

1 Tuesday, 30 March 2021

2 [Status Conference]

3 [Open session]

4 [The accused were not present]

5 --- Upon commencing at 3.00 p.m.

6 JUDGE GUILLOU: Good afternoon everyone in and outside the
7 courtroom.

8 Madam Court Officer, can you please call the case.

9 THE COURT OFFICER: Good afternoon, Your Honour. This is
10 KSC-BC-2020-07, The Specialist Prosecutor versus Hysni Gucati and
11 Nasim Haradinaj.

12 JUDGE GUILLOU: Thank you, Madam Court Officer.

13 Now I would kindly ask the parties to introduce themselves,
14 starting with the Specialist Prosecutor.

15 MR. PACE: Good afternoon, Your Honour, and to all those here
16 and joining us remotely today. Appearing for the Specialist
17 Prosecutor's Office today are Alex Whiting, Deputy
18 Specialist Prosecutor; Valeria Bolici, Prosecutor; Matt Halling,
19 Associate Prosecutor; Line Pedersen, Case and Evidence Manager; and I
20 am James Pace, Associate Prosecutor.

21 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

22 Now I turn to the Defence, starting with Mr. Rees, please.

23 Mr. Rees, microphone, please.

24 MR. REES: [via videolink] Your Honour, my name is Mr. Rees. I
25 appear on behalf of Hysni Gucati. I'm assisted by co-counsel

1 Mr. Huw Bowden.

2 JUDGE GUILLOU: Thank you, Mr. Rees.

3 And Mr. Cadman, please.

4 MR. CADMAN: [via videolink] Good morning, Your Honour. Toby
5 Cadman for Nasim Haradinaj. I'm joined today by Legal Associate
6 Miriam Boxberg.

7 JUDGE GUILLOU: Thank you, Mr. Cadman.

8 And for the record, I am Nicolas Guillou, Pre-Trial Judge for
9 this case.

10 Before we proceed with our agenda today, I remind the parties
11 that should we experience any technical difficulties with the
12 video-conference, please inform the court officer and myself
13 immediately by waving your hand. If the connection with any of the
14 remote participants fails, we will do our best to reconnect
15 immediately. And if the issue cannot be resolved immediately, I may
16 have to adjourn the hearing for a couple of minutes to ensure that
17 the line is reconnected.

18 Let me now move to the recent procedural history of the case.

19 On March 23, I scheduled the third Status Conference for this
20 case. My goal today is to review the status of the case and to
21 organise exchanges between the parties to ensure an expeditious
22 preparation for trial. In particular, I wish to discuss disclosure
23 and the status of Defence investigations.

24 I thank the SPO and the Defence for their written submissions.
25 There is no need to repeat your submissions in detail, but I will

1 invite the parties to respond to each other's submissions in a
2 concise fashion following each item in the agenda.

3 As usual, I remind the parties to give prior notice should any
4 submission require the disclosure of confidential information so that
5 we can go into private or closed session.

6 Let me now move to the first item in our agenda. I would like
7 to hear from the parties on the progress made in the disclosure of
8 evidentiary material. I remind the parties that several requests
9 related to disclosure are pending: First, the Prosecution's
10 submission on the materiality of certain information requested by the
11 Defence pursuant to Rule 102(3); this is filing F149. Second, the
12 Prosecution request for non-disclosure of certain information
13 requested by the Defence, pursuant to Rule 102(3); this is filing
14 154. And finally, the Prosecution request for authorisation of
15 non-standard redactions; this is filing F155. I note that the
16 Defence did not respond to this filing and I inform the parties that
17 I intend to issue an oral order on this request at the end of the
18 Status Conference today.

19 In the Scheduling Order for this Status Conference, I asked the
20 SPO for submissions in relation to each of the items requested by the
21 Defence under Rule 102(3) before the last Status Conference. I note
22 in that regard that the submission of the Gucati Defence that their
23 request was for such items to be listed in the Rule 102(3) notice,
24 and they reserved their right to request access after receiving such
25 notice.

1 In any event, in the Scheduling Order I asked the SPO to
2 indicate whether the item had been disclosed to the Defence and,
3 where that is not the case, the availability and disclosability of
4 such items. I thank the SPO for its submissions on this topic.

5 I would now like to hear the parties on, first, the
6 consideration based on which the initial Rule 102(3) notice was put
7 together, keeping in mind that, according to Article 21(6) and Rule
8 102(3), the SPO must provide detailed notice of any material and
9 relevant evidence or facts in its possession; then on the difference
10 between such considerations and the test of materiality, if any; the
11 *inter partes* discussions with the Defence since the last Status
12 Conference; the list provided in its annex to its submissions for
13 this Status Conference; in relation to this list and in view of the
14 additional information disclosed pursuant to the Defence request for
15 several items as provided in Annex 1 of the SPO's submissions whether
16 such items were included in the SPO's initial Rule 102(3) notice, and
17 if not, why not; and finally, the impact of the last third party
18 requests on the disclosure process and the timeline for the SPO's
19 pre-trial brief.

20 And finally, and more generally, I would like to know whether
21 the parties are experiencing any difficulties related to the
22 remainder of the disclosure process.

23 A lot of subtopics, I would say, on this disclosure issue.

24 Mr. Prosecutor, you have the floor.

25 MR. PACE: Thank you, Your Honour. I will do my best to address

1 all the issues, but please let me know if I miss any of them.

2 JUDGE GUILLOU: I will remind you of them. Don't worry.

3 MR. PACE: I will start by understanding -- by setting out what
4 the Prosecution has previously set out in terms of the approach to
5 the Rule 102(3) which, I understand, is the first request which the
6 Judge requires clarification on.

7 I refer in particular to our filing from last Friday, 26 March,
8 and that is filing 164. It's a reply. And as we set out therein, we
9 note that pursuant to Article 21(6) and Rule 102(3), the SPO is
10 obliged to provide detailed notice to the Defence of all material and
11 evidence in its possession which could reasonably be considered for
12 or against the accused.

13 We understand this to mean that there is a need for at least an
14 initial assessment and that is in conscious with certain submissions
15 made by the Defence, which, in our understanding, implies the Defence
16 would like any and all material without any initial review to be
17 placed on a list. That is not what we understand the law or the
18 rules or Your Honour's Framework Decision to mean.

19 That being said, as we set out in our reply, we fully understand
20 that the assessment must be done in good faith and that the notice
21 obligation is a broad one for 102(3) purposes and that goes beyond
22 items directly relevant to the facts.

23 As we have also previously set out before Your Honour, we
24 understand that the 102(3) process is something that happens after a
25 determination in relation to what is going to be disclosed pursuant

1 to Rule 102(B) and pursuant to 103. So the Prosecution did that, we
2 reviewed all material, we considered what to disclose under Rule
3 102(B) and what to disclose under Rule 103, and reviewed the
4 remaining material in terms of our disclosure purposes for
5 Rule 102(3).

6 Now, multiple times in these proceedings, the Defence has made
7 an issue of the fact that the Rule 102(3) notice was limited in
8 volume and to that our response, which we have also put forth before
9 Your Honour, is that we adopted a wide approach to all three
10 categories. However, that meant that the information disclosed under
11 102(1)(b) was voluminous and the same under 103. That meant that,
12 naturally, the residual material was limited in scope.

13 In terms of the arguments by the Defence in relation to listing,
14 as we also have set out in our reply, the Specialist Prosecutor's
15 Office is not obliged to confirm or deny possession or to provide
16 detailed notice of irrelevant items based on nothing more than a bare
17 request from the Defence to do so. So this is clearly one aspect in
18 which the Prosecution and the Defence have different opinions on what
19 should be done, and we, of course, submit that our understanding is
20 the correct one, as it is founded in the law, in the rules, and also
21 in Your Honour's Framework Decision in particular.

22 In terms of some of the other issues that Your Honour requested
23 submissions on, in terms of the disclosure to the Defence subsequent
24 to the requests, when we responded to the requests, we provided -- we
25 understood it to be disclosure requests as well. The items that we

1 did provide were not under Rule 102(3) notice. We see no need to add
2 it to the 102(3) notice when we are providing such items. In
3 particular in this regard, we have to remember that the SPO has
4 disputed the materiality of two of those 27 requests, and as we set
5 out in our submissions on that issue, the reason why we seized
6 Your Honour is because we feel that we have discharged our
7 obligations to the extent that we understood what the Defence wanted
8 through those two specific requests. Otherwise, we don't know what
9 else it includes because it is overly broad and does not allow us to
10 truly understand what else the Defence is after.

11 So when we seize Your Honour in relation to materiality, as we
12 set out in our submissions, it is both because the request is broad
13 and we don't know what it means; also, we find it unfair for
14 something to be phrased in such broad terms, using terms such as "all
15 material" and also because materiality of course indicates that we do
16 not feel the Defence established even the *prime facie* reason for that
17 information to be provided, whatever the information in addition to
18 that disclosed may be.

19 I'm not sure if Your Honour wanted anything else in particular
20 at this stage in relation to disclosure. If not, I can move to the
21 third party requests update.

22 So in relation to the third party requests, in our submissions
23 prior to the last Status Conference, we noted that there were two
24 such requests. Since that time, we received, I believe it was on 18
25 March, a response to one such request, and we disclosed the material

1 emanating therefrom the day after. We are yet to receive information
2 from the second request that we had mentioned. We are doing
3 everything that we can to obtain that information before the 9 April
4 deadline as set out in the consolidated calendar.

5 Of course, because a request is to a third party, we are
6 somewhat dependent on that third party, but we will, of course, keep
7 Your Honour informed and we will make any necessary submissions in
8 terms of whether delays are envisioned or whether there are any other
9 steps which we could take in that regard.

10 And so for now, unless Your Honour has anymore information
11 requested of me, I thank you for the time.

12 JUDGE GUILLOU: Just one question before I give the floor to the
13 Defence.

14 Some initial material were not disputed in terms of materiality,
15 but they were not in the initial list of the 102(3) material. Is
16 there a specific reason for that? Because you've disclosed them at a
17 later stage.

18 MR. PACE: Yes, Your Honour. When we disclosed such material to
19 the Defence, I believe we did provide a caveat that we are not
20 providing such -- the provision of such material is without a
21 concession as to the materiality thereof. In the spirit of what
22 Your Honour ordered and also in the spirit of cooperation, where the
23 Defence provide requested items which we found could be somewhat
24 reasonable, despite the fact that we did not think that they did fall
25 under our disclosure obligations as such, we provided that material.

1 The Prosecution, in this case, is not trying to hide anything.
2 We are happy to cooperate where that is possible and within the
3 realms of reasonability.

4 I won't get into too many items unless Your Honour wants, in
5 which case we would move to private session. But, for example, in
6 relation to three of the requests of the Defence among those 27
7 requests, we provided certain publicly available information. The
8 Prosecution did not assess that that information is going to be in
9 any way useful to the Defence, because they have nothing to compare
10 it to pursuant to a request from Your Honour. And I'm sorry to be
11 speaking in very broad terms. If Your Honour doesn't understand what
12 I mean, please let me know and we will move to private session.

13 So although we did provide, for example, certain orders and
14 certain requests to the Defence, we did so not because we thought
15 that they did fall within our disclosure obligations as such, in
16 particular, for the reason that we're not certain what the Defence
17 want to do, but we understood the Defence to be requesting the
18 provision of that material so that they could have, for example, a
19 confirmation of the existence thereof. Certain information we
20 disclosed to the Defence made mention of certain material. We did
21 not think that material needed to be disclosed, but because the
22 Defence raised it, we thought, okay, that's fair, we referred to it,
23 then we provided it to them. So that is the main -- the reason for
24 that, really.

25 Thank you, Your Honour.

1 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

2 Now I turn to the Defence.

3 Mr. Rees.

4 MR. REES: [via videolink] Your Honour, the SPO says that it does
5 not understand what is being requested by the Defence. What is being
6 requested is perfectly clear and it is what Your Honour has
7 previously ordered. The Framework Decision of Your Honour at
8 paragraphs 46 and 48 required the SPO to prepare and disclose a
9 detailed Rule 102(3) notice of all material and evidence in its
10 possession without delay. That is what is being requested from the
11 SPO.

12 The Rule 102(3) notice, Your Honour said, was to comprise any
13 residual information potentially material to the Defence after the
14 items have presented and exculpatory evidence disclosed. Your Honour
15 said, quite properly, that the formulation material to the defence
16 preparation was to be construed broadly and was to refer to all
17 documents and objects of relevance to the preparation of the defence
18 case.

19 Your Honour made the point that what is relevant should not be
20 necessarily limited by the temporal scope of the Confirmed
21 Indictment, nor should it be confined to material relevant to counter
22 in the SPO's case. Your Honour said, in the Framework Decision, that
23 the defence preparation is a broad concept, need not be limited to
24 what is directly linked to exonerating or incriminating evidence or
25 related to the SPO's case.

1 It follows that the formulation of Your Honour in the
2 Framework Decision, residual information potentially material to the
3 defence is to be construed even more broadly than the formulation
4 material to the defence preparation.

5 Your Honour has already noted that the SPO has been disclosing
6 to the Defence items which have not previously been under the
7 Rule 102(3) list, that list, which is required by Your Honour and by
8 Rule 102(3), to be a detailed notice of all material and evidence in
9 its possession and to be disclosed without delay. The SPO clearly do
10 not understand, or at least they do not accept, and refuse to accept,
11 Your Honour's clear ruling as to the very broad scope of that list
12 and, of course, the very broad scope of the list as required by
13 Rule 102(3) itself.

14 Your Honour, we have put in submissions as to the scope of
15 Rule 102(3) and the notice required therein both in writing in
16 relation to the submissions for this Status Conference, which
17 Your Honour will find at paragraphs 5 through to 15. Your Honour
18 will note that we have also put in detailed submissions again on the
19 scope of the Rule 102(3) notice in filing F00157, which is a
20 confidential filing.

21 There are -- within that filing, there are further submissions
22 designed to assist the SPO in interpreting the very broad scope of
23 the Rule 102(3) notice. Is Your Honour content for me to refer to
24 those submissions? I can direct Your Honour to the specific
25 paragraph, if that assists.

1 JUDGE GUILLOU: I don't think it's necessary. I have your
2 submissions.

3 MR. REES: [via videolink] Well, in which case I'm not sure I can
4 assist any further. At some point, Your Honour, the SPO has to
5 acknowledge that there is a distinction between the Rule 102(3)
6 notice and the very broad scope of that notice, as Your Honour has
7 set out, a notice requiring details of all material evidence in the
8 possession of the SPO, and the second distinct stage which is set out
9 within Rule 102(3), which is the handling of requests by the Defence
10 to view material from that Rule 102(3) notice.

11 The materiality test that the SPO seeks to apply now for the
12 compilation of the notice itself does not apply to the notice. The
13 materiality test that it seeks to apply relates to the second later
14 stage, which is any requests from the Defence to see material,
15 inspect it, or have disclosed to it copies of material that is listed
16 on the notice. At some point the SPO has to acknowledge that
17 distinction and recognise Your Honour's clear ruling and comply with
18 it.

19 Unless I can assist any further at this stage, Your Honour.

20 JUDGE GUILLOU: Thank you, Mr. Rees. I might give you the floor
21 a little later.

22 But first, Mr. Cadman, on this specific issue of the Rule 102(3)
23 notice first, and especially on the test of materiality and the
24 unicity of the test or is it a two-stage process, as Mr. Rees just
25 mentioned.

1 You have the floor.

2 MR. CADMAN: [via videolink] Thank you, Your Honour. First of
3 all, just let me say thank you, Your Honour, for agreeing to move
4 this hearing to the afternoon so that I could attend. I'm grateful
5 for that.

6 The first point I would make is that the Defence for
7 Mr. Haradinaj has joined the Defence for Mr. Gucati in the written
8 submissions and actually joins the position put forward today as the
9 joint Defence position. These are matters that are not new to the
10 SPO, and they're not new to this Court. We have been repeatedly
11 putting them forward for some time, so I don't want to repeat what's
12 in the written submissions and what counsel for Mr. Gucati has
13 already said as it will just be repetitive.

14 What I will say is that part of what the Prosecutor has
15 responded to relates to a request, a detailed request that we had put
16 to the Prosecutor following our own Defence investigations that
17 demonstrate that very little has been done in terms of a proper
18 investigation. So that's, obviously, going to cause some
19 difficulties.

20 We have received a response - and I'm grateful to the Prosecutor
21 for responding to those matters - that have also resulted in the
22 disclosures that have been made certainly within the last couple of
23 days, but I think that there is some concern as to the SPO's position
24 that they appear to rule whatever request the Defence makes as
25 irrelevant information and does not meet the test of materialities.

1 That is some concern, and so I will just join what Mr. Rees has
2 already said in relation to that.

3 I see Mr. Rees has put his hand up, so I will defer to him. But
4 our position is joined in this regard, and we have to continue to
5 express some concern as to the manner in which the SPO is conducting
6 themselves in terms of what they believe their obligations to be and
7 not following Your Honour's ruling.

8 JUDGE GUILLOU: Thank you, Mr. Cadman.

9 Let me turn to the Prosecution again. If you can elaborate on
10 what Mr. Rees just explained on the materiality test, I would
11 especially like you to give more detail about how do you interpret
12 Rule 102(3) and Article 21(6)? Especially, do you see your
13 obligation to provide notice as Mr. Rees just mentioned as a two-step
14 process: First, you identify the list, and second -- I'll give you
15 the floor in a second, Mr. Rees.

16 First, you identify the list, and then you, basically, respond
17 to the request of the Defence, that is, using the materiality test at
18 this stage, or do you use one materiality test, whether it's
19 *prima facie* first and then with the Defence request, when you prepare
20 the Rule 102(3) notice.

21 Before I give you the floor, I see that Mr. Rees wanted the
22 floor urgently.

23 So I give you the floor very briefly, Mr. Rees, because I want
24 to hear the Prosecution on that. Please.

25 MR. REES: [via videolink] Thank you, Your Honour. It was only

1 to remind Your Honour that it's not my submission that there is a
2 two-stage test, or at least I do adopt that. It is, in fact,
3 Your Honour's ruling in the Framework Decision that there is a
4 two-stage approach.

5 Your Honour has ruled at paragraphs 46 to 48 of the
6 Framework Decision that the SPO are to prepare and disclose a
7 detailed Rule 102(3) notice of all material evidence in its
8 possession without delay, and Your Honour added, by that stage, "by
9 19 February 2021 at the latest."

10 Your Honour then continue that, thereafter, the Defence shall
11 indicate to the SPO which items among those listed in the detailed
12 notice it seeks to have access to by way of disclosure or inspection.
13 Your Honour has set out that two-stage process. It's one that we
14 agree with, and it forms part of Your Honour's order.

15 JUDGE GUILLOU: I'm glad you agree with my decision, Mr. Rees,
16 but now I would like to hear from the Prosecution if they agree as
17 well. And the other main question is what is the test for these two
18 steps, because that is something that is apparently in dispute
19 between all of you.

20 Mr. Prosecutor.

21 MR. PACE: Your Honour, I'll start by saying something we've
22 said before, which is that the case against the accused is simple and
23 straightforward.

24 The SPO fully understands and has satisfied its disclosure
25 obligations and will continue to do so. The relevant information has

1 been in the Defence's possession for a while now. The Defence has
2 tried to distract from the core issues at the heart of this case
3 by -- including by seeking information that the law and the rules
4 give them no basis to obtain.

5 Your Honour has previously issued an order to the Defence to
6 inform the Prosecution of any items they deem should be added to the
7 Rule 102(3) list, setting 5 March as a deadline for that. The SPO
8 received at once its request and responded to that in detail, as we
9 also reported to Your Honour, and after the deadline, we also
10 received another request and responded to that one as well.

11 What we have heard counsel for Mr. Gucati say today, echoing
12 previous submissions, is that all material and evidence in the
13 possession of the SPO should be on this list. This is not what the
14 SPO is obliged to do, Your Honour, neither would it be a workable
15 solution.

16 First of all, the SPO, as Your Honour and everybody here well
17 knows, investigates multiple cases. I'm not sure what listing
18 information in relation to other cases would do to advance the
19 proceedings in this particular case. We do understand, as I've said,
20 disclosure obligations. I won't go over what I said earlier,
21 specifically as set out in our reply. Yes, we do understand that
22 there is a two-step test. That's not something that we can contest.
23 The rules and Your Honour told us to list material and then to
24 disclose any request therefrom. We understand our requests -- our
25 obligations to be broad ones, as I already explained.

1 I will say that, although Your Honour has ordered the Defence to
2 point out any material they believe should be on the list, when we
3 did respond on both occasions to the Defence, we heard nothing
4 further. The only pending issue to our knowledge is that before
5 Your Honour in relation to the two requests that we disputed the
6 materiality of.

7 The Defence submissions have always been with the caveat that
8 this is not an exhaustive list, and, of course, the Defence, in our
9 opinion, is using this listing interpreted in an overly broad manner
10 as an excuse to find I'm not exactly sure what, Your Honour, and that
11 should not be allowed. The proceedings need to remain focused. When
12 the Defence have made requests, as I explained earlier, and we have
13 deemed that although they are not within our 102(3) obligations,
14 that's not a problem. We can disclose; we did so.

15 I will give another example of that, Your Honour. Actually, it
16 came to me after I provided my response earlier and that is, for
17 example, the SPO had previously extracted information from certain
18 documents and then disclosed them in another format. The Defence
19 took issue with that, or it seems to have taken issue with that, and
20 the SPO deemed that although we had disclosed the relevant
21 information in order to appease the Defence and in the spirit of
22 cooperation, we will, nevertheless, disclose the original documents
23 and we did so. In that case, Your Honour, for example, those items
24 were not on the Rule 102(3) list because we had actually disclosed
25 the relevant contents thereof.

1 So all this to say that we have listened to the Defence requests
2 in terms of what they believe to be on the notice, we have disclosed
3 that which we believe they could be reasonably entitled to, and we
4 have seized Your Honour when we had issues in that regard, as
5 Your Honour instructed us to do.

6 I will also like to address the fact that the Haradinaj --
7 counsel for Mr. Haradinaj has said that very little has been done in
8 terms of investigations, which echoes that which was included in the
9 Haradinaj submissions for this Status Conference.

10 In that regard, Your Honour, I and the office, of course,
11 disagrees. These submissions, based on the questions put by the
12 Haradinaj Defence, are another indication that the Defence is seeking
13 to make this trial about something that it is not actually about.

14 I believe it was something, like, 12 of the 39 requests we
15 received which concerned, for example, the identification of the
16 person who dropped the documents at the KLA War Veterans Association.
17 We have disclosed, as we have said before, and we've informed them
18 before, the information we have about steps taken regarding the
19 potential identity of that person; in particular, there was one
20 interview which we provided to the Defence.

21 I'm not sure what exactly the Defence hopes to achieve by, for
22 example, scouring through hours of CCTV footage from old neighbouring
23 buildings or the street in order to identify the person who dropped
24 this information off. The accused are not charged with having
25 dropped any information off. The charges specifically relate to what

1 happened right after they received that information. To the extent
2 that the Defence is concerned about any SPO involvement in the
3 provision of those items, the SPO has said multiple times - and I
4 will say it again - there was no SPO involvement. There was no
5 entrapment and no sting operation. Beyond that, Your Honour, I'm not
6 certain what we can do.

7 Those are my submissions, unless Your Honour needs anything
8 further in this regard.

9 JUDGE GUILLOU: If I may, because I'm a little stubborn, on the
10 materiality test, is it the same test you apply when you prepare the
11 102(3) list, and do you think it's the same test that should be
12 applied by the Defence; or, do you see this, as Mr. Rees presented in
13 his written submissions, as a different one?

14 MR. PACE: The test which the Defence seeks to put forward goes
15 far beyond what is required in terms of the Specialist Prosecutor's
16 Office's obligations. We do not contest that there is a two-step
17 process, which is listing and then thereafter disclosure. And we
18 understand that the listing is done pursuant to Rule 102(3) which
19 refers, of course, to Article 21(6), and we have interpreted in that
20 regard, also, in the spirit of the Framework Decision, understanding
21 them broadly, we put them on that list, because, for example, what we
22 may understand as material or relevant to the Defence preparation,
23 the Defence may not have an interest in.

24 So the purpose of that list is for us to put that over there,
25 and then the Defence, as they have already done in this case, can

1 request which items they want. They don't need to request every
2 single item. In this case, they have, other than one item, which is
3 a forensic copy of another.

4 So there is no argument about the fact that this is a two-step
5 procedure. It would be pointless for us to argue that. It's not
6 because it is, and Your Honour has so ordered. The difference
7 between the parties is clearly the fact that the Defence wants a
8 list -- the initial list to essentially be one with no parameters
9 whatsoever.

10 We have heard it today and before again that it is all material
11 and evidence in the possession of the SPO which should be listed.
12 There is no basis for that assertion. None whatsoever. And as I
13 said, should that have been the case, proceedings would be endless,
14 there would be hundreds of requests for protective measures, disputes
15 as to materiality. That is clearly not what was intended by the
16 framework that we have.

17 So, Your Honour, just again to be clear - and I know I'm
18 repeating myself - we interpreted our obligations broadly. We listed
19 that material. When the Defence wanted that material from the list,
20 we provided it.

21 Thank you, Your Honour.

22 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

23 Mr. Rees, I imagine that you want to reply.

24 MR. REES: [via videolink] I do, thank you, Your Honour.

25 And I think, with Your Honour's leave, I should be allowed to

1 refer to just the conclusion of my filing F00157, because Mr. Pace
2 has inaccurately suggested that we propose a test for the first
3 stage, the compilation of the Rule 102(3) notice, which has no
4 boundaries.

5 Firstly, the SPO has Your Honour's Framework Decision, and
6 Your Honour's Framework Decision uses the words that are set out in
7 Rule 102(3) to set out the scope of the notice. They're not my
8 words. They are the words that are set out in the rules. And, as
9 Your Honour quoted, those rules require the SPO to prepare and
10 disclose a detailed Rule 102(3) notice of all material and evidence
11 in the Prosecutor's possession. Those are the words of Your Honour
12 and the words of the rules.

13 Your Honour, in the Framework Decision, gave -- set out what
14 that formulation was to include, and it was to include any residual
15 information potentially relevant to the Defence, for the materiality
16 test that the SPO applies is a test to be applied to requests for
17 disclosure or inspection of items from the list. The list itself,
18 according to Your Honour's Framework Decision, is to be compiled
19 using a different and broader test, namely, information potentially
20 relevant.

21 In our submissions, filing F00157, we gave some further
22 assistance to the Prosecutor as to what that might mean, what might
23 "potentially relevant material" mean, and we suggested it should
24 include all material which has some relation to an offence under
25 investigation or any person being investigated or under surrounding

1 circumstances of the case.

2 That is not a test without boundaries. It's a perfectly
3 explicable test, and it's one which any investigation ought to easily
4 be able to comply with because they should be aware themselves of
5 what material they have which has some relation to any offence that
6 they're investigating or any person that they're investigating or on
7 the surrounding circumstances of the case.

8 So I am glad that the Prosecution seem finally to accept that
9 there is a two-stage approach in Rule 102(3). The SPO has not
10 said -- whilst they acknowledge that there is a two-stage test, they
11 have not set out what test they apply to the production of the first
12 stage, namely, what material should go on the Rule 102(3) notice.
13 And we say that, in fact, Your Honour has already set out a ruling on
14 the scope of that notice, and we have provided further submissions
15 which we hope clarify and will assist the SPO in complying with
16 Your Honour's ruling going forward.

17 JUDGE GUILLOU: Thank you, Mr. Rees.

18 Mr. Cadman, do you have anything to add on this topic?

19 MR. CADMAN: [via videolink] Your Honour, there's not much I can
20 add that Mr. Rees hasn't already stated.

21 We, on the Defence side, agree on what the test should be.
22 Again, we're not seeking material that is related to other ongoing
23 matters. I think it would be rather silly of us to suspect that the
24 SPO is not dealing with any other cases. We're only asking for
25 matters that are potentially relevant to this case. And other than

1 that, there's nothing further that I can add.

2 JUDGE GUILLOU: Thank you, Mr. Cadman.

3 Mr. Prosecutor, on this, do you have anything to add? No?

4 Just before we finish the topic of disclosure, I asked you what
5 were the result of the *inter partes* discussions. I understand that
6 some problems have been resolved, so to say, because there has been a
7 couple of documents that have been disclosed in the past week or past
8 weeks. Is there any room for further *inter partes* discussion, or now
9 is there an urgent need to resolve the matter we just discussed in
10 order to finalise the disclosure process?

11 Mr. Prosecutor.

12 MR. PACE: Yes, Your Honour. So as I said, we responded to the
13 Defence. The Defence did not subsequently get back to us in relation
14 to any specific parts of our response. Should they be willing to,
15 for example, provide more clarification or have further questions
16 arising from either our response *inter partes*, as also submitted to
17 Your Honour, or from the material we disclosed as a result thereof,
18 we would be very happy to engage. That's obviously not a problem at
19 all.

20 And this applies to both requests from the Defence, the first
21 one being from the Gucati Defence, which Your Honour has now been
22 informed of through the annex to our submissions for the Status
23 Conference, and Your Honour has not been informed about the specifics
24 of the other *inter partes* request which I referred to earlier, but in
25 that, rather than requests, it was posed as questions to the

1 Prosecution about our investigation, which we, of course, interpreted
2 to be a request as to whether certain material is or is not in our
3 possession. We responded to the Defence, and again from that, we
4 haven't heard any further communication. We welcome that,
5 Your Honour, and that's not any problem.

6 One of the issues that, of course, is one that divides the
7 parties in this case is that we have clearly and many times now said
8 that, in creating the list, we are mindful of our obligations under
9 the Statute and the rules and the Framework Decision, in particular,
10 paragraph, I believe it is, 45, thereof, Your Honour, and that is how
11 we created the list. I'm not sure. Maybe something was lost. But
12 to be clear, that is the basis upon which we created and generated
13 that list. Also reminding Your Honour of our submissions earlier
14 about the fact that the large volume of material disclosed under
15 other rules necessarily meant that this list was going to be
16 relatively shorter.

17 So we have no problem, Your Honour, engaging in further requests
18 in this regard. I do note Your Honour has set 5 March as the
19 deadline for the request by the Defence to add any particular
20 material, but it does not seem that the exchange has been
21 particularly productive in terms of the Defence is still requesting
22 Your Honour for us to provide a new list. There is -- that's not
23 going to really get us much further. If there are further specific
24 items or categories, we would be willing to respond to that again, of
25 course, Your Honour.

1 Thank you.

2 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

3 Mr. Rees, on these *inter partes* discussions, you have the floor.

4 MR. REES: [via videolink] Well, we're grateful, Your Honour,
5 that we have had some further disclosure from the SPO in relation to
6 our requests that have taken place on an *inter partes* basis. We do
7 acknowledge that and we're grateful.

8 We do agree with Your Honour's assessment, though, that at this
9 stage there is an urgent need for Your Honour to really set out, if
10 need be again for the SPO, a clear approach for them to apply to
11 producing the Rule 102(3) notice.

12 We have, as Mr. Pace has said, suggested a number of given items
13 or categories of material that should, we expect, appear on the
14 Rule 102(3) notice, and although it has been skirted over very
15 briefly by Mr. Pace, there are two very important categories that
16 have been referred to in their third Status Conference submissions as
17 "category" or "request A" and "request B," two important categories
18 of material that are subject to an application by them to
19 Your Honour, which we responded to, and yet to be determined.

20 As Mr. Pace has said, when we have put forward suggestions for
21 types of categories and material that we would expect to be on the
22 list, we have always made it clear that that list, they are
23 suggestions and not exhaustive, and that's because it is clear on the
24 face of 102(3), and it makes perfect sense, that the responsibility
25 for putting together the Rule 102(3) notice of all the material in

1 the Prosecutor's possession, that responsibility falls upon the
2 Specialist Prosecutor. They know what they have. They know the full
3 extent of the material and the detail of it in the way that the
4 Defence do not, and they cannot abrogate their responsibility in that
5 regard by simply asking us to continue putting forward suggestions to
6 them as to what material should be on the list and then them avoiding
7 using the list and simply applying a materiality test to what we have
8 suggested, in a spirit of cooperation with them, to assist them in
9 complying with their obligations to the Rule 102(3) notice.

10 As we said previously - and we repeat - we regard that notice as
11 a fundamental building block of the disclosure process, and it can't
12 be bypassed with the SPO just seeking to move everybody onto the
13 second stage in the approach in Rule 102(3) and applying a
14 materiality test to any correspondence we have with them. That
15 fundamental building block, a very complete and detailed Rule 102(3)
16 notice of all the material in their possession, has to come and it
17 has to come urgently so that we can properly commence the disclosure
18 exercise in accordance with the Framework Decision, as Your Honour
19 has directed.

20 JUDGE GUILLOU: Thank you, Mr. Rees.

21 Mr. Cadman, do you have anything to add on these *inter partes*
22 discussions, and if this can continue and there is a hope on your
23 side that things can improve before I issue the two pending decisions
24 on the Prosecution's request?

25 MR. CADMAN: [via videolink] Your Honour, what I would say is

1 that the position as put forward by Mr. Rees has to be the correct
2 one. And what I would say is, yes, things can move forward, but
3 there needs to be a fundamental shift in attitude.

4 Constantly referring to Defence requests as a distraction or an
5 irritation doesn't help matters. Actually, smiling and laughing at
6 the reasonable requests that have been made does not help the
7 relationship. Of course, we want to work in such a way where we can
8 have reasonable discussions with the Prosecution, but, unfortunately,
9 there has to be a fundamental change in attitude in order for that to
10 happen.

11 One other thing that I would seek Your Honour's intervention in,
12 not a matter of responsibility on the SPO but -- and that's access
13 with our clients. Currently, the difficulty we have in taking
14 instructions on material is that all conferences are divided by glass
15 partition. I understand why that might be necessary. But as we are
16 moving towards a relatively tight timetable, it is virtually
17 impossible for us to have meaningful discussions with our clients
18 when we are subjected to such meetings.

19 That is going to require the Court to intervene with the
20 detention facility. Certainly on my last visit with Mr. Haradinaj, I
21 was not able to share any documents, other than putting documents up
22 on a glass partition, which is not an appropriate way to manage these
23 proceedings.

24 JUDGE GUILLOU: Thank you, Mr. Cadman.

25 Madam Court Officer, I will ask you to convey what Mr. Cadman

1 just mentioned to the Registrar and to engage with him to find an
2 appropriate solution for the discussions between the counsel and
3 their clients. And we'll try to resolve that in the following days
4 or weeks, Mr. Cadman.

5 Let me turn to -- do you have anything to add on disclosure?
6 Yes, please, Mr. Prosecutor.

7 MR. PACE: Just briefly, Your Honour, just because of the
8 remarks made by counsel for Mr. Haradinaj.

9 Should Your Honour wish to see how seriously we have taken the
10 Defence requests, we have absolutely no problem forwarding you or
11 submitting officially, even, the responses we provided. I'm not sure
12 where the references to smiling, laughing, or irritation come from.
13 We've addressed them in detail.

14 By way of example, in relation to the Gucati submissions,
15 essentially what we submitted to Your Honour was an updated version
16 of what we submitted to the Defence in response, and we took the
17 counsel for Mr. Haradinaj's submissions as seriously. Of course, we
18 disagree on certain principles, but we addressed them with all
19 caution and all seriousness. These are not issues to make light of.

20 I will say that unless Your Honour intends to change the
21 parameters of the Framework Decision in relation to Rule 102(3), the
22 SPO does not see the need for any ruling in relation to the SPO's
23 obligations as we have set out.

24 And I will just highlight, just for the avoidance of any
25 misunderstandings, that the only two issues that remain outstanding

1 after this exchange *inter partes* are the two which the Prosecution
2 seized the Pre-Trial Judge in relation to, which, of course, we did
3 according to the procedure set out by the Pre-Trial Judge.

4 And those are my submissions, Your Honour. Thank you.

5 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

6 I turn to the Defence. No, nothing to add on the -- Mr. Cadman,
7 please.

8 Mr. Cadman, microphone, please.

9 MR. CADMAN: [via videolink] Just one final point that we haven't
10 had an opportunity to respond to the Prosecutor. Just to make it
11 very clear that we do fully intend to respond.

12 And I may be jumping ahead, but on agreed facts, that was part
13 of the problem with not being able to have sufficient contact with
14 the client. We -- obviously, we do wish to respond to that in due
15 course, and we will be responding substantively. And it is
16 anticipated that much can be agreed. But, of course, that requires
17 us being able to have proper contact with our clients.

18 JUDGE GUILLOU: Thank you, Mr. Cadman.

19 For the next point on the agenda related to Defence
20 investigations, I note that despite the COVID-19 restrictions,
21 investigations have commenced and that at least one Defence team has
22 been able to undertake investigations in Kosovo and that a further
23 trip is also planned by the same Defence team.

24 I also note that the Registry filed *ex parte* submissions on
25 support and assistance regarding travel and investigations provided

1 to Defence counsel. I thank the Registrar for her submission.

2 I invite now the Defence to provide an update on the status of
3 its investigation and approximately how much time it will need to
4 finalise such investigative activities.

5 Mr. Rees, please.

6 MR. REES: [via videolink] Your Honour, our position remains as
7 we previously estimated it in the last two Status Conferences.
8 Your Honour has set out the calendar going forward, and we do expect,
9 despite the ongoing difficulties with travel and, indeed, the
10 disclosure issues, we do expect that we will be able to meet the
11 targets that Your Honour has set down for the Defence preparations in
12 that framework calendar.

13 We have previously said that we anticipate being ready for trial
14 from the week commencing 13 August onwards, and we don't -- we fully
15 expect still to be able to do that, Your Honour.

16 JUDGE GUILLOU: Thank you, Mr. Rees.

17 Mr. Cadman, please.

18 MR. CADMAN: [via videolink] Your Honour, likewise. We believe
19 that there are some difficulties still in advancing the
20 investigations. I don't want to get into a further disagreement with
21 the SPO as to whether we consider those investigations have been
22 properly conducted or not. But there have been problems due to
23 certain lines of inquiry that we are required to carry out that have
24 not been carried out, and so that is going to extend the Defence
25 investigations. But I think we are still well within the timetable

1 that has been set out.

2 And, as just stated by Mr. Rees, we are hoping to carry out a
3 further Defence investigation within the next week, week and a half.
4 That's likely to be both Defence teams. But, of course, that depends
5 on the changing situation as far as COVID is concerned. And so if
6 the whole of Europe is placed on a red list, it makes it more
7 difficult for us to be able to carry those out. But we will, of
8 course, notify Your Honour if there are any further interruptions to
9 our ability to carry out investigations.

10 JUDGE GUILLOU: Thank you very much, Mr. Cadman.

11 Mr. Prosecutor, do you have anything to add on this topic and
12 maybe also on your pre-trial brief, if there is any change in the
13 expectation that it will be filed by 9 April? You have the floor.

14 MR. PACE: Thank you, Your Honour.

15 Mindful of the consolidated calendar in which Your Honour set
16 out that Your Honour intends to transfer the case to the Trial Panel
17 on 30 June this year, we have nothing further to say in relation to
18 the timeline subsequent to that or nothing further to add in relation
19 to the Defence investigations.

20 And in terms of the pre-trial brief, yes, Your Honour, we will
21 be filing it by the deadline, which is 9 April, along with the other
22 material we are ordered to file by that date.

23 Thank you.

24 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

25 I would now like to ask the parties about their views for a

1 suitable date for the next Status Conference to address any
2 outstanding matters before the transmission of the case file.

3 I note that the Defence for Mr. Haradinaj expressed a preference
4 for the end of April and the Defence for Mr. Gucati proposed to hold
5 a Status Conference 14 days after the SPO has provided a new
6 Rule 102(3) notice.

7 In light of this, I intend to schedule the next Status
8 Conference at the end of April. Do the parties have anything to add
9 on this?

10 Mr. Prosecutor.

11 MR. PACE: No, Your Honour. We're available when Your Honour
12 deems necessary. Thank you.

13 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

14 Mr. Rees, please.

15 MR. REES: [via videolink] No, other than I'm very grateful that
16 in previous Status Conferences, whereas Your Honour has set down, if
17 you like, a target for the next Status Conference, Your Honour has
18 very kindly allowed submissions to be put into the CMU closer to the
19 time for the exact time and date of the hearing. And I'd be very
20 grateful if Your Honour would allow the same opportunity for what
21 will be the fourth Status Conference, bearing in mind that
22 Your Honour said Your Honour would wish there to be the fourth Status
23 Conference towards the end of April.

24 JUDGE GUILLOU: Thank you, Mr. Rees.

25 Just on that point, I just need a little time to myself to get

1 acquainted with all your submissions, so it cannot be 12 hours
2 before, but --

3 MR. REES: [via videolink] No.

4 JUDGE GUILLOU: -- at least, I think, 48 hours, the time also
5 for the filing to be distributed seems like a reasonable time, if
6 you're all in agreement.

7 MR. REES: [via videolink] Thank you.

8 JUDGE GUILLOU: Mr. Cadman, please.

9 MR. CADMAN: [via videolink] Your Honour, only that I would be
10 unavailable for the 26th and 27th, but I would be available for any
11 of the other days of that week, the last week of April.

12 JUDGE GUILLOU: Thank you, Mr. Cadman. This is noted. And I
13 think the 27th is actually King's Day in the Netherlands, so I don't
14 think we will plan a Status Conference on that day.

15 You will receive a Scheduling Order in due course that will
16 include the agenda before the Status Conference, and I invite the
17 parties to make any written submissions if they would like to raise
18 any specific issue during the next Status Conference.

19 At this point I would like to ask the parties whether they have
20 any other issues they would like to raise. And as usual, I remind
21 the parties to give prior notice should any submission require the
22 disclosure of confidential information.

23 Mr. Prosecutor.

24 MR. PACE: No further issues, Your Honour. Thank you.

25 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

1 Mr. Rees, please.

2 MR. REES: [via videolink] No, thank you, Your Honour.

3 JUDGE GUILLOU: Thank you, Mr. Rees.

4 Mr. Cadman, please.

5 MR. CADMAN: [via videolink] Nothing from me, Your Honour. Thank
6 you.

7 JUDGE GUILLOU: Thank you, Mr. Cadman.

8 I will now break and we will resume the hearing in 30 minutes
9 for a short period, during which I will issue a couple of oral orders
10 related to the timeline for the next procedural steps.

11 It is practically 4.00. Maybe, let's say, at 4.30 The Hague
12 time. The hearing is adjourned.

13 --- Recess taken at 3.58 p.m.

14 --- On resuming at 4.30 p.m.

15 JUDGE GUILLOU: I will now issue a number of oral orders.

16 First, I hereby issue an oral order on the submission of a
17 public redacted version of filing F116.

18 In this regard, I recall that in my decision on the Defence
19 preliminary motions, F147, I ordered the Defence for Mr. Haradinaj to
20 submit a public redacted version of F116 by 15 March 2021. The
21 Defence for Mr. Haradinaj has so far not complied with the order. In
22 this regard, I emphasise that regardless of whether the name of
23 Specialist Chambers or SPO staff member is mentioned in a public
24 transcript, pursuant to Article 33 of the Practice Direction on Files
25 and Filings, parties shall make reference to Specialist Chambers and

1 SPO staff members only by their functional titles unless strictly
2 necessary for the proceedings and preferably in submissions with a
3 classification of confidential or strictly confidential, and
4 references to other personal information shall only be made upon
5 approval by a Panel or the President.

6 For this reason, I hereby order the Defence for Mr. Haradinaj to
7 file by Thursday, 1 April 2021, a public redacted version of F116,
8 redacting the name of the SPO staff member in paragraph 70.

9 This concludes my first oral order.

10 Second, I hereby issue an oral order on the submission of a
11 public redacted version of filing F134.

12 I hereby order the Defence for Mr. Gucati to file by Thursday, 1
13 April 2021, a public redacted version of F134, redacting footnote 4
14 of that filing.

15 This concludes my second oral order.

16 Third, I hereby issue an oral order regarding the
17 reclassification of two filings. I hereby order the Registry to
18 reclassify as public the following confidential filings: F125, dated
19 15 February 2021; and F126, dated 15 February 2021.

20 This concludes my third oral order.

21 Fourth, I hereby issue an oral order regarding the SPO's request
22 for authorisation of non-standard redactions, and this is filing
23 F155.

24 In this regard, I note the following: That subsequent to my
25 decision on certain witness contacts, filing F136, the SPO identified

1 additional records of a similar nature and disclosed such record to
2 the Defence on 4 and 17 March 2021, applying redactions equivalent to
3 those authorised in my aforementioned decision; that the Defence did
4 not respond to the SPO's request for authorisation of the redactions
5 so applied; and that, having reviewed the applied redaction, I find
6 them to be in conformity with the conditions set out in paragraph 29,
7 30, of my aforementioned decision.

8 For this reason, I hereby grant the SPO request and authorise
9 the non-standard redactions applied set out in Annex 1 to filing
10 F155.

11 This concludes my fourth and last order today.

12 This concludes today's public hearing. I thank the parties for
13 their attendance, and I also wish, as usual, to thank the
14 interpreters, stenographer, audio-visual technicians, and security
15 personnel for their assistance.

16 The hearing is adjourned.

17 --- Whereupon the Status Conference adjourned
18 at 4.34 p.m.

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