

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Jakup Krasniqi

Date: 20 January 2025

Language: English

Classification: Confidential

**Thaçi, Veseli and Krasniqi Defence Reply to SPO Request to Joint Defence
Request for Certification to Appeal the First Oral Order of 4 December 2024
(F02825)**

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I. SUBMISSIONS IN REPLY

1. The SPO Response¹ to the Defence Request² begins by asserting that the Defence Request concerns the conduct of proceedings and witness examination modalities. These are characterised as “discretionary issues” in relation to which the Trial Panel is entitled to deference, with limited appellate intervention.³

2. The Defence Request in fact concerns the Trial Panel’s interpretation of the statutory framework governing SPO disclosure at the KSC. Through the Impugned Decision,⁴ the Trial Panel has approved an SPO-created workaround to the disclosure regime, allowing the SPO to disclose and immediately use materials not included on the SPO Exhibit List, that were not disclosed to the Defence pursuant to Rule 102(1)(b)⁵ by the court-ordered deadline of 17 December 2021. This workaround was created by the SPO incorrectly disclosing materials pursuant to Rule 102(3). Rule 102(3) allows for the disclosure of materials “upon request” of the Defence, which are “deemed by the Defence to be material to its preparation”. The Defence had not requested the documents in question, nor designated them as material to its preparation. This was not a Rule 102(3) disclosure, under any reading of this rule.

3. The SPO has never engaged with this central anomaly. Nothing in the SPO Response addresses that the SPO claims to be disclosing this material “upon request” of the Defence under Rule 102(3), when the Defence has never asked for it. Rather than justifying or explaining its improper reliance on Rule 102(3), the SPO is hoping to continue to get away with it.

¹ KSC-BC-2020-06/F02825, *Prosecution consolidated response to Defence requests for leave to appeal Oral Orders of 4 and 5 December 2024*, 13 January 2025, confidential (“SPO Response”).

² KSC-BC-2020-06/F02774, *Thaçi, Veseli and Krasniqi Defence Request for Certification to Appeal the First Oral Order of 4 December 2024*, 11 December 2024, confidential (“Defence Request”).

³ SPO Response, para. 2.

⁴ KSC-BC-2020-06, *Transcript of Hearing (Oral Order)*, 4 December 2024, confidential, p. 23924, line 21–p. 23926, line 20 (“Impugned Decision”).

⁵ KSC-BD-03/Rev3/2020, *Rules of Procedure and Evidence Before the KSC*, 2 June 2020 (“Rules”).

4. The practical impact of the backdoor which the SPO created and the Trial Panel authorised, is that the SPO is no longer bound by the confines of the SPO Exhibit List, the deadlines in Rule 102(1)(b) of the Rules, or the criteria set by the Trial Panel in its 8 March Decision to govern the SPO's use of documents disclosed outside the applicable deadlines.⁶ This is not procedural, it is an issue of statutory interpretation with consequences for these and future proceedings, for which immediate resolution by the Court of Appeals Panel is required.

5. The SPO Response claims that when documents purportedly acquire relevance during cross-examination, the "reactive" nature of re-examination means that documents can be immediately disclosed (on the basis that the Defence asked for disclosure even where it did not), and used in re-examination.⁷ The SPO's obligation to disclose materials it intends to present under Rule 102(1)(b) in advance of trial is described as being "distinct to from its obligation to notice material [*sic*] it wishes to use during its redirect examination".⁸ As such, SPO re-examination is being presented as an overarching exception to an otherwise applicable regime of SPO disclosure.

6. There are several reasons why the SPO position is legally and procedurally wrong. Taking the Impugned Decision as an example, the document in question was an interview conducted in 2001, and was discoverable at any time by the SPO through a simple open-source search. It was also directly relevant to matters that had been raised with W04401 during the SPO preparation session, during his direct examination, and with prior witnesses. As such, evidence elicited by the Defence during cross-examination did not trigger its use.⁹ This 2001 interview is a useful

⁶ KSC-BC-2020-06/F01352, Trial Panel II, *Decision on Prosecution Request to Amend the Exhibit List and Related Matters*, 8 March 2023 ("8 March Decision"), para. 20.

⁷ SPO Response, para. 6.

⁸ SPO Response, para. 4.

⁹ KSC-BC-2020-06, Transcript of Hearing (Procedural Matters), 3 December 2024, pp. 23265-23269.

example of how the Rule 102(3) backdoor that the SPO has created on the basis of its purported right to be “reactive” to cross-examination, is so easily open to misuse.

7. Next, the SPO unburdens itself of the need to establish good cause for a late amendment to its Exhibit List, or offer submissions on why it did not seek to amend its Exhibit List earlier. In doing so, the SPO circumvents the criteria established by the Trial Panel in the 8 March Decision.¹⁰ The SPO Response attempts to draw a distinction between the 8 March Decision, and the purported SPO right to produce and use documents arising during “re-examination”.¹¹ According to the SPO, the 8 March Decision was limited to Rule 102(1)(b)(i) documents “which the SPO foresees it will rely on in the presentation of its case”.¹² This is precisely the problem. The SPO is relying on the fact that it disingenuously characterised this last-minute disclosure as Rule 102(3) disclosure, to exempt itself from the requirements it would otherwise have to meet. The fact that the SPO has the right to re-examine witnesses cannot serve as a *carte blanche* to circumvent the otherwise rigorous and layered disclosure regime set out in the KSC’s statutory framework.

8. Late SPO disclosure through Rule 102(3), impacts the accused’s right to adequate time and resources, and to notice of the case.¹³ Even if the document is not subsequently admitted, this does not mitigate prejudice to the Defence where the document is used to attempt to undermine Defence cross-examination and its contents read into the record. The propriety of the SPO’s approach warrants appellate examination. The First and Second Issues arise from the Impugned Decision and meet the criteria for certification pursuant to Article 45(2) and Rule 77(2). The Defence reiterates its request that the Trial Panel grant leave to appeal the First and Second Issues.

¹⁰ 8 March Decision, para. 20.

¹¹ SPO Response, para. 6.

¹² SPO Response, para. 6.

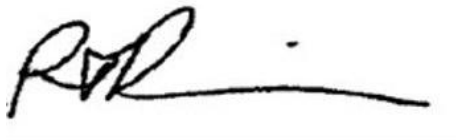
¹³ KSC Law, Article 21(4)(a), (c).

[Word count: 999 words]

Respectfully submitted on 20 January 2025,



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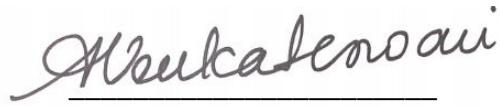
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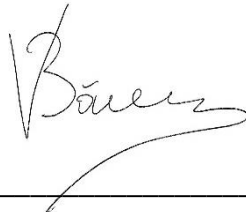
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