

Kosovo Specialist Chambers - Basic Court
Trial Preparation Conference (Open Session)

1 Thursday, 2 September 2021
2 [Trial Preparation Conference]
3 [Open session]
4 [The accused not present]
5 --- Upon commencing at 9.30 a.m.

6 JUDGE SMITH: Madam Court Officer, can you please call the case.

7 THE COURT OFFICER: Good morning, Your Honours. This is
8 KSC-BC-2020-07, The Specialist Prosecutor versus Hysni Gucati and
9 Nasim Haradinaj.

10 JUDGE SMITH: I failed to say good morning to everyone, so good
11 morning.

12 The SPO and Defence were both introduced yesterday. I don't
13 intend to do that again, unless there is somebody new sitting at any
14 of the tables. Nobody here. Anybody new?

15 Mr. Rees.

16 MR. REES: Yes, [Microphone not activated]. I'm assisted also
17 today by Ms. Victoria Maud.

18 JUDGE SMITH: I'm sorry?

19 MR. REES: By Ms. Victoria Maud.

20 JUDGE SMITH: Thank you very much.

21 And from the Registry, somebody new?

22 MR. ROCHE: Good morning. Thank you, Mr. President. I'm
23 Ralph Roche from the Registry, and also here today is
24 Stephane Wohlfahrt, the Deputy Registrar.

25 JUDGE SMITH: Thank you, Mr. Roche.

1 Today we will finish our agenda as set out in the 21 July order.
2 Then we will hear the parties on the Rule 102(3) list, and if need
3 be, in an *ex parte* session. If we are to have an *ex parte* session,
4 we will take a 30-minute break before that to allow Court Management
5 to make the necessary preparations.

6 After the lunch break, we will resume for the Panel to issue a
7 number of oral orders.

8 The first topic on the agenda for today concerns the
9 confidential or non-public nature of the material allegedly disclosed
10 by the accused. I give the floor to my colleague, Judge Barthe, for
11 his questions on this topic.

12 JUDGE BARTHE: Thank you, Mr. President.

13 In the 21 July order, in paragraph 24, the Trial Panel took note
14 of the challenge of the Gucati Defence, as indicated in its pre-trial
15 brief, as to the confidential or non-public nature of the material
16 allegedly disclosed by the accused.

17 The Panel invited oral submissions from all parties regarding
18 the question whether the material allegedly disclosed by the accused
19 was of a confidential and/or non-public nature.

20 I would like to ask the Defence first, starting with counsel for
21 Mr. Gucati, to clarify whether its position is that the material was
22 already in whole or in part in the public domain and, if so, which
23 part or parts; or for some other reason the material did not enjoy
24 confidential or protective status under the applicable regime; or the
25 SPO failed to establish that the material enjoyed such status.

1 After that, the SPO will be invited to respond.

2 Mr. Rees, you have the floor.

3 MR. REES: Thank you, Your Honour.

4 It is our position that, firstly, the information was already in
5 whole or in part in the public domain. That has been acknowledged in
6 relation to large parts of Batch 2 by the SPO, and the Defence
7 pre-trial brief has set out such other parts of the information that
8 we can identify in the absence of full disclosure of the batches
9 being provided to us. Save, that is, for the disclosed public part
10 of Batch 2.

11 And, secondly, that the SPO have failed to establish that the
12 material enjoyed the status of confidential and/or non-public. That
13 also, of course, includes that the SPO have not demonstrated the
14 material enjoyed confidential protected status under any applicable
15 regime, and we hope in the Defence pre-trial brief we've set out at
16 some length the various provisions that we rely upon to raise that
17 issue.

18 Thank you.

19 JUDGE BARTHE: Thank you, Mr. Rees.

20 Mr. Cadman, do you have anything to add?

21 MR. CADMAN: Your Honour, just simply to put we have at all
22 stages endorsed and adopted the same position put forward by
23 Mr. Rees. We have also set out, quite clearly, that in the absence
24 of being able to scrutinise that material we are unable to take the
25 position any further. And in the absence of the Trial Panel being

1 able to scrutinise that material, there are concerns as to the
2 Trial Panel being able to take that position any further.

3 We have, at all stages, put on record that the SPO are put to
4 strict proof on a establishing the confidential and non-public nature
5 of that material, and that remains our position.

6 JUDGE BARTHE: Thank you very much, Mr. Cadman.

7 Mr. Prosecutor, would you like to respond to that?

8 MR. HALLING: We would. Thank you, Your Honour.

9 Everything that is being relied upon in the batches falls within
10 the protected information articulated, in particular, in paragraph 37
11 of the Confirmation Decision.

12 As said yesterday, everything the Defence did and said made it
13 clear they understood that the materials delivered were confidential.
14 The primary thrust of the Gucati Defence arguments concern the
15 classification of the documents delivered rather than their
16 authenticity as such, but the SPO will introduce evidence, set out
17 previously, when discussing authenticity, that the materials
18 delivered were confidentially classified.

19 The Judges will receive evidence as to what is in the batches
20 and can examine extracts of them in media articles and other evidence
21 to assess the secrecy of the information. In this regard, a
22 distinction must be made between general cooperation between the SPO
23 and government authorities and specific requests demonstrating that
24 cooperation in action. The general arrangement may be publicly
25 known, but it is a different matter entirely to link specific

1 officials and locations to a criminal investigation, and we intend to
2 prove at trial that was the case.

3 Thank you.

4 JUDGE BARTHE: Very well. Thank you, Mr. Prosecutor.

5 Those were my questions. Thank you, Mr. President.

6 JUDGE SMITH: Judge Mettraux has indicated he has some
7 questions.

8 JUDGE METTRAUX: Thank you, Judge Smith. And the questions are
9 for the Defence.

10 Mr. Rees, I was very much assisted by your brief particularly on
11 this matter. There is, however, a grey area in your brief that I
12 want to ask you about. I understand you take issue with the
13 confidential nature of the material.

14 Putting that to one side, the Prosecution is relying, and it's
15 just been said a moment ago, that your client and the client of
16 Mr. Cadman, understood that the matters -- or that the materials
17 delivered were confidential. And, in fact, in their own pre-trial
18 brief the Prosecution is relying upon a number of pieces of their
19 evidential puzzle that suggests that both Mr. Gucati and
20 Mr. Haradinaj referred to that material as being confidential and/or
21 secret.

22 And what I want to ask of you is whether you have a position in
23 respect of this part of the Prosecution case. Of course, again, if
24 you prefer not to do so at this stage, this is entirely your
25 decision. But we would be assisted if we were to understand what's

1 your position, and I will come to Mr. Cadman in a second with the
2 same question, is in respect specifically to these indications.

3 MR. REES: I can assist with that question, Your Honour. The
4 remarks that are recorded as having been made by the accused have to
5 be seen in their context. And whereas there are remarks from the
6 accused that refer and appear on the face to acknowledge
7 confidentiality, there are other remarks that are recorded where they
8 make the position properly clear, which is the accused did not know
9 whether the documents were authentic or false. And, of course, if
10 they were false any appearance of confidentiality would likewise be
11 false.

12 Mr. Gucati is not a lawyer and his remarks need to be seen and
13 acknowledged as remarks not made by a lawyer. Obviously if
14 disclosure had been made, these matters could have been properly
15 checked. But they haven't. Disclosure hasn't been made. And,
16 therefore, we rely on the position as we spelled out yesterday and is
17 as spelled out in the Defence pre-trial brief. The accused did not
18 know whether the documents and any markings on them purporting to
19 indicate confidentiality and/or internal work product were authentic
20 or false.

21 JUDGE METTRAUX: Thank you, Mr. Rees.

22 Mr. Cadman, if the submissions are identical, maybe you'll
23 qualify that in respect of the fact that your client is a lawyer, we
24 are told. But can we have your position on that particular issue?

25 MR. CADMAN: Your Honour, put simply the position is identical.

1 The same position will be put forward. And the position that we take
2 is that the Trial Panel will have to observe all of those video
3 recordings, all of the press conferences, and all of the remarks made
4 in the media to put all of those matters into context.

5 Of course, I do accept that my client has some legal training.
6 And, of course, I'm sure he will be happy to explain his legal
7 training when he ultimately gives evidence at trial. But our
8 position is very clear, that it will be insufficient for the
9 Trial Panel to scrutinise the transcripts of the recordings. The
10 Trial Panel will have to observe all of those recordings to put all
11 of these matters into context before it can draw its own conclusions.

12 JUDGE METTRAUX: I'm grateful, Mr. Cadman. If your client is
13 intended to be called as a witness, may we remind you not to forget
14 to put his name on your prospective list of witnesses at the time
15 when you provide your final list on that point.

16 MR. CADMAN: As I'm sure Your Honour can appreciate, the list
17 that had been put forward at this stage is provisional. We are not
18 required to set out the extent to which a Defence case will be
19 presented. But in the event that we do, that will be made clear.

20 JUDGE METTRAUX: I'm grateful.

21 Anything from the SPO in response?

22 MR. HALLING: Just briefly, Your Honour, in relation to
23 Mr. Rees's submission when talking about what the accused did and
24 said. I think I mentioned the Defence. What the accused did and
25 said.

1 Just to point to paragraph 40 of the Confirmation Decision in
2 defining "eventual intent" and what the necessary mental element is
3 and how neatly it fits into even the explanation the Defence is
4 trying to give.

5 That's all.

6 JUDGE METTRAUX: Thank you.

7 JUDGE SMITH: Thank you, Judge Mettraux.

8 The next topic on the agenda concerns any future challenges by
9 the Defence as to the elements of the charged offences and the modes
10 of liability. We only ask the Defence to indicate whether they
11 intend to challenge any such elements. No need to go into details at
12 this point, because more questions on this subject will be asked at
13 the SPO's preparation conference.

14 Mr. Rees.

15 MR. REES: We do.

16 JUDGE SMITH: Mr. Cadman.

17 MR. CADMAN: We do, Your Honour.

18 JUDGE SMITH: All right. Thank you very much. As I said, the
19 Panel may have more questions for the parties at that prep
20 conference, the SPO's prep conference, and we'll wait for that.

21 Next is the use of the Facebook account by the Gucati Defence.
22 In its pre-trial brief regarding the use -- I'm sorry, submissions
23 made by the Gucati Defence in its pre-trial brief regarding the use
24 of a Facebook account. In relation to this topic, Judge Mettraux has
25 asked to ask some questions.

1 JUDGE METTRAUX: Thank you, Judge Smith.

2 In our order of 21 July, the Panel took note of a submission
3 made by the Gucati Defence, according to which, and I quote:

4 "The Accused accepts that there was a Facebook account in his
5 name which he had access to and occasionally did access. He did not,
6 however, have sole access to the account and it was used by the KLA
7 WVA staff and family to post material."

8 In the same order, the Panel indicated that it would invite the
9 Gucati Defence to clarify whether it disputes the SPO's claim that
10 any of the impugned posts were posted by or with the knowledge of
11 Mr. Gucati on his Facebook account.

12 So, Mr. Rees, if you are minded to respond to the Panel's
13 invitation. That's your time.

14 MR. REES: Your Honour, I'm very grateful to note that the
15 request is clarified as an invitation and not an order, no doubt
16 reflecting that the making of any Defence submissions are entirely
17 voluntary and not required.

18 I will respond in two ways. Firstly by asserting, as we do,
19 that our Defence pre-trial brief is -- consists of very full
20 voluntary Defence disclosure. And, secondly, by adopting the remarks
21 that Your Honour made yesterday morning to Mr. Halling when
22 Your Honour anticipated that the answer to the Defence in relation to
23 these Facebook postings will be that we don't have to put anything
24 forward. It's for the SPO to exclude that possibility, and we rely
25 upon that position.

1 JUDGE METTRAUX: And maybe just to clarify this. Having
2 acquainted ourselves with your brief, and indeed your brief is quite
3 an extensive iteration of your position, may we take it that you are
4 not planning either on calling evidence in respect of usage of this
5 account and are not intent on identifying any given individual who
6 could or might have had access to that account during the relevant
7 period. You are simply, as we understand it, putting the Prosecution
8 to strict proof that it was your client who is responsible or at
9 least has knowledge of the posts in question.

10 Is that a correct understanding of your position?

11 MR. REES: We do put the Prosecution to strict proof. We do on
12 all elements of their case, and they have to prove it as part of the
13 Prosecution case.

14 There is one aspect, which is a misunderstanding on my part,
15 which I think has become clear to me from Your Honour's comment to
16 Mr. Cadman in relation to Mr. Haradinaj and whether he will be giving
17 evidence. The list of proposed Defence witnesses that were submitted
18 with the pre-trial brief refers only to those additional witnesses
19 over and above the accused, Mr. Gucati himself. If it was the case
20 that if we propose to call him to give evidence, we should have put
21 his name on the list of Defence witnesses, then I apologise. That's
22 my fault and my misunderstanding of the role of the list of proposed
23 witnesses.

24 If there is any confusion, I'll clarify that. Your Honours, at
25 this stage, we do propose to call Mr. Gucati to give evidence if at

1 the end of the Prosecution case we are of the view there's a case to
2 answer.

3 So that does clarify matters and that also may explain the,
4 perhaps misunderstanding, which I hope to have clarified yesterday,
5 which is when I said that the assumption could be made that anything
6 that's in the pre-trial brief, any factual assertion, we do propose
7 calling evidence to support.

8 I hope that does assist.

9 JUDGE METTRAUX: It does assist, Mr. Rees, and we are grateful
10 for the indication, and I'm sure that the Prosecution would be
11 grateful too, insofar as they now have an indication that you may
12 make the decision to call your client. That's going to be a decision
13 for you to be doing at the end of the Prosecution case, whether you
14 feel there is a need to do so. But we're grateful for the
15 indication.

16 MR. REES: Thank you, Your Honour.

17 JUDGE METTRAUX: Mr. Cadman, sorry.

18 MR. CADMAN: Just to add to that. As Your Honour will be aware
19 from the record of these proceedings, the Facebook posts amount to
20 several thousand pages of material that require to be reviewed. At
21 the time of filing the pre-trial brief, we had requested additional
22 time so that we could consider that material.

23 We did not set our position in the pre-trial brief as far as
24 that, but our position as far as Mr. Haradinaj is the same as that as
25 Mr. Gucati.

1 JUDGE METTRAUX: Thank you.

2 JUDGE SMITH: The next topic concerns submissions made by the
3 Gucati Defence --

4 MR. HALLING: Apologies, Your Honour. Is it possible --

5 JUDGE SMITH: No, go ahead.

6 MR. HALLING: -- for the Prosecution to respond? Thank you.

7 And I will be brief, because I appreciate that this was
8 discussed yesterday. And we talked about how, in our submission,
9 this is an issue of weight and not of admissibility. But just to
10 respond to something that Mr. Rees said in particular.

11 No, the Prosecution is not denying that we are held to strict
12 proof on this point, but it is a question of circumstantial evidence
13 who is posting these things. All available evidence, as discussed
14 yesterday, is pointing to the fact that these are Gucati's posts made
15 by him or on his authorisation. The competing inference, as of this
16 moment, is a submission from counsel in the pre-trial brief.

17 The Defence is not obligated to present any evidence in this
18 trial, but there is currently no second inference that can be drawn
19 from the evidence as to where these Facebook posts came from, and so
20 that is our submission. And that's why when I said yesterday
21 something needs to be presented to create that second inference, it's
22 not because the Defence is obliged to give evidence. It's because
23 the state of the evidence now suggests that this inference is
24 unreasonable.

25 Thank you.

1 JUDGE METTRAUX: Just one matter in response to your submission,
2 Mr. Halling, is you are right that at this stage it's only an
3 assertion of counsel, but counsel has now given you an indication of
4 their intention to call evidence on each of the facts that they
5 allege in their brief. And that means one thing for you, is that the
6 burden that you have is to be met as part of your case in-chief in
7 relation to these facts.

8 So to the extent that you bear that burden, you are now on
9 notice that there is, at the very least, an intention by the Defence
10 to call evidence on these issues. And I suspect you imagine why this
11 warning is being given. You are on notice of the nature of their
12 case and their intention to call evidence on these assertions.

13 MR. HALLING: We understand you fully, Your Honour.

14 JUDGE SMITH: Anything else?

15 The next topic concerns submissions made by the Gucati Defence
16 in its pre-trial brief as regards to the retention of material.

17 In relation to this topic, I give the floor to my colleague,
18 Judge Mettraux.

19 JUDGE METTRAUX: Thank you, Judge Smith. It's going to be
20 brief.

21 In our 21 July order, the Trial Panel took note of a submission
22 by the Gucati Defence, according to which, and I quote:

23 "SPO officers had previously informed KLA WVA persons that they
24 could retain such material for up to one month."

25 And in the same order, we indicated that we would invite the SPO

1 to clarify its position on this assertion and whether it takes issue
2 with it.

3 The Panel also notes, before we give you the floor, Mr. Halling,
4 that in their submissions both Defence teams have now identified a
5 witness under number 2 of their list who is to be called, *inter alia*,
6 with a view to give evidence upon the claim that he was, and I quote,
7 "told by SPO officers that the KLA WVA could retain the documents
8 after Lightning 1 for one month."

9 So, Mr. Halling.

10 MR. HALLING: Thank you.

11 The SPO strongly takes issue with this assertion. It
12 fundamentally contradicts all evidence of the speed which the SPO
13 sought to recover the batches, and there's no evidence in any of the
14 contemporaneous official records as to something like this being said
15 or discussed or even said in a way that could be misconstrued to mean
16 what the Gucati Defence is alleging.

17 The Defence presents very little specificity of this claim. The
18 remark Your Honour mentioned in the witness summary, and this one
19 sentence in the recent submissions is the most detail that we have,
20 which makes it unclear what they're claiming was said and to what
21 this remark referred.

22 After the Defence pressed this claim, because they mentioned
23 Batch 1, we once again spoke to the SPO security officer who led the
24 operation to serve the first order and seize Batch 1. The officer
25 has signed an Official Note confirming that he never said anything

1 like that as alleged by the Gucati Defence. Should any further
2 information be provided, we will investigate this as well.

3 And just for interest of disclosure, we do intend to disclose
4 that Official Note and we will do so this week.

5 Thank you.

6 JUDGE METTRAUX: Mr. Halling, if I was to give the floor to the
7 Defence right now, I'm sure they would turn your argument on you and
8 say at this stage we only have counsel's argument in relation to
9 that. No evidence of it.

10 The question is the indication again is given now by the Defence
11 that beyond the assertion there's an intent to give evidence in
12 relation to that fact. Whether it's accepted and relied upon is, of
13 course, a different matter, but at least there's an indication that
14 there is such an intent on their part.

15 The follow-up question is will the Prosecution seek to lead
16 evidence on that matter, or are we going to do or deal with it solely
17 on the basis of your submissions?

18 MR. HALLING: Our submission is that this is fabricated, and so
19 we are not at this time planning on leading evidence in our case
20 in-chief in relation to it. And that when we challenge the evidence
21 of the Defence, whatever it is, our current position is that that is
22 sufficient on its own.

23 Should further information necessitate revisiting this position,
24 of course, we appreciate we would need to seek leave of the
25 Trial Panel, but there is no evidence in any of our records that this

1 exists. And leading evidence to disprove something that, again,
2 doesn't seem to have happened in the slightest, is not currently
3 something we feel that we need to do.

4 JUDGE METTRAUX: Anything that either Defence wants to?

5 MR. REES: Well, it is, of course, a matter for the SPO how they
6 run their case, but it seems that the Trial Panel is simply going to
7 be asked to take Mr. Halling's word for it. That's not how a trial,
8 or at least any trial that I've ever participated in, usually
9 proceeds.

10 MR. CADMAN: Let me just endorse that position and add to it.
11 The fact that we have requested of the SPO on more than one occasion
12 statements taken from the officers who were present on Operation 1,
13 2, and 3, none of those officers are currently listed to give
14 evidence at trial. We have been refused the opportunity to see any
15 statements from them, and our position is that we will not have the
16 opportunity to cross-examine any of those investigators or even be
17 given the details of those investigators, bar one officer.

18 JUDGE METTRAUX: Thank you.

19 JUDGE SMITH: Do any of my colleagues have any other questions?

20 Moving on, I invite the parties to communicate -- excuse me.
21 Moving on, I invite the parties to indicate whether they intend to
22 submit any motion pursuant to Rule 117(2) other than the motions that
23 are already received pursuant to the 21 July order or those that you
24 indicated during this conference that will be filed in the near
25 future. And if so, also indicate the subject matter of these

1 applications and whether you are in a position to file such motions
2 by 17 September with any responses to be on file by 24 September.

3 This would allow the Panel ample time to consider and rule on
4 them.

5 I'll first start with the Prosecutor.

6 MR. HALLING: Your Honour, we have no further motions other than
7 what's already been forecast and have no objection to the briefing
8 schedule.

9 JUDGE SMITH: All right. Mr. Rees.

10 MR. REES: It seems to us, Your Honour, that there are two main
11 categories outstanding. The first is the determination of the
12 admissibility status of the material that's been identified in the
13 Defence pre-trial brief list of objections to admissibility, which
14 may correspond - I haven't quite gone through yet to see if they
15 correspond entirely. But they may correspond with the content of the
16 SPO's bar table motion.

17 As I submitted yesterday, we do support the determination of
18 those matters before the opening of the trial, because clearly that
19 will have potentially a significant impact on the actual shape of the
20 trial when it begins.

21 The other matter is disclosure. And at the moment, I am not in
22 a position to give any detailed forecast as to how I see those
23 matters pan out because, of course, we are conscious that following
24 Your Honours' oral order yesterday, the completion of the Rule 102(3)
25 notice is outstanding. There is, we understand, an application to be

1 made today for redactions by the SPO. Although we've had no real
2 notice contrary to Your Honours' ruling yesterday evening, or we were
3 told moments before you came into court this morning orally was that
4 there would be an application by the SPO for an *ex parte* hearing in
5 which they would raise Rule 106 and Rule 108.

6 Remarkable, it would seem to us, that we had that briefest of
7 conversations when we've been here. We were here in the building
8 until 7.00 yesterday evening. We have e-mail accounts where the SPO
9 can reach us at any point of the day, yesterday evening, this
10 morning. And we certainly don't think what was, frankly, a shoddy
11 attempt to meet Your Honours' direction, we think it was nothing of
12 the sort, frankly, that Your Honour required them yesterday afternoon
13 to provide prior notice to the extent about the nature of their
14 objections to disclosure, and we certainly have not had that and we
15 certainly didn't have it in any timely form to allow us to consider
16 it at all.

17 So I'm afraid we do see ongoing issues with disclosure. Exactly
18 how that's going to pan out, I can't say at this stage. I certainly
19 would hope and will aim to meet the aspiration of the Trial Panel,
20 that any such motion that we may have to make we will do by
21 17 September.

22 That's all I can assist with at this stage, Your Honour.

23 [Trial Panel confers]

24 JUDGE SMITH: Is that all, Mr. Rees?

25 MR. REES: Yes, Your Honour.

1 JUDGE SMITH: Mr. Cadman.

2 MR. CADMAN: It will come as no surprise, Your Honour, that our
3 position is identical to that of Mr. Gucati. And can I just also
4 make the point that I share Mr. Rees's frustration in the way in
5 which this matter is being handled.

6 We have raised in the past that whilst the SPO has consistently
7 said throughout these proceedings over the last eight months that
8 their disclosure is complete, each and every time we approach a
9 hearing before this Court we receive additional material moments,
10 sometimes a couple of days before the hearing. That really needs to
11 stop.

12 We will be making additional applications for disclosure. We
13 will endeavour to abide by the guidelines and the timelines set by
14 the Trial Panel, but that will depend upon the response that we get
15 from the SPO moving forward.

16 JUDGE SMITH: Any response from the Prosecution?

17 MR. HALLING: Briefly, although not in relation to the question
18 asked by Your Honours.

19 In relation to the notice for the hearing today, we were
20 refining our position right up until we went into court this morning.
21 It was not ready at 7.00 last night, for instance. We didn't have
22 very much time before the hearing because of the timing in which the
23 Defence teams arrived to give more information.

24 When this issues arises, if the Defence require more time in
25 order to meaningfully respond, we have no objection to that. But we

1 have given, as you'll see when we get to that issue, we have given
2 the main arguments that we intend to present and we believe that
3 we've complied with Your Honours' instructions.

4 JUDGE SMITH: You've given them full notice of the nature of
5 your objections as I ordered yesterday?

6 MR. HALLING: We have, Your Honour.

7 JUDGE SMITH: Mr. Cadman.

8 MR. CADMAN: We don't accept that.

9 JUDGE SMITH: Obviously. All right.

10 I would ask the -- go ahead, Mr. Rees.

11 MR. REES: All we've had is reference to the two rules that they
12 propose to refer to. And it is at odds with what you were told
13 yesterday, Your Honour, by Mr. Halling.

14 JUDGE SMITH: Were you given a written notice?

15 MR. REES: No, we've had no written notice. Literally we've
16 had, as I said, moments before I even came into court this morning,
17 literally seconds, we were told that they will be relying on Rule 106
18 and 108, and that's it.

19 Yesterday, of course, Mr. Halling said that the nature of any
20 objection would be -- not an objection as such. It would be an
21 application for protective measures. So, accordingly, I spent
22 yesterday evening and this morning looking at the relevant provisions
23 for protective measures.

24 I did speak in the interests, as we have done throughout, to try
25 to engage with the SPO on an *inter partes* basis before this hearing

1 started, on Tuesday, and went to speak to my colleagues in the
2 Specialist Prosecutor's Office about this very issue, about
3 Rule 102(3), and was met with the simple response: Court of Appeal
4 have made a decision, they didn't order it, nothing to do with us,
5 not interested.

6 We had no discussions at that stage because they were not
7 interested, and we have had -- we have not had notice today, contrary
8 to Your Honours' order yesterday.

9 JUDGE SMITH: This is not sufficient. Your office will, within
10 one hour, provide to the Defence a complete written statement of what
11 the nature of your objections are not by mere reference to code -- to
12 rule sections. Is that clear?

13 MR. HALLING: It is, Your Honour.

14 JUDGE SMITH: This is about disclosure and the disclosure is an
15 essential part of these proceedings, and playing hide the ball is not
16 disclosure. We expect better.

17 MR. HALLING: Understood.

18 JUDGE SMITH: We'll move on to the last topic on the agenda from
19 the 21 July order, and it concerns the presentation of cases. And in
20 this regard, as indicated in the 21 July order, I asked the SPO to
21 indicate the following: Whether its estimate as to the time
22 necessary for the presentation of its case has changed, especially in
23 view of the additional proposed witness, and which counsel are
24 expected to appear on behalf of the SPO during the trial proceedings.

25 You can answer that at this time, Mr. Prosecutor.

1 MR. HALLING: Thank you, Your Honour.

2 In terms of the time necessary to present the evidence of the
3 two witnesses on the list of witnesses, there are no changes.
4 Obviously we would need a revised estimate for a third witness, if
5 leave is granted to call that witness.

6 In terms of counsel giving appearances. At trial, the SPO will
7 be represented by myself, Ms. Valeria Bolici, Mr. James Pace. We,
8 along with our Case Manager, Ms. Line Pedersen, will -- intend to
9 appear at all hearings. The only other persons who may present
10 submissions to you in this case from our office would be the SPO
11 senior leadership, such as the SPO Deputy Prosecutor, who is in court
12 today.

13 JUDGE SMITH: Thank you. Now I turn to the Defence and ask you
14 to indicate what each Defence team's estimate as to the time
15 necessary for cross-examination, if any, of these two witnesses might
16 be, and whether each Defence team will opt to give an opening
17 statement directly after the opening statement of the SPO, or an
18 opening statement after the closing of the SPO's case and before the
19 opening of the Defence case, or no opening statement. And I realise
20 some of that depends on when and how the SPO's case ends.

21 I also would like each Defence team to estimate as to the time,
22 if any, necessary for the presentation of their case, if you can do
23 so. Should either Defence team decide to call a case, what its
24 estimate is to the time needed for preparation after the closing of
25 the SPO's case, and which counsel are expected to appear. The same

1 question that I asked the SPO.

2 Mr. Rees, you have the floor.

3 MR. REES: Thank you, Your Honour.

4 Because the progress of the SPO case is rather unusual, I find
5 it not a simple task to give estimates. So I've prepared what I
6 think are realistic worst-case scenarios. I think they will err on
7 the side of pessimism, and I hope that actually at trial things will
8 be more speedy.

9 I've also considered with Mr. Cadman time for the Defence cases,
10 because we're conscious that there is a real overlap between the
11 witness lists and conscious of the draft direction in the conduct of
12 proceedings that exhorts the parties to consider sharing witness
13 requirements, as it were. So I will give an estimate that I think
14 for the Defence cases, assuming that all witnesses are called, as it
15 were.

16 I think in relation to Witness 1, I will call her that,
17 because -- rather than the longhand pseudonym that's been attributed.
18 But Witness 1, she is given a schedule which is some 397 rows long,
19 nine columns. Her declarations run to a total of 117 pages. We will
20 have to explore if her evidence is admissible on these matters. That
21 schedule, in real detail, trying to keep my questioning concise, but
22 bearing in mind that I've not seen any of the material that the
23 witness presents an analytical report on, together with questions
24 about her conduct of the search that took place on 25 September, I
25 think I could be up to seven days in cross-examination with her.

1 In relation to Witness 2, who produces a report based on the 107
2 Official Notes of contact with witnesses. That's how they're
3 described. With the Witness 2 only being involved in 15 of those 107
4 notes personally. Again, if that evidence is admissible, with
5 limited disclosure, and appreciating that I'm dealing with a witness
6 who's giving effectively third-hand evidence, not just second-hand
7 evidence, all of which is contentious and in dispute, the accuracy,
8 reliability, truth, credibility of the people concerned, the only way
9 I can explore all those matters is through this single witness, I
10 think I could be up to five days with Witness 2. Again, his
11 declaration and exhibits run well over a hundred pages.

12 I do not propose making an opening after the SPO's opening.

13 JUDGE SMITH: You do not?

14 MR. REES: I do not. At present, I do consider an opening after
15 the closing of the SPO's case and before the opening of any Defence
16 case. I think that on the basis that all, both defendants and
17 Defence witnesses, all Defence witnesses are called, the best
18 estimate I can come to is that evidence should take no more than
19 three weeks.

20 In relation to a break for preparation of the Defence case after
21 the closing of the Prosecution case, the time that is envisaged in
22 the Registry's submissions on the conduct of proceedings order seems
23 to me to be -- that Practice Direction is clearly drafted with cases
24 of a different nature in mind, it seems to us. So we don't seek for
25 a period as long as that that's envisaged in that direction. We

1 think a week should suffice.

2 That leads us to a position of an overall approximate time
3 estimate, including what we think is appropriate time for the
4 Prosecution opening and, of course, the --

5 JUDGE SMITH: Go ahead. I'm sorry for the interruption.

6 MR. REES: The Prosecution opening, the playing of their videos
7 that will have to be played during the course of the trial, which we
8 calculate amounts to approximately some three days worth of footage.
9 Together with incorporating the estimates that were given for
10 Witness 1 and 2 in-chief in the Prosecution's pre-trial brief, and
11 allowing some time - although we don't know quite how much - for the
12 third witness that the Prosecution have indicated they will seek to
13 call. We obviously don't know the content of his statement yet, but
14 allowing some time, that would amount to a total period of some nine
15 to ten weeks.

16 In terms of counsel, I intend to be present throughout.
17 Mr. Bowden will be with me. There are some -- I've consciously kept
18 my commitments in other matters as limited as possible for this term.
19 Although there are some unavoidable commitments that I have, they are
20 few, and they are short in duration, and I will ask, in due course,
21 for the Trial Panel's assistance or flexibility on my part to allow
22 me to meet those other commitments. There are only some five or six,
23 and they're on specific days. But on those days, Mr. Bowden will
24 certainly be here to assist with this case so that it shouldn't
25 impede progress. And obviously, again, I would ask for some

1 flexibility with the SPO in terms of how we schedule the work that
2 needs to be done on those days, to assist.

3 Unless I can assist any further with those matters, Your Honour.

4 JUDGE SMITH: Yes, I have one question. You're perfectly aware
5 that another trial will be taking place in this same courtroom, and
6 so we are going to be sharing time. So when you say three weeks, do
7 you mean three five-days -- three weeks of five days, 15 days; or, do
8 you mean three days in which we have two days in this courtroom?
9 Three weeks in which we have two days in this courtroom.

10 MR. REES: Well, certainly -- although, of course, we have
11 speculated amongst ourselves as to how, with the single courtroom,
12 things were to -- intended to progress with --

13 JUDGE SMITH: I --

14 MR. REES: -- another proceeding --

15 JUDGE SMITH: I can tell you, and maybe it's of help to
16 everyone, that when you're sharing this courtroom, and we can't work
17 every single day because we have translators and other court
18 proceedings going on at the pre-trial stage, we will probably get two
19 days per week when we're in session. And we have been offered two
20 full uninterrupted weeks at the end of October, which would mean we
21 could get eight full days of trial in probably during that
22 time-period.

23 So just so you can quit speculating a bit and understand.
24 That's how we will end up having to share this space in the future.

25 MR. REES: Well, that's very helpful, and we're grateful for

1 that to be made clear.

2 JUDGE SMITH: It may seem that we're hurrying here and trying to
3 get as much done as possible, but we are mindful of two things. One
4 is we have those two weeks available to us at the end of October.
5 And, number two, your clients, as we're quite aware, are in
6 detention.

7 MR. REES: Absolutely.

8 JUDGE SMITH: And we want this case to be brought to trial in an
9 expeditious way, and I hope everyone understands that and can look
10 forward to that.

11 MR. REES: Absolutely. And at the bar, both Defence and
12 Prosecution discussed this matter, and everybody is of the view, not
13 least because, as -- primarily as Your Honour has said, that
14 Mr. Gucati and Mr. Haradinaj have been in custody now for almost
15 12 months, that we all agree that it's imperative that the trial
16 starts as soon as possible and concludes this calendar year.

17 JUDGE SMITH: Thank you very much.

18 MR. REES: So the periods I've given were intended to
19 incorporate what we envisaged to be obvious delays in the sense of we
20 did not envisage the Court sitting every day through those periods.

21 JUDGE SMITH: Okay. But when you said three weeks, do you mean
22 15 days of trial?

23 MR. REES: No, I meant blocks.

24 JUDGE SMITH: Okay. All right. That's good. Thank you very
25 much. That's very helpful.

1 Mr. Cadman, the same questions. And if it's the same answer, we
2 don't need to go through it again.

3 MR. CADMAN: Your Honour, just to make it clear and easy.
4 Mr. Rees and I have consulted and so the position put forward is on
5 the basis of the presentation of the Defence cases. So the time
6 estimates that he has set out are the same.

7 In terms of counsel, counsel represented today will be
8 represented throughout the trial. We do not envisage any change to
9 that. And we are also equally keen, Mr. Haradinaj is very keen to
10 have this matter resolved before the end of this year as well.

11 JUDGE SMITH: And we will do our best to advise everyone
12 about -- of our planning thoughts, so you can start incorporating
13 those weeks, those days into your calendars. I can't really do that
14 today. We need to get this next meeting under our belts, and then
15 we'll probably be in a good place.

16 And bear in mind that I am negotiating and discussing with the
17 other Trial Panel all the time on opening times up. That's how we
18 got those two weeks at the end of October. The other Panel wasn't
19 going to use it and they offered that, so we're trying to cooperate
20 as well.

21 Thank you very much.

22 MR. CADMAN: The only addition that I would make is that we have
23 calculated on the basis of the Defence investigations,
24 representations made by Mr. Halling previously, of an estimate of
25 early November. So even if it's brought forward a couple of weeks,

1 then I don't think that's going to cause any insurmountable
2 difficulties for the Defence.

3 JUDGE SMITH: Thank you. We will enter an oral order this
4 afternoon in regard to some of these questions that I asked today.

5 In our 21 July order, we indicated a provisional date for the
6 SPO preparation conference for next week on Wednesday and Thursday,
7 the 8th and 9th of September. I know we contacted you earlier to see
8 if that was available. Is that still going to be a workable date for
9 you, Mr. Prosecutor?

10 MR. HALLING: Yes, Your Honour.

11 JUDGE SMITH: Mr. Rees?

12 MR. REES: Yes, Your Honour, thank you.

13 JUDGE SMITH: Mr. Cadman.

14 MR. CADMAN: Yes, Your Honour.

15 JUDGE SMITH: Very good. Thank you for the cooperation on that.
16 I realise, as I said, we're condensing, somewhat, the time available
17 to us.

18 At the Specialist Prosecutor's Preparation Conference, we will
19 be, as required by the rules, setting a date on which to open the
20 trial, and it has to be within 30 days so it gives us a fairly good
21 idea of where we are heading. I will tell you that we are
22 anticipating a date to open the trial and to hear opening statements
23 only on 7th and 8th October, and then to begin hearing evidence on
24 October 18th continuing, as I said earlier, through the 29th, two
25 full weeks of available dates.

1 We'll discuss -- I don't want you to commit yourself to this
2 today, because it takes a little bit of thought and planning on your
3 part I know, and so we will -- I am mentioning these so that you can
4 think about them and be prepared to discuss them in earnest next week
5 at the Prosecution's preparation conference. Okay?

6 Mr. Cadman.

7 MR. CADMAN: Sorry, one point I didn't set out, and that is a
8 Defence opening. Our position is the same.

9 JUDGE SMITH: Oh, I'm sorry.

10 MR. CADMAN: We would not be giving a Defence opening until the
11 close of the Prosecution case --

12 JUDGE SMITH: I'm sorry.

13 MR. CADMAN: -- if we get that far.

14 JUDGE SMITH: I'm sorry. I assumed that and I shouldn't have
15 done that. But thank you.

16 MR. CADMAN: Thank you.

17 JUDGE SMITH: Anyway, keep in mind these dates I've set out and
18 we will do our very best to live with them.

19 So we've reached the end of our agenda that was scheduled.

20 Oh, one other thing. Mr. Haradinaj's Defence had raised an
21 issue concerning private laptops. Has that been dealt with now?

22 MR. CADMAN: It has been. I'm very grateful to the Registry for
23 that.

24 JUDGE SMITH: And thank you to the Registry for facilitating
25 that for us.

1 Any other issues you wish to bring up for this hearing today?

2 Nothing from the Prosecution.

3 Anything, Mr. Rees? I know we have one large thing waiting, and
4 I realise that, and we'll get to that soon.

5 But, Mr. Cadman, anything you want to raise? Any other issues?

6 MR. CADMAN: Not at this time, Your Honour.

7 JUDGE SMITH: All right.

8 [Trial Panel confers]

9 JUDGE SMITH: Because of the need to have the updated document
10 from the SPO delivered to the Defence, we will break until 11.00. We
11 will be ready to start at that time. Please, get the document to
12 them prior to 11.00 so they can look at it before we begin.

13 All right. We are in recess until that time.

14 MR. REES: Your Honour, just very briefly in that regard.

15 If once we see the document -- we will try to be ready to deal
16 with it at 11.00. But if having seen it we would request more time
17 to consider it, is it possible that we can send a message to the
18 Trial Panel just asking for that, just delaying the start?

19 JUDGE SMITH: Just get to Viki and --

20 MR. REES: Thank you. I'm grateful.

21 JUDGE SMITH: We are in recess.

22 --- Recess taken at 10.25 a.m.

23 --- On resuming at 11.00 a.m.

24 JUDGE SMITH: We are back in session.

25 We have received a copy of the notice and have read it, and the

1 Defence indicated they needed some additional time. But we will
2 start with the Prosecution's statement now and then break and come
3 back for the Defence, and then go on from there. I appreciate
4 everyone's patience.

5 Mr. Prosecutor, you have the floor.

6 MR. HALLING: Thank you, Your Honour.

7 Your Honour's direction called for a discussion on redactions to
8 the Rule 102(3) notice materials relating to the process by which
9 these batches were disclosed to the KLA War Veterans Association.

10 You asked for an *inter partes* discussion, but for purposes of
11 that discussion, we would ask to go into private session.

12 JUDGE SMITH: [Microphone not activated].

13 [Private session]

14 THE COURT OFFICER: Your Honour, we are now in private session.

15 JUDGE SMITH: Go ahead.

16 MR. HALLING: Thank you, Your Honour.

17 And our arguments are going to be derived from the notice that
18 Your Honours have just indicated you read. We apologise to the Court
19 and to the Defence for the delay in this regard. It's not our
20 intention to hide our position on this or any other matter, and going
21 forward we'll bear Your Honour's admonishment in mind.

22 We have a continuing investigation into the deliveries of the
23 batches. It is sensitive and ongoing. We consider it to be highly
24 damaging to this investigation to reveal anything about how these
25 deliveries came to pass as it, amongst other reasons, creates

1 opportunities for further illegal disclosure.

2 Listing these materials with any detail at all, as indicated in
3 Rule 102(3), is going to be inevitably lead to revealing the lines of
4 our investigation and how all this happened. If listing materials
5 implicates restrictions on disclosure that exist in the rules,
6 Rule 106 and Rule 108 being the relevant restrictions in this case,
7 then it is our submission that the Trial Panel can order the
8 non-disclosure of that part of the Rule 102(3) notice.

9 Rule 108(1) permits withholding information disclosable under
10 Rule 102 - not just Rule 102(1), the entire rule - when doing so
11 would prejudice ongoing or future investigations. To the extent
12 witnesses provided information to the SPO, disclosing this
13 information could also pose grave risks to their security.

14 The rule entitles the SPO an opportunity to make *ex parte*
15 submissions on whether to withhold this information in whole or in
16 part.

17 In addition, parts of the materials constitute internal work
18 product under Rule 106 of the rules. Rule 106 expressly provides
19 that reports, memoranda, or other internal documents prepared by a
20 party or Victims' Counsel, their assistants or representatives, in
21 connection with the investigation or preparation of a case are not
22 subject to disclosure or notification under these rules.

23 We are under no obligation to notify such materials. And,
24 therefore, we should not be required to list them on a Rule 102(3)
25 notice.

1 We request permission to make *ex parte* submissions to give the
2 Trial Chamber further detail on the constituent elements and risks to
3 providing notice to describe our investigation on this matter.

4 In other words, we are prepared to give a meaningful description
5 to the Judges on what would be, in the updated Rule 102(3) notice,
6 that's contemplated. We are prepared to do this orally or in
7 writing. If the Trial Panel is inclined to do it orally, Mr. Whiting
8 is prepared to address the Trial Panel on this today in an *ex parte*
9 session with all further details.

10 Thank you.

11 JUDGE SMITH: I have a question for you, Mr. Halling.

12 You have known about this decision, about the decision of the
13 Court of Appeals Panel since 29 July. The decision clearly stated
14 that the relevant material should have been included in your 102(3)
15 list. Why would you only now request some sort of a redaction or
16 ruling of protection for these things? Why do we wait till the trial
17 prep conference to do this when it was quite clear - to me at least,
18 in my reading of the decision - that it should have been done?

19 MR. HALLING: The answer is because of the disposition of the
20 appeal decision that you're referencing.

21 The Pre-Trial Judge made two rulings in the impugned decision
22 leading up to that appeal. One on 102(3) notice and a second on
23 disclosure. Had the Appeals Panel wanted to reverse the decision or
24 remand it back for the notice that Your Honour just foreshadowed, we
25 would have expected them to do it in the ruling. The Appeals Panel

1 did not do that. They confirmed the ruling in whole with no further
2 order attached, and in our understanding that meant that the error on
3 Ground 1 identified was harmless.

4 And it makes sense that it's harmless, because the whole point
5 of the Rule 102(3) notice is for things to be selected such that
6 there can be a focused discussion on the materiality of the
7 information in question. Once the Appeals Panel upheld the
8 Pre-Trial Judge's finding that there was no *prima facie* materiality
9 shown by the Defence, there is no point in listing them at that
10 point. We would have just gone in a circle. We would have provided
11 the notice responding to Ground 1, they would have selected it, and
12 we would have ended up in the same place.

13 So the way we read the Court of Appeal's decision was that no
14 further action from us was required, despite the error found on
15 Ground 1. And this is, at least, the explanation as to why we
16 proceeded the way we have.

17 JUDGE SMITH: Well, that's an interesting reading.

18 Any questions? Go ahead, Judge Mettraux.

19 JUDGE METTRAUX: Thank you, Judge Smith.

20 JUDGE SMITH: Is there any objection that we return to public
21 session now?

22 MR. HALLING: Without knowing what further questions will be
23 asked, it's hard for me to say. But I leave it in Your Honours'
24 hands if you think it will --

25 JUDGE SMITH: We'll return to public session.

1 [Open session]

2 THE COURT OFFICER: Your Honours, we are back in open session
3 now.

4 JUDGE SMITH: Thank you.

5 Now, your question.

6 JUDGE METTRAUX: Thank you, Judge Smith.

7 Mr. Halling, I want to go back to -- briefly to this issue of
8 materiality.

9 Assuming your understanding of the Appeals Chamber's decision to
10 be correct, isn't it the case that the inability of the Defence to
11 demonstrate materiality is closely linked to the absence of a list of
12 items that they can review, at least as a general indication, that
13 there is something in your possession that could be material to them?
14 If they are not in possession of such an instrument, how do you
15 suggest they would be able to make that demonstration in the first
16 place?

17 And that leads me to a second point, which I would be grateful
18 for your submissions, which is in the material that we are talking
19 about now, in a very and, unfortunately, very abstract way, does this
20 material contain potential evidence of any of the material facts that
21 the Defence is putting forward as being relevant to their case? You,
22 the SPO, are the only ones who have seen that material and have the
23 benefit of it. Our rules provide a principle of disclosure with
24 exceptions that you have to -- in relation to which you carry an
25 onus.

1 So two questions: Number one, do you accept that the inability
2 of the Defence to meet this *prima facie* stage of demonstrating
3 materiality is tightly linked to your failure up to this point to
4 give them a list, number one; and, number two, are we talking of
5 material which, on the basis of what you know from the Defence
6 pre-trial briefs, plural, could be material to establishing any of
7 these facts?

8 And I'd be grateful for a specific response to the extent you
9 can do that in public.

10 MR. HALLING: Thank you, Your Honour.

11 The short answers to your two questions are, for the first one,
12 not always and not in this instance. And the answer to the second
13 question is no. But I'll expand on both.

14 As for the link between the Rule 102(3) notice and materiality.
15 It is clear from the Appeals Panel's ruling that they did not
16 consider that to be necessary in this instance. In other words, if
17 Ground 1's error had bled into Ground 2, then they would not have
18 confirmed the decision. They would have remanded it back for the
19 notice to have been provided and then to have relitigated the
20 materiality. The Court of Appeal did not consider that to be
21 necessary, which means that that particular link that Your Honour is
22 identifying, although it may be true in other context, they did not
23 see it.

24 It's also not seen from the way that the Defence was behaving,
25 because what the Defence could have done is they could have sought

1 leave to appeal only in regards to the Rule 102(3) notice and then
2 relitigated materiality at a later point. They didn't do that. They
3 saw --

4 JUDGE METTRAUX: I'll stop you there, Mr. Halling. I'm sorry,
5 but assuming your reading to be correct, and a technical reasonable
6 understanding of the Appeals Chamber decision, what do you think will
7 happen here? The Defence will make the request for the list, which
8 they have. And having reviewed that list, they will ask for the
9 documents to be disclosed to them.

10 So now we have, effectively, have to relitigate the issue and,
11 therefore, have to take a position on this issue. That's the
12 situation we are in. Instead of, as a result of the Appeals
13 Chamber's decision, taking the proactive step of assuming that this
14 was coming and, if necessary, to seek the measures, the
15 confidentiality measures that you are now seeking from us.

16 So I join Judge Smith's comment on the delay that we note in
17 your office's failure to do that at an earlier stage.

18 MR. HALLING: Yes. And on this, Your Honour, our position was
19 that this matter was settled at the pre-trial phase of the
20 proceedings. Structurally, the whole point of having a
21 Pre-Trial Judge at the KSC is to resolve matters, like disclosure,
22 before this case is transferred to the Trial Panel.

23 We understand now that the Trial Panel is interested in
24 relitigating this issue, but the entire point of that interlocutory
25 appeal was to resolve this question once and for all so that

1 revisiting this issue was not necessary.

2 Obviously the Trial Panel is entitled to -- they have the
3 obligation, in fact, to ensure the fair and expeditious conduct of
4 the proceedings. And if it is in the Trial Panel's determination
5 that further discussion of this issue is warranted, that is the
6 Trial Panel's prerogative.

7 But it is not necessary to revisit this issue because of the
8 Court of Appeal decision. Were it necessary, the Court of Appeal
9 would have said it. It would have been remanded back and the
10 litigation would have continued before the Pre-Trial Judge.

11 As to the second question, as to whether there is any
12 information in this material that would be relevant for the defences
13 that are raised, no. We have reviewed the material in light of what
14 the Defence has raised. There is nothing in it.

15 I appreciate what Your Honour is saying that you're taking my
16 word for it. How can you know without getting more information about
17 the materials yourself. We appreciate that. And this is why we're
18 asking for an opportunity to make *ex parte* submissions to provide
19 more information, following which the Trial Panel will be more
20 informed.

21 And so we again repeat this request to you, to the Court, and,
22 yes, that is our position.

23 JUDGE METTRAUX: Thank you.

24 JUDGE SMITH: Judge Gaynor.

25 JUDGE GAYNOR: Thank you, Mr. President.

1 Mr. Halling, thank you for your submissions so far. I'd like to
2 ask you a couple of questions about the SPO position, about the
3 ground for non-disclosure of reports, memoranda, or other internal
4 documents which have been prepared by the SITF or the SPO in
5 connection with its investigative work, which is set out in the final
6 sentence of Rule 106.

7 Now, this privilege against disclosure, which protects both the
8 Defence and the Prosecution, is about internal work product, and I
9 want to clarify what exactly is the internal work product here. Is
10 the internal work product, in part, material which you say was
11 unlawfully disclosed in a manner that amounts to a criminal offence
12 as part of the actual substance of this case that we have before us?

13 And separately to that, I can imagine that there is internal
14 work product which has not been, in your submission, unlawfully and
15 criminally disclosed.

16 Now, which is it that you are refusing to disclose to the
17 Defence under Rule 106?

18 MR. HALLING: Your Honour's question is difficult to answer in
19 public session. I will try.

20 JUDGE GAYNOR: I can just assist you with it a little bit. If
21 there is information which you say falls under the Rule 106
22 provisions concerning non-disclosure, and it is also information
23 which has entered the public domain as a result of what you say were
24 criminal activities, does that really fall within the Rule 106
25 internal work product privilege? That's what I'm getting at.

1 MR. HALLING: When we mention Rule 106 in this context, we're
2 not referring to those materials.

3 JUDGE GAYNOR: And are you invoking Rule 106 at any stage in
4 respect of those materials?

5 MR. HALLING: We are and have, and this goes to the decision of
6 the Pre-Trial Judge authorising non-disclosure of the three batches,
7 in particular. So we've already fully ventilated our position on
8 that.

9 But what we're talking about now, because there's already been a
10 ruling on the batches, is a different set of materials - not all of
11 which are work product but some of which are.

12 JUDGE GAYNOR: Okay. And I just want to return to the purpose
13 of Rule 106, the reason that the internal work product privilege
14 exists. Would you consider that the purpose has been somewhat
15 rendered irrelevant once the internal work product has entered the
16 public domain due to, what you say, are unlawful and perhaps criminal
17 activities?

18 MR. HALLING: Our position would be no in answer to that
19 question.

20 Our internal work product can be waived if we give it to third
21 parties. We understand that. But this is not what happened in
22 relation to the materials that we're discussing. The SPO never
23 waived its internal work product. And if the idea that something
24 wrongly disseminated into the world would deprive it of its character
25 as work product, then it would, in a sense, perpetuate the wrong in

1 question.

2 And this is -- so when the Pre-Trial Judge rendered the
3 decision, we, to this day, consider that Batch 3, in particular, is
4 internal work product of the Specialist Prosecutor's Office. That is
5 unchanged by the criminal conduct of the accused.

6 JUDGE GAYNOR: But does that material, once it has entered the
7 public domain, does it not become the very essence of the crime which
8 you say took place? It's now completely entered into a new
9 character, if you like. It becomes part of the element of the crime.

10 MR. HALLING: It still doesn't, because it's not in the public
11 domain. It was -- if something is wrongfully disseminated -- and in
12 this instance, not everything that was wrongfully disseminated
13 appears in the public domain. There are pages of Batch 3, for
14 example, that were distributed but were not necessarily revealed in
15 any media article or any other place.

16 So when you have a situation like that, the document itself
17 didn't lose its character just because this happened, nor is the
18 information within it all in the public domain. We can't lose our
19 internal work product protection for that reason. A crime can't take
20 away the privilege that we have, as Your Honour described it, for our
21 internal work product.

22 And so it's -- but, again, this discussion is different from the
23 discussion that we are talking about now. We're talking about
24 different materials. And, again, in an *ex parte* session we can
25 explain further.

1 JUDGE GAYNOR: I've no further questions.

2 Thank you, Mr. President.

3 JUDGE SMITH: Anybody else?

4 I know you want more time, and I want to give you the
5 opportunity to respond to what's been said thus far here in open
6 session, if you wish.

7 Mr. Rees.

8 MR. REES: I'd like to reserve our position, and I will deal
9 with all matters later when we reconvene.

10 Thank you.

11 JUDGE SMITH: All right.

12 MR. CADMAN: Likewise, Your Honour.

13 JUDGE SMITH: All right.

14 So we will reconvene at 2.00. That was your request, was it
15 not? 2.00. And be prepared -- hold on just a second.

16 [Trial Panel confers]

17 JUDGE SMITH: So we will reconvene at 2.00. And, Prosecution,
18 you should be prepared to go into an *ex parte* session if it's so
19 ordered immediately following that session.

20 Everyone understand? All right. That's all. Thank you. We're
21 in recess.

22 --- Luncheon recess taken at 11.21 a.m.

23 --- On resuming at 1.59 p.m.

24 JUDGE SMITH: Good afternoon everyone. We're back in session to
25 hear the submissions of the Defence on Rule 102(3), detailed notice

1 or list.

2 Mr. Rees, you have the floor.

3 MR. REES: Thank you, Your Honour.

4 Your Honour, if I can begin with yesterday's position of the
5 SPO. Yesterday the Trial Panel was told, in response to the oral
6 order that Your Honour made, that if it's the SPO's position that
7 updating the Rule 102(3) notice would involve revealing information
8 that would be subject to protective measures, even just on the list,
9 is it within the scope of your Chamber's briefing schedule to file a
10 request to the Chamber with sufficient to rule upon it by the 6th.

11 Yesterday the SPO was not sure that any such material would
12 require any measure, and the only measures under contemplation were
13 protective measures under Rule 80. Rule 80, of course, involves
14 consideration of protective measures for the protection, safety,
15 physical and psychological well-being and dignity and privacy of
16 witnesses, victims participating in the proceedings and others at
17 risk on account of testimony given by witnesses. It's related
18 specifically to the use of material at trial. And, of course,
19 Rule 80 also directs both the applicant and the Court to consider the
20 nature of the measures that are being sought, specifically with a
21 view to making sure any interference with the usual trial process is
22 kept to an absolute minimum and only as necessarily required. And it
23 specifically refers to, for example, limited measures, redacting
24 names, using pseudonyms, non-disclosure to the public, redacting
25 information on the Specialist Chambers public records, and so on.

1 The use of private or closed sessions are ways to deal with any such
2 risk and, indeed, restrictions on further disclosure of that material
3 and its use.

4 Today, we are told that, in fact, the SPO now appears to apply a
5 blanket approach. I say "appears to" because the e-mail that we
6 received at 10.35 today gives no real indication to us as to the
7 extent of any such interference with the golden rule of disclosure
8 that the SPO seeks, so I can only draw the inference, I may be wrong,
9 perhaps the SPO could assist on this, but I can only draw the
10 inference that they apply some blanket approach to all material that
11 falls within the scope of Your Honours' oral order yesterday, despite
12 their clear equivalence on the position yesterday.

13 The notice explains that the SPO has undertaken a continuing
14 sensitive investigation to deliveries of the batches. Pausing there,
15 it is of note that the assertion is that their investigation is
16 continuing, despite some bold conclusions having been expressed by
17 the SPO in the past in open sessions they have not reached the end of
18 their investigations, which either reveals a willingness to play fast
19 and loose with oral submissions in court, or, indeed, a closed mind
20 as such investigations are continuing as to what those investigations
21 will ultimately reveal.

22 The notice continues, by e-mail, the SPO considers it to be
23 highly damaging to this investigation to reveal anything about how
24 these deliveries came to pass, as this would, *inter alia*, create
25 opportunities for further illegal disclosure of confidential

1 material.

2 There is nothing in the e-mail which explains as to how or in
3 what way such opportunities might come about, or indeed what
4 confidential material further -- the risk of further illegal
5 disclosure relates to.

6 They continue that Rule 108(1) permits withholding information
7 disclosable under Rule 108(2) and doing so would prejudice ongoing or
8 future investigations.

9 I pause to add as an observation that the Specialist Prosecutor
10 in public press releases and interviews with the media is more than
11 happy to express his belief as to how -- as to the source of the
12 process which led to those deliveries without any evidence seemingly
13 completely regardless of the risk of prejudicing those ongoing
14 investigations by making such public statements. And I've referred
15 to them in the Defence pre-trial brief. I won't repeat them or give
16 them any further air time now.

17 It does seem to us that the risk of prejudicing ongoing or
18 future investigations is a factor which the SPO seeks to play with
19 when it suits them and to disregard when it suits them to so
20 disregard.

21 The e-mail continues:

22 "In addition, parts of the material constitute internal work
23 product under Rule 106 of the Rules."

24 There is no indication given to which parts or how extensive
25 that material is. It does not cover the nature of the category or

1 type of internal product which is said to fall under Rule 106.

2 "The SPO is under no obligation," it says, "to provide notice of
3 such materials and therefore should not be required to list them on a
4 Rule 102(3) notice."

5 The SPO does not acknowledge that Rule 103 does provide within
6 it -- sorry, Rule 106. I apologise. Does say that the Rule 102
7 notification requirement is subject to Rule 106 unless otherwise
8 ordered by a Panel. I make the point that Rule 106 provides a wide
9 discretion to the Panel to order such material to be subject to
10 disclosure or notification. Not just under Rule 103 but also
11 notification under Rule 102(3). That's a wide discretion that the
12 Panel has under Rule 106.

13 The e-mail finally provides:

14 "The SPO will request authorisation to make *ex parte* submissions
15 in order to provide the Trial Panel with further detail concerning
16 the risks of providing notice and details concerning the SPO's
17 internal investigations."

18 It is a general principle that where *ex parte* submissions are to
19 be made, proper notice should be given to the Defence as specific as
20 the nature of the material allows, and it is necessary to do so to
21 enable the accused to make focused submissions to the Court. There
22 is no suggestion that we have -- indeed, the way in which the notice
23 unfolded, as it were, with Your Honour raising notice yesterday
24 afternoon, the SPO having all night and this morning to properly
25 consider it, a one-minute verbal chat before the Trial Panel came in,

1 and then a hastily cobbled together e-mail, again, purporting to
2 comply with Your Honours' direction, hardly suggests that the SPO has
3 given proper thought to providing such notice as specific as the
4 nature of the material allows to enable the Defence to make focused
5 submissions to the Court.

6 I submit as well this is -- I'm drawing -- because of the hasty
7 nature of this application, I am drawing on authorities from the
8 jurisdiction of England and Wales, but only to such extent, in my
9 opinion, as they support general matters of principle. The Court of
10 Appeal of England and Wales has said that "great caution is necessary
11 in the handling of *ex parte* applications, to restrict disclosure made
12 in the absence of the defence. There should be the most searching
13 investigation by the prosecuting authorities and by the court of the
14 facts relating to matters in respect of which non-disclosure or
15 authorisation to be excused from disclosure obligations is claimed,
16 coupled with the most searching consideration, the most searching
17 consideration of their possible relevance in the light of whatever
18 defence is being advanced."

19 And I endorse that as a general principle which should be
20 applied in this Chamber also.

21 What is apparent from the e-mail is that the material that the
22 SPO seeks to withhold appears to be extensive. That is contrary to
23 the impression, at least, that was painted before the Pre-Trial Judge
24 and the parties. As an example, on 30 March of this year, at the
25 Status Conference held on that date, as recorded in the transcript of

1 these proceedings at page 197, lines 16 to 20, Mr. Pace, on behalf of
2 the Prosecution, said that they had disclosed, the SPO:

3 "We have disclosed, as we have said before, and we've informed
4 them before, the information we have about steps taken regarding the
5 potential identity of the person who dropped documents off at the KLA
6 War Veterans Association. In particular there was one interview,"
7 one interview, "which we provided to the Defence."

8 At the very least, that was economical with the truth, it seems,
9 now. In relation to that interview, as it happens -- and you will
10 have seen reference to this in the Defence pre-trial brief, that
11 interview was a interview following the revelation to Mr. -- I won't
12 name the officer, but an SPO officer on 16 December with the index
13 number of a vehicle that appeared to have been the person making the
14 delivery on that date.

15 As we have asserted in the pre-trial brief, the SPO officer
16 appeared to be seemingly disinterested in that information and was
17 effectively forced to take it, and that impression was reinforced
18 because no attempt to check that index number was made until
19 25 November 2020, and it was not until 18 December 2020 when, again,
20 Mr. James Pace interviewed that person. An interview which we have
21 had disclosed to us, and we have had the name of the witness
22 disclosed to us. I won't refer to him. So there didn't appear to be
23 any of these great concerns about revealing details of the
24 investigation of the process by which these batches made their way to
25 the KLA WVA at that stage.

1 What we see in that very short interview is the person confirmed
2 to Mr. Pace that, in fact, it was his vehicle. Although he wasn't in
3 the area, he doesn't remember where he was, wasn't involved, to which
4 Mr. Pace effectively says: Thank you very much, I've no further
5 questions. And that was it. As we've described in the pre-trial
6 brief, and we will explore at trial, a seemingly -- a sham interview
7 from which we say, together with other evidence, you can draw the
8 inference the SPO knew all along the identity of that person and
9 persons who were involved and were not interested in pursuing it at
10 our request.

11 You were also told earlier on today that the Pre-Trial Judge, in
12 his decision, on the Prosecution request and challenges pursuant to
13 F00172 ruled on an application by us, that the Rule 102(3) notice was
14 deficient. He did not. He ruled on a single issue, as is clear,
15 from paragraph 58, he ruled on the issue as to whether the evidence
16 that we said, without the assistance of Rule 102(3) notice, but we
17 had done our best to try and specify the material that we thought may
18 exist. He ruled on a single issue, which was whether that material
19 should be disclosed under Rule 102(3) or 103 of the rules.

20 Now, that's made clear in paragraph 58 of his judgement and in
21 the final judgement, paragraph 64.

22 The SPO, whether advertently or inadvertently, make assertions
23 that are incorrect, and I urge some caution on your part as a
24 Trial Panel before relying on such assertions without proper scrutiny
25 of them. The decision of the appeals against disclosure decision of

1 the Court of Appeals Chamber here, filing IA-005, does touch upon the
2 history of disclosure in these matters. That history, if I may, I
3 will take a moment to recant because it demonstrates what we say is
4 an approach to disclosure and disclosure obligations by the SPO,
5 which is not characterised of one of constructive engagement but is
6 instead one of evasion. Their approach to disclosure obligation is
7 how to evade it rather than constructively engage with it.

8 At the outset in relation to the scope of Rule 102(3), we
9 submitted that Rule 102(3) of the rules created a multi-stage process
10 which was new and was not reflected by the other international
11 criminal tribunals in this city, and we were right about that,
12 despite the SPO's resistance to it as a proposition. It is a
13 multi-stage process. The first step involving the SPO to provide a
14 detailed notice of any material and evidence in its possession that
15 is relevant to the case.

16 The Court of Appeal, as the Pre-Trial Judge did, agreed with our
17 submissions, that the concept of relevance to the case has to be
18 interpreted broadly, and that the test for relevance for the purposes
19 of that first step is not the test of relevance that has been applied
20 in other international tribunals that do not have that first step.
21 It is a test that is wider than the test of materiality to the
22 preparation of the Defence, which, conflating the various stages in
23 Rule 102(3), the SPO purported to follow and still it seems today
24 maintain, despite the ruling of the Pre-Trial Judge, confirmed by the
25 Court of Appeal.

1 Contrary to the approach adopted by the SPO, relevance to the
2 case, the Court of Appeal held, as we submitted, it was not limited
3 by the scope of the charges against the accused. Specifically,
4 contrary to the firm approach the SPO sought to apply, the process
5 through which the information arrived to the KLA WVA premises was
6 relevant, as we had submitted, from the off. The SPO have provided
7 two versions of a Rule 102(3) notice in the past.

8 The first version, dated 19 February 2021, filing 00133 in
9 Annex 1, had 13 items on it. We said at that stage that it was a
10 paltry effort to comply with the obligations of Rule 102(3), and we
11 were right, as the Pre-Trial Judge ruled. The SPO had prepared that
12 first version with only three items, setting out firmly for the
13 Pre-Trial Judge, making one of their assertions that they wanted the
14 Pre-Trial Judge to accept at face value that it fully satisfied with
15 their disclosure obligations. They were wrong about that.

16 As the Pre-Trial Judge ruled, which led to the addition of a
17 further 171 items, the vast majority of which have, as it happens,
18 been subsequently disclosed to the Defence following the revelation
19 of their existence and content only by that notice that we had to
20 argue for, the material went on a list. Once we had it, we were able
21 to properly argue that it should be disclosed as material or
22 exculpatory, and that's been accepted and we've received it.
23 Material which, if we had left the SPO to their open devices, we
24 would have been completely unaware of.

25 The second and final version to Your Honours' order, as of

1 yesterday at least, the second and final version of the Rule 102(3)
2 notice was again prepared by the SPO on an erroneous basis. Namely,
3 that any material information in the SPO's possession relating to the
4 process through which the information arrived to the KLA WVA premises
5 was not relevant and was not required to be put on the listed -- to
6 be put listed on the Rule 102(3) notice.

7 As Your Honour ruled yesterday, the SPO must not revisit the
8 Rule 102(3) notice in the knowledge that any material information in
9 the SPO's possession relating to the process through which the
10 information arrived at the KLA WVA premises is relevant and must be
11 listed on the Rule 102(3) notice, unless Your Honours authorise
12 otherwise in accordance with the statutory regime.

13 Specifically, the Court of Appeal held, as well as that broad
14 approach, that any material information in the SPO's knowledge or
15 possession relating to the process through which information arrived
16 at the KLA WVA premises is relevant and must be limited, they
17 specifically held that any material in the Prosecution's position,
18 which would fall under Gucati Requests B and C, is relevant and must
19 also be included in the revised notice as paragraph 57, where the
20 Court of Appeal in the judgement held that the Pre-Trial Judge had
21 erred in not requesting the material identified in the Gucati
22 Requests B and C be included on the Rule 102(3) notice.

23 Those requests were as follows -- and I'm going through them,
24 Your Honour, because in the absence of proper notice, and in the
25 absence of a Rule 102(3) notice that has been revised in accordance

1 with Your Honour -- with Your Honours' order, indicating, if
2 necessary, where appropriated redactions are required, complying with
3 the understanding that the golden rule is full disclosure and only
4 the minimum derogation is necessary, the SPO could have done that if
5 they wanted to constructively engage, and at least we would have that
6 that further information as to the extent of this material, how many
7 items it is, what material can be listed on the Rule 102(3) notice.
8 We don't have that and we don't have a fuller application.

9 So I will go through the requests, because it does seem to me
10 it's relevant for the SPO to consider them specifically, because they
11 don't necessarily ask for internal work documents or reports. They
12 ask for the information. And there's a difference between an
13 internal work documentation and the information upon which an
14 internal work product is based. And as I read Rule 106, there is no
15 exclusion from the disclosure obligations of the information upon
16 which such a report is based. The report itself might be protected,
17 because it might have all sorts of things in it, like the opinion of
18 the Specialist Prosecutor, or the belief of the Specialist Prosecutor
19 which, frankly, as long as he keeps it to himself, I'm not interested
20 in in the slightest.

21 But the base information, the facts upon which such a report is
22 prepared is not covered by Rule 106 and, if relevant, should be
23 listed on a Rule 102(3) notice.

24 So we asked, under Gucati Request B: All material held by the
25 SPO, which relates to the origin and provenance of the material

1 contained within the three batches, including material as to
2 authorship and chain of creation from -- custody from creation to its
3 arrival at the KLA WVA HQ.

4 Well, I accept that a report on it might fall within Gucati
5 Request B. But as I say, it's the information underlying the report
6 that we're interested in. Not anyone's opinion on it at the SPO.

7 Gucati Request C: All material held by the SPO --

8 THE INTERPRETER: Could the counsel please slow down for
9 interpretation. Thank you.

10 MR. REES: -- which relates to attempts made by the SPO to
11 identify and trace the individuals making disclosure of the three
12 batches to the KLA WVA HQ.

13 JUDGE SMITH: Counsel, they're asking you, you slow down a bit
14 when you're reading.

15 MR. REES: Sorry. Thank you, Your Honour. I will do my best.
16 Like with pressing the button on the microphone, I may forget Your
17 Honour's exhortation, so please stop me again if I don't slow down.

18 So Gucati Request C was that all material held by the SPO which
19 relates to attempts made by the SPO to identify and trace the
20 individuals making disclosure of the three batches to the KLA WVA
21 headquarters.

22 Again, I accept that there may be some reports that fall within
23 that category, but it's the underlying information that is
24 disclosable and not covered by Rule 106. But the request went
25 further than those categories. They were drafted, of course, at a

1 time when we were deprived of the assistance of a proper Rule 102(3)
2 notice, as the Court of Appeal recognised, and they were drafted at
3 the encouragement of the Pre-Trial Judge who, when he did rule in our
4 favour on the initial Rule 102(3) notice dispute, when at that time
5 there was a 13-item list, the Pre-Trial Judge, in order to expedite
6 proceedings, said to the Defence: When you receive the updated
7 Rule 102(3) notice, and there's material on there that you think
8 should be but isn't, don't worry about the Rule 102(3) notice, come
9 back to us and ask for disclosure of it. And if there's an issue on
10 materiality for disclosure purposes, the Pre-Trial Judge would deal
11 with it at that stage.

12 That's how we got -- we jumped from stage 1 to stage 3, as the
13 Court of Appeal recognised, without properly completing stage 1
14 process and allowing us to properly complete the stage 2 process.
15 But we did do our best to try and be as specific as possible, and the
16 requests incorporated the following.

17 In relation to the material identified as Batch 3, said to be
18 composed of two incomplete copies, counting 244 and 245 pages
19 respectively, of an SPO document pertaining to SPO investigations in
20 official proceedings and which constitutes internal work product
21 dated December 2019 but further references dating to March 2020,
22 which current or former SPO staff members, including investigators
23 and counsel, contributed to its creation. That does not ask for a
24 report or internal work product. It asks for the information.

25 Which current or former SPO staff members, including

1 investigators and counsel, had access to the document electronically.
2 That does not ask for internal work product or memoranda. It asks
3 for information.

4 Which current or former SPO staff members, including
5 investigators and counsel, had access to the document in hard copy
6 form. That does not request any report or internal memoranda or
7 internal work product. It requests information.

8 JUDGE SMITH: Mr. Rees, is it possible for you to wrap up in
9 five minutes? We only have so much time today, and we can't go into
10 tomorrow.

11 MR. REES: Well -- no, I do follow that, Your Honour, and I will
12 try and be as brief as possible. Five minutes will be unlikely. And
13 given that this is an oral application that's been forced upon us
14 without any opportunity for us to make written submissions, I do not
15 have much more I want to say, but I do have some things that I want
16 say, and I will do my best to keep it as concise as possible.

17 JUDGE SMITH: Well, skip to the most important ones then. Thank
18 you.

19 Just a second, Mr. Cadman has something.

20 MR. CADMAN: In the interest of time, and not wishing to repeat
21 anything that Mr. Rees has set out in detail, I'm more than happy to
22 give my time to Mr. Rees so that he can set this out.

23 JUDGE SMITH: He's already into your time.

24 All right. Thank you. Go ahead, Mr. Rees. Please do your
25 best.

1 MR. REES: And I'm grateful to Mr. Cadman, and I will try and be
2 as concise as I can.

3 JUDGE SMITH: I know you will.

4 MR. REES: But I do want to go through this list, because it
5 does seem to us that the SPO -- they do not ever take us up on our
6 invitation to look in detail at these questions, and it does seem to
7 us that they almost ignore it, because they make an application now
8 which doesn't address the decision of the Court of Appeal and the
9 matters that we raised beforehand.

10 We're not asking for internal documents, memoranda, reports.
11 We're asking for information. Was the document password protected?
12 If so, which current or former SPO staff members, including
13 investigators and counsel, had the password?

14 Are all such SPO staff members who had access to the document or
15 had any password still SPO staff members?

16 Does the SPO still retain an electronic copy of the document?
17 Has the metadata on the document been checked for evidence as to the
18 last person to access the document; and, if so, who was that person?

19 Has the SPO identified the computer upon which that document was
20 created?

21 Who is, who are the regular user or users of that or those
22 computers? Where were such devices located?

23 These are questions seeking information, facts. Not reports.
24 Not internal memoranda.

25 Have any current or former SPO staff members been interviewed

1 about the disclosure of the document?

2 Have any current or former SPO staff members been interviewed
3 about the disclosure of the document.

4 Have any electronic devices used or controlled by current or
5 former SPO staff members been interrogated for evidence of disclosure
6 of the document?

7 Have any e-mail accounts or other remote communication
8 facilities used or controlled by former or current SPO staff members
9 been interrogated for evidence of disclosure of the document?

10 Were any hard copies of the documents stored on SPO premises?
11 If so, was there any CCTV coverage of the area or areas of storage or
12 the access routes to said areas? If so, has such CCTV been examined
13 for evidence of access to and from said areas?

14 The Court of Appeal agreed that material is relevant and it's
15 the information that's relevant. Not the report. Not the opinion of
16 the SPO or the comments, internal memoranda. That information is
17 relevant and should be on a Rule 102(3) list.

18 Not restricted to those specific questions, because, of course,
19 all material relating to the process through which the information
20 arrived at the KLA WVA premises is relevant, but it should include
21 specific answers to those requests as set out by the Court of Appeal.

22 I add as well that in -- the Court of Appeal made clear that
23 those requests, being relevant as they are, they need to be reviewed
24 for disclosure, not just in relation to the issue of entrapment but
25 all wider issues. And I can't assist the Panel with that at this

1 stage because I don't have any information on the Rule 102(3) notice
2 to give me a better indication as to what material is there.

3 But if you do go into *ex parte* submissions, the SPO and
4 yourselves will have to try and consider all potential uses, all
5 potential relevances to the Defence, not just in relation to an issue
6 of entrapment.

7 The suggestion of the SPO this morning, I think, as Your Honour
8 put it, an interesting reading of the Court of Appeals decision, that
9 the Court of Appeals decision was final, and disclosure matters are
10 for the pre-trial phase and, therefore, they did absolutely nothing
11 about the failings in disclosure that were clearly identified in the
12 Court of Appeals decision. That again suggests to us -- confirms to
13 us what has become apparent, that the SPO looks at disclosure as
14 something not to engage in but to avoid or evade.

15 The Court of Appeals decision was clearly qualified in that it
16 was based on the information before the Pre-Trial Judge. On that
17 basis, on the basis before him, they said he wasn't wrong to refuse
18 disclosure. That's because we have jumped from stage 1, we'd missed
19 stage 2 without completing stage 1, and the Judge was faced with, I
20 concede now, broad applications for disclosure without the assistance
21 of the Rule 102(3) notice in its proper form.

22 What the Court of Appeal made clear, in simply confining its
23 decision to -- the decision that the Judge ruled on, which is not to
24 make disclosure on the basis of the information before him. The
25 Court of Appeal nevertheless reminded the SPO - it's there in

1 paragraph 53, it's there, of course, in Rule 112 - that the
2 disclosure obligations of the SPO are of a continuing nature. They
3 don't just stop with a Court of Appeal decision. On an interlocutory
4 basis, where the Court of Appeal knew that the matters would go back
5 in the first instance to the Pre-Trial Judge and then on to a
6 Trial Panel with the SPO having continuing disclosure obligations
7 under, *inter alia*, Rule 102(3) throughout the course of the trial
8 and, indeed, after the trial.

9 The Defence should not -- well, I'll put it a different way.
10 The SPO appear content that the Defence continue to bear the burden
11 of identifying in the abstract in the absence of any list which
12 material it requests with specificity, despite the fact that all of
13 the material should already have been placed on the SPO notice. They
14 appear to be happy -- perfectly happy with that and the trial
15 proceeding on that basis.

16 They appear to be perfectly happy with the Defence continuing to
17 be deprived of the benefit of such a notice, with a higher burden
18 unfairly placed upon it to identify, with specificity, material not
19 in its possession and potentially not even within its knowledge. The
20 criticism is clear there in the Court of Appeal decision, but the SPO
21 are perfectly happy, it seems, with the Defence continuing to suffer
22 that deprivation.

23 The SPO appear to be perfectly happy with the Defence continuing
24 to be deprived of a complete first stage of Rule 102(3) of the rules,
25 and any proposition -- repeated today. It was made before the

1 Pre-Trial Judge and repeated today that the listing of items in the
2 Rule 102(3) notice is without object, where it's already apparent -
3 to whom, we don't know - but already apparent that they're not
4 material to the preparation of the Defence. That proposition was
5 raised and the Court of Appeal singularly rejected it.

6 If the obligation under Rule 102(3) is to list all material
7 that's relevant, that's what the SPO does. And the rejection of that
8 proposition, repeated today, is in paragraph 46 of the Court of
9 Appeal's decision.

10 We submit that the SPO should comply fully with the order that
11 Your Honour made yesterday, the revised Rule 102(3) notice, listing
12 all relevant material and information in the possession of the
13 Prosecution, including material relating to the process through which
14 the information the batches arrived at the KLA WVA premises, should
15 be prepared. And that first stage, the very first stage of
16 disclosure, should finally at this late stage be complied with.

17 To the extent that there are then any new requests for
18 disclosure or material from the lists and the determination of them
19 thereafter, that will necessarily follow the completion of stage 1.

20 Under Rule 108, the SPO, again by placing, it seems to us at
21 least from the brief e-mail, primary reliance on Rule 108, the SPO
22 again conflate the principles of notification under Rule 102(3) with
23 the making of disclosure, because Rule 108 applies to material that's
24 otherwise subject to disclosure under Rule 102.

25 Under Rule 108, of course, the material can be withheld in whole

1 or in part. We have not had the assistance of the SPO to tell us
2 whether they do seek the withholding of the information in whole or
3 in part. And, of course, although we had at an earlier stage
4 requested disclosure of this material, I acknowledge the decision of
5 the Court of Appeal Panel, which is that I should wait and hold my
6 fire until I receive the Rule 102(3) notice.

7 So, again, in my respectful submission, we are again at the
8 invitation of the SPO being asked to jump directly to stage 3 of the
9 process, the disclosure questions, because they seek to rely on
10 Rule 108 to authorise non-disclosure.

11 I do not know, because the e-mail we received is silent upon it,
12 whether the Specialist Prosecutor will propose any counterbalancing
13 measures that -- where the Specialist Prosecutor is specifically
14 exhorted to consider under Rule 108(2). Those counterbalancing
15 measures could include the submission of a summary of the information
16 or submission of the information in a redacted form. As I said
17 earlier on, perhaps the most obvious way of dealing with this fairly
18 would have been for the SPO to have taken cognizance of the obvious
19 criticisms in the Court of Appeal Panel, put together an addendum,
20 draft addendum for the Rule 102(3) notice, they could have provided
21 that to us with the proposed redactions marked upon it, and we could
22 have then had a specific argument over those particular redactions,
23 which may have made the process a much more concise and easier to
24 follow and would have allowed us to engage more than in the vague way
25 that we are thus being permitted.

1 So do I not know whether there's any proposed counterbalancing
2 measures to be suggested.

3 In relation to Rule 106, as I said, and as the SPO ignore, it is
4 clear on the face of Rule 106 that as a Trial Panel you have a wide
5 discretion to order a disclosure and notification of such material,
6 even if it does fall within Rule 106.

7 I do note, and this may well have been in Your Honours' mind
8 this morning, when asking Mr. Halling about the disclosure of
9 material into the public domain, that, consistent with the submission
10 I make, that the underlying information behind an internal note,
11 report, or memoranda is not covered by Rule 106 in the way that the
12 report itself might be.

13 Of course, once material has been made public, even if it is in
14 an internal note, that internal note is not covered by Rule 106
15 anymore. And I rely on the authority of the -- I'll spell it.
16 N-i-y-i-t-e-g-e-k-a.

17 And if Your Honours have access to *Archbold: International*
18 *Criminal Courts Practice, Procedure and Evidence*, I think it's the
19 5th edition, Your Honours will see reference to that. And the
20 proposition that, for example, a question put to a witness from an
21 internal note is not an internal note anymore for the purposes of the
22 protection of Rule 70(A) of the rules; I think before the ICTR. But
23 it's at Chapter 7-297 where that is referred to.

24 I am drawing my submissions to a close. But before I do so, I
25 wish to address one aspect of the Court of Appeals decision, and

1 that's the presumption of good faith that's referred to. Any
2 presumption of good faith on the part of the Prosecution when
3 discharging its disclosure obligations is rebuttable. It is not only
4 a rebuttal presumption. And, for example, we say if the Prosecution
5 wilfully refuse to misread the Court of Appeal Panel decision and to
6 deal with the obvious failings that were identified in that
7 judgement, such wilful refusal can rebut such a presumption. As I
8 say, on this point, counsel attempted to resolve this issue through
9 *inter partes* correspondence. It was made perfectly clear in that
10 that the SPO were not seeking to address those failings whatsoever.
11 They wouldn't do it.

12 Moreover, and this is the final point, there is no presumption
13 of competence. That doesn't appear in the rules. The SPO has
14 repeatedly mischaracterised its own disclosure obligations, whether
15 deliberately or inadvertently. It has applied an overly narrow and
16 restrictive approach to disclosure.

17 Firstly, in good faith or otherwise, informing the Court that a
18 13-item Rule 102(3) notice met its disclosure obligations in full.
19 Secondly, in good faith or otherwise, by wrongly dismissing the
20 process by which the batches arrived at the KLA WVA premises as
21 irrelevant.

22 In those circumstances, any bold assertion that is made by the
23 SPO that it does not possess any information on entrapment frankly is
24 meaningless, when the SPO has never set out, for example, what it
25 understands the scope and limits and the effect of the case law of

1 the European Court of Human Rights on police incitement is. It's
2 never set that out. Yesterday, in fact, they told the Trial Panel
3 that it has no legal relevance to the framework of these
4 Specialist Chambers.

5 I do not know, for example whether --

6 JUDGE SMITH: Mr. Rees, I am going to have to insist [Microphone
7 not activated].

8 MR. REES: And I will be -- literally four lines in the notes.

9 JUDGE SMITH: Okay. I am counting.

10 MR. REES: I do not know, for example, whether they accept the
11 proposition that any information they have that any state official
12 was involved in the process by which the batches arrived at the KLA
13 WVA premises is disclosable or would assist us in looking at that
14 circumstantial case on police incitement to support our plea. I've
15 just got no idea whether they do and whether they just reject that
16 and say it's legally irrelevant, as they told the Trial Panel
17 yesterday.

18 So any -- we say that any bold assertion by them on entrapment
19 is worthless. And, of course, we have case law authorities to
20 support us in that proposition, because in Ramanauskas and Lithuania,
21 the reference is in the pre-trial brief, at paragraph 72 of that
22 judgement, they make it clear, for obvious reasons, that a simple
23 denial by the authorities of incitement is not sufficient. It cannot
24 be, for obvious reasons. Because if it was, if that was enough, to
25 take the authority's word for it, it would defeat all pleas of police

1 incitement without anything further.

2 Thank you.

3 JUDGE SMITH: Thank you.

4 [Trial Panel confers]

5 JUDGE SMITH: Judge Gaynor, did you have a question?

6 JUDGE GAYNOR: Well, very, very briefly. I just have a couple
7 of brief ones.

8 Just very briefly. I don't want to say that we're not grateful
9 for your submissions, but your citations to a decision of the Court
10 of Appeal of England and Wales. Could you in the future read out the
11 case name that you're relying upon.

12 MR. REES: I certainly can. I apologise. I'll do that now.

13 JUDGE GAYNOR: No problem.

14 And, secondly, the page of *Archbold on International Criminal*
15 *Courts*. Just -- if you just read it into the record the actual page
16 number that you're relying up.

17 MR. REES: The page number of *Archbold on International Criminal*
18 *Courts* is page 533.

19 JUDGE GAYNOR: All right.

20 MR. REESE: And in relation to the authority from the
21 jurisdiction of England and Wales, it's West [2005] EWCA Crim 517.
22 And I also referred -- or didn't specifically refer to the instrument
23 itself, but I referred, in part, to material that comes from the
24 judicial protocol on the disclosure of unused material in criminal
25 cases issued in December 2013, paragraph 55, which provides the

1 proper notice to Defence in *ex parte* applications should be as
2 specific as the nature of the material allows and is necessary to
3 enable the accused to make focused submissions to the Court.

4 JUDGE GAYNOR: Thank you very much. And very briefly, I think
5 as the Court of Appeal of this Court correctly cited, Ramanauskas is
6 authority for the proposition that the accused must be effectively
7 able to raise an issue of incitement during trial to ensure
8 compliance with Article 6 of the Convention, but it does not appear
9 to be authority for the proposition that a rogue agent gives rise to
10 a grounding of entrapment.

11 No need to get into it right now, because in due course the
12 Presiding Judge will be issuing an oral order, and you're free to
13 provide the Court with any further jurisprudence on the rogue agent
14 argument that you've made.

15 Thank you.

16 MR. REES: Well, I will -- I certainly do submit, and I will, if
17 the effect of the order is to give us an opportunity to make a --
18 further detailed written submissions, I will take -- I will certainly
19 do that. We will look for other authorities. But I will maintain
20 that Ramanauskas is authority that supports the proposition that a
21 rogue agent, a police officer who does not act under the authority of
22 superiors, et cetera, is nevertheless still responsible.

23 JUDGE SMITH: We've all read the decision. And you can make the
24 submission, but we don't need to go over it now, is what we're
25 saying.

1 MR. REES: No.

2 JUDGE SMITH: Okay. Thank you. I wanted to be sure and
3 preserve one minute for the Prosecution.

4 MR. HALLING: Thank you, Your Honour. Before taking my minute,
5 is it possible to go into private session for less than 20 seconds?

6 JUDGE SMITH: I don't know. Tell me down there, Viki? Can we
7 do that quickly?

8 [Private session]

9 THE COURT OFFICER: Your Honour, we are in private session now.

10 JUDGE SMITH: Okay. We are in private session. Go ahead.

11 MR. HALLING: Apologies, Your Honour. It was in relation to the
12 redaction order that we had requested through e-mail, but we
13 understand that a ruling has been made.

14 JUDGE SMITH: Yes.

15 MR. HALLING: So that was all. We can go back to open session.

16 [Open session]

17 THE COURT OFFICER: We are back in open session, Your Honours.

18 MR. HALLING: Thank you. I will try now to keep to a minute.

19 You heard a lot about the history of disclosure litigation in
20 this case. Not all of it is accurate. But for present purposes,
21 where are we right now?

22 This is not about the order instructing the SPO to make
23 submissions. We referenced protective measures. This is another way
24 of describing non-disclosure. Your Honours' order to us yesterday
25 was to talk about redactions to the Rule 102(3) notice. So you

1 understood us correctly as it being a non-disclosure issue.

2 This is not about the e-mail notice that was serially referenced
3 in Mr. Rees's submissions. They've had the e-mail. We apologise for
4 the way it was this morning. They've had the e-mail for hours.
5 They've had our submissions for hours. We're in a different point
6 now.

7 Nor is this about the volume of materials. We did not make any
8 submissions about the volume of materials. The passage quoted is
9 still our position now. This is again not about the status of the
10 Rule 102(3) notice throughout this litigation, and the first one and
11 the second one.

12 I found it revealing, on pages 9 and 10 of the real time
13 transcript, Mr. Rees, in referencing the Rule 102(3) notice, said it
14 was the second and final notice at least until yesterday, which
15 belied an understanding of the Defence that was similar to ours, that
16 the Rule 102(3) notice issue was resolved by the Court of Appeal.

17 When the Gucati Defence says that a single issue was ruled upon
18 in the decision, we wanted to focus on that in particular. That is
19 not what happened in the impugned decision. If the Court of Appeal
20 were ruling on a single issue and it had been resolved in
21 Mr. Gucati's favour, then their appeal would not have been dismissed.
22 The only reason why the appeal was dismissed was because there was a
23 second issue.

24 In the Gucati Defence's request leading up to the impugned
25 decision, they did not say they needed notice in order to make

1 disclosure arguments. If you look at Filing 199, paragraph 61, their
2 relief sought was disclosure. The information requested should be
3 disclosed under Rule 103 or 102(3) or otherwise, at the very least
4 listed on the Rule 102(3) notice. It is only today that they are
5 saying that they needed one to do the other.

6 Where are we right now? We've explained why we've made this
7 application when we have. We have explained that it's under
8 Rule 108. Rule 108 is what gives us the entitlement to make an
9 *ex parte* submission on this matter. We are not skipping steps. As
10 we explained this morning, there is a Rule 108 issue right now, and a
11 Rule 106 issue right now, and we are entitled to give that full
12 information to the Trial Panel.

13 This is not a referendum on the history of this disclosure
14 issue. This is about right now. And what we are requesting now is
15 to have an *ex parte* session with the Trial Panel to make the
16 submissions necessary for Your Honours to rule on our application.

17 JUDGE SMITH: Let me shorten this up. We will grant your
18 request for the *ex parte* session, which we will start as soon as
19 possible.

20 MR. HALLING: Thank you, Your Honour.

21 JUDGE SMITH: Prior to leaving the room to have it set up for
22 the *ex parte* session, I want to read oral orders just in the interest
23 of time that we discussed yesterday and that we are issuing today.

24 So the first oral order, as said yesterday:

25 The Gucati Defence is ordered to file written observations, if

1 any, on the draft order of the conduct of proceedings by 3 September
2 2021.

3 Second oral order:

4 Having received the SPO's request for admission through the bar
5 table, the Panel further orders the SPO to make written submissions
6 on the classification of these bar table exhibits by 6 September
7 2021.

8 The Panel orders the Defence to respond to the bar table motions
9 and the submissions on classification by 10 September 2021. The
10 Defence submissions shall be within a 6.000 word limit.

11 The SPO may reply by 14 September 2021 within a 2.000 word
12 limit.

13 The Panel is satisfied that these written submissions will be
14 sufficient for rendering a decision on the matter, and for this
15 reason it will not hear further oral submissions in this regard.

16 That's the end of the second order.

17 The third oral order:

18 Further to the submissions made during this conference, the
19 Gucati Defence is ordered to provide further jurisprudence, if any,
20 on entrapment by a rogue agent and to file written submissions on the
21 definition of "public interest."

22 By the same token, the Haradinaj Defence is ordered to file
23 written submissions on the legal basis relied upon them in respect of
24 entrapment and to provide any Kosovo legislation on whistle blowers.

25 Both Defence teams are further ordered to file written

1 submissions on the question asked by a member of the Panel, namely,
2 what legal avenues are available to the SPO other than relying on
3 national authorities when inquiring about evidence located on their
4 territory. That's from the draft transcript, page 476, lines 6
5 to 10.

6 The aforementioned submissions are to be consolidated in one
7 filing per Defence team, which shall not exceed 3.000 words, and are
8 to be filed by 6 September 2021. Legislation and list of authorities
9 can be annexed to the filing.

10 That's the end of the third oral order.

11 The fourth oral order:

12 The Panel orders the SPO to submit its request for adding one
13 witness to its witness list by 7 September 2021, 1600 hours. The
14 request shall not exceed 3.000 words. By the same date, the SPO is
15 ordered to disclose any evidentiary material pertaining to the
16 proposed additional witness and to submit a request for their
17 addition to the exhibit list.

18 The Defence is ordered to respond, if it so wishes, during the
19 SPO Preparation Conference.

20 That's the end of the fourth order.

21 The fifth oral order:

22 The Panel orders the SPO to submit a request for adding revised
23 transcripts to its exhibit list by 13 September 2021. The request
24 shall not exceed 3.000 words. By the same date, the SPO is ordered
25 to disclose the relevant evidentiary material if it has not already

1 done so.

2 The Defence is ordered to respond, if it so wishes, by
3 20 September 2021.

4 That's the end of the fifth oral order.

5 The sixth oral order:

6 Further to the submissions made yesterday, the Panel orders the
7 SPO to file its motion to strike Defence witnesses and parts of their
8 testimony from the proposed list by 15 September 2021.

9 The Defence is ordered to respond by 27 September 2021, 1600
10 hours.

11 That's the end of the sixth oral order.

12 The seventh oral order:

13 Further to the submissions of the Haradinaj Defence, the Panel
14 orders that the expert report of its proposed expert witness -
15 namely, Witness 17 on both the Gucati and the Haradinaj witness lists
16 - is submitted by 1 October 2021.

17 The SPO is ordered to file a notice in relation to the expert
18 report within the time limit and for the purposes provided in
19 Rule 149(2) of the Rules.

20 That's the end of the seventh oral order.

21 The eighth oral order:

22 Having heard the parties on their intention to file additional
23 Rule 117 motions, the Trial Panel hereby orders that any other
24 Rule 117 motions are filed by 17 September 2021. Any response
25 thereto shall be filed by 24 September 2021.

1 That's the end of the eighth oral order.

2 The ninth oral order:

3 Having carefully considered the arguments raised by all parties
4 in relation to the SPO request for protective measures for its two
5 proposed witnesses, the Panel hereby denies the request. Written
6 reasons shall follow next week.

7 That's the end of the ninth oral order.

8 The tenth oral order:

9 The Panel reminds the parties of the deadline of 3 September
10 2021 to submit any outstanding translation or verification requests
11 directly to the Registry. Any future translation or verification
12 requests should be submitted as soon as the need is identified.

13 The Panel reminds the parties that the eligibility and
14 prioritisation of the translation requests and the procedure to be
15 followed are governed by the Registry's Practice Direction on
16 Translation and Interpretation, and the Registry Instruction on
17 Requesting Translation, Interpretation, and Verification Services.

18 For verification requests, the Panel directs the parties to
19 follow the procedure set out in the aforementioned Registry
20 instruction. These Practice Directions are to be strictly followed.

21 And, finally, the Panel hereby schedules the SPO Preparation
22 Conference for September 8 and 9, 2021, at 9.30 a.m. A written
23 agenda will follow.

24 Now, we'll have a 30-minute break for Court Management to make
25 the necessary preparation for the *ex parte* session. We will resume,

1 only with the SPO, no later than 3.30. And I ask that we be notified
2 and SPO be notified as soon as it is ready.

3 And we ask the Defence to stay in the building so that you can
4 be recalled, if necessary, following the *ex parte* session.

5 So we will take a break for 30 minutes.

6 --- Recess taken at 3.01 p.m.

7 [Ex parte hearing under separate transcript,
8 pages 606-637]

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1 --- On resuming at 4.44 p.m.

2 JUDGE SMITH: Good afternoon. We're back in open session.

3 For the record, we had an *ex parte* discussion with the SPO on
4 the Rule 102(3) list, and we are going to issue an oral order in this
5 regard at this time.

6 This is the beginning of the oral order:

7 After having considered the arguments of all parties, including
8 those presented by the SPO in *ex parte* session, the Panel decides to
9 amend its oral order issued on 1 September 2021 and orders the SPO to
10 provide to the Panel only an unredacted Rule 102(3) list providing
11 detailed notice of the material enabling a determination of
12 materiality by the Defence.

13 The Panel also orders the SPO to provide, again to the Panel
14 only, a proposed redacted version of the same list.

15 Both of these versions should be submitted to the Panel by
16 tomorrow, 3 September 2021, at 12.00 noon.

17 The next steps will be indicated by the Panel at the SPO
18 preparation conference.

19 That concludes today's hearing, and we will see you on Wednesday
20 next.

21 --- Whereupon the hearing adjourned at 4.47 p.m.

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