



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:** 3 November 2022

**Original language:** English

**Classification:** **Public**

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

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**Specialist Prosecutor’s Office:**  
Jack Smith

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**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),<sup>1</sup> 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 that the Panel reconsider its Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules (“Appeal Decision”) according to Rule 79(1) of the Rules.<sup>2</sup> The Specialist Prosecutor’s Office (“SPO”) responded on 27 October 2022 (“Response”).<sup>3</sup> Gucati and Haradinaj replied on 1 November 2022<sup>4</sup> and 2 November 2022,<sup>5</sup> respectively.

## I. BACKGROUND

1. On 17 June 2022, Gucati and Haradinaj filed notices of appeal against the Trial Judgment issued by the Trial Panel on 18 May 2022.<sup>6</sup> On 1 July 2022, the Appeals Panel

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<sup>1</sup> F00011, Decision Assigning a Court of Appeals Panel, 21 June 2022.

<sup>2</sup> F00066, Gucati Application for Reconsideration of Decision F00064, 17 October 2022 (confidential) (“Gucati Application”); F00071, Haradinaj Application for Reconsideration of Decision F00064, 18 October 2022 (confidential) (“Haradinaj Application”) (collectively, “Defence Applications”). See F00064/RED, Public Redacted Version of Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules, 13 October 2022 (confidential version filed on 13 October 2022) (“Appeal Decision”).

<sup>3</sup> F00076, Prosecution Consolidated Response to Defence Rule 103 Requests and Related Reconsideration Requests, 27 October 2022 (confidential) (“Response”).

<sup>4</sup> F00078, Gucati Reply to Prosecution Consolidated Response to Defence Rule 103 Requests and Related Reconsideration Requests, 1 November 2022 (confidential) (“Gucati Reply”).

<sup>5</sup> F00080, Defence Reply to SPO Consolidated Response to Defence Rule 103 Requests and Related Reconsideration Requests, 2 November 2022 (confidential) (“Haradinaj Reply”). The Panel notes that the Response was notified on 27 October 2022 and therefore, according to Rules 9(1)-(2) and 76 of the Rules, the deadline for the filing of the Defence replies was on 1 November 2022. As the Haradinaj Reply was filed on 2 November 2022 and in the absence of a justification for the late filing, the Panel will not consider the Haradinaj Reply.

<sup>6</sup> 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 Judgement,

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 instructions.<sup>7</sup> On 10 and 11 July 2022, Haradinaj and Gucati refiled their respective notices of appeal of the Trial Judgment.<sup>8</sup>

2. On 19 August 2022, Haradinaj and Gucati filed their appeal briefs.<sup>9</sup>

3. On 15 September 2022, pursuant to an SPO notification of a confidential and *ex parte* communication on 7 July 2022,<sup>10</sup> the Panel issued a decision ordering, *inter alia*, the SPO to disclose to the Defence under Rule 103 of the Rules [REDACTED] Witness W04730 [REDACTED] ([REDACTED] "Rule 103 Material", collectively).<sup>11</sup>

4. On 21 September 2022, the SPO filed its brief in response.<sup>12</sup>

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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").

<sup>7</sup> 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.

<sup>8</sup> 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").

<sup>9</sup> 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").

<sup>10</sup> F00028/CONF/RED, Confidential Redacted Version of Notification on W04730 [REDACTED], 23 September 2022 (confidential and *ex parte* version filed on 7 July 2022) ("7 July Notification").

<sup>11</sup> 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].

<sup>12</sup> F00047, Prosecution Brief in Response to Defence Appeals with Two Public Annexes, 21 September 2022 (confidential, reclassified as public on 30 September 2022).

5. 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.<sup>13</sup> The SPO abided by this order and disclosed the Rule 103 Material to the Defence.

6. On 7 October 2022, Gucati and Haradinaj filed their briefs in reply.<sup>14</sup>

7. On 13 October 2022, the Panel denied the Defence requests to amend their Notices of Appeal in order to challenge the effect of the SPO's alleged breach of its disclosure obligations under Rule 103 of the Rules.<sup>15</sup>

## II. DISCUSSION

### A. PRELIMINARY MATTER

8. The Appeals Panel notes that Gucati, Haradinaj and the SPO filed the Defence Applications, the Response and the Gucati Reply as confidential.<sup>16</sup> The Panel notes that the Response and Gucati Reply contain confidential submissions related to other pending filings before it.<sup>17</sup> However, considering that all submissions filed before the

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<sup>13</sup> 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) ("Decision on SPO Request for Protective Measures").

<sup>14</sup> 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). On 12 October 2022, the Panel ordered the Accused to refile their Briefs in Reply. See F00063, Decision on Defence Requests for Variation of Word Limit of Briefs in Reply, 12 October 2022, para. 10; F00065, Haradinaj Re-filed Reply to SPO Brief in Response to Defence Appeal Brief, 16 October 2022; F00067/RED, Public Redacted Version of Re-Filed Gucati Brief in Reply pursuant to Rule 179(3) with one Annex, 21 October 2022 (confidential version filed on 17 October 2022).

<sup>15</sup> Appeal Decision, para. 19. See 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 to Amend Notice of Appeal"); 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 to Amend Notice of Appeal") (collectively, "Defence Requests to Amend Notices of Appeal").

<sup>16</sup> Gucati and the SPO submit that the Gucati Application, Response and Gucati Reply were filed as confidential in accordance with Rule 82(4) of the Rules. See Gucati Application, para. 23; Response, para. 28; Gucati Reply, para. 21. Haradinaj does not make a similar submission specifically on the classification of his application.

<sup>17</sup> [REDACTED].

Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential,<sup>18</sup> the Panel considers that public redacted versions of the Defence Applications should be filed. Therefore, the Panel instructs Gucati and Haradinaj to file public redacted versions of the Defence Applications within seven days of receiving notification of the present Decision.

## B. SUBMISSIONS OF THE PARTIES

9. The Accused argue that the Panel should reconsider the Appeal Decision as it is based on two clear errors.<sup>19</sup> The Accused first argue that contrary to the Panel's finding,<sup>20</sup> the alleged disclosure violation by the SPO occurred before the Trial Judgment was issued and "inside the trial process", as the Rule 103 Material is comprised of [REDACTED], while the Trial Judgment was issued on 18 May 2022.<sup>21</sup> Gucati and Haradinaj both argue that the disclosure violation occurred at the moment the SPO failed to *immediately* disclose the Rule 103 Material, namely by [REDACTED] at the very latest.<sup>22</sup>

10. Second, the Accused submit that the Panel committed an error by finding that the Accused had not identified a specific finding by the Trial Panel they wished to challenge in the Notices of Appeal,<sup>23</sup> as the Accused had identified such specific findings in the Defence Requests to Amend Notices of Appeal.<sup>24</sup> In particular, Gucati argues first that he identified a challenge to the Trial Panel's finding that "the Defence

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<sup>18</sup> See e.g. KSC-BC-2020-07, IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 13.

<sup>19</sup> Gucati Application, paras 2, 5, 20, 22; Haradinaj Application, paras 1, 4, 11, 18-19, 22; Gucati Reply, para. 13.

<sup>20</sup> See Appeal Decision, para. 16.

<sup>21</sup> Gucati Application, paras 6-10, 13; Haradinaj Application, paras 5-7, 9. See also Gucati Reply, para. 13.

<sup>22</sup> Gucati Application, paras 11-12; Haradinaj Application, paras 8-10.

<sup>23</sup> See Appeal Decision, para. 16.

<sup>24</sup> Gucati Application, paras 14-19, referring to Gucati Request to Amend Notice of Appeal, para. 21; F00053/RED/A01, Annex 1 to 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) ("Annex 1 to Gucati Request to Amend Notice of Appeal"), p. 19; Haradinaj Application, paras 12, 15-17, referring to Haradinaj Request to Amend Notice of Appeal, paras 44, 52.

was afforded a full and fair opportunity to put forward its Entrapment claim in compliance with the standards laid down by the ECtHR”.<sup>25</sup> Gucati further identified that he wished to challenge the fact that the Trial Panel did not disclose [REDACTED] and as a result, that he was only aware of grounds to challenge its non-disclosure following the SPO’s belated notification.<sup>26</sup> Haradinaj also submits that he had challenged specific findings of the Trial Panel, and in particular that it failed to: (i) test and evaluate the totality of the evidence contrary to Rule 139 of the Rules; and (ii) ensure that the Accused had received a fair trial, contrary to Article 6 of the European Convention on Human Rights.<sup>27</sup>

11. The Accused finally argue that the circumstances are exceptional because of the “extraordinary” result of preventing the Accused from arguing on appeal the consequences of a disclosure violation which occurred before the Trial Judgment was issued.<sup>28</sup> Haradinaj asserts that failing to permit him to raise such serious issues undermining the fairness of his trial would result in a “risk, if not a likelihood, of injustice”.<sup>29</sup>

12. The SPO responds that it disclosed the Rule 103 Material within the deadline ordered by the Panel and no Rule 103 violation has been found.<sup>30</sup> Therefore, according to the SPO, the Defence Applications, premised on the timing of a Rule 103 violation,

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<sup>25</sup> Gucati Application, para. 15, referring to Annex 1 to Gucati Request to Amend Notice of Appeal, p. 19, fn. 50. See Trial Judgment, para. 851. See also Gucati Application, paras 16-18.

<sup>26</sup> Gucati Application, para. 19, referring to Gucati Request to Amend Notice of Appeal, para. 21, fn. 16.

<sup>27</sup> Haradinaj Application, para. 16, referring to Haradinaj Request to Amend Notice of Appeal, para. 52.

<sup>28</sup> Gucati Application, para. 21; Haradinaj Application, para. 21. Gucati argues that, by contrast, the ICTR Appeals Chamber in the *Mugenzi and Mugiraneza* case “recognized the importance of the Prosecution’s disclosure obligations and accordingly considered the arguments raised as to the consequences of non-disclosure within the context of the appellant’s Grounds of Appeal as set out in his notice of appeal”. See Gucati Application, para. 21, referring to ICTR, *Mugenzi and Mugiraneza v. Prosecutor*, ICTR-99-50-A, Judgement, 4 February 2013 (“*Mugenzi and Mugiraneza* Appeal Judgement”).

<sup>29</sup> Haradinaj Application, para. 20.

<sup>30</sup> Response, paras 22-23. The SPO further submits that the finding in the *Mugenzi and Mugiraneza* Appeal Judgement is distinguishable from this case because the ICTR Appeals Chamber found there to be a disclosure violation in that case while no such determination has been made here. See Response, para. 22, referring to *Mugenzi and Mugiraneza* Appeal Judgement, para. 63.



must fail.<sup>31</sup> Moreover, the SPO argues that the requests for reconsideration, in any event, do not meet the test under Rule 79 of the Rules, as they reflect nothing more than a disagreement with the Panel's conclusions.<sup>32</sup>

### C. ASSESSMENT OF THE COURT OF APPEALS PANEL

13. The Appeals Panel recalls that according to Rule 79(1) of the Rules, a Panel may, upon request from a Party, where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, reconsider its own decisions. Reconsideration should only be granted in exceptional circumstances.

14. The Appeals Panel will first address the first error of reasoning alleged by the Accused regarding the timing of the alleged disclosure violation being "inside the trial process".<sup>33</sup>

15. The Panel recalls in this respect that it considered 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.<sup>34</sup> The Panel further noted that the alleged disclosure violation occurred after the filing of the Trial Judgment and outside the trial process and that "if a party *identifies* a potential disclosure violation alleged after the conclusion of the trial proceedings and during the appellate phase of the case, it may seek alternate relief by filing a motion before the Appeals Panel".<sup>35</sup> It is clear that even if there was a disclosure violation with respect to the Rule 103 Material, [REDACTED],<sup>36</sup> the identification thereof could only have occurred following the trial process.

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<sup>31</sup> Response, para. 23. See also Response, para. 29.

<sup>32</sup> Response, para. 23.

<sup>33</sup> See Gucati Application, paras 6-10, 13; Haradinaj Application, paras 5-7, 9.

<sup>34</sup> Appeal Decision, para. 15.

<sup>35</sup> Appeal Decision, para. 16 (emphasis added).

<sup>36</sup> [REDACTED].

16. In this regard, the Panel observes that it was notified by the SPO on 7 July 2022 of [REDACTED], after the closure of the trial proceedings.<sup>37</sup> In its 7 July 2022 Notification, the SPO explained the timing regarding the discovery and non-disclosure of [REDACTED], including that [REDACTED] was only finalised on 4 July 2022, i.e. outside the trial process, and that the SPO did not consider these [REDACTED] to fall under Rule 103 of the Rules.<sup>38</sup> The Panel disagreed with the SPO's position regarding the nature of [REDACTED] and ordered its disclosure to the Defence on 15 September 2022.<sup>39</sup> After having found that [REDACTED] needed to be disclosed to the Defence, the Panel considered that the [REDACTED] should also be disclosed, given it is inter-related to the former.<sup>40</sup> Consequently, [REDACTED] were disclosed to the Defence by 26 September 2022.<sup>41</sup> The Panel also notes that there could not have been an alleged disclosure violation before it decided to order the disclosure of this material under Rule 103 of the Rules on 15 September 2022, after the closure of the trial proceedings.<sup>42</sup>

17. Based on the above, the Panel finds that the alleged disclosure violation was identified after the filing of the Trial Judgment and outside the trial process, namely during the appellate phase of the case.<sup>43</sup> Therefore, the Panel finds that the Accused did not demonstrate a clear error of reasoning by the Panel regarding the first alleged error.

18. The Panel turns to the second alleged error regarding whether the Accused had identified specific findings by the Trial Panel they wished to challenge through the Notices of Appeal.<sup>44</sup> The Panel recalls that it noted that "the Accused have not and

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<sup>37</sup> Decision of 15 September 2022, paras 22-23, referring to 7 July 2022 Notification.

<sup>38</sup> Decision of 15 September 2022, paras 22-24, referring to 7 July 2022 Notification.

<sup>39</sup> Decision of 15 September 2022, paras 25-27.

<sup>40</sup> Decision of 15 September 2022, para. 29.

<sup>41</sup> Decision on SPO Request for Protective Measures. See Appeal Decision, para. 6.

<sup>42</sup> See above, fns 39-41.

<sup>43</sup> See Appeal Decision, paras 15-16.

<sup>44</sup> See Gucati Application, paras 14-19; Haradinaj Application, paras 12, 15-17. See also Appeal Decision, para. 16.



would not have been able to identify a specific finding of the Trial Panel they wish to challenge through their Notices of Appeal.”<sup>45</sup> Given that [REDACTED] were determined to fall under Rule 103 of the Rules and disclosed to the Defence after the trial proceedings were completed,<sup>46</sup> the Trial Panel cannot have erred by not taking into consideration: (i) the alleged disclosure violation under Rule 103 of the Rules in its findings regarding the SPO’s disclosure obligations or violations thereof, or (ii) the Rule 103 Material in its findings on the alleged “Entrapment claim”. The Appeals Panel further considers that although the Trial Panel made related findings in the Trial Judgment, based on the evidence before it, which the Accused have in fact already challenged in the Appeal Briefs,<sup>47</sup> this does not mean that the disclosure of the Rule 103 Material *after* the trial proceedings, during the appellate phase of the case, provides good cause to vary the grounds of appeal to include it. Therefore, the Panel finds that the Accused did not demonstrate a clear error of reasoning by the Panel regarding the second alleged error.

19. Finally, the Panel turns to the Accused’s arguments that to prevent injustice, the Panel should reconsider the Appeal Decision and allow them to argue the consequences of the alleged disclosure violation.<sup>48</sup> The Panel is of the view that the remedy requested by the Accused is not the only mechanism by which to raise their arguments on the SPO’s alleged disclosure violation. The Panel reminds the Accused 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.<sup>49</sup> [REDACTED].<sup>50</sup>

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<sup>45</sup> Appeal Decision, para. 16.

<sup>46</sup> See above, fns 39-41.

<sup>47</sup> See Appeal Decision, para. 17, fn. 42.

<sup>48</sup> See Gucati Application, para. 21; Haradinaj Application, paras 20-21.

<sup>49</sup> Appeal Decision, para. 16, referring to *Mugenzi and Mugiraneza* Appeal Judgement, para. 49.

<sup>50</sup> [REDACTED].

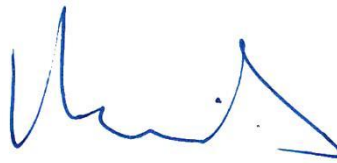
20. In light of the above, the Panel finds that the Accused have not demonstrated that it committed a clear error of reasoning in denying the Accused's requests to vary the grounds of appeal pursuant to Rule 176(3) of the Rules. The Panel therefore denies the Defence Applications to reconsider the Appeal Decision.

### III. DISPOSITION

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

**DENIES** the Defence Applications; and

**ORDERS** Gucati and Haradinaj to file public redacted versions of the Defence Applications within seven days of receiving notification of the present Decision.



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**Judge Michèle Picard,  
Presiding Judge**

Dated this Thursday, 3 November 2022

At The Hague, the Netherlands