

**In:** KSC-BC-2020-06  
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence Counsel for Jakup Krasniqi

**Date:** 27 April 2023

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**Public Redacted Version of**

**Krasniqi Defence Response to Prosecution Challenge to Disclosure of Items  
in Rule 102(3) Notice, KSC-BC-2020-06/F01061, dated 27 October 2022**

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## I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby responds to the Prosecution Challenge to Disclosure of Items in Rule 102(3) Notice (“SPO Challenge”).<sup>1</sup> The Defence opposes the Specialist Prosecutor’s Office’s (“SPO”) materiality challenges, and maintains that the requested items addressed below are material to its preparation and must be disclosed at the earliest opportunity.<sup>2</sup> In parallel, and in the spirit of cooperation and judicial efficiency, the Defence withdraws its previous disclosure request for some of the items selected from the SPO Rule 102(3) Notice (“Notice”).<sup>3</sup>

2. Pursuant to Rule 82(4) of the Rules,<sup>4</sup> this filing is classified as confidential as it responds to a document with the same classification.

## II. PROCEDURAL HISTORY

3. On 31 July 2021, the SPO filed the Notice.<sup>5</sup>

4. On 7 September 2021, the Defence requested disclosure of 358 items contained in the Notice.<sup>6</sup> On 7 October 2021, the Defence requested disclosure of further 5,945 items.<sup>7</sup>

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<sup>1</sup> KSC-BC-2020-06, F01004/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of ‘Prosecution Challenge to Disclosure of Items in Rule 102(3) Notice with strictly confidential and ex parte Annexes 1-13’*, KSC-BC-2020-06-F01004, dated 30 September 2022, 6 October 2022, confidential.

<sup>2</sup> *Infra*, paras 18-47, 49.

<sup>3</sup> *Infra*, para. 48, fn. 85.

<sup>4</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

<sup>5</sup> KSC-BC-2020-06, F00421, Specialist Prosecutor, *Prosecution Rule 102(3) Notice*, 31 July 2021, public, with Annex 1, confidential, and Annex 2, strictly confidential and *ex parte*.

<sup>6</sup> KSC-BC-2020-06, F00459, Krasniqi Defence, *Krasniqi Defence First Notification of Request for Access to Rule 102(3) Material*, 7 September 2021, public, with Annex 1, confidential.

<sup>7</sup> KSC-BC-2020-06, F00807, Krasniqi Defence, *Krasniqi Defence Submissions for Twelfth Status Conference (“Twelfth SC Submissions”)*, 18 May 2022, public, para. 4.

5. On 22 October 2021, the SPO filed an amended Notice.<sup>8</sup>

6. On 27 October 2021, the Defence requested disclosure of 8,305 items. On 3 December 2021, the Defence requested disclosure of 12,956 items. On 13 January 2022, the Defence requested disclosure of 2,304 items. On 11 March 2022, the Defence requested disclosure of 23,872 items. On 19 April 2022, the Defence requested disclosure of 13,274 items. On 17 May 2022, the Defence requested disclosure of 129 items.<sup>9</sup>

7. During the Status Conference of 20 May 2022, the Pre-Trial Judge ordered the SPO to file requests for protective measures or submit materiality challenges in relation to the Defence requests for disclosure of Rule 102(3) material, and/or complete the disclosure of all material not subject to protective measures or materiality challenges, by 30 September 2022.<sup>10</sup>

8. All through the Rule 102(3) disclosure process, the Defence has actively engaged in *inter partes* discussions with the SPO regarding materiality, which resulted in the withdrawal of several items.

9. On 30 September 2022, the SPO filed the SPO Challenge confidentially and *ex parte*. The confidential redacted version of the SPO Challenge was filed on 6 October 2022.

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<sup>8</sup> KSC-BC-2020-06, F00543, Specialist Prosecutor, *Prosecution Amended Rule 102(3) Notice Pursuant to F00421*, 22 October 2021, public, with Annexes 1 and 2, confidential.

<sup>9</sup> Twelfth SC Submissions, para. 4.

<sup>10</sup> KSC-BC-2020-06, In Court – Oral Order, Order on Disclosure of Rule 102(3) Material, 20 May 2022, public.

10. On 13 October 2022, the Defence for Mr. Rexhep Selimi filed a request for extension of time until 27 October 2022 to respond to the SPO Challenge.<sup>11</sup> On 14 October 2022, the Pre-Trial Judge granted the extension of time to all Defence teams.<sup>12</sup>

### III. SUBMISSIONS

11. At the outset, the Defence notes the SPO's erroneous and overly restrictive interpretation of the materiality test. In particular, the SPO attempts to restrict the scope of materiality by misconstruing and selectively quoting the Court of Appeals Panel ("Appeals Panel") findings in the *Gucati and Haradinaj* case,<sup>13</sup> which in fact adopted a broad interpretation of the relevant test.

12. The Appeals Panel clarified that, as provided by the well-established jurisprudence of international criminal tribunals, the concept of "material to the preparation of the Defence" should be construed broadly, and in particular: (i) it should not be confined to the temporal scope of the indictment; and (ii) it should not be necessarily linked to exonerating or incriminating evidence or which would either directly undermine the Prosecution case or support a line of argument of the Defence.<sup>14</sup> Similarly, the Pre-Trial Judge previously found that "Defence preparation" is also a broad concept and need not be limited to what is "related to the SPO's case."<sup>15</sup>

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<sup>11</sup> KSC-BC-2020-06, F01033, Selimi Defence, *Urgent Selimi Defence Request for an Extension of Time to Submit Its Response to KSC-BC-2020-06/F01004 and Request for Order to the SPO*, 13 October 2022, confidential.

<sup>12</sup> KSC-BC-2020-06, F01038, Pre-Trial Judge, *Decision on Urgent Selimi Defence Request for an Extension of Time to Submit Its Response to KSC-BC-2020-06/F01004 and Request for Order to the SPO*, 14 October 2022, confidential, para. 17.

<sup>13</sup> KSC-BC-2020-07, IA005/F00008/RED, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* ("Appeals Panel Decision"), 29 July 2021, public, cited in SPO Challenge, para. 8. See also, KSC-BC-2020-07, F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* ("Pre-Trial Judge Framework Decision"), 22 January 2021, public, para. 45.

<sup>14</sup> Appeals Panel Decision, para. 41, fn. 88.

<sup>15</sup> Pre-Trial Judge Framework Decision, para. 45.

This wide interpretation is justified by the need to uphold the fairness of the proceedings and the rights of the Accused, which must remain a paramount consideration in all disclosure-related decisions.<sup>16</sup>

13. Contrary to the SPO submissions,<sup>17</sup> a broad interpretation of materiality is also supported by the jurisprudence of other international criminal tribunals. In *Lubanga*, the ICC Appeals Chamber confirmed that “the term ‘material to the preparation of the defence’ must be interpreted broadly”, since “preparation” is a broad term itself and does not necessarily require that the material itself counter the Prosecution case.<sup>18</sup> This interpretation was echoed by the ICC Appeals Chamber in *Banda and Jerbo*, which held that:

[A]ny assessment of whether information is material to the preparation of the defence pursuant to rule 77 should indeed be made on a *prima facie* basis. This places a low burden on the defence. It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a *prima facie* assessment.<sup>19</sup>

14. Applying the correct standard set out above, the SPO’s materiality challenges ultimately fail.

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<sup>16</sup> Appeals Panel Decision, para. 35, citing ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-501, Appeals Chamber, *Judgment on the Appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the Decision of Trial Chamber IV of 23 January 2013 Entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”* (“*Banda and Jerbo Decision*”), 28 August 2013, para. 34; and *Prosecutor v. Ongwen*, ICC-02/04-01/15-251, Appeals Chamber, *Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II Entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”*, 17 June 2015, para. 40. See also Pre-Trial Judge Framework Decision, para. 29.

<sup>17</sup> SPO Challenge, para. 8, fn. 10.

<sup>18</sup> ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-1433, Appeals Chamber, *Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008*, 11 July 2008, paras 77-81, referring to ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Appeals Chamber, *Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence*, 25 September 2006, para. 9.

<sup>19</sup> *Banda and Jerbo Decision*, para. 42.

15. Further, the Defence maintains that the SPO ought to have engaged in *inter partes* discussions on the materiality of the items before submitting the SPO Challenge,<sup>20</sup> with a view to avoiding unnecessary litigation. In this regard, the Defence notes the positive outcomes of previous *inter partes* discussions where the Defence withdrew certain disclosure requests upon receiving additional information on the requested items, and the SPO eventually disclosing items for which they anticipated filing a materiality challenge, upon receipt of further submissions by the Defence.<sup>21</sup>

16. Moreover, it is noteworthy that on several occasions the SPO informed the Defence that it intended to challenge the materiality of certain requested items, and then disclosed these same items pursuant to Rule 103 of the Rules.<sup>22</sup> This demonstrates the level of thoroughness required in the review of the relevant material: documents that *prima facie* may appear to the SPO to bear no use in defence preparation, may, upon further review, go so far as to be considered exculpatory. Against this background, extreme caution must be exercised when assessing the content of the challenged items, as well as the SPO's submissions on their materiality.

17. In particular, contrary to the SPO's submissions, the Defence maintains that the following groups of items are material to its preparation and must be disclosed immediately.

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<sup>20</sup> The Defence acknowledges that some of the items in the SPO Challenge were the object of *inter partes* discussions; however, the vast majority of the items were discussed for the first time in the SPO Challenge.

<sup>21</sup> See e.g. [REDACTED]

<sup>22</sup> See e.g. [REDACTED]; (disclosed as part of [REDACTED]).

Documents Relating to the Accused or to Witnesses in this Case

18. The Defence readily notes that item [REDACTED], which is challenged by the SPO, [REDACTED] for items seized from the residence of Jakup Krasniqi on 4 November 2020. Indeed, in its Exhibit List the SPO relies on several documents that were seized from Jakup Krasniqi's residence.<sup>23</sup> In this context, the Defence is entitled to and must be able to analyse and verify the procedural background of this seizure, as well as every subsequent passage leading to the SPO's possession of this material. This is crucial to the reliability assessment of documents which the SPO intends to rely on. As such, the requested item, which relates directly to Mr. Krasniqi, is material to the preparation of Mr. Krasniqi's Defence.

19. Further, across the SPO's categories of items for which materiality is challenged, a large number of documents relate to witnesses in this case. These include: (i) SPO Official Notes and summary documents relating to meetings or interviews with SPO witnesses;<sup>24</sup> (ii) documents related to witnesses' security concerns;<sup>25</sup> (iii) a witness' medical certificate;<sup>26</sup> (iv) a document associated with [REDACTED] which, in the SPO's submissions, is a Request for Assistance;<sup>27</sup> (v) a document material to the credibility assessment of [REDACTED];<sup>28</sup> and (vi) summons and documents relating to the participation of [REDACTED].<sup>29</sup>

20. Witness-related material is, in and of itself, material to Defence preparations, including for the cross-examination of SPO witnesses, and investigations, where necessary, into their credibility. As found by the ICC in *Bemba*, information obtained

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<sup>23</sup> E.g. [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].



from a Prosecution witness *must be presumed* to be material to Defence preparation, as it will provide the foundation for the questioning of that witness and for other purposes.<sup>30</sup> The only exceptions to this presumption relate to copies of previously disclosed material or purely personal information completely unrelated to the case.<sup>31</sup> As further explained below, the requested items relate to witnesses currently on the SPO Witness List and are material to the preparation of the Defence.

21. With regard to Official Notes and summary documents relating to meetings or interviews with witnesses, the SPO argues that they are not material because they contain information which was then reflected in the Witness Statement subsequently disclosed to the Defence.<sup>32</sup> This argument fails. Whether or not this information is exactly duplicated in the Statement is something which must be assessed by the Defence as part of its preparation for cross-examination. If this assessment was left to the Prosecution, there would be “an unacceptable risk that the Defence may be deprived of materials to which it is entitled as a result of incorrect judgment calls”,<sup>33</sup> especially considering that the SPO is unaware of the precise contours of the Defence strategy. Any potential additional information, discrepancy and/or inconsistency, however slight, between contemporaneous investigator’s notes or summaries and the Witness Statement is directly material to the accuracy of the Witness Statement itself, its translation, or the way the interview was conducted. As such, it goes to the heart of the overall assessment of a witness credibility, and may provide the basis for a line of questioning during cross-examination.

22. In *Katanga and Ngudjolo*, the ICC addressed precisely the issue of disclosure of potentially duplicate material. Deciding on a Defence request for the disclosure of the

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<sup>30</sup> ICC, *Prosecutor v Bemba*, ICC-01/05-01/08-1594-Red, Trial Chamber III, *Redacted Version of Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”* (“Bemba Decision”), 29 July 2011, paras 22-23.

<sup>31</sup> *Idem*, para. 23.

<sup>32</sup> SPO Challenge, paras 22, 37-38.

<sup>33</sup> *Bemba Decision*, para. 23.



audio recording of a witness interview, the transcript of which had already been disclosed to the Defence, the Judges ordered the disclosure of the recordings, holding that “preparing the cross-examination of a witness will inevitably prompt speculation as to his or her credibility or to any inconsistencies, and access to the audio records of the interview, in addition to the record of the statement, can only facilitate that task.”<sup>34</sup> In doing so, the Trial Chamber added that the Defence does not have to provide concrete examples of discrepancies in order to demonstrate that the requested item is material, and noted that such disclosure would not cause any prejudice to the Prosecution.<sup>35</sup>

23. The same rationale applies to the SPO Challenge. The Defence does not have access to the requested items, and thus is not in a position to assess with certainty that discrepancies exist. However, the Defence notes that some SPO Official Notes have exhibits and other documents attached,<sup>36</sup> requiring additional analysis by the Defence; and that the SPO has previously disclosed Official Notes together with witness statements in this case.<sup>37</sup> In this context, the Defence assessment of these documents is an integral part of its review of witness-related material in preparation for cross-examination; as such, it falls squarely in the definition of materiality. In addition, the fact that disclosure of these items does not cause any prejudice to the SPO is also a relevant factor which weighs in favour of rejecting the SPO’s materiality challenge.

24. The Defence also notes that two of these Official Notes, in the SPO’s submission, cannot be disclosed because they fall within Rule 106.<sup>38</sup> This is incorrect. The two

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<sup>34</sup> ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-2309-Red-tENG, Trial Chamber II, *Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219*, 30 August 2010, para. 4.

<sup>35</sup> *Ibid.*

<sup>36</sup> See, e.g. [REDACTED].

<sup>37</sup> E.g. [REDACTED].

<sup>38</sup> SPO Challenge, para. 42.

documents are [REDACTED],<sup>39</sup> and [REDACTED].<sup>40</sup> The SPO has previously disclosed, including pursuant to Rule 102(3), a large number of [REDACTED]<sup>41</sup> and [REDACTED].<sup>42</sup> In the SPO Challenge, the SPO has failed to provide any persuasive reason to depart from its previous practice.

25. Specifically, the Defence notes that [REDACTED], and is thus particularly important in the context of Defence preparations for trial.<sup>43</sup> It is therefore imperative that all evidence related to this witness be made available to the Defence, and disclosure should be compelled accordingly.

26. The Defence also fails to understand how the SPO can challenge the materiality of items relating to security concerns of witnesses, in instances when it has requested protective measures on the basis of those same concerns.<sup>44</sup> Items relating to the security situation and security related concerns of witnesses that have spoken to UNMIK, EULEX, and/or the SITF/SPO are material to the Defence.<sup>45</sup> In the *Ongwen* case, for example, the Single Judge found a biographical and security questionnaire material to the defence preparation and ordered the Prosecution to disclose it to the Defence, stating that the “practical consequences of this disclosure are expected to be modest”.<sup>46</sup>

27. The Defence also notes that documents related to the security situation and/or security concerns have been previously disclosed under Rule 102(3).<sup>47</sup> The SPO again

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<sup>39</sup> [REDACTED].

<sup>40</sup> [REDACTED].

<sup>41</sup> [REDACTED].

<sup>42</sup> E.g. [REDACTED].

<sup>43</sup> [REDACTED].

<sup>44</sup> *Infra*, paras 28-29.

<sup>45</sup> *Contra* SPO Challenge, para. 25.

<sup>46</sup> ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1335, Trial Chamber IX, *Decision on Defence Request in Light of Prosecution Meeting and Interview with D-100* (“*Ongwen Decision*”), 12 September 2018, para. 7.

<sup>47</sup> See, e.g. [REDACTED].

fails to explain how the documents falling within category D of the SPO Challenge differ from those that have been already disclosed to the Defence.<sup>48</sup>

28. In particular, the SPO challenges the materiality of [REDACTED].<sup>49</sup> All documents relating to these witnesses in general, and especially those related to security concerns, are material to the assessment of their credibility.

29. [REDACTED] is a protected witness for which the SPO has allocated [REDACTED] of direct examination. The SPO sought non-disclosure of [REDACTED] identity and authorisation to withhold certain documents until 30 days before testimony, [REDACTED].<sup>50</sup> [REDACTED]. Similarly, the SPO sought authorisation to delay disclosure of [REDACTED] until the filing of the SPO's witness and exhibit lists, alleging that [REDACTED].<sup>51</sup> Notes from [REDACTED] are thus material to the Defence and need to be assessed in conjunction with the evidence provided by the witness.

30. The SPO also challenges the materiality of a medical certificate [REDACTED].<sup>52</sup> The SPO submits that historical medical information is not material because it contains privacy concerns and is geographically, substantively and temporally remote from the charges.<sup>53</sup>

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<sup>48</sup> [REDACTED].

<sup>49</sup> [REDACTED].

<sup>50</sup> KSC-BC-2020-06, F00387/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Eighth Request for Protective Measures'*, KSC-BC2020-06/F00387, dated 8 July 2021, 12 July 2021, confidential, paras 55-59.

<sup>51</sup> KSC-BC-2020-06, F00287/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Sixth Request for Protective Measures'*, KSC-BC2020-06/F00287, dated 7 May 2021 ("SPO Protective Measures Request"), 12 May 2021, confidential, para. 18.

<sup>52</sup> [REDACTED].

<sup>53</sup> SPO Challenge, para. 34.

31. Contrary to the SPO's submission, the document is material to the Defence assessment of the witness credibility.<sup>54</sup> Indeed, [REDACTED], now deceased, testified *viva voce* in the [REDACTED],<sup>55</sup> [REDACTED]. Considering that the transcript of [REDACTED] testimony will presumably be the subject of a Rule 155 motion, and that it relates to live issues in the case,<sup>56</sup> the Defence must be able to review the witness' medical history, in order to assess if and to what extent his testimony was affected by his medical condition. As the witness is deceased, the importance of a *post-hoc* analysis of his medical records provides the only means by which the Defence may conduct such an analysis, rendering this disclosure even more important to Defence preparations. In this regard, the SPO's privacy concerns are also unfounded, as demonstrated by the fact that witnesses' medical records have regularly been disclosed to the Defence throughout the pre-trial phase.<sup>57</sup>

32. The SPO also challenges the materiality of an item described as [REDACTED] which is inexplicably included among what the SPO considers 'Requests for Assistance'.<sup>58</sup> The Notice indicates that the item is dated [REDACTED]. Notably, none of the evidence associated with [REDACTED] was disclosed bearing that date. The SPO should explain whether the description is incorrect and clarify to which interview the item relates. In these circumstances and recalling the submissions above,<sup>59</sup> the Defence submits that the document is material to its preparation as it relates to the interview of an SPO witness.

33. [REDACTED]. [REDACTED].

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<sup>54</sup> The Defence acknowledges that it has withdrawn the disclosure request for this document on 26 September 2022. However, upon further review, the Defence considers this document material to its preparation and thus maintains its request for disclosure.

<sup>55</sup> [REDACTED].

<sup>56</sup> In particular, it related to alleged events in [REDACTED].

<sup>57</sup> E.g. [REDACTED]. See also [REDACTED].

<sup>58</sup> [REDACTED], included in Annex 1 of the SPO Challenge.

<sup>59</sup> *Supra*, paras 20-21.

34. Finally, the Defence maintains that summonses and procedural documents relating to the testimony of SPO witnesses in related proceedings are material to its preparations. A large number of SPO witnesses previously testified in ICTY, EULEX and [REDACTED] about events falling within the Indictment Period or otherwise relating to the KLA, the political background, or other matters relevant to the charges. Therefore, a comparative analysis of both the content of their testimonies and the circumstances in which the testimony was given, will constitute the bulk of the Defence review in preparation for their cross-examination. For example, a witness' willingness or reluctance to testify in a previous trial, or whether an external entity facilitated the organisation of an interview, may be relevant considerations for his/her credibility.

*Documents Relating to Crime Locations and/or Events Alleged in this Case*

35. The Defence also opposes the materiality challenge of documents [REDACTED]. Document [REDACTED] is described as follows:

[REDACTED]

36. Document [REDACTED] roughly bears the same description. The SPO includes these documents among the category of witness security notes<sup>60</sup> and documents of purely procedural character respectively.<sup>61</sup> First, if that is the case, the description included in the Notice is misleading. Second, the Defence submits that regardless of the type of document, any information relating to Kukës or Cahan, which are locations pleaded in the indictment as alleged crime sites,<sup>62</sup> is material to the Defence

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<sup>60</sup> SPO Challenge, para. 35, fn. 33.

<sup>61</sup> *Idem*, para. 20, fn. 27.

<sup>62</sup> KSC-BC-2020-06, F00999/A02, Specialist Prosecutor, *Annex 2 to Submission of Confirmed Amended Indictment*, 30 September 2022, confidential, paras 118-120.

preparation and investigations into these locations to the extent that they may reveal issues of inconsistency or credibility with regard to other documents or witnesses regarding that site. At the very least, it will assist the Defence in understanding and contextualising the material relating to that site.

*Documents with Potentially Exculpatory Value*

37. The Defence submits that document [REDACTED], is not only material to its case, but also contains potentially exculpatory information. Notably, the transcript of the same [REDACTED].<sup>63</sup> [REDACTED], it must also contain exculpatory information.

38. According to Rule 103 of the Rules, the SPO shall immediately disclose to the Defence *any information* which may suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence. Indeed, in the context of a decision on the disclosure of Rule 102(3) material, Trial Panel II clarified that a "sufficient material connection to a mitigating or exculpatory factor or circumstance" suffices to consider an item exculpatory for the purposes of Rule 103.<sup>64</sup> The materiality of these items is thus not only evident, it is irrelevant: as soon as the SPO takes possession of a document containing exculpatory information, such a document has to be disclosed immediately under Rule 103.

39. Similar considerations apply to [REDACTED]. At the outset, the Defence notes that the actual content of [REDACTED] is not clear. The description of this item in the Rule 102(3) Notice indicates [REDACTED], while the SPO submissions refer to "the draft notes of a lawyer present at a meeting with a non-witness".<sup>65</sup>

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<sup>63</sup> 069756-TR-ET (Parts 1-3), disclosed in Disclosure Package 297.

<sup>64</sup> KSC-BC-2020-07, F00413/RED, Trial Panel II, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, 16 December 2021, public, para. 43.

<sup>65</sup> SPO Challenge, para. 39.

40. The SPO underestimates the materiality of this item. A large number of documents relating to [REDACTED] were disclosed pursuant to Rule 103.<sup>66</sup> In *inter partes* correspondence, the Defence has conveyed to the SPO that all material relating to [REDACTED] is presumptively material to its case and subject to Rule 103.<sup>67</sup> The [REDACTED] to which the document relates was not recorded, and the only content available to the defence consists of [REDACTED], both of which were disclosed pursuant to Rule 103.<sup>68</sup> Thus, the Defence submits that [REDACTED] should be disclosed pursuant to the same Rule, or at a minimum, this item and any material reflecting the [REDACTED] should be considered material to the Defence preparations.

41. Further, document [REDACTED] is described as [REDACTED] were disclosed to the Defence under Rule 103.<sup>69</sup> In these circumstances, all documents relating to [REDACTED] are potentially exculpatory and are in any case material to Defence investigations [REDACTED], thus satisfying the materiality test of Rule 102(3).

42. The SPO also challenges the materiality of *parts* of another document [REDACTED],<sup>70</sup> holding that it had already disclosed the material portions of the document.<sup>71</sup> In a similar case, the ICC Appeals Chamber held that “once it is established that a document is material to the preparation of the defence, [...] the disclosure obligation extends to the entire document and not only to the “relevant”

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<sup>66</sup> [REDACTED].

<sup>67</sup> Defence e-mail dated 11 September 2022.

<sup>68</sup> See [REDACTED].

<sup>69</sup> [REDACTED], both disclosed in Disclosure Package 418.

<sup>70</sup> [REDACTED].

<sup>71</sup> SPO Challenge, para. 26.



portions of information contained within such a document.”<sup>72</sup> Thus, the Defence maintains that the entirety of the document must be disclosed.

43. Finally, the Defence submits that item [REDACTED], for which materiality is challenged, must be disclosed. The item emanates from [REDACTED]. The Defence has already provided extensive submissions as to [REDACTED].<sup>73</sup> For the same reasons, the item is material to the preparation of the Defence.

Documents Relating to the [REDACTED]

44. Among the documents challenged by the SPO, many consist of summons and orders by [REDACTED].<sup>74</sup>

45. All documents emanating from the [REDACTED] are relevant to this case and are material to the preparation of the Defence. The description of all these documents explicitly highlights their relation to [REDACTED],<sup>75</sup> [REDACTED].<sup>76</sup> Indeed, the SPO

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<sup>72</sup> ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-3031, Appeals Chamber, *Decision on the Prosecutor’s request for nondisclosure in relation to document “OTP/DRC/COD-190/JCCD-pt”*, 27 May 2013, para. 12. See also *Ongwen Decision*, paras 5-6; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1632, Trial Chamber VII, *Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence*, 17 February 2016, para. 20; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-886, Trial Chamber V(A), *Decision on Response to Prosecution Application Regarding the Disclosure of the Identities of Certain Individuals Who Will Not Appear as Trial Witnesses*, 28 August 2013, para. 8.

<sup>73</sup> KSC-BC-2020-06, F00877, Joint Defence, *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)*, 21 July 2022, confidential.

<sup>74</sup> [REDACTED].

<sup>75</sup> See description in the Notice of any of the items listed in fn. 76 of this Response.

<sup>76</sup> See KSC-BC-2020-06, F00709/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Corrected Pre-Trial Brief and Related Request*, 24 February 2022, confidential, paras 338-357.

in its exhibit list relies on several documents [REDACTED],<sup>77</sup> [REDACTED],<sup>78</sup> [REDACTED],<sup>79</sup> [REDACTED]<sup>80</sup> and [REDACTED].<sup>81</sup>

46. In addition, the SPO itself previously relied on events that took place during that trial to justify a protective measures request, submitting that:-

[REDACTED]<sup>82</sup>

47. In this context, summonses and orders compelling witnesses to appear are relevant to these allegations of intimidation, and are thus material to assess the credibility of both SPO witnesses who testified in [REDACTED], and witnesses who will testify about [REDACTED].

#### Notice of Withdrawal

48. Lastly, the Defence withdraws its request for the remaining items in the SPO Challenge<sup>83</sup> insofar as they do not fall under Rule 103 or under one of the categories addressed in this Response, but reserves the right to renew its request in the future should circumstances change.

## IV. CONCLUSION

49. The Defence respectfully requests the Pre-Trial Judge to:

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<sup>77</sup> KSC-BC-2020-06, F00967/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Amended Exhibit List* ("SPO Exhibit List"), 13 September 2022, confidential, ERNs SITF00299963-SITF00299964, SITF00305107-SITF00305117 RED.

<sup>78</sup> [REDACTED].

<sup>79</sup> [REDACTED].

<sup>80</sup> [REDACTED].

<sup>81</sup> [REDACTED].

<sup>82</sup> SPO Protective Measures Request, para. 18.

<sup>83</sup> [REDACTED].

**REJECT** the SPO's materiality challenge and **ORDER** the disclosure of the following categories of items:-

- (i) **Material relating to the Accused or witnesses in this case:** [REDACTED];
- (ii) **Documents relating to crime locations and/or events alleged in this case:**  
[REDACTED];
- (iii) **Documents with potentially exculpatory value:** [REDACTED]; and
- (iv) **Documents relating to the [REDACTED]:** [REDACTED].

Word count: 4,596



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**Venkateswari Alagenda**

Thursday, 27 April 2023

Kuala Lumpur, Malaysia.



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**Aidan Ellis**

Thursday, 27 April 2023

London, United Kingdom.



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**Victor Băieșu**

Thursday, 27 April 2023

The Hague, the Netherlands.