



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: 18 May 2021

Language: English

Classification: Public

**Public Redacted Version of
Decision Authorising the Addition of Items
to the Specialist Prosecutor's Exhibit List**

Specialist Prosecutor
Jack Smith

Counsel for Hysni Gucati
Jonathan Elystan Rees
Huw Bowden

Counsel for Nasim Haradinaj
Toby Cadman
Carl Buckley

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

I. PROCEDURAL BACKGROUND

1. On 22 January 2021, the Pre-Trial Judge issued the Framework Decision on Disclosure of Evidence and Related Matters setting deadlines for disclosure.²

2. On 23 February 2021, the Pre-Trial Judge ordered the Specialist Prosecutor's Office ("SPO") to provide to the Defence by 19 March 2021 a chart containing further information as regards, *inter alia*, the batch of documents seized from the Kosovo Liberation Army War Veterans' Association on 8 September 2020 ("Batch 1").³

3. On 19 March 2021, the SPO disclosed an [REDACTED] declaration encompassing the aforementioned chart ("Batch 1 Declaration").⁴

4. On 1 April 2021, the Pre-Trial Judge ordered the SPO to provide to the Defence by 14 April 2021 a chart containing further information as regards a batch [REDACTED] ("Batch 4") and [REDACTED] ("Confidential Photographs"), including an indication of any overlap with Batch 1.⁵

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*, 22 January 2021, public, para. 85.

³ KSC-BC-2020-07, F00141, Pre-Trial Judge, *Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 23 February 2021, confidential.

⁴ KSC-BC-2020-07, Disclosure Package 15, 19 March 2021.

⁵ KSC-BC-2020-07, F00171, Pre-Trial Judge, *Confidential Redacted Version of the Decision on the Non-Disclosure of Information Requested by the Defence ("Batch 4 Decision")*, 1 April 2020, confidential, paras 23-24, 42.

5. On 9 April 2021, further to the time-limit set by the Pre-Trial Judge,⁶ the SPO submitted, *inter alia*, the list of proposed exhibits for presentation at trial (“Exhibit List”).⁷
6. On 14 April 2021, the SPO disclosed [REDACTED] declaration encompassing a chart with further information regarding Batch 4 and the Confidential Photographs (“Batch 4 Declaration”).⁸
7. On 29 April 2021, the SPO requested the Pre-Trial Judge to authorise the addition of the Batch 4 Declaration to the Exhibit List (“Initial Request”).⁹
8. On 30 April 2021, further to the SPO’s indication that the Batch 1 Declaration contained errors,¹⁰ the Pre-Trial Judge ordered the SPO to prepare a revised version thereof, rectifying said errors and any other inconsistencies and disclose this revised version to the Defence by 7 May 2021.¹¹
9. On 7 May 2021, the SPO disclosed a revised version of the Batch 1 Declaration and, further to additional revisions, a revised version of the Batch 4 Declaration.¹²
10. On 7 May 2021, the SPO notified the Pre-Trial Judge of the disclosure of the aforementioned revised versions and requested that in deciding upon the Initial Request, the Pre-Trial Judge considers the revised version of the Batch 4 Declaration (“Further Request”).¹³

⁶ KSC-BC-2020-07, F00148, Pre-Trial Judge, *Consolidated Calendar for the Remainder of the Pre-Trial Proceedings*, 8 March 2021, public, para. 6(a)(vii).

⁷ KSC-BC-2020-07, F00181/A03, Specialist Prosecutor, *Annex 3 to Submission of Pre-Trial Brief, Witness and Exhibit Lists, and Rule 109(c) Chart – List of Exhibits*, 9 April 2021, confidential.

⁸ KSC-BC-2020-07, Disclosure Package 22, 14 April 2021.

⁹ KSC-BC-2020-07, F00195, Specialist Prosecutor, *Prosecution Request to Add Items to the Exhibit List (“Initial Request”)*, 29 April 2021, confidential.

¹⁰ KSC-BC-2020-07, Disclosure Package 22, 14 April 2021, ERN 095162-095239, p. 2 (0951630).

¹¹ KSC-BC-2020-07, Pre-Trial Judge, *Oral Order for Revised Version of ERN 093492-093590 To Be Disclosed by 7 May 2021*, Transcript, 30 April 2021, public, p. 272, lines 6-12.

¹² KSC-BC-2020-07, Disclosure Package 28, 7 May 2021.

¹³ KSC-BC-2020-07, F00197, Specialist Prosecutor, *Notification of Disclosure of Revised Declarations and Related Request (“Further Request”)*, 7 May 2021, confidential.

11. On 9 May 2021, the Defence for Hysni Gucati (“Mr Gucati”) responded to the Initial Request (“Response”).¹⁴

12. On 17 May 2021, the SPO filed a reply to the Response.¹⁵

II. SUBMISSIONS

13. In the Initial Request, the SPO submits that the addition of the Batch 4 Declaration would not cause any undue prejudice to the Defence, as (i) the [REDACTED] appears on the SPO’s witness list, other declarations [REDACTED] appear on the Exhibit List and the declaration was only finalised after the deadline for submitting the Exhibit List; (ii) the request is being made less than a month after the deadline set by the Pre-Trial Judge for the filing of the Exhibit List; and (iii) the Defence has been put on timely notice of this intended addition.¹⁶

14. In the Further Request, the SPO adds that once the Initial Request is resolved, the SPO will file an amended Exhibit List replacing the ERN of the Batch 1 Declaration with the ERN of its revised version and, if granted leave, it shall also add the revised version of the Batch 4 Declaration to the Exhibit List.¹⁷

15. The Defence for Mr Gucati responds that the Initial Request does not show good cause, because the SPO does not explain why the material referred to in the Batch 4 Declaration has not been notified since September 2020 and why the declaration itself was not finalised before the deadline for the submission of the Exhibit List.¹⁸ The Defence further submits that it objects to the authenticity of the material referred to in

¹⁴ KSC-BC-2020-07, F00198, Defence for Mr Gucati, *Response to Prosecution Request to Add Items to the Exhibit List KSC-BC-2020-07-F00195* (“Response”), 9 May 2021, confidential.

¹⁵ KSC-BC-2020-07, F00202, Specialist Prosecutor, *Prosecution Reply to Gucati Response to Prosecution Request to Add Items to the Exhibit List* (“Reply”), 17 May 2021, confidential.

¹⁶ Initial Request, para. 3.

¹⁷ Further Request, para. 6.

¹⁸ Response, paras 12-17.

the Batch 4 Declaration and that according to Rule 95(4)(c) of the Rules, such an objection should be recorded in the Exhibit List.¹⁹

16. The SPO replies, *inter alia*, that the Defence for Mr Gucati failed to present the relevant procedural history in its proper context and that a brief summary of the content of Batch 4 had previously been contained in a declaration which was disclosed to the Defence on 19 February 2021 and included in the Exhibit List.²⁰ The SPO further submits that Rule 95(4)(c) of the Rules only requires that the Exhibit List record, where possible, Defence objections to the authenticity of the items included therein and not Defence objections of a different nature or concerning items not included in the Exhibit List.²¹

III. APPLICABLE LAW

17. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall issue any orders necessary for the preparation of a fair and expeditious trial.

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

IV. DISCUSSION

19. As regards the notification of Batch 4, the Pre-Trial Judge recalls that a summary of the material contained in Batch 4 was provided in a declaration disclosed to the Defence on 19 February 2021.²² Furthermore, Batch 4 was included on the SPO's initial notice under Rule 102(3) of the Rules, filed on 19 February 2021.²³ On this basis, on

¹⁹ Response, paras 18-20.

²⁰ Reply, paras 1-2.

²¹ Reply, para. 6.

²² KSC-BC-2020-07, Disclosure Package 7, 19 February 2021, ERN 091927-091930.

²³ KSC-BC-2020-07, F00133/A01, *Annex 1 to the Prosecution's Rule 102(3) Notice*, 19 February 2021, confidential, Item 1.

3 March 2021, the Defence for Mr Gucati requested the disclosure of the aforementioned batch.²⁴ The Pre-Trial Judge accordingly finds that the notification by the SPO of Batch 4 was undertaken without undue delay and within the time-limit set by the Pre-Trial Judge for filing the notice under Rule 102(3) of the Rules.

20. As regards the preparation and disclosure of the Batch 4 Declaration, it is recalled that, on 1 April 2021, further to the SPO's application for non-disclosure of Batch 4,²⁵ the Pre-Trial Judge decided that, while Batch 4 fell within the scope of Rule 102(3) or 103 of the Rules, its disclosure posed a justifiable risk to ongoing or future investigations, the security of witnesses, the public interest and the interest of third parties.²⁶ Accordingly, the Pre-Trial Judge ordered the SPO to prepare the Batch 4 Declaration and disclose it by 14 April 2021.²⁷ The SPO complied with this order.²⁸ The Pre-Trial Judge accordingly finds that the preparation and disclosure of the Batch 4 Declaration was undertaken pursuant to the aforementioned order and without undue delay.

21. As regards the addition of the Batch 4 Declaration to the Exhibit List, the Pre-Trial Judge notes that the SPO has apparently decided to present this declaration at trial, notwithstanding its prior stance that the material pertaining to Batch 4 was not subject to Rule 102(1)(b) of the Rules. In similar fashion, the SPO added the Batch 1 Declaration to its Exhibit List, despite its earlier position that the material pertaining to Batch 1 was not subject to Rule 102(1)(b) of the Rules.²⁹ The Pre-Trial Judge considers that the SPO's decision to present the Batch 1 Declaration and the Batch 4

²⁴ KSC-BC-2020-07, F00154, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Request for Non-Disclosure of Certain Information Requested by the Defence Pursuant to Rule 102(3) ('SPO Request Non-Disclosure Batch 4')*, 17 March 2021, confidential, para. 8.

²⁵ SPO Request Non-Disclosure Batch 4.

²⁶ Batch 4 Decision, paras 17, 21.

²⁷ Batch 4 Decision, para. 23-24, 42.

²⁸ KSC-BC-2020-07, Disclosure Package 22, 14 April 2021.

²⁹ KSC-BC-2020-07, F00181/A03, Specialist Prosecutor, *Annex 3 to Submission of Pre-Trial Brief, Witness and Exhibit Lists, and Rule 109(c) Chart – List of Exhibits*, 9 April 2021, confidential, Item 361.

Declaration at trial comes as a result of the Pre-Trial Judge's orders for the preparation and disclosure of the charts contained in the respective declarations and could not have been made prior to those orders. Furthermore, in relation to the Batch 4 Declaration, the Pre-Trial Judge notes that the Initial Request was submitted twenty days after the filing of the Exhibit List, five days after the disclosure of the aforementioned declaration, six weeks in advance of the anticipated submission by the Defence of its Pre-Trial Brief and two months before the envisaged transmission of the case file. The Pre-Trial Judge accordingly finds that the Initial Request was submitted in a timely manner and the addition of the Batch 4 Declaration to the Exhibit List does not cause prejudice to the Defence.

22. As regards recording Defence objections to the authenticity of items included in the Exhibit List, the Pre-Trial Judge observes that the submissions of the Defence for Mr Gucati refer to the material pertaining to the Batch 4 Declaration and not to the declaration itself. Moreover, the Defence for Mr Gucati does not provide any reasons for challenging the origin or authorship of the Batch 4 Declaration or of the material pertaining to it. The Pre-Trial Judge accordingly finds that such submissions do not amount to an objection to the authenticity of the Batch 4 Declaration and need not be recorded in the Exhibit List.

23. In light of the foregoing, the Pre-Trial judge finds it appropriate to grant the Initial Request, taking in consideration the revised versions identified in the Further Request.

V. DISPOSITION

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

- a. **AUTHORISES** the addition of the revised versions of the Batch 1 Declaration and the Batch 4 Declaration to the Exhibit List; and
- b. **ORDERS** the SPO to file an amended Exhibit List containing the aforementioned versions by **Friday, 21 May 2021**.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Tuesday, 18 May 2021
At The Hague, the Netherlands.