



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 13 October 2022

Original language: English

Classification: **Public**

**Public Redacted Version of Decision on Defence Requests to Amend the
Notices of Appeal Pursuant to Rule 176(3) of the Rules**

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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”), requesting authorisation to vary the grounds of their notices of appeal pursuant to Rule 176(3) of the Rules.² The Specialist Prosecutor’s Office (“SPO”) responded on 5 October 2022 (“Response”).³ Gucati replied on 6 October 2022 (“Gucati Reply”).⁴

I. BACKGROUND

1. On 17 June 2022, Gucati and Haradinaj filed notices of appeal against the Trial Judgment.⁵ On 1 July 2022, the Appeals Panel granted the SPO’s request to reject Haradinaj’s notice of appeal for failing to comply with the formal requirements, and ordered both Accused to refile their notices of appeal in compliance with the Panel’s

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

² F00053/RED, Public Redacted Version of Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules, 4 October 2022 (confidential version filed on 3 October 2022) (“Gucati Request”); F00055/RED, Publicly Redacted Version Haradinaj Application to Amend the Notice of Appeal pursuant to Rule 176(3), 5 October 2022 (confidential version filed on 4 October 2022) (“Haradinaj Request”) (collectively, “Defence Requests”).

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

⁴ F00058, Gucati Reply to Consolidated Prosecution Response to Defence Requests concerning the Response Brief and amendment to Notices of Appeal, 6 October 2022 (confidential) (“Gucati Reply”). The Panel notes that it will not consider the Reply to the extent that it concerns the alleged SPO failure to comply with Rule 179(5) of the Rules, as the Panel had already disposed of this matter at the time the Reply was filed. See F00057/RED, 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, 6 October 2022 (confidential version filed on 6 October 2022).

⁵ F00009/RED, Public Redacted Version of Gucati Notice of Appeal re Trial Judgment KSC-BC-2020-07/F00611 (“Judgment”) Pursuant to Art.46(1)(a), (b) and (c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 176(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), 17 June 2022 (distributed on 20 June 2022; confidential version filed on 17 June 2022); F00008, Haradinaj Defence Notice of Appeal of Trial Judgment, 17 June 2022 (distributed on 20 June 2022). See F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022) (“Trial Judgment”).

instructions.⁶ On 10 and 11 July 2022, Haradinaj and Gucati refiled their respective notices of appeal of the Trial Judgment.⁷

2. On 19 August 2022, Haradinaj and Gucati filed their appeal briefs.⁸

3. On 15 September 2022, pursuant to the SPO's notification of two confidential and *ex parte* communications on 7 July 2022⁹ and 7 September 2022,¹⁰ the Panel issued a decision ordering, *inter alia*, the SPO to disclose to the Defence under Rule 103 of the Rules [REDACTED] Witness W04730 ("Rule 103 Material").¹¹ The Panel further ordered that a communication received by the SPO - identified as "Item 206"- be notified to the Defence under Rule 102(3) of the Rules ("Rule 102(3) Material").¹²

4. 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,

⁶ F00021, Decision on Haradinaj's Request for Variation of Word Limit to File Appeal Brief and SPO's Request for Order to Re-File Haradinaj's Notice of Appeal, 1 July 2022, paras 11-14. See F00014, Prosecution request for order to Haradinaj Defence to refile its Notice of Appeal and related matters, 27 June 2022.

⁷ F00030/RED, Public Redacted Version of Re-Filed Gucati Notice of Appeal re Trial Judgment KSC-BC-2020-07/F00611 ("Judgment") Pursuant to Art.46(1)(a), (b) and (c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 176(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), 11 July 2022 (confidential version filed on 11 July 2022) ("Gucati Notice of Appeal"); F00029, Haradinaj Defence Re-Filed Notice of Appeal of Trial Judgment, 10 July 2022 ("Haradinaj Notice of Appeal") (collectively, "Notices of Appeal").

⁸ F00036/RED, Public Redacted Version of Gucati Appeal Brief Pursuant to Rule 179(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), 19 August 2022 (distributed on 22 August 2022) (confidential version filed on 19 August 2022, distributed on 22 August 2022) ("Gucati Appeal Brief"); F00035/COR2, Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 2 September 2022 (uncorrected confidential version filed on 19 August 2022, corrected version filed on 31 August 2022, reclassified as public on 2 September 2022) ("Haradinaj Appeal Brief") (collectively, "Appeal Briefs").

⁹ F00028/CONF/RED, Confidential Redacted Version of Notification on W04730 [REDACTED], 23 September 2022 (confidential and *ex parte* version filed on 7 July 2022).

¹⁰ F00038/CONF/RED, Confidential redacted version of Notification on communication received by the SPO, 23 September 2022 (confidential and *ex parte* version filed on 7 September 2022).

¹¹ F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 26 September 2022 (confidential) (strictly 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].

¹² 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".

[REDACTED].¹³ On 29 September 2022, the Defence responded to the SPO.¹⁴ This matter is currently pending before the Court of Appeals Panel.

5. On 21 September 2022, the SPO filed its brief in response.¹⁵

6. On 23 September 2022, the Panel granted the SPO's request for protective measures regarding the Rule 103 Material, and ordered the disclosure to the Defence of a confidential redacted version of the material by 26 September 2022.¹⁶ The SPO abided by this order.

7. On 7 October 2022, Gucati and Haradinaj filed their briefs in reply.¹⁷

II. DISCUSSION

A. PRELIMINARY MATTER

8. The Appeals Panel notes that while Gucati and Haradinaj filed public redacted versions of the Defence Requests, the SPO filed its Response and Gucati filed his Reply as confidential pursuant to Rule 82(4) of the Rules.¹⁸ Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential,¹⁹ and that the SPO does not object to the

¹³ F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022 (confidential) (confidential and *ex parte* version filed on 19 September 2022).

¹⁴ 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) (collectively, "Responses to Prosecution Notice and Challenge to Disclosure").

¹⁵ F00047, Prosecution Brief in Response to Defence Appeals with Two Public Annexes, 21 September 2022 (confidential, reclassified as public on 30 September 2022).

¹⁶ F00049/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor's Office Request for Protective Measures, 26 September 2022 (confidential) (confidential and *ex parte* version filed on 23 September 2022).

¹⁷ F00060, Gucati Brief in Reply pursuant to Rule 179(3) with one Annex, 7 October 2022 (confidential); F00062, Haradinaj Reply to SPO Brief in Response to Defence Appeal Brief, 7 October 2022 (confidential).

¹⁸ Response, para. 9; Gucati Reply, para. 23.

¹⁹ See e.g. KSC-BC-2020-07, IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 13.

Response being reclassified as public,²⁰ the Panel instructs that, within seven days of receiving notification of the present Decision: (i) the Registry reclassify the Response as public;²¹ and (ii) Gucati file a public redacted version of his Reply.

B. SUBMISSIONS OF THE PARTIES

9. 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 Judgment and after the filing of the Defence Notices of Appeal and Appeal Briefs, were provided belatedly.²²

10. The Accused further submit they were unaware of any grounds to challenge non-disclosure until the notification on 26 September 2022 of the Decision of 15 September 2022 and that had the SPO disclosed the Rule 103 Material before the Accused filed the Notices of Appeal, they would have challenged the SPO's non-disclosure therein.²³ According to the Defence, the SPO has not taken its disclosure burden seriously nor complied with the rules governing disclosure.²⁴

11. As such, the Accused request to vary the relevant grounds of appeal in the Notices of Appeal to challenge the effect of the SPO's breach of its disclosure obligations under Rule 103 of the Rules, namely that it invalidates the Trial Judgment and "occasioned a miscarriage of justice".²⁵ Haradinaj further contends that denying

²⁰ Response, para. 9.

²¹ See Rule 82(5) of the Rules.

²² Gucati Request, paras 19-25; Haradinaj Request, paras 27, 29; Gucati Reply, paras 5-7. See also Gucati Request, para. 32; Haradinaj Request, paras 30-33.

²³ Gucati Request, paras 20, 22, 24-25, 31; Haradinaj Request, paras 25, 28; Gucati Reply, para. 11. See also Gucati Request, para. 28; Gucati Reply, para. 15. Haradinaj further submits that he filed the application in "good time", taking into account, *inter alia*, the timing of the SPO submissions and the Panel's relevant rulings. See Haradinaj Request, para. 26.

²⁴ Gucati Request, para. 24; Haradinaj Request, paras 49, 51; Gucati Reply, paras 4, 16, 18. See also Gucati Request, paras 26-29; Haradinaj Request, paras 24, 48; Gucati Reply, para. 21.

²⁵ Gucati Request, para. 30; Haradinaj Request, paras 42-43, 50, 52; Gucati Reply, paras 9, 22. Gucati and Haradinaj seek to add Ground 19C and Ground 4A, respectively, to the Notices of Appeal, and provide the specific language of the proposed grounds in the Defence Requests. See F00053/RED/A01, Annex 1 to Public Redacted Version of Gucati Application to Amend the Notice of Appeal pursuant to

the request would prevent him from developing a relevant point on appeal – now supported by material unavailable at the time he filed his notice of appeal – which has been a “constant theme” throughout the proceedings.²⁶

12. The SPO responds, *inter alia*, that the Defence Requests should be rejected as the proposed amendments to the Notices of Appeal are illogical and allege errors by the Trial Panel based on material which was disclosed or notified after the Trial Judgment was issued.²⁷ The SPO further argues that, in any event, challenges to the belated disclosure and notification alone do not constitute good cause to vary the Notices of Appeal, would result in undue delay, and given the speculative nature of the additional information disclosed, will not “have substantial importance to the success of the appeal”.²⁸

13. In reply, Gucati challenges the SPO’s assertion that it has complied with its disclosure obligations and its further suggestion that its own failure to disclose or notify material during the trial cannot sustain a ground of appeal against the Trial Judgment.²⁹ Gucati argues that it is not required to show that a variation to the grounds of appeal *has* substantial importance to the success of the appeal, but that it *could* be of substantial importance to its success.³⁰ Gucati further submits that in this case, the failure to disclose the Rule 103 Material during the course of trial is clearly a

Rule 176(3) of the Rules, 4 October 2022 (confidential version filed on 3 October 2022), pp. 19-20; Haradinaj Request, para. 52.

²⁶ Haradinaj Request, paras 44-45. Haradinaj refers to grounds of appeal advanced in his appeal brief in which he makes relevant arguments to the Rule 103 Material and Rule 102(3) Material. See Haradinaj Request, paras 44-45, referring to Haradinaj Appeal Brief, Grounds 4, 10-13, 15-16. Haradinaj submits that Article 6(3)(c) of the European Convention on Human Rights provides for the right to adequate facilities for the preparation of a defence, including access to documents and other evidence that are both inculpatory and exculpatory. See Haradinaj Request, paras 46-47.

²⁷ Response, paras 2, 7, 10.

²⁸ Response, paras 2, 8, referring to ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Anatole Nsengiyumva’s Motion for Leave to Amend his Notice of Appeal, 28 January 2010 (“*Bagosora et al.* Decision”), para. 11; ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Decision on Milan Lukić’s Motion to Amend his Notice of Appeal, 16 December 2009 (“*Lukić Decision*”), para. 10.

²⁹ Gucati Reply, paras 4, 9.

³⁰ Gucati Reply, paras 12-13 (emphasis in original), referring to *Bagosora et al.* Decision, para. 11.

matter which could be of substantial importance to the success of the appeal.³¹ Moreover, he argues that each proposed amendment should be considered in light of the particular circumstances of the case.³²

C. ASSESSMENT OF THE COURT OF APPEALS PANEL

14. The Panel recalls that according to Rule 176(3) of the Rules, the Court of Appeals Panel may authorise a variation of the grounds of appeal where good cause is shown. International criminal jurisprudence establishes that “good cause” in this context encompasses both good reason for including the new or amended grounds of appeal sought and good reason for why the new or amended grounds were not included (or were not correctly articulated) in the original notice of appeal.³³ The Panel observes that any proposed substantive amendments are to be considered in light of the particular circumstances of the case.³⁴ The Panel further recalls that to vary the grounds of appeal, the Accused must demonstrate, *inter alia*, that such variation could be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded.³⁵

³¹ Gucati Reply, para. 14.

³² Gucati Reply, para. 13, referring to *Lukić* Decision, para. 10.

³³ See e.g. ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Dragoljub Ojdanić’s Motion to Amend Ground 7 of his Notice of Appeal, 2 September 2009 (“*Ojdanić* Decision”), para. 5; ICTY, *Prosecutor v. Miroslav Bralo*, IT-95-17-A, Decision on Miroslav Bralo’s Motion for Leave to Supplement Appeal Brief in Light of New Information Concerning *Ex Parte* Portion of The Trial Record, 9 January 2007, para. 10; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-A, Decision on Motion of Dragan Jokić, for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 (“*Blagojević and Jokić* Decision”), para. 7; ICTR, *Ferdinand Nahimana et al. v. the Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean Bosco Barayagwiza’s Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct His Appellant’s Brief, 17 August 2006 (“*Nahimana et al.* Decision”), para. 10. International criminal tribunals have established that there are certain factors to consider in determining if good cause exists, such as: (i) the variation is so minor that it does not affect the content of the notice of appeal; (ii) the opposing party would not be prejudiced by the variation or has not objected to it; and (iii) the variation would bring the notice of appeal into conformity with the appeal brief. See *Ojdanić* Decision, para. 5; *Nahimana et al.* Decision, para. 10; *Blagojević and Jokić* Decision, para. 7.

³⁴ See *Lukić* Decision, para. 10; *Ojdanić* Decision, para. 5.

³⁵ See *Bagosora et al.* Decision, para. 11.

15. Notwithstanding the importance of the SPO's disclosure obligations under the Rules,³⁶ the Panel considers that, as a general rule, a notice of appeal is not the proper mechanism for advancing allegations of disclosure violations identified during the appeal proceedings.³⁷ Notices of appeal are generally confined to challenging findings made in the trial judgment, or other findings by the Trial Panel, by alleging either errors of law which invalidate the trial judgment or errors of fact which have occasioned a miscarriage of justice.³⁸

16. Although the Accused contend that the SPO's breach of its disclosure obligations, *inter alia*, "occasions a miscarriage of justice",³⁹ the Appeals Panel notes that in the present circumstances the alleged disclosure violation occurred after the filing of the Trial Judgment and outside the trial process, and that the Accused have not, and would not have been able to identify a specific finding of the Trial Panel they wish to challenge through their Notices of Appeal. Rather, the Panel considers that if a party identifies a potential disclosure violation alleged after the conclusion of trial proceedings and during the appellate phase of the case, it may seek alternate relief by filing a motion before the Appeals Panel.⁴⁰

17. The Panel notes that it is currently assessing the submissions of the Parties on the [REDACTED].⁴¹ Also, the Rule 103 Material and Rule 102(3) Material relate to issues which the Accused have already developed before the Appeals Panel in the Appeal Briefs.⁴² The Panel notes, in this regard, Haradinaj's own submission that the Rule 103 Material and Rule 102(3) Material is relevant to several grounds of appeal

³⁶ See also KSC-BC-2020-07, IA005/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.

³⁷ See ICTR, *Mugenzi and Mugiraneza v. Prosecutor*, ICTR-99-50-A, Judgement, 4 February 2013 ("*Mugenzi and Mugiraneza Appeal Judgement*"), para. 49.

³⁸ See KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, Article 47(1).

³⁹ See above, fn. 25.

⁴⁰ See *Mugenzi and Mugiraneza Appeal Judgement*, para. 49.

⁴¹ See Responses to Prosecution Notice and Challenge to Disclosure.

⁴² See e.g. Gucati Appeal Brief, paras 339, 348-351, 359, 362, 368, 377, 381; Haradinaj Appeal Brief, paras 138, 140(c), 142, 144, 158-161, 164.

developed in his Appeal Brief.⁴³ Thus, the Accused's current challenges regarding the Rule 103 Material and Rule 102(3) Material do not raise any new issues for which variation of the grounds of appeal could have such substantial importance to the success of the appeals so as to lead to a miscarriage of justice if excluded. Therefore, no good cause would exist in any event to vary the grounds of appeal pursuant to Rule 176(3) of the Rules.

18. In light of the above, the Panel denies the Defence Requests.

III. DISPOSITION

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

DENIES the Defence Requests;

ORDERS Gucati to file a public redacted version of his Reply within seven days of receiving notification of the present Decision; and

INSTRUCTS the Registry to reclassify the Response as public within seven days of receiving notification of the present Decision.



**Judge Michèle Picard,
Presiding Judge**

Dated this Thursday, 13 October 2022

At The Hague, the Netherlands

⁴³ See Haradinaj Request, paras 44-45, referring to Haradinaj Appeal Brief, Grounds 4, 10-13, 15-16. See also above, fn. 26.