

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 18 January 2023

Language: English

Classification: Public

Public Redacted Version of Haradinaj Motion for Relief for Violations of Rule 103

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I. INTRODUCTION

1. On 14 October 2022 the Panel of the Courts of Appeals Chamber (“Appeals Panel”) issued its ‘Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules’.¹ That Decision refused the Defence application² to amend the notice of appeal previously submitted.³
2. In refusing the application, the Appeals Panel notes 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”.⁴ The Appeals Panel go to rule that it “...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 alternative relief by filing a motion before the Appeals Panel.”⁵
3. Without prejudice to the previously submitted position that the issue could and should be dealt with on appeal, and further, the reference to Rule 110 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers

¹ KSC-CA-2022-01/F00064 An application independently seeking Reconsideration of F00064 has been separately filed.

² KSC-CA-2022-01/F00055/RED.

³ KSC-CA-2022-01/F00029

⁴ KSC-CA-2022-01/F00064 at para. 15

⁵ *Ibid* at paragraph 16, citing *Mugenzi & Mugiraneza v. Prosecutor*, ICTR-99-50-A, Judgment, 4 February 2013 (*Mugenzi & Mugiraneza Appeal Judgment*), para. 49

(“Rules”),⁶ within its previous filing,⁷ the Appellant now, pursuant to the position of the Appeals Panel,⁸ files a further motion pursuant to Rules 6, 103 and 110 and requests that further to a ‘stay of proceedings’ whilst ongoing disclosure issues are being resolved, that the only appropriate resolution being that the Appeals Panel enters an acquittal on all counts, given the clear disclosure irregularities.

II. BACKGROUND/PROCEDURAL HISTORY

4. On [REDACTED], the Specialist Prosecutor’s Office (“SPO” or “Prosecution”) interviewed [REDACTED].⁹
5. On [REDACTED], the SPO received item 206.¹⁰
6. On [REDACTED], [REDACTED] contacted the SPO.¹¹
7. On [REDACTED], the SPO further interviewed [REDACTED].¹²

⁶ KSC-BD-03/Rev3/2020.

⁷ KSC-CA-2022-01/F00054RED, paras. 28 and 38(b)

⁸ KSC-CA-2022-01/F00064 at para. 16

⁹ Disclosure 1, ERN 082095-TR-ET Parts 1 to 5 (“Items 186-190”)

¹⁰ KSC-CA-2022-01/F00046, *Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Court of Appeals Panel, 19 September 2022, Confidential

¹¹ Disclosure 1, ERN 105694-TR-ET Part 1, p.1, lines 13-15

¹² Disclosure 1, ERN 105694-TR-ET Part 1

8. On 18 May 2022, Trial Panel II pronounced Judgment.¹³
9. On 17 June 2022, the Appellant filed his Notice of Appeal¹⁴ pursuant to Rule 176 of the Rules.
10. On 8 July 2022, the Appellant refiled his Notice Appeal¹⁵ pursuant to the direction of the Court of Appeals Panel.¹⁶
11. On 19 August 2022, the Appellant filed his Appeal Brief¹⁷ pursuant to Rule 179 of the Rules. On 30 August 2022 a corrected Appeal Brief was filed¹⁸ and on 2 September 2022 a further corrected Appeal Brief was filed.¹⁹
12. On 15 September 2022 pursuant to the SPO's notification of two confidential and *ex parte* communications on 7 July 2022,²⁰ and 7 September 2022,²¹ the Appeals Panel issued a decision ordering, *inter alia*, the SPO to disclose to the

¹³ KSC-BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential

¹⁴ KSC-CA-2022-01/F00008, *Haradinaj Notice of Appeal of Trial Judgment*, 17 June 2022, Public

¹⁵ KSC-CA-2022-01/F00029, *Haradinaj Defence Refiled Notice of Appeal of Trial Judgment*, 8 July 2022, Public

¹⁶ KSC-CA-2022-01/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*, Court of Appeals Panel, 1 July 2022, Public

¹⁷ KSC-CA-2022-01/F00035, *Defence Appeal Brief on Behalf of Nasim Haradinaj*, 19 August 2022, Confidential

¹⁸ KSC-CA-2022-01/F00035COR, *Corrected Defence Appeal Brief on Behalf of Nasim Haradinaj*, 30 August 2022, Confidential

¹⁹ KSC-CA-2022-01/F00035COR, *Further Corrected Defence Appeal Brief on Behalf of Nasim Haradinaj*, 2 September 2022, Confidential

²⁰ F00028/CONF/RED,

²¹ F00038/CONF/RED

Defence under Rule 103 of the Rules two interviews of Witness [REDACTED], deemed Rule 103 material.²² The material was not disclosed until 26 September 2022.

13. The Appeals Panel further ordered that a communication received by the SPO, item 206, be notified to the Defence under Rule 102(3) of the Rules.²³
14. On 19 September 2022, the Appellant received notification of additional item 206 on the Rule 102(3) Notice and the prosecution's challenge to disclosure of that item.²⁴
15. On 26 September 2022, the Appellant received Disclosure 1 pursuant to orders of the Appeals Panel dated 15 September 2022²⁵ and 23 September 2022.²⁶ Disclosure 1 is exculpatory material which fell to be disclosed under Rule 103.

²² F00044/CONF/RED

²³ Decision of 15 September 2022, paras 34-37, 38(c)

²⁴ KSC-CA-2022-01/F00046/CONF/RED, *Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Prosecutor, 19 September 2022, Confidential

²⁵ KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeal Panel, 15 September 2022, Confidential.

²⁶ KSC-CA-2022-01/F00049, *Confidential Redacted Version of Decision on Specialist Prosecutor's Office Request for Protective Measures*, Court of Appeals Panel, 23 September 2022, Confidential

16. On 29 September 2022, the Appellant filed his response to the Prosecution's challenge to disclosure of item 206.²⁷ A decision in relation to disclosure of Item 206 is outstanding at the time of filing.

III. THE LAW

17. Rule 6 of the Rules provides:

"Any non-compliance with the Rules causing material prejudice shall be raised immediately, but no later than ten (10) days after it became known. The Panel may also address such non-compliance *proprio motu* and take any measure deemed appropriate to ensure the integrity and fairness of the proceedings."

18. Rule 103 of the Rules provides:

"Subject to Rule 107 and Rule 108, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence."

19. Rule 110 of the Rules provides:

²⁷ KSC-CA-2022-01/F00051, *Haradinaj Defence Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, 29 September 2022, Confidential

“The Panel may decide, upon request by a Party or proprio motu, on measures to be taken as a result of the non-compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.”

20. Rule 112 of the Rules provides:

“If either Party discovers additional evidentiary material or information that should have been disclosed earlier pursuant to the Rules, that Party shall immediately disclose such evidence or information to the opposing Party and the Panel. The Specialist Prosecutor shall disclose to the Defence any exculpatory information referred to in Rule 103 notwithstanding the closing of the case pursuant to Rule 136 and any subsequent appeal.”

21. Accordingly, the Appeals Panel does therefore have the power to grant the relief requested under the applicable Rules.

IV. SUBMISSIONS

Preliminary

22. In its decision refusing to grant the application to vary the notice of appeal,²⁸ the Appeals Panel at paragraph 16 finds “*if a party identifies a potential disclosure*

²⁸ KSC-CA-2022-01/F00064RED, *Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules*, 13 October 2022, Public

violation alleged after the conclusion of trial proceedings and during the appellate phase of the case, it may seek alternative relief by filing a motion before the Appeals Panel” and in making this determination, the Appeals Panel references Mugenzi and Mugiraneza²⁹ at paragraph 49.

23. That paragraph reads:

“The Appeals Chamber notes that, as a general rule, a notice of appeal is not the proper vehicle for advancing in the first instance alleged disclosure violations identified only during the appeal proceeding. A notice of appeal is normally limited to challenges against a particular order, ruling, or decision taken by a trial chamber. The Appeals Chamber recalls, however, that the Prosecution’s disclosure of material under Rule 68 of the Rules is a continuing obligation. If a party identifies a potential disclosure violation after the conclusion of the trial and while appellate proceedings are ongoing, it may seek relief by bringing a motion before the Appeals Chamber.”

24. It is therefore assumed that in ruling that the Appellant may bring such a motion before the Appeals Panel in the instant case, it is referencing a motion pursuant to Rule 103³⁰ in accordance with Rules 6, 110 and 112.

²⁹ *Mugenzi & Mugiraneza v. Prosecutor*, ICTR-99-50-A, Judgment, 4 February 2013 (Mugenzi & Mugiraneza Appeal Judgment).

³⁰ In *Mugenzi & Mugiraneza Appeal Judgment* the ICTR Appeals Chamber considered Rule 68bis of the ICTR Rules of Evidence and Procedure and at paragraph 49 ruled in similar terms to the Appeals Panel ruling in this matter at paragraph 16.

25. For the sake of completeness, the Appellant has filed a separate 'Application for Reconsideration of Decision F00064' on the basis that the Appeals Panel erred in finding (a) the disclosure violations occurred after the filing of the Trial Judgment and outside the Trial Process, and (b) that the Appellant would not have been able to identify a specific finding of the Trial Panel. Both points are clearly erroneous and only arise due to the disregard of its Rule 103 obligations by the SPO.

Substantive

26. The Appellant submits that he has suffered real prejudice on account of the failures of the SPO in terms of its disclosure failures and in particular its failure to disclose relevant Rule 103 material, and therefore a material impact.
27. The SPO conducted the First Interview with Witness [REDACTED] on [REDACTED] and therefore some [REDACTED] and only filed notification on [REDACTED]³¹ and a further notification on [REDACTED].³² The Defence were not notified until [REDACTED].

³¹ KSC-CA-2022-01/F00028/CONF-RED

³² KSC-CA-2022-01/F00028/ F00038/CONF-RED

28. The SPO conducted a Second Interview on [REDACTED]³³ having had contact via telephone with [REDACTED] on [REDACTED].³⁴
29. In SPO filing ‘Confidential redacted version of Notification on communication received by the SPO’,³⁵ it references a “27 January 2022 communication from a person purporting to be [REDACTED] (Communication).” It is apparent that the 27 January 2022 reference (“Item 206”) is from a different witness to [REDACTED], but who provides similar content.
30. Of particular concern is the submission at paragraph 5 of that filing:³⁶

“The SPO did not intend to provide notice of this item, but, noting this is the first post-judgment appeal phase at the KSC and that this item was received by the SPO in Albanian before the closing of the case, the SPO notifies the Appeals Panel in order to ensure the proper discharge of its disclosure obligations’. (emphasis added)

31. The SPO therefore appear to have yet again determined that it is the arbiter of what should and should not be noticed or disclosed. As has been determined

³³ Disclosure 1, ERN 105694-TR-ET Part 1

³⁴ Disclosure 1, ERN 105694-TR-ET Part 1, p.1, lines 13-15. It is noted that there is no separate statement or record from the SPO staff member who received the telephone call from [REDACTED].

³⁵ KSC-CA-2022-01/F00038/CONF-RED

³⁶ *Ibid.* para. 5

at all stages of this case, it is not for the SPO to determine what is relevant or what is not material to the defence.³⁷

32. The issue however is now of further import given the SPO admission that it did not intend to provide notice of an item that is material to a central issue in the case, against the background that the Appellant has consistently maintained either SPO, or 'state agent' involvement, including Serbian Officials, in the disclosure of the 'Batches' and thus a *prima facie* basis for raising the defence of incitement or entrapment.
33. If the SPO adopted this position in respect of this item, it is entirely possible that the SPO have adopted this position in respect of other items that it has failed to disclose, or at least provide sufficiently detailed notice. It is accepted that the Appellant ought, ordinarily, to identify with sufficient precision, the items that it seeks to be disclosed, however, in the instant case, this is not possible on account of the fact that the SPO may have further material, either Rule 102 or 103 evidence that it has not provided notice of, and therefore the Appellant is precluded from identifying such information.

³⁷ KSC-BC-2020-07/F00413, Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, Confidential, at para.42. See also ICC-01704-01/0, Prosecutor v. Thomas Lubanga Dyilo, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, para. 6

34. To be clear, the SPO has now had contact with three separate (3) witnesses who have provided information that is consistent with the defence claims of entrapment.
35. The first account, [REDACTED], provided in an official note dated 29 September 2021,³⁸ a suspect interview on 9 November 2021,³⁹ an earlier interview on 12 April 2019,⁴⁰ details of which were disclosed to the defence in heavily redacted form⁴¹ on 16 November 2021,⁴² but who implicated an SPO Prosecutor and a third-party.
36. The second account was provided by [REDACTED] in two interviews on [REDACTED] and [REDACTED] and who implicates Serbian Officials, Kosovo-Albanians as well as investigators presumably within the SPO (first interview) and the Specialist Prosecutor (second interview).

³⁸ KSC-BC-2020-07-103283-103288 RED

³⁹ KSC-BC-2020-07-104127-TR-ET Part 1 RED

⁴⁰ KSC-BC-2020-07-060171-TR-ET Part 14 pp12-34 and Part 15 pp1-2 RED

⁴¹ Prosecutor v. Ndindiliyimana et al. ICTR-00-56-T, *Decision on Defence Motions Alleging Violations of the Prosecutions Disclosure Obligations Pursuant to Rule 68*, 22 September 2008, para. 24. Redacted versions of Rule 68 material must be sufficiently cohesive, understandable and usable by the defence.

⁴² Disclosure 61, 060171-TR-ET Part 14 pp12-34 and Part 15 pp1-2 RED, 103283-103288 RED. 104127-TR-AT Part 1 RED, 104127-TR-ET Part 1 RED. See also KSC-BC-2020-07/F00361; KSC-BC-2020-07/F00435.

37. The third account, contained in Item 206, consists of an interview conducted on 27 January 2022 and again implicates Serbian Officials and Kosovo-Albanians as well as potentially members of the SPO.⁴³
38. Notwithstanding the difficult position in which the Appellant is now placed in respect of other material, he is able to identify with sufficient precision the two witness interviews with Witness [REDACTED] and the material identified as Item 206.
39. Further, in considering the timeline, it is clear that that the SPO was aware of the evidence in respect of [REDACTED] and Item 206, and further, the SPO has summarily failed to provide any cogent reason as to why it was unable to provide this evidence earlier, and in any event, during the trial phase when it became aware of that evidence, other than the statement that it previously had no intention to provide notice and that it was in Albanian,⁴⁴ an official language of the SPO as a national institution.⁴⁵ Accordingly, and similarly to *Mugenzi*, the SPO has evidently failed to act in accordance with its obligations under Rule 102, and of specific importance given its exculpatory nature, Rule 103, taking into account the continuing duty that exists under Rule 112.

⁴³ The reference to taking the files from “The Hague” should be broadly interpreted taking into account the SPO earlier notice to the Trial Panel in respect of [REDACTED] that made no mention of persons investigating the case.

⁴⁴ KSC-CA-2022-01/F00038/CONF-RED, para. 5.

⁴⁵ See Article 5 of the Constitution of the Republic of Kosovo and Article 3(2)(a) of the Law.

40. Having established what the Appellant would advance to be a clear point, having regard to the circumstances, and indeed the decision of the Appeals Panel of 15 September 2022,⁴⁶ the issue that now falls to be considered, is that of prejudice suffered, and the extent of that prejudice.
41. Putting the matter simply, and as argued by the Gucati Defence⁴⁷ and repeated by the Haradinaj Defence,⁴⁸ the Appellant had no notice of the fact of the further interview of [REDACTED] until the transcript of it was received on [REDACTED], let alone grounds to challenge its non-disclosure (the same applies to item 206). No explanation has been given for why the information provided in the interview on 22 April 2022 was not identified for disclosure immediately, despite the fact: (i) that the witness and investigator W04841 (Zdenka Pumper) was present in the interview where that information was provided;⁴⁹ (ii) that her evidence in October and December 2021 demonstrates that W04841 was aware of the importance of the issue as to how the Batches arrived at the KLA WVA;⁵⁰ and (iii) of her assurance during her evidence that she would bring relevant material to the attention of the Specialist Prosecutor

⁴⁶ KSC-CA-2022-01/F00044.

⁴⁷ KSC-CA-2022-01/F00053, paras. 22-25.

⁴⁸ KSC-CA-2022-01/F00044, para. 30

⁴⁹ Disclosure 1 at 105694-TR-ET Part 1, page 1

⁵⁰ E.g. Transcript 21 October 2021, page 1226 lines 7-22, page 1237 lines 4-17, page 1249 lines 5-12; Transcript 26 October 2021, page 1450 lines 1-5, page 1477 lines 8-25, page 1478 line 19 to page 1479 line 2; Transcript 15 December 2021, page 2622 lines 10 to line 15 referring to 1D33 [REDACTED]

or his Deputy immediately.⁵¹ The strong inference must be that the failure to disclose that material was based on a “unilateral assessment by the SPO of credibility and reliability”, which the Trial Panel had said would be treated “with the utmost severity”.⁵²

42. As a result of the Prosecution’s failure to comply with Rule 103, the Appellant was unaware of the violation of Rule 103 until 26 September 2022, over three (3) months after he was obliged to file his Notice of Appeal and over one (1) month after he was obliged to file his Brief in Appeal (albeit the Prosecution had notified the Court of Appeals Panel of this material in an *ex parte* “Notification” on 7 July 2022⁵³ and a further on 7 September 2022⁵⁴).”

43. The issue is submitted however to be wider.

44. As has already been raised within the Appellant’s submission raising Rule 110:⁵⁵

⁵¹ Transcript, 21 October 2021, page 1193 lines 17-25 (albeit within a broader passage of the evidence suggesting that the SPO does not regard a systematic approach to disclosure as a necessary part of its work - see Transcript, 21 October 2021, page 1179 line 22 to 1196 line 18)

⁵² KSC-CA-2022-01/F00028/CONF/RED, *Confidential Redacted Version of Notification on [REDACTED] [REDACTED] with two confidential and ex parte annexes*, Prosecutor, 23 September 2022, Confidential at para.1, 8, 9 and 11; KSC-BC-2020-07/F00413/RED, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.48

⁵³ KSC-CA-2022-01/F00028/CONF/RED, *Confidential Redacted Version of Notification on [REDACTED] [REDACTED] with two confidential and ex parte annexes*, Prosecutor, 23 September 2022, Confidential

⁵⁴ KSC-CA-2022-01/F00028/ F00038/CONF-RED

⁵⁵ KSC-CA-2022-01/F00054RED, paras. 28 and 38(b)

- a. The Appellant was prevented from addressing the content with W04841 in cross-examination;
 - b. The SPO have failed to adhere to a previous ruling of the Trial Panel, in that all material relating to the origin, provenance and delivery of the Batches to the KLA WVA was to be subject to a detailed notice under Rule 102(3);⁵⁶ and
 - c. That the information naming [REDACTED], was seemingly received by the SPO in the midst of a disclosure challenge relating to material dealing with items 203-205 on the same topic.⁵⁷
45. Accordingly, the SPO were aware prior to, after, and importantly, during the time that this information was received, that that same issue was one subject to submissions by the Defence both in terms of a disclosure issue, and an issue pertinent to the defence(s) argued.
46. It is therefore beyond comprehension that the SPO would not give notice of this item until not only after the trial had been concluded, but after the appeal brief had been filed.

⁵⁶ KSC-BC-2020-07/F00304, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at para.5 and 10

⁵⁷ KSC-BC-2020-07/F00533, *Decision on the SPO Request Regarding Items 203 and 204*, Trial Panel II, 25 January 2022, Confidential; KSC-BC-2020-07/F00541, *Decision on the SPO Request Regarding Item 205*, Trial Panel II, 28 January 2022, Confidential

47. This must be considered with the position advanced by the SPO that there was no evidence of anyone employed by the SPO as having any involvement in the leaks,⁵⁸ that there was no evidence of any Serbian involvement in the leaks, and therefore there was no evidence of any 'State Agent' involvement in the leaks.⁵⁹
48. This therefore leads to the submission of the SPO and the findings of the Trial Panel, that there was no evidence of Entrapment, as advanced by the Appellant.
49. The position would now appear to be clear however that there is evidence of either SPO involvement, Serbian involvement, or State Agent involvement, or all three, and thus there is evidence that the Appellant would have sought to adduce if he had been aware of the same at the material time, that being the trial phase, again reaffirming the submission that the reason such evidence was not adduced by the Appellant during the Trial Phase was solely on account of the SPO's failure to provide notice of the existence of such items.
50. In making the submission that there is evidence of the aforesaid, it is of course accepted that the SPO would raise issues of credibility and reliability, however, such a determination is one for the Trial Panel to make having heard

⁵⁸ KSC-BC-2020-07/F00565, paras. 303-306.

⁵⁹ *Ibid.*

that evidence and any testing of that evidence by way of cross-examination, not the unilateral decision of the prosecution to suppress such material. Further, the assessment under Rule 103 is an objective test meaning that the material must “reasonably suggest” or point towards the innocence or mitigated guilt of the Appellant and not based on any opinion of the prosecutor as to whether he (subjectively) finds the account credible or reliable.⁶⁰

51. In refusing to disclose the same during the relevant phase, the SPO has not only actively undermined the Defence case, but further, usurped the position of the Trial Panel by deeming itself the arbiter of what is relevant or otherwise, and what should be considered by way of evidence. This is far beyond the remit of a prosecuting authority, and further, it is a decision that has had a material impact upon the Appellant’s defence and therefore caused clear and irrevocable prejudice, particularly, and to repeat the position, where it is not known whether there exists other items of evidence or similar notes/documents that may amount to further exculpatory material and therefore Rule 103 evidence.

⁶⁰ Unlike Rule 68(A) at the ICTR/ICTY, Rule 103 at the KSC does not make reference to “...which in the actual knowledge of the Prosecutor...” the test under Rule 103 of “reasonably suggest” is an objective test that involves no assessment of the weight or reliability.

52. The Appellant accepts that a position of ‘good faith’ is adopted in terms of any prosecutorial authority, and that good faith is relied upon in terms of what evidence is held. That position is not irrebuttable however, and given the litany of disclosure failures, this most recent failure, and the admission on the part of the SPO that it “*did not intend to provide notice of this item*”, it is submitted that there can be no longer a presumption that the Defence has received notice of all relevant Rule 102 and/or 103 evidence that the SPO holds and that the SPO has acted in good faith.
53. In terms of prejudice suffered by the Appellant therefore the following is now clear:
- a. The whole disclosure process and the legitimacy of the same is now called into question;
 - b. The position of the SPO and the findings of the Trial Panel in terms of Entrapment are now called into question;
 - c. That the Defence has been prevented, and not through a decision of the Trial Panel, from advancing and developing a limb of defence;
 - d. The Defence were prevented from cross-examining witnesses, specifically, but not necessarily limited to, witness W04841 in terms of the leaks and/or the investigation into the same; and

- e. The Appellant has not received a fair trial and thus his rights per Article 6 of the ECHR have not been respected or adhered to.
54. The Defence has, in an effort to resolve the issue raised and further, in an attempt to ascertain whether there is any further evidence that ought to be disclosed per the Rules, entered into *inter partes* correspondence with the SPO, raising twenty-three (23) separate points which both refer to specific items to be disclosed where they exist, and second, seek to ascertain what steps in respect of certain issues by the SPO were taken.
55. The SPO in its response, has refused to provide any and all information requested. The request and response to that request is Annexed⁶¹ to this filing, and therefore it is not intended that the same be re-produced in full here, however of note is the following:
- a. In respect of requests 1, 6, and 12, *“The SPO confirms it retains these records. They provide no information that is relevant to the case or is potentially exculpatory.”*⁶²

⁶¹ Confidential Annexes A, B and C.

⁶² Confidential Annex C.

This position cannot be relied upon having regard to the previous Rule 103 breaches and further, the previous submissions on the SPO not determining what is relevant or otherwise.

- b. In respect of items 2-5, 7-11, 13, 15-17, 20, and 23 *“The SPO’s investigations into these matters are strictly confidential and irrelevant to this case. The SPO cannot comment on whether or what specific steps have been taken without compromising its investigations.”*⁶³

This is demonstrably incorrect, noting that the issues giving rise to this submission in the first instance are, in part, the SPO determining what is relevant or otherwise, and further, given the items subject to the most recent disclosure requests, it is abundantly clear, or at worst, *prima facie* clear, that steps taken are wholly relevant, on the basis that at least parts of the information requested may support the Appellant’s advanced defence(s).

56. The trial process is an adversarial system, and quite rightly, evidence advanced will be subject to challenge and rigorous examination; however, the Appellant must be allowed sight of evidence where such evidence exists, so as to enable the testing of the same before the Trial (or Appellate) Panel.

⁶³ *Ibid.*

57. Further, the Appellant ought not to be in a position where his advanced defence is undermined, not, through testing before the trier of fact, because of the credibility or veracity of evidence that he advances, but through arbitrary decisions taken by the prosecutorial authority that is obliged to ensure that it does nothing to undermine the fundamental principle of a fair trial.
58. It is trite law that fairness requires adequate disclosure to the defence of any material capable of assisting the defence,⁶⁴ and the failure to disclose items or confirm of their existence until after the trial has concluded goes to the very core of fair trial guarantees.
59. Therefore, in the above circumstances, it is submitted that as opposed to *Mugenzi* where failings and therefore prejudice were deemed to be minimal, in the instant case, they cannot be said to be anything other than severe and significant.

V. TEST UNDER RULE 103

60. In *Mugenzi*,⁶⁵ the ICTR Appeals Chamber set out that pursuant to the analogous Rule 68(A) of the ICTR Rules of Procedure and Evidence that the

⁶⁴ *Jespers v Belgium no.8403/78, Commission decision of 15 October 1980, DR 22, p.116; Rowe and Davis v The United Kingdom [GC], no.28901/95; Edwards v The United Kingdom 16 December 1992*

⁶⁵ *Mugenzi & Mugiraneza*, paras. 39-64

Prosecution “shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”.⁶⁶

61. The ICTR Appeals Chamber went on to explain that to establish that the Prosecution is in breach of its disclosure obligations, the Applicant/Appellant must:

- a. Identify specifically the material sought;
- b. Present a *prima facie* showing of its probable exculpatory nature; and
- c. Prove that the material requested is in the custody or under the control of the Prosecution.⁶⁷

62. Turning first to the question of “as soon as practicable”, the Appeals Panel should apply the common sense meaning to the term meaning as soon as both possible and practical under all the facts and circumstances of the individual case. In the instant case, it is beyond any reasonable doubt that the SPO had knowledge of the matters now under consideration as long ago as [REDACTED] for the first interview of [REDACTED] and [REDACTED] for the

⁶⁶ *Ibid*, para. 39 and Rule 68(A) of the ICTR Rules of Procedure and Evidence.

⁶⁷ *Ibid*, see also *Callixte Kalimanzara v. The Prosecutor*, ICTR-05-88-A, Appeals Judgment, 20 October 2010, para. 18.

second interview and [REDACTED] for the material referenced as Item 206. Taking into account 'all the facts and circumstances of the individual case' it cannot be said that the SPO has acted 'as soon as is practicable'. Even if the Appeals Panel takes the view that the SPO notified in two confidential and *ex parte* filings on [REDACTED] and [REDACTED], respectively, and that is the cut-off point, the Appellant was not notified until [REDACTED] and the delay is nonetheless considerable and no cogent or reasonable justification has been provided.

63. Further, Rule 103 clearly sets out that the "*the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge...*" (emphasis added). The first limb of the test is clear, if the material is within the *custody, control or actual knowledge* it must be disclosed, subject to consideration of the second limb, immediately. In respect of the second interview of Witness [REDACTED], even taking account of the first notification, that still accounts for considerable delay. In terms of whether the fact that the SPO did not complete the transcript of the interview until [REDACTED],⁶⁸ this is not a justification for such delay.⁶⁹

⁶⁸ KSC-CA-2022-01/F00044, para. 23, citing [REDACTED] notification, paras. 1, 6, 7.

⁶⁹ The European Court of Human Rights has emphasised States' responsibility to "to organise their legal systems in such a way that their courts" can comply with the requirements of trial within a reasonable time. See e.g. ECtHR (GC), *Zana v. Turkey*, (69/1996/688/880) ("*Zana*"), 25 November 1997, para. 83.

64. The second limb relates to material that “...*may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Special Prosecutor’s evidence*”.⁷⁰
65. Turning to the three-point test set out in *Mugenzi*, it is quite clear that the Appellant has set out, to the extent that he is able, the material sought and that which should have been disclosed *immediately* under Rule 103. The material is unquestionably within the *custody, control or actual knowledge* of the SPO and has been for some considerable time. The question therefore falls as to whether the Appellant is able to ‘present a *prima facie* showing of its probable exculpatory nature’.
66. Rule 103 clearly sets out that if material is in its ‘*custody, control or actual knowledge*’ and if that material ‘*may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Special Prosecutor’s evidence*’ then it must be disclosed and must be disclosed immediately.
67. The Appeals Panel is reminded of its own finding in the *Confidential Redacted Version of Decision on Prosecution Notifications*,⁷¹ in which it reaffirmed the ruling by the Pre-Trial Judge and its own previous ruling⁷² on the exculpatory

⁷⁰ See *f/n* 58.

⁷¹ KSC-CA-2022-01/F00044

⁷² *Ibid.* para. 26, *f/n* 37 and 38.

nature of material or information regarding purported incitement. The Appeals Panel confirmed that the material was disclosable under Rule 103.

68. The Appeals Panel declares, at paragraph 28 of its decision,⁷³ that the first interview with [REDACTED] did not implicate the SPO in the provenance of the Batches.⁷⁴ However, this is simply not correct. [REDACTED] refers to [REDACTED]⁷⁵ not only being present during the [REDACTED], but from the very beginning [REDACTED]. Curiously, the SPO elects not to press the issue further to clarify the identity of the [REDACTED]. Furthermore, there is repeated reference to the involvement of Serb Officials throughout the first interview⁷⁶ and in particular referencing the Serbian Prosecution Services and Serbian Intelligence Services (“BIA”).⁷⁷ In this regard it is quite clear that the interview of [REDACTED] presents a *prima facie* showing of purported entrapment or incitement by a plurality of persons including members of the SPO, high ranking Serbian Officials and other persons including Kosovan Albanians. The notice provided by the SPO at the relevant time, omitted these key details.⁷⁸

⁷³ *Ibid.* para. 28.

⁷⁴ *Ibid.* para. 28, *f/n* 42.

⁷⁵ See e.g., Disclosure 1 at 082095-TR-ET Part 2, p. 2, lines 2-16.

⁷⁶ See e.g., Disclosure 1 at 082095-TR-ET Part 1, starting at p. 14.

⁷⁷ See e.g., Disclosure 1 at 082095-TR-ET Part 1, p. 23.

⁷⁸ KSC-BC-2020-07/F00304, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at paragraph 18

69. The Appeals Panel confirms that:

“...had the First Witness [REDACTED] Interview suggested the involvement of the SPO in the provenance of the Batches, the interview would have been relevant to the claim of entrapment and should have been made available to the Defence under Rule 103...”⁷⁹

70. In the first instance, the reference to [REDACTED] can only mean the SPO. One must enquire who else would have been investigating the leak at that time. And secondly, the entrapment defence does not rest solely on SPO involvement, it involves potentially a plurality of persons and can include private entrapment as previously argued.⁸⁰

71. The Appellant has argued throughout the proceedings that the issue of SPO and/or Serbian involvement in how the Batches arrived at the KLA WVA headquarters in Prishtinë was directly relevant to a central issue at trial.⁸¹

72. In terms of the second strand, affecting the credibility or reliability of the Specialist Prosecutor’s evidence, the question was put to Witness W04841 (Zdenka Pumper)⁸² by Reserve Judge Fergal Gaynor as to whether any

⁷⁹ *Ibid.* para. 26.

⁸⁰ KSC-CA-2022-01/F00051, para 37, adopting KSC-CA-2022-01/F00050, paras. 29-34.

⁸¹ KSC-BC-2020-07, ‘Trial Hearing’, Transcript 11 January 2022, page 2710, lines 2-25; page 2711, lines 1-25; page 2713, lines 23-25; page 2714, lines 1-19; KSC-BC-2020-07/F00509, Annex 2 to Submission of Statement of Nasim Haradinaj, Confidential, 28 December 2021, paras 21, 32, 34-35, 45, 52, 132-134.

⁸² Transcript, 26 October 2021, page 1478-1479

member of the SPO could have been involved in the delivering of the Batches to the Appellant's office:

JUDGE GAYNOR: Now, on the basis of your experience in the SITF and subsequently with the SPO, do you have any reason to believe that any current or former member of the SPO was involved in any way in providing any of the information contained in the batches of information to the KLA War Veterans Association?

A. I have no information that this took place.

JUDGE GAYNOR: Do you have any reason to believe that any person acting under the instructions or control of the SPO provided any of that information to the KLA War Veterans Association?

A. I have no information to that effect.

JUDGE GAYNOR: To the best of your knowledge, did the SPO carry out any steps to rule out the involvement of any current or former members of the SPO or any person acting under the instruction or control of the SPO in the delivery of information to the KLA War Veterans Association?

A. Your Honour, respectfully, I have no information of the -- the substance of the investigation into this matter, so I cannot answer what was investigated or what was not investigated. I'm not privy to this information.

73. The defence were denied the opportunity to put questions to Witness W04841, a senior SPO investigations coordinator, on the first interview with Witness [REDACTED] that had taken place on [REDACTED], nor was it in a position to put further questions to W04841 when she was recalled on 15 December 2021.

74. In the SPO Final Trial Brief, it is clearly stated that “...*nor is there any indication that anyone from the SPO met, contacted, interacted, or was otherwise associated with anyone delivering the Batches*”.⁸³ It goes on to say “*Any SPO obligation to disprove entrapment is dependent upon the allegations of the Accused being not wholly improbable. That initial threshold has never been met in this case, and in any event has been disproven.*”⁸⁴
75. The FTB was filed on 3 March 2022, some five (5) weeks after the Item 206⁸⁵ interview in which it is stated that the files were “taken from The Hague” and more than [REDACTED] after the first interview of Witness [REDACTED] which references the [REDACTED].
76. The SPO seeks to hide behind a myopic view of what Rule 103 material is and it seeks to argue that it’s either not relevant to the case, not a credible account, or part of an ongoing investigation, for failing to disclose. The simple fact is that they knew, and they decided not to disclose to the detriment of the Appellant and to the detriment of this court.
77. The conduct of the SPO is nothing short of scandalous. They have trampled over the fair trial rights of the Appellant. Recalling paragraph 5 of the SPO’s

⁸³ KSC-BC-2020-07/F00565, para. 303, citing in f/n 824 citing Pumper, T.1478; Moberg, T.1953, 1957-58; Berisha, T.1574; Jukić, T.1899.

⁸⁴ KSC-BC-2020-07/F00565, para. 306.

⁸⁵ KSC-CA-2022-01/F00046/CONF-RED, para. 1.

‘Confidential redacted version of Notification on communication received by the SPO’,⁸⁶ in which it “*did not intend to provide notice of this item*”, is demonstrative of the SPO’s adherence to the procedural rules of the Specialist Chambers.

78. The obligation is to disclose immediately – the question then falls as to the prejudice and the appropriate remedy. It is submitted that the only remedy appropriate to the breach is a complete reversal of the conviction and sentence with prejudice for the documented violations of Rule 103.

79. In terms of the prejudice caused, it is noted that, as the ICC Appeals Chamber held in *Lubanga*,⁸⁷ where the prosecution had violated its obligation to disclose exculpatory material immediately, but disclosed before the trial, there was limited prejudice. Further, in *Mugenzi & Mugiraneza*, the ICTR Appeals Chamber held that although the prosecution had violated its disclosure obligations, but there was no material prejudice to the accused.⁸⁸ The situation in the instant matter is substantially different to that of *Lubanga* and *Mugenzi & Mugiraneza* in that the material was not disclosed before trial and that there

⁸⁶ KSC-CA-2022-01/F00038/CONF-RED

⁸⁷ The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3113, ICC Appeals Chamber, *Decision on Request of the Defence in relation to Investigations Conducted Pursuant to Article 70 of the Statute*, 17 June 2014, para. 22

⁸⁸ *Mugenzi & Mugiraneza Appeals Decision*, para. 63

is clear material prejudice to the Appellant in the presentation of his case and the safety of the convictions.

80. It is submitted that the relief in *Mugenzi*, to “draw a reasonable inference in favour of the accused from the exculpatory material as a remedy”,⁸⁹ is clearly not appropriate in the instant case given the parameters of the issue and the material prejudice suffered.

81. In the *Mugenzi* case the disclosure failing related to a narrow and discrete issue, and an issue upon which further evidence was considered. It therefore did not undermine the Defence to a significant or material defence.

82. The same cannot be said in the instant case, the issues subject to this filing being fundamental not only to the defence advanced in its entirety, but one that is fundamental to the integrity of the entire trial process.

VI. CONCLUSION

83. The SPO has, as previously submitted on numerous occasions, paid lip-service to their disclosure obligations and continues to seek to make

⁸⁹ *Ibid.*

determinations that are beyond its mandate, and thus acting in a cavalier manner.

84. The most recent instance has fundamentally undermined the Appellant's right to a fair trial for the reasons given, and thus the only relief capable of rectifying the prejudice is that of a full reversal of the convictions and an acquittal verdict entered. Alternatively, and at the minimum, the Appeals Panel should order that a retrial is ordered with a new and fresh process of disclosure within which the SPO will provide new and updated notices detailing all items in its possession whether it deems them relevant or not, something that it has hitherto evidently failed to do. Further, the Appellant must be afforded adequate time and facilities, in accordance Article 6(3)(b) of the ECHR, to conduct effective investigations in relation to Disclosure 1 and Item 206, provided disclosure is ordered, and to elicit evidence at trial from those witnesses capable of providing relevant evidence on the issues that are central to the case.

85. The disclosure of material pursuant to Rule 103 (and the analogous Rule 68(A) at the ICTY/ICTR) is fundamental to the fairness of proceedings⁹⁰ and the obligation has been deemed "as important as the obligation to prosecute".⁹¹

⁹⁰ KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at paragraph 48. See *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para. 188.

⁹¹ *Prosecutor v. Kordić & Čerkez*, IT-64-14-A, Judgement, 17 December 2004, paras. 184, 242.

The disclosure of exculpatory material is fundamental to ensure the equality of arms between the parties and the fairness of proceedings as guaranteed under Article 6(1) of the ECHR and the trial proceedings in which the Appellant was convicted failed to meet those fundamental standards and should therefore be set aside.

VII. RELIEF SOUGHT

86. On the basis of the submissions made, the Appellant respectfully requests that the Appeals Panel:

- a. find that the Appellant has sufficiently identified the material in question;
- b. find that the material in question is in the SPO's custody, control or actual knowledge;
- c. find that the Appellant has made a *prima facie* showing of the probable exculpatory nature of the material in question;
- d. find that the SPO violated Rule 103 of the Rules by failing to disclose the First and Second Interview of Witness [REDACTED] held on [REDACTED] and [REDACTED] and Item 206, immediately, or at least, as soon as practicable;

- e. find that the disclosure violations materially impacted on the Appellant's case and could have been a decisive factor; and
 - f. find that the Appellant has been prejudiced by the SPO's violation of Rule 103 taken together with Rule 6 of the Rules.
87. Further, pursuant to Rule 110 of the Rules, and the general power under Rule 6 for any non-compliance with the Rules causing material prejudice, and due to the material impact on the fairness of the Appellant's trial, the Appellant respectfully requests that the Appeals Panel finds that the simple finding of a violation as just satisfaction for the continued and persistent violations of its disclosure obligations by the SPO with no further sanction would not be appropriate in the circumstances and would occasion a further miscarriage of justice and is requested to reverse the convictions and a enter an acquittal verdict in respect of Counts 1, 2, 3, 5 and 6, the Appellant having already been acquitted of Count and to which the SPO has not appealed.
88. The Appellant further respectfully requests, in the alternative to the relief requested in the preceding paragraph, the Appeal Panel to:
- a. order a stay of proceedings; or in the further alternative
 - b. order a retrial.

VIII. CLASSIFICATION

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

Word Count: 5,995 words



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