



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

In: KSC-CA-2024-03

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 19 December 2024

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Public redacted version of

'Prosecution Response to Defence Request for order to disclose and related requests'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Request,¹ which should be denied. First, the SPO has already disclosed the items in its possession requested by the Defence,² therefore no order to disclose further materials is necessary. Second, as outlined below, any prejudice in this instance is minimal and the Defence misrepresents the prior disclosure record in these proceedings. As such, no further measures are necessary.

II. SUBMISSIONS

A. DISCLOSURE OF W04264'S OTHER STATEMENTS AND TESTIMONIES

2. The Defence request for the SPO to disclose other W04264 materials in its possession is moot, as the SPO promptly disclosed them on 13 December 2024³ for reasons of transparency and completeness, notwithstanding the fact that they bear little, if any, relevance, to this case.

B. NO FURTHER MEASURES ARE WARRANTED

1. Any prejudice is minimal

3. The SPO acknowledges that W04264's SPO Interview⁴ should have been disclosed at an earlier stage. However, as outlined below, W04264's evidence is only marginally relevant to W04733's credibility,⁵ and could have no impact whatsoever

¹ Defence Request for Order to Prosecution to Disclose Rule 103 Material and Finding of Violation of Disclosure Obligations by the Prosecution, KSC-CA-2024-03/F00030, 10 December 2024, Confidential ('Request').

² Request, KSC-CA-2024-03/F00030, paras 1, 12. The SPO did not disclose W04264's testimony in *Thaçi et al.* as, to date, W04264 has not testified in that case.

³ Disclosure 3 in KSC-CA-2024-03, 13 December 2024.

⁴ 054739-TR-ET Parts 1-9 ('W04264's SPO Interview'), Disclosure 2 in KSC-CA-2024-03, 9 December 2024.

⁵ *Contra* Request, paras 14-15.

on the Trial Panel's findings regarding SHALA's criminal responsibility. As such, any prejudice arising from its late disclosure is minimal.

4. W04264's SPO Interview was, in fact, listed in the very first Rule 102(3)⁶ notice provided to the Defence in September 2021, and each version thereafter.⁷ Moreover, the SPO disclosed W04264's testimony in the trial against Sabit GECI to the Defence, pursuant to Rule 103,⁸ on 3 March 2022,⁹ as it was relevant to assess the credibility of one of its witnesses. Against this background, any suggestion that the SPO strategically 'timed' the disclosure of W04264's SPO Interview, or acted in bad faith,¹⁰ is entirely without basis. The fact that the SPO *proprio motu* identified this oversight, and took immediate steps to remedy it, is itself demonstrative of the SPO's cognisance of, and ongoing commitment to, its disclosure obligations.

5. W04264 was not an identified perpetrator or JCE member in either the Indictment or the Pre-Trial Brief; in fact, he is not referenced at all in either the SPO's Pre-Trial or Final Trial Briefs.¹¹ As will be more fully developed in the response to Ground 7 of the Appeal,¹² W04264's role, as found in the Judgment, has no tangible

⁶ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein are to the Rules, unless otherwise specified.

⁷ Annex 1 to Prosecution Rule 102(3) notice, KSC-BC-2020-04/F00069/A01, items 141-142. *See most recently* ANNEX 1 to Prosecution amended Rule 102(3) notice dated 19 October 2022 ("SPO Rule 102(3) Notice"), KSC-BC-2020-04/F00319/A01, items 227-244. Although the description of the items referred to W04264 by his code, rather than by name, they also specifically referenced the 'Legal Department' or 'legal system' of the KLA.

⁸ SITF00015437-00015510 RED2 (in evidence as D00050).

⁹ Disclosure 38 in KSC-BC-2020-04, 3 March 2022. The item had been already disclosed pursuant to Rule 102(3) in Disclosure 25 on 20 November 2021.

¹⁰ Request, paras 19-20.

¹¹ *See* ANNEX 1 to Submission of public redacted version of corrected Indictment, KSC-BC-2020-04 - F00107/A01, 16 November 2021; ANNEX 1 to Submission of Pre-Trial Brief, with witness and exhibit lists - Pre-Trial Brief, KSC-BC-2020-04/ F00135/A01, 28 January 2022; Prosecution Final Trial Brief with confidential Annexes 1 and 3 and public Annex 2, KSC-BC-2020-04/F00818, 25 March 2024, Confidential.

¹² Corrected Version of Defence Appeal Brief with confidential Annexes 1 and 2, KSC-CA-2024-03/F00029COR, 25 November 2024, Confidential ('Appeal Brief'), para.120.

impact on the Trial Panel's findings regarding SHALA's criminal responsibility.¹³ Nor has the Defence argued that it does.¹⁴

6. W04264 provides no evidence relevant to the charged crimes, to the Kukës Metal Factory ('KMF'), or to SHALA's presence at the KMF.¹⁵

7. One prosecution witness,¹⁶ W04733, identified W04264 as a person who participated in his interrogation, on one occasion, together with Xhemshit KRASNIQI (whom numerous witnesses implicated in their detention and mistreatment at the KMF).¹⁷ W04733's further identification of SHALA at the KMF on that day¹⁸ is only one of the many occasions in which SHALA was found to have been present at the KMF.¹⁹ Indeed, SHALA's presence at the KMF was established by the Trial Panel on the basis of multiple sources,²⁰ including SHALA's own statements.²¹ Moreover, the Trial Panel found that W04733's evidence – in all other relevant respects – was corroborated by numerous other witnesses, namely TW4-01, TW4-11, W01448, TW4-08, TW4-06, TW4-07, TW4-09, TW4-05, and the forensic expert evidence provided by Dr Gasior.²² As such, the relevance to W04733's credibility is limited and

¹³ See Trial Judgment and Sentence with one confidential annex, KSC-BC-2020-04/F00847, 16 July 2024, Confidential ('Judgment'), paras 903-913, summarising SHALA's role in the commission of the crimes, para.1025, listing the factors considered by the Trial Panel in assessing SHALA's significant contribution, and paras 1029-1036, summarising the findings concerning SHALA's *mens rea*. *Contra* Request, para.14.

¹⁴ See Appeal Brief, KSC-CA-2024-03/F00029, para.120. While arguing that W04264's role was established solely based on W04733's evidence, the Defence does not explain how this finding impacts any aspect of SHALA's conviction. In the section of Ground 7 of the Appeal Brief entitled 'Decisiveness of Untested Evidence' (paras 137-143), the Defence does not argue that the Trial Panel's findings on W04264 played any decisive role in SHALA's conviction.

¹⁵ *Contra* Request, para.15.

¹⁶ The Defence refers to 'witnesses' in the plural, *see* Request, KSC-CA-2024-03/F00030, paras 14, 18.

¹⁷ Judgment, KSC-BC-2020-04/F00847, paras 346-349.

¹⁸ Request, KSC-CA-2024-03/F00030, para.15.

¹⁹ Judgment, KSC-BC-2020-04/F00847, paras 839-852.

²⁰ Judgment, KSC-BC-2020-04/F00847, paras 836, 840-852.

²¹ Judgment, KSC-BC-2020-04/F00847, para.873.

²² Judgment, KSC-BC-2020-04/F00847, para.180.

tangential at best, and there can be no impact on the Panel's findings as to SHALA's criminal responsibility.

8. Notably, at trial, the Defence did not question any witness about W04264's presence at the KMF, even when TW4-01 mentioned W04264 during his testimony.²³ The Defence claims that it could have used W04264's evidence to question [REDACTED], without explaining on what issues, and what information these witnesses could have provided in relation to W04264.²⁴

9. Finally, to the extent the Defence considers that W04264's SPO Interview assists its case, remedies remain open for it to pursue.²⁵

2. The Defence misrepresents the record in this case

10. In requesting the Panel to take measures under Rule 110, the Defence claims that the SPO has 'continuously failed to comply with its disclosure obligations in this case.'²⁶ This statement is unsupported and untrue.

11. In the Request, the Defence cites only to its own filings, namely the Urgent Motion and the Appeal, which in turn almost exclusively rely on previous Defence submissions.²⁷ The Trial Panel has already considered and addressed these claims,

²³ Transcript, Trial Hearing (TW4-01), 5 June 2023, p.1844.

²⁴ [REDACTED].

²⁵ See e.g. Rule 181.

²⁶ Request, KSC-CA-2024-03/F00030, para.20.

²⁷ Request, KSC-CA-2024-03/F00030, para.20, n.20, *citing* Defence Urgent Motion for Suspension or Extension of Time to File its Appeal Brief, KSC-CA-2024-03/F00026, 18 November 2024, Confidential, paras 1, 14, 16 and Appeal Brief, KSC-CA-2024-03/F00029COR, paras 170-171. In paragraph 170 of the Appeal Brief, the Defence references the Defence Final Trial Brief with Annex 1, KSC-BC-2020-04/F00821, 26 March 2024, Confidential ('Defence Final Trial Brief'), paras 294-300, where it relies again on its own submissions, with the exception of one instance (para.296) where the Pre-Trial Judge found that an exculpatory document had been disclosed late, and granted the Defence additional time before transmitting the case to the Trial Panel. The Defence suffered no prejudice as a consequence of this disclosure, which took place more than seven months before the start of trial.

where it found *inter alia* that they were premised upon ‘the Defence misrepresent[ing] or ignor[ing] the legal framework for disclosure before the Specialist Chambers’.²⁸

12. The very few and isolated instances in question – some of which pertain to evidence which was ‘not necessary for the determination of the truth, and [where] *no prejudice* was caused to the Defence’²⁹ – entirely undermine the Defence’s attempt to claim there has been a ‘pattern’ of conduct warranting additional remedies.

13. The SPO has always discharged its disclosure obligations in this case in good faith. The very limited instances at issue caused no prejudice to the Defence, and were immediately and *proprio motu* remedied as soon as the SPO became aware of them. These are relevant considerations when assessing a request to impose measures pursuant to Rule 110.³⁰ Under these circumstances, it is unnecessary for the SPO to be ordered to conduct a further review of its evidentiary holdings. Indeed, noting the existing requirements of Rule 179(5), such a request serves no additional purpose at this time.

IV. CONCLUSION

14. The late disclosure of W04264’s SPO Interview was unintentional, as demonstrated by its inclusion in the SPO’s very first Rule 102(3) Notice and by the

²⁸ Judgment, KSC-BC-2020-04/F00847, paras 44-47; Defence Final Trial Brief, KSC-BC-2020-04/F00821, paras 294-300.

²⁹ Decision on the Defence request for leave to reopen its case, KSC-BC-2020-04/F00813, 19 March 2024, Confidential (‘Reopening Decision’), para.21 (*emphasis added*). The materials found to have been disclosed late in Decision on Defence’s Urgent Request for Suspension or Extension of Time to File its Appeal Brief, KSC-CA-2024-03/F00028, Public, concern the same events as those found to be of limited relevance in the Reopening Decision, KSC-BC-2020-04/F00813 (*see* Prosecution Response to Defence urgent request for suspension or extension of time to file its Appeal Brief, KSC-CA-2024-03/F00027, 19 November 2024, Confidential, para.5).

³⁰ *Specialist Prosecutor v. Thaçi et al.*, Decision on Joint Defence Request for a Finding of Disclosure Violation Regarding W04714’s Evidence, KSC-BC-2020-06/F01796, 15 September 2023, para.19.

disclosure of other exculpatory materials of this witness. Moreover, it was proactively identified and then immediately remedied by the SPO.

15. Throughout the entirety of the proceedings the very limited instances of late disclosure by the SPO in this case have caused no prejudice to the Defence, and any prejudice stemming from the late disclosure of W04264's SPO Interview is minimal. On this basis, no measures under Rule 110 are warranted.

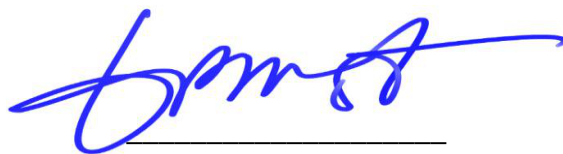
V. CLASSIFICATION

16. This filing is classified as confidential to protect the integrity of other proceedings before the Specialist Chambers, as it contains references to a witness who is scheduled to testify in another case, but has not yet given his testimony.

VI. RELIEF REQUESTED

17. For the foregoing reasons the SPO respectfully request the Appeals Panel to:
- a. declare the request for the disclosure of W04264's other materials as moot;
and
 - b. reject the remainder of the Request.

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Kimberly P. West

Specialist Prosecutor

Thursday, 19 December 2024

At The Hague, the Netherlands.