



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

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

Before: Court of Appeals Panel
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Public Redacted Version of

Response to Defence Appeals of Disclosure Decision

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I. Introduction

1. The Court of Appeals Panel ('Panel') should reject the Appeals¹ in their entirety since the Defence misrepresents the appealed Decision² and fails to establish that the Pre-Trial Judge committed a discernible error in the exercise of his discretion. The Decision correctly rejected Defence requests for disclosure grounded on baseless allegations that the Specialist Prosecutor's Office ('SPO') incited or entrapped the Accused ('Entrapment Allegations'). As the Defence has been informed on several occasions, no such information exists.

II. Procedural background

2. On 14 December 2021, following confirmation,³ the confirmed Indictment was filed.⁴ The Indictment concerns three batches of confidential material relating to the investigations of the Special Investigative Task Force ('SITF') and SPO ('Batch 1', 'Batch 2', 'Batch 3', collectively: 'Batches') which were unlawfully disseminated by the Accused to the press and public. The Accused – the head and deputy head of the KLA War Veterans Association ('KLA WVA') – are charged with committing various crimes stemming from unlawfully disseminating these confidential materials. The Accused are not charged with unlawful acquisition of these materials, and the Indictment does not

¹ Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00210 pursuant to Article 45(2) and Rule 170(2), KSC-BC-2020-07/IA005/F00002, 25 June 2021, Confidential (notified 28 June 2021) ('Gucati Appeal'); Submissions on Appeal of Decision KSC-BC-2020-07/F00210, KSC-BC-2020-07/IA005/F00003, 25 June 2021, Confidential (notified 28 June 2021) ('Haradinaj Appeal', together with the Gucati Appeal: the 'Appeals').

² Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00210, 26 May 2021, Confidential ('Decision').

³ Public Redacted Version of Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (public redacted version notified 22 December 2020).

⁴ Annex 2 to Submission of confirmed Indictment, KSC-BC-2020-07/F00075/A02, 14 December 2020 ('Indictment').

address the process by which these documents arrived at the KLA WVA. The Indictment was recently re-filed following the Indictment Appeals Decision,⁵ but none of these aspects of the charges changed.⁶

3. On 23 February 2021, upon the SPO request, the Pre-Trial Judge ordered that the Batches themselves were not to be disclosed.⁷ As counterbalancing measures, the SPO was ordered to provide the Defence with various detailed information about the contents of the Batches.⁸

4. On 3 March 2021, the GUCATI Defence requested information concerning the process by which the Batches arrived at the KLA WVA.⁹ The SPO responded that it had already provided all information on this issue which fell under its disclosure obligations, requesting that the Pre-Trial Judge reject the generic request for material proving ‘the absence of incitement’.¹⁰ The Defence then claimed that the requested information was relevant under Rule 102(3) as it could ‘[p]oint towards the involvement of a person who was an agent of/working with/associated with SPO in the making of disclosure of the Three Batches, in whole or in part, to the KLA WVA HQ’,¹¹ or be ‘[s]upportive of the

⁵ Annex 2 to Submission of corrected indictment, KSC-BC-2020-07/F00251/A02, 5 July 2021, *following* Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021 (‘Indictment Appeals Decision’).

⁶ For more on the nature of the SPO’s case against the Accused, *see generally* Annex 1 to Submission of Pre-Trial-Brief, witness and exhibit lists, and Rule 109(c) chart, KSC-BC-2020-07/F00181/A01, 9 April 2021, Confidential (pre-trial brief).

⁷ Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00141, 23 February 2021, Confidential.

⁸ KSC-BC-2020-07/F00141, paras 39, 45, 47(b).

⁹ *See* Annex 1 to Prosecution Submissions for third Status Conference, KSC-BC-2020-07/F00165/A01, 26 March 2021, Confidential, pp.1-2 (containing the contents of the Gucati Defence’s 3 March 2021 email and the SPO’s responses thereto).

¹⁰ Prosecution submissions on the materiality of certain information requested by the Defence pursuant to Rule 102(3), KSC-BC-2020-07/F00149, 8 March 2021, Confidential, paras 9-11, *quoting from* Defence Submissions for the First Status Conference, KSC-BC-2020-07/F00100, 7 January 2021, paras 6-8.

¹¹ Response to Prosecution Submissions on the Rule 102(3) Notice, KSC-BC-2020-07/F00157, 18 March 2021, Confidential (‘18 March 2021 Defence Response’), para.30.

claim made by the SPO (made thus far without any attempt to provide an evidential justification) that the issue of incitement is indeed without foundation'.¹²

5. On 1 April 2021, the Pre-Trial Judge determined that, including in light of the available materials, the Gucati Defence did not substantiate that these requests concerned materials relevant to the case.¹³ This ruling was without prejudice to a further determination following a more specific Defence request. The Defence did not seek leave to appeal this decision.

6. On 14 April 2021, the SPO filed its consolidated Rule 102(3) Notice.¹⁴

7. On 21 April 2021, the GUCATI Defence essentially repeated its 3 March 2021 request for notice and/or disclosure as follows:

- i. all 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;
- ii. all 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 3.¹⁵

8. The GUCATI Defence was transparent that the request was again made with the intent to develop the Entrapment Allegations, and purported to provide additional specificity through a list of questions concerning the conduct and practices of the SPO.¹⁶

¹² 18 March 2021 Defence Response, KSC-BC-2020-07/F00157, para.31.

¹³ Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, KSC-BC-2020-07/F00172, 1 April 2021, Confidential ('1 April 2021 Rule 102(3) Decision'), paras 32-37.

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

¹⁵ See Public Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', dated 26 April 2021, KSC-BC-2020-07/F00190/RED, 18 May 2021, para.32. Because of their prior numbering, these are often identified as Gucati requests B-C in the present litigation.

¹⁶ See KSC-BC-2020-07/F00190/RED, paras 34-36. The questions were as follows: (i) Which current or former SPO staff members (including investigators and counsel) contributed to its creation?; (ii) Which current or former SPO staff members (including investigators and counsel) had access to the document electronically?; (iii) Which current or former SPO staff members (including investigators and counsel) had

9. On 26 May 2021, the Pre-Trial Judge issued the Decision, finding once again that the materials sought by the Defence are neither relevant to the case nor material to the preparation of the defence.¹⁷

10. On 15 June 2021, the Pre-Trial Judge granted the Defence applications for leave to appeal the Decision.¹⁸ The Defence were clear in their leave to appeal applications that the impact on the proceedings implicated by the certified issues relates to their ability to develop the Entrapment Allegations.¹⁹

11. On 25 June 2021, the Appeals were filed.

access to the document in hard copy form?; (iv) Was the document password protected? If so, which current or former SPO staff members (including investigators and counsel) had the password?; (v) Are all such SPO staff members who had access to the document (or had any password) still SPO staff members?; (vi) Does the SPO still retain an electronic copy of the document?; (vii) Has the metadata on the document been checked for evidence as to the last person to access the document? If so, who was that person?; (viii) Has the SPO identified the computer(s) upon which that document was created? Who is/are the regular user(s) of that/those computer(s)? Where were any such devices located?; (ix) Have any current or former SPO staff members been interviewed about the disclosure of the document?; (x) Have any electronic devices used/controlled by current or former SPO staff members been interrogated for evidence of disclosure of the document?; (xi) Have any email accounts or other remote communication facilities used/controlled by current or former SPO staff members been interrogated for evidence of disclosure of the document?; (xii) Were any hard copies of the document stored on SPO premises? If so, was there any CCTV coverage of the area(s) of storage, or the access routes to said area(s)? If so, has such CCTV been examined for evidence of access to and from said area(s)?

¹⁷ Decision, KSC-BC-2020-07/F00210, paras 61-64.

¹⁸ Decision on the Defence Applications for Leave to Appeal the Decision on the Gucati Requests B-C, 15 June 2021, KSC-BC-2020-07/F00235, Confidential ('Leave to Appeal Decision').

¹⁹ 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), KSC-BC-2020-07/F00216, 3 June 2021, Confidential, paras 14-16, 18-20; Application for Leave to Appeal the Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00219, 3 June 2021, Confidential, paras 29-30. It is noted that the Defence's issues were not certified exactly as phrased, but were consolidated. This was done solely for reasons of judicial economy and clarity. Leave to Appeal Decision, KSC-BC-2020-07/F00235, para.21.

III. Standard of review

12. The Defence mis-frames the Appeals as errors of law, rather than as a question of abuse of discretion. The applicable law relied upon by the Defence in the Appeals can be summarised as follows:

- (i) Pursuant to Rule 102(3), residual materials not otherwise disclosed under Rules 102 or 103 must be listed for the Defence in the Rule 102(3) Notice.²⁰
- (ii) Only those materials relevant to the case need be included in the Rule 102(3) Notice. This necessitates an initial assessment by the SPO.²¹
- (iii) Once items are selected by the Defence from the Rule 102(3) Notice, the SPO may challenge the disclosure of those items on grounds they are not material to the preparation of the Defence.²²
- (iv) What is material to the preparation of the defence is to be construed broadly, and entails anything relevant to the defence's preparation. Such information is not limited to the temporal scope of the Indictment nor confined to material relevant to countering the SPO's case.²³

13. The SPO does not dispute any of these points. They are also in conformity with the statutory scheme²⁴ and the Pre-Trial Judge's interpretation of the law as stated in the Decision and elsewhere.²⁵ For the Defence to argue that the Pre-Trial Judge adopted an 'incorrect interpretation of the governing law'²⁶ is inaccurate. What the Defence is actually

²⁰ Gucati Appeal, KSC-BC-2020-07/IA005/F00002, para.23; Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.14.

²¹ Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 23-24; Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.14.

²² Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 18, 25; Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.14.

²³ Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 26-27; Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.14.

²⁴ Article 21(6); Rule 102(3).

²⁵ Decision, KSC-BC-2020-07/F00210, paras 13-17; 1 April 2021 Rule 102(3) Decision, KSC-BC-2020-07/F00172, paras 22-26; Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, 22 January 2021 ('Framework Decision'), paras 45-46.

²⁶ Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 29, 38.

alleging is that the Pre-Trial Judge interpreted the law correctly, but *mis-applied* it in respect of the materials sought.

14. This is a meaningful distinction. When evaluating an alleged abuse of discretion in applying the law, as is the case in this instance, the Pre-Trial Judge's assessment is to be given deference.²⁷

15. A decision on whether or not material is disclosable is a discretionary decision.²⁸ When rendering discretionary decisions, the weight given to relevant considerations may depend on numerous factors.²⁹ Because of the fact-specific nature of such determinations, the lower level panel is better placed to assess these factors.³⁰ A mere disagreement with the conclusions that the first instance panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.³¹ Finding an abuse of discretion requires that the decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.³²

²⁷ Indictment Appeals Decision, KSC-BC-2020-07/IA004/F00007, para.9.

²⁸ MICT, *Prosecutor v. Niyitegeka*, Decision on Appeals of Decisions Rendered by a Single Judge, MICT-12-16-R, 9 August 2017, para.14; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Judgement, ICTR-98-42-A, 14 December 2015, para.431; ICTR, *Karemera and Ngirumpatse v. Prosecutor*, Judgement, ICTR-98-44-A, 29 September 2014, para.85.

²⁹ Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public ('*Gucati Detention Appeals Decision*'), paras 44, 49.

³⁰ *Gucati Detention Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.49.

³¹ *Gucati Detention Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.64.

³² *Gucati Detention Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.14. Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.14.

IV. Submissions

16. As a preliminary matter, the Appeals Panel recently admonished the Haradinaj Defence for not meeting the formal requirements for appeal.³³ The Haradinaj Appeal suffers from these same deficiencies, as his submissions remain inadequately sourced.³⁴

A. THE MATERIALS SOUGHT FOR THE ENTRAPMENT ALLEGATIONS ARE NOT RELEVANT TO THE CASE

17. This section addresses the arguments across Grounds 1 and 2 of the Appeals as to whether the process by which Batches 1-3 arrived at the KLA WVA is relevant to the case.³⁵ Arguments that information on this issue is material to the Defence's preparation are addressed in the next section.

18. The process by which the documents arrived at the KLA WVA is not relevant to the case. Nowhere in the Indictment is it pled how the documents arrived at the KLA WVA, nor was any such pleading required following the Indictment Appeals Decision.³⁶

³³ Indictment Appeals Decision, KSC-BC-2020-07/IA004/F00007, 14-17.

³⁴ See egs Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, paras 22 (uncited indictment allegations are 'therefore suggestive of being a further incident in a conspiracy'), 42-43 (the Pre-Trial Judge took an unsourced contradictory position), 53 (claiming violation of Article 6(1) of the ECHR with no corresponding authority). See also fn.39 below.

³⁵ At the outset, it is noted that the dispute under appeal only concerns certain aspects of the Gucati Defence's previous disclosure requests (set out at para.7 above), namely the extent to which they implicate the process by which the Batches arrived at the KLA WVA. Other aspects of these requests have already been resolved through, *inter alia*, the Pre-Trial Judge's counterbalancing measures and witness statements of an SPO investigator to be called at trial. See 1 April 2021 Rule 102(3) Decision, KSC-BC-2020-07/F00172, paras 35-37. The SPO has already disclosed the type, title, date and, where relevant, origin or author of each of the undisclosed documents contained in the Batches, as well as indicia suggesting the confidentiality of such documents [REDACTED]. Declaration of W04841, 095533-095602.

³⁶ The Gucati Defence's emphasis on the Indictment being non-compliant is therefore beside the point. Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 13, 30.

What is relevant to the case as charged is the fact that the Accused received the documents and subsequently unlawfully disseminated them.³⁷

19. The sole basis upon which the Defence attempt to establish the relevance of information about the prior process by which the Batches arrived at their premises is the Entrapment Allegations.³⁸ Those allegations are entirely unsupported and, as has been made repeatedly clear to the Defence, the SPO does not possess any information even remotely suggesting any purported incitement or entrapment of the Accused, including by anyone affiliated with the SPO itself. This includes there being no information in the SPO's possession that any person affiliated with the SPO 'released' or, in any other manner, provided the Batches to any person.

20. The Haradinaj Defence's attempts at inferring the existence of such information quickly devolve into absurdity, suggesting that the SPO had a perceived lack of interest in preventing or thwarting the 'leaks'.³⁹ That theory is plainly contradicted by the facts. The SPO obtained and executed judicial orders to stop further dissemination and to seize Batches 1 and 2 within a day of their release.⁴⁰ The SPO proceeded even more swiftly as

³⁷ *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, paras 18-19. Asserting that the process by which the documents arrived at the KLA WVA has a 'but-for' causal link to the case as charged is, without more, insufficient. There are infinitely many 'but-for' causes which, had they not occurred, the case as charged would not have arisen. A gun must have been made by someone in order for a shooting to occur, for example. But this does not make the manufacturing process of the gun relevant in a murder case. Whether a given cause is relevant to the case depends on a case-by-case assessment; factual causation cannot be considered in isolation.

³⁸ Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 16, 43; Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, paras 33-35.

³⁹ *See* Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, paras 24-29. Ironically, part of the Haradinaj Defence's support for this suggestion is that the Accused warned the SPO to act more promptly in the future *to prevent the crimes they are now charged with committing* (Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.25). The Haradinaj Defence assertion is unsourced. The SPO understands the Haradinaj Defence to be referencing Mr Gucati's remark found at Official Note of 17 September 2020, 082010-082013 RED, p.082013.

⁴⁰ URGENT Decision Authorising a Seizure, KSC-BC-2020-07/F00005, 7 September 2020 (reclassified as public on 30 September 2020); Decision Authorising a Seizure, KSC-BC-2020-07/F00007, 17 September 2020 (reclassified as public on 30 September 2020).

concerns Batch 3, retrieving the material from the KLA WVA directly on the day it was released and subsequently notifying the Single Judge.⁴¹ The SPO requested the arrest of the Accused that same day.⁴²

21. Moreover, in this case, it is apparent that incitement or entrapment would not even be factually possible. Incitement and entrapment both depend on being prompted to commit a crime by other persons. On the disclosed evidence available to the Pre-Trial Judge when rendering the Decision, the Accused's own words make it clear that they were never incited or entrapped by anybody. The Accused made it clear that they did not know who delivered the Batches to the KLA WVA, and never interacted with them:

- i. *7 September 2020 press conference (Batch 1) – '[t]oday, at around 09.15 in the morning, I might be out by a couple of minutes, a package arrived at the Veterans' Association. We do not know who brought this package and where it came from.'*⁴³
- ii. *16 September 2020 press conference (Batch 2) – 'Another surprise took place again today at our War Veterans Association around 15:30 hrs. We have now called this "Lightning 2" for the reason that the gentleman left like lighting. And as such, in relation to this, we even had a little bit of a problem with two of our colleagues. In relation to the gentleman, they were going to, except that we did not catch him, and on that day we were not able to catch him, to hold him in order to find out as to who the gentleman is. Therefore, we called this, and for this reason we also called this "Lightning 2". The name was given to him by the Organisation.'*⁴⁴
- iii. *22 September 2020 press conference (Batch 3) – 'You know we are calling this guy or man who came today again to our association, "Lightening 3". I called him "Lightening 2" the other day, today "Lightening 3". Today he was faster than lightening. He just left the files from the lift in the hallway and took the stairs down.'*⁴⁵

22. Far from having been incited or entrapped by others, the Accused repeatedly, publicly insisted that nothing could overcome their desire to unlawfully disseminate the

⁴¹ Prosecution notice and related request, KSC-BC-2020-07/F00010, 23 September 2020, Confidential (with one annex).

⁴² URGENT Public Redacted Version of 'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F0009 dated 22 September 2020, KSC-BC-2020-07/F00009/RED, 1 October 2020.

⁴³ Press Conference Transcript of 7 September 2020, 081344-01-TR-ET Revised, p.1.

⁴⁴ Press Conference Transcript of 16 September 2020, 081344-02-TR-ET Revised, p.1. *See also* Nasim Haradinaj Interview of 17 September 2020, 082106-06-TR-ET Revised 2, p.3.

⁴⁵ Press Conference Transcript of 22 September 2020, 082136-01-TR-ET Revised, p.1. *See also* pp.10-11.

Batches. GUCATI made it clear that he would make public all documents he might receive, and that he and others are against the KSC because it is racist, one-sided and irrelevant.⁴⁶ He stated that it was his responsibility to undermine the KSC.⁴⁷ HARADINAJ went even further, proclaiming that '[e]ven if you sentence me to 300 years, I will still disclose them. I am speaking on my behalf and on the behalf of the whole presidium [...] We are ready to face 300 years [...] We are ready to die'.⁴⁸

23. The SPO is fully aware that if there were any information even suggesting purported incitement or entrapment of the Accused, it would need to be disclosed under Rule 103 (and not Rule 102(3)), as correctly determined by the Pre-Trial Judge.⁴⁹ There is nothing contradictory in the Pre-Trial Judge's reasoning on that point.⁵⁰ The Pre-Trial Judge was clearly addressing the hypothetical situation in which a different factual scenario existed; one in which there was information which could support the allegations being made by the Defence and where, consequently, the scope of relevant and/or exculpatory material would also be different.⁵¹ That factual scenario does not exist. Yet

⁴⁶ Hysni Gucati Interview of 22 September 2020, 082106-01-TR-ET, pp.7-8.

⁴⁷ 082106-01-TR-ET, pp.8-9.

⁴⁸ 082136-01-TR-ET Revised, p.13.

⁴⁹ Decision, KSC-BC-2020-07/F00210, para.63.

⁵⁰ *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, paras 42-45, 48-51.

⁵¹ This is also why it was appropriate for the Pre-Trial Judge to acknowledge that the ultimate resolution of the Defence's arguments on incitement or entrapment – meritless as they are and will remain – is to be at trial. Decision, KSC-BC-2020-07/F00210, para.63. In this regard, *see* ECtHR, *McKeown v. the United Kingdom*, 6684/05, 11 January 2011, para.52 (finding no ECHR Article 6(1) violation from decision rejecting disclosure to establish an unsubstantiated entrapment defence prior to trial, when this defence remained unsubstantiated during trial: '[t]he defence [...] made detailed submissions on the facts of the case and on the nature of the defence case, namely that the applicant had been "set-up" by the police. At that hearing, the disclosure judge, who was fully aware of the issues in the case, concluded that none of the undisclosed material was relevant to the defence and that he did not anticipate any circumstances which would result in the material becoming of value to the defence. [...] Nonetheless, the disclosure judge was careful to note that, if the defence were to advance a proposition or raise an issue that might, by a remote possibility, touch on the undisclosed material and make it of use to the defence, the prosecution could be relied on to alert the trial judge with a view to referring the case back to the disclosure judge. In this connection, the Court notes that the defence case advanced at the trial was essentially that which had already been indicated to the disclosure judge. The applicant has been unable to point to any instance in the course of the trial where,

the Defence seeks detailed notice of information irrelevant to the case, [REDACTED], in order to satisfy itself of its irrelevance. It does so on the basis of entirely unsupported and unsustainable allegations.

24. Imposing reasonable limits on disclosure is necessary and in full conformity with the ECHR.⁵² In *M v. Netherlands*, an interpreter with the General Intelligence and Security Service of the Netherlands ('AIVD') was prosecuted for sharing state secrets. The accused asked for the agency's internal investigation report into his conduct. The ECtHR found no violation of Article 6(1) of the ECHR for its non-disclosure because there was insufficient substantiation that the information sought existed or could be exculpatory:

As regards the internal AIVD investigation, the Court notes that the Court of Appeal did not find it established that any report actually existed [...] At all events, the Court is satisfied that no such document was in the hands of the prosecution either – let alone the Court of Appeal – and that accordingly it could not form part of the prosecution case [...] In so far as the applicant wishes to imply that the investigation might have yielded information capable of disculpating him, the Court dismisses such a suggestion as entirely hypothetical.⁵³

25. The same issues are apparent in this case. No evidence exists to establish the Entrapment Allegations, and the Defence's speculation that other requested information could yield something exculpatory is entirely hypothetical.

26. In determining that the requested material falls squarely outside the scope of the case, the Pre-Trial Judge considered that the charges against the Accused: (i) pertain to their conduct following the receipt of alleged confidential information at the KLA WVA premises; and (ii) are based on the alleged unlawful revelation of confidential information [REDACTED] purportedly contained in the delivered material.⁵⁴ These considerations, supported from the case record before the Pre-Trial Judge, are plainly

as a result of any change in his defence, it would have been appropriate for the prosecution to have referred the matter to the disclosure judge. [...]).

⁵² *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.53.

⁵³ ECtHR, *M v. The Netherlands*, 2156/10, Judgment, 25 July 2017, paras 68-71 (quote from para.68).

⁵⁴ Decision, KSC-BC-2020-07/F00210, para.62.

relevant to a disclosure assessment and accurately describe the case as charged. In particular, it is entirely reasonable to consider whether information falls outside the temporal parameters charged as one factor among others when assessing relevance to the case.⁵⁵ The Gucati Defence misrepresents the Decision as making the timeframe of the charges a single, determining limit on disclosure.⁵⁶ The Pre-Trial Judge imposed no such limitation.⁵⁷ Rather, the Pre-Trial Judge made the relevance assessment in full knowledge of the factual and legal contours of the case charged, the materials disclosed, and the submissions of the parties, including the degree of substantiation (or lack thereof) in respect of the allegations being made. That Decision was entirely reasonable, and within the Pre-Trial Judge's discretion.

27. There is no discernible error in how the Pre-Trial Judge weighed the relevant considerations.

B. THERE IS NO BASIS TO CONCLUDE THAT WHAT IS SOUGHT FOR THE ENTRAPMENT ALLEGATIONS IS MATERIAL TO THE DEFENCE'S PREPARATION

28. This section addresses the remainder of Ground 2 of the Appeals, namely whether information and material which goes to the process through which alleged confidential material arrived to the KLA WVA premises is material to the preparation of the defence.

29. For the reasons set out above, the information sought bears no relevance to the case at all. Such a finding renders any ruling on the remainder of Ground 2 unnecessary, as what is 'relevant to the case' must necessarily be broader than what is 'material to the preparation of the defence'. However, even if the Panel made a contrary finding, any error identified would be harmless. Listing items in the Rule 102(3) Notice is without

⁵⁵ *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.36.

⁵⁶ Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 31-32, 34-35.

⁵⁷ Framework Decision, KSC-BC-2020-07/F00104, para.45 (emphasis in original: '[w]hat is *relevant* in this context should not necessarily be limited by the temporal scope of the Confirmed Indictment nor should it be confined to material relevant to countering the SPO's case').

object where it is already apparent that they are not material to the preparation of the defence, as without such materiality the Defence ultimately would not receive disclosure of the listed items.

30. The information sought by the Defence⁵⁸ is not material to the Defence's preparation. There is no material or information in the SPO's possession relevant to the Entrapment Allegations, and the Pre-Trial Judge did not abuse his discretion in determining as much. As charged, it simply does not matter how the Accused obtained the confidential information they unlawfully disseminated. Moreover, and as discussed above, the Indictment already reflects the narrative provided by the Accused as to how they received the confidential materials.

31. Nor can the process by which the documents arrived at the KLA WVA establish any context which would be material.⁵⁹ In contrast to authorities on which the Defence seek to rely,⁶⁰ the case charged does not involve war crimes or crimes against humanity (to which contextual elements attach), is of limited temporal scope, and involves the

⁵⁸ See KSC-BC-2020-07/F00190/RED, paras 34-36. See also the Defence questions identifying the requested information, as recalled in fn.16 above.

⁵⁹ *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, paras 17, 31.

⁶⁰ Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 27, 28, 42 citing ICC, *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, 11 July 2008 ('*Lubanga Appeals Decision*'). The *Lubanga Appeals Decision* concerned a large-scale war crimes case, involving contextual elements, and in which the recruitment and use of child soldiers was specifically at issue. Consequently, in the particular circumstances of that case, the Appeals Chamber found information concerning the general use of child soldiers in the DRC to be potentially relevant. The Haradinaj Defence cites to a different *Lubanga* decision of no relevance to the present context. Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.62, citing ICC, *Prosecutor v. Lubanga*, Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red, 8 July 2010. This *Lubanga* decision concerned the Prosecution's refusal to comply with an order from the Chamber to disclose information. The present facts are precisely the opposite, as the Pre-Trial Judge rejected a defence request for disclosure. It is also noted that the *Lubanga* decision cited by the Haradinaj Defence was reversed on appeal. ICC, *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", ICC-01/04-01/06-2582, 8 October 2010.

direct conduct of the Accused, much of which was captured on video and publicly broadcast.

32. In reaching the finding of non-materiality, the Pre-Trial Judge did not err in ruling without receiving the materials sought.⁶¹ Such a review would be impossible, as there is no information potentially relevant to the Entrapment Allegations. The Pre-Trial Judge's ruling was predicated on the nature and parameters of the case as charged, assessed in light of the information in the case record before him. Whether or not reviewing materials in a disclosure dispute is necessary forms part of the exercise of judicial discretion,⁶² and the Pre-Trial Judge committed no discernible error.

V. Conclusion

33. The KSC disclosure framework depends upon a division of responsibilities between the parties and the judges. Because Rules 102 and 103 place affirmative disclosure obligations on the SPO, the SPO must make an initial assessment on whether requested items are to be disclosed. The Defence has the opportunity to challenge that assessment. It is for the judge(s) confronted with the disclosure dispute to decide whether or not the SPO has discharged its obligations.

⁶¹ *Contra* Gucati Appeal, KSC-BC-2020-07/IA005/F00002, para.12.

⁶² See ICC, *Prosecutor v. Banda and Jerbo*, 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", ICC-02/05-03/09-501, 28 August 2013, para.39 (provision of the documents themselves is optional, see emphasis added: '[h]owever, the right to disclosure is not unlimited and which objects are "material to the preparation of the defence" will depend upon the specific circumstances of the case. The Chamber *may* need to be provided with further information by the Prosecutor about the documents being sought, either in the form of lists of the documents or the documents themselves, as well as an accompanying explanation, in order to be placed in the best position to take an informed decision with regard to whether the documents in respect of which disclosure was requested are material to the preparation of the defence').

34. The Defence cannot simply present a frivolous, baseless allegation and use it as justification to obtain disclosure. This is not the SPO's unilateral assessment of the Defence's arguments.⁶³ The SPO's initial disclosure assessment in this instance was challenged, necessitating the ruling made by the Pre-Trial Judge in the Decision. On the facts presented, it was the Pre-Trial Judge – not the SPO - who assessed that the Defence's arguments were insufficient. In conformity with the disclosure framework, the Pre-Trial Judge resolved this dispute on the showing of the defence and the charges as read in the light of the facts in the case record.

35. It would create serious consequences - cutting across all KSC cases - if fanciful challenges could disrupt the assessment of the judge best placed to know what is relevant to the case and material to the defence's preparation. It would invite endless challenges and [REDACTED]. It would also strip the Pre-Trial Judge of his responsibility to resolve disclosure disputes. Instead of receiving all information for or against the Accused, or otherwise potentially relevant to the case, as they are entitled,⁶⁴ the Defence could obtain disclosure of details relating to any material at all, without the need to demonstrate any degree of relevance. The only limit would be the Defence's imagination.

36. There are real costs to such an outcome. [REDACTED]. [REDACTED].⁶⁵ The SPO cannot effectively function if it must disclose such information to satisfy a mere fishing expedition.

37. For the foregoing reasons, the Panel should deny the Appeals in their entirety.⁶⁶

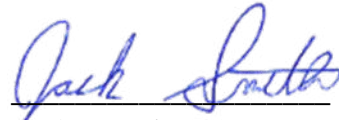
⁶³ *Contra* Gucati Appeal, KSC-BC-2020-07/IA005/F00002, paras 33, 46; Haradinaj Appeal, KSC-BC-2020-07/IA005/F00003, para.38.

⁶⁴ Article 21(6); Rule 102(3).

⁶⁵ [REDACTED].

⁶⁶ The present submission is submitted confidentially pursuant to Rule 82(4). The SPO has no objection to this filing or its annex being reclassified as public.

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At The Hague, the Netherlands.