Defence maintains its application for item 201, in the first instance on the grounds of its clear materiality to the Defence case.

44. Further, the SPO have not satisfied any test to refuse disclosure, or in the alternative, that counter-balancing measures are necessary.

45. Still further, where that evidence has been seen and/or considered by the trial panel, it must be disclosed to the Defence so as to ensure compliance with Article 6(1) of the Convention.

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