

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: 9th May 2021

Language: English

Classification: Confidential

Response to Prosecution Request to add items to the Exhibit List

KSC-BC-2020-07/F00195

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I. INTRODUCTION

1. On 29th April 2021, the defence received notification of the Prosecution Request to authorise the addition of W04841's 14 April 2021 declaration ('Declaration')¹ and its translation² to the Exhibit List ('Request')³, pursuant to Rules 9(5), 95(2) and 95(4)(c) of the Rules⁴.
2. Since service of the Request, a revised version of 095162-095239, dated 7th May 2021, has been disclosed⁵.
3. The defence on behalf of Hysni Gucati responds to the Request as follows (without prejudice to any subsequent objection to the admissibility of the Declaration, and earlier declarations made by W04841, at trial).

II. PROCEDURAL BACKGROUND

4. In its written submissions for the First Status Conference⁶, the Prosecution informed the Pre-Trial Judge that it anticipated 'being in a position to provide complete witness and exhibit lists, and to have fulfilled Rule 102(1)(b) disclosure, by 19 February 2021'.

¹ 095162-095239 (plus two annexes)

² 095162-095239-AT

³ Annex 3 to Submission of Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A03, 9th April 2021, Confidential ('Exhibit List')

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules')

⁵ 095603-095653, disclosed 7th May 2021

⁶ *Prosecution Submissions for First Status Conference*, KSC-BC-2020-07/F00096 at paragraphs 2 and 9

5. The Pre-Trial Judge accordingly directed the Prosecution to complete disclosure of material falling under Rule 102(1)(b) of the Rules by Friday 19 February 2021⁷.

6. Subsequently, in the Order Setting the Date for the Second Status Conference and Related Matters the Pre-Trial Judge sought submissions from the Prosecution as to:
 - a. Whether the SPO expected to be in a position to file its Pre-Trial Brief and related material, together with its consolidated Rule 109(c) chart by 9th April 2021⁸; and

 - b. whether any late disclosure under Rule 102(1)(b)(ii) and (iii) was expected prior to or in conjunction with the submission of the Pre-Trial Brief and related material, including the nature and number of such items⁹.

7. In reply to the Pre-Trial Judge, the Prosecution claimed to have complied with the *Framework Decision* orders and that all Rule 102(1)(b) material had been disclosed, subject only to the outcome of two outstanding requests to third parties and the discovery of new material¹⁰. The Prosecution indeed expected to be in a position to file its Pre-Trial Brief and related material, together with its consolidated Rule 109(c) chart by 9 April 2021.

⁷ *Framework Decision on Disclosure of Evidence and Related Matters*, KSC-BC-2020-07/F00104 at paragraph 85(b)

⁸ *Order Setting the Date for the Second Status Conference and Related Matters*, KSC-BC-2020-07/F00129 at paragraph 7(2)(b)

⁹ *Order Setting the Date for the Second Status Conference and Related Matters*, KSC-BC-2020-07/F00129 at paragraph 7(1)(ii)

¹⁰ *Prosecution Submissions for Second Status Conference*, KSC-BC-2020-07/F00140 at paragraph 5

8. At the Second Status Conference on 24th February 2021, the Prosecution were accordingly ordered to file its Pre-Trial Brief, witness and exhibit lists as well as its consolidated Rule 109(c) disclosure chart by Friday 9th April 2021¹¹.
9. At the Third Status Conference on 30 March 2021, the Prosecution were invited by the Pre-Trial Judge to raise any issue with the deadline of Friday 9th April 2021, but were firmly assured by the Prosecution that, "...in terms of the pre-trial brief, yes, Your Honour, we will be filing it by the deadline, which is 9 April, along with the other material we are ordered to file by that date"¹².
10. Despite the direction to complete disclosure of material falling under Rule 102(1)(b) of the Rules by Friday 19 February 2021, and the Prosecution's repeated assurances of compliance, the Prosecution has in fact continued to disclose material under Rule 102(1)(b) with seemingly little regard for the directions of the court¹³:
- | | |
|------------------|-----------------------------|
| a. Disclosure 8 | 4 th March 2021 |
| b. Disclosure 10 | 11 th March 2021 |
| c. Disclosure 13 | 17 th March 2021 |
| d. Disclosure 14 | 19 th March 2021 |
| e. Disclosure 15 | 19 th March 2021 |
| f. Disclosure 18 | 26 th March 2021 |
| g. Disclosure 19 | 9 th April 2021 |
| h. Disclosure 21 | 9 th April 2021 |

¹¹ Second Status Conference, Transcript p.178 lines 4-6; see also *Consolidated Calendar for the Remainder of the Pre-Trial Proceedings*, KSC-BC-2020-07/F00148 at paragraph 6(a)(vii)

¹² Third Status Conference, Transcript p.210 lines 12 to 22

¹³ Although Disclosures 15, 22, 23, 24 and 28 were said to be pursuant to orders of the court, the Pre-Trial Judge did not order said material to be disclosed under Rule 102(1)(b) (evidence 'that the Specialist Prosecutor intends to present at trial')

- | | |
|------------------|-----------------------------|
| i. Disclosure 22 | 14 th April 2021 |
| j. Disclosure 23 | 22 nd April 2021 |
| k. Disclosure 24 | 28 th April 2021 |
| l. Disclosure 28 | 7 th May 2021 |

III. SUBMISSIONS

11. Pursuant to Rule 9(5) the Pre-Trial Judge may, on application by the Prosecution, extend the time limit ordered for the list of exhibits so as to permit amendments, but it may do so only where the Prosecution shows good cause.
12. The Request, however, does not show good cause.
13. Although the Request says that the Declaration was only finalised after the deadline for submitting the Exhibit List, it makes no attempt to explain why.
14. The material referred to in the Declaration has apparently been in the possession of the Prosecution since 9th September 2020¹⁴.
15. No explanation has been provided as to why - despite apparently being in possession of "Batch 4" for over 6 months by 9th April 2021 - the Declaration had not been completed until after that deadline had passed.
16. No explanation has been provided as to why, despite repeated assurances to the Pre-Trial Judge (i) that the Prosecution has complied with its disclosure obligations throughout, (ii) that the Prosecution would complete Rule 102(1)(b)

¹⁴ Annex 2 to Submission of Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A02 at paragraph 3

disclosure by 19 February 2021, and (iii) that the Prosecution would meet the 9th April 2021 deadline without difficulty, the Prosecution now request an extension post-deadline of the time limit to permit amendment to the list of exhibits relating to material which has apparently been in its possession since 9th September 2020.

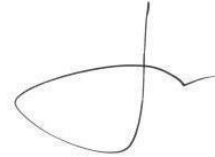
17. In the absence of such an explanation, the Request should be refused.
18. Finally, the Prosecution are reminded that the authenticity of the material referred to in the Declaration is objected to, as is the authenticity of the material referred to in the earlier declarations of W04841 dated 29 October 2020 (ERN 084015-084026), 9 February 2021 (ERN 091791-091792), 17 February 2021 (ERN 091927-091930) and 19 March 2021 (ERN 093492-093590).
19. Rule 95(4)(c) requires the Prosecution to state defence objections regarding authenticity in its list of proposed exhibits.
20. Before making baseless requests for authorisation to add further evidence to the list of exhibits, the Prosecution should comply with Rule 95(4)(c) and state the defence objections to the authenticity of items 181, 182, 294, 295, 340, 341, 360 and 361 on the existing List of Exhibits¹⁵.

IV. CLASSIFICATION

21. Pursuant to Rule 82(4), this reply bears the classification 'confidential' as it is a reply to the Request which was classified by the SPO as confidential. It is submitted, however, that there is nothing truly confidential about the original Request, and both the Request and this reply should be reclassified as public.

¹⁵ Annex 3 to Submission of Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart, List of Exhibits, KSC-BC-2020-07/F00181/A03

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