



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: 8 March 2021

Language: English

Classification: Confidential

**Prosecution submissions on the materiality of certain information requested by
the Defence pursuant to Rule 102(3)**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to Rule 102(3) of the Rules¹ and the Pre-Trial Judge's orders,² the Specialist Prosecutor's Office ('SPO') hereby disputes the materiality of certain information,³ which the Defence claims should be included on the Rule 102(3) Notice.⁴

2. The SPO has satisfied its disclosure obligations, including pursuant to Rule 102(3), and will continue to do so in accordance with the Framework Decision. While the Defence may request additional information it deems material to its preparation,⁵ it is not entitled to embark on a fishing expedition, encompassing information that is not demonstrably relevant. In this regard, when making Rule 102(3) requests for information not previously notified or disclosed, the Defence must: (i) sufficiently identify the information sought; and (ii) demonstrate that it is material to defence preparations.⁶ The Defence has failed to do so.

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

² Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, Public, 22 January 2021 ('Framework Decision'), para.48; Status Conference, Transcript of 24 February 2021, pp.131, 142.

³ The information subject of this request is described in para.8 below.

⁴ Prosecution's Rule 102(3) notice, KSC-BC-2020-07/F00133, Public, 19 February 2021 ('Rule 102(3) Notice').

⁵ Rule 102(3), second sentence.

⁶ See, similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013, para.21-22; ICTR, *Kamukama et al. v. Prosecutor*, ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 18 May 2010, para.32; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Appeal Judgement, 26 October 2009, para.189; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment on the Appeal of Mr Bosco Ntaganda against the "Decision on Defence Requests Seeking Disclosure Orders and a Declaration of the Prosecution Obligation to Record Contacts with Witnesses", 20 May 2016, para.35. See also ECtHR, *Matanović v. Croatia*, 2742/12, Judgment, 4 April 2017, para.157.

II. BACKGROUND

3. On 23 February 2021, the Defence for Mr. GUCATI filed submissions for the second Status Conference asserting, *inter alia*, that the Rule 102(3) Notice is ‘wholly inadequate’, and listing 27 items that should be included in this notice ‘by way of example’.⁷ On the same day, the HARADINAJ Defence endorsed the GUCATI Submissions, *inter alia*, in relation to the items which the GUCATI Defence considered to be required to be set out in the Rule 102(3) Notice.⁸

4. During the 24 February 2021 Status Conference, the Pre-Trial Judge took note of the Defence submissions regarding the scope of the notice under Rule 102(3), and invited the Parties to engage in *inter partes* discussions on this topic, following the timeline set out in the Framework Decision.⁹

5. In an *inter partes* communication on 3 March 2021, the GUCATI Defence, *inter alia*, referred to the Pre-Trial Judge’s request that the parties correspond over the content of the Rule 102(3) list and reproduced the contents of paragraphs 6 and 7 of the GUCATI Defence submissions in their entirety, adding that the list of 27 items is ‘not intended to be exhaustive’.¹⁰

6. In an *inter partes* communication on 5 March 2021, the Defence for Mr. HARADINAJ, joined the GUCATI Request.¹¹

7. The SPO will address all Rule 102(3) requests not referred to in these submissions in accordance with the procedure set out in the Framework Decision.

⁷ Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters, KSC-BC-2020-07/F00137, Confidential, 23 February 2021, paras 6-7 (‘GUCATI Submissions’).

⁸ Defence Submissions Following Order Setting the Date for the Second Conference and Related Matters (KSC-BC-2020-07/F00129), KSC-BC-2020-07/F00138, Confidential, 23 February 2021, para.18 (‘HARADINAJ Submissions’), referring to GUCATI Submissions, KSC-BC-2020-07/F00137, para.7.

⁹ Status Conference, Transcript of 24 February 2021, pp.131, 142.

¹⁰ Email from the GUCATI Defence to the SPO sent on 3 March 2021 at 07:01 p.m. with the subject ‘KSC-BC-2020-07 Disclosure CONFIDENTIAL’ (‘GUCATI email’).

¹¹ Email from the HARADINAJ Defence to the SPO sent on 5 March 2021 at 03:52 p.m. with the subject ‘Re: Disclosure 8 - KSC-BC-2020-07 – Strictly Confidential’ (‘HARADINAJ email’).

III. SUBMISSIONS

8. The SPO disputes the materiality of the Defence Rule 102(3) requests to the extent that they concern, in relation to the Three Batches:¹²

- a. 'all material held by the SPO which relates to the origin and provenance of the material contained within Batches 1, 2 and 3, including material as to authorship and chain of custody from creation to its arrival at the KLA WVA HQ'; and
- b. 'all material held by the SPO which relates to any attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA HQ'.

9. The SPO has already notified or disclosed all information falling in these broadly defined categories, which it has determined to be subject to disclosure pursuant to Rules 102 and 103.¹³ The Defence fails to: (i) sufficiently identify any additional information falling within these broadly defined categories that it deems material;¹⁴ or (ii) demonstrate on a *prima facie* basis that any such information is in fact material to defence preparations.¹⁵

10. No explanation of relevance was given in the context of the instant Defence Rule 102(3) requests. As such, and in light of the broadly defined categories, it is unclear the nature of the material, or type of records, being sought. The GUCATI Defence previously submitted – without foundation – that information relating to the

¹² GUCATI Submissions, KSC-BC-2020-07/F00137, para.7(a)-(b); GUCATI email; HARADINAJ Submissions, KSC-BC-2020-07/F00138, para.18; HARADINAJ email. The term 'Three Batches' refers to the material identified as Batches 1, 2 and 3 in the GUCATI Submissions and GUCATI email.

¹³ See, for example, Rule 102(3) Notice, Annex, KSC-BC-2020-7/F00133/A01, Confidential, items 2-4, 11-13; 079500-079500; 080449-080499; 081340-081340 (081340-081340-ET); 084015-084026; 091791-09792; 091925-01-09125-12; 091927-091930. The Defence has also been notified of the reports and related filings concerning the seizure of the Three Batches. See, for example, KSC-BC-2020-07/F00008; KSC-BC-2020-07/F00010; KSC-BC-2020-07/F00028. Further relevant information will be provided by 19 March 2021 pursuant to Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00141, Confidential, 23 February 2021, paras 39, 45, 47(b).

¹⁴ Based on the ample information already in its possession, the Defence is in a position to provide greater specificity when requesting additional information falling in these broadly defined categories.

¹⁵ See para.2 above.

origin and provenance of the Three Batches was relevant insofar as the 'defence put the SPO to strict proof of the absence of incitement'.¹⁶ However, as previously indicated,¹⁷ such allegations are entirely speculative and the SPO rejects the completely unfounded implication thereof. In turn, the Defence has failed to demonstrate the materiality of any information relating to the provenance of the Three Batches beyond that already provided. Indeed, in the absence of further articulation, such inadequate and unjustified requests appear to be but the latest attempt to distract from the charges presented.

IV. CONFIDENTIALITY

11. Pursuant to Rule 82(4), this filing is classified as 'Confidential' since it refers to other material bearing the same classification. The SPO does not object to its reclassification as public.

V. RELIEF REQUESTED

12. For the foregoing reasons, the SPO requests that the Pre-Trial Judge find that the Defence has failed to sufficiently identify, and demonstrate the materiality of, the information sought, as described above.

Word count: 1287



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¹⁶ Defence Submissions for the First Status Conference, KSC-BC-2020-07/F00100, 7 January 2021, paras 6-8. *See also* Status Conference, Transcript of 8 January 2021, pp.121-122.

¹⁷ Status Conference, Transcript of 8 January 2021, pp.120-121; Prosecution consolidated reply to Defence responses to Prosecution submissions on the disclosure of certain documents seized from the KLA War Veterans Association, KSC-BC-2020-07/F00130, Confidential, 19 February 2021, para.9.

Monday, 8 March 2021

At The Hague, the Netherlands.