



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: 26 May 2021

Language: English

Classification: Public

**Public Redacted Version of
Decision on Prosecution Requests and Challenges Pursuant to F00172**

Specialist Prosecutor

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(13) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 102(3), 106 and 108 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 issued a decision on the non-disclosure of documents seized from the Kosovo Liberation Army War Veterans' Association ("KLA WVA") on 8, 17 and 22 September 2020 (respectively, "Batch 1", "Batch 2" and "Batch 3"; and collectively, "Three Batches").³
3. On 1 April 2021, the Pre-Trial Judge set out a revised schedule for the disclosure of Rule 102(3) material and for any requests by the Specialist Prosecutor's Office ("SPO") for the non-disclosure of such material ("Decision on Rule 102(3) Material").⁴

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 ("Decision on Batches 1-3")*, 23 February 2021, confidential.

⁴ KSC-BC-2020-07, F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential.

4. On 9 April 2021, further to the time-limit set by the Pre-Trial Judge,⁵ the SPO submitted, *inter alia*, its Pre-Trial Brief and a list of proposed exhibits (“SPO Exhibit List”).⁶

5. On 14 April 2021, further to the Decision on Rule 102(3) Material, the SPO submitted a consolidated detailed notice of Rule 102(3) material in its possession (“Consolidated Rule 102(3) Notice”).⁷

6. On 26 April 2021, the SPO submitted a request for the non-disclosure of certain items included on the Consolidated Rule 102(3) Notice and other material on the grounds that they are not material to the Defence or are subject to Rule 108 of the Rules (“Request”).⁸

7. On 10 May 2021, the Defence for Mr Gucati, and on 11 May 2021, the Defence for Mr Haradinaj (collectively, the “Defence”) filed their respective responses to the Request.⁹

⁵ 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).

⁶ KSC-BC-2020-07, F00181/A01, Specialist Prosecutor, *Annex 1 to Submission of Pre-Trial Brief, Witness and Exhibit Lists, and Rule 109(c) Chart – Pre-Trial Brief* (“Pre-Trial Brief”), 9 April 2021, confidential; F00181/A03, Specialist Prosecutor, *Annex 3 to Submission of Pre-Trial Brief, Witness and Exhibit Lists, and Rule 109(c) Chart – List of Exhibits* (“SPO Exhibit List”), 9 April 2021, confidential.

⁷ KSC-BC-2020-07, F00183/A01, Specialist Prosecutor, *Annex 1 to Prosecution/s Consolidated Rule 102(3) Notice*, 14 April 2021, confidential.

⁸ KSC-BC-2020-07, F00190, Specialist Prosecutor, *Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172* (“Request”), 26 April 2021, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*. See also F00190/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172*, 28 April 2021, confidential.

⁹ KSC-BC-2020-07, F00199, Defence for Mr Gucati, *Response to Confidential Redacted Version of ‘Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172’*, KSC-BC-2020-07/F00190 Dated 26 April 2020 (“Gucati Response”), 10 May 2021, confidential; F00200, Defence for Mr Haradinaj, *Defence Response to SPO Confidential Redacted Version of ‘Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07/F00172’*, and F00190 (“Haradinaj Response”), 11 May 2021, confidential.

8. On 17 May 2021, the SPO filed a reply.¹⁰
9. On 20 May 2021, the Pre-Trial Judge ordered the Parties to make submissions on, *inter alia*, some of the items referred to in the Request (“Order for Submissions”).¹¹

II. SUBMISSIONS

10. The SPO seeks the non-disclosure of the following documents:

- (a) Items 99, 101-103 and 106-120 of the Consolidated Rule 102(3) Notice on the grounds that they are not material to the preparation of the Defence;¹²
- (b) Items 92-98 of the Consolidated Rule 102(3) Notice as well as two additional items [REDACTED] on the grounds that they are not material to the preparation of the Defence and/or are subject to Rule 108 of the Rules;¹³
- (c) Items 122-132 of the Consolidated Rule 102(3) Notice on the grounds that they are not material to the preparation of the Defence and/or are subject to Rule 108 of the Rules;¹⁴ and
- (d) Item 177 of the Consolidated Rule 102(3) Notice on the grounds that it is subject to Rule 108.¹⁵

¹⁰ KSC-BC-2020-07, F00201, Specialist Prosecutor, *Prosecution Reply to Defence Responses to Filing F00190 (“Reply”)*, 17 May 2021, confidential.

¹¹ KSC-BC-2020-07, F00204/A01, Pre-Trial Judge, *Annex to the Order Setting the Date for the Fifth Status Conference*, 20 May 2021, confidential.

¹² Request, paras 18-24, 42(a).

¹³ Request, paras 5-14, 42(b); Annex 2 to the Request.

¹⁴ Request, paras 15-17, 42(b); Annex 3 of the Request.

¹⁵ Request, paras 2-4, 42(c); Annex 1 of the Request.

11. The SPO further requests the Pre-Trial Judge to reject the following three requests by the Defence for Mr Gucati for items not included in the Consolidated Rule 102(3) Notice:

- (a) “disclosure of all contemporaneous notes in the SPO’s possession [“made by an investigator, counsel or other staff member of the Prosecution”] which refer to statements made by a witness or questions put to a witness”(“Gucati Request A”);¹⁶
- (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 the authorship and chain of custody from creation to its arrival at the KLA WVA HQ, and specifically such material relating to Batch 3”(“Gucati Request B”);¹⁷ and
- (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” (“Gucati Request C”).¹⁸

12. The responses of the Defence and the reply of the SPO are indicated in the relevant paragraphs below.

III. APPLICABLE LAW

13. Article 21(6) of the Law provides that all material and relevant evidence or facts in possession of the SPO, which are for or against the Accused shall be made available

¹⁶ Request, paras 28-31, 42(d).

¹⁷ Request, paras 32(a), 33-34, 36-40, 42(d).

¹⁸ Request, para. 32(b), 33-40, 42(d).

to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

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

15. Pursuant to Rule 106 of the Rules, subject to Rule 103 of the Rules, and unless otherwise ordered by a Panel, reports, memoranda or other internal documents prepared by a Party in connection with the investigation or preparation of a case are not subject to disclosure or notification.

16. Pursuant to Rule 108 of the Rules, where information in the custody, control, or actual knowledge of the Specialist Prosecutor is subject to disclosure under Rule 102 or Rule 103 of the Rules, but such disclosure may: (i) prejudice ongoing or future investigations; (ii) cause grave risks to the security of a witness, victim participating in proceedings or members of his or her family; or (iii) be contrary for any other reason to the public interest or the rights of third parties the Specialist Prosecutor may apply confidentially and *ex parte* to the Panel to withhold the information in whole or in part.

17. Rule 108(3) and (4) of the Rules further provides that a Panel may order appropriate counterbalancing measures. If no measures ensure the Accused's right to a fair trial, the Specialist Prosecutor shall be given the option of either disclosing the

information, or amending or withdrawing the charges to which the information relates.

IV. DISCUSSION

A. ITEMS 99, 101-103 AND 106-120

18. In light of the Order for Submissions, the Pre-Trial Judge shall not address these items in the present decision and shall defer determination to a subsequent decision.

B. ITEMS 92-98 AND TWO ADDITIONAL DOCUMENTS

19. The SPO submits that Items 92-98 and the two additional documents¹⁹ [REDACTED].²⁰

20. The SPO requests that the [REDACTED] are withheld under Rule 108 of the Rules,²¹ because: (i) they contain [REDACTED];²² (ii) there is a concrete risk that the Accused would disseminate this information were they to gain access thereto, which would be contrary to the public interest in effective investigation and prosecution of offences under Specialist Chambers (“SC”) jurisdiction;²³ and (iii) the [REDACTED] cannot be redacted in a manner which would effectively ensure that [REDACTED].²⁴

¹⁹ The SPO indicates that the two items [REDACTED] have been inadvertently omitted from its Consolidated Rule 102(3) Notice. Request, fn. 14.

²⁰ Request, para. 5. *See also* Annex 2 to the Request.

²¹ Request, para. 5.

²² Request, para. 7, fn. 18.

²³ Request, para. 8.

²⁴ Request, para. 9.

The SPO submits that appropriate counterbalancing measures are available because:

(i) [REDACTED]; (ii) [REDACTED];²⁵ (iii) [REDACTED];²⁶ and (iv) [REDACTED].²⁷

21. Further, the SPO requests that the [REDACTED] are withheld because they are not subject to disclosure under Rule 102(3) of the Rules, for the reason that, [REDACTED], there is no readily apparent, legitimate forensic purpose justifying access to these documents.²⁸

22. The Defence for Mr Gucati responds that if [REDACTED], then the test in Rule 108 of the Rules cannot be made out.²⁹ The Defence for Mr Gucati adds that the SPO has already disclosed [REDACTED].³⁰

23. The SPO replies that the information regarding [REDACTED] can only be disclosed at a general level, because [REDACTED].³¹

1. Rule 102(3) of the Rules

24. The Pre-Trial Judge recalls at the outset that [REDACTED].³² The Defence is accordingly entitled to challenge this assertion and receive any material or evidence, [REDACTED], which could be relevant for the preparation of such a challenge. In fact, the Pre-Trial Judge has previously found that material similar to [REDACTED] was material to the preparation of the Defence and was subject to disclosure under

²⁵ Request, para. 12.

²⁶ Request, paras 12-13.

²⁷ Request, para. 13.

²⁸ Request, para. 6.

²⁹ Gucati Response, para. 5.

³⁰ Gucati Response, para. 5.

³¹ Reply, para. 6.

³² Pre-Trial Brief, para. 201.

Rule 102(3) of the Rules.³³ The fact that [REDACTED] cannot prevent the Defence from challenging the SPO's assertions in its regard.³⁴

25. The Pre-Trial Judge accordingly finds that the [REDACTED] are subject to disclosure under Rule 102(3) of the Rules.

2. Rule 108 of the Rules

26. Given the above finding, the Pre-Trial Judge will now consider whether the [REDACTED] are to be withheld under Rule 108 of the Rules.

27. The Pre-Trial Judge notes that the [REDACTED], as annexed to the Request,³⁵ contain: (i) [REDACTED]; and (ii) [REDACTED]. These documents refer to [REDACTED].

28. With regard to prejudice to investigations and grave risks to the security of witnesses, the Pre-Trial Judge recalls the Accused's statements indicating an aim to undermine and obstruct SC proceedings³⁶ and public expressions that they do not care about witnesses.³⁷ The Pre-Trial Judge further recalls that Mr Haradinaj, in the presence of Mr Gucati, publicly named potential accused persons and a potential witness by name.³⁸ These statements indicate that, if the Accused gained access to the

³³ KSC-BC-2020-07, F00171/RED, Pre-Trial Judge, *Confidential Redacted Version of the Decision on the Non-Disclosure of Information Requested by the Defence*, 1 April 2021, confidential, paras 28-29.

³⁴ Decision on Batches 1-3, paras 43-45

³⁵ Annex 2 to the Request.

³⁶ KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment*, 11 December 2020, public, para. 120; KSC-BC-2020-07, F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati* ("Gucati December 2020 Detention Review Decision"), 24 December 2020, public, paras 33-35; F00094, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj* ("Haradinaj December 2020 Detention Review Decision"), 24 December 2020, public, para. 38.

³⁷ Gucati December 2020 Detention Review Decision, para. 34.

³⁸ Gucati December 2020 Detention Review Decision, para. 30; Haradinaj December 2020 Detention Review Decision, para. 38.

[REDACTED], there would be a risk that they would disseminate this information and thereby prejudice investigations or proceedings and cause grave risks to the security of witnesses or members of their family.

29. With regard to the necessity of non-disclosure, the Pre-Trial Judge considers that the non-disclosure to the Accused of [REDACTED] is strictly necessary in order to protect their and their family members' security, well-being and dignity.

30. With regard to the proportionality of non-disclosure, the Pre-Trial Judge notes the SPO's submissions regarding the existence of counterbalancing measures, such as the [REDACTED].³⁹ The Pre-Trial Judge considers, however, that additional counterbalancing measures are appropriate in order to uphold the Accused's rights under the Law and allow the Defence to challenge, if it so wishes, the SPO case [REDACTED]. Accordingly, the SPO is ordered to provide to the Defence: (i) redacted versions of the [REDACTED]; and (ii) an indication, per each item, of [REDACTED].

3. Conclusion

31. In light of the foregoing, the Pre-Trial Judge finds that the [REDACTED] are subject to disclosure under Rule 102(3) of the Rules and orders the SPO to disclose the redacted versions thereof, together with the additional information, as set out in paragraph 30.

³⁹ Request, paras 11-13.

C. ITEMS 122-132

32. As regards Items 122-132, the SPO submits that these are videos (ten of which are identical)⁴⁰ depicting the SPO's search and seizure at the KLA WVA premises on 25 September 2020 ("Search and Seizure Videos") and that they include the movements of the SPO staff members through the premises and the collection of certain items.⁴¹ The SPO requests that the Search and Seizure Videos are withheld as they are not subject to disclosure under Rule 102(3) of the Rules, because the Defence has already received extensive documentation regarding the search and seizure and the Defence has never alleged or had any basis to allege that anything untoward occurred during the operation.⁴² Alternatively, the SPO requests that the Search and Seizure Videos are withheld under Rule 108 of the Rules because they depict SPO staff members who travel frequently to, or are based in, Kosovo.⁴³ According to the SPO, disclosing these videos could put these persons at risk and/or hinder their work; in addition, the redaction of these videos would be highly complicated and time-consuming.⁴⁴

33. The Defence for Mr Gucati responds that the conduct of the SPO during the search of the KLA WVA premises on 25 September 2020 is in issue, as the search was conducted in the absence of Mr Gucati and because the Defence has observed certain inconsistencies between records of the search prepared by the SPO.⁴⁵ The Defence for Haradinaj responds that it is not prepared to accept something as being a fact without

⁴⁰ According to the SPO, Items 123-131 are duplicates of Item 122, annexed to the Request (Annex 3). Item 132 is described on the Consolidated Rule 102(3) Notice as "SPO search and seizure video".

⁴¹ Request, para. 15.

⁴² Request, para. 16.

⁴³ Request, para. 17.

⁴⁴ Request, para. 17.

⁴⁵ Gucati Response, paras 6-10.

having had the opportunity to critically analyse it.⁴⁶ The Defence for Mr Haradinaj further avers that the search was undertaken in normal working hours, in a public building with members of the public and the press present and therefore anyone in the video can be identified.⁴⁷

34. The SPO replies that all Defence objections stem from factual circumstances clearly reflected in the disclosed written record and that the Defence provides no prima facie indication as to what needs to be verified through the videos.⁴⁸

1. Rule 102(3) of the Rules

35. The Pre-Trial Judge notes that Item 122, as annexed to the Request,⁴⁹ depicts the movements of SPO staff, an interpreter and an independent observer during the search of the KLA WVA premises conducted on 25 September 2020 pursuant to the Single Judge's order, in the presence of Faton Klinaku ("Mr Klinaku") and Tome Gashi ("Mr Gashi"). The Pre-Trial Judge further notes that, as indicated by the SPO, the search resulted in the seizure of, *inter alia*, CCTV footage dated 7, 16 and 22 September 2020 depicting items being delivered to the KLA WVA premises.⁵⁰ The Pre-Trial Judge also observes that Item 121 of the Consolidated Rule 102(3) Notice is a detailed account by an SPO staff member of the aforementioned search and seizure, noting, *inter alia*, concerns raised by Mr Klinaku and the movements and statements of both Mr Gashi and Mr Klinaku.⁵¹ Given the material seized by the SPO during this search and the aforementioned notes of the SPO staff member, the Pre-Trial Judge considers

⁴⁶ Haradinaj Response, para. 31.

⁴⁷ Haradinaj Response, paras 34-35.

⁴⁸ Reply, para. 8.

⁴⁹ Annex 3 to the Request.

⁵⁰ Request, fn. 34, referring to Items 328-339 of the SPO Exhibit List.

⁵¹ Item 121 of the Consolidated Rule 102(3) Notice, ERN 083846-083927, at 083864, 083888-083984.

that the Defence is entitled to have access to the Search and Seizure Videos, as these provide an opportunity to observe the event neutrally, as it unfolded, and not solely relying on the disclosed SPO account.

36. The Pre-Trial Judge accordingly finds that the Search and Seizure Videos are subject to disclosure under Rule 102(3) of the Rules.

2. Rule 108 of the Rules

37. Given the above finding, the Pre-Trial Judge will now consider whether the Search and Seizure Videos are to be withheld under Rule 108 of the Rules.

38. The Pre-Trial Judge notes that Item 122, as annexed to the Request,⁵² shows some SPO staff members and other persons whose identity is redacted in the SPO records regarding the aforementioned search and seizure.⁵³

39. With regard to prejudice to SC investigations and proceedings, the Pre-Trial Judge recalls the Accused's statements indicating an aim to undermine and obstruct SC proceedings.⁵⁴ These statements indicate that, if the Accused gained access to the Search and Seizure Videos, there would be a risk that they would disseminate the identities of the aforementioned persons and thereby cause prejudice to SC investigations and proceedings. At the same time, the Pre-Trial Judge observes that the persons in the video may have already been identifiable to Mr Klinaku and Mr Gashi, who were present during the search.

⁵² Annex 3 to the Request.

⁵³ Item 121 of the Consolidated Rule 102(3) Notice, ERN 083846-083927.

⁵⁴ Gucati December 2020 Detention Review Decision, paras 33-35; Haradinaj December 2020 Detention Review Decision, para. 38.

40. With regard to the necessity and proportionality of the non-disclosure, in order to mitigate the aforementioned risks, while giving the Defence the opportunity to watch the search and seizure videos, the Pre-Trial Judge orders the SPO to make Items 122-132 viewable to the Defence Counsel on the SPO premises and to allow the taking of notes during such viewing(s). Correspondingly, the Pre-Trial Judge reminds Defence Counsel of their obligation to respect the confidentiality of information and orders them to refrain from making any copies (e.g. videos, screenshots, stills) of Items 122-132 during such viewing(s).⁵⁵ Defence Counsel are, however, permitted to show their notes to the Accused and discuss their content.

3. Conclusion

41. In light of the foregoing, the Pre-Trial Judge finds that the Search and Seizure Videos are subject to disclosure under Rule 102(3) of the Rules and orders the SPO to make them available for viewing by Defence Counsel, as set out in paragraph 40.

D. ITEM 177

42. The SPO submits that Item 177 is a medical documentation [REDACTED].⁵⁶ The SPO indicates that the redacted record of the interview has been disclosed to the Defence and that this record clearly states that [REDACTED], thereby providing a sufficient counterbalancing measure for non-disclosure.⁵⁷ The SPO further specifies

⁵⁵ Article 12(1) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers. KSC-BD-07, 1 March 2019.

⁵⁶ Request, para. 2. *See also* Annex 1 to the Request.

⁵⁷ Request, paras 2, 4.

that Item 177 contains [REDACTED].⁵⁸ According to the SPO, Item 177 cannot be meaningfully redacted, since its format could reveal [REDACTED].⁵⁹

43. The Defence for Mr Gucati does not accept that Item 177 cannot be meaningfully redacted.⁶⁰ The Defence for Mr Haradinaj responds that [REDACTED].⁶¹ The Defence for Mr Haradinaj further submits that if the SPO does not disclose of Item 177, the Pre-Trial Judge ought to rule that the item is inadmissible.⁶²

44. The SPO replies that the present litigation concerns the disclosure of Rule 102(3) items and not the admissibility of evidence.⁶³ The SPO further submits that it does not intend to seek the admission of any of the Rule 102(3) items into evidence and that the question whether it can prove its allegations in relation to the disclosed evidence is a matter for trial.⁶⁴

45. The Pre-Trial Judge notes that Item 177, as annexed to the Request,⁶⁵ contains [REDACTED]. [REDACTED]. Furthermore, Item 177 contains information [REDACTED]. The Pre-Trial Judge will accordingly consider whether Item 177 is to be withheld under Rule 108 of the Rules.

46. With regard to [REDACTED], the Pre-Trial Judge recalls the findings in paragraph 28 regarding the propensity of the Accused to disseminate confidential information related to witnesses. Moreover, [REDACTED].⁶⁶

⁵⁸ Request, para. 3.

⁵⁹ Request, para. 4.

⁶⁰ Gucati Response, para. 3.

⁶¹ Haradinaj Response, paras 12-14, 18-19.

⁶² Haradinaj Response, para. 15.

⁶³ Reply, para. 4.

⁶⁴ Reply, paras 4-5.

⁶⁵ Annex 1 to the Request.

⁶⁶ ECtHR, *Kotilainen and Others v. Finland*, no. 62439/12, [Judgment](#), 17 September 2020, para. 83.

47. With regard to the necessity of non-disclosure, the Pre-Trial Judge considers that the non-disclosure to the Accused of Item 177 is strictly necessary in order to [REDACTED].

48. With regard to the proportionality of non-disclosure, [REDACTED], the Pre-Trial Judge considers that no additional counterbalancing measures are necessary and the non-disclosure is therefore proportionate.

49. The Pre-Trial Judge accordingly finds that Item 177 is to be withheld under Rule 108 of the Rules.

E. THE THREE GUCATI REQUESTS

1. The Gucati Request A

50. The SPO submits that the Gucati Request A 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.⁶⁷ The SPO further avers that there is no requirement at other international courts that notes or questions underlying a disclosed witness statement are automatically disclosable.⁶⁸ The SPO indicates that information related to the seizure of Batches 1 and 2, the arrival of Batch 3 at the KLA WVA premises and the handover of Batch 3 has been disclosed to the Defence and that the SPO is not in possession of any such contemporaneous notes by the staff members or third parties referred to by the Defence.⁶⁹ The SPO further specifies that items related to its two witnesses, W04841 and W04842, or to witnesses in other

⁶⁷ Request, para. 29.

⁶⁸ Request, para. 29.

⁶⁹ Request, para. 30.

proceedings who were contacted by the SPO in the wake of the Accused's actions, have also been disclosed.⁷⁰

51. The Defence for Mr Gucati responds that the official SPO notes concerning contact with witnesses ("Official Witness Notes"),⁷¹ the two declarations by [REDACTED] ("Declarations")⁷² and the official SPO notes concerning the seizure of documents from the KLA WVA and the [REDACTED] ("Official Seizure Notes")⁷³ are not accepted, because they are second and third account statements, having been made days, weeks or months after the contact or event had actually taken place.⁷⁴ The Defence further submits that it is necessary to disclose the questions put to witnesses to make the statement intelligible and that the earliest record is of the highest value, being closest in time to the events and less vulnerable to any subsequent influence.⁷⁵ The Defence also avers that if the requested contemporaneous notes were destroyed, the information thereon, the time and circumstances in which they were destroyed should be recorded in detail in the Consolidated Rule 102(3) Notice.⁷⁶ The Defence also provides a list of the particular contemporaneous notes requested.⁷⁷

52. The Defence for Mr Haradinaj joins the Gucati Request A.⁷⁸ It further submits that the Gucati Request A cannot be more specific, as the Defence is entirely unaware as to which witnesses the SPO may have spoken to and/or taken statements from.⁷⁹ The Defence for Mr Haradinaj also disputes that information related to the

⁷⁰ Request, para. 31.

⁷¹ Gucati Response, para. 19, referring to Items 1, 136, 137, 183-196, 227-243, 250-275, 287-293, 296-327, 346-357, 362 and 364 of the SPO Exhibit List.

⁷² Gucati Response, para. 20, referring to Items 179-180 and 285-286 of the SPO Exhibit List.

⁷³ Gucati Response, para. 24, referring to Items 134-135, 174-175 and 177 of the SPO Exhibit List.

⁷⁴ Gucati Response, paras 19-25.

⁷⁵ Gucati Response, para. 22.

⁷⁶ Gucati Response, para. 26.

⁷⁷ Gucati Response, para. 27, pp. 9-21.

⁷⁸ Haradinaj Response, para. 55.

⁷⁹ Haradinaj Response, paras 58-62.

seizure/handover of documents and concerning contacted witnesses has been disclosed.⁸⁰

53. The SPO replies that the witness contacts for which contemporaneous notes are sought are not with witnesses or potential witnesses in this case and therefore their statements are not disclosable under Rule 102(1)(b) of the Rules.⁸¹ The SPO further submits that any issues regarding how the Official Witness Notes, Declarations and Official Seizure Notes were prepared, including the length of time it took to prepare them, are matters of admissibility and weight at trial.⁸² According to the SPO, the aforementioned formal documents supersede any preparation materials or rough notes.⁸³ The SPO further avers that in its response, the Defence for Mr Gucati adds specificity to its request after the deadline set by the Pre-Trial Judge and that the Gucati Request A should therefore be dismissed on this basis alone.⁸⁴

54. As regards the Official Witness Notes and the Declarations, the Pre-Trial Judge notes that these documents have been added to the SPO Exhibit List, indicating an intention by the SPO to rely on them at trial. While preliminary, rough notes taken by investigators or prosecutors during interviews with witnesses are not necessarily considered (part of) the witness statements so produced and are not typically disclosable under Rule 102(1)(b) of the Rules, they may be disclosed in specific circumstances if they are exculpatory in nature or if they are material to the preparation of the Defence.⁸⁵ Even though the SPO indicates that it does not intend to

⁸⁰ Haradinaj Response, para. 63.

⁸¹ Reply, para. 10.

⁸² Reply, para. 10.

⁸³ Reply, para. 11.

⁸⁴ Reply, para. 11.

⁸⁵ Similarly, ICC, *Prosecutor v. Bemba Gombo*, Trial Chamber III, [Public Redacted Version of "Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure"](#) (ICC-01/05-01/08-750-Conf), ICC-01/05-01/08-750-Red, 9 April 2010, paras 31-33; *Prosecutor v. Ruto & Sang*, Trial Chamber V, [Decision on Defence Request to Be Provided with Screening Notes and Prosecution's](#)

present the Official Witness Notes as witness statements under Rule 102(1)(b) of the Rules, the Pre-Trial Judge observes that these documents record answers given by the contacted individuals regarding the effects the conduct of the Accused purportedly had on them and their family members. Accordingly, any contemporaneous notes taken during the aforementioned interviews, containing the questions asked and the answers provided, are the product of the interviewed person and may, depending on the circumstances, be material for the preparation of the Defence.⁸⁶ In the present instance, the Pre-Trial Judge takes note of the SPO's indication that the Official Witness Notes and the Declarations record all disclosable information arising from these contacts.⁸⁷ The Pre-Trial Judge accordingly finds that any contemporaneous notes taken during interviews with contacted individuals and on the basis of which the Official Witness Notes and the Declarations were prepared are subject to disclosure under Rule 102(3) of the Rules only to the extent that they contain disclosable information that has not been recorded in the Official Witness Notes and Declarations. The SPO is accordingly ordered to review any such contemporaneous notes and, where they contain disclosable information, such as the questions posed to the contacted individuals, which has not been recorded in the Official Witness Notes and the Declarations, to disclose such notes to the Defence. Insofar as such contemporaneous notes contain internal analyses, opinions or conclusions of SPO staff members regarding the collected information, these parts fall within the scope of

[Corresponding Requests For Redactions](#), ICC-01/09-01/11-743-Red, 20 May 2013, paras 22-24; *Prosecutor v. Yekatom and Ngaiisona*, Trial Chamber V, [Decision on the Yekatom Defence Motion for Disclosure of Draft Witness Statements](#), ICC-01/14-01/18-539, 1 June 2020, paras 24-25; *Prosecutor v. Yekatom and Ngaiisona*, Trial Chamber V, [Decision on the Yekatom Defence Motion for Disclosure of Screening Notes](#), ICC-01/14-01/18-618, 10 August 2020, para. 13.

⁸⁶ Similarly, ICTR, *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Appeals Chamber, [Judgement](#), 9 July 2004, paras 33-34; STL, *In the Matter of El-Sayed*, CH/AC/2011/01, Appeals Chamber, [Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011](#), 19 July 2011, para. 83.

⁸⁷ Reply, para. 11.

Rule 106 of the Rules and may be redacted.⁸⁸ The SPO may also apply redactions under Rule 108 of the Rules equivalent to those applied or authorised for the Official Witness Notes.

55. As regards the Official Seizure Notes, the Pre-Trial Judge takes note of the SPO's indication that it is not in possession of contemporaneous notes taken during the seizure/handover of documents from the KLA WVA and [REDACTED].⁸⁹ The Pre-Trial Judge further notes that the Defence has been provided with all reports on the search and seizure conducted by the SPO at the KLA WVA premises.⁹⁰

56. In light of the foregoing, the Pre-Trial Judge grants in part the Gucati Request A and orders the SPO to disclose, by Monday, 7 June 2021, relevant material, if any, as set out in paragraph 54.

2. The Gucati Requests B-C

57. The SPO reproduces in its Request the questions posed by the Defence for Mr Gucati in relation to Gucati Request B and the Gucati Request C (collectively, "the Gucati Requests B-C").⁹¹ The SPO submits that the Defence for Mr Gucati fails to: (i) sufficiently identify any information, beyond that already in the Defence's possession, that it deems material; and (ii) demonstrate that any such information is in fact material to Defence preparations.⁹² The SPO further avers that the Defence fails to shed light upon the manner in which the requested information could possibly be

⁸⁸ Similarly, ICTR, *Prosecutor v. Nizeyimana*, ICTR-2000-55C-PT, Trial Chamber, [Decision on Urgent Defence Motion for Disclosure of Prior Statements](#), 31 January 2011, para 6.

⁸⁹ Request, para. 30.

⁹⁰ See KSC-BC-2020-07, F00050, Specialist Prosecutor, *Prosecution Report on Search and Seizure Pursuant to KSC-BC-2020-07-F00013 and KSC-BC-2020-07-F00014*, 15 October 2020, confidential, with Annexes 1-7; KSC-BC-2020-07, Disclosure Package 25, 28 April 2021 (ERN 083846-083927 RED).

⁹¹ Request, paras 34-35.

⁹² Request, para. 36.

relevant to the case, its preparation or serve any legitimate forensic purpose, given 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.⁹³ The SPO submits that the Gucati Requests B-C concern information about the transfer of the Three Batches to the Accused and that such information does not inform the authenticity of the material in question, nor does it mitigate or bear upon the Accused's liability.⁹⁴

58. The Defence for Mr Gucati responds that the information sought through the Gucati Requests B-C is relevant to the case and material to the Defence preparation because of the possibility that at least some of the material pertaining to the Three Batches was "leaked" or "released" by the SPO.⁹⁵ The Defence for Mr Gucati refers to several Official Witness Notes, in which the interviewed individuals express their concern or opinion regarding the purported leak of SPO information.⁹⁶ On this basis, the Defence submits that any evidence that the source of the leaks to the Accused can be traced back to any SPO staff member might reasonably suggest that the Accused were somehow incited or entrapped and such evidence would beg the question why the material was released by said SPO staff member.⁹⁷ The Defence avers that any such evidence should be disclosed under Rule 102(3) or 103 of the Rules, so that the argument can be advanced by the Defence at trial.⁹⁸

59. The Defence for Mr Haradinaj joins the Gucati Requests B-C.⁹⁹ The Defence submits that the alleged leak and the circumstances of how it happened go to the very

⁹³ Request, paras 37-40.

⁹⁴ Request, para. 39.

⁹⁵ Gucati Response, paras 33-55.

⁹⁶ Gucati Response, paras 33-34, 39-44.

⁹⁷ Gucati Response, para. 55.

⁹⁸ Gucati Response, paras 56-57.

⁹⁹ Haradinaj Response, para. 55.

heart of the case, as they are the catalyst for the allegations themselves.¹⁰⁰ The Defence for Mr Haradinaj further avers that the reluctance of the SPO to disclose its investigation and findings is of utmost concern, given that such a leak is a criminal offence and the Specialist Prosecutor has publicly stated that he is certain that the leak did not come from his office.¹⁰¹

60. The SPO replies that the case as charged includes no allegations relevant to how the Three Batches came into the hands of the Accused.¹⁰² The SPO further submits that the concerns expressed by the witnesses identified by the Defence for Mr Gucati are immaterial to what the Accused did with the confidential information that came into their possession.¹⁰³ The SPO also states that not commenting on its ongoing investigations is standard practice and should not be construed as tacit admission that disclosable information is being withheld.¹⁰⁴ The SPO submits that the questions posed by the Defence for Mr Gucati do not add any meaningful specificity to the Gucati Requests B-C and that its submissions regarding incitement or entrapment are speculative.¹⁰⁵

61. The Pre-Trial Judge notes that the questions posed by the Defence for Mr Gucati in relation to the Gucati Requests B-C concern the following: (i) contribution and access of current and former SPO staff members to the material contained in the Three Batches;¹⁰⁶ (ii) the SPO's measures for the storage and protection of the material;¹⁰⁷ (iii) the steps taken by the SPO to identify devices on which such material was stored

¹⁰⁰ Haradinaj Response, para. 67.

¹⁰¹ Haradinaj Response, paras 68-70.

¹⁰² Reply, para. 13.

¹⁰³ Reply, para. 14.

¹⁰⁴ Reply, para. 14.

¹⁰⁵ Reply, paras 15-16.

¹⁰⁶ Request, para. 34(i)-(v); Gucati Response, para. 49(ii)(a)-(e).

¹⁰⁷ Request, paras 34(iv), (vi), (viii), 35(xii); Gucati Response, para. 49(ii)(d), (f), (h), (m).

and the users of such devices;¹⁰⁸ and (iv) investigative steps taken by the SPO, including interviewing current or former SPO staff members and examining devices, in relation to the alleged leak of documents.¹⁰⁹

62. Having reviewed the questions posed by the Defence for Mr Gucati, the Pre-Trial Judge finds that the information and material requested fall squarely outside the scope of the present case. The Pre-Trial Judge emphasises that the charges against the Accused pertain to their conduct following the receipt of alleged confidential information at the KLA WVA premises. The process through which the information arrived to the KLA WVA premises, whether or not it is subject to an SPO investigation, does not fall under the scope of the charges against the Accused, which are based on the alleged unlawful revelation of confidential information [REDACTED] purportedly contained in the delivered material.

63. The extent to which the Defence's submissions regarding incitement or entrapment may constitute a permissible substantive defence or a ground for the exclusion of evidence are matters to be addressed at trial. In any event, the Pre-Trial Judge notes that, were the SPO to have any material or information in its custody, control or actual knowledge as regards any purported incitement or entrapment of the Accused, such material or information would fall under the scope of Rule 103 of the Rules and would have to be immediately disclosed.

64. The Pre-Trial Judge accordingly finds that the information and material sought by the Defence in the Gucati Requests B-C are not relevant to the case and are not material to the Defence preparation and, as such, are not subject to disclosure under Rule 102(3)

¹⁰⁸ Request, para. 34(vii)-(viii); Gucati Response, para. 49(ii)(g)-(h).

¹⁰⁹ Request, para. 35(ix)-(xii); Gucati Response, para. 49(ii)(j)-(m).

of the Rules. In light of the foregoing, the Pre-Trial Judge rejects the Gucati Requests B-C.

V. DISPOSITION

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

- a. **DEFERS** decision on Items 99, 101-103 and 106-120 to a later date;
- b. **GRANTS** the Request in relation to Item 177;
- c. **ORDERS** the SPO to provide to the Defence by **Wednesday, 2 June 2021**, the [REDACTED] and related information, as set out in paragraph 30;
- d. **ORDERS** the SPO to make available to Defence Counsel, upon request, the Search and Seizure Videos, as set out in paragraph 40, and **ORDERS** the Defence to abide by the measures provided in the same paragraph;
- e. **GRANTS** in part the Gucati Request A and **ORDERS** the SPO to disclose, by **Monday, 7 June 2021**, relevant material, if any, as set out in paragraph 54; and
- f. **REJECTS** the Gucati Requests B-C.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Wednesday, 26 May 2021

At The Hague, the Netherlands.