



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: 26 March 2021

Language: English

Classification: Confidential

**Prosecution reply to Gucati response to Prosecution submissions on the
materiality of certain information requested pursuant to Rule 102(3)**

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I. SUBMISSIONS

1. Rather than demonstrating the manner in which the Requested Information¹ falls within the notice obligations of the Specialist Prosecutor's Office ('SPO'), the Gucati Response² attempts to reframe the requirements of Rule 102(3) of the Rules³ and asserts that the relief sought in the Prosecution Submissions is premature.⁴ These are new issues justifying a reply in accordance with Rule 76.

2. Pursuant to Article 21(6)⁵ and Rule 102(3), the SPO is obliged to provide detailed notice to the Defence of all material and evidence in its possession which could reasonably be considered to be for or against the Accused. This necessarily entails a degree of initial review and assessment.⁶ Naturally, the assessment must be done in good faith, and the notice obligation should be broadly interpreted, extending beyond simply items directly relevant to the facts.⁷

3. The Defence is additionally fully entitled to seek information not set out in the Rule 102(3) notice.⁸ The SPO has addressed each such request advanced by the Defence in accordance with the Pre-Trial Judge's instructions,⁹ either by notifying the

¹ Prosecution submissions on the materiality of certain information requested by the Defence pursuant to Rule 102(3) Notice, KSC-BC-2020-07/F00149, Confidential, 8 March 2021 ('Prosecution Submissions'), para.8(a)-(b) ('Requested Information').

² Response to Prosecution Submissions on the Rule 102(3) Notice, KSC-BC-2020-07/F00157, Confidential, dated 18 March 2021, notified 19 March 2021 ('Gucati Response').

³ 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.

⁴ Gucati Response, KSC-BC-2020-07/F00157, para.34.

⁵ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

⁶ As acknowledged by the Defence (Gucati Response, KSC-BC-2020-07/F00157, paras 11 and 12), both from the language of the relevant provisions themselves and their purpose, it is self-evidently not the case that the notice obligation extends simply to every item in the SPO's possession. The futile and unworkable nature of such an interpretation is especially apparent in discrete cases such as that against the Accused.

⁷ However, as a matter of principle, it would not extend to *all* or *any* items having 'some relation' to 'any offence under investigation or any person being investigated or on the surrounding circumstances' (*contra*. Gucati Response, KSC-BC-2020-07/F00157, paras 11, 35).

⁸ Prosecution Submissions, KSC-BC-2020-07/F00149, para.2.

⁹ Status Conference, Transcript of 24 February 2021, pp.131, 142; Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, Public, 22 January 2021 ('Framework Decision'), para.48.

Defence that the material sought is or is not in the SPO's possession, disclosing the requested material, and/or seeking any necessary protective measures.

4. Nevertheless, at any stage of the process, the SPO is entitled to challenge the basis of a request received, whether it be a request to be notified of certain items in the SPO's possession or to subsequently be disclosed such items.¹⁰ In this instance, where the Defence request was (i) unsubstantiated,¹¹ (ii) imprecisely formulated,¹² and (iii) based merely on fanciful and hypothetical theories,¹³ the SPO is entitled to seek a judicial ruling on such a request, and doing so is not premature.¹⁴ The SPO is not obliged to confirm or deny possession, or to provide detailed notice, of patently irrelevant items based on nothing more than a bare request to do so.¹⁵

5. The Gucati Response fails to shed any further light upon the manner in which the Requested Information could serve any legitimate forensic purpose to the Defence. The SPO has rejected the unfounded allegation that it was involved in the provision of the Three Batches¹⁶ to the Accused.¹⁷ That the SPO would have provided the Accused with any information regarding its investigations, let alone information of the nature contained in the Three Batches, goes beyond the merely fanciful to the absurd. Moreover, had the SPO conducted some form of sting operation of the nature that the Defence appears to be alleging, this information would be subject to positive disclosure pursuant to Rule 103, as opposed to falling under the Rule 102(3) notice provisions. As previously indicated,¹⁸ the Defence is simply raising entirely baseless

¹⁰ Status Conference, Transcript of 24 February 2021, pp.131, 142; Framework Decision, KSC-BC-2020-07/F00104, para.48.

¹¹ Prosecution Submissions, KSC-BC-2020-07/F00149, paras 2, 9-10.

¹² Prosecution Submissions, KSC-BC-2020-07/F00149, paras 2, 9-10.

¹³ Prosecution Submissions, KSC-BC-2020-07/F00149, para.10.

¹⁴ *Contra*. Gucati Response, KSC-BC-2020-07/F00157, para.34.

¹⁵ *Contra*. Gucati Response, KSC-BC-2020-07/F00157, paras 20-21.

¹⁶ As defined in Prosecution submissions on certain seized documents, KSC-BC-2020-07/F00110, Confidential, 1 February 2021 ('Prosecution submissions on certain seized documents').

¹⁷ 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.

¹⁸ Prosecution Submissions, KSC-BC-2020-07/F00149, para.10.

allegations in an attempt to deflect attention from the charges in this case and the Accused's own unlawful conduct. The Defence has no entitlement to conduct a speculative fishing expedition of the nature attempted through its quest for the Requested Information.

6. Finally, it is recalled that the Rule 102(3) notice contains the remaining residual information after disclosure pursuant to Rules 102(1)(b) and 103.¹⁹ The Gucati Defence submissions²⁰ concerning the 'adequacy' of the Rule 102(3) notice ignore the fact that, at the time such notice was provided, a total of 414 items had been disclosed to the Defence under Rules 102(1)(a)-(b) and Rule 103. Further, at the time, a number of requests for non-disclosure of items which the SPO identified as falling within, *inter alia*, its Rule 102(3) obligations²¹ were pending. All such items would have been subject to inclusion in the Rule 102(3) notice had they not been so disclosed or subject to then pending requests. Accordingly, the material in relation to which the Defence has been put on notice far exceeds that contained only in the Rule 102(3) notice.

II. CONFIDENTIALITY

7. 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.

III. RELIEF REQUESTED

8. For the foregoing reasons, the SPO requests that the Pre-Trial Judge: (i) find that the Defence has failed to sufficiently identify the Requested Information, and to demonstrate the basis upon which it falls within the SPO's notice obligations; and (ii) reject the Gucati Defence request to issue an order to the SPO in relation to Rule 102(3).

¹⁹ Prosecution Submissions for First Status Conference, KSC-BC-2020-07/F00096, Public, 5 January 2021, para.13; Framework Decision, KSC-BC-2020-07/F00104, para.47, fn.56.

²⁰ Gucati Response, KSC-BC-2020-07/F00157, paras 12, 17.

²¹ Prosecution Request for Non-disclosure of Certain Information Pertaining to Contacts with Witnesses, KSC-BC-2020-07/F00107, Confidential, 29 January 2021; Prosecution submissions on certain seized items, KSC-BC-2020-07/F00110.

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Friday, 26 March 2021

At The Hague, the Netherlands.