



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

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

Registrar: Fidelma Donlon

Date: 21 October 2022

Original language: English

Classification: **Public**

**Public Redacted Version of Decision on the Specialist
Prosecutor's Office's Request Regarding Item 206**

Specialist Prosecutor's Office:
Jack Smith

Counsel for Hysni Gucati:
Jonathan Elystan Rees

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),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”), is seised of a Prosecution notice of additional item 206 and challenge to disclosure filed on 19 September 2022.² Mr Hysni Gucati (“Gucati”) and Mr Nasim Haradinaj (“Haradinaj”) responded on 29 September 2022.³ The Specialist Prosecutor’s Office (“SPO”) did not reply.

I. BACKGROUND

1. Pursuant to the SPO notification of two confidential and *ex parte* communications,⁴ the Court of Appeals Panel issued a decision on 15 September 2022 ordering the SPO to, *inter alia*, disclose to the Defence under Rule 103 of the Rules two interviews of Witness W04730 (“Rule 103 Material”).⁵ The Panel further ordered that the communication received by the SPO – identified by the Parties as “Item 206” – be notified to the Defence under Rule 102(3) of the Rules.⁶ On 19 September 2022, the SPO

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

² F00046/CONF/RED, Confidential Redacted Version of Prosecution notice of additional item 206 and challenge to disclosure, 19 September 2022 (strictly confidential and *ex parte* version filed on 19 September 2022) (“SPO Notice of Item 206”).

³ F00050, Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure, 29 September 2022 (confidential) (“Gucati Response”); F00050/A01, Annex 1 to Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure, 29 September 2022 (“Annex 1”); F00050/A02, Annex 2 to Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure, 29 September 2022 (“Annex 2”); F00051, Haradinaj Defence Response to ‘Prosecution notice of additional item 206 and challenge to disclosure’, 29 September 2022 (confidential) (“Haradinaj Response”).

⁴ F00028, Notification on W04730 telephone contact, 7 July 2022 (confidential and *ex parte*); F00038, Notification on communication received by the SPO, 7 September 2022 (confidential and *ex parte*).

⁵ F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 26 September 2022 (confidential) (strictly confidential and *ex parte* version filed on 15 September 2022) (“Decision of 15 September 2022”), paras 25-29, 38(a). In the Decision of 15 September 2022, the Rule 103 Material is identified as “First Witness W04730 Interview” and “Second Witness W04730 Interview”.

⁶ Decision of 15 September 2022, paras 34-37, 38(c). In the Decision of 15 September 2022, Item 206 is identified as “Communication identified in the 7 September 2022 Notification”.

complied with the Decision of 15 September 2022 and notified the Defence of Item 206. The SPO, however, opposes its disclosure to the Defence.⁷

II. DISCUSSION

A. SUBMISSIONS OF THE PARTIES

2. In support of its assertion that Item 206 shall not be disclosed to the Defence, the SPO asserts that this item is immaterial to the Defence as it does not contain any information or opinion regarding any role or involvement of the SPO in the provenance of the Batches and as such, this item could not have been a decisive factor in reaching a decision at trial.⁸

3. The SPO also argues that even if Item 206 was deemed material, disclosing the identity of the author would cause grave risks to his security.⁹ This is [REDACTED].¹⁰

4. Stressing that the investigation into the Batches is part of a multi-faceted obstruction investigation, the SPO further submits that disclosing the identity of the author would prejudice ongoing or future investigations.¹¹

5. Gucati and Haradinaj respond that Item 206 is material to the Defence and should be disclosed pursuant to Rule 102(3) and/or Rule 103 of the Rules.¹² Both recall the Panel's finding that the process through which the Batches arrived at the KLA WVA premises is a relevant issue in the case.¹³ Both also challenge the SPO's assertion that Item 206 could not have been a "decisive factor" in reaching a decision at trial and

⁷ SPO Notice of Item 206, paras 2-8.

⁸ SPO Notice of Item 206, para. 3, referring to Rule 181(3) of the Rules. See also SPO Notice of Item 206, paras 2, 7-8. The Panel recalls that the "Batches" are the documents seized from the Kosovo Liberation Army War Veterans' Association ("KLA WVA") on 8, 17 and 22 September 2020. See e.g. Decision of 15 September 2022, para. 3.

⁹ SPO Notice of Item 206, para. 4.

¹⁰ SPO Notice of Item 206, para. 6.

¹¹ SPO Notice of Item 206, paras 4-5.

¹² Gucati Response, paras 3, 10-11, 21, 34-35; Haradinaj Response, para. 3.

¹³ Gucati Response, paras 12-13; Haradinaj Response, paras 10, 14, 17, 22, 30.

underline that Rule 181(3) of the Rules, as relied upon by the SPO, does not apply in this case.¹⁴

6. According to Gucati, the author of Item 206 could provide further leads to the Defence in relation to the process by which the Batches arrived at the KLA WVA premises.¹⁵ In addition, the SPO's assertion that the communication contains no information suggesting the involvement of the SPO in the provenance of the Batches is only relevant to assessing whether it should be disclosed under Rule 103 of the Rules, but is irrelevant for the purpose of the materiality test under Rule 102(3) of the Rules.¹⁶

7. Gucati submits that the author of Item 206's suggestion of the involvement of the two [REDACTED] he mentions demands further investigations by the Defence in light of: (i) [REDACTED];¹⁷ (ii) [REDACTED];¹⁸ and (iii) the possibility that Item 206 could contribute to an overall picture which does suggest the involvement of the SITF/SPO in the disclosure of the Batches to the KLA WVA premises.¹⁹

8. Gucati further argues that in the Rule 103 Material that was disclosed to the Accused, Witness W04730 predicted that [REDACTED]. This predication [REDACTED] author of Item 206 [REDACTED] on 27 January 2022.²⁰ Therefore, Gucati submits that Item 206 can assist in the assessment of the credibility and reliability of a witness and accordingly meets the test of materiality.²¹ Haradinaj develops a similar argument,²² and adds that, since the Panel has already decided that

¹⁴ Gucati Response, para. 36; Haradinaj Response, paras 25-26.

¹⁵ Gucati Response, para. 15.

¹⁶ Gucati Response, paras 20-21.

¹⁷ Gucati Response, paras 16, 18. The Panel recalls [REDACTED].

¹⁸ Gucati Response, paras 16-17.

¹⁹ Gucati Response, para. 19.

²⁰ Gucati Response, para. 23.

²¹ Gucati Response, para. 24.

²² Haradinaj Response, paras 20-21.

the Rule 103 Material was relevant, it has to rule in a similar manner in relation to Item 206.²³

9. In addition, Gucati submits that Item 206 is material to the defence of public interest.²⁴ This is because the author of the communication apparently provides an account in which [REDACTED], [REDACTED]. According to Gucati, this information is relevant to the issue of [REDACTED].²⁵ Gucati further underlines that the Trial Panel rejected his submissions on that matter partly because the Panel [REDACTED].²⁶

10. Finally, Gucati argues that Item 206 appears to suggest that [REDACTED].²⁷ This material could constitute a case of private entrapment as defined under Article 6 of the European Convention on Human Rights (“ECHR”) which, if found to be violated, would require a proper remedy such as a stay of the proceedings.²⁸ Haradinaj adopts Gucati’s argument on this matter.²⁹

11. Haradinaj submits that it is not for the SPO to determine what is material to the Defence, especially at “such a late stage in the proceedings” and all the more that the Accused is notified of an item without being able to see it and to assess it.³⁰ In Haradinaj’s view, if the Panel upholds the position of the SPO, it will in effect allow the SPO to determine what can be disclosed. In that regard, Haradinaj recalls that the Trial Panel considered the second limb of the materiality test to be the prerogative of the Defence and had to be assessed in a broad manner.³¹

²³ Haradinaj Response, para. 22.

²⁴ Gucati Response, paras 25-28.

²⁵ Gucati Response, para. 28.

²⁶ Gucati Response, para. 27.

²⁷ Gucati Response, paras 29-33.

²⁸ Gucati Response, para. 33.

²⁹ Haradinaj Response, para. 37.

³⁰ Haradinaj Response, paras 7-9. See also Haradinaj Response, paras 18-19. Haradinaj further challenges the SPO’s reliance on Rule 181(3) of the Rules and the SPO’s statement that Item 206 could not have been a decisive factor in reaching a decision at trial. Haradinaj Response, paras 25-27.

³¹ Haradinaj Response, para. 15. Haradinaj also claims that the SPO has consistently denied the existence

12. Haradinaj recalls that he raised at trial [REDACTED]. He also raised [REDACTED]. He submits that the SPO objected [REDACTED].³²

13. Haradinaj argues that Item 206 suggests that [REDACTED]. In this regard, Witness W04841 stated that [REDACTED]. This, according to Haradinaj, corroborates the information in Item 206 and would confirm that the leaked material must have been removed by a member of the SPO.³³

14. Haradinaj further recalls that the SPO received the communication identified as Item 206 on 27 January 2022 and discussed the disclosure of a previous item, “Item 205” at the Status Conference held on 31 January 2022, just four days after receiving Item 206. Despite that, the SPO only notified the Defence of it eight months later, post-conviction. This, to Haradinaj’s view, constitutes a fundamental failure by the SPO to meet its disclosure obligations.³⁴

15. On the security risks alleged by the SPO, Haradinaj responds that the SPO fails to provide any explanation to support its claim that disclosing the identity of the author of Item 206 would prejudice its investigations and further fails to offer counter-balancing measures such as, for example, redaction of the author’s name.³⁵

16. Haradinaj requests the Panel to take “relevant measures” pursuant to Rule 110 of the Rules,³⁶ to “stay any determination pending the resolution of the issue of disclosure,”³⁷ and to find that the SPO violated its disclosure obligations.³⁸

of any investigatory shortcomings, despite there being clear evidence to challenge this position. See Haradinaj Response, para. 16.

³² Haradinaj Response, para. 11.

³³ Haradinaj Response, paras 11-13.

³⁴ Haradinaj Response, paras 23-24, 27.

³⁵ Haradinaj Response, paras 32-36.

³⁶ Haradinaj Response, para. 28. See also Haradinaj Response, paras 29, 38(b).

³⁷ Haradinaj Response, paras 31, 38(c).

³⁸ Haradinaj Response, para. 38(a).

B. PRELIMINARY MATTERS

17. The Panel recalls its endorsement of the principles applicable to disclosure pursuant to Rule 102(3) of the Rules set forth in the Framework Decision on Disclosure and, more significantly, the Decision on the Materiality of Rule 102(3) Items.³⁹ In that regard, the Panel recalls that Rule 102(3) of the Rules sets out a procedure involving the following steps: (i) the provision by the SPO of a detailed notice to the Defence of any material and evidence in its possession; (ii) any requests by the Defence for the disclosure or inspection of material in the custody or control of the SPO, which is deemed by the Defence to be material for its preparation, or was obtained from or belonged to the Accused; and (iii) any disputes raised by the SPO as to the materiality of the material requested by the Defence.⁴⁰

18. The Panel observes that the SPO stated its challenges to the disclosure of Item 206 in order to resolve the matters as soon as possible.⁴¹ In so doing, the SPO merged step one and step three of the steps of the disclosure process detailed above. The Panel allows this, as the Trial Panel also did on previous occasions,⁴² in the interest of expediting matters, provided that the detailed notice meets the requirements of the first step that is the provision by the SPO of a detailed notice to the relevant material.⁴³

³⁹ Decision of 15 September 2022, para. 21; Disclosure Appeal Decision, para. 34. See also KSC-BC-2020-07, F00104, Framework Decision on Disclosure of Evidence and Related Matters, 22 January 2021 (“Framework Decision on Disclosure”); KSC-BC-2020-07, F00172/RED, Public Redacted Version of the Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, 15 July 2021 (confidential version filed on 1 April 2021) (“Decision on the Materiality of Rule 102(3) Items”).

⁴⁰ Decision of 15 September 2022, para. 21; Decision on the Materiality of Rule 102(3) Items, para. 22. See also Disclosure Appeal Decision, para. 38.

⁴¹ See e.g. KSC-BC-2020-07, F00541, Decision on the SPO Request Regarding Item 205, 28 January 2022 (confidential) (“Decision on Item 205”), para. 15 and jurisprudence quoted therein.

⁴² See e.g. Decision on Item 205, para. 15; 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, 16 December 2021 (confidential version filed on 3 November 2021) (“Decision on the Prosecution Challenges to Disclosure”), para. 42.

⁴³ Decision on Item 205, para 15; Decision on the Prosecution Challenges to Disclosure, para. 42.

19. In regard to the first step, the SPO explains that the author of the communication identified in Item 206 appears to be referring to the documents made public by the Accused and alleges, *inter alia*, that:

(i) [REDACTED]; (ii) [REDACTED]; and (iii) [REDACTED].⁴⁴

20. The Panel considers that the description provided strikes an appropriate balance between not divulging the content of an item for which non-disclosure is sought and providing a detailed notice to the Defence. The Panel is therefore satisfied that the notice provided by the SPO is sufficiently detailed to meet the requirements of Rule 102(3) of the Rules.

21. In relation to Haradinaj's submission that he has not seen Item 206,⁴⁵ the Panel is aware that it is asked to make a determination on the materiality of Item 206 under Rule 102(3) of the Rules without the Defence having access to it, and without being in a position to make informed submissions on its materiality.⁴⁶ In view of this, and in order to preserve the effectiveness of the rights of the Accused in this matter, the Panel has exercised particular caution in reviewing Item 206 and evaluating its potential materiality to the Defence.

22. The Panel observes that Gucati and Haradinaj request the disclosure of Item 206 pursuant to Rule 102(3) of the Rules and/or Rule 103 of the Rules.⁴⁷ The Panel already found that Item 206 does not fall under the disclosure regime of Rule 103 of the Rules,⁴⁸ and the Defence, in the present instance do not argue that Item 206 is exculpatory. The Panel further agrees with Gucati and Haradinaj that the SPO's assertion according to which Item 206 item could not have been a "decisive factor" in

⁴⁴ Decision of 15 September 2022, para. 31. See also SPO Notice of Item 206, para. 1.

⁴⁵ See e.g. Haradinaj Response, para. 7.

⁴⁶ Decision on Item 205, para. 17 and jurisprudence quoted therein.

⁴⁷ Gucati Response, paras 3, 10-11, 21, 34-35; Haradinaj Response, para. 3.

⁴⁸ Decision of 15 September 2022, para. 33.

reaching a decision at trial does not apply in this case.⁴⁹ This is because the Panel is not assessing, in this Decision, whether Item 206 should be admitted as additional evidence pursuant to Rule 181 of the Rules.

23. In a prior decision, the Panel declined to assess whether the notification procedure under Rule 102(3) of the Rules continues during the appeal phase.⁵⁰ The Panel recalls that Item 206 was received by the SPO on 27 January 2022, *before* the Trial Panel closed the case on 17 March 2022.⁵¹ For the purpose of this decision, the Panel will assume that Rule 102(3) of the Rules also applies, at the appeal stage, to specific situations like the present one where the SPO has failed to notify material under Rule 102(3) of the Rules during trial despite being in possession of such material.⁵²

C. ASSESSMENT OF THE COURT OF APPEALS PANEL

24. Rule 102(3) of the Rules states:

The Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the materiality of the information exist.

⁴⁹ Gucati Response, para. 36; Haradinaj Response, paras 25-26. See also SPO Notice of Item 206, para. 3, fn. 3.

⁵⁰ Decision of 15 September 2022, para. 35.

⁵¹ Transcript, 17 March 2022, p. 3855. See also Gucati Response, para. 37; Haradinaj Response, para. 23.

⁵² See e.g. KSC-BC-2020-07, F00610, Decision on the Defence Requests for Permission to Make Further Submissions on Disclosure, 17 May 2022 (“Trial Panel Decision of 17 May 2022”), para. 17.

25. The Panel previously stressed the importance of the disclosure process in ensuring the fairness of the proceedings and that the rights of the Defence are respected, and that this should remain paramount in disclosure related decisions.⁵³

26. Both Gucati and Haradinaj rely on the Panel's finding that the process through which the Batches arrived at the KLA WVA premises is a relevant issue in the case.⁵⁴ The Panel recalls, however, that *relevance* and *materiality* are two different standards for the purpose of the disclosure process under Rule 102(3) of the Rules.⁵⁵ In the present Decision, the Panel is requested to rule on the dispute mechanism foreseen under the last limb of Rule 102(3) of the Rules which concerns challenges to the *materiality* of the requested materials, not their *relevance* (i.e. the basis for inclusion in the Rule 102(3) Notice).⁵⁶

27. The Panel recalls that the concept of "material to the preparation of the defence" is to be interpreted broadly and should not necessarily be confined to the temporal scope of the indictment, or confined to issues directly linked to exonerating or incriminating evidence or which would either directly undermine the prosecution case or support a line of argument of the defence.⁵⁷

28. The Court of Appeals Panel provided further guidance and ruled that, for instance, some documents may be deemed material to the preparation of the Defence because they: (i) are relevant to a breach of the accused's rights under the Statute; (ii) are able "to support a colourable argument; that is, an argument that has some prospect of success"; (iii) could assist in the assessment of the credibility and reliability

⁵³ Decision of 15 September 2022, para. 20.

KSC-BC-2020-07, IA005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021) ("Disclosure Appeal Decision"), para. 35 and authorities cited therein.

⁵⁴ Gucati Response, paras 12-13; Haradinaj Response, paras 10, 14, 17, 22, 30. See also Decision of 15 September 2022, para. 34.

⁵⁵ Disclosure Appeal Decision, paras 42, 45.

⁵⁶ Disclosure Appeal Decision, para. 45.

⁵⁷ See e.g. Disclosure Appeal Decision, para. 41 and jurisprudence quoted therein.

of Defence witnesses, and therefore the decision of whether to call them; or (iv) might dissuade a defendant from pursuing an unmeritorious defence. By contrast, information that bears no connection to the events relevant to the charges – such as items of a purely personal nature; too remote, hypothetical or speculative; not related to the charges against the accused; or which has only an “abstract logical relationship to the issues” may be considered as not material to the preparation of the Defence.⁵⁸

29. The Panel notes that Gucati and Haradinaj focus on the first part of Item 206 [REDACTED]. This, according to the Defence, is material because it suggests and/or corroborates existing evidence such as that of Witness W04841 on [REDACTED];⁵⁹ and corroborates allegations made by Witness W04730 in the Rule 103 Material, who also refers to [REDACTED].⁶⁰

30. Haradinaj’s argument that Item 206 could corroborate the evidence provided by Witness W04841 and confirm that the leaked material must have been in fact removed by a member of the SPO,⁶¹ is groundless since neither Item 206 nor the abstract of the testimony of Witness W04841 referred to by Haradinaj support this assertion.

31. The Panel further finds that the argument according to which Item 206 would be relevant to assess the credibility of allegations made by Witness W04730 in the Rule 103 Material since they both refer to [REDACTED],⁶² does not meet the materiality test. At most, it corroborates allegations related to [REDACTED]. The Panel further recalls Witness W04730 referred to [REDACTED] in a first interview (“First Witness W04730 Interview”) that was deemed not material to the preparation of the Defence by the Trial Panel.⁶³ The Panel recalls that it ordered the disclosure of

⁵⁸ Disclosure Appeal Decision, para. 41 and jurisprudence quoted therein.

⁵⁹ Gucati Response, paras 16-19; Haradinaj Response, paras 11-13.

⁶⁰ Gucati Response, para. 24; Haradinaj Response, paras 20-24.

⁶¹ Haradinaj Response, para. 13.

⁶² Haradinaj Response, paras 20-24.

⁶³ Decision on the Prosecution Challenges to Disclosure, para. 60.

the First Witness W04730 Interview on the basis that it was found to be inter-related to a second interview provided by the same witness that was found to be subject to disclosure pursuant to Rule 103 of the Rules.⁶⁴

32. The Panel finds that although Item 206 suggests [REDACTED]. The allegation that [REDACTED]. Therefore, the Panel finds that the arguments raised by the Accused above⁶⁵ are hypothetical and speculative, are not related to the charges against the accused and only have an “abstract logical relationship to the issues”.⁶⁶

33. In addition, and further to the above, the Panel observes that Gucati and Haradinaj appear to claim that the information contained in Item 206 should allow them to [REDACTED].⁶⁷ The Panel fails to see the relevance of these arguments in the context of assessing the materiality of Item 206 and will therefore not entertain them.

34. In any event, this matter was previously addressed by the Trial Panel. In a decision issued on 17 May 2022, the Trial Panel found that the Defence had not demonstrated any link between [REDACTED] and the facts underlying its case in the current proceedings and that therefore those matters were not relevant to the case.⁶⁸

35. Further to their arguments related to the [REDACTED] suggested by Item 206, Gucati and Haradinaj argue that Item 206 is material to defences raised at trial, namely public interest and private entrapment.⁶⁹

⁶⁴ Decision of 15 September 2022, para. 29.

⁶⁵ See para. 29 above.

⁶⁶ See para. 28 above.

⁶⁷ Gucati Response, para. 17. See also Haradinaj Response, para. 11.

⁶⁸ Trial Panel Decision of 17 May 2022, para. 16. The Panel notes that the Defence did not seek certification to appeal this decision and that ultimately, this matter has been raised by Haradinaj in his appeal brief. F00035/COR2, Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 2 September 2022 (confidential, reclassified as public on 2 September 2022) (uncorrected version filed on 19 August 2022, first corrected version filed on 30 August 2022), paras 115-126 (Ground 10). The appeal filed by Haradinaj is currently being assessed by the Court of Appeals Panel.

⁶⁹ Gucati Response, paras 25-34; Haradinaj Response, para. 37.

36. Gucati elaborates that Item 206 suggests that [REDACTED].⁷⁰ According to Gucati, such information is pertinent to the issue of the independence, impartiality and integrity of investigations conducted by the SITF/SPO with their close collaboration.⁷¹

37. In the Trial Judgment in this case, the Panel defined the notion of public interest in the context of SITF/SPO cooperation with Serbia as follows:

[T]he claimed public interest in relation to which relevant evidence could be permissibly elicited is limited to evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation.⁷²

38. Even if the Panel were to accept that Item 206 suggests that [REDACTED], this as such, would not suggest any impropriety occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO or any impropriety attributable to the SITF/SPO.

39. Further and contrary to Gucati's submission, the Trial Panel did not reject the Defence's submissions on public interest "partly" on the basis that it had not heard evidence of the involvement of Serbian officials "in relevant offences."⁷³ The Trial Panel's finding was more specific and was referring to the absence of evidence that any of the Serbian officials with whom the SITF/SPO cooperated had been prosecuted for war crimes, let alone convicted for any crime.⁷⁴ Accordingly, the submissions of the Gucati Defence that the disclosure of Item 206 is required are not persuasive, as this item would have no bearing on the defence of public interest in these proceedings.

⁷⁰ Gucati Response, para. 28.

⁷¹ Gucati Response, para. 28.

⁷² KSC-BC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022) ("Trial Judgment"), para. 808.

⁷³ Gucati Response, para. 27.

⁷⁴ Trial Judgment, para. 814.

40. Turning to the argument that a violation of Article 6 of the ECHR can occur in the case of “private entrapment” – that is, entrapment by an actor who is not an agent of the prosecuting state⁷⁵ – the Panel understands that the Defence is suggesting that, even without the involvement of the SPO, conduct such as that described in Item 206 [REDACTED] could constitute private entrapment.

41. The Panel observes that Gucati and Haradinaj in their respective responses do not point to any arguments made at trial related to raising a claim of private entrapment. More importantly, even if the Panel were to accept Gucati’s assertion that Item 206 suggests that [REDACTED],⁷⁶ Item 206 clearly identifies [REDACTED]. However, the Panel notes that according to the established jurisprudence of the European Court of Human Rights, private entrapment requires that the goal of the alleged entrapper is the prosecution of the allegedly entrapped person,⁷⁷ which Item 206 does not suggest.

42. The Panel finds that the Defence fails to demonstrate any link between Item 206 and the facts underlying its case in the current proceedings. Item 206 entails unverified allegations of impropriety on the part of [REDACTED] which appear unrelated to the defences raised by Gucati and Haradinaj, including with regard to the SPO’s cooperation with such authorities or any claims of SPO impropriety raised by the Defence in the current proceedings.

⁷⁵ Gucati Response, paras 29-33; Haradinaj Response, para. 37.

⁷⁶ Gucati Response, para. 32.

⁷⁷ The ECtHR “does not exclude that the admission of evidence so obtained [i.e. by private entrapment] may in certain circumstances render the proceedings unfair for the purposes of Article 6 of the Convention” and has gone on to analyse whether the circumstances of a particular case did give rise to such unfairness. See e.g. ECtHR, *Shannon v. United Kingdom*, no. 67537/01, Decision as to Admissibility, 6 April 2004, p. 11. While this suggests that, in certain circumstances, the ECtHR may find that entrapment violated Article 6 of the ECHR even when it was not committed by state actors or those acting on the latter’s instructions, it does not show any departure from the established definition of entrapment that requires that the goal of the alleged entrapper is the prosecution of the allegedly entrapped person. See ECtHR, *Akbay and Others v. Germany*, no. 40495/15 and 2 others, Judgment, 15 October 2020, para. 112.

43. Accordingly, the Panel finds that Item 206 is not subject to disclosure under Rule 102(3) of the Rules. It follows from this finding that the Panel need not address arguments disputing the security risks alleged by the SPO or the failure to offer counter balancing measures such as, for example, redaction of the author's name.⁷⁸

44. Finally, the Panel is mindful that the SPO received Item 206 on 27 January 2022 and only notified it to the Defence after the delivery of the Trial Judgment.⁷⁹ In that regard, the Defence was belatedly notified. The SPO explained in a previous filing that on 1 September 2022, it came across a 23 August 2022 English translation of Item 206, received on 27 January 2022.⁸⁰ The Panel does not consider that this explanation justifies the belated notification and therefore finds that the SPO violated its notification obligation under Rule 102(3) of the Rules.

45. Nonetheless, the failure to provide timely notice of Item 206 did not prejudice the Defence as this evidence has been found not to meet the materiality test under Rule 102(3) of the Rules. Item 206 is therefore not subject to disclosure to the Defence. Accordingly, the Panel finds that a stay of proceedings and other remedies requested by Gucati and Haradinaj are not warranted.⁸¹

⁷⁸ Haradinaj Response, paras 32-36.

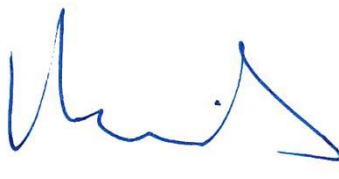
⁷⁹ See e.g. Haradinaj Response, paras 23-24, 27, 38.

⁸⁰ Decision of 15 September 2022, para. 31.

⁸¹ Gucati Response, paras 30-33, 35; Haradinaj Response, para. 38.

III. DISPOSITION

46. For these reasons, the Court of Appeals Panel **GRANTS** the SPO's request and **DECIDES** that Item 206 shall not be disclosed to the Defence.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 21 October 2022

At The Hague, the Netherlands