



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-CA-2022-01
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Court of Appeals Panel**
Judge Michèle Picard, Presiding Judge
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 12 January 2023

Language: English

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**Public Redacted Version of Prosecution Consolidated Response to Defence Rule
103 Requests and Related Reconsideration Requests**

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I. Introduction

1. The basis of the relief sought in the Requests¹ is the disclosure of two interviews which have no bearing on the evidence convicting the Accused for intimidating witnesses, violating the secrecy of proceedings, and obstructing official persons. The only reason why they were found to fall under Rule 103 of the Rules² is because the witness made 'claims involving the SPO'³ that were vague and provided no support for a baseless entrapment defence which the Trial Panel rejected on grounds that 'there is no reasonable basis to conclude that either of the Accused was entrapped by any SPO official or any individual acting under the SPO's direction or control'.⁴

2. The SPO acted transparently with this [REDACTED] interview of W04730, notifying the Appeals Panel of it even while considering it not to fall under Rule 103. The Appeals Panel did not agree with this determination, but to insinuate the SPO deliberately withheld exculpatory information⁵ or that the legitimacy of the whole disclosure process is now called into question⁶ is plainly baseless.

3. The Defence's vexatious attempts to transform this disclosure into overturned convictions, stays of proceedings, and re-trials⁷ should be rejected.

¹ Gucati Motion for Alternate Relief relating to Disclosure Violations, namely, An Order Overturning the Convictions, with the Imposition of a Stay or Order for Re-Trial, KSC-CA-2022-01/F00068, 17 October 2022, Confidential ('Gucati Request'); Haradinaj Motion for Relief for Violations of Rule 103, KSC-CA-2022-01/F00073, 18 October 2022, Confidential (with three annexes) ('Haradinaj Request').

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Confidential Redacted Version of Decision on Prosecution Notifications, KSC-CA-2022-01/F00044/CONF/RED, 15 September 2022, Confidential (redacted version notified 26 September 2022) ('Notifications Decision'), para.27.

⁴ Public Redacted Version of the Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022 (with three annexes) ('Judgment'), para.889.

⁵ Gucati Request, KSC-CA-2022-01/F00068, para.52.

⁶ Haradinaj Request, KSC-CA-2022-01/F00073, para.53.

⁷ Gucati Request, KSC-CA-2022-01/F00068, paras 62-64; Haradinaj Request, KSC-CA-2022-01/F00073, paras 3, 78, 86-88.

II. Procedural History

4. On [REDACTED], the SPO conducted its First Interview with W04730.⁸
5. On 3 November 2021, the Trial Panel concluded that the First Interview was not material to the preparation of the defence and denied its disclosure.⁹
6. On [REDACTED], the SPO conducted its Second Interview with W04730 (collectively with First Interview: 'Interviews').¹⁰
7. The SPO did not assess the Second Interview as falling under Rule 103. In an abundance of caution to ensure proper compliance with its disclosure obligations on appeal, on 7 July 2022 the SPO notified the Appeals Panel of the Second Interview and provided its contents *ex parte* ('July 2022 Notification').¹¹
8. On 15 September 2022, the Appeals Panel issued the Notifications Decision and considered that the Second Interview fell under Rule 103.¹² The First Interview was also found to be disclosable solely because it contextualised the Second Interview. No finding of a disclosure violation was made, but the Appeals Panel ordered disclosure of the Interviews subject to any request for protective measures.

⁸ See 082095-TR-ET RED (five parts) ('First Interview').

⁹ Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413, 3 November 2021, Confidential ('Trial Panel Rule 102(3) Decision'), paras 58-61.

¹⁰ 105694-TR-ET Part 1 RED ('Second Interview').

¹¹ Notification on W04730 telephone contact, KSC-CA-2022-01/F00028, 7 July 2022, Confidential and *Ex Parte* (with two annexes) ('July 2022 Notification').

¹² Notifications Decision, KSC-CA-2022-01/F00044/CONF/RED.

9. On 23 September 2022, the Appeals Panel granted the SPO's request to redact all of W04730's identifying information prior to disclosing the Interviews.¹³ The Appeals Panel ordered the SPO to disclose the Interviews by 26 September 2022.¹⁴
10. On 26 September 2022, the SPO released Disclosure Package 1 pursuant to the Appeals Panel's order.
11. On 3 and 4 October 2022, the Gucati and Haradinaj Defence, respectively, requested to vary their grounds of appeal to challenge the effect of an alleged breach of the SPO's disclosure obligations under Rule 103 of the Rules.¹⁵
12. On 13 October 2022, the Appeals Panel denied the Defence requests to add these additional grounds of appeal ('New Grounds of Appeal Decision').¹⁶
13. On 17 and 18 October, the Gucati and Haradinaj Defence, respectively, sought reconsideration of the New Grounds of Appeal Decision ('Reconsideration Requests').¹⁷ They also presented their proposed appellate additions in the form of the Requests, doing so in circumvention of the New Grounds of Appeal Decision.

III. Submissions

14. Preliminarily, the relief sought in the Requests is exclusively premised under Rule 103.¹⁸ The Defence do not seek any relief for alleged violations under Rule 102(3),

¹³ Confidential Redacted Version of Decision on Specialist Prosecutor's Office Request for Protective Measures, KSC-CA-2022-01/F00049/CONF/RED, 23 September 2022, Confidential (redacted version notified 26 September 2022) ('Protective Measures Decision').

¹⁴ Protective Measures Decision, KSC-CA-2022-01/F00049/CONF/RED, para.15.

¹⁵ Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3), KSC-CA-2022-01/F00053, 3 October 2022, Confidential; Haradinaj Application to Amend the Notice of Appeal pursuant to Rule 176(3), KSC-CA-2022-01/F00055, 4 October 2022, Confidential.

¹⁶ Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules, KSC-CA-2022-01/F00064, 13 October 2022, Confidential ('New Grounds of Appeal Decision').

¹⁷ Gucati Application for Reconsideration of Decision F00064, KSC-CA-2022-01/F00066, 17 October 2022, Confidential; Haradinaj Application for Reconsideration of Decision F00064, KSC-CA-2022-01/F00071, 18 October 2022, Confidential.

¹⁸ Gucati Request, KSC-CA-2022-01/F00068, para.13.

making such arguments irrelevant. In particular, the Haradinaj Defence's arguments as to item 206 on the Rule 102(3) notice have already been rejected.¹⁹ Their repetition in the Haradinaj Request should not be countenanced, and the Haradinaj Defence's assertion that item 206 has similar content to the Interviews - such that its existence further establishes its Rule 103 arguments²⁰ - is flatly contradicted by the Appeals Panel.

A. THE DEFENCE'S PROPOSED INFERENCES ARE BASELESS

15. The Appeals Panel has already determined that the First Interview does not implicate the SPO in the provenance of the Batches.²¹ The Appeals Panel made this determination in light of both Interviews, such that it could contextualise the First Interview with the Second Interview. Indeed, the only reason why the First Interview was determined to be disclosable was not that it contained any information falling under Rule 103 itself but because it was needed to 'properly understand' the Second Interview.²²

16. The Defence place great reliance on the reference by W04730 in the First Interview to [REDACTED].²³ W04730 says [REDACTED].²⁴ [REDACTED],²⁵ [REDACTED].²⁶ [REDACTED].²⁷

17. The Defence submissions in this regard are similar to Defence attempts to infer such SITF/SPO involvement in the assertion from item 206 that the Batches were taken

¹⁹ Decision on the Specialist Prosecutor's Office's Request Regarding Item 206, KSC-CA-2022-01/F00075, 21 October 2022, Confidential ('Item 206 Decision').

²⁰ Haradinaj Request, KSC-CA-2022-01/F00073, paras 29, 34, 37.

²¹ Notifications Decision, KSC-CA-2022-01/F00044/CONF/RED, para.28.

²² Notifications Decision, KSC-CA-2022-01/F00044/CONF/RED, para.29.

²³ Gucati Request, KSC-CA-2022-01/F00068, paras 30-39, 46; Haradinaj Request, KSC-CA-2022-01/F00073, para.68.

²⁴ First Interview, 082095-TR-ET RED Part 2, pp.1-2.

²⁵ *Contra* Gucati Request, KSC-CA-2022-01/F00068, para.37.

²⁶ *Contra* Gucati Request, KSC-CA-2022-01/F00068, paras 35-36.

²⁷ [REDACTED].

from 'The Hague'.²⁸ This inference was recently rejected by the Appeals Panel,²⁹ and the wild leaps based on W04730's reference to third parties should be given similarly short shrift.

18. The notion that the First Interview on its own has exculpatory content is so unreasonable that it cannot justify any relief. These arguments are a clear attempt to reconsider the Appeals Panel's previous findings, and should be dismissed accordingly.

B. NO RULE 103 VIOLATION HAS BEEN FOUND

19. The SPO had reasonable grounds to consider the Second Interview to not fall under Rule 103. The information provided by W04370 has commonalities with that provided by [REDACTED], as noted by the Defence itself.³⁰ [REDACTED].³¹ But [REDACTED]'s information was only noticed under Rule 102(3), and the Trial Panel considered it under this provision.³²

20. It was therefore not unreasonable for the SPO to conclude that the information W04730 provided in the Second Interview did not fall under Rule 103. The SPO made this link explicitly when notifying the Appeals Panel of the existence of the Second Interview.³³ If anything, [REDACTED].³⁴

21. The Appeals Panel was certainly empowered to reach a contrary conclusion, and did so.³⁵ But this is not the same as concluding that the SPO violated its disclosure

²⁸ *Contra* Haradinaj Request, KSC-CA-2022-01/F00073, para.37, n.43.

²⁹ Item 206 Decision, KSC-CA-2022-01/F00075, para.32.

³⁰ Haradinaj Request, KSC-CA-2022-01/F00073, paras 35-36.

³¹ Prosecution update to Rule 102(3) Notice Addendum, KSC-BC-2020-07/F00361, 13 October 2021, Confidential (103283-103288).

³² Trial Panel Rule 102(3) Decision, KSC-BC-2020-07/F00413, paras 75-78.

³³ July 2022 Notification, KSC-CA-2022-01/F00028, para.9.

³⁴ [REDACTED].

³⁵ Notifications Decision, KSC-CA-2022-01/F00044/CONF/RED, para.28.

obligations.³⁶ The SPO invited the possibility of a contrary conclusion, affirmatively notifying the Appeals Panel of the Second Interview even though this is not required when it assesses an item as non-disclosable. Rule 103 assessments inherently require an exercise of judgment, including on matters where reasonable people can disagree.³⁷ In this case, the SPO acted transparently, allowing the Appeals Panel to review its assessment.³⁸

22. In sum, the SPO had a good faith basis for making the Rule 103 assessment it did, took the extra step of notifying the Second Interview to the Appeals Panel, and complied with all Appeals Panel deadlines after its Rule 103 determination. What distinguishes the *Mugenzi and Mugiraneza* case from the present one is not the seriousness of the violation, but rather that the ICTR Appeals Chamber found a disclosure violation and no such determination has been made in this case.³⁹

³⁶ The Haradinaj Request concedes awareness of this, noting that it, *inter alia*, requests a finding that the SPO violated its Rule 103 obligations. Haradinaj Request, KSC-CA-2022-01/F00073, para.86(d).

³⁷ See similarly ICC, *Prosecutor v. Ruto and Sang*, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015 (ICC-01/09-01/11-1774-Conf), ICC-01/09-01/11-1774-Red, 16 February 2015, para.47 ('[r]easonable people could disagree on whether the [...] material was disclosable in this case, and not every adverse ruling from a Chamber can be equated with the Prosecution having not diligently discharged its disclosure obligations'). There may also be reasons why exculpatory evidence disclosure during or after trial requires no judicial intervention. See e.g. ICC, *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, paras 36-39, 52-55 (material becoming latently exculpatory only following information on lines of defence); ICTR, *Prosecutor v. Musema*, Decision on "Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal", ICTR-96-13-A, 18 May 2001 (ICTR prosecution noting that statements disclosed post-conviction could fall under the exculpatory disclosure provision – without acknowledging that they in fact did so – found to be sufficient and the ICTR Appeals Chamber did not take any further action).

³⁸ Far from being a violation, a similar procedure is expressly permitted in the ICC statutory scheme. See similarly Rule 83 of the ICC Rules; Article 67(2) of the ICC Statute (with emphasis added: 'In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. *In case of doubt as to the application of this paragraph, the Court shall decide.*').

³⁹ *Contra* Haradinaj Request, KSC-CA-2022-01/F00073, paras 22-23, 59, 79-82. The violation in *Mugenzi and Mugiraneza* concerned a failure by the Prosecution to disclose exculpatory evidence generated in

23. The SPO disclosed the Interviews within the deadline prescribed by the Appeals Panel, and no Rule 103 violation has been found. Reconsideration Requests premised on the timing of a Rule 103 violation must also fail, and in any event do not meet the Rule 79 test because they reflect nothing more than a disagreement with the Appeals Panel's conclusions.

C. NO PREJUDICE EXISTS

24. Even if the SPO's original Rule 103 assessments of the Interviews were to be considered as a disclosure violation, the Defence can establish no prejudice. The relief sought is not even in time, noting that both Defence teams rely upon Rule 6 to justify their relief sought⁴⁰ and this provision requires relief to be sought within 10 days of notice of the non-compliance in question. The Defence had notice of the facts underlying the alleged violation on 26 September 2022, making their relief sought longer than 10 days later and out of time within the language of this rule.

25. Prior to the Judgment, the Defence did not even seek to admit [REDACTED]'s similar evidence at trial.⁴¹ It is inconceivable that information of the kind provided in the Interviews would have made any difference at trial. Based on all of the evidence elicited at trial, the Trial Panel found no reasonable basis for a defence of entrapment. Nothing in the Interviews changes that result.

26. Further, no prejudice could exist as concerns the cross-examination of Ms Pumper.⁴² Ms Pumper made it clear she was not aware of any information suggesting

other ICTR trials to the Defence. The ICTR Appeals Chamber found the prejudice caused by these violations to be minimal and no relief was warranted. ICTR, Prosecutor v. *Mugenzi and Mugiraneza*, Judgement, ICTR-99-50-A, 4 February 2013, para.63.

⁴⁰ Gucati Request, KSC-CA-2022-01/F00068, paras 16, 61; Haradinaj Request, KSC-CA-2022-01/F00073, para.17.

⁴¹ See Judgment, KSC-BC-2020-07/F00611/RED, para.878. See also Prosecution Brief in Response to Defence Appeals, KSC-CA-2022-02/F00047, 21 September 2022, para.129 (on the Defence attempt to improperly rely on [REDACTED]'s evidence on appeal).

⁴² *Contra* Haradinaj Request, KSC-CA-2022-01/F00073, paras 44, 73.

SPO involvement in the disclosure of the Batches.⁴³ These answers necessarily exclude any knowledge of allegations like those made by W04730 in the Second interview.

27. The First and Second Interviews add nothing meaningful to the evidence in this case, and the Defence fails to substantiate any prejudice. Nothing raised in the Requests justifies anything approaching the remedies sought.⁴⁴

IV. Classification

28. The present response is submitted confidentially in accordance with Rule 82(4).

V. Relief sought

29. For the reasons above, the relief sought by the Defence should be rejected.

Word count: 2414



Alex Whiting
Acting Specialist Prosecutor

Thursday, 12 January 2023

At The Hague, the Netherlands.

⁴³ Transcript of Hearing, 26 October 2021, pp.1478-79, *quoted in* Haradinaj Request, KSC-CA-2022-01/F00073, para.72.

⁴⁴ *Compare with* ICTY, *Prosecutor v. Lukić and Lukić*, Decision on Milan Lukić's Motion for Remedies Arising Out of Disclosure Violations by the Prosecution, IT-98-32/1-A, 12 May 2011 (evidence disclosed post-conviction of where and how murder victims died not found to justify a stay of proceedings or an acquittal/re-trial, despite being in the ICTY Prosecution's possession for several years).