



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 1 April 2021

Language: English

Classification: Public

**Public Redacted Version of the
Decision on the Materiality of Information Requested under Rule 102(3) and
Related Matters**

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 95(2)(b) and 102(3) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this order.

I. PROCEDURAL BACKGROUND

1. On 22 January 2021, the Pre-Trial Judge issued a framework decision on disclosure ("Framework Decision"), setting out, *inter alia*, the content of disclosure obligations of the Specialist Prosecutor's Office ("SPO") under the Rules.²

2. On 19 February 2021, the SPO filed its detailed notice pursuant to Rule 102(3) of the Rules, with a confidential annex containing 13 items ("Initial Rule 102(3) Notice").³

3. On 23 February 2021, in anticipation of the second status conference in the proceedings, the Defence for Hysni Gucati ("Mr Gucati") filed written submissions and stated, *inter alia*, that the Initial Rule 102(3) Notice was inadequate and provided a list of 27 items, requesting their inclusion in the aforementioned notice ("Gucati Rule 102(3) Items").⁴ The Gucati Rule 102(3) Items included requests related to the three sets of documents seized by the SPO from the Kosovo Liberation Army War Veterans' Association ("Three Batches").⁵

¹ KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public.

² KSC-BC-2020-07, F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* ("Framework Decision"), 22 January 2021, public.

³ KSC-BC-2020-07, F00133, Specialist Prosecutor, *Prosecution's Rule 102(3) Notice*, 19 February 2021, public, with Annex 1 ("Initial Rule 102(3) Notice"), confidential.

⁴ KSC-BC-2020-07, F00137, Defence for Mr Gucati, *Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters* ("Gucati Rule 102(3) Items"), 23 February 2021, confidential, para. 7(a)-(aa).

⁵ Gucati 102(3) Items, para. 7(a)-(b). See also KSC-BC-2020-07, F00141, Pre-Trial Judge, *Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association* ("Decision on the Three Batches"), 23 February 2021, confidential, paras 1-2.

4. On 23 February 2021, the Defence for Nasim Haradinaj joined these submissions.⁶
5. On 8 March 2021, following *inter partes* communications,⁷ the SPO filed a request disputing the materiality of two of the Gucati Rule 102(3) Items (“Request”).⁸
6. On 18 March 2021, the Defence for Mr Gucati responded to the Request (“Response”).⁹
7. On 26 March 2021, in anticipation of the third status conference in the proceedings (“Third Status Conference”), the Defence for Mr Gucati filed written submission on, *inter alia*, the Initial Rule 102(3) Notice and the Gucati Rule 102(3) Items (“Gucati Further Submissions”).¹⁰
8. On 26 March 2021, the SPO replied to the Response (“Reply”).¹¹ On the same day, the SPO filed written submission in anticipation of the Third Status Conference and, as ordered by the Pre-Trial Judge,¹² provided an annexed chart with information regarding the availability and disclosability of each of the Gucati Rule 102(3) Items.¹³

⁶ KSC-BC-2020-07, F00138, Defence for Mr Haradinaj, *Defence Submissions Following Order Setting the Date for the Second Status Conference and Related Matters*, 23 February 2021, confidential, para. 18.

⁷ KSC-BC-2020-07, F00149, Specialist Prosecutor, *Prosecution Submissions on the Materiality of Certain Information Requested by the Defence Pursuant to Rule 102(3)* (“Request”), 8 March 2021, confidential, paras 5-6.

⁸ Request, paras 1, 8, 12.

⁹ KSC-BC-2020-07, F00157, Defence for Mr Gucati, *Response to Prosecution Submissions on the Rule 102(3) Notice* (“Response”), 18 March 2021, confidential.

¹⁰ KSC-BC-2020-07, F00163, Defence for Mr Gucati, *Submissions for the Third Status Conference* (“Gucati Further Submissions”), 26 March 2021 (incorrectly dated 25 March 2021), public, paras 5-15.

¹¹ KSC-BC-2020-07, F00164, Specialist Prosecutor, *Prosecution Reply to Gucati Response to Prosecution Submissions on the Materiality of Certain Information Requested Pursuant to Rule 102(3)* (“Reply”), 26 March 2021, confidential.

¹² KSC-BC-2020-07, F00160, Pre-Trial Judge, *Order Setting the Date for the Third Status Conference*, 23 March 2021, public, para. 9(1)(b).

¹³ KSC-BC-2020-07, F00165, Specialist Prosecutor, *Prosecution Submissions for Third Status Conference*, 26 March 2021, public, para. 5, with Annex 1 (“F00165/A01”), confidential.

9. On 30 March 2021, on the occasion of the Third Status Conference in the proceedings, the SPO and the Defence made further oral submissions on the matter.¹⁴

II. SUBMISSIONS

10. In the Request, the SPO disputes the materiality of the following two Gucati Rule 102(3) Items (collectively, “Items (a)-(b)”):

- a) “all material held by the SPO which relates to the origin and provenance of the material contained within [the Three Batches], including material as to authorship and chain of custody from creation to its arrival at the KLA WVA HQ” (“Item (a)”);¹⁵ and
- b) “all material held by the SPO which relates to any attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA HQ” (“Item (b)”);¹⁶

11. The SPO requests that the Pre-Trial Judge find that the Defence has failed to sufficiently identify, and demonstrate the materiality of, the information sought.¹⁷

12. In the Response, the Defence for Mr Gucati requests the Pre-Trial Judge to find that the Request is premature and to order the SPO to comply with the requirement to provide a Rule 102(3) notice which lists all the material in the SPO possession, which has some relation to any offence under investigation or any person being investigated or on the surrounding circumstances.¹⁸

¹⁴ KSC-BC-2020-07, Draft Transcript, 30 March 2021, public, pp. 184-208.

¹⁵ Request, para. 8(a), referring to the Gucati 102(3) Items, para. 7(a).

¹⁶ Request, para. 8(b), referring to the Gucati 102(3) Items, para. 7(b).

¹⁷ Request, para. 12.

¹⁸ Response, para. 35.

13. In the Reply, the SPO reiterates its Request and further seeks that the Pre-Trial Judge reject the request of the Defence for Mr Gucati to issue an order to the SPO in relation to Rule 102(3) of the Rules.¹⁹

III. APPLICABLE LAW

14. Pursuant to Rule 95(2)(b) of the Rules, the Pre-Trial Judge shall take any measures to ensure timely disclosure.

15. Pursuant to Rule 102(3) of the Rules, the Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the materiality of the information exist.

IV. DISCUSSION

16. The Pre-Trial Judge notes at the outset that the present litigation concerns the following matters: (i) the interpretation of Rule 102(3) of the Rules, namely, the basis on which the detailed notice is put together and the stage at which the test of materiality is applied; (ii) whether the Initial Rule 102(3) Notice complied with Rule 102(3) of the Rules; and (iii) whether Items (a)-(b) fall under Rule 102(3) of the Rules.

¹⁹ Reply, para. 8.

17. The Pre-Trial Judge shall address these matters in turn in the following paragraphs.

A. THE INTERPRETATION OF RULE 102(3) OF THE RULES

18. The SPO submits that it has satisfied its disclosure obligations, including pursuant to Rule 102(3) of the Rules. The SPO further avers that the Defence, when making Rule 102(3) requests for information not previously notified or disclosed, must sufficiently identify the information sought and demonstrate that it is material to Defence preparations.²⁰

19. The Defence for Mr Gucati responds that Rule 102(3) of the Rules provides for a two-stage approach; in the first stage, the SPO ought to provide the Defence with a detailed list of all material in its possession and in the second stage, the SPO ought to disclose to the Defence statements, documents, photographs or other tangible objects which are deemed by the Defence to be material to its preparation.²¹ The Defence for Mr Gucati further avers that the only boundary applicable to the first stage is that the material must have some relation to an offence under investigation, a person being investigated or the surrounding circumstances.²² The Defence for Mr Gucati also submits that the test of materiality only applies at the second stage, that is, to requests for disclosure or inspection, and in that context, it should be broadly interpreted.²³ As a consequence, the Defence for Mr Gucati submits that the Request is premature.²⁴

²⁰ Request, para. 2.

²¹ Response, paras 7-10.

²² Request, para. 11.

²³ Response, paras 5, 13. *See also* KSC-C-2020-07, Draft Transcript, 30 March 2021, public, pp. 189-191, 193-194, 199-201.

²⁴ Response, paras 34-35.

20. In the Reply, the SPO submits that pursuant to Article 21(6) of the Law and Rule 102(3) of the Rules, the SPO is obliged to provide detailed notice to the Defence of all material and evidence in its possession which could reasonably be considered for or against the Accused. The SPO further avers that such an exercise entails a degree of initial review and assessment, which must be done in good faith, with the notice obligation broadly interpreted to extend beyond items directly relevant to the facts.²⁵

21. During the Third Status Conference, the SPO submitted that Rule 102(3) of the Rules involved a two-stage process, in the course of which the SPO lists material and then disclose any requests therefrom.²⁶ The SPO further averred that the listing under Rule 102(3) of the Rules was done in view of Article 21(6) of the Law, interpreted broadly, as the Defence may not have any interest in that which the SPO may understand as material or relevant to the Defence preparation.²⁷

22. The Pre-Trial Judge notes at the outset that Rule 102(3) of the Rules sets out a procedure involving the following steps: (i) the provision by the SPO of a detailed notice to the Defence of any material and evidence in its possession; (ii) requests by the Defence for the disclosure or inspection of material in the custody or control of the SPO, which is deemed by the Defence to be material for its preparation, or were obtained from or belonged to the Accused; and (iii) any disputes raised by the SPO as to the materiality of the material requested by the Defence.

23. As regards the provision by the SPO of a detailed notice, the Pre-Trial Judge notes that, as stated in the Framework Decision, this requirement concerns any material and evidence in the SPO's possession.²⁸ The scope of this requirement is determined by Article 21(6) of the Law, according to which all material and relevant evidence or facts

²⁵ Reply, para. 2. *See also* KSC-BC-2020-06, Draft Transcript, 30 March 2021, public, pp. 184-185.

²⁶ KSC-BC-2020-06, Draft Transcript, 30 March 2021, public, p. 195.

²⁷ KSC-BC-2020-06, Draft Transcript, 30 March 2021, public, p. 198.

²⁸ Framework Decision, para. 46.

in possession of the SPO which are for or against the Accused must be made available to him before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied. Interpreted in the context of Rule 102(3) of the Rules, the scope of Article 21(6) of the Law must be interpreted broadly, as the purpose of drawing up a detailed notice is to inform the Defence of material and evidence in the possession of the SPO, which has not been disclosed, in order to assist the Defence in requesting information *they* deem material for their preparation.²⁹ Accordingly, the detailed notice must include not only information the SPO assesses to be potentially material to the Defence preparation, but any material and evidence in the SPO's possession, which has not been disclosed under Rule 102(1)(a)-(b) and 103 and which is relevant *to the case*.³⁰ This necessarily entails a degree of initial assessment by the SPO of the materials to be included on the list. This assessment, however, should not amount to a unilateral evaluation of what information would be relevant, useful or material *only for the Defence preparation*. If the detailed notice included only information that the SPO assessed to be relevant, useful or material to the Defence preparation, then a dispute mechanism to resolve issues of materiality, as provided in Rule 102(3), would be wholly unnecessary.

24. As regards requests for the Defence for disclosure or inspection of materials included in the detailed notice, the Pre-Trial Judge recalls his findings in the Framework Decision regarding the materiality of information to the Defence preparation.³¹

²⁹ In this regard, the Pre-Trial Judge notes that Rule 102(3) of the Rules is distinct from equivalent provisions in the ICTY and ICC rules of procedure and evidence in the sense that it (i) requires a detailed notice to be drawn up by the SPO before any requests are made by the Defence; (ii) explicitly indicates that what is material for the Defence preparation must be deemed as such by the Defence and (iii) stipulates that disputes on materiality are to be raised by the SPO. *See* Rule 66(B) ICTY Rules of Procedure and Evidence; Rule 77 ICC Rules of Procedure and Evidence.

³⁰ The Pre-Trial Judge notes that material under Rule 106 of the Rules is not subject to disclosure or notification, subject to Rule 103 and unless otherwise ordered by a Panel.

³¹ Framework Decision, para. 45.

25. As regards any materiality disputes raised by the SPO, such disputes must take in consideration the parameters of materiality as provided in the Framework Decision.

26. In any event, the Defence remains entitled to request the disclosure or inspection of material not included in the notice, but claimed by the Defence to be material for its preparation. In such a case, however, the Defence must (i) provide suitable parameters for specification of any requested items, so as to enable the SPO to identify the items sought; and (ii) indicate the materiality of the requested items for Defence preparation. As regards the parameters of specification, these may include a specific event or group of witnesses, a time period and/or geographic location to which the material refers, a category of documents defined by criteria which apply to a distinct group of individuals, or any other features defining the requested items with sufficient precision.³² In particular, the Defence may not rely on mere general descriptions of or conclusory allegations on the requested information and should avoid making requests in the form of catch-all phrases.³³ As regards the indication of materiality, the parameters of materiality as set out in the Framework Decision apply. Finally, if the SPO raises any disputes regarding such Defence requests, it may take issue with the parameters of specification as well as the materiality of the requested items.

B. THE INITIAL RULE 102(3) NOTICE

27. The SPO submits that it has satisfied its disclosure obligations, including pursuant to Rule 102(3) of the Rules.

³² Similarly, ICTR, *Karemera et al. v. Prosecutor*, ICTR-98-44-AR73.18, Appeals Chamber, [Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation](#) ("Karemera Appeals Decision"), 17 May 2010, para. 32.

³³ Similarly, ICTR, [Karemera Appeals Decision](#), para. 32; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case](#), 8 February 2012, para. 8; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT, Pre-Trial Judge, [Public Redacted Version of "Decision on the Sabra Defence's Fifth Request of the Fourth Motion for Disclosure" Dated 21 December 2012](#), 28 May 2013, para. 12.

28. The Defence for Mr Gucati responds that the Initial Rule 102(3) Notice is inadequate as the SPO failed to provide detailed notice as required by Rule 102(3) of the Rules.³⁴ The Defence for Mr Gucati requests the Pre-Trial Judge to order the SPO to provide a detailed Rule 102(3) notice listing all material in its possession, which has some relation to any offence under investigation or any person being investigated or on the surrounding circumstances.³⁵ In the Gucati Further Submissions, the Defence for Mr Gucati also submits that the SPO has either misunderstood the Framework Decision requiring it to prepare and disclose a detailed Rule 102(3) notice of all material in its possession, comprising any residual information potentially material to the Defence, or the SPO simply refuses to comply with the Framework Decision.³⁶

29. The SPO replies that the Defence attempts to reframe the requirements of Rule 102(3) of the Rules and that the SPO's obligation is 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.³⁷ The SPO further submits that it 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.³⁸ During the Third Status Conference, the SPO also submitted that where the Defence requested items not included in the Initial Rule 102(3) Notice, but found by the SPO to be "somewhat reasonable", such material was provided to the Defence.³⁹

30. The Pre-Trial Judge recalls that the Initial Rule 102(3) Notice comprised 13 items. Following the submission of the Gucati Rule 102(3) Items, the SPO has disclosed

³⁴ Response, para. 17.

³⁵ Response, paras 34-35.

³⁶ Gucati Further Submissions, para. 14.

³⁷ Reply, paras 1-2.

³⁸ Reply, para. 4.

³⁹ KSC-BC-2020-06, Draft Transcript, 30 March 2021, public, p. 187.

additional items, without raising grounds to dispute their relevance or materiality.⁴⁰ In this regard, the Pre-Trial Judge observes that some of the items disclosed by the SPO following the Gucati Rule 102(3) Items, but not included in the Initial Rule 102(3) Notice, appear to contain information relevant to the case, as they relate to, *inter alia*, [REDACTED].⁴¹

31. The Pre-Trial Judge accordingly finds that the Initial Rule 102(3) Notice does not include all material and evidence in the possession of the SPO which has not been disclosed under Rule 102(1)(a)-(b) and 103 and which is relevant to the case. For this reason, the Pre-Trial Judge finds it necessary to order the SPO to submit a consolidated detailed notice comprising all such material and evidence, including but not limited to items disclosed following the Gucati Rule 102(3) Items, where they meet the aforementioned requirements.

C. ITEMS (A)-(B)

32. The SPO submits that, in relation to Items (a)-(b), the Defence fails to: (i) sufficiently identify any additional information falling within these broadly defined categories that it deems material; or (ii) demonstrate on a *prima facie* basis that any such information is in fact material to defence preparations.⁴² The SPO further avers that no explanation of relevance was given as to these Rule 102(3) requests and that the nature of the material or type of records sought is unclear.⁴³ The SPO also submits that the Defence has failed to demonstrate the materiality of any information relating to the provenance of the Three Batches beyond that already provided.⁴⁴

⁴⁰ F00165/A01, [REDACTED].

⁴¹ See for example, F00165/A01, [REDACTED].

⁴² Request, para. 9.

⁴³ Request, para. 10.

⁴⁴ Request, para. 10.

33. The Defence for Mr Gucati responds that Items (a)-(b) ought to have been included in the Initial Rule 102(3) Notice, as they concern, *inter alia*, the authenticity and reliability of the Three Batches and the claim of incitement by the SPO.⁴⁵

34. In the Reply, the SPO reiterates its submissions that the Defence request is unsubstantiated, imprecisely formulated, and based merely on fanciful and hypothetical theories.⁴⁶

35. In relation to Item (a), the Pre-Trial Judge recalls that the Defence was provided with information regarding the type, title, date and, where relevant, origin or author of each of the undisclosed documents contained in the Three Batches as well as indicia suggesting the confidentiality of such documents and any indications whether [REDACTED].⁴⁷ This information was provided to the Defence so as to assist in ascertaining, *inter alia*, the authenticity and confidentiality of the documents allegedly disclosed.

36. In relation to Item (b), the Pre-Trial Judge notes that the Defence was already notified or provided with information regarding the delivery of documents to the KLA WVA.⁴⁸

37. Given the material already provided to the Defence in relation to Items (a)-(b) and the information contained therein, the Pre-Trial Judge considers that the Defence has not provided sufficient specification of what other (type of) documents or information should have been placed by the SPO on the Initial Rule 102(3) Notice or, for that matter, disclosed to the Defence. The Pre-Trial Judge accordingly finds that the Defence request as regards the broad categories covered

⁴⁵ Response, paras 22-32.

⁴⁶ Reply, para. 4.

⁴⁷ Decision on the Three Batches, paras 39, 45; Disclosure Package 15.

⁴⁸ Initial Rule 102(3) Notice, Items 2-4, 11-13; Request, para. 9, fn. 13; F00165/A01, [REDACTED].

by Items (a)-(b) is not sufficiently specific to allow the Pre-Trial Judge to make an informed determination as to their relevance to the case or their materiality for Defence preparation. This finding is without prejudice to any further rulings, following the submission by the SPO of the consolidated detailed notice and any resulting requests.

V. DISPOSITION

38. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **ORDERS** the SPO to file by **Wednesday, 14 April 2021**, a consolidated detailed notice comprising all material and evidence in its possession which has not been disclosed under Rule 102(1)(a)-(b) and 103 and which is relevant to the case, including but not limited to items disclosed following the Gucati Rule 102(3) Items, where they meet the aforementioned requirements;
- b. **ORDERS** the Defence to indicate to the SPO, by **Wednesday, 21 April 2021**, or at any time earlier, which items, among those listed in the consolidated detailed notice under paragraph 38.a, they seek to have access to by way of disclosure or inspection;
- c. **ORDERS** the Defence to submit to the SPO, by **Wednesday, 21 April 2021**, any final requests for pre-trial disclosure or inspection, including regarding any sufficiently specified items not included in the consolidated detailed notice under paragraph 38.a;
- d. **ORDERS** the SPO to seize the Pre-Trial Judge, **within five days** of the Defence indication(s) as referred to under paragraphs 38.b-c, with any grounds disputing the materiality of evidence or requests for protective measures or non-disclosure; and

- e. **ORDERS** the SPO, on the basis of any Defence indication(s) under paragraphs 38.b-c, to disclose to or provide the Defence with access to the material not subject to requests under paragraph 38.d no later than **Wednesday, 28 April 2021**, or within one week of the Defence indication, whichever is earlier.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 1 April 2021
At The Hague, the Netherlands.