



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: 18 May 2021

Language: English

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**Public Redacted Version of 'Prosecution reply to Defence Responses to Filing
F00190', dated 17 May 2021**

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I. SUBMISSIONS

1. The Specialist Prosecutor's Office ('SPO') hereby replies to the GUCATI Response¹ and HARADINAJ Response² (collectively 'Responses') to the Request³ concerning the disclosure litigation surrounding the Rule 102(3) Notice.⁴ This reply concerns new issues⁵ raised in relation to four categories of items on the Rule 102(3) Notice,⁶ as well as the further items sought beyond this notice.⁷

2. The Responses do not even attempt to explain how many listed items could be material to defence preparations, further confirming the SPO's position that they are not. The Responses also reiterate requests for materials which the SPO has clearly stated do not exist. In some instances, the GUCATI Defence even amends or supplements its previous requests, impermissibly circumventing the deadline set in the Rule 102(3) Decision that all requests for materials on or off the Rule 102(3) Notice be made by 21 April 2021.⁸

3. These latest Defence submissions again divert the litigation towards matters other than the charges and the evidence material to any of the parties. In the interest of the expeditiousness of the proceedings, the SPO seeks a final resolution on the

¹ Response to Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2020, KSC-BC-2020-07/F00199, 10 May 2021, Confidential ('GUCATI Response').

² Defence Response to SPO Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', and F00190, KSC-BC-2020-07/F00200, 10 May 2021, Confidential ('HARADINAJ Response').

³ Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2021, KSC-BC-2020-07/F00190/CONF/RED, 28 April 2021, Confidential ('Request').

⁴ Prosecution's consolidated Rule 102(3) notice, KSC-BC-2020-07/F00183/A01, 14 April 2021, Confidential ('Rule 102(3) Notice').

⁵ Rule 76 of the Rules.

⁶ Sections A-D below.

⁷ Sections E-F below.

⁸ Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, KSC--BC-2020-07/F00172, 1 April 2021, Confidential ('Rule 102(3) Decision'), para.38(b)-(c).

materials identified in the Request. These misdirected efforts must be put to a definitive end so that the trial can begin.

A. MEDICAL DOCUMENTATION

4. The HARADINAJ Defence repeatedly raises inapposite admissibility arguments in relation to the Medical Documentation and other categories of items.⁹ The present litigation concerns the disclosure of items on the Rule 102(3) Notice. There is no intention of seeking the admission of any items on the Rule 102(3) Notice, as items the SPO intends to rely upon are disclosed under other provisions like Rule 102(1)(b).

5. Whether the SPO can prove its allegations in relation to the evidence it has disclosed and relied upon is a matter for trial. To the extent the HARADINAJ Defence argues that the SPO is precluded from relying on allegations relating to withheld materials,¹⁰ no support for this proposition is provided and there is no such rule in the statutory framework.

B. [REDACTED]

6. The Responses ignore that the disclosure of information related to these [REDACTED] creates particular challenges, [REDACTED].¹¹ [REDACTED].¹² No measure short of non-disclosure can adequately protect the persons concerned by these materials.

C. SEARCH AND SEIZURE VIDEOS

7. Further requests by the GUCATI Defence in relation to these items circumvent the Pre-Trial Judge's deadlines in the Rule 102(3) Decision and should be summarily

⁹ KSC-BC-2020-07/F00200, paras 9-21 (see also paras 39, 43, 53, 74, 77).

¹⁰ Eg KSC-BC-2020-07/F00200, para.21.

¹¹ [REDACTED]. [REDACTED].

¹² [REDACTED]. [REDACTED]. [REDACTED].

dismissed.¹³ In any event, all disclosable information in the new materials sought has already been provided.¹⁴

8. As for the videos themselves, all the objections the Defence raise stem from factual circumstances clearly reflected in the disclosed written record.¹⁵ The Defence provide no *prima facie* indication as to what needs to be verified through the videos. The SPO is not asking the Pre-Trial Judge to take its submissions 'at its word' as to their contents.¹⁶ These videos have been annexed to the Request without redaction for the Pre-Trial Judge's full consideration.¹⁷ That SPO staff and investigators in the field may need their identities redacted to protect themselves and their work is a common non-disclosure justification,¹⁸ which is why such information is covered by standard redaction categories.¹⁹

D. [REDACTED]

9. The Responses do not attempt to explain why any of the listed items [REDACTED] could be material to defence preparation, which further confirms the SPO's position that they are not.²⁰ The *Lubanga* citation provided by the HARADINAJ Defence is misplaced, as the [REDACTED] at issue is neither potentially exculpatory

¹³ *Contra* KSC-BC-2020-07/F00199, para.10.

¹⁴ That contemporaneous notes were disclosed in the ERNs identified in para.8, fn.7 of the GUCATI Response is inaccurate. 083880-083900 is the formal memorandum of service of the search order and report required by Rule 39(4). 083903-083908 is a supplement to that report and (at p.083903) expressly provides that the supplement (emphasis added) '*was obtained from* contemporaneous notes taken during the search [...]', including those of the investigator concerned.

¹⁵ KSC-BC-2020-07/F00199, para.10. That the search and seizures were conducted in Mr GUCATI's absence (and the objections on this point raised by other persons present) is reflected in the written records cited at footnote 7 of the GUCATI Response.

¹⁶ *Contra* KSC-BC-2020-07/F00200, paras 25-27.

¹⁷ KSC-BC-2020-07/F00190/A03.

¹⁸ *Contra* KSC-BC-2020-07/F00200, paras 32-35.

¹⁹ KSC-BC-2020-07/F00104, para.82.

²⁰ KSC-BC-2020-07/F00190/CONF/RED, paras 18-24, 42(b).

nor material to the preparation of the defence, meaning that it has no impact on the fairness of these proceedings.²¹

E. CONTEMPORANEOUS NOTES (GUCATI DEFENCE REQUEST (A))

10. The GUCATI Defence arguments and authorities concerning notes of contacts with prosecution witnesses are made out of context.²² The witness contacts for which contemporaneous notes are sought are not with witnesses or potential witnesses in this case. Their statements are not disclosable under Rule 102(1)(b) of the Rules, nor is there any statutory obligation to record them in a particular way. Any issues with how these official notes were prepared, including the length of time it took to prepare them, are matters of admissibility and weight at trial.²³

11. The GUCATI Defence supplements its request by adding specificity after the deadline set by the Pre-Trial Judge.²⁴ These additional submissions should be dismissed on this basis alone. That there is no general disclosure obligation for any notes of these persons is clear from the authorities supporting the Request.²⁵ The formal official notes record all disclosable information arising from these witness contacts. They supersede any preparation materials or rough notes, rendering them superfluous.

F. PROVENANCE OF THE THREE BATCHES (GUCATI DEFENCE REQUESTS (B) AND (C))

²¹ KSC-BC-2020-07/F00200, paras 46-49, citing ICC, *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, ICC-01/04-01/06-1486, 21 October 2008. In *Lubanga*, the disclosure issue concerned materials falling under provisions equivalent to Rule 107. But these materials were deemed disclosable by the ICC Trial Chamber, creating a situation which ultimately led to a conditional stay of proceedings. See ICC-01/04-01/06-1486, paras 21-23, 75-83. Had the *Lubanga* materials not fallen under the prosecution’s disclosure obligations, no impact on the fairness of the trial would have arisen.

²² KSC-BC-2020-07/F00199, paras 22-23.

²³ *Contra* KSC-BC-2020-07/F00199, para.21.

²⁴ KSC-BC-2020-07/F00199, para. 27.

²⁵ KSC-BC-2020-07/F00190/CONF/RED, para.29.

12. The GUCATI Defence again impermissibly modifies its request beyond the Pre-Trial Judge's deadline, previously asking simply for disclosure and now requesting that these materials should be 'at the very least, listed on the Rule 102(3) Notice'.²⁶ Assessing whether these items are material to the defence's preparation obviates the need to consider the Rule 102(3) Notice further, as a ruling on the Request favourable to the defence would lead to disclosure (making a list of the items redundant) and a ruling favourable to the SPO would foreclose any disclosure (making a list of the items without object). Nevertheless, the SPO will reply to this request as currently phrased.

13. The SPO included no new information falling under these requests in the Rule 102(3) Notice because there is no such information relevant to the case.²⁷ As stated previously, the case as charged includes no allegations relevant to how the three batches actually came into the hands of the accused.²⁸

14. The witness concerns identified by the GUCATI Defence²⁹ are immaterial to what the accused did with the confidential information which came into their possession. That the SPO does not comment on ongoing investigations is standard practice, and no comment will likewise be made on the GUCATI Defence's speculations in this regard.³⁰ But construing standard investigative practices as some sort of tacit admission that disclosable information is being withheld is a baseless leap in logic.

15. The GUCATI Defence did not add any meaningful specificity beyond the request rejected in the Rule 102(3) Decision. The request is the same as before. What the GUCATI Defence labels as further 'very specific information'³¹ are only a series of

²⁶ KSC-BC-2020-07/F00199, para.61.

²⁷ *Contra* KSC-BC-2020-07/F00199, para.30.

²⁸ KSC-BC-2020-07/F00190/CONF/RED, paras 37-40; Transcript of Hearing, 30 April 2021, p.226.

²⁹ KSC-BC-2020-07/F00199, paras 39-44.

³⁰ KSC-BC-2020-07/F00199, paras 35-38.

³¹ KSC-BC-2020-07/F00199, para.49(ii).

questions about the SPO's investigation concerning Batch 3. These questions do little to further identify relevant types of documents or information sought, which is the defect identified by the Pre-Trial Judge in the first place.³²

16. When pressed to show any connection between these materials it seeks and this case, the Defence continue to raise speculative possibilities like '[a]ny evidence that the source of the leaks to the Accused can be traced back to any SPO staff member, whether identified or unidentified, might reasonably suggest that the accused were somehow incited or entrapped'.³³ There are no such facts, which is a primary reason why the materials sought are irrelevant to the case.³⁴

17. As repeatedly stated in the past, the SPO is in possession of no evidence suggesting this.³⁵ It is quite clear that the Defence are interested in the SPO's internal investigation as to how the batches came into the possession of the KLA WVA.³⁶ But disclosure obligations are to ensure the Defence's preparation, not satisfy their curiosity.

II. RELIEF REQUESTED

18. For the foregoing reasons, the SPO reiterates that the Pre-Trial Judge grant the Request.³⁷

³² Rule 102(3) Decision, KSC--BC-2020-07/F00172, para.37.

³³ KSC-BC-2020-07/F00199, para.55.

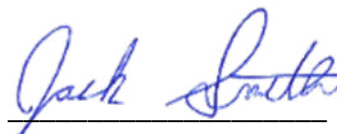
³⁴ Nothing has ever been 'conceded' in this aspect. *See* KSC-BC-2020-07/F00199, para.53. The status conference submission cited by the GUCATI Defence concerned a hypothetical of how such information would be disclosable if facts linking it to the accused were to exist. Transcript of Hearing, 30 April 2021, pp.226-27.

³⁵ KSC-BC-2020-07/F00190/CONF/RED, para. 37, and further references recalled therein. The Accused have also stated that the batches were delivered to them by unknown persons. *See* Pre-Trial Brief, KSC-BC-2020-07/F00181/A01, paras 46, 80, 137. On their own narrative, no one contacted the Accused to incite or entrap them.

³⁶ KSC-BC-2020-07/F00200, paras 65-72.

³⁷ As to the classification of this litigation, public redacted versions of this reply and the Request will be filed. Redactions to the Responses are necessary vis-à-vis the public, meaning that they should not be fully reclassified.

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Tuesday, 18 May 2021

At The Hague, the Netherlands