



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

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**Public Redacted Version of
Decision on the Prosecution Challenges to Disclosure of Items
in the Updated Rule 102(3) Notice**

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TRIAL PANEL II (“Panel”), pursuant to Articles 21(6) and 40(2) and 6(b) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 102(3) and 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 1 September 2021, the Panel, taking in consideration the 29 July 2021 decision of the Court of Appeals Panel,¹ ordered the Specialist Prosecutor’s Office (“SPO”) to, *inter alia*, submit, by 6 September 2021, an updated Rule 102(3) notice listing material in its possession that was subject to the findings of the Court of Appeals Panel.² On the same day, the SPO requested leave to file an application for protective measures to be applied to any updated Rule 102(3) Notice.³
2. On 2 September 2021, the Panel heard oral submissions from both Parties on the updated Rule 102(3) notice,⁴ including submissions from the SPO in an *ex parte* session.⁵ Further to those submissions, the Panel ordered the SPO to provide, by 3 September 2021, 12:00 hours, to the Panel only: (i) an un-redacted draft updated Rule 102(3) notice; and (ii) a proposed redacted version of the same list.⁶
3. On 3 September 2021, the SPO filed a draft, un-redacted updated Rule 102(3) notice and a proposed redacted version thereof.⁷
4. On 7 September 2021, the Panel found that the items on the draft updated Rule 102(3) notice appeared, at least *prima facie*, to be subject to disclosure under Rules

¹ IA005-F00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* (“Appeal Decision on Disclosure”), 29 July 2021.

² Oral Order on updated Rule 102(3) Notice, 1 September 2021, Transcript pp 442-443.

³ Trial Preparation Conference, 1 September 2021, Transcript p. 443.

⁴ Trial Preparation Conference, 2 September 2021, Transcript pp 560-600.

⁵ Transcript, *Ex Parte* Hearing, pp 606-637.

⁶ Oral Order Regarding SPO Rule 102(3) List, 2 September 2021, Transcript p. 638.

⁷ F00296, Specialist Prosecutor, *Prosecution Proposed Redactions to Rule 102(3) Notice*, 3 September 2021, with Annexes 1-2, strictly confidential and *ex parte*.

102 and/or 103 of the Rules and on that basis ordered the SPO to transmit to the Defence an updated redacted Rule 102(3) notice (“Rule 102(3) Order”).⁸

5. On 9 September 2021, the SPO filed a confidential redacted updated Rule 102(3) notice (“Updated Rule 102(3) Notice”).⁹

6. On 13 September 2021, the Defence for Hysni Gucati (“Gucati Defence”) and the Defence for Nasim Haradinaj (“Haradinaj Defence”) sought from the SPO access to all items listed in the Updated Rule 102(3) Notice.¹⁰

7. On 17 September 2021, the SPO seized the Panel with a request for non-disclosure of the material sought by the Defence (“F00316”).¹¹

8. On 24 September 2021, the Gucati Defence and the Haradinaj Defence submitted their respective responses to F00316 (“F00325/COR”, “F00326”).¹²

9. On 28 September 2021, further to the Panel’s order (“F00320”),¹³ the SPO submitted, to the Panel only, further submissions on some of the items listed in the Updated Rule 102(3) Notice, including four hard copies of Item 191 (“F00331”).¹⁴

⁸ F00304, Panel, *Order on the Updated Rule 102(3) Detailed Notice* (“Rule 102(3) Order”) with confidential and *ex parte* annex, 7 September 2021, paras 23, 26.

⁹ F00307, Specialist Prosecutor, *Prosecution Addendum to its Consolidated Rule 102(3) Notice* with confidential annex, 9 September 2021.

¹⁰ F00316/COR, Specialist Prosecutor, *Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice* (“F00316”), 17 September 2021, para. 13. *See also* F00316/CONF/RED, confidential and F00316/RED, public; F00325/COR, Gucati Defence, *Corrected Version of Response to Confidential Redacted Version of Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice* (“F00325/COR”), 1 October 2021, confidential, para. 8.

¹¹ *See supra* fn. 10 (F00316).

¹² *See supra* fn. 10 (F00325/COR); F00326, Haradinaj Defence, *Defence Response to Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice* (“F00326”), 24 September 2021.

¹³ F00320, Panel, *Order for Further Submission in Relation to the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice* (“F00320”), 22 September 2021.

¹⁴ F00331, Specialist Prosecutor, *Prosecution Submission Pursuant to KSC-BC-2020-07-F00320* (“F00331”), 28 September 2021.

10. On 29 September 2021, the SPO filed an official note on a strictly confidential and *ex parte* basis (“F00337”) relating to a recent contact with a witness.¹⁵

11. On 4 October 2021, the Panel held an *ex parte* hearing only with the SPO to hear further submissions on F00337.¹⁶ The Defence was notified of the hearing, but was not made privy to the detailed nature of the material subject to that procedure.

12. On 7 October 2021, further to the *ex parte* hearing, the Panel ordered the SPO to file an addendum to its Updated Rule 102(3) Notice (“Rule 102(3) Addendum Order”).¹⁷

13. On 13 October 2021, the SPO filed an addendum to its Update Rule 102(3) Notice adding an item listed in Annex 1 of F00337 (“Item 201”).¹⁸

14. On 18 October 2021, the Panel informed the Parties that a consolidated decision on the outstanding Rule 102(3) matters would be issued as soon as practical during or immediately after having heard the evidence of witnesses W04841 and W04842. The Panel noted that deferral was necessary because the materiality and disclosure of the Rule 102(3) items was closely connected to the allegations raised by the Defence that the SPO entrapped the Accused (“Entrapment Allegations”) and because, should witnesses W04841 and W04842 be in a position to give evidence with respect to the Entrapment Allegations, their evidence could affect the pending decision.¹⁹

15. On 21 October 2021, the Panel held a further *ex parte* hearing only with the SPO to hear submissions on pending Rule 102(3) disclosure issues and potential

¹⁵ F00337, Specialist Prosecutor, *Prosecution Transmission of Official Note of Contact and Related Request*, 29 September 2021, with two strictly confidential and *ex parte* annexes. Annex 1 of F00337 contained a summary of contact with a witness.

¹⁶ F00346, Panel, *Scheduling Order for Ex Parte Hearing*, 1 October 2021, confidential.

¹⁷ F00354, Panel, *Order for an Addendum to the Updated Rule 102(3) Detailed Notice* (“Rule 102(3) Addendum Order”), 7 October 2021, confidential.

¹⁸ F00361, Specialist Prosecutor, *Prosecution Update to Rule 102(3) Notice Addendum*, 13 October 2021, confidential.

¹⁹ Transcript, 18 October 2021, pp. 816-817.

counterbalancing measures.²⁰ Questions were asked, in particular, of counterbalancing measures under Rule 108(2) of the Rules necessary to ensure the fairness of proceedings and so as to enable the Defence to investigate and present the “entrapment” part of its case in an effective manner.²¹

16. On 22 October 2021, the SPO filed its challenge to the disclosure of the addendum to the Updated Rule 102(3) Notice and made submissions on proposed counterbalancing measures (“F00389”).²²

17. On 27 and 29 October 2021, the Defence filed their respective responses to F00389 (“F00404”, “F00407”).²³

18. On 1 November 2021, the SPO filed a reply to the Defence responses (“F00409”).²⁴

II. SUBMISSIONS

19. In F00316, the SPO seeks the non-disclosure of all sixteen (16) items on the Updated Rule 102(3) Notice (“Items 185-200”).²⁵ The SPO submits that none of the items are material for the Defence preparation, as the Defence has not, and cannot, make a *prima facie* case of entrapment justifying disclosure in this case.²⁶ The SPO submits that the Panel’s *prima facie* finding in the Rule 102(3) Order is without prejudice to a definitive finding of materiality that can only be made once the Defence

²⁰ F00382, Panel, *Scheduling Order for Ex Parte Hearing*, 19 October 2021, confidential, with strictly confidential and *ex parte* annex.

²¹ Transcript, 21 October 2021, pages 1254-1256, 1265-1280, 1281-1289.

²² F00389, Specialist Prosecutor, *Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures* (“F00389”), 22 October 2021, strictly confidential and *ex parte*, with confidential annex. See also F00389/CONF/RED.

²³ F00404, Haradinaj Defence, *Defence Response to ‘Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures’* (“F00404”), 27 October 2021, confidential; F00407, Gucati Defence, *Response to ‘Public Redacted Version Prosecution Challenge to Disclosure and Proposed Rule 102(3) Notice Counterbalancing Measures’ and Ancillary Application* (“F00407”), 29 October 2021, confidential.

²⁴ F00409, Specialist Prosecutor, *Prosecution Consolidated Reply to Responses to Challenge to Disclosure and Proposed Counterbalancing Measures* (“F00409”), 1 November 2021, confidential.

²⁵ F00316, paras 1, 56.

²⁶ F00316, paras 16-17.

has selected the items from the Updated Rule 102(3) Notice and the SPO has been given a full opportunity to challenge their materiality.²⁷

20. The SPO further avers that the disclosure of Items 185-200 would prejudice ongoing and future investigations, would cause grave risk to the security of witnesses and would create serious complications to the SPO's ability to seek cooperation from third states.²⁸ The SPO also submits that Item 191 also falls under the scope of Rule 106 of the Rules.²⁹ The SPO further submits that the list of questions initially submitted to it by the Gucati Defence on 3 March 2021, and re-submitted by the Gucati Defence on 21 April 2021 and 13 September 2021 ("Gucati 12 Questions")³⁰ and three additional requests put forward by the Haradinaj Defence ("Haradinaj Additional Requests")³¹ are not justified and should not be further addressed.³²

21. In F00325/COR, the Gucati Defence responds that the Panel was correct in its assessment that the material requested was *prima facie* subject to disclosure under Rule 102(3) and/or Rule 103 of the Rules, and that the Panel should refuse the SPO request to deny disclosure as the SPO has not established that the exceptions in Rules 106 or 108 of the Rules apply.³³

22. In F00326, the Haradinaj Defence responds that the materiality threshold has been satisfied and that the SPO has not sufficiently demonstrated that disclosure leads to risks and that these risks cannot be addressed by redactions.³⁴

²⁷ F00316, para. 15.

²⁸ F00316, paras 22-43.

²⁹ F00316, paras 44-48.

³⁰ F00316, para. 7, fn. 16; Annex 1.1, p. 5 containing the twelve questions submitted by the Gucati Defence in April 2021 and reproduced by the SPO in F00190, Specialist Prosecutor, *Prosecution Requests and Challenges Pursuant to KSC-BC-2020-07-F00172*, 26 April 2021, paras 34-36. *See infra* fn. 115.

³¹ F00316, para. 13, fn. 25; Annex 1.2, p. 11 containing three additional disclosure requests made by the Haradinaj Defence. *See infra* para. 85 and fns. 120-122.

³² F00316, paras 49-54.

³³ F00325/COR, paras 87-88.

³⁴ F00326, paras 35-38.

23. In F00389, the SPO seeks the non-disclosure of Item 201, submitting that this item is similar in kind to Items 185-200, the non-disclosure of which is pending a Panel determination.³⁵

24. The SPO further submits that, while the Panel found that the first step under the Rule 102(3) disclosure regime does not involve any assessment of reliability of the material or evidence in the SPO's possession, the Panel made no clear ruling on whether the speculative nature of evidence can affect whether the information is material to the preparation of the Defence under the second step of the Rule 102(3) disclosure framework.³⁶ The SPO maintains that it is well-recognised that information "material to the preparation of the defence" must hold out a real, as opposed to a fanciful, prospect of providing a lead on possibly relevant evidence or new issues.³⁷ On this basis, the SPO argues that "fanciful information" should also fall outside the ambit of Rule 103 of the Rules. The SPO further states that the quality of information also affects what counterbalancing measures are necessary, if any, under the third step of disclosure framework under Rule 102(3) of the Rules.³⁸ In relation to Item 201, the SPO maintains that the information contained in Item 201 is not of high enough quality to prove or disprove any fact at issue in this case to even a *prima facie* standard and it accordingly cannot be material to the Defence's preparation.³⁹

25. The SPO further maintains that the disclosure of Item 201 would prejudice ongoing and future investigations and would also cause grave risks to the security of the person whose identity would be revealed by disclosure of the item.⁴⁰

26. In F00389, the SPO also proposes counterbalancing measures to the non-disclosure of Items 191, 195-200 and 201.⁴¹ The SPO indicates that it consents to such

³⁵ F00389, para. 3.

³⁶ F00389, para. 5.

³⁷ F00389, para. 6, citing ICTY and ICC jurisprudence (fn. 13).

³⁸ F00389, para. 6.

³⁹ F00389, para. 8.

⁴⁰ F00389, paras 9-10.

⁴¹ F00389, paras 11-16.

measures only in the interest of resolving the pending Rule 102(3) matter and on the understanding that no further disclosures will be required, with the possible exception of one further counterbalancing measure that it has suggested for the Panel's consideration, and that these measures will not themselves be used as a basis to justify further disclosure.⁴²

27. In F00404, the Haradinaj Defence responds that Item 201 is clearly material to the Defence case, and that the question of credibility and/or weight of the information in that item is one for the Panel to assess if it admits the evidence.⁴³ The Haradinaj Defence further submits that it does not accept the counterbalancing measures proposed by the SPO in relation to Items 191, 195-200 and 201.⁴⁴ It further avers that it is wholly improper for the SPO to hold the Defence and/or the Panel to ransom by seeking to offer an ultimatum in terms of the proposed counterbalancing measures.⁴⁵ The Haradinaj Defence also submits that if the Panel has seen the content of Item 201, the Defence ought to have access to it as well.⁴⁶

28. In F00407, the Gucati Defence responds that Item 201 is deemed by the Defence to be both material to its preparation and exculpatory.⁴⁷ It further avers that the materiality of the information contained in Item 201 is not speculative, as the information is relevant and has a direct connection to a live issue in the case, namely the Entrapment Allegations.⁴⁸ The Gucati Defence also maintains that F00389 does not provide any detail, in its redacted version at least, of the prejudice to SPO investigations or grave witness security risks.⁴⁹ As regards the counterbalancing measures proposed by the SPO regarding Items 191, 195-200 and 201, the Defence notes that they ought not to be matters for negotiation between the Panel and the SPO

⁴² F00389, para. 12.

⁴³ F00404, paras 9-10, 15-16.

⁴⁴ F00404, para. 27.

⁴⁵ F00404, para. 25.

⁴⁶ F00404, paras 34-42.

⁴⁷ F00407, para. 5.

⁴⁸ F00407, paras 6-10.

⁴⁹ F00407, para. 17.

and that it is inappropriate for the SPO to demand to be released from the continuing nature of its disclosure obligations in exchange for its “consent” to counterbalancing measures.⁵⁰ The Gucati Defence also submits that it is unable to comment on the proposed counterbalancing measures given the wholesale redactions applied in the confidential redacted version of F00389.⁵¹ The Gucati Defence requests nonetheless that the items be disclosed in full or in a limited manner as a counterbalancing measure.⁵²

29. The Gucati Defence also requests that the transcript of the *ex parte* hearing of 21 October 2021 be reclassified as confidential (“Gucati Ancillary Application”).⁵³

30. In F00409, the SPO replies that the entrapment jurisprudence of the European Court of Human Rights (“ECtHR”) requires that the allegations of entrapment must not be “wholly improbable”.⁵⁴ On this basis, the SPO maintains that while the quality of information was found by the Panel not to be relevant when listing material in the Rule 102(3) notice, if entrapment is wholly improbable, then the disclosure is unjustified under the plain language of the Rules and the ECtHR. Pure speculation cannot be material to the preparation of the defence.⁵⁵ The SPO further avers that nothing in the testimony of W04841 and W04842 justifies disclosure in relation to Entrapment Allegations.⁵⁶

31. The SPO also submits that the counterbalancing measures proposed by the SPO are not holding the Panel to ransom and that they are calibrated to provide the Defence with further information, while also protecting competing interests in favour of non-disclosure.⁵⁷ The SPO maintains that this balancing exercise would be defeated

⁵⁰ F00407, para. 20.

⁵¹ F00407, para. 21.

⁵² F00407, paras 23, 28(a)-(b).

⁵³ F00407, paras 24-26, 28(c).

⁵⁴ F00409, para. 3.

⁵⁵ F00409, para. 4.

⁵⁶ F00409, paras 6-9.

⁵⁷ F00409, para. 10.

if the SPO were to volunteer such measures only to have them serve as stepping stones for further disclosure.⁵⁸

32. In relation to the Gucati Ancillary Application, the SPO submits in F00409 that there is no basis for the reclassification of the *ex parte* hearing of 21 October 2021, as the SPO referenced this hearing in a manner compliant with the Panel's 17 September 2021 order on the conduct of proceedings ("Order on the Conduct of Proceedings").⁵⁹

III. APPLICABLE LAW

33. Article 21(6) of the Law provides that all material and relevant evidence or facts in possession of the SPO, which are for or against the Accused shall be made available to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

34. Pursuant to Rule 102(3) of the Rules, 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.

35. The Panel recalls the findings of the Pre-Trial Judge and the Court of Appeals Panel that the disclosure regime before the Specialist Chambers ("SC") is unlike that

⁵⁸ F00409, para. 10.

⁵⁹ F00409, para. 2, referring to F00314, Panel, Order on the Conduct of Proceedings, 17 September 2021.

of international(ised) criminal tribunals.⁶⁰ In particular, Rule 102(3) of the Rules is distinct from equivalent provisions in the ICTY and ICC rules of procedure and evidence in the sense that it: (i) requires a detailed notice to be drawn up by the SPO before any requests are made by the Defence; (ii) explicitly indicates that what is material for the Defence preparation must be deemed as such by the Defence; and (iii) stipulates that disputes on materiality are to be raised by the SPO.⁶¹ Moreover, Article 21(6) of the Law makes it clear that the disclosure regime of the SC is based on a presumption of disclosure with limited exceptions set out in the Rules. Furthermore, it is for the SPO rather than the Defence to establish the existence of an exception to its general obligation of disclosure.⁶²

36. The Panel further recalls that the regime of disclosure under Rule 102(3) of the Rules is a three-step system.⁶³ The first step constitutes a practical and procedural step by which the SPO informs the Defence of what material is in its possession so as to place the Defence in a position to: (i) determine in a meaningful way which of the items listed in the notice could be material to its case; and (ii) make a disclosure request to the SPO for any such items.⁶⁴

37. The Panel recalls the Pre-Trial Judge's finding that the formulation "material to the Defence preparation" must be construed broadly and refers to all documents and objects of relevance to the preparation of the Defence case, in the exercise of the Accused's rights under the Law and the Rules. What is material 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 case. The Defence "preparation" is also a

⁶⁰ Appeal Decision on Disclosure, paras 39-40; F00172, Pre-Trial Judge, Public Redacted Version of Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters ("Decision on Rule 102(3) Material"), 1 April 2021, para. 23, fn. 29.

⁶¹ Decision on Rule 102(3) Material, fn. 29.

⁶² Rule 102(3) Order, para. 15.

⁶³ Rule 102(3) Order, para. 16; Appeal Decision on Disclosure, para. 39; Decision on Rule 102(3) Material, para. 22.

⁶⁴ Rule 102(3) Order, para. 16.

broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence, or related to the SPO's case.⁶⁵

38. Once the Defence is placed in a position to determine materiality based on the Rule 102(3) notice, the second step of the process comes into play, *i.e.*, the Defence asks the SPO to disclose the relevant items.⁶⁶ This triggers the third step of the process, 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. Any such challenge should, however, account for the importance of disclosure to the fairness of proceedings and for the fact that the regime in force before the SC is one that is based on a presumption of disclosure of relevant material.⁶⁷

39. The Panel also recalls its finding that the first step of the disclosure regime under Rule 102(3) of the Rules does not involve any assessment of reliability of the material or evidence in the SPO's possession.⁶⁸ "Material" can refer to any information, idea, data or document emanating from a witness or another source, regardless of whether that information has any factual basis.⁶⁹ The source, accuracy, reliability or subjectivity of information in the SPO's possession may inform the admissibility of the relevant evidence or its weight if admitted, but should not inform a decision on whether to give notice to the Defence of such material under Rule 102(3) of the Rules. The Rules do not provide for the possibility for the SPO to refrain from giving notice of information in its possession on grounds of reliability or credibility.⁷⁰

⁶⁵ Decision on Rule 102(3) Material, para. 24, referring to F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 22 January 2021, para. 45.

⁶⁶ Rule 102(3) Order, para. 20.

⁶⁷ Rule 102(3) Order, para. 20.

⁶⁸ Rule 102(3) Addendum Order, para. 8.

⁶⁹ See B. A. Garner (ed.), *Black's Law Dictionary*, 11th edition, 2019, defining "material" as "[i]nformation, ideas, data, documents, or other things that are used in reports, books, films, studies, etc.".

⁷⁰ Rule 102(3) Addendum Order, para. 8.

IV. DISCUSSION

A. GUCATI REQUEST FOR EXTENSION OF THE WORD LIMIT

40. The Gucati Defence requests an extension of the 6000-word limit for F00325/COR.⁷¹ The Panel observes that the Gucati Response exceeds that limit by 561 words and that the request for extension was made in the last footnote of that filing. The Panel reminds the Gucati Defence that, according to Article 36(1) of the Practice Direction on Files and Filings (“Practice Direction”), requests for the extension of word limits must be made “sufficiently in advance” and an explanation of the good cause must be provided. The Gucati Defence’s reference to the “importance of the issue dealt with”, in the same filing for which it requests an extension of the word limit, does not comply with the requirements of Article 36(1) of the Practice Direction. That being said, the Panel, in accordance with Article 36(3) of the Practice Direction and to preserve the interests of the Accused, exceptionally and *proprio motu* recognises the Gucati Response as validly made. The Panel cautions, however, the Gucati Defence that subsequent failures to abide by the requirements of Article 36(1) of the Practice Direction shall not be accepted.

B. MATERIALITY UNDER RULE 102(3) AND THE RELIABILITY OF EVIDENCE

41. The Panel will first address the SPO argument that the speculative nature of evidence can affect the SPO disclosure obligations under Rules 102(3) and 103 of the Rules.⁷² The SPO submits that the Panel made no clear ruling on whether the speculative nature of evidence can affect whether the information is material to the preparation of the Defence under the second step of the Rule 102(3) disclosure framework.⁷³ The SPO avers that such an argument would not traverse the Panel’s order, and in fact could not, given that the sequencing of the statutory framework

⁷¹ F00325/COR, fn. 55.

⁷² F00389, paras 5-6.

⁷³ F00389, para. 5.

gives the SPO the right to challenge the materiality of items selected from the Rule 102(3) Notice.⁷⁴ In this regard, the SPO submits, it is well recognised that information “material to the preparation of the Defence” must hold out a real, as opposed to a fanciful, prospect of providing a lead on possibly relevant evidence or new issues.⁷⁵ Fanciful information should likewise fall outside the ambit of Rule 103.⁷⁶

42. In relation to the disclosure regime under Rule 102(3) of the Rules, the Panel reminds the SPO that it is the *Defence* who determines, as part of the second step, what is material to its preparation. While the SPO may challenge materiality in the third step of the Rule 102(3) disclosure regime, it is not open to the SPO to withhold information based on its unilateral determination that the evidence is speculative or the information is insufficiently reliable. The Panel has expressly held that the SPO’s notice *and disclosure* obligation under Rule 102 of the Rules applies even if the SPO considers that the material in question is false or misleading.⁷⁷ The Panel also held that the underlying principle of the disclosure regime applicable before the SC is that information falling under Rule 102 of the Rules must be disclosed unless an exception pursuant to Rules 105, 106, 107 or 108 of the Rules applies.⁷⁸

43. In relation to Rule 103 of the Rules, the Panel observes that the provision requires immediate disclosure of any information in the custody, control or actual knowledge of the SPO “which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor’s evidence”. The phrase “reasonably suggest” requires the application of an objective test that involves no assessment of the weight or reliability of the material or the credibility of a witness. Instead, it means “probable” in the sense of having a sufficient material

⁷⁴ F00389, para. 6.

⁷⁵ F00389, para. 6.

⁷⁶ F00389, para. 6.

⁷⁷ Rule 102(3) Addendum Order, para. 10.

⁷⁸ Rule 102(3) Addendum Order, para. 10.

connection to a mitigating or exculpatory factor or circumstance.⁷⁹ Simply put, the phrase “reasonably suggest” means that the information in question must point, in some logical manner, towards the innocence or mitigated guilt of the Accused, regardless of whether the SPO finds the information reliable or “fanciful”. Holding otherwise would lead to the SPO’s entitlement to withhold exculpatory evidence in violation of the Accused’s right to a fair trial and the equality of arms principle.

44. The Panel further notes that the ICTY and ICC case-law on which the SPO relies in F00389 does not support the SPO view for the following reasons. First, as recalled above, the ICTY and ICC provisions on the disclosure of evidence material to the Defence preparation are based on a different principle, where the onus to trigger such disclosure is on the Defence. Materiality under the ICTY and ICC regimes is determined by the Prosecution, with the possibility for the Defence to challenge the Prosecution’s materiality assessment.⁸⁰ This difference already qualifies the extent to which ICTY or ICC case-law may be relevant to the disclosure regime under Rule 102(3) of the Rules.

45. Secondly, the decisions relied upon by the SPO do not stand for the principle for which they are cited. The relevant ICTY jurisprudence says the following:

The material requested [by the Defence] pursuant to Rule 66(B) [of the ICTY Rules of Procedure and Evidence] must: (i) be relevant or possibly relevant to an issue in the case; (ii) raise or possibly raise a new issue, the existence of which is not apparent from the evidence the Prosecution proposes to use; and (iii) *hold out a real, as opposed to a fanciful, prospect of providing a lead on evidence which goes to (i) or (ii)* [emphasis added].⁸¹

⁷⁹ Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, [Decision Denying Merhi Defence Motion Seeking Disclosure of Material Relating to Potential Users of Purple Phone 231](#), 13 September 2017, para. 34; *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, [Decision Dismissing Sabra Defence Application for Disclosure of Material Related to Mr Michael Taylor](#), 14 June 2018, para. 13.

⁸⁰ See Rule 66(B) ICTY Rules of Procedure and Evidence; Rule 77 ICC Rules of Procedure and Evidence.

⁸¹ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision On Accused’s Motion To Compel Inspection Of Witness Material \(Christian Nielsen\) And Prosecution’s Motion To Reclassify Public Motion](#), 7 July 2011, para. 6; *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Chamber, [Decision on Stanišić Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud](#)

46. Under this test, what must be “real” rather than “fanciful” is thus the prospect of the material or information in question providing a lead on evidence that is either relevant or possibly relevant to an existing issue or can raise or possibly raise a new issue in the case. The test does not mean, as the SPO submits, that a reliability or weight evaluation is to be conducted before information is disclosed. In other words, requested information must have “more than [...] [an] abstract logical relationship to the issues”.⁸² The quality of the information – in the sense of its reliability – is not relevant to that evaluation.

47. As regards the ICC decision cited by the SPO, the Panel notes its holding that “[i]n the view of the Chamber, the suggested materiality is speculative and hypothetical”.⁸³ The decision contains thus no suggestion that disclosure would be conditioned to any evaluation of the reliability of the information itself or the credibility of its provider. Instead, the aforementioned holding evaluates the logical connection between the information concerned and an issue of materiality to the defence.

48. For these reasons, the Panel rejects the SPO’s submissions regarding the nature of the disclosure regime under Rule 102(3) or Rule 103 of the Rules. Moreover, the legal understanding advanced by the SPO in these proceedings causes the Panel to be concerned about the SPO’s full compliance with its disclosure obligations. Therefore, the Panel reminds the SPO of its ongoing obligation to conduct a full and effective review of its holdings in a manner consistent with the Rules. Failure to disclose material falling under Rule 102(3) or Rule 103 of the Rules based on a unilateral assessment by the SPO of (lack of) credibility or reliability will be treated by the Panel with the utmost severity. The Panel emphasises that disclosure constitutes an essential

Theunens, 11 March 2011, para. 12; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber, [Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence](#), 26 September 1996, paras 6-7.

⁸² ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber, [Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence](#), 26 September 1996, para. 7.

⁸³ ICC, *Prosecutor v. Al Hassan*, Trial Chamber X, [Public Redacted Version of ‘Decision on the Defence Request to Terminate the Proceedings and Related Requests’](#), ICC-01/12-01/18-1009-Red, 24 August 2020 (date of original), para. 37.

and fundamental element of the guarantee of a fair trial. The Panel cautions the SPO that disclosure obligations stemming from this guarantee are not duties to be circumvented through sophistries, but legal obligations to be fulfilled with the greatest of care, urgency and diligence.

C. MATERIALITY UNDER RULE 102(3) AND THE ENTRAPMENT ALLEGATIONS

49. Before addressing Items 185-201, the Panel finds it necessary to provide a number of clarifications as to the relationship between “materiality” under Rule 102(3) of the Rules and the Entrapment Allegations.

50. The SPO maintains that the Defence is 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”.⁸⁴ The SPO also argues that the questions posed by the Gucati Defence regarding the author of 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 of the Entrapment Allegations.⁸⁵ The Gucati Defence responds that the Accused is not required, in order to receive relevant disclosure, to make a *prima facie* showing that the Entrapment Allegations are not wholly improbable.⁸⁶ The Gucati Defence submits that the decision of the Panel as to whether the Entrapment Allegations are other than wholly improbable and the effect thereon upon the burden of proof, is to be determined at trial, after full disclosure has been made and the Parties have been able to fully state their case.⁸⁷

51. The Panel recalls that the Court of Appeals Panel has found that circumstances through which material seized by the SPO came into possession of the Kosovo

⁸⁴ F00316, para. 16.

⁸⁵ F00316, para. 17.

⁸⁶ F00325/COR, para. 59.

⁸⁷ F00325/COR, para. 60.

Liberation Army War Veterans' Association ("KLA WVA") is "relevant" for the purposes listed under Rule 102(3) of the Rules.⁸⁸

52. The Panel further recalls the test set out by the Court of Appeals Panel with regard to the Entrapment Allegations:

[a]ccording to the jurisprudence of the [ECtHR], applicants must be effectively able to raise an issue of incitement during their trial to ensure compliance with Article 6 of the European Convention on Human Rights ("ECHR"). The prosecuting authorities therefore have to disclose information relevant to entrapment to permit the Defence to argue a case on entrapment in full at trial, otherwise, the proceedings will fail to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial, in violation of Article 6(1) of the ECHR. The Panel notes however that the defendant's entrapment allegations should not be "wholly improbable".⁸⁹

53. The Panel understands this jurisprudence to mean that it is bound to consider the Entrapment Allegations during trial with a view to determining whether the claims are, in the language of the ECtHR, "wholly improbable". If the Panel considers that the claims are not wholly improbable, it must consider whether the SPO has met its burden of proof in relation to these matters.⁹⁰ The Panel further observes that its determination will rest on the evidence presented at trial. For these reasons, the Panel finds it premature to decide at this juncture whether the Entrapment Allegations are wholly improbable. The Defence must be permitted to receive, as part of the disclosure process, relevant and disclosable information that could assist the Entrapment Allegations, to conduct effective investigations thereon and to elicit evidence from those witnesses capable of testifying thereto.

54. Furthermore, the Panel is acutely aware that it is asked to make determinations of materiality under Rule 102(3) of the Rules for the purposes of the Entrapment Allegations without the Defence having access to the relevant material.⁹¹ For these

⁸⁸ Appeals Disclosure Decision, para. 47.

⁸⁹ Appeals Disclosure Decision, para. 52.

⁹⁰ Transcript, 18 October 2021, p. 816.

⁹¹ See ECtHR, *Edwards and Lewis v UK*, nos. 39647/98 and 40461/98, [Judgment](#), 27 October 2004.

reasons, the Panel finds it necessary to clarify the parameters under which it assessed the materiality of Items 185-201.

55. The Panel notes that its *prima facie* finding in the Rule 102(3) Order that Items 185-190 and 192-200 appeared to be subject to disclosure under Rules 102 and/or 103 of the Rules was made: (i) for the purposes of the first step of the Rule 102(3) disclosure regime; and (ii) without the Panel having inspected the materials.⁹² This does not preclude the SPO from challenging the materiality of those items under the third step of the Rule 102(3) disclosure regime.

56. In its assessment under the third step, the Panel considered that information was material under Rule 102(3) of the Rules in the context of the Entrapment Allegations if: (i) the information could assist for the Defence claim or its investigations of entrapment (without assessing the weight, reliability or credibility of that information); or (ii) the information, interpreted in the relevant context, suggested that the SPO failed to take adequate investigative steps to exclude the possibility that a member of its staff or someone under its control entrapped the Accused by disclosing the impugned information.

57. Thirdly, the Panel also considered whether any information in Items 185-201 contained further incriminating or exculpatory evidence, or if it had any prospect of providing a lead on evidence that was either (possibly) relevant to an already existing issue or could (possibly) raise a new issue in the present case.

⁹² Rule 102(3) Order, paras 11-12, 23-24.

D. THE ITEMS

1. Items 185-190 and 192-194

58. The Panel notes that: (i) Item 185 is a collection [REDACTED];⁹³ (ii) Items 186-190 are [REDACTED];⁹⁴ and (iii) Items 192-194 are [REDACTED], [REDACTED].⁹⁵

59. Having carefully reviewed these items, the Panel considers that they contain no information that could assist the Defence claim or its investigations of entrapment. Likewise, the items do not contain any information or evidence that would suggest that the SPO had failed to take adequate investigative steps to exclude the possibility that entrapment occurred. In fact, none of the items contain any information or opinion regarding any role or involvement the SPO would have had in the provenance ([REDACTED],⁹⁶ [REDACTED]) of the Batches. Furthermore, the Panel found no further incriminating or exculpatory evidence in the aforementioned items.

60. The Panel further notes that Item 185 does not relate to any existing issue and does not raise any new issue in the present proceedings. While Items 186-190 and 192-194 contain [REDACTED], [REDACTED] they do not contain any claim that could be relevant or possibly relevant to an existing issue or could raise or possibly raise a new issue in the present case. Accordingly, the submissions of the Gucati Defence that disclosure of these items is required in order to explore, *inter alia*, the credibility of the witnesses, the reliability of the accounts provided and any leads of evidence cannot be entertained,⁹⁷ as none of these items would have any bearing on the Defence case and these proceedings.

61. For these reasons, the Panel finds that Items 185-190 and 192-194 are not material to the Defence preparation and do not fall under the scope of Rule 102(3) of the Rules. Given this finding, the Panel need not determine whether the aforementioned items

⁹³ F00307/A01, p. 2.

⁹⁴ F00307/A01, pp 2-3.

⁹⁵ F00307/A01, pp 3-4.

⁹⁶ F00325/COR, para. 48.

⁹⁷ F00325/COR, paras 49-51.

fall under the scope of Rule 108(1) of the Rules. Nonetheless, the Panel notes that Items 186-190 contain highly sensitive information [REDACTED], [REDACTED]. Likewise, the disclosure of Items 185-190 and 192-194 would likely prejudice ongoing SPO investigations [REDACTED].

2. Item 191

62. The Panel notes that Item 191 is [REDACTED]. The SPO maintains that this item constitutes internal work product.⁹⁸

63. The Panel recalls that Rule 102 of the Rules does not contain an exception to disclosure of internal work product in accordance with Rule 106 of the Rules. That is because, as is apparent from Rule 106, such material is not subject to disclosure or notification, unless it falls under Rule 103 of the Rules or disclosure is ordered by the Panel.⁹⁹ Whether a specific document falls under the scope of Rule 106 of the Rules depends not on its title, but on its content, function, purpose and source. Documents constituting internal work product typically contain “the thoughts and original work” of staff employed by the respective Party,¹⁰⁰ and any disclosure of such documents “must be narrow in nature and may not serve to undermine the purpose of the Rule, namely, to protect the free exchange of ideas and an open discussion” within the staff of that Party.¹⁰¹

64. Having carefully reviewed Item 191, the Panel considers that, even if this document and its content constitutes internal work product under Rule 106 of the Rules, disclosure of certain parts would have to be ordered by the Panel in accordance with that Rule with a view to ensure the fairness of proceedings and to enable an

⁹⁸ F00307/A01, p. 3, fn. 2.

⁹⁹ Rule 102(3) Order, para. 21. *See also* Rule 106 of the Rules.

¹⁰⁰ *Similarly*, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, [Reasons for the Trial Chamber’s Decision Dismissing the Sabra Defence Application to Order Prosecution Disclosure of Documents Related to Mr Michael Taylor](#), 13 July 2018, para. 28.

¹⁰¹ *Similarly*, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, [Reasons for the Trial Chamber’s Decision Dismissing the Sabra Defence Application to Order Prosecution Disclosure of Documents Related to Mr Michael Taylor](#), 13 July 2018, para. 27.

effective Defence exploration of the issue of entrapment in a manner consistent with the ECtHR test outlined above. While Item 191 contains no clear information that could assist the Defence claim or its investigations of entrapment, it is, in itself, information that directly bears upon the investigative steps the SPO took to exclude the possibility that entrapment occurred. As the SPO concedes, Item 191 contains [REDACTED].¹⁰² This in itself pertains to the question whether the SPO took reasonable steps to exclude the possibility that entrapment occurred and what those steps consisted of. For this reason, the Panel finds that Item 191 is material to the Defence preparation and falls under the scope of Rule 102(3) of the Rules. Having made this finding, the Panel shall determine whether Item 191 falls under the scope of Rule 108(1) of the Rules.

65. The Panel notes that Item 191 contains sensitive information [REDACTED], [REDACTED].¹⁰³ The Panel further notes that Item 191 contains further specific details [REDACTED].

66. The Panel recalls the Pre-Trial Judge's finding that there was a well-grounded suspicion, *inter alia*, that the Accused: (i) intentionally participated in the unauthorised dissemination of protected information;¹⁰⁴ (ii) published on repeated occasions SPO/SITF-related documents received by the KLA WVA;¹⁰⁵ and (iii) vowed to continue to publish such information in the future,¹⁰⁶ despite being ordered by the Single Judge to refrain from doing so.¹⁰⁷ The Panel is mindful that its current determination must take as a starting point the Accused's presumption of innocence. Nevertheless, the Panel finds that the above findings show a risk that, if the Accused gained access to Item 191, they may attempt to disseminate the information contained

¹⁰² F00389, para. 15.

¹⁰³ F00389, para. 15.

¹⁰⁴ F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment* ("Confirmation Decision"), 11 December 2020, paras 100, 102-103, 105, 108-109, 111-113, 115-117.

¹⁰⁵ Confirmation Decision, paras 101-102, 106, 108.

¹⁰⁶ Confirmation Decision, paras 101-102, 106-108.

¹⁰⁷ Confirmation Decision, paras 101-102, 106-108.

therein. In addition, even if such a risk did not exist, the full disclosure of that item could prejudice ongoing SPO investigations as a result of its use during Defence investigations of the Entrapment Allegations. The Panel considers therefore that the full disclosure of Item 191 would prejudice the ongoing SPO investigation.

67. The Panel will therefore assess whether any counterbalancing measures would provide adequate relief to the Defence. The Panel observes that the SPO proposed as counterbalancing measures the provision of extracts of Item 191 [REDACTED], [REDACTED].¹⁰⁸ While the Panel welcomes these proposals, it finds that they are insufficient to put the Defence in a position to ascertain the relevant context of the SPO's efforts to exclude the possibility of the information having been intentionally leaked by one of its staff.

68. For this reason, the Panel orders the SPO, pursuant to Rule 108(4) of the Rules, to provide further extracts of Item 191 as set out in the strictly confidential and *ex parte* Annex of this decision. The Panel further notes that the rest of Item 191, not disclosed to the Defence, contains no further incriminating or exculpatory evidence nor does it relate to any existing issue and does not raise any new issue in the present proceedings.

3. Items 195-200

69. The Panel notes that Items 195-200 are call data records ("CDRs") [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]) [REDACTED] ([REDACTED]).

70. The Panel recalls in this regard that it was provided with a summary of the steps and verifications taken by the SPO to exclude the possibility that the CDRs contained indications that current or former SPO staff or any person acting under the SPO's

¹⁰⁸ F00389, paras 15-16.

instruction or control voluntarily disclosed the impugned information to the Accused (“Summary of Verifications”).¹⁰⁹

71. Having carefully reviewed the CDRs, the Panel finds that they do not, in themselves, assist the Defence in its claim or investigation of entrapment. The Panel also notes that the CDRs, in their raw format, are not informative as to the investigative steps the SPO took to exclude the possibility of an intentional leak. Moreover, the CDRs do not appear on their face to contain further incriminating or exculpatory evidence nor do they appear to relate to any existing issue and do not raise any new issue in the present proceedings. The Panel is mindful, however, that the Defence could commission its own analysis of the CDRs and reach their own findings regarding any investigative steps taken by the SPO to exclude the possibility that entrapment occurred. The Panel further notes that the information in the CDRs provide relevant context of the SPO’s efforts to exclude the possibility of an intentional leak. For this reason, the Panel finds that Items 195-200 are material to the Defence preparation and fall under the scope of Rule 102(3) of the Rules. Having made this finding, the Panel shall determine whether Items 195-200 fall under the scope of Rule 108(1) of the Rules.

72. The Panel notes that Items 195-200 contain specific call data records pertaining to [REDACTED], [REDACTED].¹¹⁰ [REDACTED].¹¹¹ Taking in consideration the Accused’s statements recalled in paragraph 66, the Panel finds that they show a risk that, if the Accused gained access to the CDRs, they may attempt to disseminate the information contained therein. The Panel considers therefore that the full disclosure of Items 195-200 would prejudice the ongoing SPO investigation.

73. The Panel will therefore assess whether any counterbalancing measures would provide adequate relief to the Defence. The Panel observes that the SPO proposed as

¹⁰⁹ The Panel ordered such a summary in F00320, paras 8 and 9(b). The SPO provided such a summary of verifications in F00331, paras 3-6.

¹¹⁰ F00389, para. 14.

¹¹¹ F00389, para. 14.

counterbalancing measures the provision to the Defence of the Summary of Verifications. The Panel considers that the Summary of Verifications provides relevant context to demonstrate the nature and scope of the investigative steps taken by the SPO to exclude the possibility that entrapment occurred. The Panel accordingly finds that the provision to the Defence of the Summary of Verifications constitutes an appropriate counterbalancing measure under Rule 108(2) and (4) of the Rules.

74. For this reason, the Panel orders the SPO to provide to the Defence the Summary of Verifications.

4. Item 201

75. The Panel notes that Item 201 contains an official note of contact with a witness, whereby he, *inter alia*, indicates [REDACTED].¹¹²

76. Having carefully reviewed Item 201, the Panel finds that it directly relates to the Entrapment Allegations. The Panel notes, however, the indication of the witness in Item 201 that [REDACTED].¹¹³ The Panel is mindful that the full disclosure of that information could have security and/or investigative implications under Rule 108 of the Rules. For that reason, the Panel will stay consideration of this particular item until further steps have been taken by the SPO, as outlined next.

77. The Panel notes the SPO's proposed counterbalancing measures in relation to Item 201.¹¹⁴ The Panel considers that the measures proposed by the SPO would provide the Panel with further information regarding Item 201 and may assist in its determination of materiality and/or non-disclosure.

78. For this reason, the Panel orders the SPO to implement the proposed measures and report back to the Panel by 12 November 2021. In that report, the SPO is directed to state its position regarding the disclosability of the material, any objection thereto

¹¹² F00361, p. 2.

¹¹³ F00361, p. 2.

¹¹⁴ F00389, para. 13.

and any counterbalancing measures it would propose to adopt in relation to parts of the record it says should not be disclosed.

E. FURTHER CROSS-EXAMINATION BY THE DEFENCE

79. In view of the above findings, the Defence is ordered to indicate, by 8 November 2021, whether it wishes further to cross-examine W04841. This order is without prejudice to a request for relief by the Defence after the Panel rules on the materiality and/or disclosure of Item 201.

F. THE GUCATI 12 QUESTIONS

80. In F00316, the SPO maintains that all items addressing the Gucati 12 Questions are included in the Updated Rule 102(3) Notice.¹¹⁵ The Gucati Defence submits that while the SPO may not be obliged to create further documentation to answer the Gucati 12 Questions, the fact that it did not carry out relevant enquiries in relation to those questions is both relevant and disclosable information.¹¹⁶

¹¹⁵ F00316, para. 49. The Gucati 12 Questions are 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)?

¹¹⁶ F00325/COR, para. 56.

81. The Panel notes in this regard that the Gucati Defence addressed most of the Gucati 12 Questions to W04841,¹¹⁷ and is also entitled to do the same in relation to W04842 or W04876.¹¹⁸

82. The Panel considers that, to the extent to which the Gucati 12 Questions pertain to information disclosable under Rule 102(3) of the Rules, they are addressed by the counterbalancing measures ordered by the Panel in relation to Item 191.

83. The Panel also considers that the Gucati 12 Questions are insufficiently specific and constitute, in effect, a fishing expedition that is inconsistent with the Rules. As previously held, the Defence may request the disclosure of material not included in a Rule 102(3) notice, but in such a case, the Defence must provide suitable parameters for specification of any requested items, so as to enable the SPO to identify the items sought, and must indicate the materiality of the requested items for Defence preparation.¹¹⁹ The disclosure regime is not intended to allow the Defence to force the SPO into creating disclosable items or to trawl through the SPO records in the hope of identifying relevant information.

84. For this reason, the Panel shall not further entertain the Gucati 12 Questions.

G. THE HARADINAJ ADDITIONAL REQUESTS

85. The three Haradinaj Additional Requests seek: (i) details of the SPO personnel present during the search and seizure operations of 8, 17, 22 and 25 September 2020 over and above what has already been disclosed;¹²⁰ (ii) details of any and all SPO personnel who were dismissed or whose contracts were not extended following the

¹¹⁷ Transcript, 21 October 2021, pp 1216-1240.

¹¹⁸ Transcript, 18 October 2021, p. 817.

¹¹⁹ Transcript, 28 October 2021, pp 1649-1650.

¹²⁰ The first of the Haradinaj Additional Requests is as follows: (a) Details 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.

alleged leaks,¹²¹ and (iii) a copy of the original video recording of the interview of 25 August 2021, to verify alleged errors in the translation of the transcript of interview of Witness W04866.¹²²

86. The SPO submits that the Haradinaj Additional Requests are unsubstantiated and are indicative of a fishing expedition.¹²³ In relation to the first additional request, the SPO submits that identity of all SPO personnel involved in the collection of the Batches has already been disclosed, with the exception of one interpreter subject to standard redactions.¹²⁴ The SPO adds that the Defence has been able to review the entirety of the video-footage of the 25 September 2020 search.¹²⁵ In relation to the second additional request, the SPO submits that no SPO staff were dismissed or had their contracts not extended for any reason relevant to the present case.¹²⁶ In relation to the third additional request, the SPO submits that the corrections to W04866's interview transcripts are minor and there is no utility in reviewing the video for corrections of this kind.¹²⁷

87. In F00326, the Haradinaj Defence does not specifically respond to the SPO submissions.

88. In relation to the first additional request, the Panel notes the SPO's submissions that all relevant information has been disclosed. No evidence or information has been adduced by the Defence to refute these submissions. The Panel further notes that the Defence explored at length the matter with W04841 and the Panel also asked questions

¹²¹ The second of the Haradinaj Additional Requests is as follows: (b) Details 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 members including 4 team leaders whose contracts were not extended past December 2020.

¹²² The third of the Haradinaj Additional Requests is as follows: (c) Due 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.

¹²³ F00316, para. 50.

¹²⁴ F00316, para. 51.

¹²⁵ F00316, para. 51.

¹²⁶ F00316, para. 53.

¹²⁷ F00316, para. 54.

in this regard.¹²⁸ In relation to the second additional request, the Panel notes the SPO's submission that no SPO staff members ended their contracts for reasons related to the present case. No evidence or information has been adduced by the Defence to refute this indication. In relation to the third additional request, the Haradinaj Defence is reminded that the proper avenue for such queries is a request for transcript verification.¹²⁹

89. For these reasons, the Panel finds that the Haradinaj Additional Requests are without merit.

H. THE GUCATI ANCILLARY APPLICATION

90. The Gucati Defence submits that the SPO, by selectively reporting alleged comments made by the Panel in the 21 October 2021 *ex parte* hearing, appears to have acted in breach of the strictly confidential and *ex parte* classification of that information.¹³⁰

91. The SPO responds that it referenced the aforementioned hearing in a manner compliant with the Order on the Conduct of Proceedings.¹³¹

92. The Panel finds nothing objectionable in the SPO's references to the Panel's instructions provided in the 21 October 2021 *ex parte* hearing and considers that the relevant submissions did not defeat the purpose of the classification of that hearing.

93. For this reason, the Panel finds that the Gucati Ancillary Application is without merit.

¹²⁸ Transcript, 25 October 2021, pp 1390-1407; Transcript, 26 October 2021, pp 1479-1489.

¹²⁹ Oral Order on Submitting Outstanding Translation or Verification Requests, 2 September 2021, p. 604.

¹³⁰ F00407, para. 24.

¹³¹ F00409, para. 2, referring to F00314, Panel, Order on the Conduct of Proceedings, 17 September 2021.

V. CLASSIFICATION

94. The Panel considers that, given the sensitive nature of many of the issues addressed in this decision and the related Rule 102(3) litigation, all filings submitted so far should retain their present classification. The Panel shall revisit this finding if and when appropriate.

VI. DISPOSITION

95. For these reasons, the Panel:

- a. **GRANTS** the SPO request in relation to Items 185-190 and 192-194;
- b. **ORDERS** the SPO to provide to the Defence, by **5 November 2021**:
 - i. extracts of Item 191 as set out in the strictly confidential and *ex parte* annex of this decision; and
 - ii. the Summary of Verifications in relation to Items 195-200;
- c. **ORDERS** the SPO to implement the measures proposed in relation to Item 201 and report back to the Panel by **12 November 2021**;
- d. **REJECTS** the Haradinaj Additional Requests and the Gucati Ancillary Application; and
- e. **ORDERS** the Defence to indicate, by **8 November 2021**, in oral submissions during the hearing, whether it wishes further to cross-examine W04841 in view of the present decision and the ordered SPO disclosure.



Judge Charles L. Smith, III
Presiding Judge

Dated this Wednesday, 3 November 2021
At The Hague, the Netherlands