



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: 28 November 2022

Original language: English

Classification: **Public**

**Public Redacted Version of Decision on Defence Requests to Interview Witnesses,
to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing**

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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: (i) requests filed on 2 November 2022 by Mr Hysni Gucati (“Gucati”) and Mr Nasim Haradinaj (“Haradinaj”) (collectively, “Accused”) requesting, *inter alia*, that interviews with certain witnesses be facilitated or their contact details be disclosed;² and (ii) a request filed by Haradinaj on 28 November 2022 seeking adjournment of the appeal hearing.³ The Specialist Prosecutor’s Office (“SPO”) responded on 11 November 2022 that the Requests should be rejected.⁴ The Accused did not reply.

I. BACKGROUND

1. On 18 May 2022, Trial Panel II (“Trial Panel”) issued a judgment finding the Accused guilty of five of the six counts charged and sentencing them to four and a half years of imprisonment, with credit for the time served, and to a fine of one hundred euros.⁵

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

² F00079, Defence Request for an Order for Disclosure of Witness Contact Details, 2 November 2022 (confidential) (“Haradinaj Request”); F00081, Gucati Request for (i) a Declaration that Rule 102(3) applies to Appeal Proceedings; and (ii) an Order for Disclosure of Witness Contact Details, 2 November 2022 (confidential) (“Gucati Request”) (collectively, “Requests”).

³ F00093, Haradinaj Application to Adjourn the Oral Appeal Hearing, 28 November 2022 (confidential) (“Request for Adjournment”), paras 2, 20.

⁴ F00091/CONF/RED, Confidential redacted version of Prosecution Consolidated Response to Defence Disclosure Requests, 11 November 2022 (confidential) (strictly confidential and *ex parte* version filed on 11 November 2022) (“Response”), para. 25.

⁵ 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”), paras 1012-1017.

2. On 20 June 2022, the Accused filed notices of appeal.⁶ Pursuant to a decision of the Court of Appeals Panel,⁷ Haradinaj and Gucati re-filed their notices of appeal on 10 and 11 July 2022, respectively.⁸
3. On 19 August 2022, the Accused filed their appeal briefs.⁹
4. On 21 September 2022, the SPO filed its brief in response.¹⁰
5. Pursuant to an SPO notification of a confidential and *ex parte* communication with Witness W04730 (“Protected Witness”),¹¹ 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 the Protected Witness dated [REDACTED] and [REDACTED] (“First Witness W04730 Interview” and “Second

⁶ F00008, Haradinaj Defence Notice of Appeal of Trial Judgement, 17 June 2022 (distributed on 20 June 2022); F00009/RED, Public Redacted Version of Gucati Notice of Appeal re Trial Judgment KSC-BC-2020-07/F00611 (“Judgment”) Pursuant to Art.46(1)(a), (b) and (c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 176(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), 17 June 2022 (distributed on 20 June 2022) (confidential version filed on 17 June 2022).

⁷ F00021, Decision on Haradinaj’s Request for Variation of Word Limit to File Appeal Brief and SPO’s Request for Order to Re-File Haradinaj’s Notice of Appeal, 1 July 2022, paras 10-14.

⁸ F00029, Haradinaj Defence Re-Filed Notice of Appeal of Trial Judgement, 10 July 2022; F00030/RED, Public Redacted Version of Re-Filed Gucati Notice of Appeal re Trial Judgment KSC-BC-2020-07/F00611 (“Judgment”) Pursuant to Art.46(1)(a), (b) and (c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 176(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), 11 July 2022 (confidential version filed on 11 July 2022) (collectively, “Notices of Appeal”).

⁹ F00036/RED, Public Redacted Version of Gucati Appeal Brief Pursuant to Rule 179(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), 19 August 2022 (distributed on 22 August 2022) (confidential version filed on 19 August 2022); F00035/COR2, Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 2 September 2022 (uncorrected confidential version filed on 19 August 2022, corrected version filed on 31 August 2022, reclassified as public on 2 September 2022).

¹⁰ F00047, Prosecution Brief in Response to Defence Appeals, 21 September 2022 (confidential, reclassified as public on 30 September 2022).

¹¹ F00028/CONF/RED, Confidential Redacted Version of Notification on W04730 telephone contact, 23 September 2022 (confidential) (confidential and *ex parte* version filed on 7 July 2022) (“7 July 2022 Notification”).

Witness W04730 Interview”, respectively, and “Rule 103 Material”, collectively) and/or to request counter-balancing measures.¹²

6. On 23 September 2022, the Panel granted the SPO’s request for protective measures regarding the Rule 103 Material and ordered the disclosure to the Defence of a confidential redacted version of the material by 26 September 2022.¹³ The SPO abided by this order and disclosed the Rule 103 Material to the Defence (“Disclosure”).

7. On 7 October 2022, Gucati and Haradinaj filed their briefs in reply.¹⁴

8. On 13 October 2022, the Panel denied the Defence requests to amend their notices of appeal in order to challenge the effect of the SPO’s alleged breach of its disclosure obligations under Rule 103 of the Rules.¹⁵

9. Pursuant to an order of the Court of Appeals Panel,¹⁶ Haradinaj and Gucati re-filed on 16 and 17 October 2022, respectively, their briefs in reply.¹⁷

10. On 20 October 2022, the Appeals Panel issued an order scheduling the appeal hearing for Thursday, 1 December 2022 and Friday, 2 December 2022.¹⁸

¹² F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 26 September 2022 (confidential) (confidential and *ex parte* version filed on 15 September 2022) (“Decision on SPO Notifications”), paras 25-29, 38(a)-(b).

¹³ F00049/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures, 26 September 2022 (confidential) (strictly confidential and *ex parte* version filed on 23 September 2022) (“Decision on Protective Measures”).

¹⁴ F00060, Gucati Brief in Reply pursuant to Rule 179(3) with one Annex, 7 October 2022 (confidential); F00062, Haradinaj Reply to SPO Brief in Response to Defence Appeal Brief, 7 October 2022 (confidential).

¹⁵ F00064/RED, Public Redacted Version of Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules, 13 October 2022 (confidential version filed on 13 October 2022) (“Decision on Amending Notices of Appeal”).

¹⁶ F00063, Decision on Defence Requests for Variation of Word Limit of Briefs in Reply, 12 October 2022.

¹⁷ F00065, Haradinaj Re-filed Reply to SPO Brief in Response to Defence Appeal Brief, 16 October 2022; F00067/RED, Public Redacted Version of Re-Filed Gucati Brief in Reply pursuant to Rule 179(3) with one Annex, 21 October 2022 (confidential version filed on 17 October 2022).

¹⁸ F00074, Order Scheduling an Appeal Hearing, 20 October 2022, p. 2. See also F00084, Order for the Preparation of the Appeal Hearing, 7 November 2022.

11. On 3 November 2022, the Panel dismissed the Defence requests to reconsider its Decision on Amending Notices of Appeal.¹⁹

12. On 7 November 2022, the Panel found no disclosure violation in relation to the Rule 103 Material.²⁰

13. On 9 November 2022, the Panel authorised the Accused to file any motions pursuant to Rule 181 of the Rules no later than 14 days from the notification of the Panel's decision on the Requests, should the Panel decide to grant them.²¹

II. DISCUSSION

A. REQUEST TO INTERVIEW WITNESSES

1. Submissions of the Parties

14. The Accused request that the Panel: (i) order the SPO to facilitate interviews with [REDACTED] (collectively, "Proposed Witnesses") or to disclose their contact details; and (ii) order the Witness Protection and Support Office to facilitate an interview with the Protected Witness and put appropriate protective measures in place.²² The Defence proposes specific measures to ensure a proper balance between the fair trial rights of the Accused and the interests of the SPO in ensuring confidentiality and witness protection.²³ According to the Defence, this information is

¹⁹ See F00082/RED, Public Redacted Version of Decision on Defence Applications for Reconsideration of "Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules", 3 November 2022 (confidential version filed on 3 November 2022), paras 20-21.

²⁰ F00083, Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations, 7 November 2022 (confidential) ("Decision on Rule 103 Disclosure Violations"), paras 26, 29.

²¹ F00090, Decision on Defence Requests for Extension of Time to File Potential Motions Pursuant to Rule 181, 9 November 2022 (confidential), paras 5, 7.

²² Haradinaj Request, paras 1, 23-24; Gucati Request, paras 1, 16(iii). See also Haradinaj Request, paras 3-4.

²³ Haradinaj Request, paras 20-22. With respect to the Proposed Witnesses, the Defence specifically proposes that: any interviews be conducted at either the Specialist Chambers or an address proposed by the SPO; a representative of the SPO be present during any interview; the interview be recorded; and a list of questions be provided in advance (see Haradinaj Request, para. 20), while with respect to the Protected Witness, the Defence requests that the Witness Protection and Support Office: (i) directly

necessary to conduct important and urgent investigative opportunities relevant to the proper preparation of their appeals in accordance with their right to adequate facilities for the preparation of the defence.²⁴ Gucati also submits that the witnesses who are the subject of the Defence requests are witnesses to the information underlying the Disclosure who may be able to provide further exculpatory material, and the Defence may be able to obtain further information even if the SPO was not able.²⁵

15. The SPO responds that there is no basis for the SPO to facilitate the requested interviews or to disclose the Witnesses' contact details, since: (i) the Defence cannot interview the Protected Witness in a manner that respects the authorised protective measures; (ii) some of the Proposed Witnesses have declined to be interviewed by the Defence and the SPO has no obligation to facilitate interviews outside the contact protocol adopted at trial; and (iii) there is no indication that the current and former SPO staff, with the exception of SPO Witness Pumper (W04841) who was extensively cross-examined at trial, have any information relevant to this case.²⁶

2. Assessment of the Court of Appeals Panel

16. At the outset, the Panel notes that the Accused seem to frame their requests to interview and/or receive the contact details of the Protected Witness and the other Proposed Witnesses as requests for disclosure, on the basis that they are necessary for the preparation of their appeals.²⁷ However, such requests, especially when the identity of the Proposed Witnesses is already known to the Defence, cannot be based on Rules 102(3) or 103 of the Rules, since their sole aim is to get access to the witnesses with a view to facilitate interviews and they do not otherwise concern material which the SPO currently possesses. As such, the Panel will treat this aspect of the Defence

organises and facilitates the interview with this witness; and (ii) puts in place appropriate measures to ensure that their identity is not revealed (see Haradinaj Request, paras 21, 24).

²⁴ Haradinaj Request, paras 2, 14-18; Gucati Request, paras 12-13.

²⁵ Gucati Request, paras 14-15.

²⁶ Response, paras 1, 11-15.

²⁷ See e.g. Haradinaj Request, paras 2, 18; Gucati Request, paras 4-11, 14, 16(iii).

requests as requests to conduct further investigations on appeal and will examine whether the Defence has demonstrated that interviewing these witnesses is warranted at this stage.²⁸

17. The Panel recalls that an appeal is not a trial *de novo*.²⁹ The Panel also notes that the record on appeal is generally the trial case file.³⁰ It is for this reason that investigations should be carried out during the pre-trial and trial stage³¹ and are only allowed at the appellate stage of the proceedings for exceptional reasons, for example, if the moving party demonstrates that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice and that this specific information was not available at trial and could not have been discovered at trial through the exercise of due diligence.³² To satisfy this requirement, it needs to be shown that the investigation will not merely be a “fishing expedition.”³³ The Panel observes in this regard that the Second Witness W04730 Interview was held after the closing arguments, at which stage further submissions would only be justified for exceptional reasons,³⁴ and that the First Witness W04730 Interview, which is dated [REDACTED], was only disclosed on appeal to provide context to it.³⁵ The Panel also

²⁸ See Haradinaj Request, paras 2, 8; Gucati Request, para. 13 (submitting, *inter alia*, that the disclosure of the Potential Witnesses’ contact information is necessary to conduct a proper investigation relevant to the proper preparation of their appeals and/or the circumstances surrounding the offences with which they were charged).

²⁹ Article 46(2) of the Law.

³⁰ See Rule 175 of the Rules.

³¹ ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Hassan Ngeze’s Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 June 2006 (“*Nahimana et al. Decision of 20 June 2006*”), para. 4.

³² IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Decision on a Motion to Order the Prosecution to Obtain and Disclose Subsequent Statements, 10 May 2016, p. 2. See also IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Decision on a Motion for a Binding Order pursuant to Article 28 and on Related Requests, 18 February 2019, p. 4.

³³ ICTR, *Gacumbitsi v. Prosecutor*, ICTR-01-64-A, Decision on the Appellant’s Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005, para. 15.

³⁴ Rule 136 of the Rules.

³⁵ Decision on SPO Notifications, paras 29, 38(a). See also Decision on Rule 103 Disclosure Violations, para. 21.

observes that given the corrective nature of appeal proceedings, its powers to provide judicial assistance shall be exercised restrictively.³⁶

18. The Panel further notes that the assessment of requests for further investigation at the appeal stage is necessarily associated with the requirements of Rule 181 of the Rules in the sense that any investigation at the appeal stage can only be authorised with the view to proffer potential evidence under this Rule.³⁷ The admission of additional evidence during the appeal proceedings is exceptional and, pursuant to Rule 181(3) of the Rules, requires that, in addition to the general conditions for admitting evidence under Rule 138 of the Rules, the Panel be satisfied that the proposed evidence: (i) was not available at the time of trial and could not have been discovered with the exercise of due diligence; and (ii) could have been a decisive factor in reaching a decision at trial. To satisfy the requirement of “decisive factor” under Rule 181 of the Rules, the evidence must be such that it could have had an impact on the verdict, which means that in the case of a request by a defendant, it could have shown that a conviction was unsafe.³⁸

19. The Panel notes in this regard that the Accused merely argue that the witnesses may assist in the preparation of their defence,³⁹ by supporting their entrapment claims,⁴⁰ and that the witnesses *may* be able to provide further exculpatory material to

³⁶ See ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018 (“*Bemba Appeal Judgment*”), para. 61. See also ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Ferdinand Nahimana’s “Requête aux Fins de Communication d’Éléments de Preuve Disculpatoires et d’Investigations sur l’Origine et le Contenu de la Pièce à Conviction P 105”, 12 September 2006 (“*Nahimana et al. Decision of 12 September 2006*”), para. 13 (wherein the appeals chamber held that: it would only grant a motion based on Rules 54 and 107 of the ICTR Rules, which are the equivalent of Rules 48(2) and 173(3) of the Rules, if the moving party shows a legitimate judicial reason; and it has the discretion to determine whether the applicant succeeded in making the required showing, as is necessary to ensure that the compulsive mechanism is not abused).

³⁷ See *Nahimana et al. Decision of 12 September 2006*, para. 13.

³⁸ See *Nahimana et al. Decision of 20 June 2006*, para. 6.

³⁹ Haradinaj Request, paras 2, 17; Gucati Request, paras 2, 13.

⁴⁰ Haradinaj Request, para. 18; Gucati Request, para. 12.

the Defence.⁴¹ Accordingly, the Panel observes that the Accused's arguments about the value of the evidence that the requested witnesses could potentially provide does not meet *prima facie* the requirements of Rule 181 of the Rules.

20. With respect to the Protected Witness, the Panel recalls that the protective measures granted to him shall continue to have effect *mutatis mutandis* in the present proceedings, pursuant to Rule 81(1)(a) of the Rules, and that [REDACTED] found that the First Witness W04730 Interview [REDACTED].⁴² Accordingly, the Panel authorised the SPO to disclose the Rule 103 Material without disclosing the identity of the Protected Witness.⁴³ In these circumstances, the Panel must strike an appropriate balance between the need to protect the witness and SPO ongoing investigations in relation to other cases before the Specialist Chambers,⁴⁴ and to ensure the fair trial rights of the Accused. Considering the relatively low probative value of the information the Protected Witness provided on the issue of the delivery of the Batches to the Kosovo Liberation Army War Veterans' Association ("KLA WVA") premises, which constitutes hearsay and is unverified,⁴⁵ the Panel finds that not authorising the Defence to interview this witness will not result in a miscarriage of justice.

21. With respect to the SPO former and current staff who were present during the interviews of the Protected Witness, the Panel notes that, although the Defence suggests that their evidence is "absolutely necessary" to further advance the defence of entrapment,⁴⁶ their interaction with the Protected Witness [REDACTED] is depicted in the transcript of the interview which has been disclosed to the Defence.⁴⁷ Moreover,

⁴¹ Gucati Request, para. 14.

⁴² Decision on Protective Measures, paras 13-14.

⁴³ Decision on Protective Measures, para. 15. See also Article 23(1) of the Law; Rules 80(1) and 108(1)(b) of the Rules.

⁴⁴ See Response, para. 15.

⁴⁵ See Second Witness W04730 Interview, pp. 10, 14, 17, 21 ([REDACTED]).

⁴⁶ Haradinaj Request, para. 18; Gucati Request, para. 12.

⁴⁷ See above, para. 6.

[REDACTED] were SPO staff present at the First Witness W04730 Interview. The Panel recalls in this regard that this interview was only disclosed with the aim to provide context to the Second Witness W04730 Interview.⁴⁸ The Panel also observes that the SPO contacted the current SPO staff and confirms that they declined to be interviewed by the Defence⁴⁹ and that one of the former SPO staff appears to have already been contacted by the Defence directly.⁵⁰ Further, the Panel notes that the Defence does not identify any particular information that these persons would be in a position to provide with respect to the specific issue raised by the Protected Witness in his second interview. Accordingly, the Panel considers that not authorising the Defence to interview these witnesses will not result in a miscarriage of justice.

22. Regarding [REDACTED], who, according to the Protected Witness, is the source of his information regarding the [REDACTED], the Panel observes that he is not an SPO witness.⁵¹ More importantly, the Panel notes that any information that this person could bring does not concern a topic new to the Defence which would reasonably prompt investigations at this stage.⁵² In this regard, the Panel notes that in another instance where the Defence was given access to an official note documenting what was said by another witness, [REDACTED] as the source of the leak of the documents, it chose not to seek the admission of the note, nor to call the witness in question to testify at trial, nor to follow up with further investigations.⁵³ The Panel is therefore of the view that in the present circumstances, where the Defence seeks to investigate the information provided by the Protected Witness at this stage of the

⁴⁸ Decision on SPO Notifications, paras 29, 38(a).

⁴⁹ See Response, para. 14. See also KSC-BC-2020-07, F00314/A01, Annex to Order on the Conduct of Proceedings, 17 September 2021, para. 27 (providing that “[i]f, prior to testimony, an opposing Party wishes to interview a witness on the list of the presenting Party, it shall notify the presenting Party and [t]he presenting Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party”).

⁵⁰ See Response, fn 14.

⁵¹ See Response, para. 7.

⁵² See similarly *Bemba* Appeal Judgment, para. 62 (finding that the accused did not explain why the need to pursue this line of investigation for which he now seeks assistance from the appeals chamber arises only now and could not have been reasonably pursued before).

⁵³ [REDACTED]; KSC-BC-2020-07, Transcript, 16 March 2022, p. 3675.

proceedings, while it had not followed-up on similar information provided during the trial, it has failed to demonstrate that investigations should be facilitated at this stage. Consequently, the Panel finds that not authorising the Defence to interview this witness will not result in a miscarriage of justice.

B. REQUEST TO ORDER AN UPDATED RULE 102(3) NOTICE

1. Submissions of the Parties

23. Gucati requests that the Panel declare that Rule 102(3) of the Rules applies to the appeal proceedings in terms of both notification and disclosure obligations⁵⁴ and order the SPO to provide an updated Rule 102(3) notice.⁵⁵

24. The SPO submits that, contrary to the explicit extension of Rule 103 obligations to appellate proceedings pursuant to Rule 112 of the Rules, Rule 102(3) obligations do not extend to appellate proceedings, since, otherwise, appellate proceedings can be “serially reopened for clearly non-exculpatory information” that would only have an “exceedingly remote” prospect of having any impact on a trial judgment.⁵⁶

2. Assessment of the Court of Appeals Panel

25. The Panel recalls that pursuant to Rule 103 of the Rules, and subject to Rules 107 and 108 which regulate instances of information not subject to disclosure, the SPO shall immediately disclose to the Defence any information as soon as it is in its 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 SPO evidence. The Panel also recalls that, pursuant to Rule 112 of the Rules, the SPO shall disclose to the Defence any exculpatory information referred to in Rule 103

⁵⁴ Gucati Request, paras 2, 4-8, 10-11, 16(i).

⁵⁵ Gucati Request, para. 16(ii). See also Gucati Request, para. 9 (submitting that the SPO has not provided an updated Rule 102(3) notice of relevant material that has come into its possession since the pronouncement of the Trial Judgment).

⁵⁶ Response, paras 1, 16-23.

notwithstanding the closing of the case pursuant to Rule 136 and any subsequent appeal.

26. Further, Rule 102(3) of the Rules provides, *inter alia*, that the SPO shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in its possession and shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in its custody or control, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. The Panel recalls that the disclosure process before the Specialist Chambers under Rule 102(3) of the Rules: (i) requires a detailed notice to be drawn up by the SPO before any requests are made by the Defence for inspection or disclosure of information material to the Defence's preparation; (ii) explicitly indicates that what is material for the Defence's preparation must be deemed as such by the Defence; and (iii) stipulates that disputes on materiality are to be raised by the SPO.⁵⁷ In this sense, the regime applicable at the Specialist Chambers with respect to Rule 102(3) of the Rules differs from that of international criminal tribunals, where it is for the prosecution to conduct the initial assessment of what documents are material to the preparation of the defence and must be made available for inspection or disclosed to the defence.⁵⁸ The Panel also

⁵⁷ KSC-BC-2020-07, IA0005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021) ("Appeal Decision on Disclosure"), para. 39.

⁵⁸ See Appeal Decision on Disclosure, para. 40. See also IRMCT Rules, Rule 71(B); ICTY Rules, Rule 66(B); ICTR Rules, Rule 66(B); ICC Rules, Rule 77; STL Rules, Rule 110(B). According to the jurisprudence of the *ad hoc* tribunals, the prosecution's continuing obligation to disclosure on appeal extends under certain conditions to material other than potentially exculpatory evidence. See ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Ferdinand Nahimana's Motions for Disclosure of Material in the Prosecutor's Possession Necessary for the Appellant's Defence and for Registry's Assistance to Conduct Further Investigations at the Appeal Stage, 8 December 2006, para. 9; ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Decision on Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions, 28 June 2002, p. 3. However, given the differences between the regime governing the disclosure of Rule 102(3) material at the Specialist Chambers and that of the *ad hoc* tribunals, the Panel considers that the related jurisprudence of international criminal courts has limited relevance. See Appeal Decision on Disclosure, para. 40.

observes that Rule 112 of the Rules does not include an obligation of the SPO to disclose to the Defence material under Rule 102(3) of the Rules after the closing of the case.

27. While the requirements for disclosure are different than the requirements for admission of evidence, the Panel considers that the disclosure regime during the appeal proceedings cannot be completely disengaged from the opportunities the Specialist Chambers legal framework provides on appeal for admitting evidence not available at trial. For this reason, the Panel considers that it needs to balance the unlikely prospect that evidence disclosable under Rule 102(3) of the Rules could constitute a decisive factor under Rule 181 of the Rules with the restrictive and expeditious nature of appeal proceedings.⁵⁹ Accepting otherwise and ordering the notification and/or disclosure of material which does not stand a chance of succeeding to have any practical consequence for the Defence does not serve, in the Panel's view, the interests of justice.⁶⁰ Therefore, the Panel understands that Rule 112 of the Rules extends the SPO's disclosure obligations only to potentially exculpatory material under Rule 103 of the Rules, as explicitly foreseen therein, unless the SPO had failed to notify material under Rule 102(3) of the Rules during the trial despite being in possession of such material.⁶¹

28. The Panel notes that the SPO seised the Panel in relation to material under Rule 103 as well as under Rule 102(3) of the Rules, even where it did not consider that the material should be disclosed or notified, in order to ensure the proper discharge

⁵⁹ See above, paras 17-18. See also Rule 72(3) of the Rules.

⁶⁰ The case law of the European Court of Human Rights cited by Haradinaj (see Haradinaj Request, para. 16, referring to ECtHR, *Mayzit v. Russia*, no. 63378/00, Judgment, 20 January 2005, para. 79; ECtHR, *Huseyn and Others v. Azerbaijan*, nos 35485/05, 45553/05, 35680/05 and 36085/05, Judgment, 26 July 2011, para. 175) does not suggest that Article 6(3)(b) of the European Convention on Human Rights, which protects an accused's right of access to facilities which assist or may assist him in the preparation of his defence, extends to the appeal proceedings.

⁶¹ F00075, Decision on the Specialist Prosecutor's Office's Request Regarding Item 206, 21 October 2022 (confidential), para 23. See also KSC-BC-2020-07, F00610, Decision on the Defence Requests for Permission to Make Further Submissions on Disclosure, 17 May 2022, para. 17.

of its disclosure obligations.⁶² The Panel recalls that, as confirmed by extensive international criminal jurisprudence, there is a presumption of good faith on the Prosecution's part when discharging its disclosure obligations.⁶³ The Panel therefore does not consider that there is a reason to believe that there is any material under Rule 102(3) of the Rules in the SPO's possession which was available at trial. Accordingly, Gucati's request to order that the SPO provide an updated Rule 102(3) notice is baseless.

C. REQUEST FOR ADJOURNMENT OF ORAL HEARING

1. Submissions of the Parties

29. Haradinaj submits that the Requests, which relate to important issues affecting the progress of his appeal, remain under consideration by the Appeals Panel and that, if granted, motions for additional evidence would be submitted within 14 days of the issuance of the decision, which goes beyond the date of the appeal hearing.⁶⁴

2. Assessment of the Court of Appeals Panel

30. Given the findings made above in relation to the Requests,⁶⁵ the Panel finds that the Request for Adjournment is moot. The Panel notes that it is in the interests of justice to dispose of the Request for Adjournment immediately, without waiting for the SPO to respond, given that no prejudice will be caused to it and considering the imminence of the appeal hearing.⁶⁶

⁶² 7 July 2022 Notification, paras 1-2, 11; F00038/CONF/RED, Confidential redacted version of Notification on communication received by the SPO, 23 September 2022 (confidential) (confidential and *ex parte* version filed on 7 September 2022), para. 5.

⁶³ F00057/RED, Public Redacted Version of Decision on Defence Applications for a Formal Decision that the Specialist Prosecutor's Office Failed to Comply with Rule 179(5) of the Rules, 6 October 2022 (confidential version filed on 6 October 2022), para. 13, referring to Appeal Decision on Disclosure, para. 53 and jurisprudence referred therein.

⁶⁴ Request for Adjournment, paras 2, 11-19.

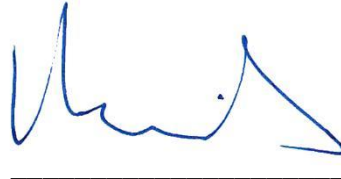
⁶⁵ See above, paras 20-22, 27-28.

⁶⁶ See above, para. 10.

III. DISPOSITION

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

DENIES the Requests and the Request for Adjournment.



**Judge Michèle Picard,
Presiding Judge**

Dated this Monday, 28 November 2022

At The Hague, the Netherlands