

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 Christophe Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 17 January 2022

Language: English

Classification: Public

**Public Redacted Version of Corrected Version of Response to Confidential
Redacted Version of Prosecution Challenges to Disclosure of Items in Updated
Rule 102(3) Notice with One Confidential Annex**

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I. INTRODUCTION

1. On 29 July 2021, the Court of Appeals Panel rendered a decision that the process through which the information contained within the 'Three Batches' arrived to the KLA WVA HQ was relevant to the case and that the SPO should have included material in its possession falling under Gucati Requests B-C in its Rule 102(3) Notice¹.
2. On 1 September 2021, the Trial Panel, taking in consideration the findings of the Court of Appeals Panel in its 29 July 2021 decision, ordered the SPO to, *inter alia*, submit, by 6 September 2021, an updated Rule 102(3) notice listing material in its possession falling under the Gucati Requests B-C².
3. On 2 September 2021, following submissions from the SPO in an *ex parte* session, the Trial Panel ordered to 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 providing detailed notice of the material, enabling a determination of materiality by the Defence; and (ii) a proposed redacted version of the same list³.
4. On 3 September 2021, the SPO filed a draft un-redacted updated Rule 102(3) notice and a proposed redacted version thereof⁴.

¹ IA005-00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* ("Appeal Decision on Disclosure"), 29 July 2021 at paragraphs 43 and 47

² Oral Order on updated Rule 102(3) Notice, 1 September 2021, Transcript page 443

³ Oral Order Regarding SPO Rule 102(3) List, 2 September 2021, Transcript page 638, line 6 to line 18

⁴ F00296, Specialist Prosecutor, *Prosecution Proposed Redactions to Rule 102(3) notice*, 3 September 2021, with Annexes 1-2, strictly confidential and *ex parte*

5. On 7 September 2021, the Trial Panel ordered ('Order')⁵:
- a. the SPO to transmit, by 9 September 2021, a redacted updated Rule 102(3) notice to the Defence as set out in Annex 1 to the Order;
 - b. the Defence not to make public the redacted updated Rule 102(3) notice or any parts thereof and to guarantee the confidential nature of all information contained therein;
 - c. the Defence to indicate to the SPO, by 13 September 2021, which items among those listed in the redacted updated Rule 102(3) notice they seek to have access to by way of disclosure or inspection;
 - d. the SPO to seize the Panel, by 17 September 2021, with any request for non-disclosure of any of the requested material pursuant to Rules 105, 107, and/or 108 of the Rules or any associated request based on Rule 106;
 - e. the Defence to respond to any such application by 24 September 2021; and
 - f. the SPO to disclose to the Defence, by 17 September 2021, any of the material listed in the redacted updated Rule 102(3) notice and requested by the Defence that is not subject to requests for non-disclosure by the SPO.
6. In so ordering, the Trial Panel found that documents nos.185-190 and 192-200 appear, at least, *prima facie*, to be subject to disclosure under Rules 102 (material

⁵ F00304, Trial Panel, *Order on the Updated Rule 102(3) Detailed Notice*, 7 September 2021 at paragraph 26

to defence preparation) and/or 103 (may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence) of the Rules⁶.

7. On 10 September 2021, the SPO transmitted to the Defence a public redacted version of 'Prosecution addendum to its Consolidated Rule 102(3) Notice' with Confidential Annex 1⁷. Annex 1 thereto⁸ listed 16 further items, items no.185 to 200. Of the items listed, only item 191 had not previously been found by the Trial Panel to be *prima facie* subject to disclosure under Rules 102 and/or 103. In footnote 2, the SPO maintained that item 191 constitutes [REDACTED].
8. Pursuant to the Order, on 13 September 2021 the Defence indicated that it sought to have access by way of disclosure of items 185 to 190, 191 and 192 to 200⁹.
9. On 17 September 2021, the Defence received notification of the 'Confidential Redacted Version of Prosecution Challenges to Disclosure of Items I updated Rule 102(3) Notice with one confidential annex' ('Request'), although the filing was not, in fact, accessible to the Defence until the morning of 20 September 2021 following intervention by the CMU¹⁰.
10. Contrary to the Order, which restricted any request for non-disclosure of any of the requested material to requests under Rules 105, 107 and/or 108 of the

⁶ The Order at paragraph 23

⁷ F00307, Specialist Prosecutor, *Public redacted version of 'Prosecution addendum to its Consolidated Rule 102(3) Notice with Confidential Annex 1*, 9 September 2021

⁸ F00307/A01, Specialist Prosecutor, *Public redacted version of 'Prosecution addendum to its Consolidated Rule 102(3) Notice with Confidential Annex 1*, 9 September 2021

⁹ F00316/CONF/RED/A01, Specialist Prosecutor, *Annex 1 to Prosecution Challenges to Disclosure of Items in Updated Rule 102(3) Notice*, 17 September 2021 at pages 3 to 7

¹⁰ F00316, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Challenges to Disclosure of items in updated Rule 102(3) Notice with one confidential annex*, 17 September 2021

Rules or any associated request based on Rule 106, the SPO challenged the materiality of each of the requests under Rule 102(3)¹¹.

11. The SPO also requests non-disclosure under Rule 108(1) and Rule 106¹².

12. No request for non-disclosure is made under Rules 105 or 107.

13. On 22 September 2021¹³, the Trial Panel acknowledged that the SPO had provided it with items 185-190 and 192-200 on a strictly confidential and *ex parte* basis and, *proprio motu*, further ordered the SPO to provide to the Trial Panel on a strictly confidential and *ex parte* basis:

a. [REDACTED]; and

b. [REDACTED].

14. In accordance with the Order, the Accused responds to the Request as follows.

II. LAW

15. Disclosure before the Specialist Chambers is regulated by Articles 2, 3, 21, 35(2) and 40(6)b) of the Law, Rules 102 *et seq* of the Rules, Article 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights¹⁴.

¹¹ F00316, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Challenges to Disclosure of items in updated Rule 102(3) Notice with one confidential annex*, 17 September 2021 at paragraph 1

¹² F00316, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Challenges to Disclosure of items in updated Rule 102(3) Notice with one confidential annex*, 17 September 2021 at paragraph 56

¹³ F00320, Trial Panel, *Order for Further Submissions in Relation to the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Confidential, 22 September 2021 at paragraph 8

¹⁴ F00304, Trial Panel, *Order on the Updated Rule 102(3) Detailed Notice*, 7 September 2021 at paragraph 13

16. Article 21(6) of the Law makes it clear that the SC disclosure regime is based on a presumption of disclosure with limited exceptions set out in the Rules. It is for the SPO rather than the Defence to establish the existence of an exception to its general obligation of disclosure¹⁵.
17. Rule 102(3) requires as a first step the provision of a “detailed notice” of the material in the possession of the SPO¹⁶. The purpose of the list 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 preparation¹⁷.
18. The Rule 102(3) “detailed notice” is designed to provide the Defence with sufficient specificity and information to relieve the Defence of the higher burden of identifying with specificity items not in its possession and potentially not even within its knowledge which could be material to its preparation and facilitate its request of such items¹⁸.
19. Rule 102(3) further requires material and evidence which is material to Defence preparation to be disclosed without delay. The concept of ‘material to Defence preparation’ is to be interpreted broadly and should not necessarily be confined to the temporal scope of the indictment or confined to issues directly linked to exonerating or incriminating evidence or which would either directly undermine the prosecution case or support a line of argument of the defence¹⁹. It may include material which may simply put the Accused on notice that other

¹⁵ F00304, Trial Panel, *Order on the Updated Rule 102(3) Detailed Notice*, 7 September 2021 at paragraph 15

¹⁶ F00304, Trial Panel, *Order on the Updated Rule 102(3) Detailed Notice*, 7 September 2021 at paragraph 16

¹⁷ IA005-00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* (“Appeal Decision on Disclosure”), 29 July 2021 at paragraph 44

¹⁸ IA005-00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* (“Appeal Decision on Disclosure”), 29 July 2021 at paragraph 45

¹⁹ IA005-00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* (“Appeal Decision on Disclosure”), 29 July 2021 at paragraph 41

material exists which may assist him in his defence²⁰. It may include purely inculpatory material, for example, when the material could reasonably lead to further investigation by the Defence and the discovery of additional information²¹. Some documents may be deemed material to the preparation of the Defence because they *inter alia*: (i) could assist in the assessment of the credibility and reliability of Defence witnesses, and therefore the decision whether to call them; or (ii) might dissuade a defendant from pursuing an unmeritorious defence²².

20. Rule 103 (“Disclosure of Exculpatory Evidence”) requires the Specialist Prosecutor to “immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, 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”. On its face, Rule 103 is not confined to material which may reasonably suggest innocence: material which may reasonably mitigate guilt also falls to be immediately disclosed under Rule 103.

21. Like Rule 102(3), Rule 103 is not to be narrowly applied. Material which may simply put the Accused on notice that other material exists which may assist him in his defence may fall within the terms of Rule 103 (as well as Rule 102(3))²³.

22. Rule 103 is not subject to the exemption under Rule 106.

²⁰ *Prosecutor v Krnojelac*, IT-97-25, Transcript, 14 September 1999, at page 70; affirmed in *Prosecutor v Krstic*, IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004 at paragraph 178

²¹ *Prosecutor v Nahimana*, ICTR-99-52-A, Appeals Chamber, Decision on Motions Relating to the Appellant Hassan Ngeze’s and the Prosecution’s Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 at paragraph 16

²² IA005-00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision (“Appeal Decision on Disclosure”)*, 29 July 2021 at paragraph 41

²³ *Prosecutor v Krnojelac*, IT-97-25, Transcript, 14 September 1999, at page 70; affirmed in *Prosecutor v Krstic*, IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004 at paragraph 178

23. Material which may reasonably mitigate guilt, for example, will fall to be immediately disclosed under Rule 103, even if it otherwise would fall within the scope of Rule 106.
24. Proper categorisation for the purposes of Rule 106 depends not on a document's title but on its content, function, purpose and source²⁴.
25. The focus of the exemption in Rule 106 is on *opinion*²⁵. Legal analysis, research or investigatory strategies, accordingly, may fall within the scope of Rule 106²⁶. *Fact* (including where discussion is expressed in such a categorical manner by a decision maker as to properly be categorized as admission of fact) will not²⁷.
26. Where the information in a document is third-hand product that information will not fall within the scope of Rule 106²⁸. A distinction is to be drawn between the source material (which will not fall under Rule 106) and any comment on that material by the Party (which may fall under Rule 106) even when contained in the same document (in which case redaction might be appropriate)²⁹.

²⁴ *El-Sayed*, STL CH/AC/2011/01, Appeals Chamber, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 at paragraph 117

²⁵ *El-Sayed*, STL CH/AC/2011/01, Appeals Chamber, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 at paragraph 100

²⁶ *El-Sayed*, STL CH/AC/2011/01, Appeals Chamber, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 at paragraph 95

²⁷ *El-Sayed*, STL CH/AC/2011/01, Appeals Chamber, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 at paragraph 102

²⁸ *El-Sayed*, STL CH/AC/2011/01, Appeals Chamber, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 at paragraph 109

²⁹ *El-Sayed*, STL CH/AC/2011/01, Appeals Chamber, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 at paragraph 109; *Prosecutor v Dyilo*, ICC-01/04-01/06, Trial Chamber I, Public Annex 2 Redacted Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information" of 5 December 2008, 2 June 2009 at paragraph 31

27. It is a “well-established principle that disclosable and protected information, even when co-existing within the same document, can be accurately identified and separated for the purposes of disclosure”³⁰.

28. Rule 108(1) provides for a limited exception to disclosure under Rule 102 or Rule 103 where such disclosure may:

(a) Prejudice ongoing or future investigations;

(b) Cause grave risk to the security of a witness, victim participating in the proceedings or members of his or her family; or

(c) Be contrary for any other reason to the public interest or the rights of third parties.

29. The application, which may be confidential and *ex parte* (Rule 108(1)), must include a statement relating to the proposed counterbalancing measures including (a) identification of new, similar information; (b) submission of a summary of the information; (c) submission of the information in a redacted form; or (d) stipulation of the relevant facts regarding the reasons for non-disclosure (Rule 108(2)).

30. However, the scope of Rule 108 is not absolute. It is subject to the rights of the Accused under Article 6 of the ECHR.

31. As recognised in Rule 108(4), where Rule 108 applies, if non-disclosure violates the Accused’s Article 6 rights, “the Specialist Prosecutor shall be given the

³⁰ *Prosecutor v Ayyash et al*, STL-11-01/T/TC, Trial Chamber, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017 at paragraph 60

option of either disclosing the information, or amending or withdrawing the charges to which the information relates". The same must apply to Rule 106.

32. It is established that where "police incitement" occurs (incitement by those responsible for the investigation of crime or persons acting under their instructions) the Accused's right to a fair trial under Article 6(1) of the ECHR is violated³¹.

33. It is not essential to the existence of a violation of Article 6 in these circumstances that the state agent acts under the supervision or authorisation or with the knowledge of any more senior person within the state authority. It is sufficient if the state agent acts of his/her own initiative³².

34. Indeed, the absence of supervision or authorisation or knowledge of any more senior person within the state authority is itself an important feature *pointing towards* the finding of a violation of Article 6³³. In practice the authorities may be prevented from discharging the burden to prove that there was no incitement by the absence of authorisation and supervision³⁴.

35. Where an agent of the state is involved in any way (directly or indirectly) in the steps leading to the alleged offence, it falls to the Prosecution to establish at trial how that agent was involved, his reasons or personal motives³⁵.

³¹ *Teixeira de Castro v Portugal* (1999) 28 EHRR 101, ECtHR Chamber at paragraph 39

³² *Teixeira de Castro v Portugal*, ante at paragraphs 36, 47 and 31; *Ramanauskas v Lithuania*, no.74420/01, (2010) 51 EHRR 11 (2008) at paragraphs 11-12 and 44; and *Furcht v Germany*, no. 54648/09, (2015) 61 EHRR 25 at paragraph 39

³³ *Teixeira de Castro* ante at paragraphs 37 and 38 (see also paragraph 47 of the decision of the Commission in the same case)

³⁴ *Bannikova v Russia*, no.18757/06, ECtHR, 4 November 2010 at paragraph 48; *Furcht*, ante at paragraph 53

³⁵ ECtHR, *Ramanauskas v Lithuania*, no.74420/01, Judgment, 5 February 2008 at paragraphs 64 and 72

36. It is further established that Article 6(1) requires the prosecuting authorities 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 ECHR³⁶. This will include material which is shown to the Trial Panel which may be damaging to an Accused's submissions on entrapment, as well as material which may further those submissions³⁷.

37. Where the Trial Panel has an issue of fact to determine related to a plea of incitement, the right to an adversarial trial means, in a criminal case, that the defence must be given the opportunity to have knowledge of and comment on the submissions and material related to that issue of fact that are put before it by the Prosecution³⁸.

38. The principle of equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality. It is a matter for the defence to assess whether a submission (or information upon which a submission is based) deserves a reaction (and if so how to react)³⁹. A party which is not informed about the material submitted to the court by the opposing party is put at a substantial disadvantage vis-à-vis its opponent⁴⁰.

³⁶ IA005-00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* ("Appeal Decision on Disclosure"), 29 July 2021 at paragraph 52, referring to ECtHR, *Edwards and Lewis v United Kingdom*, nos.39647/98 and 40461/98, Judgment, 27 October 2004, pp.16-17; ECtHR, *V v Finland*, no.40412/98, Judgment, 24 April 2007, paragraphs 77-80

³⁷ *Edwards & Lewis v UK*, ante at p.17

³⁸ *Edwards & Lewis v UK*, ante at p.16-17

³⁹ *Lanz v Austria*, no.24430/94, ECtHR, Judgment, 31 January 2002 at paragraph 58

⁴⁰ *Lanz*, ante at paragraph 62

39. Where a violation of Article 6 occurs, the remedies include the exclusion of evidence and a stay of proceedings.
40. Where the circumstances fall short of establishing an Article 6 violation, such as where incitement occurs but not by those responsible for the investigation of crime or persons acting under their instructions, the circumstances may amount to mitigation⁴¹.

III. SUBMISSIONS

Challenge to Materiality

41. Having reviewed the updated Rule 102(3) Notice (in its unredacted form), the Trial Panel found in the Order that documents nos.185-190 and 192-200 were *prima facie* subject to disclosure under Rules 102(3) (material to defence preparation) and/or 103 (disclosure of exculpatory evidence) of the Rules.
42. Accordingly, any challenge to disclosure was restricted to requests under Rules 105, 107 and/or 108 of the Rules or any associated request based on Rule 106.
43. The Defence are entitled to rely upon the above rulings.
44. The Defence are not required to demonstrate anything other than that an item on the Rule 102(3) Notice is *prima facie* subject to disclosure under Rule 102(3) and/or Rule 103 *on the face of* the Rule 102(3) Notice.

⁴¹ Article 70.3 of the Kosovo Criminal Code 2019

45. The Rule 102(3) Notice is all that the Accused is provided with. The information thereon is intended to be sufficient for an assessment of materiality. That is the very purpose of the Notice.
46. If it is deficient for that purpose, then a further Rule 102(3) Notice should be provided with more detail. The Accused has not been provided with the material itself or the *ex parte* submissions that the SPO has made in relation to it (in writing and orally) and cannot comment upon either. It is ironic that the SPO complains that it was not given a full opportunity to challenge materiality⁴².
47. Moreover, the assessment by the Trial Panel that items 185-190 and 192-200 were *prima facie* subject to disclosure under Rules 102 and/or Rules 103 was correct.
48. Items 185-190 and 199-200 suggest that the SPO has significant information as to how Batch 1 arrived at the KLA WVA HQ, including [REDACTED]. [REDACTED]. [REDACTED].
49. The Accused is properly entitled to disclosure of items 185-190 and 199-200, under the principles set out in paragraphs 19 to 23 above, to enable it to further investigate these matters, including *inter alia*:
- (a) [REDACTED]
 - (b) [REDACTED]
 - (c) [REDACTED]
 - (d) [REDACTED]

⁴² Request at paragraph 15

(e) [REDACTED]

(f) [REDACTED]

(g) [REDACTED]

(h) [REDACTED]

50. Items 192-194 refer to '[REDACTED]' [REDACTED] '[REDACTED]'. These items again suggest that the SPO has significant further information as to how the batches arrived at the KLA WVA HQ ([REDACTED]). It is stated [REDACTED].

51. The Accused is properly entitled to disclosure of items 192-194, under the principles set out in paragraphs 19 to 23 above, to enable it to further investigate these matters, including *inter alia*:

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

(e) [REDACTED]

(f) [REDACTED]

(g) [REDACTED]

(h) [REDACTED]

(i) [REDACTED]

52. Item 195 is described as '[REDACTED]'. Although the updated Rule 102(3) Notice does not disclose [REDACTED], the [REDACTED]⁴³ [REDACTED]. No

⁴³ ERN 088935-TR-ET Part 1 RED

further information is provided in the Rule 102(3) Notice as to what [REDACTED].

53. The Accused is properly entitled to disclosure of item 195, under the principles set out in paragraphs 19 to 23 above, to enable it to further investigate these matters, including *inter alia*:

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

(e) [REDACTED]

(f) [REDACTED]

54. Items 196-197 are stated to be [REDACTED]. The Rule 102(3) Notice does not identify [REDACTED]. It is assumed given the presence of these items on a Rule 102(3) Notice prepared in relation to the Order that [REDACTED], or might be, relevant to the process through which the information arrived to the KLA WVA HQ.

55. The Accused is properly entitled to disclosure of items 196-197, under the principles set out in paragraphs 19 to 23 above, to enable it to further investigate these matters, including *inter alia*:

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

56. In relation to Item 191 (which the Trial Panel did not make a finding about in the Order), it is stated to be an “[REDACTED]” constituting [REDACTED]. Unlike other items, this document appears to be [REDACTED]. No further

detail is provided. However, the Appeal Decision on Disclosure held that the information requested in relation to [REDACTED] in the '[REDACTED]' was relevant⁴⁴ and, to the extent that it was in the possession of the SPO, should be listed on the Rule 102(3) Notice. [REDACTED]. Indeed, [REDACTED] of the Request confirms that '[REDACTED]'. It is assumed that where the SPO is not in possession of any of the information sought, it has identified the same in Item 191, in addition to recording any positive information. The SPO may not be obliged to create further documentation to answer the remainder of the [REDACTED], but the fact that relevant enquiries, confirmed by the Court of Appeals Panel as relevant, have not been carried out is itself both relevant and disclosable information.

57. The existence of an [REDACTED], presumably relating to the process by which it arrived to the KLA WVA HQ and addressing at least some of the [REDACTED], suggests that the SPO has significant further information as to how the batches arrived at the KLA WVA HQ.

58. The Accused is properly entitled to disclosure of item 191, under the principles set out in paragraphs 19 to 23 above, to enable it to further investigate these matters.

59. The Accused is not required "in order to receive disclosure relating to these defences" to make a "*prima facie* showing" that the "defence is not 'wholly improbable'"⁴⁵. That submission reverses the true order of events and undermines the presumption of disclosure with limited exceptions.

⁴⁴ The '[REDACTED]' as set out in footnote [REDACTED] to the Request

⁴⁵ Submitted in the Request at paragraph 16

60. The judgment by the Trial Panel as to whether the plea of incitement is other than wholly improbable⁴⁶, and the effect thereon upon the burden of proof at trial, is to be determined at trial, after full disclosure has been made and the parties have been able to fully state their case (not before).
61. In order to receive disclosure, all that is required is that the material sought is material to defence preparation and/or may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence (in accordance with Rules 102(3) and 103).
62. Moreover, the *ex parte* provision by the SPO of items 185-190 and 192-200 to the Trial Panel, with (i) the submission that their contents undermine the Accused's plea of incitement and (ii) the invitation to the Trial Panel to determine as an issue of fact that the plea is wholly improbable, was unfair.
63. The SPO provided items 185-190 and 192-200 to the Trial Panel in circumstances where there had already been a ruling that such items were *prima facie* disclosable on the basis of the Rule 102(3) Notice. The possible grounds for the SPO to seek non-disclosure in those circumstances were accordingly restricted by the Order to requests under Rules 105 – 108 (not a materiality challenge under Rule 102(3)).
64. The SPO, however, undermined the Order by challenging the finding of materiality therein, that had been properly based on the *inter partes* Rule 102(3) Notice, and provided items 185-190 and 192-200 to the Trial Panel on an *ex parte* basis without invitation.

⁴⁶ The Accused has previously set out in detail the matters which *inter alia*, and *subject to further disclosure*, it will rely upon at trial in relation to the plea of incitement – see F00258, Defence Pre-Trial Brief on behalf of Hysni Gucati, Confidential, 12 July 2021 and F00288, Written Submissions on behalf of Hysni Gucati for the Trial Preparation Conference with Confidential Annexes 1 and 2, Confidential, 27 August 2021

65. Disclosure of items 185-190 and 192-200 should now be made to ensure the proceedings are adversarial and to provide equality of arms⁴⁷. The plea of incitement is a matter which may be determinative of the Accused's trial (the remedies for a violation of Article 6 include the exclusion of evidence relating to the Batches and a stay of proceedings).

66. The Accused is entitled to have access to all prosecution material put before the Trial Panel which may be relevant to the plea of incitement, including (indeed, especially) any such material which may be damaging to the Accused's submissions on entrapment (as the SPO submits the present material is).

Rule 108

67. In the Request (as redacted) although it is asserted at paragraph 23 that 'disclosure of any of these materials will certainly prejudice the SPO's ongoing and future investigation', no detail is provided to support that assertion.

68. The presumption of disclosure, like the principle of publicity, requires that the limited exceptions to disclosure require proof of some objective basis underlying the claim⁴⁸. The party seeking to withhold disclosure under Rule 108 must demonstrate a real likelihood that disclosure may (a) prejudice ongoing or future investigations; (b) cause grave risk to the security of a witness etc.; or (c) be contrary for any other reason to the public interest or the rights of third parties. It is further submitted that the party seeking to withhold disclosure under Rule 108 must demonstrate (i) that withholding disclosure as

⁴⁷ *Edwards & Lewis v UK*, ante at p.17

⁴⁸ F00303, Trial Panel, Decision on the Prosecution Request for Protective Measures, Public, 7 September 2021 at paragraph 11 in relation to protective measures

proposed is no more than the minimum interference with disclosure that is strictly necessary; and (ii) must consider counterbalancing measures. A general concern or fear that is not substantiated by concrete, objective elements or the hypothetical possibility of prejudice to investigations or that the safety or security of a witness may be affected, or that the public interest or rights of third parties may be damaged by the disclosure of certain information should not warrant an order for non-disclosure under Rule 108. The burden of establishing that the conditions under Rule 108 are met lies with the Prosecution.

69. It is submitted that the request under Rule 108 (like the SPO's previous application for protective measures) is not based on concrete or verifiable grounds but on hypothetical concerns and complaints about the burden of the SPO's disclosure obligations under the Law and the Rules.

70. For example, the complaint in paragraph 33 that the information covered by the Rule 102(3) Notice will need to be updated whenever the SPO uncovers new relevant information is, in reality, merely a complaint about the true effects of: (a) Rule 102(3) which requires a detailed notice of any material and evidence in his possession which is relevant to the case and (b) Rule 112 which affirms that the SPO's disclosure obligations are continuing.

71. It is clear that the SPO regards the SC disclosure regime (which is unlike that of international(ised) criminal tribunals) as placing too high a burden upon it. But the SPO's complaints about that burden and how it impacts upon the SPO's operational effectiveness are not justifiable grounds to withhold disclosure that is due under Rule 102 and 103⁴⁹.

⁴⁹ Indeed Rule 85(4), which the SPO refers to in paragraph 33 and footnote 46 of the Request as indicating the direction of travel of the KSC regulatory framework, is expressly subject to Rules 102 and 103

72. No consideration is given in the Request as to whether lesser measures than withholding disclosure might suffice: for example, an order to the Defence not to make public the disclosure or any parts thereof and to guarantee the confidential nature of all information contained therein (as the Trial Panel ordered in relation to the updated Rule 102(3) Notice, without incident). No statement as to proposed counterbalancing measures appears to have been provided, as mandated by Rule 108(4).

73. Indeed, even where its conditions are met, Rule 108 cannot justify withholding disclosure that is required under Rule 103 or Article 6 of the ECHR.

74. For the reasons set out above, therefore, even if Rule 108 was satisfied, it is submitted that disclosure of items 185-190 and 192-200 is nevertheless required (or otherwise the charges should be withdrawn under Rule 108(4)).

Rule 106

75. In relation to item 191, it is claimed that the item falls within the scope of Rule 106.

76. There is nothing in the description of the item on the Rule 102(3) Notice which confirms that, by virtue of its content, function, purpose and source, item 191 is properly characterised as falling within the scope of Rule 106.

77. The focus of Rule 106 is to protect *opinion*. Contrary to the submission of the SPO at paragraph 47 of the Request, it is a well-established principle a [REDACTED] can be 'divorced from its contents': "disclosable and protected

information, even when co-existing within the same document, can be accurately identified and separated for the purposes of disclosure”.⁵⁰

78. Where disclosure is required under Rules 102(3), there is good reason to identify and separate disclosable and protected information for the purposes of disclosure – indeed it is compulsory to do so.

79. Rule 106 is, in any event, subject to Rule 103.

80. Whereas the description on the Rule 102(3) Notice provides no account of the contents of the [REDACTED], such that the Accused cannot make any further submissions as to whether the material falls under Rule 103, the Trial Panel has ordered, *proprio motu*, that it be provided with the [REDACTED] by Tuesday 28 September 2021, together with further submissions from the SPO, on an *ex parte* basis, and the Trial Panel will be able to consider the extent to which Rules 102, 103 and 106 apply to it (albeit without submissions from the Accused to assist).

81. The Accused maintains that disclosure of item 191 should, in fact, be made to ensure the proceedings are adversarial and to provide equality of arms⁵¹. The plea of incitement is a matter which may be determinative of the Accused’s trial (the remedies for a violation of Article 6 include the exclusion of evidence relating to the Batches and a stay of proceedings).

82. The Accused is entitled to have access to all prosecution material put before the Trial Panel which may be relevant to the plea of incitement, including (indeed,

⁵⁰ *Prosecutor v Ayyash et al*, STL-11-01/T/TC, Trial Chamber, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017 at paragraph 60

⁵¹ *Edwards & Lewis v UK*, ante at p.17

especially) any such material which may be damaging to the Accused's submissions on entrapment (as the SPO submits item 191 is).

83. In relation to the further order that the SPO provide the Panel, on an *ex parte* basis, with "[REDACTED]"⁵², it is submitted that the enquiry ought to be wider to encompass any involvement in the disclosure of the impugned information to the Accused, whether 'voluntary' or not. Where an agent of the state is involved in any way (directly or indirectly) in the steps leading to the alleged offence, it falls to the Prosecution to establish at trial how that agent was involved, his reasons or personal motives⁵³.

84. The Accused maintains that disclosure of any further information provided pursuant to the order in paragraph 9(b) of F00320 should, in fact, be made to ensure the proceedings are adversarial and to provide equality of arms⁵⁴. The plea of incitement is a matter which may be determinative of the Accused's trial (the remedies for a violation of Article 6 include the exclusion of evidence relating to the Batches and a stay of proceedings).

85. The Accused is entitled to have access to all prosecution material put before the Trial Panel which may be relevant to the plea of incitement, including (indeed, especially) any such material which may be damaging to the Accused's submissions on entrapment (as steps and verifications purporting to 'exclude' entrapment would appear).

IV. CLASSIFICATION

⁵² F00320, *Order for Further Submissions in Relation to the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel, Confidential, 22 September 2021 at paragraph 8

⁵³ ECtHR, *Ramanauskas v Lithuania*, no.74420/01, Judgment, 5 February 2008 at paragraphs 64 and 72

⁵⁴ *Edwards & Lewis v UK*, ante at p.17

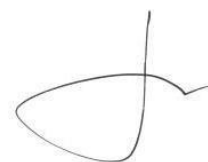
86. This filing is classified as confidential as it relates to other filings which bear that classification.

V. CONCLUSION

87. For the reasons set out above, the Trial should refuse the request to deny disclosure of the items on the updated Rule 102(3) Notice.

88. The Trial Panel was correct in its assessment that the material requested was *prima facie* subject to disclosure under Rules 102(3) and/or Rule 103, and the Prosecution has not made out that the limited exceptions in Rules 106 or 108 apply.

Word count: 6561 words⁵⁵



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⁵⁵ Given the importance of the issue dealt with in this Response, the Trial Panel is requested to grant a short extension to the 6000-word limit in Article 41 of the Practice Direction on Files and Filings KSC-BD-15.

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1 October 2021

Cardiff, UK