

**In:** KSC-BC-2020-07

**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge,

Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 18<sup>th</sup> March 2021

**Language:** English

**Classification:** Confidential

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**Response to Prosecution Submissions on the Rule 102(3) Notice**

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**Specialist Prosecutor**

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## I. INTRODUCTION

1. On 9<sup>th</sup> March 2021, the defence received notification of the Prosecution submissions in relation to the content of the Rule 102(3) notice (“Prosecution Submissions”)<sup>1</sup>.
2. The defence on behalf of Hysni Gucati responds as follows.

## II. APPLICABLE LAW

3. Article 21(6) of the Law on Specialist Chambers and Specialist Prosecutor’s Office Law No.05/L-053 (“Law”) provides that:

*“All material and relevant evidence or facts in possession of the Specialist Prosecutor’s Office which are for or against the accused shall be made available to the accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.”*

4. Rule 102(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) further provides that:

“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

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<sup>1</sup> *Prosecution Submissions on the Materiality of Certain Information Requested by the Defence pursuant to Rule 102(3)*, KSC-BC-2020-07/F00149

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.”

5. The test of ‘materiality to the preparation of the defence’ should be interpreted broadly<sup>2</sup>. It is a lower standard than relevance and thus includes a broader category of materials<sup>3</sup>. It may include material which may simply put the accused on notice that other material exists which may assist him in his defence<sup>4</sup>. It may include purely inculpatory material, for example, when the material could reasonably lead to further investigation by the Defence and the discovery of additional information<sup>5</sup>.

### III. SUBMISSIONS

6. Rule 102(3) of the Rules assists in the implementation of the broad requirement in Article 21(6) to make available to the accused all material in possession of the Specialist Prosecutor’s Office which is for or against the accused, subject only to restrictions which are strictly necessary.

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<sup>2</sup> *Prosecutor v Lubanga*, Judgment on the Appeal of Mr Lubanga against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, 11 July 2008, paras.77-81

<sup>3</sup> *Prosecutor v Karadzic*, Decision on the Accused’s Motion for Postponement of Trial, 26 February 2010, para.36

<sup>4</sup> *Prosecutor v Krnojelac*, Record of Rulings Made in Status Conference, 14 September 1999, p.2; affirmed in *Prosecutor v Krstic*, Appeals Judgment, 19 April 2004, para.178

<sup>55</sup> *Prosecutor v Nahimana*, Public Redacted Version of the Decision on Motions Relating to the Appellant Hassan Ngeze’s and the Prosecution’s Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006, para.16; relying on *Prosecutor v Radislav Krstic*, Confidential Decision on the Prosecution’s Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C), 27 March 2003

7. Rule 102(3) of the Rules assists by providing for a *two-stage approach*.
8. The *first stage* under Rule 102(3) is the provision by the Specialist Prosecutor to the defence of a detailed list of all material in the possession of the Specialist Prosecutor (the Rule 102(3) notice).
9. It is to be noted that neither the obligation on the Prosecution to provide the Rule 102(3) Notice, nor the contents of the Rule 102(3) notice, are dependent upon any request from the Defence. The responsibility to fully comply with Rule 102(3) rests with the Prosecutor and cannot be abrogated.
10. The clear purpose of the Rule 102(3) notice is to facilitate the *second stage* provided for in Rule 102(3), namely, the disclosure or inspection of any statements, documents, photographs or other tangible objects from that list which are deemed by the Defence to be material to its preparation (Rule 102(3) disclosure). It follows that the scope of the Rule 102(3) notice is necessarily – and on the face of Rule 102(3) itself – even wider than the broad category of material that may subsequently fall to be disclosed under Rule 102(3) disclosure.
11. The Rule 102(3) notice covers, in the words of Rule 102(3) itself, any material in the Prosecutor’s possession, and the only boundary that might be implied is that the material has some relation to any offence under investigation or any person being investigated or on the surrounding circumstances.
12. Certainly, at the very least, all material in the possession of the Prosecutor which is, or might be, for or against the accused, or which is, or might be, material to the preparation of the defence, as broadly interpreted, will by definition fall to be included by the Prosecution in the Rule 102(3) Notice.

13. The test of 'materiality to the preparation of the defence', however, applies only to the second stage, that is, to requests for disclosure/inspection of items listed in the Rule 102(3) notice.
14. The Rule 102(3) notice is required to list each item in detail. The purpose of that requirement is obvious - the description should make clear the nature of each item and contain sufficient detail to enable the defence to decide whether any given item is material to its preparations; if so, to request its disclosure/inspection and, if necessary, demonstrate that it is material to defence preparations.
15. The Prosecution Submissions fail to appreciate the two-stage approach in Rule 102(3).
16. The present dispute concerns the first stage, the provision of a detailed and complete Rule 102(3) notice, and *not* the second stage, namely whether disclosure/inspection of any particular statement, document, photograph or other tangible object from that list should occur.
17. The Rule 102(3) notice<sup>6</sup> as presently served is clearly inadequate and cannot with any credibility be said by the Prosecutor to 'provide detailed notice to the Defence of any material and evidence in his or her possession'.
18. As the Prosecution Submissions acknowledge, the defence have attempted to assist by identifying 27 individual items or categories of material that might be expected to feature on a detailed list in this case of all material in the Specialist Prosecutor's possession, but those suggestions were not intended to be exhaustive. The reason why any such suggestions cannot be exhaustive is that

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<sup>6</sup> *Prosecution's Rule 102(3) notice*, KSC-BC-2020-07/F00133

the responsibility for collating the Rule 102(3) notice falls upon the Specialist Prosecutor. Only the Specialist Prosecutor will know the full extent of the material in his possession.

19. Addressing paragraph 7(a) of the Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters dated 23<sup>rd</sup> February 2021<sup>7</sup> specifically, it was submitted therein that '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' should be listed in the detailed rule 102(3) notice (the first stage).
20. The test for whether such material should be listed is not the test of materiality to the preparation of the defence, but whether there is such material in the possession of the Prosecutor.
21. If there is no material in the possession of Specialist Prosecutor which falls within that category, then the Specialist Prosecution can simply confirm that they have no such material.
22. However, if there is such material in the possession of the Specialist Prosecutor it should be listed in the Rule 102(3) notice - any such material clearly has some relation to the offences under investigation and the surrounding circumstances.
23. Indeed, if there is such material in the possession of the Specialist Prosecutor relating to the origin and provenance of the material contained within Batches 1, 2 and 3 which points towards its authenticity and reliability, in whole or in

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<sup>7</sup> *Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters*, KSC-BC-2020-07/F00137

part, then that material is *against* the accused and should be listed on the Rule 102(3) notice as such.

24. By contrast, if there is such material in the possession of the Specialist Prosecutor relating to the origin and provenance of the material contained within Batches 1, 2 and 3 which is equivocal or incomplete then that material is *for* the accused and should be listed on the Rule 102(3) notice as such.

25. Whether any such material falls thereafter to be disclosed or inspected (the second stage) is a different matter and can be determined in the event that a request for disclosure from the list is made.

26. Similarly, in relation to paragraph 7(b) of the Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters dated 23<sup>rd</sup> February 2021<sup>8</sup>, it was submitted therein that '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' should be listed in the detailed rule 102(3) notice (the first stage).

27. The test for whether such material should be listed is not the test of materiality to the preparation of the defence, but whether there is such material in the possession of the Prosecutor.

28. If there is no material in the possession of Specialist Prosecutor which falls within that category, then the Specialist Prosecution can simply confirm that they have no such material.

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<sup>8</sup> *Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters*, KSC-BC-2020-07/F00137

29. However, if there is such material in the possession of the Specialist Prosecutor it should be listed in the Rule 102(3) notice - any such material clearly has some relation to the offences under investigation and the surrounding circumstances.
30. Indeed, if there is such material in the possession of the Specialist Prosecutor relating to attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA HQ which is supportive of the claim made by the SPO (made thus far without any attempt to provide an evidential justification) that the issue of incitement is indeed without foundation then that material is against the accused and should be listed on the Rule 102(3) notice as such.
31. On the other hand, if there is such material which might, on one view, point towards the involvement of a person who was an agent of/working with/associated with SPO in the making of disclosure of the Three Batches, in whole or in part, to the KLA WVA HQ, then that material is for the accused and should be listed on the Rule 102(3) notice as such.
32. Whether any such material falls thereafter to be disclosed or inspected (the second stage) is a different matter and can be determined in the event that a request for disclosure from the list is made.

#### IV. CONFIDENTIALITY

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

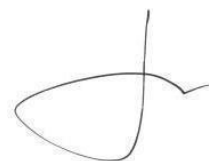


V. RELIEF REQUESTED

34. Accordingly, for the reasons set out above, the request for the relief sought by the Prosecution in paragraph 12 of the Prosecution Submissions is premature.

35. Instead, the Pre-Trial Judge is requested to order the Specialist Prosecutor to comply with the requirement to provide a detailed Rule 102(3) notice which lists all the material in the possession of the Prosecutor, which has some relation to any offence under investigation or any person being investigated or on the surrounding circumstances.

Word count: 1927 words



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