

In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **The Trial Panel**
Judge Charles Smith III
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 17 January 2022

Language: English

Classification: **Public**

Public Redacted Version of Response to 'Public Redacted Version of Prosecution Challenge to Disclosure and Proposed Rule 102(3) Counterbalancing Measures' and Ancillary Application

Specialist Prosecutor

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I. INTRODUCTION

1. On 22 October 2021, the Defence received notification of the 'Public Redacted version of Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice counterbalancing measures' ('Challenge')¹ which challenges the disclosure of Item 201 of the Rule 102(3) Notice and proposes counterbalancing measures in relation to the non-disclosure of Items 191, 195-200 and 201 of the same.
2. The Defence makes the following submissions on behalf of Mr Gucati in response.

II. SUBMISSIONS

3. The Defence incorporates into this Response its submissions as to the legal framework for disclosure, materiality, Rule 108 and the equality of arms as set out previously in its 'Response to Confidential Redacted Version of Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice with One Confidential Annex'², in relation to the pending Trial Panel determination on disclosure of items 185 to 200 of the Rule 102(3) Notice.

Disclosure of Item 201

¹ KSC-BC-2020-07/F00389/RED, *Public Redacted Version of Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures*, Prosecution, Public

² KSC-BC-2020-07/F00325, *Response to Confidential Redacted Version of Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice with One Confidential Annex*, Gucati, Confidential

4. The Defence makes the following additional submissions specifically in relation to the disclosure of item 201.
5. Item 201 is deemed by the Defence to be both (a) material to the preparation of the defence, pursuant to Rule 102(3), and (b) information which may reasonably suggest the innocence or mitigate the guilt of the Accused, pursuant to Rule 103.
6. According to the description of item 201, it contains information which [REDACTED].
7. The materiality of that information is not 'speculative'. The information is relevant and has a direct connection to a live issue in the case³, namely, the 'entrapment allegations raised by the defence'⁴.
8. As the Trial Panel has already ruled, the SPO's disclosure obligation under Rule 102 of the Rules applies to material contained even if the SPO considers it to be false or misleading⁵:

"...The SPO's notice and *disclosure* obligation under Rule 102 of the Rules applies to the material contained in the Transmission even if the SPO considers it to be false or misleading".

9. The source, accuracy, reliability or subjectivity of information in the SPO's possession may inform the admissibility of the relevant evidence or its weight

³ *Prosecutor v Al Hassan*, "Public Redacted version of 'Decision on the Defence request to terminate the proceedings and related requests'", ICC-01/12-01/18, Trial Chamber X, Public at paragraph 37

⁴ Transcript at page 816, lines 816 to 817

⁵ KSC-BC-2020-07, "Order for an Addendum to the Updated Rule 102(3) Detailed Notice", Trial Panel II, Confidential at paragraph 10

if admitted⁶, but the Rules neither provide for the possibility for the SPO to refrain from giving notice of information in its possession, nor, it is submitted, from making disclosure under Rules 102(3) or Rule 103, on grounds of reliability or credibility.

10. Article 6(1) requires the prosecuting authorities to disclose information *relevant* to entrapment, and call witnesses who can testify on the issue of incitement, to permit the Defence to argue a case on entrapment in full at trial⁷.
11. Although W04841 gave evidence that [REDACTED], she otherwise candidly made clear that she had no knowledge of the investigation into the leak of documents from the SPO⁸.
12. The extent to which W04842 is able to assist on the process by which the 'Batches' arrived at the KLA WVA is not presently established.
13. It is noted that W04842 was asked in evidence on 28 October 2021 whether he had (i) 'any reason to believe that any current or former member of the SPO was involved in any way in delivering unauthorised information to the KLA War Veterans Association' and (ii) 'any reason to believe that any person acting under the instruction or control of the SPO was involved in any way in delivering unauthorised information to the KLA War Veterans Association'⁹.

⁶ KSC-BC-2020-07, "Order for an Addendum to the Updated Rule 102(3) Detailed Notice", Trial Panel II, Confidential at paragraph 8

⁷ KSC-BC-2020-07/IA005-0008, "Public Redacted Version of Decision on the Appeals Against Disclosure Decision", Court of Appeals Panel, 29 July 2021 at paragraph 52, referring to ECtHR, *Edwards and Lewis v United Kingdom*, nos.39647/98 and 40461/98, Judgment, 27 October 2004, pp.16-17; ECtHR, *V v Finland*, no.40412/98, Judgment, 24 April 2007, paragraphs 77-80; ECtHR, *Bannikova v Russia*, no.18757/06, Judgment, 4 November 2010 at paragraph 65

⁸ Transcript at page 1207, lines 10 to 14; page 1226 line 21, page 1237 lines 4 to 17; page 1249 lines 5-10, page 1477 lines 22-25; page 1478 lines 10 to 1479 line 2

⁹ Transcript at page 1756, lines 12 to 20

14. Neither the question nor answer was qualified by reference to a 'reliable' or 'credible' reason.
15. In the circumstances, the Defence are entitled in cross-examination of W04842 to, *inter alia*, explore whether the witness was aware of item 201, and the [REDACTED] the process by which the Batches arrived at the KLA WVA, when giving evidence on 28 October 2021.
16. As the Trial Panel has previously stated, the underlying principle of the disclosure regime applicable before this jurisdiction is that information must be disclosed unless an exception is made to it pursuant to Rules 105-108 of the Rules¹⁰.
17. Although the Challenge asserts at paragraph 1 that if item 201 "is disclosed, it would cause grave witness security risks and irremediably prejudice sensitive, ongoing Specialist Prosecutor's Office ('SPO') investigations into obstruction of justice" and that the information sought falls under Rule 108 in paragraph 18, the Challenge does not provide any detail, in the redacted version at least, to support those assertions. The Defence refers to paragraphs 68 to 69 of its 'Response to Confidential Redacted Version of Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice with One Confidential Annex'¹¹ and incorporates those submissions as they apply *mutatis mutandis* to the Challenge.
18. Accordingly, full disclosure should be ordered.

¹⁰ KSC-BC-2020-07, "Order for an Addendum to the Updated Rule 102(3) Detailed Notice", Trial Panel II, Confidential at paragraph 10

¹¹ KSC-BC-2020-07/F00325, *Response to Confidential Redacted Version of Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice with One Confidential Annex*, Gucati, Confidential

Proposed counterbalancing measures

19. Counterbalancing measures are not an alternative to non-disclosure (as submitted in the Challenge at paragraph 18) but an alternative to disclosure and ensure fairness to the Accused where non-disclosure under Rule 108 is strictly necessary (see Rule 108(4)).
20. Disclosure, non-disclosure and the use of counter-balancing measures are not matters for negotiation between the Trial Panel and the Prosecution, and it is inappropriate for the Prosecution to demand to be released from the continuing nature of its disclosure obligations under Rule 112 in exchange for its 'consent' to counterbalancing measures.
21. As to whether the proposed counterbalancing measures in the Challenge are sufficient 'to meet the legitimate needs of the defence'¹², the Defence are simply unable to comment given the wholesale redactions applied to the proposals within the Challenge itself.
22. The Defence, however, acknowledges the concession made by the SPO in paragraph 12 of the Challenge that the Defence have 'legitimate needs' that are required to be met by further disclosure, albeit limited not in full, of information relating to items 191, 195-200 and 201, and welcomes the constructive engagement with disclosure by the SPO (albeit belatedly) that the concession implies.
23. If contrary to the above submissions, the Trial Panel orders non-disclosure in full of items 191, 195-200 and 201, the Defence agrees that restricted disclosure

¹² KSC-BC-2020-07/F00389/RED, *Public Redacted Version of Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures*, Prosecution, Public at paragraph 12

in relation to those items should be made as a counterbalancing measure to ensure the Accused's right to a fair trial under Rule 108(4).

ANCILLARY APPLICATION

24. The Defence observe that by selectively reporting alleged comments made by the Trial Panel during the *ex parte* hearing on 21 October 2021¹³, the Prosecution appear to have acted in breach of the strictly confidential and *ex parte* classification of that information without authorisation.

25. To the extent that the selectively reported comments of the Trial Panel indicate that a view has been taken on factual matters revealed during the *ex parte* hearing, the Defence herein repeat the concerns set out in the submissions made in paragraphs 62 to 66 of its *Response to Confidential Redacted Version of Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice with One Confidential Annex*¹⁴ in relation to adversarial proceedings and the equality of arms.

26. In the circumstances, reclassification of the transcript of the *ex parte* hearing should be ordered in full so that the comments of the Trial Panel can be placed by the Defence into context.

III. CLASSIFICATION

¹³ KSC-BC-2020-07/F00389/RED, *Public Redacted Version of Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures*, Prosecution, Public at paragraph 12

¹⁴ KSC-BC-2020-07/F00325, *Response to Confidential Redacted Version of Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice with One Confidential Annex*, Gucati, Confidential

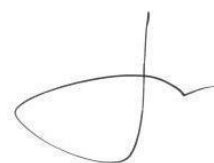
27. This filing is classified as confidential as it relates to a filing that bears the same classification.

IV. CONCLUSION

28. For the above reasons, it is submitted that:

- a. Full disclosure of items 191, 195-200 and 201 should be ordered;
- b. If contrary to the above, the Trial Panel orders non-disclosure of items 191, 195-200 and 201 in full, limited disclosure in relation to each of those items should be made as a counterbalancing measure in accordance with Rule 108(4) to the fullest extent that is compatible with Rule 108(1) and the Accused's right to a fair trial; and
- c. The transcript of the *ex parte* hearing on 21 October 2021 should be reclassified as confidential, given the selective reporting of comments by the Trial Panel during that *ex parte* hearing by the Prosecution.

Word count: 1732 words

A handwritten signature in black ink, consisting of a large, stylized loop followed by a vertical line and a small horizontal stroke at the end.

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29 October 2021

Cardiff, UK