



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Prosecutor

Date: 17 May 2021

Language: English

Classification: Confidential

**Prosecution reply to Gucati response to Prosecution request to add items to the
Exhibit List**

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. SUBMISSIONS

1. Contrary to what is asserted in the Response,¹ there is good cause to grant the Request² and add both the Declaration³ and its translation⁴ to the Exhibit List.⁵ The SPO hereby replies on two new issues raised in the Response, namely the Gucati Defence's failure to present relevant procedural history in its proper context⁶ and its submission that the Exhibit List should reflect objections to the authenticity of certain materials.

2. A brief summary of the content of Batch 4 (078570-079499) had previously been contained in declaration 091927-091930,⁷ which was disclosed to the Defence on 19 February 2021⁸ and included in the Exhibit List.⁹ The Declaration was subsequently compiled pursuant to an order of the Pre-Trial Judge dated 1 April 2021,¹⁰ as a

¹ Response to Prosecution Request to add items to the Exhibit List KSC-BC-2020-07/F00198, KSC-BC-2020-07/F00198, 9 May 2021, Confidential ('Response').

² Prosecution Request to add items to the Exhibit List, KSC-BC-2020-07/F00195, 29 April 2021, Confidential ('Request'), modified by the Notification of disclosure of revised declarations and related requests, KSC-BC-2020-07/F00197, 7 May 2021, Confidential ('Notification').

³ The declaration with two annexes (095162-095239), including a detailed summary of Batch 4, was disclosed to the Defence on 14 April 2021 (KSC-BC-2020-07, Disclosure 22). A corrected version of the declaration with two annexes (095603-095653), including a detailed summary of Batch 4, was disclosed to the Defence on 7 May 2021 (KSC-BC-2020-07, Disclosure 28) ('Declaration'). As specified in the Notification, KSC-BC-2020-07/F00197, para.6, the Specialist Prosecutor's Office ('SPO') requests that the revised version of the Declaration be added to the Exhibit List.

⁴ 095603-095653-AT, disclosed on 14 May 2021. The Albanian translation of the earlier version of the Declaration (095162-095239-AT) was disclosed on 28 April 2021 (KSC-BC-2020-07, Disclosure 24).

⁵ Annex 3 to Submission of the Pre-Trial Brief, witness and exhibit list, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A03, 9 April 2021, Confidential ('Exhibit List').

⁶ For example, in noting at para.10 of the Response that the SPO has disclosed Rule 102 material after 19 February 2021, the Gucati Defence omits the Pre-Trial Judge's direction that residual Rule 102 material was to be disclosed by 9 April 2021 (*see, e.g.*, Consolidated Calendar for the Remainder of the Pre-Trial Proceedings, KSC-BC-2020-07/F00148, 8 March 2021, Public ('Consolidated Calendar') para.6(a)(viii)). The Response further misrepresents at para.7 the contents of the Prosecution Submissions for the second Status Conference, KSC-BC-2020-07/F00140, 23 February 2021, Public, para.5, where the SPO stated that limited additional 102(1)(b) material might be disclosed by the 9 April 2021 deadline, including as a result of protective measures decisions and ongoing investigations.

⁷ Declaration, 17 February 2021, 091927-091930, paras 5-13.

⁸ KSC-BC-2020-07, Disclosure 7.

⁹ Exhibit List, KSC-BC-2020-07/F00181/A03, Item 341.

¹⁰ Confidential Redacted Version of the Decision on the Non-Disclosure of Information Requested by the Defence, KSC-BC-2020-07/F00171/CONF/RED, 1 April 2021, Confidential, ('1 April Decision') paras 23-24, 39.

counterbalancing measure, following a Defence request for disclosure of Batch 4.¹¹ The Declaration provides detailed information on the contents of Batch 4. The nature of the additional, detailed analysis required to produce the Declaration prevented its finalisation in advance of the two-week deadline set by the Pre-Trial Judge for its provision. As a result, while the Declaration was disclosed to the Defence within the set deadline of 14 April 2021,¹² this disclosure occurred five days after the deadline scheduled for submission of the Exhibit List, filed on 9 April 2021.¹³

3. The request for non-disclosure of Batch 4 was necessitated by the need to protect ongoing investigations and witness security.¹⁴ The relevance of information on the contents of Batch 4 to the prosecution case was never in question.¹⁵ Once the SPO has been ordered to disclose additional details on the contents of Batch 4, it would be contradictory, and contrary to the interests of justice, to prevent the SPO from relying on the entirety of the disclosed information at trial, considering *inter alia* that: (a) W04841 is to testify on the contents of Batch 4;¹⁶ (b) the contents of Batch 4 and Batch 1¹⁷ largely overlap;¹⁸ (c) a detailed summary of Batch 1 analogous to the one provided in the Declaration is included in the Exhibit List;¹⁹ and (d) the addition of the

¹¹ For the relevant procedural history, *see, e.g.* Confidential Redacted Version of 'Prosecution request for non-disclosure of certain information requested by the Defence pursuant to Rule 102(3), with strictly confidential and *ex parte* Annexes 1-3', KSC-BC-2020-07/F00154/CONF/RED, 17 March 2021, Confidential ('Request for non-disclosure'), paras 4-13, filed within the deadline set with the Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, 22 January 2021, paras 48, 85(f).

¹² KSC-BC-2020-07, Disclosure 22.

¹³ Consolidated Calendar, KSC-BC-2020-07/F00148, para.6(a)(vii).

¹⁴ Request for non-disclosure, KSC-BC-2020-07/F00154/CONF/RED, paras 16-17.

¹⁵ *See* Declaration, 17 February 2021, 091927-091930, paras 5-13; Exhibit List, KSC-BC-2020-07/F00181/A03, Item 341; Annex 1 to Submission of the Pre-Trial Brief, witness and exhibit list, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A01, 9 April 2021, Confidential ('Pre-Trial Brief'), paras 34-35, 181.

¹⁶ Annex 2 to Submission of the Pre-Trial Brief, witness and exhibit list, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A02, 9 April 2021, Confidential, p.2, para.3. *See also*, for even earlier notice provided to the Defence, Request for non-disclosure, KSC-BC-2020-07/F00154/CONF/RED, para.19.

¹⁷ 'Batch 1' refers to the documents seized by the SPO on 8 September 2020, as detailed in Prosecution report pursuant to decision KSC-BC-2018-01/F00121, with strictly confidential and *ex parte* Annex 1, KSC-BC-2020-07/F00008, 21 September 2020, Confidential.

¹⁸ 091927-091930, paras 8-13.

¹⁹ Exhibit List, KSC-BC-2020-07/F00181/A03, Item 361 (093492-093590).

Declaration to the Exhibit List would enable a comparison of Batch 1 and Batch 4 based on similarly detailed information.

4. The Gucati Defence's assertion that 'the authenticity of the material referred in the Declaration is objected to',²⁰ merely highlights the general disagreement of the Gucati Defence with the prosecution case, which is clearly a matter to be assessed at trial and has no bearing on the Request or on the authenticity of the Declaration itself.

5. The Gucati Defence additionally claims to have raised similar objections in relation to the authenticity of all other declarations of W04841, and – although falling outside the scope of the Request – states that such objections should have been reflected by the SPO in the Exhibit List pursuant to Rule 95(4)(c).²¹

6. The Gucati Defence's response does not in fact articulate any challenges to either the authorship or origin of W04841's declarations, nor does it refer to any previous submissions to that effect.²² Rule 95(4)(c) only requires that the Exhibit List record, where possible, defence objections to the authenticity of the items included in the Exhibit List, and not defence objections of a different nature, or defence objections concerning items not included in the Exhibit List. The Response does not raise any objection relevant to Rule 95(4)(c).

II. CONFIDENTIALITY

7. Both the Request and this filing are confidential because they refer to filings bearing the same classification. A public redacted version of the Request will be filed

²⁰ Gucati Response, KSC-BC-2020-07/F00198, para.18.

²¹ Gucati Response, KSC-BC-2020-07/F00198, paras 18-20, referring to items 181, 182, 294, 295, 340, 341, 360 and 361 on the Exhibit List.

²² For the notion of authenticity, *see, e.g.*, ICTY, IT-04-74-AR73.16, *Prosecutor v. Jadranko Prlić et al.*, Appeals Chamber, Decision on Jadranko Prlić's Interlocutory Appeal against the *Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission Documentary Evidence*, 3 November 2009, Public, para.34, noting that '[a]uthenticity relates to whether a document is what it professes to be in origin and authorship'.

shortly. The SPO does not object to the subsequent reclassification of the Response and of this filing as public.

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Jack Smith

Specialist Prosecutor

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At The Hague, the Netherlands.