



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-07  
**Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 18 May 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of 'Prosecution requests and challenges pursuant to  
KSC-BC-2020-07/F00172', dated 26 April 2021**

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## I. INTRODUCTION

1. Pursuant to the Rule 102(3) Decision,<sup>1</sup> Articles 23, 35(2)(f), and 39(1), (3) and (11) of the Law,<sup>2</sup> and Rules 80, 81, 95(2)(h), and 108 of the Rules,<sup>3</sup> the Specialist Prosecutor's Office ('SPO'):

(i) disputes the materiality of, and/or requests protective measures in relation to, certain items included on the Rule 102(3) Notice,<sup>4</sup> the disclosure of which has been requested by one or both Defence teams;<sup>5</sup> and

(ii) disputes the materiality of information not contained in the Rule 102(3) Notice which the GUCATI Defence requests disclosure of.<sup>6</sup>

## II. SUBMISSIONS

### A. MEDICAL DOCUMENTATION

2. [REDACTED],<sup>7</sup> [REDACTED].<sup>8</sup> [REDACTED]. [REDACTED].<sup>9</sup>

3. [REDACTED]. [REDACTED]<sup>10</sup> [REDACTED].<sup>11</sup>

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<sup>1</sup> Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, KSC-BC-2020-07/F00172, 1 April 2021, Confidential ('Rule 102(3) Decision').

<sup>2</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>3</sup> 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.

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

<sup>5</sup> Email from the HARADINAJ Defence to the SPO, 21 April 2021 at 18:44 ('HARADINAJ Correspondence'), requesting the disclosure of Rule 102(3) Notice Items 14-37, 79-80, 178-184. The HARADINAJ Defence also sought clarification in relation to the descriptions of items 38-69, 91-98, and 155 on the Rule 102(3) Notice and the SPO provided clarifications the following day, Email from the SPO to the HARADINAJ Defence dated 22 April 2021 at 11:43 a.m.; Email from the GUCATI Defence to the SPO, 21 April at 23:49 ('GUCATI Correspondence'), requesting the disclosure of all items on the Rule 102(3) Notice and of certain other items.

<sup>6</sup> GUCATI Correspondence.

<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> [REDACTED].

4. [REDACTED]. [REDACTED].<sup>12</sup> [REDACTED],<sup>13</sup> [REDACTED].

B. [REDACTED]

5. Pursuant to Rule 108, the SPO should be authorised to withhold nine items related to [REDACTED],<sup>14</sup> since: (i) disclosure poses an objective and grave risk to protected persons and interests; (ii) non-disclosure is strictly necessary, *i.e.* no less restrictive measures are sufficient or feasible; and (iii) non-disclosure is proportionate, balancing the grave risks of disclosure with the minimal, if any, prejudice to the Defence.<sup>15</sup>

6. [REDACTED],<sup>16</sup> [REDACTED], there is no readily apparent, legitimate forensic purpose justifying access to the [REDACTED].<sup>17</sup> Indeed, as explained below, disclosure of the [REDACTED].

**1. Non-disclosure is necessary to address objectively justifiable and grave risks to protected persons and interests**

7. [REDACTED].<sup>18</sup>

8. The Accused's prior public declarations and conduct demonstrate their intention to undermine and obstruct SC proceedings and their utter disregard for the well-being and security of (potential) witnesses.<sup>19</sup> In turn, if the Accused were to gain access to the confidential information in these items, there is a concrete risk that they

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<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

<sup>15</sup> Rule 108(1); Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, 22 January 2021 ('Framework Decision'), para.71.

<sup>16</sup> [REDACTED].

<sup>17</sup> *See also* Prosecution request for non-disclosure of certain information requested by the Defence pursuant to Rule 102(3) with strictly confidential and *ex parte* Annexes 1-3, KSC-BC-2020-07/F00154/CONF/RED, 17 March 2021 ('Request for non-disclosure'), para. 24.

<sup>18</sup> [REDACTED].

<sup>19</sup> Non-Disclosure Decision, KSC-BC-2020-07/F00141, paras 34-35.

would disseminate it, prejudicing investigations and proceedings<sup>20</sup> and causing a grave risk to the security and well-being of (potential) witnesses and their family members.<sup>21</sup> Such unlawful dissemination would be contrary to the public interest in effective investigation and prosecution of offences within the SC's jurisdiction.<sup>22</sup>

9. Moreover, non-disclosure is the least restrictive measure available to address the objective risks of disclosure since these items cannot be redacted in a manner which would effectively ensure that the identity of the protected witnesses is not revealed. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].<sup>23</sup>

10. [REDACTED], non-disclosure is necessary.

## 2. Appropriate counterbalancing measures are available

11. [REDACTED].

12. [REDACTED]<sup>24</sup> [REDACTED],<sup>25</sup> [REDACTED],<sup>26</sup> [REDACTED].<sup>27</sup> [REDACTED].<sup>28</sup>

13. [REDACTED].<sup>29</sup> [REDACTED]. [REDACTED]. [REDACTED].

14. Finally, the Defence is being notified of, and given the opportunity to respond to, these submissions, which itself constitutes an appropriate safeguard. The fact that, through these submissions and any responses filed by the Defence, the Pre-Trial Judge will be able to fully scrutinize the basis for the SPO's request, review the relevant items, and make an informed assessment of the irreversible harm that disclosure would entail, also constitutes an effective counterbalancing measure.

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<sup>20</sup> See, *similarly*, Non-Disclosure Decision, KSC-BC-2020-07/F00141, para.34.

<sup>21</sup> See, *similarly*, Non-Disclosure Decision, KSC-BC-2020-07/F00141, para.35.

<sup>22</sup> See, *similarly*, Non-Disclosure Decision, KSC-BC-2020-07/F00141, para.36.

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED]. [REDACTED].

<sup>29</sup> [REDACTED].

### C. SEARCH AND SEIZURE VIDEOS

15. The Search and Seizure Videos requested by the GUCATI Defence, Rule 102(3) Notice Items 122-31,<sup>30</sup> depict the SPO's search and seizure of the KLA WVA premises on 25 September 2020. They include the movements of SPO staff members through the premises and the collection of certain items. Ten of these videos are identical.<sup>31</sup>

16. Extensive documentation concerning this search and seizure has already been provided to the Defence<sup>32</sup> and further information on this event will be disclosed to the Defence by the 28 April 2021 deadline.<sup>33</sup> Moreover, the Defence has never alleged, or had any basis to allege, that anything untoward occurred during the search and seizure operation, and - noting the detailed report already available (of which the video would be largely duplicative), the extensive safeguards applied, and the very limited reliance by the SPO on any material resulting from the search<sup>34</sup> - there is no basis for concluding that the video, recording the items being seized, is material to the preparation of the defence.

17. In the alternative, the non-disclosure of the Search and Seizure Videos should be granted pursuant to Rule 108 since the videos clearly depict, *inter alia*, SPO staff members who travel frequently to, or are based in, Kosovo. Disclosing videos showing their identities could put these persons at risk and/or hinder their work, thereby putting ongoing or future investigations at risk. While identifying information related

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<sup>30</sup> Rule 102(3) Notice Items 122 (083902-01), 123 (083902-02), 124 (083902-03), 125 (083902-04), 126 (083902-05), 127 (083902-06), 128 (083902-07), 129 (083902-08), 130 (083902-09), 131 (083902-10), 132 (083902-11).

<sup>31</sup> Rule 102(3) Notice Items 123-131 are duplicates of item 122, as such they have not been included in Annex 3.

<sup>32</sup> See Prosecution report on search and seizure pursuant to KSC-BC-2020-07-F00013 and KSC-BC-2020-07-F00014 with strictly confidential and *ex parte* Annexes 1-7, KSC-BC-2020-07-F00050, 15 October 2020, Confidential. The confidential and *ex parte* Annexes to this filing have been reclassified as confidential, or confidential redacted versions thereof have been made available to the Defence.

<sup>33</sup> Rule 102(3) Notice Item 121 (083846-083927).

<sup>34</sup> The only items on the Exhibit List which were obtained pursuant to this search and seizure are items 328-339, containing CCTV footage dated 7, 16 and 22 September 2020 depicting items being delivered to the KLA WVA premises.

to such persons would ordinarily be subject to standard redactions pursuant to the Framework Decision,<sup>35</sup> the redaction of video evidence is highly complicated and time-consuming.

#### D. [REDACTED]

18. [REDACTED].<sup>36</sup> [REDACTED]. [REDACTED]. [REDACTED]. Additionally, noting the lack of legitimate forensic purpose, and the information already available to the Defence, no prejudice arises.

19. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED],<sup>37</sup> [REDACTED].

20. [REDACTED]. [REDACTED]. [REDACTED].<sup>38</sup> [REDACTED].<sup>39</sup>

21. [REDACTED].<sup>40</sup> [REDACTED]. [REDACTED].<sup>41</sup> [REDACTED].<sup>42</sup>

22. [REDACTED]. [REDACTED]. [REDACTED].

23. [REDACTED]. [REDACTED].<sup>43</sup> [REDACTED]. [REDACTED].

24. [REDACTED].<sup>44</sup>

#### E. ITEMS DEPICTING BATCH 3

25. Rule 102(3) Notice Item 87, SPOE00220916-00220919, contains photographs of: (i) an evidence bag; (ii) a document acknowledging delivery of Batch 3 to the SPO; (iii) the SPO order to produce Batch 3; and (iv) at page SPOE00220919, a page of Batch 3.

Rule 102(3) Notice Item 89, SPOE00222534-SPOE00222546, contains photographs of:

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<sup>35</sup> [REDACTED].

<sup>36</sup> [REDACTED].

<sup>37</sup> [REDACTED].

<sup>38</sup> [REDACTED].

<sup>39</sup> [REDACTED].

<sup>40</sup> [REDACTED]. [REDACTED].

<sup>41</sup> [REDACTED].

<sup>42</sup> [REDACTED]. [REDACTED].

<sup>43</sup> [REDACTED]. [REDACTED].

<sup>44</sup> [REDACTED].

(i) an evidence bag; and (ii) at pages SPOE00222535-SPOE00222545, pages from Batch 3 visible through plastic folders.

26. On 23 February 2021 the Pre-Trial Judge found, *inter alia*, that Batch 3 was not subject to disclosure under the Rules.<sup>45</sup> Accordingly, on the basis of this decision, photographs depicting pages from Batch 3<sup>46</sup> will not be disclosed to the Defence.

#### F. GUCATI DEFENCE REQUEST FOR ITEMS NOT ON THE RULE 102(3) NOTICE

27. In the GUCATI Correspondence, the GUCATI Defence included 'additional requests for pre-trial disclosure'. Given that the GUCATI Defence requests disclosure of these items, not merely their inclusion in the Rule 102(3) Notice, the resolution of these requests depends on the information sought being sufficiently identified, material to the preparation of the defence, and not falling under any applicable disclosure restrictions.<sup>47</sup>

#### *GUCATI Defence Request (A)*

28. The first GUCATI request reads as follows:

- (a) Further to the disclosure correspondence from the SPO to the defence dated 12 March 2021 regarding the 'Gucati Rule 102(3) items', disclosure of all contemporaneous notes in the SPO's possession which refer to statements made by a witness or questions put to a witness is requested. Notes made by an investigator, counsel or other staff member of the Prosecution are subject to disclosure to the extent that they refer to such statements or questions (Prosecutor v Norman, Decision on Disclosure of Witness Statements and Cross-examination, 16 July 2004, paras 7 and 16; Prosecutor v Brima, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para.16; Prosecutor v Niyitegeka, Appeals Chamber Judgment, 9 July 2004, paras.33-34). Rule 106 does not apply to such material. Such notes are material to defence preparations in that they provide contemporaneous records of statements made by prosecution witnesses (and by third parties whose statements are referred to by prosecution witnesses) and will assist with cross-examination. Such notes also provide first-accounts from potential defence witnesses, which will assist in the identification and examination of defence witnesses.<sup>48</sup>

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<sup>45</sup> Non-Disclosure Decision, KSC-BC-2020-07/F00141, para.44.

<sup>46</sup> These are p.SPOE00220919 from SPOE00220916-00220919, and pp.SPOE00222535-SPOE00222545 from SPOE00222534-SPOE00222546.

<sup>47</sup> See Framework Decision, KSC-BC-2020-07/F00104, paras 45, 71.

<sup>48</sup> GUCATI Correspondence, para.2(a) ('Request A').

29. This request is unclear and overbroad, potentially extending to any note made about any witness in the SPO's possession, irrespective of its relevance to the case against the Accused, and should be rejected. It is unknown to which 'witnesses' the Defence is referring. Further, and contrary to the GUCATI Defence assertion,<sup>49</sup> there is no requirement at other international courts that notes or questions underlying a disclosed witness statement are automatically disclosable.<sup>50</sup>

30. However, in any event, to the extent Request A refers to 'contemporaneous notes' taken by SPO staff members and/or other persons during the seizure of Batches 1 and 2, the arrival of Batch 3 at KLA WVA premises, and the handover of Batches 3 and 4 to the SPO,<sup>51</sup> the relevant information in relation to such events has been disclosed and the SPO is not in possession of any such contemporaneous notes by the

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<sup>49</sup> The cited *Norman* case found no violation in the Prosecution disclosing investigator notes summarising oral statements of witnesses, which is more analogous to the official notes disclosed by the SPO than the information sought by the GUCATI Defence, SCSL, *Prosecutor v. Norman et al.*, Decision on Disclosure of Witness Statements and Cross-examination, SCSL-04-14-PT, 16 July 2004, paras 22-24. In *Brima et al.*, the Chamber considered it reasonable for the Prosecution to take rough investigator's notes during interviews, isolate the disclosable material into written witness statements, and then disclose only those statements. No disclosure obligation attached to the rough notes, which is the opposite of what the Defence contends, SCSL, *Brima et al.*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, SCSL-04-16-T, 4 May 2005, paras 17-18. *Niyitegeka* is yet another case concerning the form of written witness statements (analogous to those under Rule 102(1)(b)(i), not witness contacts under more general provisions like Rules 102(3) or 103), and again found no disclosure violation because the Prosecution did not possess the documents sought. ICTR, *Niyitegeka v. Prosecutor*, Judgement, ICTR-96-14-A, 9 July 2004, paras 33-40.

<sup>50</sup> In addition to the *Brima et al.* case cited by the GUCATI Defence, see ICC, *Prosecutor v. Bemba*, Decision on the "Defence Motion on Prosecution contact with its witnesses", ICC-01/05-01/08-3070, 2 July 2014, para.25 ("The Chamber finds that, in principle, the Items generated during the course of contacts between prosecution and witnesses called by the defence may be material to the preparation of the defence. However, in general terms, "interview notes" fall within the scope of Rule 81(1) of the Rules [governing internal work product at the ICC]"); ICC, *Prosecutor v. Lubanga*, Redacted Decision on the prosecution's disclosure obligations arising out of an issue concerning witness DRC-OTP-WWWW-0031, ICC-01/04-01/06-2656-Red, 20 January 2011, para.17(v).

<sup>51</sup> See Annex 1 to Prosecution Submissions for third Status Conference, KSC-BC-2020-07/F00165/A01, Confidential, 26 March 2021 ('Annex to Status Conference Submissions') requests (i), (k), (m), (n), (w) (where the defence requested 'contemporaneous notes'). Batches 1-3 refer to confidential documents seized from the KLA WVA, respectively, on 8, 17 and 22 September 2020. Batch 4 refers to confidential documents received from [REDACTED].



staff members or third parties referred to by the Defence.<sup>52</sup> Accordingly, the request is moot.

31. To the extent the request refers to witnesses in the proceedings against the Accused, the SPO has disclosed the relevant items related to W04841 and W04842. To the extent the request refers to witnesses in other proceedings who were contacted by the SPO in the wake of the Accused's actions, the relevant information in relation thereto has also been disclosed.

*GUCATI Defence Requests (B) and (C)*

32. In the GUCATI Correspondence, essentially replicating a previous request which the Pre-Trial Judge deemed insufficiently specific,<sup>53</sup> the GUCATI Defence reiterates that it seeks to obtain:

- (b) [a]ll 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, and specifically such material relating to Batch 3 [...];<sup>54</sup>
- (c) [a]ll material held by the SPO which relates to attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA HQ and specifically such material relating to Batch 3 [...]<sup>55</sup>

33. In the Rule 102(3) Decision, the Pre-Trial Judge noted that the Defence was already 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 they contained the names of potential witnesses.<sup>56</sup> The Pre-Trial Judge further noted that that the Defence was already notified or provided with

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<sup>52</sup> Even had they existed, such notes would have been likely to fall within Rule 106.

<sup>53</sup> See Rule 102(3) Decision, KSC-BC-2020-07/F00172, paras 10, 32-37; Prosecution submissions on the materiality of certain information requested by the Defence pursuant to Rule 102(3), KSC-BC-2020-07/F00149, 8 March 2021, Confidential ('First Prosecution Submissions'), para.8(a) and (b).

<sup>54</sup> GUCATI Correspondence, para.2(b) ('Request B').

<sup>55</sup> GUCATI Correspondence, para.2(c) ('Request C').

<sup>56</sup> Rule 102(3) Decision, KSC-BC-2020-07/F00172, para.35.

information regarding the delivery of documents to the KLA WVA.<sup>57</sup> Given the material already provided to the Defence and the information contained therein, the Pre-Trial Judge found that that the Defence had not provided sufficient specification of what other (type of) documents or information should have been placed by the SPO on its initial Rule 102(3) notice or disclosed to the Defence.<sup>58</sup>

34. The GUCATI Defence indicates that, in relation to Requests B and C, the information it requests the SPO to disclose should address the following questions:

- (i) Which current or former SPO staff members (including investigators and counsel) contributed to its creation?
- (ii) Which current or former SPO staff members (including investigators and counsel) had access to the document electronically?
- (iii) Which current or former SPO staff members (including investigators and counsel) had access to the document in hard copy form?
- (iv) Was the document password protected? If so, which current or former SPO staff members (including investigators and counsel) had the password?
- (v) Are all such SPO staff members who had access to the document (or had any password) still SPO staff members?
- (vi) Does the SPO still retain an electronic copy of the document?
- (vii) Has the metadata on the document been checked for evidence as to the last person to access the document? If so, who was that person?
- (viii) Has the SPO identified the computer(s) upon which that document was created? Who is/are the regular user(s) of that/those computer(s)? Where were any such devices located?<sup>59</sup>

35. The GUCATI Defence further indicates that, in relation to Request C, the information it requests the SPO to disclose should address the following questions:

- (ix) Have any current or former SPO staff members been interviewed about the disclosure of the document?
- (x) Have any electronic devices used/controlled by current or former SPO staff members been interrogated for evidence of disclosure of the document?
- (xi) Have any email accounts or other remote communication facilities used/controlled by current or former SPO staff members been interrogated for evidence of disclosure of the document?
- (xii) Were any hard copies of the document stored on SPO premises? If so, was there any CCTV coverage of the area(s) of storage, or the access routes to said area(s)? If so, has such CCTV been examined for evidence of access to and from said area(s)?<sup>60</sup>

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<sup>57</sup> Rule 102(3) Decision, KSC-BC-2020-07/F00172, para.36.

<sup>58</sup> Rule 102(3) Decision, KSC-BC-2020-07/F00172, para.37.

<sup>59</sup> GUCATI Correspondence, Requests B, C.

<sup>60</sup> GUCATI Correspondence, Request C.

36. The GUCATI Defence asserts that the information requested pursuant to Request B is material to defence preparations because '[t]he defence seek to investigate the circumstances in which the Three Batches, including specifically Batch 3, were passed to the KLA WVA HQ, and in particular whether and to what extent the SPO, or those for whom the SPO are responsible, were involved therein (potential incitement/entrapment)'.<sup>61</sup> An analogous justification is provided for Request C.<sup>62</sup> Accordingly, the GUCATI Defence essentially reiterates the contents of its initial request, which the Pre-Trial Judge has dismissed. Through the limited additional information provided in the GUCATI Correspondence, the GUCATI Defence once again fails to: (i) sufficiently identify any information, beyond that already in the Defence's possession, that it deems material; or (ii) demonstrate that any such information is in fact material to defence preparations.<sup>63</sup> These requests should be dismissed on this basis alone.

37. Were these requests to be further considered, the Defence has received ample notice that the charges against the Accused concern the Accused's unlawful conduct following the delivery of confidential material to the KLA WVA, irrespective of the manner in which such material was obtained.<sup>64</sup> Furthermore, the Defence has already been provided with all relevant information establishing the origin and provenance of the confidential information in question.<sup>65</sup> How the Accused came to obtain the Three Batches has no relevance to the case as charged.

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<sup>61</sup> GUCATI Correspondence, para.2(b).

<sup>62</sup> GUCATI Correspondence, para.2(c) ('[t]he GUCATI Defence asserts that '[t]he defence seek to investigate the circumstances in which the Three Batches, including specifically Batch 3, were passed to the KLA WVA HQ, and in particular whether and to what extent the SPO, or those for whom the SPO are responsible, were involved therein.').

<sup>63</sup> See First Prosecution Submissions, KSC-BC-2020-07/F00149, paras 9-10; Prosecution Reply to Gucati Response to Prosecution Submissions on the Materiality of Certain Information Requested Pursuant to Rule 102(3), KSC-BC-2020-07/F00164, 26 March 2021, Confidential ('Prosecution Reply'), paras 4, 8(i).

<sup>64</sup> Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, Annex 1, KSC-BC-2020-07/F00075/A01, 14 December 2021, Confidential ('Indictment').

<sup>65</sup> See 084015-084025; 090142-090143; 093492-093590; 095162-095239. See also, Rule 102(3) Decision, KSC-BC-2020-07/F00172, para.35.

38. The GUCATI Correspondence makes it clear that the primary basis for the information requested is the Defence's interest in finding out whether the SPO was involved in the provision of the Three Batches to the Accused. This ignores the SPO's repeated assertions that there is no information in its possession that would indicate or even remotely suggest this to be true.<sup>66</sup>

39. In the end, what the GUCATI Defence actually requests is information concerning the transfer of the Three Batches to the Accused which: (i) can add nothing new as to the authenticity of the confidential information in question; and (ii) cannot mitigate or otherwise bear upon the Accused's liability.

40. Accordingly, the GUCATI Defence yet again fails to shed any light upon the manner in which the requested information could possibly be relevant to the case, its preparation, or serve any legitimate forensic purpose.<sup>67</sup> Any information concerning possible investigations carried out by the SPO on allegations other than the charges against the Accused is: (i) not relevant to the case against the Accused and therefore not subject to notification and/or disclosure pursuant to Rule 102(3); and (ii) immaterial to defence preparation in the present case. The SPO 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.<sup>68</sup> This is even more true when the information sought is intended to impermissibly gain an understanding of facts and allegations that, while irrelevant to the Indictment, are nevertheless subject to the jurisdiction of the SC pursuant to Article 15 of the Law and, therefore, subject to the SPO's ongoing investigative mandate.<sup>69</sup>

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<sup>66</sup> See First Prosecution Submissions, KSC-BC-2020-07/F00149, para.10; Prosecution Reply, KSC-BC-2020-07/F00164, para.5; Status Conference, Transcript of 8 January 2021, pp.120-121; Prosecution consolidated reply to Defence responses to Prosecution submissions on the disclosure of certain documents seized from the KLA War Veterans Association, KSC-BC-2020-07/F00130, Confidential, 19 February 2021, para.9.

<sup>67</sup> Prosecution Reply, KSC-BC-2020-07/F00164, paras 4-5.

<sup>68</sup> Prosecution Reply, KSC-BC-2020-07/F00164, para.4.

<sup>69</sup> Article 35(1)-(2) of the Law.

## V. CONFIDENTIALITY

41. This filing and its annexes are strictly confidential and *ex parte* because they contain information which the SPO seeks to withhold from the Defence and refer to filings bearing the same classification. A confidential redacted version of the filing will be filed.

## VI. RELIEF REQUESTED

42. For the foregoing reasons, the SPO requests that the Pre-Trial Judge:

(a) Authorise the non-disclosure of the following Rule 102(3) Notice Items on grounds that they are not material to the preparation of the defence:

[REDACTED];<sup>70</sup>

(b) Authorise the non-disclosure of the following Rule 102(3) Notice Items and two additional items on grounds that they are not material to the preparation of the defence and/or pursuant to Rule 108: [REDACTED];<sup>71</sup>

(c) Authorise the non-disclosure of [REDACTED] pursuant to Rule 108; and

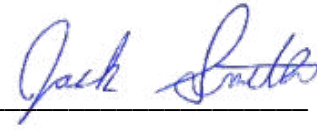
(d) Reject GUCATI Defence Requests A-C concerning disclosure of additional materials beyond the Rule 102(3) Notice since the GUCATI Defence fails to sufficiently identify the requested information and/or demonstrate the materiality of this information.

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<sup>70</sup> [REDACTED].

<sup>71</sup> [REDACTED].

**Word count: 3763**



**Jack Smith**

**Specialist Prosecutor**

Tuesday, 18 May 2021

At The Hague, the Netherlands.