



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: 10 June 2021

Language: English

Classification: Confidential

Prosecution Response to

Defence Requests for Clarification F00217 and F00220

Specialist Prosecutor's Office

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1. The Motions for Clarification¹ should be dismissed, as the relevant parts of the Pre-Trial Judge's Decision² are clear and require no additional explanation.
2. Preliminarily, the Specialist Prosecutor's Office ('SPO') notes that requests for clarification are not provided for under the Law³ or the Rules.⁴ The statutory framework provides instead that, when a Party seeks to appeal a decision of a Panel for which an appeal does not lie as of right, that Party shall request certification from the Panel that rendered the impugned decision within seven days thereof, if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.⁵ In the alternative, pursuant to Rule 79, a Party may request a Panel to reconsider a decision, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice.⁶ Requests for clarification, which are generally treated as an exceptional measure,⁷ are not tools to circumvent the legal tests set at Rules 77(2) and 79.

¹ Motion for Clarification of Decision KSC-BC-2020-07/F00213, KSC-BC-2020-07/F00217, 3 June 2021, Confidential ('Gucati Motion for Clarification'); Motion for Clarification of Decision KSC-BC-2020-07/F00210, KSC-BC-2020-07/F00220, 7 June 2021, Confidential ('Haradinaj Motion for Clarification'); collectively 'Motions for Clarifications'.

² Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00210, 26 May 2021, Confidential ('Decision'). Although the title of the Gucati Motion for Clarification indicates an erroneous filing number (KSC-BC-2020-07/F00213) the Defence submissions make clear that clarification is sought in relation to the Decision, KSC-BC-2020-07/F00210.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁴ 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.

⁵ Rule 77.

⁶ Rule 79.

⁷ See, ICTY, *Prosecutor v. Dragan Nikolić*, IT-94-2-AR73, Decision on Motion Requesting Clarification, 6 August 2003, p.2; ICC, Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, Decision on the request for clarification by the OPCD, 3 October 2007, ICC-01/04-403, p.3; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgement on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, para. 92.

3. The Defence requests that the Pre-Trial Judge clarify, with respect to paragraph 54 of the Decision, whether ‘where the Official Witness Note and Declaration records information which is not taken during interview with the relevant contacted individual, the contemporaneous note will fall to be disclosed under the order’.⁸

4. The Decision reads in its relevant part:

The Pre-Trial Judge accordingly finds that any contemporaneous notes taken during interviews with contacted individuals and on the basis of which the Official Notes and the Declarations were prepared are subject to Disclosure under Rule 102(3) of the Rules *only to the extent* that they contain disclosable information that has not been recorded in the Official Witness Notes and Declarations. The SPO is accordingly ordered to review any such contemporaneous notes and, where they contain disclosable information, such as the questions posed to the contacted individuals, which has not been recorded in the Official Witness Notes and the Declarations, to disclose such notes to the Defence.⁹

5. The language of the Decision is plainly clear in stating that contemporaneous notes taken during SPO contacts with relevant individuals are subject to disclosure only to the extent that additional disclosable information was recorded in such contemporaneous notes that was not recorded in the Official Notes and Declarations. The Decision expressly refers to instances where contemporaneous notes taken during contacts with relevant individuals contain *more* disclosable information than the corresponding Official Notes and Declarations, such as the questions asked and the answers provided.¹⁰

6. The interpretation of the Decision suggested by the Defence would imply that any contemporaneous note taken in the course of contacts with relevant individuals be disclosed to the Defence unless it was identical to the subsequent official note. However, as previously submitted, contemporaneous notes are simply a shorthand memory aid to facilitate preparation of the subsequent official record and are not

⁸ Gucati Motion for Clarification, KSC-BC-2020-07/F00217, para.2; Haradinaj Motion for Clarification, KSC-BC-2020-07/F00220, paras 2-6.

⁹ Decision, KSC-BC-2020-07/F00210, p.2, para.54 (emphasis added).

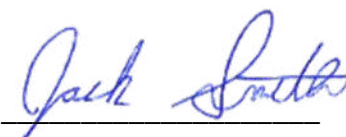
¹⁰ Decision, KSC-BC-2020-07/F00210, p.2, para.54, lines 2-3 and 7-15.

typically disclosable.¹¹ The Defence request amounts to a further circuitous attempt to obtain disclosure of all and any contemporaneous notes, which has already been adjudicated. As made clear in the Decision's disposition,¹² the Gucati Request was granted only *in part*, within the limits of the instructions provided in paragraph 54 of the Decision. If the Pre-Trial Judge intended to order that any contemporaneous notes taken by SPO staff in the course of contacts with individuals be disclosed to the Defence, he would not have confined the scope of his ruling.

7. The SPO requests that the Motions for Clarification be dismissed, as there is no uncertainty or unclarity in the Decision.

8. This submission is filed confidentially because it refers to filings bearing the same classification. The SPO does not object to the subsequent re-classification of this filing as public.

Word count: 911.



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Thursday, 10 June 2021

At The Hague, the Netherlands

¹¹ Confidential Redacted Version of Prosecution Request and Challenges Pursuant to KSC-BC-2020-07/F00172, KSC-BC-2020-07/F00190/RED, 26 April 2021, Confidential, para.29, and further references cited therein.

¹² Decision, KSC-BC-2020-07/F00210, para.65(e).