



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: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 17 September 2021

Language: English

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Public redacted version of

Prosecution challenges to disclosure of items in updated Rule 102(3) Notice

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The items selected by the Gucati Defence and Haradinaj Defence from the 9 September 2021 update to the Rule 102(3) Notice ('Rule 102(3) Notice Addendum')¹ are not material to the preparation of the defence and, if disclosed, would severely and irremediably prejudice sensitive, ongoing SPO investigations into obstruction of justice. Such investigations are crucial to the ability of the KSC and SPO to effectively undertake their mandates. For this and the other reasons set out in more detail below, pursuant to the Rule 102(3) Notice Order² and with regard to Articles 23, 35 and 40 of the Law³ and Rules 102-03, 106 and 108 of the Rules,⁴ none of the items selected by the Gucati Defence⁵ and Haradinaj Defence⁶ should be disclosed.

II. PROCEDURAL BACKGROUND

2. On 11 December 2020, the Pre-Trial Judge issued the decision⁷ confirming the Indictment in this case.⁸ The Indictment concerns three batches of confidential material relating to the SITF/SPO's investigations ('Batch 1', 'Batch 2', 'Batch 3', collectively: 'Batches'). The Accused are charged with committing various crimes stemming from unlawfully disseminating these confidential materials. They are not charged with the unlawful acquisition of these materials.

¹ Annex 1 to Prosecution addendum to its Consolidated Rule 102(3) Notice, 9 September 2021, KSC-BC-2020-07/F00307/A01, Confidential. As this update was transmitted via formal filing submitted at 16:27 on 9 September 2021, it was only notified at 08:49 on 10 September 2021. The SPO regrets any inconvenience caused by this short delay. The SPO files this request before 16:00 to ensure the Defence has all necessary opportunity to review this submission before its 24 September 2021 response deadline.

² Order on the Updated Rule 102(3) Detailed Notice, KSC-BC-2020-07/F00304, 7 September 2021 (with annex) ('Rule 102(3) Notice Order').

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁵ Annex 1.1.

⁶ Annex 1.2.

⁷ KSC-BC-2020-07/F00074/RED.

⁸ For the latest version, see KSC-BC-2020-07/F00251/A02 ('Indictment').

3. From the beginning of this case, the Accused have sought to shift the focus away from the charges in the Indictment to the unrelated question of the process by which the Batches arrived at the KLA WVA. As seen below, and despite having numerous chances to do so, they have repeatedly failed to substantiate that disclosure is justified to establish whether the SPO incited or entrapped the Accused ('Entrapment Allegations').

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.¹⁰ The Defence then claimed that the requested information was relevant 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 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 the Gucati Defence did not substantiate these requests.¹³ This ruling was without prejudice to a further determination following a more specific Defence request.

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

7. On 21 April 2021, the Gucati Defence repeated its 3 March 2021 request for notice and/or disclosure.¹⁵ The Gucati Defence again stated that the request was again

⁹ See KSC-BC-2020-07/F00165/A01, pp.1-2.

¹⁰ KSC-BC-2020-07/F00149, *quoting from* KSC-BC-2020-07/F00100, paras 6-8.

¹¹ KSC-BC-2020-07/F00157, para.30.

¹² KSC-BC-2020-07/F00157, para.31.

¹³ KSC-BC-2020-07/F00172, paras 32-37.

¹⁴ KSC-BC-2020-07/F00183/A01.

¹⁵ See KSC-BC-2020-07/F00190/RED, para.32.

made with the intent to develop the Entrapment Allegations, and purported to provide additional specificity on why the items were relevant through a list of 12 questions concerning the conduct and practices of the SPO ('12 Questions').¹⁶

8. On 26 May 2021, the Pre-Trial Judge again found that the materials sought by the Defence are neither relevant to the case nor material to the preparation of the defence.¹⁷ The Defence sought leave to appeal this decision in relation to these separate determinations, and leave was granted in respect of each.¹⁸

9. On 29 July 2021, the Appeals Panel found an error in the Pre-Trial Judge's assessment on whether the items sought should be listed on the Rule 102(3) notice, but confirmed the Pre-Trial Judge's finding that the Defence failed to establish the materiality of the items sought.¹⁹ As such, the matter was not remanded for further consideration and the appeals against the 26 May 2021 Decision were dismissed.

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 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 Public Redacted Version of Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00210/RED, 26 May 2021 (reclassified 15 July 2021) ('26 May 2021 Decision'), paras 61-64.

¹⁸ KSC-BC-2020-07/F00235.

¹⁹ Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021 ('Appeals Decision').

10. On 2 September 2021, the Trial Panel ordered the SPO to provide a new Rule 102(3) notice listing those items subject to the error found by the Appeals Panel.²⁰ This notice was provided to the Trial Panel the next day.²¹

11. On 7 September 2021, the Trial Panel issued the Rule 102(3) Notice Order.

12. On 9 September 2021, the Rule 102(3) Notice Addendum was filed. The items listed are: (i) [REDACTED] ('[REDACTED]'; item 185); (ii) the transcript of a witness [REDACTED] ('Witness Interview'; items 186-90); (iii) [REDACTED] ('Report'; item 191); (iv) three lesser redacted official notes including [REDACTED] ('Lesser Redacted Notes'; items 192-94);²² and (v) [REDACTED] ('CDRs'; items 195-200) (collectively, 'Materials').²³

13. On 13 September 2021, the Defence selected all these items. The Guwati Defence asked the exact same 12 Questions as in April 2021 to specify the information needed to establish the Entrapment Allegations, seeking confirmation that the Rule 102(3) Notice Addendum contained this information or otherwise requesting its addition to the notice.²⁴ The Haradinaj Defence endorsed the points raised by the Guwati Defence and presented three additional disclosure requests when selecting the items ('Additional Requests'),²⁵ none of which could be said to arise from the Rule 102(3) Notice Addendum.

²⁰ Transcript of Hearing, 2 September 2021, p.638.

²¹ KSC-BC-2020-07/F00296.

²² Additionally, a further note (088027-088027) has been identified which is linked to item 193 and contains similar information. It has not been previously disclosed because it does not relate to the impact of the conduct of the Accused on the witness. It is understood as being also selected by the Defence, and is included in Annex 2.

²³ Annex 2 provides all items in the Rule 102(3) Notice Addendum falling exclusively under Rule 108 other than the CDRs. Due to their size, each of the five CDRs are provided as separate Annexes 3-7.

²⁴ Annex 1.1.

²⁵ Annex 1.2. The Additional Requests are: (a) '[d]etails of the SPO personnel, including prosecutors, investigators, security officers support staff present during the search and seizure operations of 8, 17, 22 and 25 September 2021 over and above that already disclosed, including any official notes, reports, video footage' ('Request A'); (b) '[d]etails of any and all SPO personnel who were dismissed or whose contracts were not extended following the alleged leaks, including but not limited to the 25 staff

III. SUBMISSIONS

A. THE MATERIALS SOUGHT ARE NOT MATERIAL TO THE PREPARATION OF THE DEFENCE

14. The SPO's position has consistently been that the Materials are not relevant to the case at all. The Appeals Decision rejected this position, but relevance to the case and materiality are separate inquiries. The Rule 102(3) Notice Order sets out the Rule 102(3) notice regime as a three-step procedure.²⁶ The first of these steps is to provide notice of the materials in question, which in this instance is the Rule 102(3) Notice Addendum. The notice transmitted was approved in advance by the Trial Panel, ensuring that the Defence received sufficient detail.²⁷ The second step is for the Defence to select the items in question, which they have done by virtue of the *inter-partes* communications reproduced in Annex 1. The third step is the present filing, whereby the 'SPO can challenge before the Panel the claim of materiality or seek non-disclosure of otherwise disclosable material pursuant to Rules 105, 107 or 108 of the Rules'.²⁸

15. The Defence argue that the Trial Panel has already made a finding that the items are material to the preparation of the defence and that the only relief available to the SPO is that falling under Rules 105-08 of the Rules.²⁹ The SPO is mindful that these are the only rules listed in the disposition of the Rule 102(3) Notice Order,³⁰ but the Defence's interpretation of the Rule 102(3) Notice Order is incompatible with the Trial Panel's three step framework and Rule 102(3) itself, which gives the SPO the right to 'seize the Panel where grounds to dispute the materiality of the information exist'

members including 4 team leaders whose contracts were not extended past December 2020' ('Request B'); (c) '[d]ue to several errors in the translation of the transcript of interview of Witness W04866, having compared the English and Albanian transcripts, a copy of the original video recording of the interview of 25 August 2021' ('Request C').

²⁶ Rule 102(3) Notice Order, KSC-BC-2020-07/F00304, paras 16-20.

²⁷ *Contra* Annex 1.2 (objecting to the 'scant detail' concerning the Report).

²⁸ Rule 102(3) Notice Order, KSC-BC-2020-07/F00304, para.20 (emphasis added).

²⁹ Annex 1.1-1.2.

³⁰ Rule 102(3) Notice Order, KSC-BC-2020-07/F00304, para.26(d).

for selected items. The Trial Panel has preliminarily indicated that the Rule 102(3) Notice Addendum items appear to be subject to disclosure under Rules 102 and 103,³¹ but no definitive finding of materiality can be made until the Defence has selected the items from the Rule 102(3) notice and the SPO has been given a full opportunity to challenge their materiality.

16. None of the Materials are material to the preparation of the defence within the meaning of Rule 102(3). The Defence claims of materiality have been linked to a potential affirmative defence of entrapment. The Defence are entitled to argue for alleged affirmative defences at trial, but in order to receive disclosure relating to these defences a *prima facie* showing must be made such that the defence is not 'wholly improbable'.³² Without this minimal showing, any Accused person in an obstruction or core crime case could simply claim 'entrapment', without any plausible basis whatsoever, and thereby gain broad disclosure of ongoing investigations and internal materials that otherwise have no connection to the charges in the Indictment.

17. The Defence has not, and cannot, make a *prima facie* case justifying disclosure in this case. The Gucati Defence questions posed as to who wrote Batch 3, the details of how it was accessed within the SPO, and what matters the SPO did and did not investigate are not a *prima facie* showing and can establish nothing in relation to entrapment without more. In fact, there is no evidence whatsoever in the record that 'entrapment' could have occurred in this case, noting in particular that, in all their many public statements, neither Accused ever made any mention of being entrapped at any point. To the contrary, the Accused made it clear that they did not know who

³¹ Rule 102(3) Notice Order, KSC-BC-2020-07/F00304, para.23.

³² ECtHR, *Pătrașcu v. Romania*, 7600/09, 14 February 2017, para.38 (articulating a standard arising from undercover operations divorced from the current context). See also *Matanović v. Croatia*, 2742/12, 4 April 2017, para.131; ECtHR, *Lyubchenko v. Ukraine*, 34640/05, 31 May 2016, para.33.

delivered the Batches to the KLA WVA, never interacted with them, committed the crimes enthusiastically, and would continue to do so given any opportunity.³³

18. Defence attempts to provide more of a showing – most notably in the Gucati Defence’s submissions before the Trial Preparation Conference³⁴ – are no more successful and provide not a shred of evidence that entrapment could have occurred in this case. Instead, their speculative and wholly improbable claims devolve into calling authorised press statements illegal leaks³⁵ and labelling typos in documents as proof of advance knowledge of the commission of crimes.³⁶ Made-up facts and fanciful inferences cannot be enough to justify disclosure.

19. The Materials cannot assist in substantiating the Entrapment Allegations, because none contain any information that anyone from the SPO was involved in the process by which the Batches arrived at the KLA WVA. Entrapment requires official persons exercising influence over the Accused – there is no evidence in the Materials of any official persons exercising any such influence.

20. Analysis of the contents of certain Materials, such as the CDRs, remains ongoing. But all known information to date confirms that the Materials contain no information material to the Entrapment Allegations. As found by the Appeals Panel and maintained by the SPO, if any material supporting the Entrapment Allegations actually existed (or emerges) then such materials would have been (or would be)

³³ 081344-01-TR-ET Revised, p.1; 081344-02-TR-ET Revised, p.1; 082106-06-TR-ET Revised 2, p.3; 082136-01-TR-ET Revised, p.1, pp.10-11.

³⁴ KSC-BC-2020-07/F00288, para.20.

³⁵ Compare KSC-BC-2020-07/F00288, para.20(c)(i) with *Prosecutor v. Taçi et al.*, Decision on Specialist Prosecutor’s Urgent Request, KSC-BC-2020-06/F00009, 23 June 2020 (reclassified 20 November 2020).

³⁶ Compare KSC-BC-2020-07/F00288, para.20(c)(xi) with SPOE00220914-00220914.

affirmatively disclosed under Rule 103.³⁷ The SPO's submissions in this regard must be presumed to be made in good faith.³⁸

21. The additional information in the Rule 102(3) Notice Addendum did not change the Defence's materiality arguments – the arguments made are the same as those rejected by the Pre-Trial Judge on two occasions and confirmed by the Appeals Panel. Nothing has been presented to justify revisiting the Appeals Panel's findings on this point.

B. THE MATERIALS CANNOT BE DISCLOSED FOR THE REASONS PROVIDED IN RULE 108(1)

1. *Disclosure of the Materials prejudices ongoing and future investigations*³⁹

22. The investigation into the process by which the Batches arrived at the KLA WVA is part of a web of interference incidents. Disclosure of aspects of this ongoing investigation would severely limit the SPO's ability to investigate and prevent obstruction and interference. The SPO cannot disclose parts of its investigation piecemeal, because the various parts are interrelated. It is simply the nature of ongoing investigations that aspects that appear to be of lesser significance today can take on vastly greater significance later, when more is known. Attempting to pre-judge in the middle of ongoing investigations what is important and what is not is certain to lead to erroneous conclusions and damaging disclosures. Compromising the SPO's ability to combat obstruction will substantially affect the fair and expeditious conduct of these proceedings and create real world consequences for victims and witnesses who have entrusted their safety to this Court.

³⁷ Appeals Decision, KSC-BC-2020-07/IA005/F00008/RED, paras 49-50; Transcript of Hearing, 30 April 2021, p.227.

³⁸ See Appeals Decision, KSC-BC-2020-07/IA005/F00008/RED, paras 53, 56.

³⁹ Rule 108(1)(a).

23. Disclosure of any of these Materials will certainly prejudice the SPO’s ongoing and future investigation.⁴⁰ The SPO’s broader interference investigations regularly yield significant information and new leads. [REDACTED].⁴¹ [REDACTED].

24. [REDACTED].⁴² [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

25. [REDACTED]. [REDACTED]. [REDACTED].

26. [REDACTED]:

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

27. [REDACTED].

28. [REDACTED]. [REDACTED].

29. [REDACTED]. [REDACTED]. [REDACTED].

30. [REDACTED]. [REDACTED].⁴³ [REDACTED]⁴⁴ - [REDACTED]. [REDACTED]. [REDACTED].⁴⁵

31. [REDACTED]. [REDACTED]. [REDACTED].

32. [REDACTED]. [REDACTED]. [REDACTED].

⁴⁰ When discussing non-disclosure of the Materials across the present submission, this concerns only the redacted information which would be lifted in the Lesser Redacted Notes. Versions of these notes have already been disclosed.

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

33. The nature of what is sought by the Defence will lead to a disclosure path which cannot be reasonably limited or controlled. Ordering disclosure of the Materials will lead to almost every investigative development in the SPO's interference investigations creating a disclosure issue pertaining to allegations for which there is no shred of evidence. The information covered by the Rule 102(3) Notice Addendum will need to be updated whenever these investigations uncover new information on the process by which the Batches arrived at the KLA WVA. It will be tantamount to providing the Accused with a rolling update of what the SPO knows and does not know in the course of these investigations. This makes it effectively impossible to obtain further information without telegraphing – and therefore compromising - the steps necessary to acquire it. It would also run counter to the clear protections envisioned in the KSC's regulatory framework.⁴⁶

34. The risks of disclosing any aspects of ongoing, sensitive investigations to these Accused is clear. The Accused have been consistent about expressing their unwavering intent to continue engaging in illegal acts to undermine this Court:

(i) Hysni Gucati, on the day Batch 3 was distributed to the media:

JOURNALIST: And you will continue to publicise other documents that you have, or might have?

HYSNI GUCATI: Whatever sacrifices are to come, I am telling you sincerely, I will publicise all the files. If they won't look after their files, I most certainly will not do it for them. You do know that we are against the Special Court, we have said this for a long time.

[...]

JOURNALIST: So, even if there would be a penal consequence as a result of this, you have no regrets that you are publicising this?

HYSNI GUCATI: Not even a millimetre, even if they were to give me five years in prison, I would be more than ready to answer the call of the Special Court about the publicising of the files.⁴⁷

⁴⁶ See Rule 85(4).

⁴⁷ 082106-01-TR-ET, pp.7, 12.

- (ii) Nasim Haradinaj, in an interview just after his co-accused was arrested:

Keep this in mind, we will be against this court as long as we live, as long as we can breathe. Full stop. We will work against this court. Full stop. It is their job to keep their secrets safe. It is not my fault that they have involved those illiterate people, that they have involved naïve people, and that they have lied to these naive people of ours that they will protect their secrets. They should have protected their archives. We protect our archives. We did not take them by force, as they are doing today ... had we prevented them. Then they would have an alibi. We did not take them from anybody by force. We were handed them over by a person who delivered them to us. God willing, he will bring us more. It does not mean that it has to be only me, Mr. GUCATI, Mr. Faton KLINAKU who will do it ... even the lowest ranked KLA member here will carry out that task. We will disclose them to the media. Let them see. Time will tell who is right. Of course, war and freedom have not come yet. So, we still have to win. We will win when no foreigner would dare interfere in our justice. Full stop.⁴⁸

35. The Accused also have associates on the outside willing to release confidential KSC information because they consider this institution illegitimate. This includes Faton Klinaku, a named associate in the Indictment and acting chairman of the KLA War Veterans' Association, who has repeatedly claimed that the KSC is illegitimate and that he will distribute its confidential information given any opportunity.⁴⁹

36. As noted in Section A above, disclosure of the Materials creates these grave risks in order to provide the Defence with wholly immaterial information. There should be no doubt that if highly sensitive investigations can be made subject to disclosure to these Accused on the basis of unsubstantiated assertions and mere speculation, it will be impossible to conduct effective investigations of acts of obstruction. Without that ability, the SPO cannot properly protect witnesses in any of its cases. Those who seek to interfere will be further incentivised to do so.

⁴⁸ 081931-04-TR-ET Revised, p.2.

⁴⁹ Annex 1.3. *See also* Prosecution consolidated submissions for review of detention, KSC-BC-2020-07/F00273/A01 (on 12 June 2021: '[t]o the Specialist Prosecutor's Office in The Hague: I am surprised by your amateurism. We have not published and we cannot publish anything. We have offered them to the media for publication and will offer it to them again. We will not keep your scandals secret because we're under no obligation to do so'); KSC-BC-2020-07/F00228/A01 (on 4 June 2021: '[a]s we have been against this Court, we will make public any material we receive that is in everybody's interest').

2. *Disclosure of certain Materials cause grave risk to the security of witnesses*⁵⁰

37. The Witness Interview and Lesser Redacted Notes concern persons who volunteered sensitive information about, *inter alia*, witness intimidation. There are persons implicated by their information who are subjects of ongoing investigations and readily capable of retaliating against them.

38. As concerns the Witness Interview, [REDACTED] does not implicate the SPO in the arrival of the Batches, but does implicate [REDACTED]. [REDACTED].⁵¹ [REDACTED].

39. As concerns the Lesser Redacted Notes, the Pre-Trial Judge already found that Rule 108 risks applied to these persons when approving the redactions covering the information selected by the Defence.⁵² There is no justification for revisiting this finding. The details which would be revealed in the Lesser Redacted Notes can only be known by select persons, and revealing them risks identifying the persons contacted and thus compromising the other redactions granted.

3. [REDACTED]⁵³

40. [REDACTED]. [REDACTED]. [REDACTED].

41. [REDACTED]. [REDACTED]. [REDACTED].

42. Public interest concerns are implicated by this material as well.⁵⁴ As illustrated by the protesters disrupting the President and Registrar of the Court last week,⁵⁵ those

⁵⁰ Rule 108(1)(b).

⁵¹ [REDACTED].

⁵² KSC-BC-2020-07/F00136/RED.

⁵³ Rule 108(1)(a) and (c).

⁵⁴ Rule 108(1)(c).

⁵⁵ Annex 1.3; <https://balkaninsight.com/2021/09/07/kosovo-arrests-seven-for-protest-against-war-court-chief/>; <https://rs.n1info.com/english/news/kosovo-specialist-court-head-met-with-protest-in-pristina/>.

who work at this Court face risks to their safety and well-being in the course of their work in Kosovo. This creates particular concerns for staff named in [REDACTED].

43. [REDACTED]. [REDACTED]. [REDACTED].

C. THE REPORT IS INTERNAL WORK PRODUCT UNDER RULE 106

44. [REDACTED]. [REDACTED].

45. [REDACTED],⁵⁶ [REDACTED]. [REDACTED].

46. [REDACTED].⁵⁷ [REDACTED]. [REDACTED]. [REDACTED].

47. [REDACTED].⁵⁸ [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].⁵⁹
[REDACTED]:

[REDACTED]. [REDACTED]. [REDACTED].

48. As internal work product, the SPO was not obliged to notify the existence of the Report to the Accused.⁶⁰ For the reasons outlined above pertaining to Rules 106 and 108, the Trial Panel is requested to not order disclosure of the Report.

D. NONE OF THE ADDITIONAL REQUESTS ARE JUSTIFIED

49. As a preliminary matter, all items addressing the 12 Questions are included in the Rule 102(3) Notice Addendum. These questions are invasive, and the SPO is not obliged to create further documentation to answer the remainder of them.⁶¹

50. The Haradinaj Defence fail to substantiate any of the Additional Requests. The questions themselves are indicative of a fishing expedition - which the Appeals Panel

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ Compare also Rule 108(2) with Rule 106.

⁶¹ [REDACTED].

cautioned against⁶² - and show that there is no limit, or basis, to the Defence's intrusive inquiries into the legitimate activities of SPO staff.

51. *Request A.* The identity of all SPO personnel involved in the collection of the Batches has already been disclosed,⁶³ with the exception of one interpreter subject to standard redactions.⁶⁴ In relation to the 25 September 2020 operation, the search report authors have been disclosed and standard redactions applied to other staff members.⁶⁵ The Defence has been able to review the entirety of the video-footage of this operation, including any action undertaken by any staff member present.⁶⁶

52. Noting that no evidence from the 25 September 2020 search operation is being relied upon at trial beyond CCTV footage available online from other sources, there is no apparent forensic purpose for providing the identity of all SPO staff who attended this operation.

53. *Request B.* No SPO staff were dismissed or had their contracts not extended for any reason relevant to this case. The SPO maintains that personal details of SPO staff members, as well as any staffing policy or decision, is not subject to disclosure.

54. *Request C.* No basis for disclosure has been identified. Corrections to W04866's interview transcripts are minor. Many are not ascertainable from the video, such as the date at the top of the transcript and the spelling of words. There is no utility in reviewing the video for corrections of this kind, noting that applying the standard redactions necessary to disclose these videos would be highly time-consuming. Should the Defence have any question in relation to a specific revision in these

⁶² Appeals Decision, KSC-BC-2020-07/IA005/F00008/RED, para.56.

⁶³ 082010-082013 RED; 082014-082016; 083988-083989 RED, paras 1-10.

⁶⁴ 082014-082016, paras 1, 3, 4, 8, 10.

⁶⁵ 083846-083927.

⁶⁶ KSC-BC-2020-07/F00236, para.24.

transcripts, the SPO is available to provide further information or submit the matter to the Registry for independent verification.

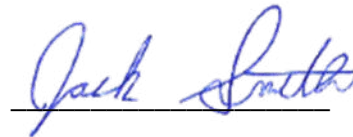
IV. CLASSIFICATION

55. This filing and Annexes 2-7 are submitted strictly confidential and *ex parte* in order to protect sensitive and ongoing SPO investigations, witnesses, and SPO staff members. Annex 1 is submitted confidentially for these same reasons. Confidential and public redacted versions of this request will be filed simultaneously.

V. RELIEF REQUESTED

56. Because the information sought is immaterial and falls under Rules 106 and/or 108, the SPO requests that the Trial Panel deny disclosure of any items selected in the Rule 102(3) Notice Addendum or the additional information requested in full.⁶⁷

Word count: 4442



Jack Smith

Specialist Prosecutor

Friday, 17 September 2021

At The Hague, the Netherlands

⁶⁷ Additionally including 088027-088027. See also footnote 40 above.