



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-CA-2022-01**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 6 October 2022

Original language: English

Classification: **Public**

**Public Redacted Version of Decision on Defence Applications for a Formal
Decision that the Specialist Prosecutor's Office Failed to Comply with Rule 179(5)
of the Rules**

Specialist Prosecutor's Office:
Jack Smith

Counsel for Hysni Gucati:
Jonathan Elystan Rees

Counsel for Nasim Haradinaj:
Toby Cadman

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”), is seised of the applications filed by Mr Hysni Gucati (“Gucati”) and Mr Nasim Haradinaj (“Haradinaj”) (collectively, “Accused”) for a formal decision that the Specialist Prosecutor’s Office (“SPO”) has failed to file a brief in response which complies with Rule 179 of the Rules and, accordingly, the time limit for filing briefs in reply shall start only once the SPO has complied with this obligation.² The SPO responded on 5 October 2022.³

I. BACKGROUND

1. Pursuant to the SPO notification of two confidential and *ex parte* communications on 7 July 2022⁴ and on 7 September 2022,⁵ the Court of Appeals Panel issued on 15 September 2022 a decision ordering, *inter alia*, the SPO to disclose to the Defence under Rule 103 of the Rules [REDACTED] Witness W04730 (“Rule 103 Material”).⁶ The Panel further ordered that a communication received by the SPO -

¹ F00011, Decision Assigning a Court of Appeals Panel, 21 June 2022.

² F00052/RED, Public Redacted Version of Gucati Application for a Formal Decision that the Prosecution has Failed to File a Brief in Response which complies with Rule 179, 3 October 2022 (confidential version filed on 3 October 2022”) (“Gucati Application”); F00054, Haradinaj Application for a Ruling on the Prosecution Failure to Comply with Rule 179, 3 October 2022 (confidential) (“Haradinaj Application”) (collectively, “Applications”).

³ F00056, Consolidated Prosecution response to Defence requests concerning the Response Brief and amendment of Notices of Appeal, 5 October 2022 (confidential) (“Response”).

⁴ F00028, Notification on W04730 [REDACTED], 7 July 2022 (confidential and *ex parte*) (“7 July 2022 Notification”).

⁵ F00038, Notification on communication received by the SPO, 7 September 2022 (confidential and *ex parte*) (“7 September 2022 Notification”).

⁶ F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 26 September 2022 (confidential) (confidential and *ex parte* version filed on 15 September 2022) (“Decision of 15 September 2022”), paras 25-29, 38(a). In the Decision of 15 September 2022, the Rule 103 Material is identified as [REDACTED].

identified as “Item 206”- be notified to the Defence under Rule 102(3) of the Rules (“Rule 102(3) Material”).⁷

2. On 19 September 2022, the SPO complied with the Decision of 15 September 2022 and notified the Defence of the Rule 102(3) Material. The SPO, [REDACTED].⁸ On 29 September 2022, the Defence responded to the SPO.⁹ This matter is currently pending before the Court of Appeals Panel.

3. On 21 September 2022, the SPO filed its brief in response.¹⁰

4. On 23 September 2022, the Panel granted the SPO’s request for protective measures regarding the Rule 103 Material, and ordered the disclosure of a confidential redacted version of the material by 26 September 2022.¹¹ The SPO abided by this order.

II. DISCUSSION

A. PRELIMINARY MATTER

5. Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all non-public submissions filed,¹² the

⁷ Decision of 15 September 2022, paras 34-37, 38(c). In the Decision of 15 September 2022, the Rule 102(3) Material is identified as “Communication identified in the 7 September 2022 Notification”.

⁸ F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022 (confidential) (strictly confidential and *ex parte* version filed on 19 September 2022), para. 8.

⁹ See also F00050, Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure, 29 September 2022 (confidential); F00051, Haradinaj Defence Response to ‘Prosecution notice of additional item 206 and challenge to disclosure’, 29 September 2022 (confidential).

¹⁰ F00047, Prosecution Brief in Response to Defence Appeals with two public annexes, 21 September 2022 (confidential, reclassified as public on 30 September 2022) (“Response Brief”).

¹¹ F00049/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures, 26 September 2022 (confidential) (strictly confidential and *ex parte* version filed on 23 September 2022).

¹² See e.g. F00020/RED, Public Redacted Version of Decision on Gucati’s Third Request for Temporary Release on Compassionate Grounds, 4 July 2022 (confidential and *ex parte* version filed on 30 June 2022), para. 21.

Panel directs Haradinaj to file a public redacted version of his application (F00054), within seven days from the filing of the present Decision.

B. SUBMISSIONS OF THE PARTIES

6. The Accused argue that the disclosure of the Rule 103 Material and the notification of the Rule 102(3) Material, which occurred four months after the delivery of the Trial Judgment¹³ and after the filing of the Response Brief, were provided belatedly.¹⁴ Referring to the Response Brief, both Accused assert that the SPO's statement according to which completion of disclosure is subject to "pending litigation at the time of filing" does not comply with the requirement in Rule 179(5) of the Rules that disclosure must be completed at the time of filing of that brief.¹⁵ Gucati underlines that the Trial Panel warned the SPO about its disclosure conduct in a decision dated 3 November 2021.¹⁶

7. Gucati further submits that Rule 6 of the Rules provides the Court of Appeals Panel with the authority to take any measures deemed appropriate to ensure the fairness and integrity of the proceedings in case of non-compliance with the Rules and that Rule 9 of the Rules provides that the Panel may extend or reduce any time limit prescribed by the Rules.¹⁷

8. Haradinaj argues that the time for filing his brief in reply can only start after the SPO has made an unequivocal declaration pursuant to Rule 179(5) of the Rules, as the clear intent of this rule is to ensure that the Appellant is in full possession of the evidence to be disclosed at the time of the first filing by the SPO in the appeal process.¹⁸ Similarly, in Gucati's view, the fairness and integrity of the proceedings are

¹³ See F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022).

¹⁴ Gucati Application, paras 15-21, 29-34, 37-38; Haradinaj Application, paras 14-16, 20, 24.

¹⁵ Gucati Application, para. 22; Haradinaj Application, paras 10, 25.

¹⁶ Gucati Application, paras 35-36.

¹⁷ Gucati Application, paras 13-14.

¹⁸ Haradinaj Application, para. 11.

undermined if the 15 days allocated to him under the Rules to file his brief in reply is curtailed because the SPO filed its Response Brief before completing the disclosure instead of requesting an extension of time under Rule 9(5) of the Rules.¹⁹

9. Accordingly, the Accused request the Panel to issue a formal decision that: (i) the Response Brief does not comply with Rule 179(5) of the Rules; and (ii) the 15 day-time limit for the filing of the briefs in reply shall only start to run after all matters of disclosure, including the present litigation, have been concluded and the SPO files an affirmative and unequivocal declaration in accordance with Rule 179(5) of the Rules.²⁰

10. The SPO responds, *inter alia*, that the Applications should be rejected as it has acted transparently, complied with its obligations and there is no reason why the Defence should be afforded more time to file any replies to the Response Brief.²¹ According to the SPO, at the time of filing its Response Brief it had disclosed everything that it was authorised and able to and delaying the filing of its Response Brief because of the mere prospect that further disclosure may be ordered is clearly antithetical to the expeditious conduct of appellate proceedings.²²

C. ASSESSMENT OF THE COURT OF APPEALS PANEL

11. At the outset, the Panel notes that, in its Response Brief, the SPO indicated that “subject to pending litigation”, in accordance with Rule 179(5) of the Rules, it had disclosed all material in its custody or control falling under its disclosure obligations.²³ The Panel understands the reference to “pending litigation” to designate the litigation related to the disclosure of: (i) the Rule 103 Material that in the meantime took place

¹⁹ Gucati Application, paras 24-28, 38.

²⁰ Gucati Application, para. 23; Haradinaj Application, para. 26. Gucati additionally requests the Panel to include in its decision an order that the SPO must file a valid Response Brief after completion of its disclosure obligations under Rule 179(5) of the Rules. See Gucati Application, para. 23.

²¹ Response, paras 1, 4-6, 10.

²² Response, para. 3.

²³ Response Brief, para. 192.

on 26 September 2022; and (ii) the Rule 102(3) Material that is indeed still pending before the Court of Appeals.²⁴

12. Rule 179(5) of the Rules provides that the SPO shall make a declaration in its Response Brief that disclosure of material in its custody or control has been completed at the time of filing that brief. The Panel is satisfied that the identification of the specific and limited in scope material that was disclosed or notified following the filing of the Response Brief does not render the SPO's declaration under Rule 179(5) of the Rules invalid.²⁵ Accordingly, the Panel sees no reason to order the SPO to file another declaration under Rule 179(5) of the Rules once both matters under the pending litigation have been resolved.

13. In this regard, the Panel recalls that there is a presumption of good faith on the prosecution's part when discharging its disclosure obligations, as confirmed by extensive international criminal jurisprudence.²⁶ When the SPO notified the Panel regarding the Rule 102(3) Material and the Rule 103 Material, it explained that [REDACTED].²⁷ The SPO further abided by the Panel's instructions for the notification of the Rule 102(3) Material and the Rule 103 Material.²⁸

14. Having found that the SPO did not fail to comply with Rule 179(5) of the Rules, the Panel does not need to address the Defence's requests any further.²⁹ The Panel further finds that Gucati's argument³⁰ that the fairness and integrity of the proceedings would be undermined if the Accused had to file their briefs in reply within the time

²⁴ See above, para. 2.

²⁵ In the Panel's view, the formal requirement provided in Rule 179(5) of the Rules does not encompass a change to the briefing schedule.

²⁶ See e.g. KSC-BC-2020-07, F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021), para. 53 and jurisprudence referred therein.

²⁷ See 7 July 2022 Notification, paras 1-2, 11. See also 7 September 2022 Notification, para. 3.

²⁸ See above, paras 1-2.

²⁹ Gucati Application, para. 23; Haradinaj Application, para. 26.

³⁰ See Gucati Application, para. 25.

limit prescribed by the Rules notwithstanding the SPO's alleged non-compliance with Rule 179(5) of the Rules to be generic, unsubstantiated and unpersuasive.

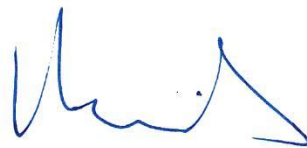
15. In light of the above, the Panel finds that since the declaration under Rule 179(5) of the Rules has been validly filed in these circumstances, there are no grounds to suspend the time limit for the filing of the Defence briefs in reply. Accordingly, the Panel finds that the requested relief is not warranted, that the briefing schedule remains unchanged and that the Accused must meet the deadline for the filing of their briefs in reply by **Friday 7 October 2022**.

III. DISPOSITION

16. For these reasons, the Court of Appeals Panel:

DENIES the Applications; and

ORDERS Haradinaj to file a public redacted version of his Application within seven days from the filing of the present Decision.



**Judge Michèle Picard,
Presiding Judge**

Dated this Thursday, 6 October 2022

At The Hague, the Netherlands