

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

**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** A Panel of the Court of Appeals Chamber

Judge Michéle Picard

Judge Kai Ambos

Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 6 October 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of Gucati Reply to Consolidated Prosecution Response  
to Defence Requests concerning the Response Brief and amendment to Notices of  
Appeal**

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## I. INTRODUCTION

1. On 3 October 2022, the Appellant filed an application under Rule 179<sup>1</sup> and an application to amend his grounds of appeal<sup>2</sup>.
2. On 6 October 2022, the Prosecution responded to both applications (“Consolidated Response”)<sup>3</sup>.
3. The Appellant replies as follows.

## II. SUBMISSIONS

4. The assertion in paragraph 1 of the Consolidated Response that the SPO has complied with its obligations is preposterous.
5. The failure to disclose Disclosure 1 before the Trial Panel pronounced Judgment amounts to an unequivocal failure in breach of Rules 103 and 102(3) of the Rules. Similarly, the Prosecution failed to notify Item 206 in accordance with Rule 102(3) during the course of the trial<sup>4</sup>.
6. The SPO were aware of each of the items in Disclosure 1 as far back as [REDACTED] and [REDACTED], when [REDACTED] spoke to (i)

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<sup>1</sup> KSC-CA-2022-01/F00052, *Gucati Application for a Formal Decision that the Prosecution has Failed to File a Brief in Response which complies with Rule 179*, *Gucati*, 30 September 2022, Confidential

<sup>2</sup> KSC-BC-2022-01/F00053, *Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules*, *Gucati*, 30 September 2022, Confidential

<sup>3</sup> KSC-CA-2022-01/F00056, *Consolidated Prosecution response to Defence requests concerning the Response Brief and amendment of Notices of Appeal*, *Prosecutor*, 5 October 2022, Confidential

<sup>4</sup> KSC-CA-2022-01/F00044/CONF/RED, *Confidential Redacted Version of Decision on Prosecution Notifications*, *Court of Appeals Panel*, 15 September 2022, Confidential at para.34-37

[REDACTED] (Prosecutor of the SPO) and [REDACTED] (SPO Investigator), then (ii) [REDACTED] (Senior Prosecutor of the SPO) and [REDACTED] (SPO Investigator) respectively. The proposition that the SPO seized the Appeals Panel about the now disclosed items as soon as it identified them is nonsense.

7. In relation to Item 206, it was received by the SPO as far back as 22 January 2022. No explanation has been provided as to who received it at the SPO, or when, or what was done with it.
8. The application in relation to Rule 179(5) does not attempt to gain more time than is afforded to the Appellant by the Rules for filing a Brief in Reply. It is an attempt to defend the Appellant's entitlement to 15 days under the Rules from confirmation that disclosure is complete.
9. The SPO's suggestion that its own failure to disclose or notify material during the trial cannot sustain a ground of appeal against Judgment by the Trial Panel on the grounds of an error on a question of law invalidating the judgement or an error of fact which has occasioned a miscarriage of justice pursuant to Article 46(1) and (4) of the Law is absurd.
10. The Trial Panel are the guarantors of a fair trial, and a failure to ensure compliance with the disclosure obligations in Rule 102(3) and Rule 103 is the responsibility of the Specialist Chambers as much as the Specialist Prosecutor's Office.
11. In relation to Items 186-190, the TP specifically ordered non-disclosure of those items, in circumstances where the Appellant had no effective opportunity before the Trial Panel (nor before the Court of Appeals Panel) to argue that in fact *those* interviews contained exculpatory material, namely, material which

might reasonably have suggested the involvement of the SPO in the provenance of the Batches<sup>5</sup>.

12. Contrary to the SPO's submission, an application to amend the grounds of appeal is not required to demonstrate that the variation sought *has* substantial importance to the success of the appeal.
13. It is sufficient, but not necessary, that the variation *could* be of substantial importance to the success of the appeal<sup>6</sup>. Moreover, there is no cumulative list of requirements established for a substantive amendment to be granted. Rather, each proposed amendment is to be considered in light of the particular circumstances of the case<sup>7</sup>.
14. In the present case, the failure to disclose exculpatory material under Rule 103 during the course of the trial is plainly a matter which could be of substantial importance to the success of the appeal.
15. Both the Trial Panel and the Court of Appeals Panel have stressed the importance of disclosure of exculpatory material, particularly, material which might reasonably have suggested the involvement of the SPO in the provenance of the Batches, to the fairness of the trial<sup>8</sup>. Indeed, the Judgment itself acknowledged the specific importance of disclosure to the issue of entrapment and asserted that the Trial Panel had ensured full disclosure had

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<sup>5</sup> See ERN 082095-TR-ET Part 2 at pages 1 to 2 where [REDACTED] asserts that the [REDACTED]

<sup>6</sup> ICTR, *Prosecutor v Bagosora et al*, Decision on Anatole Nsengiyumva's Motion for Leave to Amend his Notice of Appeal, ICTR-98-41-A, 28 January 2010, para.11

<sup>7</sup> ICTY, *Prosecutor v Lukić and Lukic*, Decision on Milan Lukić's Motion to Amend his Notice of Appeal, IT-98-32/1-A, 16 December 2009, para.10

<sup>8</sup> KSC-BC-2020-07/IA005, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Panel, 29 July 2021, Confidential at para.52; KSC-BC-2020-07/F00413/RED, *Public Redacted Version of Decision on Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.48

been made so as to ensure that the Defence was given every opportunity to present its Entrapment Claim<sup>9</sup>.

16. It is now established that full disclosure had not been made and the SPO desperately seeks to avoid any argument as to the consequences of that failure.

17. The Appeals Panel has “stressed the importance of the disclosure process in ensuring the fairness of the proceedings and that the rights of the Defence are respected”<sup>10</sup>.

18. In response to both present applications, the SPO, however, remains dismissive of the importance of the disclosure process in ensuring the fairness of the proceedings and advocates riding roughshod over the rights of the Defence.

19. The Appeals Panel should not condone the SPO’s dismissive approach.

### III. CONCLUSION

20. The Appeals Panel should ensure that the rights of the Defence are respected and grant both requests.

21. There is no doubt that a breach of Rule 103, an essential and fundamental element of the guarantee of a fair trial has occurred.

22. Authorisation to vary the grounds of appeal should be granted to permit the Appellant to argue the effect of that breach, namely, that it invalidated the Judgment or occasioned a miscarriage of justice.

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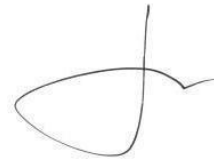
<sup>9</sup> KSC-BC-2020-07/F00611, *Trial Judgement*, Trial Panel II, Confidential at paras.837-846

<sup>10</sup> KSC-CA-2022-01/F00044/CONF/RED, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at para.20

IV. CLASSIFICATION

23. This filing is classified as confidential in accordance with Rule 82(4).

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6 October 2022

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