



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-05
The Prosecutor v. Salih Mustafa

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 16 February 2021

Language: English

Classification: Public

**Public Redacted Version of
Decision on Disclosure and on Specialist Prosecutor's Request for Redactions**

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Julius von Bóné

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 23(1) and 39(1), (3), (11), and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 80, 95(2)(b) and (h), 102, and 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 9 October 2020, the Pre-Trial Judge issued the "Framework Decision on Disclosure of Evidence and Related Matters" ("Framework Decision on Disclosure"), in which he set out the principles governing disclosure of evidence between the Parties, set out time limits for the Specialist Prosecutor's Office ("SPO") to meet its disclosure obligations, and adopted the redaction regime applicable to the present case.²
2. On 1 February 2021, during the fourth status conference,³ the SPO indicated to the Pre-Trial Judge that it may disclose to the Defence the evidence of one additional witness to be relied on at trial.⁴ It further indicated that an updated detailed notice of Rule 102(3) material would be provided to the Defence by 15 February 2021.⁵
3. On 8 February 2021, pursuant to an order by the Pre-Trial Judge,⁶ the SPO submitted further information concerning the status of disclosure.⁷

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public.

³ KSC-BC-2020-05, F00070, Pre-Trial Judge, *Order Setting the Date for the Fourth Status Conference*, 26 January 2021, public, para. 15(a).

⁴ KSC-BC-2020-05, Transcript, 1 February 2021 ("1 February 2021 Transcript"), confidential, p. 126, line 23 to p. 127, line 4.

⁵ 1 February 2021 Transcript, p. 127, line 24 to p. 128, line 12.

⁶ KSC-BC-2020-05, F00073, Pre-Trial Judge, *Order for Further Submissions on Disclosure*, 4 February 2021, public, paras 11, 14(a).

⁷ KSC-BC-2020-05, F00074, Specialist Prosecutor, *Prosecution's Further Submissions on Disclosure* ("Submissions on Disclosure"), 8 February 2021, public.

4. On 10 February 2021, the SPO submitted its “Request for Redactions to Certain Parts of [REDACTED]’s Transcripts” (“Request”).⁸ The Defence did not submit any response to the Request.

5. On 15 February 2021, the SPO submitted the “Prosecution’s Updated Rule 102(3) Notice”, informing the Defence of new material disclosable under Rule 102(3) of the Rules.⁹

II. APPLICABLE LAW

6. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in possession of the SPO which are for or against the Accused shall be made available to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

7. Pursuant to Rule 102(1)(b) of the Rules, within a time limit set by the Panel, and no later than 30 days prior to the opening of the Specialist Prosecutor’s case, the SPO shall make available to the Defence the following material: (i) the statements of all witnesses whom the SPO intends to call to testify at trial, in a language the Accused understands and speaks; (ii) all other witness statements, expert reports, depositions, or transcripts that the SPO intends to present at trial; and (iii) the exhibits that the SPO intends to present at trial.

8. Pursuant to Rule 102(2) and (4) of the Rules, any statements of additional SPO witnesses, which have not been disclosed within the time limit pursuant to

⁸ KSC-BC-2020-05, F00076, Specialist Prosecutor, *Request for Redactions to Certain Parts of [REDACTED]’s Transcripts*, 10 February 2021, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*. A confidential redacted version was filed on 10 February 2021, F00076/CONF/RED.

⁹ KSC-BC-2020-05, F00080/COR, Specialist Prosecutor, *Corrected Version of Prosecution’s Updated Rule 102(3) Notice (“Updated Notice”)*, 15 February 2021, public, with Annex 1, confidential.

Rule 102(1)(b) of the Rules, and whom the SPO intends to call to testify at trial, shall be made available to the Defence as soon as possible, in a language the Accused understands and speaks, and shall be accompanied by reasons for late disclosure.

9. Pursuant to Rule 102(3) of the Rules, the SPO shall disclose to the Defence, upon request and without delay, any statements, documents, and photographs and allow inspection of other tangible objects in the custody or control of the SPO, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused.

10. Pursuant to Article 23(1) of the Law and Rules 80(1) and 108(1)(b) of the Rules, a Panel may order, *proprio motu* or upon request, appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings, as well as other persons at risk on account of testimony given by witnesses.

11. Pursuant to Rules 80(4)(a) and 108(1)(b) of the Rules, such measures may include the redaction of names and other identifying information, in order to prevent disclosure to the Accused and the public, where necessary, of the identity and/or whereabouts of a witness, a victim participating in the proceedings or of a person related to or associated with them.

12. Pursuant to Rule 108(3) and (4) of the Rules, appropriate counterbalancing measures may be adopted, *proprio motu* by the Panel or upon request of a Party, to ensure the Accused's right to a fair trial.

III. SUBMISSIONS

A. RULE 102(2) MATERIAL AND REQUEST FOR NON-STANDARD REDACTIONS

13. The SPO submits that it will disclose to the Defence English and Albanian versions of the transcript and related official note of a recent SPO interview with an additional witness (“Additional Witness”) the SPO intends to call to testify at trial.¹⁰ It avers that: (i) it had previously indicated that limited investigative steps were yet to be taken in the present case, as a result of which the Additional Witness was located and contacted in a Third State, with the assistance of the authorities of that state; and (ii) his interview was completed in the last week of January 2021, following the necessary arrangements.¹¹

14. The SPO further requests authorisation to disclose the transcripts of the Additional Witness’s SPO interview (“Interview”) in redacted form.¹² It submits that a small number of redactions are strictly necessary [REDACTED].¹³ [REDACTED].¹⁴

B. RULE 102(3) MATERIAL

15. With regard to the updated detailed notice of Rule 102(3) material, the SPO submits that the newly added items consist of material related to three recently conducted SPO interviews, for which transcripts have only recently become

¹⁰ Submissions on Disclosure, para. 3. In addition to such disclosure under Rule 102(2) of the Rules, the SPO also indicates that, in addition to the items disclosed to the Defence under Rule 102(1)(b) of the Rules in November and December 2020, in compliance with the time limit set out in the Framework Decision on Disclosure, it also: (i) disclosed one additional item under Rule 102(1)(b) on 29 January 2021; and (ii) expects to disclose eleven additional items under the same rule by 15 February 2021, seven following the identification of their potential utility during the preparation of its Pre-Trial Brief and four following verification of their Rule 107 clearance status (Submissions on Disclosure, paras 2-4). The latter 11 items were disclosed on 12 February 2021.

¹¹ Submissions on Disclosure, para. 5.

¹² Request, paras 2, 6.

¹³ Request, paras 2-4

¹⁴ Request, paras 2, 6.

available.¹⁵ Should the material be requested by the Defence, the SPO anticipates requesting authorisation for the application of protective measures.¹⁶

IV. DISCUSSION

A. DISCLOSURE

1. Rule 102(2) Material

16. The Pre-Trial Judge recalls that the Rules mandate the Specialist Prosecutor to disclose Rule 102(1)(b) material within the time limit set by the Panel. Such time limit may be set by the Panel to allow the completion of disclosure no later than 30 days prior to the opening of the Specialist Prosecutor's case. According to the Framework Decision on Disclosure, in the present case, the disclosure of Rule 102(1)(b) material to the Defence was to be completed by Tuesday, 1 December 2020,¹⁷ as originally proposed by the SPO.¹⁸ The Pre-Trial Judge takes note of the reasons provided by the SPO for the late disclosure of the Additional Witness's evidence. Considering further the specificities of the case, the size of the evidentiary record, and the current stage of the proceedings, the Pre-Trial Judge finds that the disclosure of the Additional Witness's evidence under Rule 102(2) of the Rules does not cause any undue prejudice to the Defence.

17. In order to ensure the expeditious preparation of the case for trial, the Pre-Trial Judge considers it appropriate to set Friday, 19 February 2021, as the deadline for the SPO to disclose to the Defence the material related to the Additional Witness, as further specified in Section IV.B. below.

¹⁵ Submissions on Disclosure, para. 8.

¹⁶ Submissions on Disclosure, para. 9.

¹⁷ Framework Decision on Disclosure, paras 49, 90(c).

¹⁸ KSC-BC-2020-05, Transcript, 5 October 2020 ("5 October 2020 Transcript"), public, p. 32, line 20 to p. 33, line 1.

2. Rule 102(3) Material

18. The Pre-Trial Judge recalls that, according to the Framework Decision on Disclosure, the time limit for providing the Defence with a detailed notice of evidence falling under Rule 102(3) of the Rules was Tuesday, 1 December 2020,¹⁹ as originally proposed by the SPO.²⁰ Noting the reasons provided by the SPO for the provision of an updated detailed notice and in order to ensure the expeditious preparation of the case for trial, the Pre-Trial Judge also considers it appropriate to set the following deadlines as concerns disclosure of Rule 102(3) material. The Defence shall indicate to the SPO by Monday, 22 February 2021, which items among those newly added to the detailed notice under Rule 102(3) of the Rules²¹ it seeks to have access to. If the material does not require redactions or requires standard redactions,²² the SPO shall disclose or provide access to the selected material within two days of the Defence's indication. Should the Rule 102(3) material require non-standard redactions, the SPO shall make a prompt request for protective measures to the Pre-Trial Judge, no later than Friday, 26 February 2021. In accordance with the Framework Decision on Disclosure, the SPO shall submit a strictly confidential and *ex parte* as well as a confidential redacted version of any such request for protective measures and any response or observations in relation thereto shall be submitted within five days of notification.²³ Upon notification of the decision of the Pre-Trial Judge, the SPO shall then disclose or provide access to the Defence to the material within two days. Should the SPO wish to dispute the materiality of the evidence indicated by the Defence, it shall promptly seize the Pre-Trial Judge, also by Friday, 26 February 2021.

¹⁹ Framework Decision on Disclosure, paras 52, 90(e).

²⁰ 5 October 2020 Transcript, p. 37, line 18 to p. 38, line 1.

²¹ Updated Notice, footnote 4.

²² Framework Decision on Disclosure, para. 86.

²³ Framework Decision on Disclosure, para. 88.

B. NON-STANDARD REDACTIONS

19. The Pre-Trial Judge recalls the legal test for non-disclosure of information to the opposing Party, in particular identifying information related to witnesses whose identity must be withheld from the opposing Party, as set out in the Framework Decision on Disclosure.²⁴

20. Regarding the existence of an objectively justifiable risk, the Pre-Trial Judge [REDACTED].²⁵ [REDACTED].

21. Regarding the necessity of the requested measure, having reviewed the Interview, the Pre-Trial Judge is of the view that the limited redactions proposed by the SPO are necessary [REDACTED] as there are no less restrictive protective measures available.

22. Regarding the proportionality of the requested measure, the Pre-Trial Judge [REDACTED],²⁶ [REDACTED]. [REDACTED]. The Pre-Trial Judge also notes that any difficulties faced by the Defence in its investigations and the preparation of its cross-examination can be taken into account by the relevant Trial Panel when scheduling the testimony of the relevant witnesses.²⁷ Moreover, the Accused and his Counsel will have access to the Additional Witness's complete evidence and testimony in the courtroom.

23. These are appropriate counterbalancing measures, in the present circumstances, to uphold the Accused's rights under the Law. Accordingly, the requested measures are proportionate.

²⁴ Framework Decision on Disclosure, para. 76.

²⁵ [REDACTED].

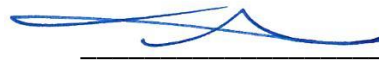
²⁶ See *supra* para. 17.

²⁷ Similarly, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Trial Chamber, [Decision on Prosecution's Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532, and Variation of Protective Measures for KDZ489](#), 5 June 2009, para. 15.

V. DISPOSITION

24. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **GRANTS** the Request;
- b. **AUTHORISES** the SPO to disclose to the Defence, by **Friday, 19 February 2021**, the material listed in Annex 1 to the Request with the proposed redactions;
- c. **ORDERS** the Defence to indicate to the SPO, by **Monday, 22 February 2021**, which items, among those newly added to the detailed notice under Rule 102(3) of the Rules, it seeks to have access to by way of disclosure or inspection;
- d. **ORDERS** the SPO, on the basis of any Defence indication as referred to under point (c) above, to disclose or provide access to the selected material that does not require redactions or that requires standard redactions, **within two days of the Defence's indication**;
- e. **ORDERS** the SPO, on the basis of any Defence indication as referred to under point (c) above, to file any request for protective measures of selected material by **Friday, 26 February 2021**;
- f. **ORDERS** the SPO, following the Pre-Trial Judge's decision on any request for protective measures as referred to under point (e) above, to disclose or provide access to the Defence to the material that any such request for protective measures relates to, **within two days of notification of the Pre-Trial Judge's decision thereon**; and
- g. **ORDERS** the SPO, on the basis of any Defence indication as referred to under point (c) above, to seize the Pre-Trial Judge by **Friday, 26 February 2021**, should it dispute the materiality of the evidence indicated by the Defence.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Tuesday, 16 February 2021

At The Hague, the Netherlands.