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SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Acting Specialist Prosecutor
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Public redacted version of 'Prosecution response to 'Joint Defence Motion for Disclosure Pursuant to Rule 103' (F00877)', KSC-BC-2020-06/F00910, dated 03 August 2022

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I. INTRODUCTION

1. The Request[1] should be rejected as legally and factually unsubstantiated, and overly broad. In April of this year, when the Specialist Prosecutor's Office ('SPO') responded to the Thaçi Defence's initial email seeking, pursuant to Rule 103,[2] disclosure of 'any evidence demonstrating the source' of SPO evidence and witnesses as being Serbia, the SPO explained that it did not accept the proposition that the requested information fell within the parameters of that rule. This remains the case in respect of the Request, which also now seeks various other even more sweeping categories of information related to SPO contacts with Serbia and evidence obtained therefrom.

2. The Defence (i) ignores the information already provided to it; (ii) cites no relevant legal authority for the remedy it seeks; and (iii) relies on a recounting of arbitrary incidents and anecdotes which are unrelated to either the evidence upon which the SPO intends to rely at trial or to any cooperation between the SITF/SPO and Serbia. Indeed, the submissions put forward serve only to highlight the lack of any connection between the Requested Categories[3] and the Defence's stated purpose of being able to challenge materials to be relied upon by the SPO at trial.

II. SUBMISSIONS

3. The Request seeks, pursuant to Rule 103 (or, in the alternative, Rule 102(3)):

   a. Disclosure of the provenance of any material in the possession of the SPO, where its origin is or appears to be the Republic of Serbia, or any of its organs or agents past or present; and
   b. Disclosure of the nature and extent of the SITF's and SPO's relationship with Serbia, including its legal basis, and specifically such materials as are necessary

[1] Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022), KSC-BC-2020-06/F00877/COR, 21 July 2022 ('Request').
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BC—03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' are to the Rules unless otherwise noted.
[3] The term Requested Categories used herein shall refer to all items requested under paragraph 81 of the Request.

for the Defence to understand the conditions on which information was requested and accepted, including but not necessarily limited to:

1. All requests for assistance, and/or other agreements reached between the SITF and/or the SPO and the Republic of Serbia or any of its organs or agents;
2. All requests for information and associated correspondence between the SITF and/or the SPO and the Republic of Serbia or any of its organs or agents;
3. A summary of all contact related to this case between the SPO and officials from the Republic of Serbia or any of its organs or agents; and
4. A complete list of all documents and materials the source of which is the Republic of Serbia or any of its organs or agents.[4]

a. **The Defence is already being provided with relevant information**

4. The Request is premised on the basis that the Defence is not already being provided with relevant information to determine and evaluate the source of evidence upon which the SPO intends to rely.[5] That is not correct. Such information is available both from the metadata already being provided by the SPO, and in many instances is also self-evident on the face of the documents themselves.

[4] Request, KSC-BC-2020-06/F00877/COR, para.81.

[5] Although not clearly set out in the Request, and despite the expansive nature of what it being sought, it appears that the Request is directed towards enabling the Defence to challenge evidence that the SPO may seek to rely upon at trial. *See* Request, KSC-BC-2020-06/F00877/COR, para.3 (claiming that the SITF/SPO have received a 'significant quantity' of evidence from Serbia and '[t]he Defence intends to challenge such evidence'); para.4 (requesting all information in the SPO's possession 'which originally emanated from Serbia or which reasonable appears to have emanated from Serbia, as well as the provenance of any such material upon which the SPO intends to rely'); para.5 (seeking information that will purportedly affect the 'credibility and reliability' of evidence that came from Serbia); para.75 (seeking provenance of documents from Serbia 'so that the Defence can investigate and determine whether to challenge the documents' admissibility'); para.76 ('the Defence will oppose any request that the SPO makes for any documents obtained via the Republic of Serbia to be tabled from the bar'); para.77 (stating that 'detailed provenance is crucial' in order to 'make appropriate challenges'); para.78 (information necessary to 'take a properly informed position on admissibility'). Hence, although some of the Defence's phrases and the language of the Requested Categories extends to all materials that may have come from Serbia, or are ambiguous about the extent of its request, the object of the Request is clearly indicated as an intention to challenge the introduction by the SPO of certain materials as evidence.

5. For example, first, and contrary to the Defence's generalised submission that the 'originator' field contains 'many blank entries',[6] of the over 17,000 items (including translations) disclosed pursuant to Rule 102(1), the originator field is blank in less than 160 instances in total.[7] The SPO remains willing to review those entries and see whether any additional specification can be provided. However, even in those cases, and as with all disclosed documents, additional information - including with regard to the source of the document in question - is already available from the 'description' metadata field, which typically indicates, *inter alia*, the author of the document.[8] Both the originator field and the description field are searchable,[9] and will return hits to relevant search terms.[10]

6. In certain instances – such as where a document was obtained by the SITF/SPO from a separate third party, rather than Serbia directly – the originator field will reflect the provider from which the SITF/SPO obtained the document. In such circumstances, the author or creator of the document is nonetheless provided or otherwise readily apparent from the description metadata as indicated above, and/or from the face of the document, as the Defence itself implicitly acknowledges.[11]

7. To the extent that the Defence considers that the provenance of a particular item or items that the SPO seeks to rely on at trial is not evident from the information already

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[6] Request, KSC-BC-2020-06/F00877/COR, para.74.

[7] Equally, even from the tens of thousands of documents disclosed pursuant to Rule 103 or 102(3) upon which the SPO does not intend to rely (and setting aside one early disclosure package which has been identified as lacking originator data (Disclosure Package 8)), the 'originator' field is blank in less than 25 instances.

[8] For example, in respect of certain of the documents for which the originator field is currently blank the descriptions read 'UNMIK report on […]', '[…] [REDACTED] […]', '[…] Serbia MUP, Witness Interview Record […]'.

[9] Either, for example, in LWF or from CSVs generated from LWF. Such descriptions are also provided in the SPO's exhibit list, which the SPO has already provided the Defence with a courtesy excel version of.

[10] Such as, for example, in this instance 'Serbia', Serbian', 'SWCPO' or 'Belgrade'.

[11] Request, KSC-BC-2020-06/F00877/COR, para.74. Each of the documents cited in footnote 85 of the Request are in clear terms indicated in the description metadata field as 'Republic of Serbia MUP Report […]', 'Republic of Serbia, CRBD Pristina […]', 'Republic of Serbia, Ministry of Information, Report […]', 'Republic of Serbia SUP Witness Statement' and 'Republic of Serbia MUP Report […]'.

provided, the SPO has no objection to providing such additional information on request, to the extent it is known. This includes ERN ranges for certain materials obtained by the SITF/SPO from the [REDACTED], but understood to have previously been provided to the [REDACTED] by Serbia, where the information in question may not already be readily apparent. These are matters which could have been, and can be, resolved *inter partes* in the ordinary course,[12] and do not fall within Rule 103.

8. However, as outlined below, the Request itself - seeking redisclosure pursuant to Rule 103 of such information and of items already disclosed or otherwise made available, and the 'legal basis' and other information pertaining to the SITF/SPO's cooperation with Serbia - is not legally or factually grounded, and should be rejected accordingly. Indeed, the Requested Categories are instead transparently and speculatively directed at extrajudicial objectives such as baselessly attempting to fish for details regarding cooperation arrangements in order to further political narratives and attempt to generally discredit the legitimacy of the KSC.[13]

b. **The Defence Fails to Justify Disclosure Under Rule 103**

9. Rule 103 requires the disclosure of any information 'which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of

[12] In the context of *inter partes* LWF forum discussions, the SPO has previously indicated willingness to address any queries relating to originator metadata.

[13] *See similarly*, Transcript of Status Conference dated 4 February 2022, pp.906-909 (Defence Counsel, in the context of making unfounded allegations regarding 'rogue prosecutions, rogue judicial systems' claiming that '[t]he KSC has lost its way' and, if not corrected, the 'legacy of international justice will forever irreparably be harmed'); Klan TV, Opinion, available at https://www.youtube.com/watch?v=fJtrWR13EF0 (quoting Defence Counsel Dastid Pallaska falsely claiming that 'there was a scandal of dimensions probably unheard of for any court, even those that work in the most undemocratic and repressive systems: it was found that the prosecution had deliberately hidden an exculpatory evidence and which it disclosed only when they realised they were caught hiding that evidence'; and baselessly claiming that documents not having been part of indictment supporting materials was 'an unprecedented, unforgivable scandal'). *See also* Transcript of Status Conference dated 20 May 2022, including at pp.1229, 1247 (incorrectly and irrelevantly claiming that the SPO has an office in Belgrade), and 1247 (baselessly asserting the SPO to be 'in lock-step' with Serb entities in its investigations).

the Specialist Prosecutor's evidence'.[14] The phrase 'reasonably suggest' requires the application of an objective test, and means "'probable' in the sense of having a sufficient material connection to a mitigating or exculpatory factor or circumstance.'[15] When seeking materials pursuant to Rule 103, 'the party making the request should be specific and demonstrate materiality of the information sought … and particularly how the information has a direct connection to the charges or a live issue in the case.'[16] The Defence are not permitted to engage in 'fishing expeditions' pursuant to Rule 103.[17] The Defence utterly fail to show that the Requested Categories meet this standard.

10. The Requested Categories are excessively broad, vague, and not justified by the purported justification.[18] Indeed, the lack of clarity surrounding the scope of what is actually being sought, and why, appears to have resulted in what amounts to the same information being requested in two different forms.[19]

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[14] Rule 103; *see also* Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020, para.66.

[15] Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413/RED, 3 November 2021, para.43.

[16] ICC, Prosecutor v. Al Hassan, ICC-01/12-01/18, Public redacted version of 'Decision on the Defence request to terminate the proceedings and related requests', 24 August 2020, para.35. Although, as has been previously noted by the Court of Appeals, the distinct Rule 102(3) disclosure regime at the KSC limits the applicability of certain jurisprudence from other international courts in some aspects, the same is not true for Rule 103, which operates similarly to other courts, here, Article 67(2) of the Rome Statute.

[17] Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021, ('Appeals Disclosure Decision'), para.56; STL, Prosecutor v. Ayyash et al, STL-ll-01/PT/PTJ, Decision on Sabra's Ninth Motion for Disclosure-Requests for Assistance, 6 June 2013, para. 15 (and sources cited therein).

[18] *See* MICT, Prosecutor v. Turinabo et al, MICT-18-116-PT, Decision on Motion for Access to Prosecution's Requests for Assistance and Responses Thereto, 18 April 2019, p.4 (denying request for all RFAs in order to challenge the reliability of the evidence where it 'essentially seeks to review the entirety of the Prosecution's investigation that involved the assistance of Rwanda or any other authority without substantiating that the information or documents sought are material to the preparation of the [defendant's] defence').

[19] The Request seeks both 'the provenance of any material in the possession of the SPO, where its origin is or appears to be the Republic of Serbia, or any of its organs or agents past or present' (Request, KSC-BC-2020-06/F00877/COR, para.81(a)) and also '[a] complete list of all documents and materials the source of which is the Republic of Serbia or any of its organs or agents'(Request, KSC-BC-2020-06/F00877/COR, para.81(b)(4)).

11. The Request fails to connect in a logical fashion the Requested Categories to the stated intention of challenging the SPO's evidence at trial, or to connect information that might be in the Requested Categories to any legitimate challenges to such evidence. This means that the Request does not 'reasonably suggest' that the Requested Categories are disclosable under Rule 103. Instead, the Request is just a fishing expedition of the kind that Court of Appeals jurisprudence notes as prohibited.[20]

12. It is further notable—and telling—that although four months have transpired since the Defence first raised a claim for information on the Serbian provenance of documents and related items pursuant to Rule 103,[21] they fail to identify a single case where similar materials were ordered disclosed pursuant to exculpatory evidence obligations. Instead, each of the four cases the Defence relies on were premised on the respective court's rules for items material to preparation for trial, akin to Rule 102(3).[22] They therefore are not in any way instructive as to Rule 103 obligations.

[20] Appeals Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, para.56. *See also* ICTR, Prosecutor v. Nahimana et al, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecutor's Requests for Leave to Present Additional Evidence of Witness ABC1 and EB, 27 November 2006, para.11 (exculpatory disclosure obligation 'does not … entitle the Defence to embark on a fishing expedition').

[21] Email from Thaçi Defence, 24 March 2022.

[22] *See* Request, KSC-BC-2020-06/F00877/COR, paras 20-24. First, the Defence rely on a decision on reconsideration in the ICC's *Ongwen* case. Request, KSC-BC-2020-06/F00877/COR, para.20. The initial decision, that is quoted in the reconsideration, granted disclosure on the basis that the RFAs in question were 'material to the preparation of the defence', which is the language of ICC Rules of Procedure and Evidence Rule 77. Second, the Defence rely on a decision from the MICT's *Nzabonimpa et al*'s case. Request, KSC-BC-2020-06/F00877/COR, para.20. That decision orders disclosure of a letter pursuant to MICT Rules of Procedure and Evidence 71(b). Third, the Defence rely on a decision from the STL's *Ayyash et al* case. Request, KSC-BC-2020-06/F00877/COR, para.21. That decision orders disclosure pursuant to STL Rules of Procedure and Evidence 110(B). Finally, the Defence rely on a decision in the ICTY's *Milutinović et al* case. Request, KSC-BC-2020-06/F00877/COR, paras 23-24. That decision was made by a chamber separate from the one overseeing the case against the requesting parties, and the order was made pursuant to ICTY Rules of Procedure and Evidence Rule 54.

13. Moreover, even by analogy, the decisions the Request cite cannot bear the interpretive weight the Defence seek to place on them.[23] For instance, the Defence quote from a decision in the International Criminal Court ('ICC')'s *Ongwen* case that held that certain RFAs had to be disclosed.[24] Reading the decision more fully, however, shows that even in reaching its limited conclusion—the Judge denied the request for RFAs that did not result in evidence the prosecution would rely on at trial—the Judge emphasised that 'the materiality of RFAs are assessed on a case-by-case basis.'[25] This *Ongwen* decision, even if it reflected current jurisprudence, therefore stands for a much narrower disclosure obligation concerning RFAs than what the Defence are seeking here.[26]

14. However, the Defence neglect to mention that the *Ongwen* decision is no longer good law. Less than two years after it was issued, the ICC Appeals Chamber in *Bemba et al* rejected the proposition that RFAs, responses, agreements, and the like (in that case between the prosecution and Cameroonian authorities) were disclosable purely because they had led to evidence that the prosecution relied on at trial. That basis, the ICC Appeals Chamber held, was 'manifestly insufficient for their disclosure to the defence to be considered mandatory' and furthermore 'had no basis in law'.[27] In doing so the ICC Appeals Chamber reiterated that what is disclosable 'depends on the content, context and

[23] The SPO is mindful of the applicability of jurisprudence from other courts regarding Rule 102(3) disclosure, considering the unique nature of the process at the KSC. However, the Defence presumably raise these cases in a filing whose main argument is Rule 103 because they believe they have some bearing in that regard. The SPO therefore addresses them in the same context.

[24] ICC, Prosecutor v. Ongwen, ICC-03/04-01/15-468, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2006 ('*Ongwen* Decision').

[25] ICC, Prosecutor v. Ongwen, ICC-02/04-01/15-457, Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, paras 13.

[26] *Ongwen* Decision, 15 June 2016, para.1, *quoting* ICC, Prosecutor v. Ongwen, ICC-02/04-01/15-457, Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, paras 13-14.

[27] ICC, Prosecutor v. Bemba et al, ICC-01/05-01/13, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/13, 8 March 2018, para.642 ('Bemba Appeals Decision').

purpose of any *individual* request for assistance in the specific circumstances of each case'.[28] That the ICC Appeals Chamber was evaluating this issue under ICC Rule 77, which is the analogue to Rule 102(3), is significant. Even under that rule's materiality standard, which is broader[29] than requirements pertaining to exculpatory materials disclosable under Rule 103 (*i.e.* ICC Article 67(2)), the ICC Appeals Chamber rejected the notion that use of evidence obtained through such RFAs, correspondence, and agreements merited disclosure.[30]

15. On the other hand, the Special Tribunal for Lebanon and MICT decisions the Defence cite only serve to highlight the chasm between the limited and case-specific disclosures ordered there and the sweeping demands in the Request.[31] Those decisions only pertain to disclosures related to telecommunications data and electronic evidence, respectively – and were premised on very distinct factors such as, *inter alia*, in the case of the STL decision the centrality of the telecommunications data in question to the prosecution's case and new information that had arisen during the course of testimony.[32] The parameters of what is sought in the Request, on the other hand, are closer to those addressed in a different decision by the same judge in the case before the MICT, in which

[28] Bemba Appeals Decision, para.641 (emphasis added); *see also* ICC, Prosecutor v. Bemba, ICC-01/05-01/08, Decision on defence requests for disclosure, 2 July 2014, para.29 (dismissing defense request for disclosure of RFAs sent to the Democratic Republic of the Congo for failure to show materiality where defense had claimed such materials necessary, *inter alia*, to show 'credibility and probative value of any leads or information proffered by the DRC'); ICC, Prosecutor v. Bemba, ICC-01/05-01/08, Decision on Defence request for further disclosure, 9 March 2016, para.54.

[29] ICC, Prosecutor v. Lubanga, ICC-01/04-01/06-1433, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, paras 77-78.

[30] *See also* ICC, Prosecutor v. Al Hassan, ICC-01/12-01/18, Decision on Defence motion seeking disclosure of Prosecution's correspondence with national authorities, 23 April 2020, para.6 ('in principle, documents related to cooperation between the Prosecution and national authorities are not disclosable *per se*').

[31] Request, KSC-BC-2020-06/F00877/COR, paras 20-21.

[32] Moreover, the STL decision was a reconsideration of an earlier decision which had rejected a request for such RFAs in the absence of such additional and distinct factors. The MICT decision similarly related to a very distinct category of RFAs pertaining to a group of intercepts which appeared to be outstanding or missing from what had been furnished by the national authorities.

he denied a request to disclose RFAs.[33] There, the Judge dismissed the request for all prosecution RFAs sent to Rwanda and other materials as 'overly broad in scope and framed in language too vague.'[34] He also noted that the defence's putative aim for requesting the RFAs—to 'know the manner in which the Prosecution requested and collected the evidence' and to 'challenge *inter alia*, the reliability of the evidence and the veracity of the testimonies'[35]—was too expansive because it 'essentially seeks to review the entirety of the Prosecution's investigation that involved the assistance of Rwanda'.[36]

16. The last of the decisions the Defence offer in support of their claim is from the *Milutivnović et al* case before the ICTY.[37] This decision, however, is wholly irrelevant to the matters at hand. It concerns substantive evidence (not RFAs, transmissions, or the like), from an entirely different case, disclosed under a general production rule, not a Rule 103 or 102(3) equivalent.

17. The Defence therefore fail to justify disclosure pursuant to Rule 103.

c. **The Requested Categories are also neither Relevant nor Material**

18. With respect to the Defence's cursorily submitted alternative basis of Rule 102(3),[38] the SPO is entitled to challenge disclosure of documents requested by the Defence pursuant to Rule 102(3) (regardless of whether requested through a 102(3) list or *sua sponte*) on the basis of relevance and/or materiality.[39]

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[33] MICT, Prosecutor v. Nzabonimpa et al, MICT-18-116-PT, Decision on Motion for Access to Prosecution's Requests for Assistance and Responses Thereto, 18 April 2019 ('*Nzabonimpa* Decision').
[34] *Nzabonimpa* Decision, p.4.
[35] *Nzabonimpa* Decision, p.4.
[36] *Nzabonimpa* Decision, p.4.
[37] Request, KSC-BC-2020-06/F00877/COR, paras 22-23.
[38] Request, KSC-BC-2020-06/F00877/COR, paras 79-80.
[39] Indeed, although not argued or sought by the Defence, given the lack of cogent justification, the Requested Categories, as articulated, would - beyond what is already provided to the Defence - fail even to meet the broad relevance standard for notice under Rule 102(3). In any event, all evidence relevant to

19. Trial Panel I has already rightly rejected a comparably-grounded Rule 102(3) disclosure request, observing that the request entailed 'unverified allegations of impropriety on the part of Serbian authorities, which appear unrelated to the SPO's cooperation with such authorities.'[40] That decision found that not even the relevance standard, let alone materiality, had been met on the basis of such disconnected submissions.[41] Similar considerations apply here.[42]

20. Although the Court of Appeals has cautioned against the applicability of some jurisprudence from international or internationalised tribunals regarding Rule 102(3)-equivalent disclosure because of the KSC's unique regime in this regard,[43] it has explicitly endorsed other holdings as informing the question of 'materiality'.[44] In that regard, it has held that among the categories of items that will be deemed not material under the KSC's jurisprudence are those considered 'too remote, hypothetical or speculative.'[45]

21. The Request falls foul of this standard, being too remote, hypothetical, and speculative to satisfy materiality. It simply speculates that the Requested Categories will

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the case and not disclosed pursuant to other rules - including evidence obtained directly or indirectly from Serbia - is already being noticed on the SPO's Rule 102(3) notice.

[40] Decision on the Defence Requests for Permission to Make Further Submissions on Disclosure, KSC-BC-2020-07/F00610, 17 May 2022, para.16 (the allegations raised in that disclosure request similarly addressed claims related to the fabrication or manipulation of evidence, and/or false implication of Kosovan Albanians – see para.8 of the decision).

[41] The same disconnected submissions are also relied upon in the Request (Request, KSC-BC-2020-06/F00877/COR, para.43).

[42] *See also* Section II(d) below (elaborating on the failure of the Defence to draw the necessary connection between the 'circumstances' it presents, and the Requested Categories).

[43] Appeals Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, paras 39-40.

[44] Appeals Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, paras 41-42, 56, fn.122; *see also* Fifth In Court Oral Order, KSC-BC-2020-06, 29 October 2021 (Pre-Trial Judge noting 'that Rule 102(3) of the rules only obligates disclosure upon showing of materiality on the part of the Defence').

[45] Appeals Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, paras 41, 56, fn.122; *see also* Second Oral Order, KSC-BC-2020-06, 24 March 2021 (dismissing Defence argument on the need for audio and video recordings of interviews in order to be able to do a 'complete assessment of the witness' as 'insufficiently substantiated insofar as it remains a hypothetical and generic argument').

contain some information going to the credibility or reliability of the SPO's evidence, without ever showing how that is so, or that there is some basis to believe it to be so.[46]

22. Given that the Defence's stated purpose is to gather information in order to challenge evidence at trial, much of the Requested Categories are in fact irrelevant as they have no connection to the charges or to evidence that the SPO intends to rely on at trial. They therefore cannot be relevant to a 'live issue' in the case.

23. As outlined above, provenance information is already being provided in respect of material intended to be relied upon at trial.[47] The expansion of the request to 'any material in the possession of the SPO, where its origin is or appears to be the Republic of Serbia', amounts to an attempt to review the entirety of the SITF/SPO's investigations that involved the assistance of Serbia, with complete disregard to any relevance to the case.[48]

24. A decision that was specifically cited to by the Court of Appeals, in explaining what should be considered too remote, hypothetical or speculative,[49] is particularly relevant here. The cited paragraph, of an ICC decision in *Al Hassan*, rejected a disclosure request for 'all and any material that could have been requested by the Prosecution and the basis for the Prosecution to request such material' as related to a particular request for assistance (generally, 'RFA') that the prosecution had sent to Mali.[50] The chamber denied the 'broad' request because the defence's proffered justification—that the

[46] *Cf.* Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022, para.815 (holding that connection to Serbia alone would not 'demonstrate that the statements were obtained by means of coercion or duress in the context of SITF/SPO cooperation with Serbian authorities').

[47] *See* Section II(a) above. Indeed, similar description and originator metadata is also being provided in respect of items disclosed pursuant to Rules 102(3) and 103 (and the description metadata is additionally contained on the Rule 102(3) notice itself), thereby encompassing all evidence of relevance to the case. Given the limited degree to which the SPO has chosen to challenge materiality to date, the information already being made available far exceeds the scope of what could even potentially be relevant to challenging evidence intended to be relied upon at trial.

[48] *See similarly, Nzabonimpa* Decision, p.4.

[49] Appeals Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, fn.23.

[50] ICC, Prosecutor v. Al Hassan, ICC-01/12-01/18, Decision on Defence request for disclosure of material related to Mr Al Hassan's arrest and detention in Mali, 5 January 2021, para.20 ('*Al Hassan* Decision').

documents would help 'illuminate' a point the defence wished to make, aid them in investigative activities, or could show improper involvement between the prosecution and the Malian authorities—were 'not enough to warrant disclosure' and were 'speculative and hypothetical and fail to meet the test'.[51] It also noted that RFAs are 'not, *per se*, disclosable.'[52] The 'test' that the passage refers to is identified earlier in the decision, and requires that 'the party making the request should be specific and demonstrate materiality of the information sought … particularly how the information has a direct connection to the charges or a live issue in the case.'[53] This finding is also consistent with the jurisprudence already discussed above determining that requests for disclosure of, *inter alia*, RFAs and related arrangements, of the type the Defence is seeking, do not meet the materiality standard.[54]

25. The additional requested information pertaining to the 'nature and extent' of the SPO's 'relationship' with Serbia, including its legal basis, is a similarly stark example of the Request's failure to demonstrate the necessary materiality, and is addressed further in Section II(e) below.

26. Furthermore, the Requested Categories are insufficiently specific;[55] they are framed not in relation to particular pieces of evidence or events,[56] but instead are an

[51] *Al Hassan* Decision, para.20; *see also* ICC, Prosecutor v. Al Hassan, ICC-01/12-01/18, Public redacted version of 'Decision on the Defence request to terminate the proceedings and related requests', 24 August 2020, para.37 (request for RFAs on the basis that they may show link between prosecution and state acts rejected because 'the suggested materiality is speculative and hypothetical').
[52] *Al Hassan* Decision, para.20.
[53] *Al Hassan* Decision, para.9.
[54] See paragraphs 14-15 above.
[55] *See* ICTR, Prosecutor v. Nahimana et al, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecutor's Requests for Leave to Present Additional Evidence of Witness ABC1 and EB, 27 November 2006, para.11 (request 'has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request'); ICTY, Prosecutor v. Bralo, IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record and for Disclosure of Mitigating Material, 30 August 2006, para.30.
[56] *Cf.* ICC, Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on Mr Thomas Lubanga's request for disclosure, 11 April 2013, para.11 (granting disclosure as 'material to the preparation of the defence' of

expansive net seeking 'any material' connected to Serbia its organs or agents; information on the 'nature and extent' of the SPO's relationship to Serbia, its organs, or agents; and other broad formulations with catch-all phrases such as 'including but not necessarily limited to' multiple other groups of documents, encompassing 'any' and 'all' RFAs, other agreements, and correspondence, whether related to evidence the SPO intends to use at trial or not.[57] They also ask the SPO to interpret notions such as what materials 'are necessary for the Defence to understand the conditions on which information was requested and accepted,'[58] and terms such as the 'nature and extent' of a 'relationship'.[59] The request which was rejected in the ICC's *Al Hassan* decision discussed above is positively restrained by comparison to what the Defence are seeking here.

27. Finally, two portions of the Requested Categories deserve special attention. In paragraph 81(b)(3) and (4), the Defence request a 'summary of all contact related to this case' between Serbia and the SPO and a 'complete list' of documents the source of which is Serbia.[60] However, the jurisprudence is clear that disclosure obligations do not extend to requiring the production of new materials, such as a 'summary' or 'list'. The SPO 'is not obliged to undertake investigations, perform analyses, or create work products which are not in its custody or control, possession or actually known to it.'[61]

28. The Request therefore also fails to meet the applicable standard under Rule 102(3), and this alternative basis should similarly be rejected.

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portions of a single RFA because it related to ascertaining the age of two individuals, which was 'a key issue in dispute').

[57] Text in quotations is taken from Request, KSC-BC-2020-06/F00877/COR, para.81.

[58] Request, KSC-BC-2020-06/F00877/COR, para.81(b).

[59] Request, KSC-BC-2020-06/F00877/COR, para.81(b).

[60] Request, KSC-BC-2020-06/F00877/COR, para.81(b)(3) and (4). *See also* Request, KSC-BC-2020-06/F00877/COR, para.75 (seeking that the SPO be required to analyse material – even outside of that intended to be relied upon – on the Defence's behalf in order to connect documents by substantive subject matter).

[61] Appeals Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, para.54.

d. **The 'Circumstances' Proffered by the Defence do not Advance the Request**

29. None of the Defence's examples,[62] even taken at face value,[63] demonstrate the need for disclosure of the Requested Categories, and quite a few - indicating the vigilance being exercised by the SPO and the information already available to the Defence - demonstrate the opposite. The vast majority of the incidents presented have no connection whatsoever to evidence that the SPO intends to rely on, or even events in the Indictment,[64] and so cannot relate to challenging the credibility or reliability of the SPO's evidence. Indeed, only in a smattering of instances do the Defence even attempt to relate these accounts to witnesses or evidence in the case, and in those instances there is no cogent showing of what added value the Requested Categories would bring for the purposes of challenging credibility and reliability. In fact, the cited evidence often shows that information concerning provenance and witness treatment is already readily available to the Defence.

30. The submissions fail to advance a claim that the Requested Categories would rationally affect the credibility or reliability of any evidence that the SPO seeks to rely on. In the rare instances where the Defence do cite to documents that have been disclosed or that the SPO will seek to rely on, they further show that the Requested Categories are not necessary. [REDACTED][65] [REDACTED].[66] None of these items are ones that the SPO seeks to rely on at trial. Nevertheless, the Defence effectively acknowledges it was able to identify the items, and request them for disclosure (or was proactively provided them pursuant to Rule 103 as the case may be), enabling the Defence to present its narrative for

[62] Request, KSC-BC-2020-06/F00877/COR, paras 27-73.
[63] The Defence mispresent or misleadingly portray certain of the sources. For example, with respect to the Stanković interview provided at Annex 1 of the Request (and referenced at Request, KSC-BC-2020-06/F00877/COR, para.30), nowhere in that interview is Stanković quoted with the word 'great', and the context in which he mentions cooperation being good for Serbia is from the perspective of drawing attention to Serbian victims and the possibility of resolving missing persons cases.
[64] Submission of amended Indictment and related documents, KSC-BC-2020-06/F00789, 29 April 2022.
[65] [REDACTED].
[66] [REDACTED].

why they believe [REDACTED] is tainted or otherwise not reliable. Should they feel it necessary, and the Trial Panel find it relevant, the Defence can further seek to tell this narrative at trial. They fail to identify any further benefit or need to be gained in this regard from the Requested Categories.

31. Emblematic of the Defence's failure to substantiate the need for the Requested Categories is the Defence claim about a witness that was put forth in the *Haradinaj* retrial.[67] The witness's evidence was ultimately considered unsound and not relied on in the judgment. The Defence claim that this demonstrates 'why it is so important for the SPO to disclose the full nature and extent of the SITF and SPO's relationship with Serbian authorities.'[68] But even the document cited by the Defence shows that (i) the ICTY prosecution had itself indicated an intention not to rely upon the evidence of Witness 81, and had invited the Chamber to ignore it as being unreliable, and (ii) the Chamber's analysis of the witness's testimony focused on it being contradictory, inconsistent, and evasive,[69] not on any matters related RFAs or transmissions, nor any interactions between the ICTY prosecution and Serbia.

32. The Defence also raise a [REDACTED] interview with [REDACTED] in support of their argument.[70] In it, he described [REDACTED].[71] But this again goes to show the lack of any basis for disclosure beyond what is already being provided by the SPO. In the first place, it shows that the SPO is diligent in its investigations in drawing out relevant information that could affect the reliability and credibility of evidence. And on the other hand, it shows that the information [REDACTED] stated, to the extent the Defence is

[67] Request, KSC-BC-2020-06/F00877/COR, para.59.
[68] Request, KSC-BC-2020-06/F00877/COR, para.60.
[69] *See* Request, KSC-BC-2020-06/F00877/COR, fn.65, *citing* ICTY, Prosecutor v. Haradinaj et al, IT-04-84bis-T, Public Judgment, 29 November 2012, paras. 457-461.
[70] Request, KSC-BC-2020-06/F00877/COR, para.64.
[71] [REDACTED]; Request, KSC-BC-2020-06/F00877/COR, para.64.

interested in it, would not be contained in RFAs or other Requested Categories, but instead is contained in the already disclosed documents themselves.[72]

33. Likewise, the Defence discuss a statement of [REDACTED], which – as an associated exhibit to [REDACTED] - is on the SPO's exhibit list.[73] The Defence [REDACTED] a judgment from the ICTY.[74] This again shows, at once, both that such challenges can be made at trial in the absence of the Requested Categories, and the irrelevancy of the Requested Categories. Citing to [REDACTED]'s disclosed statement, the Defence pronounces 'that it is only through Defence efforts that the full context of their statements will come to light.'[75] And yet anyone reading the document itself, which prominently identifies in capital letters on the first page that it originates in the Republic of Serbia, and anyone reading the SPO's description of the document in its exhibit list, which identifies it as 'Serbia MUP Statement of [REDACTED],[76] will know that the document originated in Serbia.

34. The Defence claims that they are seeking the Requested Categories, at least in part, to challenge evidence allegedly obtained under torture or duress. The Defence will be, of course, entitled to raise any such claims that are permissible during trial. The SPO is mindful that there may be certain sources of information that need to be looked at closely in determining reliability. But this reality does not provide cover for the Defence's failure to rationally articulate materiality for the Requested Categories. Once again, to the extent the Defence seeks disclosure beyond that which is already being provided (in particular with respect to available information on the provenance of evidence that the SPO will

[72] The SPO notes that the Defence misrepresent [REDACTED].
[73] Request, KSC-BC-2020-06/F00877/COR, para.67.
[74] Request, KSC-BC-2020-06/F00877/COR, para.67.
[75] Request, KSC-BC-2020-06/F00877/COR, para.80.
[76] Annex 1 to Prosecution Submission of corrected version of KSC-BC-2020-06/F00738/A02, KSC-BC-2020-06/F00768/A01, 14 April 2022, Item 4487. The documents cited at Request, fn.81, are all also clearly identified in the SPO's exhibit list as coming from courts in Serbia, and the Defence fail to give a cogent explanation of what further information might be relevant.

offer at trial), the Defence fail to explain in any sensible way how the Requested Categories are relevant to any such challenges. Instead they attempt to paper over the incongruency between their disconnected claims and the Requested Categories with generic phrases such as '[d]isclosure is required to identify such material in order to ensure the proceedings are not contaminated by unlawfully obtained evidence;'[77] and, '[f]ulsome knowledge of the SITF and SPO's relationship with Serbia is critical to the integrity of these proceeding.'[78] Such generalised submissions do not meet the requisite standard.

e. **The Request for the Legal Basis of SPO Cooperation with Serbia is Unavailing**

35. The disconnected and extrajudicial objectives of the Request[79] are perhaps most apparent in the Defence's request for information on 'the legal basis of the SPO's cooperation with Serbia'.[80] This request is supported by the bare assertion that they need this information 'in order to take a properly informed position on admissibility.'[81] That is not the case.

36. First, with respect to the entirely speculative assertion that there may be violations of Article 4(4),[82] it is apparent that the SPO —as well as the Specialist Chambers and the Registry— has wide authority under the Law and Rules to collect evidence and engage in cooperation through a variety of means, with a broad range of actors.[83] Indeed, the Trial Panel in the *Gucati and Haradinaj* case have already noted that '[a]s regards the

[77] Request, KSC-BC-2020-06/F00877/COR, para.66.
[78] Request, KSC-BC-2020-06/F00877/COR, para.73.
[79] *See* para.8 above.
[80] Request, KSC-BC-2020-06/F00877/COR, para.78.
[81] Request, KSC-BC-2020-06/F00877/COR, para.78.
[82] Which, it is noted, refers to the 'Specialist Chambers', rather than the Specialist Prosecutor's Office.
[83] *For example* Articles 4-5, 35(2) and (4), 38, 52-59, 62; Rules 101, 198-211.

cooperation between Serbia and the SITF/SPO, there can be no dispute that this was known to the public and that it is a lawful part of the mandates of the SITF and SPO.'[84]

37. Equally, with respect to the similarly unsupported claim of possible violations of Serbian law, the Defence ignores that the KSC is expressly barred from ruling upon the application of a state's national law in addressing questions of relevance or admissibility.[85] The Defence therefore fails to legally substantiate that, even if, *arguendo*, a violation existed, they could assert any related right or would have any standing to challenge the admissibility of the evidence obtained on that basis.[86]

38. Requiring disclosure of the SPO's arrangements with States and other entities as a matter of law, without a particularised and justified showing, would not only intrude on the powers afforded to the SPO under the Law, but would significantly constrain the SPO's ability to enter into the necessary arrangements, which may require negotiations premised on confidentiality.[87]

III. CONCLUSION AND RELIEF REQUESTED

39. For the foregoing reasons, the SPO respectfully requests the Pre-Trial Judge to dismiss the Request.

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[84] Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/F00470, 3 December 2021, para.59.

[85] Article 37(5).

[86] *See similarly for example* ICC, Prosecutor v. Bemba et al., ICC-01/05-01/13, Decision on Requests to Exclude Dutch Intercepts and Call Data Records, 29 April 2016, paras 16-20 (noting, in challenge to evidence on claim that its collection violated domestic law, that portions of the Rome Statute dealing with international cooperation 'address sovereignty concerns of States and are not generally apt to protect the interests of the individual' and provisions of statute dealing with state cooperation 'do not establish independent rights for the accused.').

[87] *See* ICC, Prosecutor v. Al Hassan, ICC-01/12-01/18, Decision on Defence motion seeking disclosure of Prosecution's correspondence with national authorities, 23 April 2020, para.6 ('[t]he cooperation regime under the [Rome] Statute is integral to the effective functioning of the Court and central to that regime is the relationship of trust between the State Parties and the organs of the Court, in this instance, the Prosecution').

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Monday, 3 April 2023

At The Hague, the Netherlands.