



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

In: KSC-BC-2020-07
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 19 February 2021

Language: English

Classification: Confidential

**Prosecution consolidated reply to Defence responses to Prosecution submissions
on the disclosure of certain documents seized from the KLA War Veterans
Association**

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I. INTRODUCTION

1. Mindful of the permissible scope,¹ this reply addresses alternative counterbalancing measures and other new issues raised in the Defence Responses² and, in doing so, provides certain context and clarifications.

II. SUBMISSIONS

2. The Specialist Prosecutor's Office ('SPO') makes two preliminary observations. First, the Haradinaj Defence request for a stay of proceedings clearly misapprehends the status of the litigation, and the questions currently at issue.³ The request is unsubstantiated and the jurisprudence cited in support is inapposite;⁴ the request should be dismissed *in limine*.

3. Second, the burden is on the SPO to prove its case at trial relative to the applicable elements of the offences and modes of liability charged, and it will be for the Trial Panel to assess whether that burden has been met based on how the SPO determines to present its case. Defence characterisations of what it intends to put the SPO 'to proof' on,⁵ do not alter the elements required to actually be proven.

¹ Rule 76 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BC-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule' or 'Rules' herein are to the Rules.

² Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00122, Confidential, 11 February 2021 (notified 12 February 2021, 'GUCATI Response') and Defence Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association (KSC-BC-2020-07/F00110) and Prosecution Request for Non-Disclosure of Certain Information Pertaining to Contact with Witnesses (KSC-BC-2020-07/F00107), KSC-BC-2020-07/F00123, Confidential, 11 February 2021 (notified 12 February 2021, 'HARADINAJ Response', collectively the 'Defence Responses'). The paragraph numbering in the GUCATI Response runs from paras 1-32, then 20-24, 20-23, 33, and 24-27. Accordingly, in order to avoid confusion, the footnotes in this reply citing to the GUCATI Response refer to both the paragraph number and the page on which that paragraph appears.

³ *Contra* HARADINAJ Response, KSC-BC-2020-07/F00123, paras 12-13, 49.

⁴ HARADINAJ Response, KSC-BC-2020-07/F00123, para.12.

⁵ GUCATI Response, KSC-BC-2020-07/F00122, p.8, para.32, p.10, para.22; HARADINAJ Response, KSC-BC-2020-07/F00123, paras 40, 61.

4. The SPO intends to establish the authenticity⁶ and confidentiality⁷ of the Three Batches⁸ through a combination of corroborative evidence, *inter alia*: the detailed Investigator's Declarations⁹ and the testimony of their author, statements made by the Accused and others in relation to the content and nature of the Three Batches, and excerpts from the Three Batches which have been published in the media.¹⁰ The Defence Responses fail to specifically address or acknowledge this combination of corroborative evidence from various sources – which has already been or will be disclosed in full – or explain why this and other disclosed information is insufficient for it to adequately prepare and, as appropriate, challenge, *inter alia*, the authenticity of the evidence the SPO intends to rely upon at trial.

5. While the confidential nature of the Three Batches is distinct from their authenticity, the SPO intends to prove their confidential nature through the same combination of consistent and corroborative evidence identified above. In turn, the Defence has access to the necessary and relevant evidence and will have ample opportunities to test such evidence.

6. For the reasons set out in the Prosecution Submissions, disclosure of the Three Batches only to Specialist Counsel¹¹ or the disclosure thereof in redacted form do not constitute appropriate counterbalancing measures.¹² Pursuant to Rule 106, and as

⁶ See GUCATI Response, KSC-BC-2020-07/F00122, p.8, para.31, pp.8-9, para.32, p.9, para.21, p.10, para.20, pp.8-9, para.32; HARADINAJ Response, KSC-BC-2020-07/F00123, paras 40, 76.

⁷ See GUCATI Response, KSC-BC-2020-07/F00122, p.8, para.31, p.9, para.20, pp.8-9, para.32; HARADINAJ Response, KSC-BC-2020-07/F00123, paras 40, 76.

⁸ As defined in Prosecution submissions on the disclosure of certain documents seized from the KLA War Veterans Association, KSC-BC-2020-07/F00110, Confidential, 1 February 2021 ('Prosecution Submissions'); see also Submission of additional information relevant to filing KSC-BC-2020-07/F00110, KSC-BC-2020-07/F00118, Confidential, 9 February 2021.

⁹ Investigator's Declaration, 084015-084026, 29 October 2020 and Investigator's Declaration, 091791-091792, 9 February 2021, see Confidential Annex 1 to Submission of additional information relevant to filing KSC-BC-2020-07/F00110, KSC-BC-2020-07/F00118, Confidential, 9 February 2021 (collectively, 'Investigator's Declarations').

¹⁰ See Prosecution Submissions, KSC-BC-2020-07/F00110, para.31.

¹¹ See GUCATI Response, KSC-BC-2020-07/F00122, p.11, para.33(a); HARADINAJ Response, KSC-BC-2020-07/F00123, paras 9, 41.

¹² *Contra* GUCATI Response, KSC-BC-2020-07/F00122, p.11, para.33(b), p.12, para.25; HARADINAJ Response, KSC-BC-2020-07/F00123, para.41.

further outlined in the Prosecution Submissions, Batch 3 is not subject to disclosure. Further, none of the Three Batches can be redacted in a manner which would render them meaningful to the Defence while also protecting the confidential and non-public information, including Rule 106 information, contained therein. Disclosure to Defence Counsel would also not serve the general purposes set out in the Defence Responses, *inter alia*, as the contents of the Three Batches – beyond the information already provided through the consistent and corroborative evidence from varied sources set out above – would not assist Defence Counsel to determine authenticity and/or confidentiality or prepare in light of the scope and nature of the SPO's case.¹³

7. As previously submitted, there are adequate counter-balancing measures to ensure the fairness of these proceedings.¹⁴ Should the Pre-Trial Judge nevertheless consider it necessary, the SPO does not object to appointment of a counsel unaffiliated with the SPO or any defence team before the KSC to inspect Batches 1 and 2 ('Independent Counsel').¹⁵ The inspection by Independent Counsel would take into account necessary, appropriate, and transparently communicated instructions from the SPO and Defence. Both parties would provide Independent Counsel with the resources and information necessary to verify any challenge to the contents of the Investigator's Declarations and confirm to the Panel and the Parties that Batches 1 and 2 do not contain any potentially exculpatory information. The Independent Counsel would perform such inspection on SPO premises and would not be authorised to remove, record in any form, or disseminate – including through any report or testimony – any of the confidential content of the documents.

¹³ Finally, it is also possible that, if Defence Counsel were to be provided with the Three Batches and not be authorised to convey the contents thereof to their clients, they may be put in a situation which is at conflict with their ethical duties in their domestic jurisdiction and, consequently, lead to their request to withdraw as representatives of the Accused, *see* UK, *R v G and Another* [2004] 1 WLR 2932, paras 13-20.

¹⁴ *See* Prosecution Submissions, KSC-BC-2020-07/F00110, paras 31-33, 41-42.

¹⁵ *See* HARADINAJ Response, KSC-BC-2020-07/F00123, para.9 (where the HARADINAJ Defence refers to the possibility of instructing an independent counsel to review the Three Batches). The counterbalancing measures set out in Rule 108(2) are not exhaustive; *see also* Rule 108(5). As previously submitted, Batch 3 is not subject to disclosure and therefore counter-balancing measures in respect of it are not warranted.

8. If the Pre-Trial Judge considers an Independent Counsel to be appropriate, the SPO requests the opportunity to make further submissions, including the nomination of an appropriately qualified Independent Counsel by the SPO for final selection by the Pre-Trial Judge, and as to the appropriate procedure to be followed.

9. Finally, the SPO rejects the unfounded, absurd allegations that it was in any way involved in the provision of the Three Batches to the Accused.¹⁶

III. CONFIDENTIALITY

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

IV. RELIEF REQUESTED

11. The Pre-Trial Judge should grant the relief requested in the Prosecution Submissions. Insofar as the Pre-Trial Judge considers the appointment of an Independent Counsel necessary as a further counter-balancing measure in the circumstances of this case, the SPO requests the opportunity to make further submissions in accordance with paragraph 8 above.

Word count: 1,259



Jack Smith
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Friday, 19 February 2021
At The Hague, the Netherlands.

¹⁶ GUCATI Response, KSC-BC-2020-07/F00122, p.10, paras 22-23; HARADINAJ Response, KSC-BC-2020-07/F00123, para.51.