

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 Counsel for Hysni Gucati

Date: 4 August 2021

Language: English

Classification: Public

**Public Redacted Version of Notice of Interlocutory Appeal with Leave
from Decision KSC-BC-2020-07/F00210
pursuant to Article 45(2) and Rule 170(2)**

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I. INTRODUCTION

1. On 26 May 2021, the Pre-Trial Judge issued a decision (“Impugned Decision”) on, *inter alia*, the non-disclosure of any material held by the SPO which relates to (i) the origin and provenance of the material contained within the Three Batches, including material as to the authorship and chain of custody from creation to its arrival at the KLA WVA (“Gucati Request B”); and (ii) attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA (“Gucati Request C”, collectively “Gucati Requests B-C”)¹.
2. Pursuant to Article 45 of the Law², a Court of Appeals Panel shall hear interlocutory appeals from an accused in accordance with the Law and the Rules³. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel in accordance with Rule 77(2).
3. On 15 June 2021, the Pre-Trial Judge granted leave to appeal the Impugned Decision through certification in relation to the following Two Issues⁴:

¹ KSC-BC-2020-07, F00210, Pre-Trial Judge, *Decision on Prosecution Requests and Challenges Pursuant to F00172* (“Impugned Decision”), 26 May 2021, confidential

² Law on Specialist Chambers and Specialist Prosecutor’s Office, Law No.05/L-053

³ Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020

⁴ KSC-BC-2020-07/F00235, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on the Gucati Requests B-C*, 15th June 2021, confidential

Issue 1

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; and

Issue 2

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.

II. STANDARD OF REVIEW

4. The Court of Appeals Panel has previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law⁵.

⁵ KSC-BC-2020-07/IA004, The Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 8

5. Accordingly, the Court of Appeals Panel will intervene on an interlocutory appeal where there has been an error on a question of law, or an error of fact which has occasioned unfairness⁶.
6. If challenging a discretionary decision, the appellant must 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 discretion⁷.
7. The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision⁸.

III. BACKGROUND

8. The GUCATI Requests B and C were set out in short form in KSC-BC-2020-07/F00190/CONF/RED, SPO, *Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172, KSC-BC-2020-07/F00190 dated 26 April 2021, 28 April 2021 at paragraphs 32(b), 34 and 35.*

⁶ KSC-BC-2020-07/IA004, The Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 8

⁷ KSC-BC-2020-07/IA004, The Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 11

⁸ KSC-BC-2020-07/IA004, The Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 11

9. No material identified as falling within GUCATI Requests B-C has been listed on the Rule 102(3) Notice.
10. The SPO has not sought authority to refuse disclosure or notification under Rule 106.
11. The SPO has not applied for strictly necessary restrictions, with or without necessary counter-balancing measures under Article 21(6), in relation to the material requested.
12. The Pre-Trial Judge was not provided with copies (or summaries) of any material falling within GUCATI Requests B-C for his own assessment, and did not hear any evidence called upon which to make conclusions of fact adverse to the Accused.
13. The Indictment⁹ is presently not compliant with Articles 21(4)(a) and 38(4) of the Law, and Rule 86(3) of the Rules (which requires an indictment to set forth with sufficient specificity and clarity the facts underpinning the charged crimes and ensues directly from the principle that the Accused has to be informed of the nature and cause of the accusation against him or her, as enshrined in Article 30(1) of the Constitution of Kosovo and Article 6(3)(a) of the European Convention on Human Rights¹⁰. Specifically, the Indictment is absent material particulars concerning the identities of others alleged to have been involved¹¹, the Accused are not adequately informed about their alleged role in the alleged

⁹ KSC-BC-2020-07/F00075/A02, Redacted Indictment, 14 December 2020, public

¹⁰ KSC-BC-2020-07/IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 35

¹¹¹¹ KSC-BC-2020-07/IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraphs 46, 47, 50

offences charged¹², and the Indictment provides scope for potential liability at trial for acts which are presently unknown¹³. The scope of the charges is presently ambiguous, thereby affecting the Accused's ability to prepare an effective defence¹⁴. An amended Indictment which is compliant with Article 6(3) of the Convention is awaited¹⁵.

14. The Defence Pre-Trial Brief (including notice of intent to offer grounds excluding criminal responsibility) is not yet due¹⁶.
15. In accordance with Rule 95(5) of the Rules, the Accused will set out therein the nature of the Accused's defence in general terms, the charges and matters which the Accused disputes and the reasons why the Accused disputes them, with a list of potential witnesses the Defence intends to call at trial specifying to which particular issue the evidence relates.
16. To assist the expeditious preparation of the case for trial, however, both Accused have consistently indicated from an early stage that the issue of incitement by or on behalf of SPO officers will feature as principal arguments in their respective cases at trial¹⁷. Where incitement by investigating agencies

¹² KSC-BC-2020-07/IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 73

¹³ KSC-BC-2020-07/IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 86

¹⁴ KSC-BC-2020-07/IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraphs 51, 69 and 86

¹⁵ KSC-BC-2020-07/IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public at paragraph 90; KSC-BC-2020-07/F00244, Pre-Trial Judge, *Order for the Submission of a Corrected Indictment and for a Second Revised Calendar for the Remainder of the Pre-Trial Proceedings*, 23 June 2021, public at paragraphs 13 and 22(a)

¹⁶ KSC-BC-2020-07/F00244, Pre-Trial Judge, *Order for the Submission of a Corrected Indictment and for a Second Revised Calendar for the Remainder of the Pre-Trial Proceedings*, 23 June 2021, public at paragraphs 16, 17 and 22(b)

¹⁷ See, for example, KSC-BC-2020-07/F00122, Defence for Mr Gucati, *Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 11 February 2021, confidential, paras 22-23 (p.11); Transcript, 30 April 2021, public, pp.231, 233; F00200, Defence for Mr Haradinaj, *Defence Response to SPO Confidential Redacted Version of 'Prosecution Requests*

occurs an accused will be deprived of a fair trial in violation of Article 6(1) of the European Convention on Human Rights¹⁸.

IV. APPLICABLE LAW

17. Rule 102(3) of the Rules provides that:

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

18. Rule 102(3) of the Rules sets out a procedure involving the following steps: (1) the provision by the SPO of a detailed notice to the Defence of any material and evidence in its possession; (2) requests by the Defence for disclosure or inspection of material in the custody or control of the SPO, which is deemed by the Defence to be material for its preparation, or were obtained from or

and Challenges Pursuant to KSC-BC-2020-07/F00172' and F00190, 10 May 2021, confidential, paras 67-70; F00211, Defence for Mr Haradinaj, *Defence Submissions for the Fifth Status Conference*, 26 May 2021, confidential, paras 33-39

¹⁸ *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 at paragraph 39.

belonged to the Accused; and (3) any disputes raised by the SPO as to the materiality of the material requested by the Defence¹⁹.

19. The stage approach in Rule 102(3) – in particular, the introduction of Step 1 above - is novel²⁰.
20. As the Pre-Trial Judge has ruled (see below), it requires an appreciation that the test for relevance is wider than the test of materiality to the preparation of the Defence. It also requires any reference to case-law from other jurisdictions, where the distinction between relevance and the test of materiality is not so defined, to take account of the distinction inherent in Rule 102(3) (namely, that the test for relevance is wider than the test of materiality).
21. As regards Step 1, the provision of a detailed notice of any material and evidence in the SPO's possession, the scope of this requirement is determined by Article 21(6) of the Law, according to which all material and relevant evidence or facts in possession of the SPO which are for or against the Accused must be made available to him before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied²¹.
22. Interpreted in the context of Rule 102(3) of the Rules, the scope of Article 21(6) of the Law must be interpreted broadly, as the purpose of drawing up a detailed notice is to inform the Defence of material and evidence in the

¹⁹ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential at paragraph 22

²⁰ KSC-BC-2020-07/F00228, Prosecution, *Prosecution Consolidated Submissions for Review of Detention*, 11 June 2021, public at paragraph 6

²¹ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential at paragraph 23

possession of the SPO, which has not been disclosed, in order to assist the Defence in requesting information *they* deem material for their preparation²².

23. Accordingly, the detailed notice must include not only information the SPO assesses to be potentially material to the Defence preparation, but any material and evidence in the SPO's possession, which has not been disclosed under Rule 102(1)(a)-(b) and 130 and which is relevant to the case (subject to Rule 106)²³.

24. This necessarily entails a degree of initial assessment by the SPO of the materials to be included on the list – this assessment, however, should not amount to a unilateral evaluation of what information would be relevant, useful or material only for the Defence preparation²⁴.

25. If the detailed notice included only information that the SPO assessed to be relevant, useful or material to the Defence preparation, then a dispute mechanism to resolve issues of materiality, as provided in Rule 102(3), would be wholly unnecessary²⁵.

26. The Pre-Trial Judge has noted that what is relevant in the context of Rule 102(3) should not necessarily be limited by the temporal scope of the Indictment nor should it be confined to material relevant to countering the SPO's case²⁶.

²² KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential at paragraph 23

²³ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential at paragraph 23

²⁴ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential at paragraph 23

²⁵ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential at paragraph 23

²⁶ KSC-BC-2020-07/F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, public at paragraph 45, citing: STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Appeals Chamber, *Public Redacted Version of 19 September Decision on Appeal by Counsel for Mr Onessi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records"*, ("2 October 2013 Decision) 2 October 2013, paragraph 22

27. The formulation *material to the Defence preparation* shall be construed broadly and refers to all documents and objects of relevance to the preparation of the Defence case²⁷.

28. The Defence *preparation* is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence or related to the SPO's case²⁸. The test of materiality to the preparation of the defence may be met by material which may simply put the accused on notice that other material exists which may assist him in his defence²⁹, and by material which is purely inculpatory, for example, when the material could reasonably lead to further investigation by the Defence and the discovery of additional information³⁰.

V. SUBMISSIONS ON APPEAL

²⁷ KSC-BC-2020-07/F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, public at paragraph 45, citing: STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Appeals Chamber, *Public Redacted Version of 19 September Decision on Appeal by Counsel for Mr Onessi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records"*, ("2 October 2013 Decision") 2 October 2013, paragraph 21 and references therein; ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-1433 (OA 11), Appeals Chamber, *Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber 1 of 18 January 2008*, ("11 July 2008 Judgment") 11 July 2008, paras.77-78; *Prosecutor v Ntaganda*, ICC-01/04-02/06-1330 (OA 3), Appeals Chamber, *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, para.23, and references therein.

²⁸ KSC-BC-2020-07/F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, public at paragraph 45, citing: ; ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-1433 (OA 11), Appeals Chamber, *Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber 1 of 18 January 2008*, ("11 July 2008 Judgment") 11 July 2008, para.77; STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Appeals Chamber, *Public Redacted Version of 19 September Decision on Appeal by Counsel for Mr Onessi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records"*, ("2 October 2013 Decision") 2 October 2013, paragraph 22 and references therein

²⁹ ICTY, *Prosecutor v Krstic*, IT-98-33, Appeals Judgment, 19 April 2004, paragraph 178

³⁰ ICTR, *Prosecutor v Nahimana*, ICTR-99-52-A, Appeals Chamber, *Public Redacted Version of the Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB*, 27 November 2006, paragraph 16

CERTIFIED ISSUE 1 – 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

29. It is submitted that 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. In so finding, the Pre-Trial committed a discernible error in that the finding was based on an incorrect interpretation of the governing law.
30. It is clear that the Pre-Trial Judge erroneously confined relevance to the ‘scope of the charges’³¹ – a scope that is presently ambiguous (and the attempt to define it in the Indictment is non-compliant with Articles 21(4)(a) and 38(4) of the Law, Rule 86(3) of the Rules, Article 30(1) of the Constitution of Kosovo and Article 6(3)(a) of the European Convention on Human Rights).
31. Moreover, it is clear that the Pre-Trial Judge wrongly approached the question of relevance as if relevance was necessarily limited by the temporal scope of the charges and confined to material relevant to countering the SPO’s case (emphasising that ‘the charges against the Accused pertain to their conduct *following* the receipt of alleged confidential information at the KLA WVA premises’ and stating that ‘the process through which the information arrived to 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

³¹ The Impugned Decision at paragraph 62

confidential information [REDACTED] purportedly contained in the delivered material')³².

32. The error made by the Pre-Trial Judge, in incorrectly limiting the definition of relevance to (i) the temporal scope of the charges (in the view of the Pre-Trial Judge, at least, from the point that the material arrived at the KLA WVA premises to arrest) and (ii) to material confined to directly countering the SPO's case, is made plain by the acknowledgement in paragraph 63 of the Impugned Decision that any material or information as regards any purported incitement or entrapment (which necessarily precedes an offence and does not directly counter the elements of it) would fall under the scope of Rule 103.
33. The unilateral evaluation by the SPO of what information it deems is relevant, or material to the defence preparation, or exculpatory is itself irrelevant to the error made by the Pre-Trial Judge in limiting the definition of relevance to the temporal scope of the charges and to material confined to directly countering the SPO's case. The test of relevance is not coterminous with the unilateral assessment by the SPO of what information would be relevant, useful or material only for the Defence preparation³³.
34. In limiting relevance to the temporal scope of the charges, the Pre-Trial Judge took an approach to relevance even narrower than if he had limited relevance to the temporal scope of the Indictment.
35. The Indictment recognises that the surrounding circumstances leading up to the alleged offences are relevant, even if outside the temporal scope of the

³² The Impugned Decision at paragraph 62

³³ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1st April 2021, confidential at paragraph 23

charges, referring to events occurring during the period April 2020 up to and including August 2020³⁴.

36. Indeed, the temporal scope of the charges as particularised is itself not clear (“between at least 7 September and 25 September 2020”) and indicates that ‘the scope of the charges’ may even encompass actions taking place *before* the receipt of alleged confidential information at the KLA WVA premises. There can be no doubt that if any of the information falling within GUCATI Requests B-C even remotely implicated the Accused or ‘associates’, directly or indirectly, in the process through which alleged confidential material arrived to the KLA WVA premises, the SPO would not contend that such material was irrelevant.

37. The circumstances which surround the alleged unlawful revelation of confidential information and [REDACTED] purportedly contained in the delivered material, including the process through which the alleged confidential information and [REDACTED] came to be delivered to the KLA WVA premises, are plainly relevant.

CERTIFIED ISSUE 2 – 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

³⁴ The Indictment at paragraph 5

38. It is submitted that 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 (i) not relevant to the case and (ii) not material to the Defence preparation. In so finding, the Pre-Trial committed a discernible error in that the finding was based on an incorrect interpretation of the governing law.

(i) Relevant to the case

39. As the Pre-Trial Judge rightly acknowledged, the information and material requested in GUCATI Requests B-C go to the issue of the process through which alleged confidential material arrived to the KLA WVA premises. For the reasons set out above, that issue was relevant and it follows that the information and material which go to that issue are relevant also.

40. The information and material requested in GUCATI Requests B-C should accordingly have been listed on the Rule 102(3) Notice (pursuant to the order at paragraph 38(a) of the *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, KSC-BC-2020-07/F00172, Pre-Trial Judge, 1 April 2021, confidential).

41. The purpose of the Rule 102(3) Notice is 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 preparation³⁵.

³⁵ KSC-BC-2020-07/F00172, Pre-Trial Judge, *Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, confidential at paragraph 26

(ii) *Material to the Defence preparation*

42. The formulation *material to the Defence preparation* shall be construed broadly and refers to all documents and objects of relevance to the preparation of the Defence case³⁶.
43. The Accused's case at trial will include a plea of incitement by or on behalf of SPO Officers – a plea relating to the process through which alleged confidential material arrived to the KLA WVA premises.
44. Construing the formulation of *material to the Defence preparation* broadly, all information and material of relevance to that issue are properly deemed material to preparation of that case. As the Pre-Trial Judge rightly acknowledged, the information and material requested in GUCATI Requests B-C go to the issue of the process through which alleged confidential material arrived to the KLA WVA premises.
45. The Accused is neither required to demonstrate that the material requested is exculpatory (in the sense of positively advancing the defence case on this issue) nor that the material is non-incriminating (in the sense of not refuting the

³⁶ KSC-BC-2020-07/F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, public at paragraph 45, citing: STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Appeals Chamber, *Public Redacted Version of 19 September Decision on Appeal by Counsel for Mr Onessi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records"*, ("2 October 2013 Decision") 2 October 2013, paragraph 21 and references therein; ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06-1433 (OA 11), Appeals Chamber, *Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber 1 of 18 January 2008*, ("11 July 2008 Judgment") 11 July 2008, paras.77-78; *Prosecutor v Ntaganda*, ICC-01/04-02/06-1330 (OA 3), Appeals Chamber, *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, para.23, and references therein.

defence case on this issue)³⁷. The test of materiality to the preparation of the defence may be met by material which may simply put the accused on notice that other material exists which may assist him in his defence³⁸.

46. At present the material falling within GUCATI Request B-C has been subject only to the unilateral evaluation by the SPO of what it deems useful or material for the Defence preparation. The material itself, nor summaries of it, were provided to the Pre-Trial Judge for his assessment, and no evidence called from which adverse findings of fact could be drawn against the Accused.

47. The Accused has been erroneously deprived of the assistance in requesting the material within GUCATI Requests B-C, which should have been provided by the detailed scheduling of that material on the Rule 102(3) Notice.

48. Accordingly, the Pre-Trial Judge was wrong to find 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 (i) not relevant to the case and (ii) not material to the Defence preparation.

VI. RELIEF SOUGHT

49. The Court of Appeals Panel is requested to allow the appeal, in whole or in part, and:

- a. Order the disclosure of all material falling within Gucati Requests B-C;
- or

³⁷ See paragraph 27 above

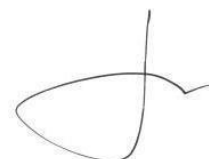
³⁸ ICTY, *Prosecutor v Krstic*, IT-98-33, Appeals Judgment, 19 April 2004, paragraph 178

- b. Order that all material falling within Gucati Requests B-C be listed on the detailed Rule 102(3) Notice.

VII. CLASSIFICATION

50. Pursuant to Rule 82(4) of the Rules, this notice of interlocutory appeal is classified as confidential. There is no objection to the reclassification of this notice of interlocutory appeal as public.

Word count: 4309 words



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25th June 2021

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