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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-07**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	29 July 2021
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Public Redacted Version of

Decision on the Appeals Against Disclosure Decision

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel" or "Panel" and "Specialist Chambers", respectively),[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules"), is seised of the "Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 170(2)" filed on 28 June 2021 by Gucati, and the "Submissions on Appeal of Decision KSC-BC-2020-07/F00210" also filed on 28 June 2021 by Haradinaj (collectively the "Appeals"),[2] challenging the "Decision on Prosecution Requests and Challenges Pursuant to F00172" ("Impugned Decision").[3] The Specialist Prosecutor's Office ("SPO") responded on 8 July 2021 that the Appeals should be rejected in their entirety.[4] Gucati and Haradinaj (collectively the "Accused" or "Defence") each replied on 13 July 2021.[5]

I. BACKGROUND

1. On 22 January 2021, the Pre-Trial Judge issued a framework decision setting out *inter alia* the principles applicable to the disclosure of material under Rule 102(3) of the Rules.[6]

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[1] F00001, Decision Assigning a Court of Appeals Panel, 16 June 2021 (confidential, reclassified as public on 28 July 2021).
[2] F00002, Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 170(2), 28 June 2021 (confidential) ("Gucati Appeal"); F00003, Submissions on Appeal of Decision KSC-BC-2020-07/F00210, 28 June 2021 (confidential) ("Haradinaj Appeal"). The Panel notes that although both Appeals were ultimately filed and distributed on 28 June 2021, they were initially submitted on 25 June 2021, within the time-limit set under Rule 170(2) of the Rules. See F00004, Memorandum from Acting Head of Court Management Unit: Receipt, processing and distribution of two submissions, 30 June 2021 (confidential).
[3] F00210/RED, Public Redacted Version of Decision on Prosecution Requests and Challenges Pursuant to F00172, 15 July 2021 (original version filed on 26 May 2021).
[4] F00005, Response to Defence Appeals of Disclosure Decision, 8 July 2021 (confidential) ("Response"), paras 1, 37.
[5] F00006, Reply to Prosecution Response to Defence Appeals of Disclosure Decision, 13 July 2021 (confidential) ("Gucati Reply"); F00007, Reply to the Prosecution Response to the Defence Appeals of Disclosure Decision, 13 July 2021 (confidential) ("Haradinaj Reply").
[6] F00104, Framework Decision on Disclosure of Evidence and Related Matters, 22 January 2021 ("Framework Decision on Disclosure").

2. On 19 February 2021, the SPO filed an initial notice pursuant to Rule 102(3) of the Rules.[7]

3. 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 (the "Batches").[8]

4. On 1 April 2021, the Pre-Trial Judge issued a decision setting out a revised schedule for the disclosure of Rule 102(3) material.[9] In this decision, the Pre-Trial Judge ruled on an SPO request disputing the materiality of two items requested by Gucati, namely Items (a) and (b),[10] and found the Defence's request for disclosure of such material "not sufficiently specific to allow the Pre-Trial Judge to make an informed determination as to their relevance to the case or their materiality for Defence preparation".[11]

5. On 14 April 2021, further to the Decision on the Materiality of Rule 102(3) Items, the SPO submitted a consolidated detailed notice of material in its possession falling under Rule 102(3) of the Rules.[12]

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[7] F00133, Prosecution's Rule 102(3) notice, 19 February 2021.
[8] F00141/RED, Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, 15 July 2021 (original version filed on 23 February 2021).
[9] F00172/RED, Public Redacted Version of the Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, 15 July 2021 (original version filed on 1 April 2021) ("Decision on the Materiality of Rule 102(3) Items").
[10] See F00149, Prosecution submissions on the materiality of certain information requested by the Defence pursuant to Rule 102(3), 8 March 2021 (confidential) ("SPO Submissions on Materiality"). Item (a) pertains to "all material held by the SPO which relates to the origin and provenance of the material contained within Batches 1, 2 and 3, including material as to authorship and chain of custody from creation to its arrival at the KLA WVA HQ". Item (b) pertains to "all material held by the SPO which relates to any attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA HQ". See SPO Submissions on Materiality, para. 8, quoting F00137/RED, Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters, 26 February 2021 (original version filed on 23 February 2021), para. 7(a)-(b).
[11] Decision on the Materiality of Rule 102(3) Items, para. 37.
[12] F00183/A01, Annex 1 to Prosecution's consolidated Rule 102(3) notice, 14 April 2021 (confidential) ("Rule 102(3) Notice").

6. On 21 April 2021, Gucati requested, via *inter partes* correspondence, the disclosure of all items listed in the Rule 102(3) Notice and of certain other items, including: (i) "[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 […]" ("Gucati Request B"); and (ii) "[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") (collectively "Gucati Requests B-C").[13] Gucati Requests B-C mirror material previously identified under Items (a) and (b), respectively.

7. On 26 April 2021, the SPO submitted a request for the non-disclosure of, *inter alia*, certain material not listed in the Rule 102(3) Notice, including the material identified under Gucati Requests B-C.[14]

8. On 10 and 11 May 2021 respectively, Gucati and Haradinaj responded.[15]

9. On 26 May 2021, the Pre-Trial Judge issued the Impugned Decision, where he, *inter alia*, rejected Gucati Requests B-C.[16]

[13] See F00190/RED, Public Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', dated 26 April 2021, 18 May 2021 (original version filed on 26 April 2021) ("Request for Non-Disclosure"), paras 1, 32, quoting an email dated 21 April 2021 from the Gucati Defence team to the SPO.
[14] Request for Non-Disclosure.
[15] F00199, 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, 10 May 2021 (confidential); F00200, Defence Response to SPO Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', and F00190, 11 May 2021 (confidential, reclassified as public on 15 July 2021).
[16] Impugned Decision, paras 57-65. In this decision, the Pre-Trial Judge also granted in part another request for disclosure of Gucati of items not included in the Rule 102(3) Notice. See Impugned Decision, paras 50-56, 65.

10. On 3 June 2021, Gucati and Haradinaj each requested leave to appeal the Impugned Decision.[17]

11. On 15 June 2021, the Pre-Trial Judge granted the Defence leave to appeal the Impugned Decision on the two following issues ("Certified Issues"):[18]

(a) Whether the Pre-Trial Judge erred in finding that the issue of the process through which alleged confidential material arrived to the KLA WVA premises was not relevant to the case ("Issue 1");[19] and

(b) Whether the Pre-Trial Judge erred in finding that the information and material requested in Gucati Requests B-C, which went to the issue of the process through which alleged confidential material arrived to the KLA WVA premises, was not relevant to the case and not material to the Defence preparation ("Issue 2").[20]

[17] F00216, Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 77(1); Alternative Request for Reconsideration under Rule 79(1), 3 June 2021 (confidential, reclassified as public on 15 July 2021) ("Gucati Certification Request"); F00219, Application for Leave to Appeal the Decision on Prosecution requests and challenges pursuant to F00172, 3 June 2021(confidential, reclassified as public on 15 July 2021) ("Haradinaj Certification Request"). On 10 June 2021, the SPO filed a consolidated response. See F00226, Specialist Prosecutor, Consolidated Prosecution Response to Defence Applications F00216 and F00219 for Leave to Appeal and Reconsideration, 10 June 2021 (confidential, reclassified as public on 15 July 2021). On 14 June 2021, Gucati and Haradinaj filed their respective replies. See F00230, Reply to Consolidated Prosecution Response to Defence Applications F00216 and F00219 for Leave to Appeal and Reconsideration, 14 June 2021 (confidential, reclassified as public on 15 July 2021); F00234, Defence Reply to Prosecution Response to Defence Applications F00216 and F00219, 14 June 2021 (confidential, reclassified as public on 15 July 2021).

[18] F00235, Decision on the Defence Applications for Leave to Appeal the Decision on the Gucati Requests B-C, 15 June 2021 (confidential, reclassified as public on 15 July 2021) ("Certification Decision"), paras 7(a), 21, 38, 40.

[19] Certification Decision, para. 7(a).

[20] Certification Decision, para. 21.

12. On 12 July 2021, Gucati and Haradinaj filed their respective pre-trial briefs, in which they each confirmed their intention to raise the issue of incitement and/or entrapment at trial.[21]

13. On 16 July 2021, the Pre-Trial Judge transmitted the case to Trial Panel II pursuant to Rule 98(1) of the Rules.[22]

II. STANDARD OF REVIEW

14. The Court of Appeals Panel adopts the standard of review for interlocutory appeals set out in its first decision and applied subsequently.[23]

III. DISCUSSION

A. PRELIMINARY MATTERS

1. Public Filings

15. The Panel notes that both the Pre-Trial Judge's Impugned Decision and his Certification Decision were initially filed confidentially.[24] As a result, all submissions on appeal were also filed confidentially. The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all

[21] F00258, Defence Pre-Trial Brief on behalf of Hysni Gucati, 12 July 2021 (confidential), paras 36-50; F00260, Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 12 July 2021 (confidential), paras 277-280. See also Gucati Reply, para. 5.
[22] F00265, Decision Transmitting Case File to Trial Panel II, 16 July 2021.
[23] F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, paras 11-14; F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("Appeal Decision on Preliminary Motions"), paras 8-11; KSC-BC-2020-06, F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, paras 4-7.
[24] A public redacted version of the Impugned Decision was issued on 15 July 2021, and the Certification Decision was reclassified as public on 15 July 2021, after completion of the briefing schedule on appeal.

submissions filed before the Panel.[25] The Panel notes that Gucati and Haradinaj do not object to the reclassification of their Appeals as public, nor does Gucati object to the reclassification of the Gucati Reply as public.[26] However, in assessing whether their submissions can be reclassified as public, the Panel invites the Parties to exercise caution and to follow the guidance provided by the redactions appended in the public redacted versions of the relevant decisions issued by the Pre-Trial Judge. The Panel therefore orders the Parties to file public redacted versions of their filings on appeal,[27] or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.[28]

2. Formal Requirements on Appeal

16. Despite the warning issued in its previous decision,[29] the Court of Appeals Panel notes that in several instances Haradinaj again mentions filings without any specific references or footnotes,[30] or fails to substantiate his argument with reference to case-law.[31] The Panel recalls the requirements set forth in the Practice Direction, notably concerning the necessity to provide specific references to filings and authorities relied upon.[32] In light of Haradinaj's repeated failures to abide by the

[25] See e.g. Appeal Decision on Preliminary Motions, para. 13; KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021(original version filed on 30 April 2021), para. 10.
[26] See Gucati Appeal, para. 50; Haradinaj Appeal, paras 1-2; Gucati Reply, para. 25.
[27] Namely, Gucati Appeal (F00002); Haradinaj Appeal (F00003); Response (F00005); Gucati Reply (F00006); Haradinaj Reply (F00007).
[28] See Rule 82(3) and (5) of the Rules and KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 ("Practice Direction"), Article 39(1).
[29] See Appeal Decision on Preliminary Motions, paras 16-17.
[30] See Haradinaj Appeal, paras 21-22, 36-38 (mention of SPO submissions or allegations in the Indictment without any reference or footnote); Haradinaj Reply, para. 10 (claiming that the SPO declared on numerous occasions that it had complied fully with its disclosure obligations, only to then further disclose thousands of pages to the Defence, without any reference or footnote). See also Response, para. 16, fn. 34.
[31] See Haradinaj Appeal, para. 53 (claiming a violation of Article 6(1) of the European Convention on Human Rights with no corresponding jurisprudence). See also Response, para. 16, fn. 34.
[32] Practice Direction, Article 32(2).

Practice Direction, the Panel summarily dismisses Haradinaj's above-mentioned submissions.

3. Issues Falling Outside of the Scope of the Certified Issues

17. Pursuant to Rule 170(2) of the Rules, an appeal for which leave has been granted through certification by the Pre-Trial Judge or Trial Panel shall be filed exclusively in respect of the issues certified by the lower panel.[33] The scope of the Court of Appeals Panel's review therefore lies strictly within the confines of the issues certified by the Pre-Trial Judge in the Certification Decision.[34] It is for the Pre-Trial Judge or the Trial Panel to determine not only whether a decision may be appealed, but also to what extent.[35] The Panel may thus decline to consider the arguments of an appellant that go beyond the issue in relation to which certification has been granted.[36] Furthermore, the Panel recalls that it will only decide issues that actually arise from the Impugned Decision.[37]

18. Before addressing their substance, the Panel will now assess whether the Appeals exceed the scope of the Certified Issues. The Panel recalls that the Pre-Trial Judge granted all the issues raised for certification by the Defence in their requests for certification.[38] The Panel observes that the Gucati Appeal contains submissions that pertain to alleged defects in the Indictment.[39] The Panel finds that these arguments do not arise from the Impugned Decision. Consequently, they also fall outside of the scope of the Certified Issues. Gucati's arguments on this matter are therefore not

[33] See Appeal Decision on Preliminary Motions, para. 18.
[34] See Appeal Decision on Preliminary Motions, para. 20, and jurisprudence cited therein. See also Certification Decision, paras 7, 21, 38.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] The Certified Issues have however been consolidated and rephrased by the Pre-Trial Judge for "reasons of judicial economy and to ensure clarity". See Certification Decision, para. 21.
[39] See Gucati Appeal, paras 13, 30, 36, 40.

properly brought before the Panel. The Panel therefore declines to consider them and formally dismisses these challenges.

B. CHALLENGES

1. Submissions of the Parties

19. With regard to Certified Issue 1, Gucati argues that the Pre-Trial Judge erred in finding that the issue of the process through which alleged confidential material arrived at the KLA WVA premises was not relevant to the case.[40] In his view, it stems from Article 21(6) of the Law and Rule 102(3) of the Rules that the test for relevance is wider than the test of materiality to the preparation of the Defence, and is not "coterminous" with the unilateral assessment by the SPO of what is deemed material or relevant for the Defence's preparation.[41]

20. Gucati further submits that it was erroneous for the Pre-Trial Judge to limit the definition of relevance to (i) the temporal scope of the charges, that is, from the time when the material arrived at the KLA WVA premises; and (ii) material confined to directly countering the SPO's case. He submits that these errors are highlighted by the finding that any material or information regarding purported incitement or entrapment (which necessarily precedes an offence and does not directly counter its elements) would fall under the scope of Rule 103 of the Rules.[42] According to him, the concept of temporal scope of the charges is "even narrower" than a limitation to the temporal scope of the Indictment, which recognises surrounding circumstances leading up to the offences and refers to events that took place between April and August 2020.[43]

[40] Gucati Appeal, paras 29, 37, 39.
[41] Gucati Appeal, paras 18-26, 33. See also Haradinaj Appeal, para. 38.
[42] Gucati Appeal, paras 30-32. See also Haradinaj Appeal, para. 38.
[43] Gucati Appeal, paras 34-36. See also Haradinaj Appeal, para. 38.

21. Turning to Certified Issue 2, Gucati argues that the Pre-Trial Judge erred in finding that the information and material requested in Gucati Requests B-C was not relevant to the case and not material to the Defence preparation.[44] He indicates in that regard that his case at trial will include a plea of incitement by or on behalf of SPO officers, which relates to the process through which the material arrived at the KLA WVA premises.[45]

22. Gucati asserts that the concept of "material to the Defence preparation" must be construed broadly and refers to all information and material of relevance to the preparation of its case.[46] He claims that the Accused is not required to demonstrate that the requested material is exculpatory or non-incriminating.[47] In his view, the materiality test may be met by material "which may simply put the accused on notice that other material exists which may assist him in his defence".[48]

23. As the SPO failed to include the material identified under Gucati Requests B-C in its Rule 102(3) Notice, Gucati contends that he was erroneously deprived of the necessary assistance in requesting this material (according to what the Defence deems material to its preparation) which should normally have been provided by the Rule 102(3) Notice detailing this material.[49] He asserts that this material has only been subject to a unilateral evaluation by the SPO of what it deems useful or material to the Defence's preparation, and that such material was not provided to the Pre-Trial Judge for his assessment.[50] Gucati further avers that the SPO did not seek non-disclosure or non-notification under Rule 106, nor did it apply for restrictions with or without counter-balancing measures.[51]

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[44] Gucati Appeal, paras 38, 48.
[45] Gucati Appeal, para. 43. See also Gucati Appeal, para. 16; Gucati Reply, paras 3, 5-6.
[46] Gucati Appeal, paras 27-28, 42, 44.
[47] Gucati Appeal, para. 45. See also Gucati Appeal, para. 28.
[48] Ibid.
[49] Gucati Appeal, paras 9, 40-41, 47. See also Gucati Reply, paras 13-15.
[50] Gucati Appeal, para. 46. See also Gucati Appeal, paras 12, 24, 33.
[51] Gucati Appeal, paras 10-11.

24. Haradinaj indicates that he adopts Gucati's submissions on appeal, including those concerning the tests for relevance and materiality.[52] According to Haradinaj, the two grounds of appeal overlap and he makes similar submissions under both grounds.[53] He contends that the Pre-Trial Judge erred in finding that the issue of the process through which alleged confidential material arrived at the KLA WVA premises was not relevant to the case.[54] He submits that this issue and the circumstances of the alleged "leaks" are of direct relevance and underpin the entire case, as the alleged disclosures could not have occurred had the Batches not been delivered to the KLA WVA premises.[55]

25. Haradinaj further argues that he has the right to raise any defence at trial, that he made clear his intention to raise a defence of incitement and/or entrapment at trial and that the material sought is directly relevant in that respect.[56] He submits that the Pre-Trial Judge contradicted himself by first acknowledging that issues of entrapment and/or incitement may constitute a permissible defence, albeit that this should be addressed at trial, and then ruling that the information sought was not material to the Defence's preparation.[57] In Haradinaj's view, the SPO's "blanket refusal" to disclose the requested material prevents him from raising this defence or even from investigating whether such a defence could be substantiated by evidence.[58] He claims that this violates his fair trial rights and results in significant prejudice and unfairness.[59]

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[52] Haradinaj Appeal, paras 14, 65.
[53] Haradinaj Appeal, paras 46, 49, 54.
[54] Haradinaj Appeal, paras 17, 44, 55, 57.
[55] Haradinaj Appeal, paras 18-19, 31, 35, 50. See also Haradinaj Appeal, paras 20-30, 36-38; Haradinaj Reply, paras 4, 17, 21.
[56] Haradinaj Appeal, paras 17, 32-33, 35, 49-50, 56. See also Haradinaj Appeal, paras 32, 52; Haradinaj Reply, paras 9-10, 13-14.
[57] Haradinaj Appeal, paras 42-45, 48, 51, referring to Impugned Decision, paras 62-64.
[58] Haradinaj Appeal, paras 34, 41, 53, 58. See also Haradinaj Appeal, paras 35, 49; Haradinaj Reply, paras 18-20.
[59] Haradinaj Appeal, paras 53, 59. See also Haradinaj Appeal, paras 60-64; Haradinaj Reply, paras 19-20.

26. Gucati and Haradinaj request the Court of Appeals Panel to order the disclosure of all material falling within Gucati Requests B-C or to order that this material be listed on the Rule 102(3) Notice.[60]

27. The SPO responds that it was reasonable and within the Pre-Trial Judge's discretion to find that the process by which the documents arrived at the KLA WVA premises was not relevant to the case.[61] It submits that the entrapment allegations are "entirely unsupported" and that it does not possess any information remotely suggesting that any person affiliated with the SPO released or otherwise provided the Batches to any person.[62] According to the SPO, these claims are not only absurd and hypothetical but also not even "factually possible" in light of the Accused's own words and conduct.[63]

28. Turning to the second issue, the SPO argues that the information sought by the Defence is not material to the Defence's preparation.[64] It adds that it does not matter how the Accused obtained the confidential information they subsequently disseminated.[65] It further submits that listing items in the Rule 102(3) Notice is without object where it is already apparent that they are not material to the Defence's preparation.[66] In the SPO's view, it is for the judge confronted with the disclosure dispute to decide whether the SPO has discharged its obligations, and it was within the Pre-Trial Judge's discretion to rule on the Defence's request without having reviewed the material sought.[67] The SPO finally argues that the Defence should not be permitted to engage in frivolous "fishing expedition[s]" to obtain disclosure without

[60] Gucati Appeal, para. 49; Haradinaj Appeal, para. 66. See also Gucati Reply, para. 24; Haradinaj Reply, para. 22.
[61] Response, paras 12-15, 26-27. See also Response, paras 18, 29.
[62] Response, paras 19, 23, 25. See also Response, para. 30.
[63] Response, paras 20-23, 25. See also Response, paras 24, 31.
[64] Response, paras 30-31
[65] Response, para. 30. See also Response, para. 18.
[66] Response, para. 29.
[67] Response, paras 32-33. See also Response, paras 34-35.

the need to demonstrate any degree of relevance as this "could disrupt the assessment of the judge", lead to endless challenges and [REDACTED].[68]

29. Gucati replies that the SPO had never suggested that it does not possess any material falling under Gucati Requests B-C, and argues that a review by the Pre-Trial Judge of this material was therefore possible.[69] He further points to some material within the SPO's possession which allegedly supports his position that the Batches were released by the SPO.[70] Haradinaj stresses that it is only in its Response that the SPO reveals the "real reason" for withholding the disclosure of the requested information, [REDACTED], and argues that this cannot be used to justify failing to adhere to the principles of fairness in the present case.[71]

2. Assessment of the Court of Appeals Panel

30. At the outset, the Court of Appeals Panel finds that the first and second grounds of appeal presented by Gucati and Haradinaj substantially overlap, as they both relate to the closely intertwined concepts of relevance to the case and materiality to the preparation of the Defence; therefore, these grounds will be considered together.

31. The Court of Appeals Panel recalls the provisions of the Law and of the Rules relevant to disclosure.

32. Article 21(6) of the Law provides that:

> All material and relevant evidence or facts in possession of the Specialist Prosecutor's Office which are for or against the accused shall be made available 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.

[68] Response, paras 34-36.
[69] Gucati Reply, paras 16-22.
[70] Gucati Reply, paras 7-11.
[71] Haradinaj Reply, paras 18-20.

33. Rule 102(3) of the Rules states:

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

34. The Panel also notes with approval the principles applicable to disclosure pursuant to Rule 102(3) of the Rules set forth by the Pre-Trial Judge in the Framework Decision on Disclosure[72] and, more significantly, the Decision on the Materiality of Rule 102(3) Items.[73]

35. The Panel further stresses the importance of the disclosure process in ensuring the fairness of the proceedings and that the rights of the defence are respected, and that this should remain paramount in disclosure related decisions.[74] The Panel also notes the finding of the Specialist Chamber of the Constitutional Court that entitlement to disclosure of relevant evidence is not an absolute right and that, in some cases, it may be necessary to withhold certain evidence from the Defence in order to preserve the fundamental rights of another individual or to safeguard an important public interest.[75]

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[72] Framework Decision on Disclosure, paras 45-46.
[73] Decision on the Materiality of Rule 102(3) Items, paras 22-23.
[74] See e.g. ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-501, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013 ("*Banda and Jerbo* Judgment"), para. 34. See also ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-251, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 17 June 2015, para. 40.
[75] KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017, para. 135, fn. 77 and jurisprudence cited therein.

36. The Panel further finds that decisions relating to disclosure of evidence are generally treated as discretionary.[76] Appellants will therefore have to demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[77]

37. In the Impugned Decision, the Pre-Trial Judge found that the information and material requested by Gucati "fall squarely outside the scope of the present case" since the charges against the Accused pertain to their conduct following the receipt of alleged confidential information at the KLA WVA premises.[78] He further found that the process through which the information arrived at the KLA WVA premises 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".[79] The Pre-Trial Judge found that the information and material sought "are not relevant to the case and are not material to the Defence preparations" and, therefore, "not subject to disclosure under Rule 102(3) of the Rules."[80]

38. The Panel agrees with the Pre-Trial Judge's assessment that disclosure under Rule 102(3) of the Rules is a three-step process.[81] The first step involves the SPO

[76] See e.g. STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.5, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judges' "Decision on Sabra's Tenth and Eleventh Motions for Disclosure", 6 November 2013 ("*Sabra* Appeal Decision"), para. 9; IRMCT, *Prosecutor v. Niyitegeka*, MICT-12-16-R, Decision on Appeals of Decisions Rendered by a Single Judge, 9 August 2017, para. 14; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para. 431; ICTY, *Prosecutor v. Šešelj*, IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14. C.f. Gucati Appeal, para. 29; Response, para. 13.
[77] See e.g. Appeal Decision on Preliminary Motions, para. 11.
[78] Impugned Decision, para. 62.
[79] Ibid.
[80] Impugned Decision, para. 64.
[81] See Decision on the Materiality of Rule 102(3) Items, para. 22.

providing a detailed notice of "any material and evidence in [its] possession".[82] According to Rule 102(3) of the Rules, the scope of this requirement is determined by Article 21(6) of the Law, which refers to "all material and relevant evidence or facts […] for or against the accused". According to the Pre-Trial Judge, this entails that the detailed notice must include any material and evidence in the SPO's possession that is "relevant to the case".[83] Under the second step, the SPO must disclose, *inter alia*, any material in its custody or control which the Defence deems to be material to its preparation and has requested. Finally, under the last step, the SPO can seize a Panel if it disputes the materiality of the material requested by the Defence. However, neither the Rules nor the Law offer guidance as to the interpretation of the concepts of 'relevance to the case' and 'material to the Defence preparation'.

39. As rightly noted by the Pre-Trial Judge,[84] the disclosure process before the Specialist Chambers under Rule 102(3) of the Rules is distinct from the equivalent provisions of some international criminal tribunals,[85] in the sense that Rule 102(3) of the Rules: (i) requires a detailed notice to be drawn up by the SPO before any requests are made by the Defence for inspection or disclosure of information material to the Defence's preparation; (ii) explicitly indicates that what is material for the Defence's preparation must be deemed as such by the Defence; and (iii) stipulates that disputes on materiality are to be raised by the SPO.

40. The procedural context before these international criminal courts is different in the sense that the relevant rules of these other courts do not require the Prosecution to first provide a list of any material and evidence in its possession, ahead of any request from the Defence for inspection or disclosure of information material to the Defence's preparation. In addition, it is for the Prosecution to conduct the initial

[82] See Impugned Decision, para. 14.
[83] Decision on the Materiality of Rule 102(3) Items, para. 23.
[84] See Decision on the Materiality of Rule 102(3) Items, fn. 29.
[85] See IRMCT Rules, Rule 71(B); ICTY Rules, Rule 66(B); ICTR Rules, Rule 66(B); ICC Rules, Rule 77; STL Rules, Rule 110(B).

assessment of what documents are material to the preparation of the defence and must be made available for inspection or disclosed to the Defence.[86] Therefore, before these international criminal tribunals, the concept of 'relevance to the case' does not come into play in the specific assessment of which documents must be disclosed to the Defence following a request for inspection or disclosure. These courts rather focus on examining, under the term "material to the preparation of the defence", the relevance of the documents to the preparation of the defence case.[87] As a result, their jurisprudence is of little assistance with regard to the definition of the concept of 'relevance to the case' relied upon in order to compile the notice under Rule 102(3) of the Rules.

41. It transpires from well-established jurisprudence from international criminal tribunals that the concept of 'material to the preparation of the defence' is to be interpreted broadly and should not necessarily be confined to the temporal scope of the indictment, or confined to issues directly linked to exonerating or incriminating evidence or which would either directly undermine the prosecution case or support a line of argument of the defence.[88] For instance, some documents may be deemed material to the preparation of the Defence because they: (i) are relevant to a breach of

[86] See e.g. *Delalić* Decision, paras 9, 11; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1330, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses", 20 May 2016 ("*Ntaganda* Appeal Decision"), paras 23, 34; ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-249-Red2, Public Redacted Second Decision on the Prosecutor's Request for the Non-Disclosure of Witness Identities and Non-Standard Redactions, 3 February 2020, para. 29.

[87] See e.g. ICTR, *Prosecutor v. Bagosora et al*., ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 ("*Bagosora* Appeal Decision"), para. 9; *Ntaganda* Appeal Decision, para. 23.

[88] See e.g. *Bagosora* Appeal Decision, paras 8-9; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008 ("*Karadžić* Decision"), para. 11; IRMCT, *Prosecutor v. Turinabo et al*., MICT-18-116-PT, Decision on Motion for Access to Prosecution's Requests for Assistance and Responses Thereto, 18 April 2019, p. 3; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1433, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, paras 73, 76-78; *Banda and Jerbo* Judgment, para. 38; STL, *Prosecutor v. Ayyash et al*., STL-11-01/PT/AC/AR126.4, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013 ("*Oneissi* Appeal Decision"), paras 21-22; *Sabra* Appeal Decision, para. 30.

the accused's rights under the Statute;[89] (ii) are able "to support a colourable argument; that is, an argument that has some prospect of success";[90] (iii) could assist in the assessment of the credibility and reliability of Defence witnesses, and therefore the decision of whether to call them;[91] or (iv) might dissuade a defendant from pursuing an unmeritorious defence.[92] By contrast, information that bears no connection to the events relevant to the charges – such as items of a purely personal nature;[93] too remote, hypothetical or speculative;[94] not related to the charges against the accused;[95] or which has only an "abstract logical relationship to the issues"[96] – may be considered as not material to the preparation of the Defence.

42. In this regard, the Panel finds that international criminal jurisprudence with regard to the materiality test can nevertheless provide some useful guidance to delineate the concept of relevance to the case. The Pre-Trial Judge rightly pointed out that this concept of 'relevance to the case' has to be interpreted broadly as well.[97] The Panel further agrees with Gucati that the test for relevance is wider than the test of materiality to the preparation of the Defence. In that sense, given that the former encompasses the latter, what is found to be material to the preparation of the defence will necessarily also be found relevant to the case.

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[89] ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents, 30 September 2009, para. 9.
[90] *Karadžić* Decision, para. 23.
[91] *Bagosora* Appeal Decision, para. 9; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2624, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, para. 18.
[92] *Bagosora* Appeal Decision, fn. 32.
[93] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1594-Red, Public Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 29 July 2011, para. 23.
[94] ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1351, Decision on Defence Request for Disclosure and Remedy for Late Disclosure, 28 September 2018 ("*Ongwen* Decision"), para. 24; ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-859-Red, Public redacted version of Decision on Defence request for disclosure of material related to Mr Al Hassan's arrest and detention in Mali, 5 January 2021 ("*Al Hassan* Decision"), para. 20.
[95] *Ongwen* Decision, paras 32-33.
[96] ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996 ("*Delalić* Decision"), para. 7.
[97] See Decision on the Materiality of Rule 102(3) Items, para. 23.

43. As a result, the Panel finds that in the Impugned Decision, the Pre-Trial Judge contradicted his earlier finding that relevance is broader than the temporal scope of the indictment, by finding that some materials were not relevant to the case because they did not fall under the scope of the charges against the Accused.[98] The Panel is of the view that although the process through which the information arrived to the KLA WVA premises does not *per se* form part of the charges against the Accused and relates to a different conduct, insofar as the Accused are alleged to have disseminated confidential information *following* the receipt of that information, such process nevertheless bears some connection, at least temporal, with the charges, in that it precedes the events forming part of the charges.

44. The Panel notes that according to the Pre-Trial Judge, the Defence remains entitled to request the disclosure of material not included in the Rule 102(3) Notice "but claimed by the Defence to be material for its preparation", if it follows strict parameters with regard to the required degree of the specificity in identifying the requested material.[99] However, the Panel considers that within the framework of Rule 102(3) of the Rules, before any such request for information potentially material to the Defence preparation can be made, the SPO must list "any material and evidence in the SPO's possession, which has not been disclosed under Rule 102(1)(a)-(b) and 103 and which is relevant *to the case*".[100] Therefore, the Defence should not bear the burden of identifying, in the abstract and in the absence of any list, which material it requests with specificity, since all of that material should already have been placed on the SPO notice. The Panel agrees with the Pre-Trial Judge's finding that, otherwise, this would frustrate the purpose of the first prong of Rule 102(3) of the Rules, which

[98] Compare Framework Decision on Disclosure, para. 45, with Impugned Decision, para. 62.
[99] See Decision on the Materiality of Rule 102(3) Items, para. 26. The parameters set by the Pre-Trial Judge mirror the ones set by the ICTR Appeals Chamber, albeit in a different procedural context, since, unlike before the Specialist Chambers, the ICTR Rules of Procedure an Evidence do not require the Prosecution to first provide a notice to the Defence of all material in its possession. See ICTR, *Karemera et al. v. Prosecutor*, ICTR-98-44-AR 73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, para. 32. See also above, para. 40.
[100] See Decision on the Materiality of Rule 102(3) Items, para. 23 (emphasis in the original).

is precisely to "inform the Defence of material and evidence in the possession of the SPO, which has not been disclosed, in order to assist the Defence in requesting information *they* deem material for their preparation".[101] It would therefore deprive the Defence of the benefit of such notice and place a higher burden on it to identify with specificity material not in its possession and potentially not even within its knowledge.[102]

45. The Panel finds that the dispute mechanism foreseen under the last limb of Rule 102(3) of the Rules concerns challenges to the *materiality* of the requested materials, not their *relevance* (i.e. the basis for inclusion in the Rule 102(3) Notice). The Panel finds that, in the present case, the Defence was deprived of the first step of Rule 102(3) of the Rules, namely the opportunity to be informed of the relevant materials in the possession of the SPO, in order to assist its identification of items which could be material to its preparation and facilitate its request of such items.

46. The Panel furthermore finds that the "degree of initial assessment" by the SPO[103] in terms of which materials are "relevant to the case" and must therefore be included on the Rule 102(3) Notice should leave little discretion to the SPO. The Panel therefore disagrees with the SPO's statement that listing items in the Rule 102(3) Notice is without object where it is already apparent that they are not material to the preparation of the Defence.[104] The Panel finds that such an approach would amount to an impermissible "unilateral assessment" by the SPO of what information would

[101] Ibid. (emphasis in the original).
[102] While before certain international courts, which follow a different procedure as mentioned above, the Defence has the burden of demonstrating that the sought material is in the Prosecution's possession, the process under the first prong of Rule 102(3) of the Rules should relieve the Defence of this burden. C.f. ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 12. See also IRMCT, *Prosecutor v. Uwinkindi*, MICT-12-25-AR14.1, Decision on Motions for Disclosure, 25 May 2016, p. 4; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012, paras 18-19.
[103] See Decision on the Materiality of Rule 102(3) Items, para. 23.
[104] See Response, para. 30. See also Gucati Reply, paras 13-15.

be material *only for the Defence preparation*, as the Pre-Trial Judge correctly noted.[105] This would render the dispute mechanism provided in Rule 102(3) of the Rules regarding materiality "wholly unnecessary".[106]

47. As a result, and in light of its finding above concerning the relevance to the case of the process through which the information arrived to the KLA WVA premises,[107] the Panel finds that the Pre-Trial Judge erred in finding that this issue was not relevant to the case. The Panel also considers that the SPO should have included material in its possession falling under Gucati Requests B-C in its Rule 102(3) Notice. The impact, if any, of this finding of error will be assessed subsequently.

48. The Panel turns next to the question of the materiality to the Defence preparation of the requested material, and addresses first the issue of whether the Pre-Trial Judge should have initially reviewed the material before making any determination on its materiality. The Panel notes that the Pre-Trial Judge indeed did not review such material, and in fact was not even provided with a list detailing this material as part of the Rule 102(3) Notice. As a result, his assessment has been confined to the Parties' submissions. The Panel further notes that Rule 102(3) of the Rules does not provide more details as to how the Pre-Trial Judge should settle a dispute on materiality and whether this entails that the requested material be disclosed to him beforehand. It is noteworthy in that regard that, unlike Rule 102(3), both Rules 107(2) and 108(2) of the Rules provide for the *ex parte* communication to a Panel of the information whose non-disclosure is sought.[108] While the Panel finds that a review of

[105] See Decision on the Materiality of Rule 102(3) Items, para. 23.
[106] Ibid.
[107] See above, para. 43.
[108] Chambers of international criminal tribunals can conduct an *ex parte* review of the material requested in order to determine whether it has to be disclosed to the Defence and/or whether counter-balancing measures are warranted. See e.g. ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, paras 45-48, 94-97; *Banda and Jerbo* Judgment, para. 39; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-591, Decision on the "Request seeking the Prosecution to provide to the

the material might have assisted the Pre-Trial Judge in his determination of the materiality of such documents, especially because they were not listed in the Rule 102(3) Notice, it nevertheless finds that it was within the Pre-Trial Judge's discretion not to request an *ex parte* review of the material falling under Gucati Requests B-C.

49. The Pre-Trial Judge found that the extent to which allegations of incitement and/or entrapment may constitute a permissible substantive defence or grounds for the exclusion of evidence were matters to be addressed at trial, but nevertheless acknowledged the exculpatory nature of material or information regarding purported incitement or entrapment of the Accused, stating that such information would have to be immediately disclosed to the Defence pursuant to Rule 103 of the Rules.[109]

50. The Panel agrees with the Pre-Trial Judge that issues regarding incitement or entrapment are matters to be addressed and determined at trial.[110] For the purposes of the present Decision, the Panel considers that it is neither necessary nor appropriate for the Court of Appeals Panel to engage in an assessment of the permissibility and/or merits, if any, of a possible defence of incitement and/or entrapment and what this might entail.

51. As a result, the Panel will not directly address the parties' submissions on appeal as to whether there are factual grounds that could support such a defence[111] and will limit its determination to whether the Pre-Trial Judge erred in finding that

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Kilolo Defence specific information relating to its reimbursement of Prosecution witnesses" dated 27 June 2014, 25 July 2014, p. 4. See also; ICTY, *Prosecutor v. Milošević*, IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, paras 29-31; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Rule 70(B), 12 February 2009, para. 8.

[109] Impugned Decision, paras 63-64.

[110] See Impugned Decision, para. 63. See also F00267, Order for Submissions and Scheduling the Trial Preparation Conference, 21 July 2021, para. 11.

[111] See Haradinaj Appeal, paras 21-30; Response, paras 20-22, 31; Gucati Reply, paras 6-12; Haradinaj Reply, paras 11-14.

the material falling under Gucati Requests B-C did not have to be disclosed to the Defence.

52. For the purposes of the present Decision, it suffices to recall that according to the jurisprudence of the European Court of Human Rights ("ECtHR"), applicants must be effectively able to raise an issue of incitement[112] during their trial to ensure compliance with Article 6 of the European Convention on Human Rights ("ECHR").[113] The prosecuting authorities therefore have to disclose information relevant to entrapment to permit the Defence to argue a case on entrapment in full at trial, otherwise, the proceedings will fail to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial, in violation of Article 6(1) of the ECHR.[114] The Panel notes however that the defendant's entrapment allegations should not be "wholly improbable".[115]

53. In the present case, the Panel notes that the SPO has repeatedly maintained its position that it does not possess any material or information supporting the "entrapment allegations".[116] The Panel also recalls that there is a presumption of good faith on the prosecution's part when discharging its disclosure obligations, as confirmed by extensive international criminal jurisprudence.[117] Consequently, the

[112] See ECtHR, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb) <https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf> (updated on 30 April 2021), fn. 6, which points out that the terms "entrapment" and "incitement" are, *inter alia*, used interchangeably within ECtHR jurisprudence.
[113] ECtHR, *Ramanauskas v. Lithuania*, no. 74420/01, Judgment, 5 February 2008 ("*Ramanauskas* Judgment"), para. 69.
[114] ECtHR, *Edwards and Lewis v. United Kingdom*, nos 39647/98 and 40461/98, Judgment, 27 October 2004, pp. 16-17; ECtHR, *V. v. Finland*, no. 40412/98, Judgment, 24 April 2007, paras 77-80.
[115] *Ramanauskas* Judgment, para. 70.
[116] See above, para. 27.
[117] See e.g. ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34; ICTR, *Prosecutor v. Gatete*, ICTR-2000-61-PT, Decision on Defence Motions for Disclosure Pursuant to Rule 66 (A)(ii) and Commencement of Trial, 13 October 2009, paras 12, 23; ICTR, *Kamuhanda v. Prosecutor*, ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, paras 14, 18, 27, 44, 46; ICTY, *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 31; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement,

Court of Appeals Panel will assume that the SPO's representation that it does not possess any information on entrapment is made in good faith. The Panel stresses that, were the SPO to have any material or information in its custody, control or actual knowledge on any purported incitement or entrapment of the Accused, this material must be disclosed immediately pursuant to Rule 103 of the Rules.[118] The Panel further recalls the continuing nature of the SPO's disclosure obligations pursuant to Rule 112 of the Rules.

54. The Panel recalls that the Prosecution cannot disclose that which it does not have and is not obliged to undertake investigations, perform analyses, or create work products which are not in its custody or control, possession or actually known to it.[119] In light of the above, the Panel finds that the Accused have failed to demonstrate that the Pre-Trial Judge committed a discernible error or abused his discretion.

55. The Panel notes, however, that besides stating that it does not possess information concerning the allegations of entrapment, the SPO in fact neither confirms nor denies being in possession of any material falling under Gucati Requests B-C.[120] The Panel finds that the requested information identified under Gucati Requests B-C is broader than information that could potentially support an allegation of entrapment. The Panel further notes that the SPO objects to the disclosure of the

17 December 2004, para. 183; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Decision on Sesay Defence Motion Requesting the Appeals Chamber to Order the Prosecution to Disclosure Rule 68 Material, 16 June 2009, para. 20; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the Oneissi Defence's Request for Disclosure Regarding a Computer, 24 October 2013, para. 37. See also Framework Decision on Disclosure, para. 49.

[118] See also Impugned Decision, para. 63; Response, para. 23.

[119] See *Oneissi* Appeal Decision, para. 27. See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012, para. 31.

[120] The SPO has stated in previous submissions before the Pre-Trial Judge that it "is not obliged to confirm or deny possession, or to provide detailed notice, of patently irrelevant items based on nothing more than a bare request to do so"; see Request for Non-Disclosure, para. 40.

material identified under Gucati Requests B-C only on the ground that its materiality is disputed. [REDACTED].[121]

56. In any event, keeping in mind the principles applicable to the materiality test as stated above,[122] the Panel recalls that the Accused are expected not to engage in mere "fishing expeditions" in search of materials which the SPO has indicated, acting under a presumption of good faith, do not exist.[123] Based on the information before the Pre-Trial Judge, and the SPO's assertion that it had no relevant material in its possession, the Panel finds that the Accused have failed to show that the Pre-Trial Judge committed a discernible error or abused his discretion in finding that the specific information requested by the Defence under Gucati Requests B-C[124] was not material to the preparation of the Defence.

57. In light of the foregoing, the Panel concludes that although, as found above, the Pre-Trial Judge erred in not requesting that the material identified under Gucati Requests B-C be included on the Rule 102(3) Notice as relevant to the case, his error does not invalidate the overall conclusion that this material should not be disclosed to the Defence and does not impact the outcome of the Impugned Decision.

[121] [REDACTED].
[122] See above, para. 41.
[123] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion for Access to Confidential Materials in Completed Cases, 5 June 2009, para. 14. See also ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-768-Red, Public redacted version of Decision on Defence motion seeking disclosure of Prosecution's correspondence with national authorities, 5 January 2021, para. 13; *Al Hassan* Decision, para. 20; *Oneissi* Appeal Decision, para. 22.
[124] See Request for Non-Disclosure, paras 34-35; Gucati Reply, paras 17-19.

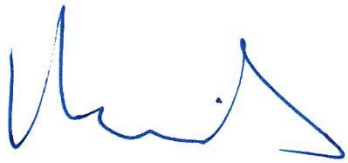
IV. DISPOSITION

58. For these reasons, the Court of Appeals Panel:

DENIES the Appeals;

ORDERS the Parties to submit public redacted versions of their appellate filings referenced in paragraph 15 or indicate, through a filing, whether these filings can be reclassified as public within ten days of receiving notification of the present Decision; and

ORDERS the Registry to execute the reclassification of the filings referenced in paragraph 15 upon indication by the Parties that they can be reclassified.



Judge Michèle Picard,

Presiding Judge

Dated this Thursday, 29 July 2021

At The Hague, the Netherlands