

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: 25th March 2021

Language: English

Classification: Confidential

Submissions for the Third Status Conference

Specialist Prosecutor

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

I. INTRODUCTION

1. On 23rd March 2021, the Pre-Trial Judge made an order setting the date for the Third Status Conference (“the Order”)¹ and invited submissions from the parties in relation to:
 - a. Updates on any outstanding issues addressed in the Framework Decision, the Second Status Conference and the Consolidated Calendar (paragraph 9);
 - b. Disclosure (paragraph 9(1));
 - c. Defence investigations (paragraph 9(2)); and
 - d. Views on the date of the next status conference.

2. The defence on behalf of Hysni Gucati responds as follows.

II. PROCEDURAL BACKGROUND

3. The procedural background is as set out in paragraphs 1 to 5 of the Order.

III. APPLICABLE LAW

4. The applicable law is as set out in paragraphs 6 and 7 of the Order.

IV. SUBMISSIONS

¹ *Order Setting the Date for the Third Status Conference*, KSC-BC-2020-07/F00160

Updates on any outstanding issues addressed in the Framework Decision, the Second Status Conference and the Consolidated Calendar

5. The Framework Decision² at paragraphs 46 and 48 required the SPO to prepare and disclose a detailed Rule 102(3) notice of all material and evidence in its possession without delay, and by 19 February 2021 at the latest.
6. The Rule 102(3) notice was to comprise any residual information *potentially* material to the Defence after the items to be presented at trial and the exculpatory evidence have been disclosed (see paragraph 47).
7. Paragraph 45 provided that the formulation *material to the Defence preparation* was to be construed broadly and refers to all documents and object of relevance to the preparation of the Defence case. What is *relevant*, the Pre-Trial Judge stated, should not necessarily be limited by the temporal scope of the Confirmed Indictment nor should it be confined to material relevant to countering the SPO's case. The Pre-Trial Judge continued: "defence *preparation* is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence, or related to the SPO's case".
8. It follows that the formulation *residual information potentially material to the Defence* is to be construed even more broadly.
9. As stated above, and in paragraph 47 of the Framework Decision itself, the scope of the Rule 102(3) notice is not to be confined to material that *is* material to the Defence preparation – it is necessarily wider.

² Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104

10. At the Second Status Conference, the complaint was made that the SPO had not complied with the order in the Framework Decision to provide a detailed and complete Rule 102(3) notice³. It was submitted that:

- a. The notice filed on 19 February 2021 was wholly inadequate (paragraph 7 of the Written Submissions on behalf of Hysni Gucati for the Second Status Conference); and
- b. In the absence of provision of the detailed rule 102(3) notice, the defence were unable to comply with the direction in the Framework Decision at paragraph 48, that following provision of the detailed and complete rule 102(3) notice, 'thereafter, the Defence shall indicate to the SPO which items among those listed in the detailed notice it seeks to have access to, by way or disclosure or inspection' (paragraphs 9 and 17 of the Written Submissions on behalf of Hysni Gucati for the Second Status Conference).

11. It was submitted that the foundation stone of the disclosure exercise – as indeed recognised by the Pre-Trial Judge in the Framework Decision – is a detailed and complete Rule 102(3) notice listing all material held by the Prosecutor (whether or not the material listed thereon is to be subsequently disclosed) (paragraph 18 of the Written Submissions on behalf of Hysni Gucati for the Second Status Conference).

12. A detailed and complete Rule 102(3) notice remains outstanding. No revised notice has been provided.

³ *Written Submissions on behalf of Hysni Gucati for the Second Status Conference*, KSC-BC-2020-07/F00137 at paragraphs 6, 7 and 16.b

13. The Prosecution instead has filed submissions asserting that it is for the defence to demonstrate that information is material to defence preparations before it will be included by the SPO in the Rule 102(3) notice⁴.
14. In so submitting, the Prosecution makes clear that either (i) it has misunderstood the Pre-Trial Judge's order in the Framework Decision requiring the SPO to prepare and disclose a detailed Rule 102(3) notice of all material and evidence in its possession, comprising any residual information *potentially* material to the Defence; or (ii) it simply refuses to comply with the Pre-Trial Judge's order in the Framework Decision.
15. On behalf of Mr Gucati, a detailed Response to Prosecution Submission on the Rule 102(3) Notice has been filed⁵ and the issue of the SPO's compliance with the requirement to provide a detailed and complete Rule 102(3) notice of all material and evidence in its possession remains outstanding.

Disclosure: whether in light of the current stage of the SPO disclosure of evidentiary material, the Parties are facing or foresee any difficulties related to the remainder of the disclosure process

16. Until a detailed and complete Rule 102(3) Notice is provided, the defence continue to foresee difficulties relating to the remainder of the disclosure process.

Disclosure: submissions by the SPO in relation to each of the items requested by the Defence under Rule 102(3), as set out in para.7(a)-(aa) of F00137,

⁴ Prosecution Submissions on the materiality of certain information requested by the Defence pursuant to Rule 102(3), KSC-BC-2020-07/F00149 at paragraphs 2 and 9

⁵ Response to Prosecution Submissions on the Rule 102(3) Notice, KSC-BC-2020-07/F00157

indicating whether the item has been disclosed to the Defence, and where that is not the case, the availability and disclosability of such item, also where relevant, in light of decisions F00136 and F00141, pending requests (F00149, F00154 or F00155) and related disclosure of material

17. This request is specifically addressed to the SPO, and the defence will therefore await the response from the SPO.
18. To assist, however, the defence reminds the SPO that paragraphs 7(a)-(aa) of F00137 submitted that the items, or categories or material, referred to therein should be listed on the Rule 102(3) notice in the first instance.
19. Paragraphs 7(a)-(aa) did not request access to the said material by way of disclosure and inspection – in accordance with the Framework Decision at paragraph 48, that stage is reached only once the material is included by the SPO on the Rule 102(3) notice.
20. 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.
21. 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.

22. 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 in paragraphs 7(a)-(aa) of F00137 but those suggestions were not intended to be exhaustive. The reason why any such suggestions cannot be exhaustive is that the responsibility for collating the Rule 102(3) notice falls upon the Specialist Prosecutor. Only the Specialist Prosecutor will know the full extent, and the detail, of the material in his possession.

Defence investigations

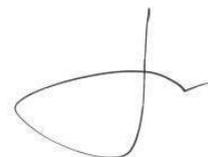
23. Despite continuing difficulties with disclosure and travel, the defence remain hopeful that the parties can be ready for trial for the week commencing 30th August 2021 onwards.

Views on the date of the next status conference

24. The next status conference should take place 14 days after the SPO have provided a detailed and complete Rule 102(3) Notice listing all the material in the Prosecutor's possession, including, but not exclusively:
- 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.

Word count: 1457 words



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

25th March 2021

Cardiff, UK