



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

Date: 1 February 2022

Language: English

Classification: Public

**Corrected Version of
Decision on Request for Certification or Reconsideration of F00541**

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 40(6)(h) and 45 of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 77 and 79 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 25 January 2022, the Specialist Prosecutor’s Office (“SPO”) added an item (“Item 205”) to its Rule 102(3) notice and stated its challenge to its disclosure to the Defence (“F00534”).¹
2. On 27 and 28 January 2022, following the Panel’s order shortening the time for response,² the Defence respectively responded to F00534 seeking disclosure of Item 205.³
3. On 28 January 2022, the Panel issued a confidential decision on Item 205 granting the SPO’s request not to disclose Item 205 (“Impugned Decision”).⁴
4. On 31 January 2022, at the status conference held by the Panel, the Defence for Hysni Gucati (“Gucati Defence”) orally submitted a request seeking either leave to appeal, or reconsideration, of the Impugned Decision (“Request”).⁵ The Defence for Nasim Haradinaj (“Haradinaj Defence”) joined the Request.⁶ The SPO responded.⁷

¹ F00534, Specialist Prosecutor, *Prosecution Notice of Additional Item 205 and Challenge to Disclosure* (“F00534”), 24 January 2022, confidential, with Annex 1, strictly confidential and *ex parte*.

² F00535, Panel, *Order Varying Time Limit to Respond to F00534*, 26 January 2022.

³ F00536, Haradinaj Defence, *Defence Response to Prosecution Filings F00534*, 27 January 2022, confidential; F00539, Gucati Defence, *Defence Response to Prosecution Notice of Additional Item 205 and Challenge to Disclosure with one Strictly Confidential and ex parte annex*, 28 January 2022, confidential.

⁴ F00541, Panel, *Decision on the SPO Request Regarding Item 205* (“Impugned Decision”), 28 January 2022, confidential.

⁵ Draft Transcript, 31 January 2022, pp 3381-3385.

⁶ Draft Transcript, 31 January 2022, p. 3385; F00543, Haradinaj Defence, *Defence Application for Leave to Appeal Through Certification from Decision KSC-BC-2020-07-F00541*, 31 January 2022, confidential.

⁷ Draft Transcript, 31 January 2022, pp 3386-3387.

II. SUBMISSIONS

5. The Gucati Defence seeks leave to appeal two issues (collectively, “Issues”):

- (i) Whether the Panel erred in refusing disclosure to the Defence of material which, in the Panel’s stated view, demonstrated matters which were adverse to the Defence submissions on entrapment (“First Issue”);
- (ii) Whether, in the absence of disclosure, the Panel was wrong to draw conclusions from the material which were adverse to the Defence submissions on entrapment (“Second Issue”).⁸

6. The Gucati Defence submits that both Issues refer to paragraph 20 of the Impugned Decision. It argues that the Panel drew a conclusion from material that the Defence has not seen, on which it has not been able to make submissions, and which appears on its face to be adverse to the Defence’s claim that the SPO entrapped the Accused (“Entrapment Allegations”).⁹ The Gucati Defence recalls that it argued that: (i) Item 205 *may* be capable of demonstrating failures of the SPO to take adequate investigative steps in relation to the Entrapment Allegations;¹⁰ and (ii) the European Court of Human Rights (“ECtHR”) has made it clear that an accused ought to have access to *all* material put before the trier of fact which may be relevant to a plea of incitement, including material which may be adverse to the accused’s position.¹¹ The Gucati Defence submits that the Issues are appealable, are neither abstract nor hypothetical, and derive directly from the Impugned Decision. The Gucati Defence further submits that the Issues significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial. The Gucati Defence also avers that an immediate resolution of the Issues by the Court of Appeals Panel may materially

⁸ Draft Transcript, 31 January 2022, p. 3383.

⁹ Draft Transcript, 31 January 2022, p. 3383.

¹⁰ Draft Transcript, 31 January 2022, p. 3383.

¹¹ Draft Transcript, 31 January 2022, p. 3384 *referring to* ECtHR, Grand Chamber, *Edward & Lewis v. United Kingdom*, no. 3947/98 and 40461/98, [Judgment](#), 27 October 2004.

advance the proceedings. The Gucati Defence argues that this is its last opportunity to address any prejudice that may arise from adverse conclusions drawn by the Panel from material that was not shared with the Defence. On this basis, the Gucati Defence seeks leave to appeal the Impugned Decision.¹²

7. In the alternative, the Gucati Defence requests the Panel to reconsider the Impugned Decision because, it submits, (i) the Panel committed a clear error by drawing a conclusion from material which had not been shown to the Defence which was adverse to its Entrapment Allegations; and (ii) reconsideration of the Impugned Decision would avoid injustice by granting the Defence the opportunity to challenge and address the material.¹³

8. The Haradinaj Defence joins the submissions made by the Gucati Defence (“Joinder”).¹⁴

9. The SPO responds that, as regards the First Issue, the Defence merely disagrees with the Panel and fails to demonstrate an error.¹⁵ Turning to the Second Issue, the SPO submits that it does not arise from the Impugned Decision but from the statutory framework of the Specialist Chambers which, the SPO submits, the Defence actually challenges.¹⁶ In this regard, the SPO argues that Rules 102 and 108 of the Rules expressly provide for the procedure which the Panel followed in the Impugned Decision.¹⁷ Lastly, the SPO argues that an interlocutory appeal at this late stage of the proceedings would not advance but would significantly delay the proceedings.¹⁸

¹² Draft Transcript, 31 January 2022, p. 3385.

¹³ Draft Transcript, 31 January 2022, p. 3385.

¹⁴ Draft Transcript, 31 January 2022, p. 3385; F00543, Haradinaj Defence, *Defence Application for Leave to Appeal Through Certification from Decision KSC-BC-2020-07-F00541*, 31 January 2022, confidential.

¹⁵ Draft Transcript, 31 January 2022, pp 3386-3387.

¹⁶ Draft Transcript, 31 January 2022, p. 3387; F00543, Haradinaj Defence, *Defence Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07-F00541*, 31 January 2022, confidential.

¹⁷ Draft Transcript, 31 January 2022, p. 3387.

¹⁸ Draft Transcript, 31 January 2022, p. 3387.

III. APPLICABLE LAW

10. Rule 77(1) of the Rules provides that when a Party seeks to appeal a decision of a Panel for which an appeal does not lie as of right according to the Law and the Rules, that Party shall request certification from the Panel that rendered the impugned decision within seven (7) days thereof.

11. The conditions for leave to appeal are set out in Article 45 of the Law and Rule 77(2) of the Rules: the Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings (“Certification Test”).

12. The Panel has set out the interpretation of the Certification Test in previous decisions.¹⁹

13. Pursuant to Rule 79 of the Rules, the Panel may, upon request by a Party, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, reconsider its own decisions.

14. Reconsideration is an exceptional measure and should only be undertaken if a clear error of reasoning has been demonstrated or if necessary to avoid injustice. New facts and arguments arising since the impugned decision was rendered may be relevant to this assessment.²⁰

¹⁹ F00372, Panel, *Decision on Haradinaj Defence’s Application for Certification of F00328*, 15 October 2021; F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021; F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021.

²⁰ F00236, Pre-Trial Judge, *Decision on the Haradinaj Application for Leave to Appeal the Decision on the Search and Seizure Videos*, 15 June 2021, para. 22. See also ICTY, *Prosecutor v Prlić*, IT-04-74-AR73.16, [Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for](#)

IV. DISCUSSION

15. At the outset, the Panel takes note that the Haradinaj Defence reiterated its Joinder through a written filing.²¹ The Panel observes that this was unnecessary in light of the oral submissions made in court.

16. As a preliminary matter, the Panel notes that the Impugned Decision was issued confidentially. The submissions in relation to the certification and reconsideration request were made in open session. The Panel hereby renders a public decision on this matter, without revealing any confidential information from the Impugned Decision.

17. For context, the Panel recalls the paragraph of the Impugned Decision with which the Gucati Defence takes specific issue:

20. The Panel further observes that Item 205 does not contain any information or evidence that would suggest any investigative shortcomings on behalf of the SPO. In particular, the interview of the third person by the SPO and the questions posed by the SPO investigator suggest – contrary to what the Gucati Defence submits – that the SPO is taking investigative steps which appear to be reasonable and professional in the circumstances, including the evaluation of the credibility of the information received [REDACTED]. Lastly, the Panel found no information suggesting that there was any incriminating or exculpatory evidence in Item 205.

18. The Panel further recalls the test it previously set for assessing whether information was material under Rule 102(3) of the Rules in the context of the Entrapment Allegations. The Panel considered information to be material if: (i) it could assist the Defence claim or its investigations of entrapment (without assessing

Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18; *Prosecutor v Galić*, IT-98-29-A, *Decision on Defence's Request for Reconsideration*, 16 July 2004, p. 2; ICTR, *Prosecution v Semanza*, ICTR-97-20-T, Trial Chamber III, *Decision on Defence Motion to Reconsider Decision*, 9 May 2002, para. 8; ICC, *Prosecutor v Ongwen*, ICC-02/04-01/15-468, Trial Chamber IX, *Decision on Request for Reconsideration of the Order to Disclosure Requests for Assistance*, 15 June 2016, para. 4; *Prosecutor v Bemba Gombo et al*, ICC-01/05-01/13-1085, Trial Chamber VII, *Decision on Kilolo Defence Request for Reconsideration*, 15 July 2015, para. 4; *Prosecutor v Ruto and Sang*, ICC-01/09-01/11-1813, Trial Chamber V-A, *Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits*, 10 February 2015, para. 19.

²¹ F00543, Haradinaj Defence, *Defence Application for Leave to Appeal Through Certification from Decision KSC-BC-2020-07-F00541*, 31 January 2022, confidential.

the weight, reliability or credibility of that information); or (ii) the information, interpreted in the relevant context, suggested that the SPO had 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”).²² The Panel has interpreted the second limb of the Materiality Test broadly, so as to cover information pertaining to the question of whether the SPO took reasonable investigative steps to exclude the possibility that entrapment occurred.²³ The Defence has not challenged the correctness and applicability of this standard.

A. REQUEST FOR CERTIFICATION

19. As regards the First Issue, the Panel observes that the Defence misconstrues the finding of the Panel at paragraph 20 of the Impugned Decision. The Panel examined Item 205 in light of information contained in Items 203 and 204 and, on that basis, examined the further investigation undertaken by SPO in respect of those items, which resulted in the production of Item 205. The Panel found that Item 205 contained no information to support the Entrapment Allegations or assist the Defence investigation thereon. The Panel further found that Item 205 contained no indication of investigative inadequacies on the part of the SPO in respect of the information contained in Items 203 and 204.

20. Accordingly, the Panel’s findings in relation to Item 205 were made without prejudice to any of its previous findings in relation to materiality in the context of

²² F00413, Panel, *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice* (“3 November Disclosure Decision”), 3 November 2021, confidential para. 56; F00435, Panel, *Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201* (“Item 201 Decision”), 15 November 2021, confidential, para. 12; F00479, Panel, *Decision on Item 202 Disclosure* (“Item 202 Decision”), 7 December 2021, para. 12; F00533, Panel, *Decision on SPO Request Regarding Items 203 and 204* (“Items 203 and 204 Decision”), confidential para. 15.

²³ Item 201 Decision, para. 17; Item 202 Decision, para. 12; Items 203 and 204 Decision, para. 15.

Entrapment Allegations.²⁴ Furthermore, the aforementioned findings have no bearing on the Panel's overall position in regards to the merits of the Entrapment Allegations, which relies entirely on all items admitted as evidence in the case. Accordingly, the Impugned Decision is without prejudice to a final ruling on the Entrapment Allegations generally.

21. For these reasons, the Panel finds that the First Issue does not emanate from the Impugned Decision and cannot significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

22. As regards the Second Issue, the Panel notes that it is premised on the First Issue, to the extent that it assumes that the Panel made adverse conclusions on the Entrapment Allegations. In light of the above findings, and for the reasons given, the Panel considers that the Second Issue does not emanate from the Impugned Decision.

23. In any event, the Panel recalls that, in every decision where it has been asked to make a determination of materiality under Rule 102(3) of the Rules for the purposes of the Entrapment Allegations where the Defence has not had access to the information in question, it has exercised particular caution. In line with the case-law of the ECtHR and in order to preserve the effectiveness of the rights of the Accused, the Panel has always considered whether the information in question contained incriminating evidence.²⁵ The Panel has also considered whether the material contained exculpatory evidence, or if it had any prospect of providing a lead on evidence that was either possibly relevant to an already existing issue or could possibly raise a new issue in the present case.²⁶ It carried out the same exercise in respect of Item 205 and satisfied itself that the Defence was not prejudiced by its inability to see the content of the item concerned.

²⁴ 3 November Disclosure Decision, paras 64, 71; Item 201 Decision, paras 17-19.

²⁵ See ECtHR, *Edwards and Lewis v. UK*, nos. 39647/98 and 40461/98, [Judgment](#), 27 October 2004, p. 17.

²⁶ 3 November Disclosure Decision, para. 57; Items 203 and 204 Decision, para. 17; Impugned Decision, para. 17.

24. For these reasons, the Panel finds that the Defence has failed to establish that the Second Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

25. Having found that the two Issues do not meet the first prong of the Certification Test, the Panel need not determine whether the second prong is met. In any event, the Panel agrees with the SPO that, given the current stage of the proceedings, an immediate resolution by the Court of Appeals Panel cannot materially advance the proceedings.

B. REQUEST FOR RECONSIDERATION

26. As said above, the Panel considers that the Defence misconstrued paragraph 20 of the Impugned Decision to interpret it as encompassing a general, adverse ruling on the merits of the Entrapment Allegations. As stated above, the finding in paragraph 20 was made without prejudice to any previous findings in relation to other Rule 102(3) items and, in any event, without prejudice to a final, general ruling on the merits of the Entrapment Allegations.

27. For this reason, the Panel finds that the Defence has failed to demonstrate the existence of a clear error of reasoning, or that reconsideration of the Impugned Decision is necessary to avoid injustice.

V. CLASSIFICATION

28. The Panel observes that the Haradinaj Defence filed its joinder to the Request (F00543) confidentially. Since the filing merely repeats submissions that were made publicly in court, there is no reason for it to remain confidential. The Panel therefore directs the Registrar to reclassify F00543 as public.

VI. DISPOSITION

29. For these reasons, the Panel:

- a. **DENIES** the Request, including the Joinder; and
- b. **DIRECTS** the Registrar to reclassify F00543 as public by 4 February 2022.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 1 February 2022

At The Hague, the Netherlands

In paragraphs 28 and 29(b) the number F00453 was changed to F00543.