



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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 17 May 2022

Language: English

Classification: Public

**Decision on the Defence Requests for Permission
to Make Further Submissions on Disclosure**

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Article 40(2) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 112 and 136(2)-(3) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 17 March 2022, the Panel closed the case in accordance with Rule 136(1) of the Rules.¹
2. On 12 May 2022, the Defence for Hysni Gucati (“Gucati Defence”) filed a request for permission to make further submissions regarding disclosure (“Request”).²
3. On the same day, 12 May 2022, the Panel instructed the Defence for Nasim Haradinaj (“Haradinaj Defence”) and the Specialist Prosecutor’s Office (“SPO”) to respond to the Request, if they so wished, by 16 May 2022.³
4. On the same day, 12 May 2022, the Haradinaj Defence joined the Request (“Joinder”).⁴
5. On 16 May 2022, the SPO responded (“SPO Response”).⁵
6. On 17 May 2022, the Gucati Defence indicated that it would not reply to the SPO Response.⁶

¹ Transcript, 17 March 2022, p. 3855.

² F00605, Gucati Defence, *Gucati Request for Permission to Make Further Submissions re Disclosure* (“Request”), 12 May 2022, confidential.

³ Correspondence 102, confidential.

⁴ F00606, Haradinaj Defence, *Haradinaj Request for Permission to Make Further Submissions re: Disclosure* (“Joinder”), 12 May 2022, confidential.

⁵ F00608, Specialist Prosecutor, *Prosecution Consolidated Response to Defence Requests Concerning Disclosure* (“SPO Response”), 16 May 2022, confidential.

⁶ Email from Gucati Defence Counsel to the Trial Panel Legal Officer, *RE: A filing has been approved: F00605 in the case KSC-BC-2020-07*, 17 May 2022, 2:36PM.

II. SUBMISSIONS

7. The Gucati Defence requests permission from the Panel to make submissions in relation to the compliance of the SPO with its disclosure obligations under Rule 102(3) of the Rules towards any material the SPO might possess regarding matters reported in a series of press reports beginning on 10 April 2022, namely: Mr Dick Marty's allegations that Serbian state authorities were behind a plot to threaten his life with the design of falsely implicating Kosovan Albanians in the operation ("Reported Matters").⁷

8. The Gucati Defence argues that the Reported Matters are relevant to the Defence case because they share two features with the case, namely: (i) a deliberate attempt by a state agency to create the circumstances in which to implicate Kosovan Albanians; and (ii) the allegation that Serbian state authorities are engaged in impropriety with a view to fabricate and manipulate evidence.⁸ The Gucati Defence avers that it sought to clarify through *inter partes* communications whether the SPO held any information relating to the Reported Matters before the closing of the case,⁹ but the SPO refused to confirm whether it possessed any such material and asserted that the information requested was irrelevant to the case.¹⁰ The Gucati Defence argues that it might be inferred from this that the SPO does hold the requested information.¹¹ The Gucati Defence therefore seeks to challenge the SPO's unilateral assessment that the requested information was not relevant to the case and submits that this amounts to good cause.¹² The Gucati Defence further submits that the publication of the Reported Matters after the closing of the case amount to exceptional circumstances.¹³

⁷ Request, paras 3, 14.

⁸ Request, para. 4.

⁹ Request, paras 5, 17.

¹⁰ Request, paras 6, 18.

¹¹ Request, para. 18.

¹² Request, para. 19.

¹³ Request, para. 16.

9. The Haradinaj Defence fully adopts the Request.¹⁴

10. The SPO responds that the Panel should reject the Request *in limine*.¹⁵ The SPO submits that the Defence fails to establish “exceptional circumstances” and “good cause” warranting consideration of the Request.¹⁶ The SPO submits that the attempts of the Defence to draw parallels between the reported murder plot and the case against the Accused are unpersuasive and that it fails to set out coherent reasons as to how or why this would be relevant to the case.¹⁷ The SPO further argues that it is under no obligation to provide the Defence with information on matters not relevant to the case against the Accused.¹⁸ The SPO submits that the alleged plot has no connection whatsoever to the Defence allegations of entrapment, which were the subject of distinguishable Rule 102(3) notice orders made by the Panel. The reported plot likewise cannot have informed the charged conduct of the Accused, as the reports post-date the charged timeframe.¹⁹

III. APPLICABLE LAW

11. Pursuant to Article 40(2) of the Law, the Panel shall ensure that a trial is fair and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused.

12. Pursuant to Rule 112 of the Rules, if either Party discovers additional information that should have been disclosed earlier pursuant to the Rules, that Party shall immediately disclose such evidence or information to the opposing Party and the Panel. The Specialist Prosecutor shall disclose to the Defence any exculpatory

¹⁴ Joinder, paras 4.1-4.9.

¹⁵ SPO Response, paras 1, 13, 18, 23.

¹⁶ SPO Response, paras 14-18.

¹⁷ SPO Response, para. 16.

¹⁸ SPO Response, paras 19-21.

¹⁹ SPO Response, para. 20.

information referred to in Rule 103 of the Rules notwithstanding the closing of the case pursuant to Rule 136 and any subsequent appeal.

13. Pursuant to Rule 136(2) of the Rules, once the case is closed, “no further submissions may be made to the Panel, unless in exceptional circumstances and on showing of good cause”.

14. Pursuant to Rule 136(3) of the Rules, after the closing of the case, “the Panel may not receive further submissions or hear evidence, unless exceptional circumstances require otherwise”.

IV. DISCUSSION

15. At the outset, the Panel recalls that, in accordance with Rule 136(1) of the Rules, it closed the case on 17 March 2022.²⁰ Accordingly, the Panel shall assess whether the Reported Matters amount to exceptional circumstances and whether the Defence showed good cause in support of its Request.

16. The Panel finds the Defence’s argument that the Reported Matters share features with its case unconvincing. The Defence has not demonstrated any link between those matters and the facts underlying its case in the current proceedings. The Reported Matters entail unverified allegations of impropriety on the part of Serbian authorities, which appear unrelated to the SPO’s cooperation with such authorities or any claims of SPO impropriety raised by the Defence in the current proceedings. For this reason, the Panel is not satisfied that the Reported Matters are relevant to the case.

17. Furthermore, the Panel further notes that the Defence interprets Rule 112 of the Rules as providing for the continuing nature of the SPO’s disclosure obligations, notwithstanding the closing of the case pursuant to Rule 136 of the Rules.²¹ The Panel notes that the information which the SPO is bound to disclose to the Defence

²⁰ Transcript, 17 March 2022, p. 3855.

²¹ Request, para. 8.

“notwithstanding the closing of the case” is “any exculpatory information referred to in Rule 103” of the Rules. The Panel sees no indication that the information requested would amount to exculpatory information, as the Reported Matters appear to post-date the time relevant for the charges and there is no reason to believe that the information requested otherwise falls under Rule 103 of the Rules. Assuming that Rule 112 of the Rules also applies to a situation where the SPO has failed to disclose material under Rule 102 of the Rules, there is no indication that the SPO failed to fulfill its disclosure obligations in respect of it. As noted above, even if one were to assume that the SPO is in possession of the information to which the Defence has pointed, this information is irrelevant to these proceedings and it would not come under the terms of Rule 102(3) of the Rules.

18. In any event, the SPO may be relieved of its disclosure obligation, if the existence of the relevant evidence is known and the evidence is accessible to the Defence, as the Accused would not be prejudiced materially by this violation.²²

19. In light of the foregoing, the Panel considers that the Defence failed to establish that the publication of the Reported Matters amounts to exceptional circumstances, and failed to establish good cause which would warrant consideration of the Request despite the closing of the case. As a result, the Panel denies the Request and the Joinder.

²² ICTY, *Prosecutor v. Blaškić*, IT-95-14, Appeals Chamber, [Decision on the Appellant's Motions for Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings](#), 26 September 2000, para. 38. See also ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90, Trial Chamber I, [Decision on Ivan Čermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence](#), 7 August 2009, para. 12; ICTY, *Prosecutor v. Bralo*, IT-95-17, Appeals Chamber, [Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material](#), 30 August 2006, para. 30; ICTY, *Prosecutor v. Brđanin*, IT-99-36, Appeals Chamber, [Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials](#), 7 December 2004, p. 3; ICTY, *Prosecutor v. Kordić*, IT-95-14/2, Appeals Chamber, [Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with Its Disclosure Obligation Under Rule 68 of the Rules](#), 11 February 2004, para. 20.

V. CLASSIFICATION


20. The Panel notes that the Request (F00605), the Joinder (F00606) and the SPO Response (F00608) were filed confidentially. The Panel observes that: (i) the Gucati Defence provides no reason for filing its Request confidentially;²³ (ii) the Haradinaj Defence does not oppose reclassification as public of its Joinder;²⁴ and (iii) the SPO sees no reason for the Request, the Joinder and the SPO Response to remain confidential and does not oppose their reclassification as public.²⁵

21. In light of the above and considering that the Reported Matters are all publicly available reports, the Panel instructs the Registry to reclassify as public the Request (F00605), the Joinder (F00606) and the SPO Response (F00608).

VI. DISPOSITION

22. For these reasons, the Panel:

- a. **DENIES** the Request and the Joinder; and
- b. **DIRECTS** the Registry to reclassify as public F00605; F00606; F00608.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 17 May 2022

At The Hague, the Netherlands

²³ Request, para. 20.

²⁴ Joinder, para. 5.1.

²⁵ SPO Response, para. 22.