

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge,

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 2nd September 2021

Language: English

Classification: Public

**Public Redacted Version of 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**

Specialist Prosecutor

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

I. INTRODUCTION

1. On 28th April 2021, the defence received notification of the Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2020¹ ('Request').
2. The defence on behalf of Hysni Gucati responds to the Request as follows.

II. SUBMISSIONS

A. MEDICAL DOCUMENTATION

3. It is not accepted that the Medical Documentation cannot be meaningfully redacted – the defence have no way of knowing. Without prejudice to any objection to the admissibility of 089886-089886 RED at trial, the refusal of the Prosecution to make disclosure of item 177 is accordingly noted.

B. ITEMS CONCERNING PROTECTIVE MEASURES ORDERED BY KOSOVO COURTS

¹ Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2020, KSC-BC-2020-07/F00190/CONF/RED

4. It is not accepted that disclosure of the nine items, said to be related to Kosovo court-ordered protective measures concerning *inter alia* (potential) witnesses referred to in Batch 3, poses an objective and grave risk to protected persons and interests; (ii) non-disclosure is strictly necessary, *i.e.* no less restrictive measures are sufficient or feasible; and (iii) non-disclosure is proportionate.
5. It is noted that the Prosecution assert that the information sought to be withheld is already public and easily accessible to the Accused². The test in Rule 108 cannot be made out in those circumstances – indeed the SPO has disclosed other records from prior proceedings in such circumstances³. Specifically, the Prosecution appears to have already disclosed a version of item 92⁴.

C. SEARCH AND SEIZURE VIDEOS

6. The conduct of the SPO during the search of the KLA WVA premises on 25 September 2020 is in issue. Despite the order for search and seizure specifically providing that Mr Gucati was to be permitted to be present during the execution of the order, the search and seizure was conducted in his absence⁵.
7. In Mr Gucati's absence, others specifically raised concerns about the conduct of the search and seizure on 25 September 2020⁶.

² See the Request at paragraph 9: '[REDACTED].'

³ *Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association*, KSC-BC-2020-07/F00141 at paragraph 6, referring to Disclosure 5

⁴ SITF00372142-SITF00372153

⁵ *Decision Authorising Search and Seizure*, KSC-BC-2018-01/F00129 at paragraph 32(c)(ii); see also 083904 at paragraph 12: "[REDACTED]".

⁶ *E.g.* 083864

8. The accounts from SPO officers disclosed thus far as to the conduct of the search and seizure are not accepted. In particular, the 'Official Note' dated 14 October 2020 is in part inconsistent with, and in part unsupported by, the contemporaneous notes of [REDACTED]⁷.
9. The video at item 122 should be disclosed in those circumstances.
10. Further, in contrast to the notes of [REDACTED], the contemporaneous notes of [REDACTED] in relation to the have neither been disclosed nor listed on the Rule 102(3) notice. They should be both disclosed and listed accordingly.
11. Item 132 appears to be a separate 'SPO search and seizure video' (and not a duplicate of Item 122)⁸. The consolidated Rule 102(3) notice gives no further description as to the date/location of the search and seizure to which Item 132 relates. Although the footnote to paragraph 15 of the Request refers to Item 132, it is not clear whether the Request seeks to withhold disclosure of Item 132 as well as Items 122-31. For the avoidance of doubt, in the absence of further particulars about the nature of Item 132, the defence repeat the request for its disclosure.

D. CORRESPONDENCE WITH INTERNATIONAL ORGANISATIONS

12. Items 99, 101 - 103, and 106 -118 are each described on the Rule 102(3) Notice simply as 'Letter relevant to 094674-094675'.

⁷ 083880-083900; 083903-083908

⁸ *Annex 1 to Prosecution's confidential Rule 102(3) notice*, KSC-BC-2020-07/F00183/A01/CONF at item 132

13. The requirement in Rule 102(3) is to provide a 'detailed' notice. The present description of these items does not meet that requirement.
14. The further details in the Request are noted, including the fact that the SPO sought authorisation from the [REDACTED] to disclose Items 101-03 to the defence but that authorisation was refused.
15. It is further noted that the SPO assert that in the absence of disclosure by the SPO of Batch 3, no comparison can be made by the defence in any event between the materials referenced in the correspondence at Items 99, 101-103, 106-120 and to those materials which may - or may not – be referenced also in Batch 3⁹. That may be so – the defence maintained (and continue to maintain) that disclosure of Batch 3 should also have taken place so that such forensic scrutiny can properly take place.

E. ITEMS DEPICTING BATCH 3

-
1. ⁹ *Request* at paragraph 18; the SPO similarly asserted that in the absence of disclosure by the SPO of Batch 3, no comparison can be made by the defence in any event between the witnesses referenced in Items 92-98 and the two items left off the Rule 102(3) Notice, SPOE00208776-00208779 and SPOE00209054-00209058, and to those persons who may - or may not – be referenced also in Batch 3 – the Request at paragraph 6.

16. The defence note that other images of material alleged to be contained with Batch 3 have been disclosed, albeit very few in number¹⁰ but acknowledge the Pre-Trial Judge's decision KSC-BC-2020-07/F00141.

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

17. In accordance with the Pre-Trial Judge's direction at paragraph 38(c) of the Decision on the Materiality of Information Requested under Rules 102(3) and Related Matters, KSC-BC-2020-07/F00172, the defence submitted requests 'for pre-trial disclosure or inspection, including regarding any sufficiently specified items not included in the consolidated detailed notice under paragraph 38.a'.

18. It follows that such material, where it is in the possession of the Prosecution and is relevant to the case against the Accused, must be included in the Rule 102(3) Notice if disclosure is not made.

GUCATI Defence Request A

19. Without prejudice to any subsequent objection to the admissibility at trial of the same, the List of Exhibits at Annex 3 to the 'Submission of Pre-Trial Brief, witness and exhibit lists and Rule 109(c) chart', KSC-BC-2020-07/F00181 indicates the intention of the Specialist Prosecutor to present at trial 113 exhibits described as SPO Official Notes concerning contact with witnesses (Items 1, 136, 167, 183-196, 227-243, 250-275, 287-293, 296-327, 346-357, 362, and 364 of the List of Exhibits). The SPO does not intend to call any of the 'witnesses' with

¹⁰ E.g. see Investigator's Declaration, 29th October 2020 at paragraphs 36-74

whom contact is recorded therein to testify at trial; and, save for [REDACTED] and [REDACTED], does not intend to call any of the many SPO officials who participated in such contact and recorded the contact to testify at trial.

20. Additionally, and without prejudice to any subsequent objection to the admissibility at trial of the same, the List of Exhibits at Annex 3 to the 'Submission of Pre-Trial Brief, witness and exhibit lists and Rule 109(c) chart', KSC-BC-2020-07/F00181 indicates the intention of the Specialist Prosecutor to present at trial two 'declarations' by [REDACTED] which purports to summarise the SPO's communications with 'potential witnesses' (Items 179-180 and 285-286). The SPO does not intend to call any of the 'potential witnesses' with whom contact is recorded therein to testify at trial.

21. As stated in the request by the defence, the Prosecution should disclose all contemporaneous notes in the SPO's possession of the contact with such 'witnesses' or 'potential witnesses'. The content of the 'Official Notes' and the 'declarations' is not accepted. In many cases, the 'Official Notes' are made days, weeks and even months after the contact has actually taken place¹¹.

¹¹ E.g. 090066 (witness contact on 17 December 2010, Official Note made on 26 January 2021); 091813 (witness contact on 03 October 2020, Official Note made 28 January 2021); 091815 (witness contact on 05 October 2020, Official Note made 28 January 2021); 091817 (witness contact on 02 October 2020, Official Note made on 21 January 2021); 091819 (witness contact on 06 October 2020, Official Note made 28 January 2021); 0918121 (witness contact on 06 November 2020, Official Note made on 28 January 2021); 091823 (witness contact on 11 November 2020, Official Note made on 28 January 2021); 091826 (witness contact on 13 October 2020, Official Note made 28 January 2021); 091828 (witness contact on 16 November 2020, Official Note made on 28 January 2021); 091902 (witness contact on 07 September 2021), Official Note made on 15 February 2021); 091903 (witness contact on 07 September 2021, Official Note made on 15 February 2021); 091907 (witness contact on 24 and 25 September 2021, Official Note made on 15 February 2021)

22. Rule 102(1)(b)(ii) requires disclosure of all witness statements that the Specialist Prosecutor intends to present at trial – any statement made by the ‘witness’/‘potential witness’ and recorded in any form by an official in the course of an investigation will fall within that definition¹². Accordingly, facts contained in an investigator’s interview notes which constitute statements made by a ‘witness’ in the course of an investigation come within the meaning of ‘witness statements’¹³. It is necessary to disclose the records of the questions put to ‘witnesses’ also in order to make the statement intelligible – an accused must have access to the questions put to the witness in order to be able to prepare to deal with the material properly¹⁴. Moreover, the earliest record is ‘of the highest value’ being ‘closest in time to the events and less vulnerable to any subsequent influence’¹⁵.

23. It is indeed a disgrace that the SPO seek to rely upon second and third hand accounts of statements made by ‘witnesses’ and ‘potential witnesses’, without calling either the ‘witness’ or ‘potential witness’ to testify, or indeed the official who claims to have heard and recorded the statement the statement, AND at the same time seek to withhold from the defence the first recorded account of the ‘witness’/‘potential witness’.

¹² *Prosecutor v Norman, Decision on Disclosure of Witness Statements and Cross-examination*, 16 July 2004 at paragraph 22-23

¹³ *Prosecutor v Brima, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68*, 4 May 2005 at paragraph 16; it was not the case in *Brima* that ‘no disclosure obligation attached to rough notes’ – all statements of witnesses within the possession of the OPT had been disclosed to the defence in *Brima* and there were no investigators notes in existence (the same having been destroyed previously in good faith). Unlike in *Brima*, the Specialist Prosecutor has not asserted that there are no contemporaneous notes in existence in relation to Items 1, 136, 167, 183-196, 179-180, 227-243, 250-275, 285-293, 296-327, 346-357, 362, and 364 of the List of Exhibits.

¹⁴ *Prosecutor v Nititegeka, Judgement*, ICTR-96-14-A, 09 July 2004 at paragraph 33

¹⁵ *Prosecutor v Nititegeka, Judgement*, ICTR-96-14-A, 09 July 2004 at paragraph 33

24. Further, and without prejudice to any subsequent objection to the admissibility at trial of the same, the List of Exhibits at Annex 3 to the 'Submission of Pre-Trial Brief, witness and exhibit lists and Rule 109(c) chart', KSC-BC-2020-07/F00181 indicates the intention of the Specialist Prosecutor to present at trial five further exhibits described simply as SPO Official Notes (Items 134-135, 174-175, 177 on the List of Exhibits). They relate to the seizure of documents from the KLA WVA (including contact with the Accused) and [REDACTED] (further contact with 'potential witnesses'). The SPO does not intend to call any of the SPO officials who participated in the events recorded in those notes, or indeed created the records, to testify at trial ([REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]).

25. For the reasons set out above, As stated in the request by the defence, the Prosecution should disclose all contemporaneous notes in the SPO's possession of said contact. The content of the 'Official Notes' is not accepted. In some cases, the 'Official Notes' are made days and weeks after the contact has actually taken place¹⁶.

26. It is noted that the SPO assert that there are no such contemporaneous notes in its possession. However, it would be remarkable if such Official Notes were prepared without any contemporaneous notes to assist. If contemporaneous notes were taken and then destroyed, the information that such notes were destroyed, when and the circumstances in which they were destroyed should be recorded in detail in the Rule 102(3) Notice.

¹⁶ E.g. 083997 (relates to events on 22 September 2020, Official Note made on 22 October 2020); 084011 (relates to events on 17 September 2020, Official Note made on 27 October 2020);

27. To assist the Prosecution the following records are requested under this heading (the relevant witness or potential witness is identified below, save where the identity of the witness or potential witness has been withheld from the defence and is therefore referred to only as 'X', together with a page reference):

(i) Contemporaneous notes of [REDACTED], SPO, re contact with:

[REDACTED] (090144)

X (078313)

[REDACTED] and [REDACTED] (091798; 084034)

[REDACTED] (091800)

[REDACTED] (091802)

[REDACTED] (091802)

[REDACTED] (091802)

[REDACTED] (091877)

X (092913)

[REDACTED] (084032)

[REDACTED] (082125)

[REDACTED] (082128)

[REDACTED] (084030)

[REDACTED], [REDACTED] and [REDACTED] (084038)

(ii) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (082102)

X (084231)

X (084232)

X (084236)

X (084243)

X (084245)

X (084247)

X (084249)

(iii) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (084247)

X (084249)

(iv) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (083960)

X (088304)

X (089934)

X (089953)

[REDACTED] and [REDACTED] (091798; 084034)

[REDACTED] (091800)

[REDACTED] (091802)

[REDACTED] (091802)

[REDACTED] (091802)

[REDACTED] (091877)

[REDACTED] (084032)

[REDACTED] (084030)

[REDACTED], [REDACTED] and [REDACTED] (084038)

[REDACTED] (090064)

(v) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (083960)

X (090066)

[REDACTED] (090064)

(vi) Contemporaneous notes of [REDACTED], SPO, re contact with:

[REDACTED] (090064)

(vii) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (084232)

X (089908)

X (089909)

X (089910)

X (090066)

X (090264)

X (091902)

X (091907)

X (084303)

X (089886)

X (092914)

X (092918)

[REDACTED] (092945)

X (093386)

X (093388)

X (093379)

X (094748)

Contemporaneous notes of [REDACTED], SPO, re contact with:

X (090066)

[REDACTED] (091803)

[REDACTED] (091805)

[REDACTED] (082125)

[REDACTED] (082128)

(viii) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (084236)

X (089196)

X (092922)

(ix) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (089196)

X (092922)

(x) Contemporaneous notes of [REDACTED], SPO re contact with:

X (084243)

X (088300)

X (088301)

X (088302)

X (088303)

X (088304)

X (090004)

X (090006)

X (091903)

X (091904)

X (091906)

[REDACTED] (092945)

X (089993)

X (093379)

(xi) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (088301)

X (089934)

X (089936)

X (089938)

X (089940)

X (089944)

X (089946)

X (089948)

X (089950)

X (089951)

X (089953)

X (089955)

X (092925)

X (094748)

(xii) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (085880)

X (089908)

X (089909)

X (089910)

X (090264)

X (091203)

X (092914)

X (092916)

X (092918)

[REDACTED] and others at KLA WVA (082010)

KLA WVA (082014)

(xiii) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (090024)

X (090025)

X (090026)

X (090028)

X (090031)

X (090033)

X (090040)

X (090041)

X (090048)

X (090049)

X (091899)

X (091901)

(xiv) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (090050)

X (090052)

X (090054)

X (090056)

X (090058)

X (090062)

X (091813)

X (091815)

X (090817)

X (091819)

X (091821)

X (091823)

X (091826)

X (091828)

X (091830)

X (091832)

X (091834)

X (091836)

X (091838)

X (091840)

X (091842)

X (091844)

X (091846)

X (091848)

X (091850)

X (091852)

X (091854)

X (091856)

X (091865)

X (091867)

(xv) Contemporaneous notes of [REDACTED], SPO, re contact with:

X (090178)

X (091907)

(xvi) Contemporaneous notes of [REDACTED], SPO, re contact with

KLA WVA (082010)

KLA WVA (082014)

KLA WVA (083988)

[REDACTED] (083986)

(xvii) Contemporaneous notes of [REDACTED], SPO, re contact with

[REDACTED] (083986)

(xviii) Contemporaneous notes of [REDACTED], SPO, re contact with
[REDACTED] (083986)

(xix) Contemporaneous notes of [REDACTED], SPO, re contact with
KLA WVA (083988)

(xx) Contemporaneous notes of [REDACTED], SPO, re contact with
X (093601)

(xxi) Contemporaneous notes of unnamed officers, SPO, re contact with:

X (089988)

X (089989)

X (089990)

X (089991)

X (089997)

X (090001)

X (090004)

X (090006)

X (090024)

X (090025)

X (090026)

X (090028)

X (090031)

X (090033)

X (090040)

X (090041)

X (090048)

X (090049)

X (090050)

X (090052)

X (090054)

X (090056)

X (090058)

X (090062)

X (090175)

X (090177)

X (090178)

X (090263)

X (091216)

X (091817)

X (091828)

X (091830)

X (091832)

X (091836)

X (091838)

X (091840)

X (091842)

X (091844)

X (091846)

X (091848)

X (091850)

X (091852)

X (091854)

X (091856)

X (091865)

X (091867)

X (091899)

X (091901)

X (091903)

X (091904)

X (091906)

X (091907)

X (092911)

X (092913)

X (092916)

X (093383)

X (089993)

X (093601)

GUCATI Defence Requests (B) and (C)

28. In the Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, KSC-BC-2020-07/F00172 at paragraph 38, the Pre-Trial Judge ordered the Prosecution to file a consolidated detailed notice comprising all material and evidence in its possession which has not been disclosed under Rule 102(1)(a)-(b) and 103 and which is relevant to the case.
29. At paragraph 37 thereof the Pre-Trial Judge made it clear that his finding that the categories covered by “Items (a)-(b)” were 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 was ‘without prejudice to any further rulings, following the submission by the SPO of the consolidated detailed notice and any resulting requests’.
30. In so doing finding, the SPO was not absolved of the obligation to include all or any such material that would fall within the scope of ‘Items (a)-(b)’ if such was in its possession, had not been disclosed and was relevant to the case (material, for these purposes, to include information).

31. Nor, the Pre-Trial Judge made clear, could the defence to be estopped from raising these matters further.
32. In fact, no new material which might be said to fall with the scope of “Items (a)-(b)” did subsequently appear on the consolidated Rule 102(3) notice that was provided on 14th April 2021¹⁷.
33. The defence do not accept, *on the evidence*, that the Prosecution is not in possession of material (including, for these purposes, information) that would fall within the scope of “Items (a)-(b)” and is relevant to this case.
34. In repeated ‘Official Notes’¹⁸, the Prosecution has disclosed that ‘potential witnesses’ expressed concern that the ‘leak’ originated from the SPO and they were assured that the Prosecution would investigate the same thoroughly.
35. Investigations as to the source of the material, however, were clearly focussed on the SPO *internally*.
36. By way of contrast, the SPO has confirmed¹⁹ that:
- a. it carried out no interviews with members of the KLA WVA to identify the source of the material;
 - b. it conducted no interviews with owners or staff members of other businesses in the same building as the KLA WVA HQ, or adjacent to that

¹⁷ Prosecution’s consolidated Rule 102(3) notice with confidential Annex 1, KSC-BC-2020-07/F00183/A01

¹⁸ E.g. 078313, 089936, 089944, 089953, 091824, 091833, 091850

¹⁹ Email correspondence from the SPO to the defence dated 23 March 2021

building, or in the locality of the KLA WVA HQ to identify the source of the material;

- c. It seized no CCTV in the locality of the KLA WVA HQ to identify the source of the material, other than the footage from the KLA WVA HQ which was taken only at the Accused's insistence;
- d. It conducted no forensic examination upon the material (Batches 1-3) to identify the source of the material;
- e. It made no enquiries with the Kosovo Police and/or Prosecutor's Office about CCTV to identify the source of the material;
- f. It did not speak to Kosovo Police Officers or Kosovo Prosecutors to identify the source of the material; and
- g. It did not speak to any officials of the Kosovo Government to identify the source of the material.

37. As to whether the KLA WVA HQ was placed under surveillance the SPO has been equivocal, replying to the straightforward question, 'Was the building placed under any form of surveillance after the first or second drop off' not with "Yes" or "No", but with the cryptic answer that:

'The SPO is not in possession of the information sought by the Defence as to "the building [being] placed under any form of surveillance after the first or second drop off".'

38. The proper inference to draw from the circumstances – and, in particular, the absence of investigation into external sources - is that the SPO are aware that the source of the leak was internal.

39. Indeed, in ERN 088303, [REDACTED].

40. In ERN 090006, [REDACTED].

41. ERN 091840 [REDACTED].

42. According to ERN 091849 [REDACTED].

43. In ERN 091815, [REDACTED]:

‘[REDACTED].’

44. According to ERN 091830, [REDACTED].

45. Indeed, if the SPO are correct and Batch 3 did contain a highly confidential, and legally privileged, ‘internal work product’ [REDACTED]

46. The obvious questions begged are (i) who at the SPO ‘released’ this material? and (ii) why.

47. If the SPO are correct and Batch 3 did contain an ‘internal work product’ which, on the surface at least, would appear accessible only to those entitled to see legally privileged material, the only inference which can be drawn, without anything further, is that it was ‘released’ by someone at the SPO with ‘high

clearance' able to access the document despite the 'robust data security protocols'.

48. In order to assist the SPO, the defence did not simply replicate the request contained within "Items (a)-(b)" as addressed in Decision F00172.

49. Instead, the defence additionally:

- (i) concentrated its requests in the first instance upon "the material relating to Batch 3 [REDACTED]"; and
- (ii) thereafter identified very specific information to be disclosed by reference to a series of questions to assist, namely:
 - a. Which current or former SPO staff members (including investigators and counsel) contributed to its creation?
 - b. Which current or former SPO staff members (including investigators and counsel) had access to the document electronically?
 - c. Which current or former SPO staff members (including investigators and counsel) had access to the document in hard copy form?
 - d. Was the document password protected? If so, which current or former SPO staff members (including investigators and counsel) had the password?
 - e. Are all such SPO staff members who had access to the document (or had any password) still SPO staff members?

- f. Does the SPO still retain an electronic copy of the document?
- g. 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?
- h. Has the SPO identified the computer(s) upon which that document was created? Who is/are the regular user(s) of that/those computers? Where were such devices located?
- i. Have any current or former SPO staff members been interviewed about the disclosure of the document?
- j. Have any current or former SPO staff members been interviewed about the disclosure of the document?
- k. Have any electronic devices used/controlled by current or former SPO staff members been interrogated for evidence of disclosure of the document?
- l. 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?
- m. 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)?

50. It is reasonable to infer that the SPO are in possession of the above requested information (otherwise, the repeated assurances given to 'witnesses' that the

issue as to whether the SPO was the source of the leak would be - and had been - thoroughly investigated were false).

51. The requested information, and the issue how the Accused came to obtain the Three Batches in general, is obviously relevant to the case.

52. The contrary suggestion in paragraph 37 of the Request (that “how the Accused came to obtain the Three Batches has no relevance to the case as charged”) is nonsense.

53. As the SPO has since conceded, any evidence that the accused were ‘somehow incited or entrapped’ by the SPO must be disclosed under Rule 103 as exculpatory material²⁰.

54. Indeed, any material that ‘*may reasonably suggest*’ that the accused were somehow incited or entrapped by the SPO must be disclosed under Rule 103 as exculpatory material, even if the SPO themselves are of the view that the evidence does not demonstrate that the accused actually were ‘somehow incited or entrapped’.

55. Any evidence that the source of the leaks to the Accused can be traced back to any SPO staff member, whether identified or unidentified, might reasonably suggest that the accused were somehow incited or entrapped – such evidence would beg the question, why was the material released by that SPO staff member?

²⁰ Transcript, 30th April 2021, page 227 line 3

56. The Prosecution's answer to that question might not be incitement/entrapment but any such evidence should be disclosed under Rule 103 so that the argument can be made and the Trial Panel – not the SPO acting unilaterally - can determine the issue.
57. At the very least the information sought should be disclosed under Rule 102(3) (or otherwise listed in detail on the Rule 102(3) notice).
58. The test for disclosure under Rule 102(23) of 'materiality to the preparation of the defence' is a lower standard than the test for disclosure under Rule 103, it is to be interpreted broadly²¹, and includes a broader category of materials including material which might simply put the accused on notice that other material exists which may assist him in his defence²² and even material which is purely *inculpatory*²³.
59. The test for inclusion on the detailed Rule 102(3) Notice of 'relevance to the case' is even wider again²⁴:

“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

²¹ *Prosecutor v Lubanga*, Judgment on the Appeal of Mr Lubanga against the Oral Decision of the Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, 11 July 2008, paras.77-81

²² *Prosecutor v Krnojelac*, Record of Rulings Made in Status Conference, 14 September 1999, p.2; affirmed in *Prosecutor v Krstic*, Appeals Judgment, 19 April 2004, para.178

²³ *Prosecutor v Nahimana*, 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, para.16; relying on *Prosecutor v Radislav Krstic*, Confidential Decision on the Prosecution's Motion to be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C), 27 March 2003

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

detailed 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 preparation. 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 103 and which is relevant to the case. 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 preparation."

60. As the Pre-Trial Judge has found, the Rule 102(3) Notice is not to be confined only to such information that the SPO assesses to be relevant, useful or material to the Defence preparation²⁵.

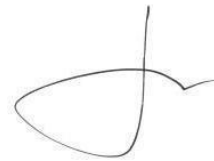
61. The information requested should be disclosed (under Rule 103 or 102(3)) or otherwise, at the very least, listed on the Rule 102(3) Notice.

III. CLASSIFICATION

62. Pursuant to Rule 82(4), this reply bears the classification 'confidential' as it is a reply to the Request which was classified by the SPO as confidential. It is submitted, however, that there is nothing truly confidential about the original Request, and both the Request and this reply should be reclassified as public.

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

Word count: 5180 words

A handwritten signature in black ink, appearing to be 'JER', written in a cursive style.

JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

2nd September 2021

Cardiff, UK