

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

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 8 March 2021

**Language:** English

**Classification:** Public

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**Thaçi Defence Request for Orders related to Disclosure**

*With Confidential Annex 1*

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hashim Thaçi**

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**Counsel for Kadri Veseli**

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Venkateswari Alagendra

## I. INTRODUCTION

1. Defence pre-trial preparations are being significantly hampered by the approach taken to disclosure by the Specialist Prosecutor's Office ("SPO"). While some of these concerns were recently discussed at the third status conference held on 16 February 2021,<sup>1</sup> the defence for Mr Hashim Thaçi ("defence") considers that the Pre-Trial Judge's intervention is now warranted at this stage to minimise the prejudicial impact of the SPO's disclosure practices and failings on the defence's ability to analyse the evidence, create investigation plans and deploy resources in the most efficient and effective manner.

## II. APPLICABLE LAW

2. Pursuant to Article 21(6) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, all material and relevant evidence or facts in the 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.

3. Rule 102 (1)(b) and (3) of the Rules of Procedure and Evidence ("RPE") provide that:

"(1) Subject to the provisions of Rule 105, Rule 107 and Rule 108, the Specialist Prosecutor shall make available to the Defence and, where applicable, Victims' Counsel:

(...)

(b) within the time limit set by the Panel, and no later than thirty (30) days prior to the opening of the Specialist Prosecutor's case:

(i) the statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial;

(ii) all other witness statements, expert reports, depositions, or transcripts that the Specialist Prosecutor intends to present at trial; and

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<sup>1</sup> KSC-BC-2020-06/F00194, Thaçi Defence Submissions for Third Status Conference, 10 February 2021, paras. 9-10; KSC-BC-2020-06, Status Conference, 16 February 2021, pp 237-241.

(iii) the exhibits that the Specialist Prosecutor intends to present at trial.

The statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial shall be made available in a language the Accused understands and speaks.

(...)

(3) The Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the materiality of the information exist" (emphasis added).

4. Pursuant to Rule 103 of the RPE, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may affect the credibility or reliability of the Specialist Prosecutor's evidence or suggest the innocence or mitigate the guilt of the accused.

5. Pursuant to Rule 95(2)(b) of the RPE, after the initial appearance of the accused, the Pre-Trial Judge shall set time limits for disclosure of evidence and take any measure to ensure timely disclosure. Indeed, "adopting a system that ensures efficiency of the disclosure process is fundamental for the Pre-Trial Judge to achieve a balance between the duty to safeguard certain interests, including the protection of witnesses, participating victims, and other persons at risk, and the obligation to uphold the rights of the Accused under Article 21 of the Law."<sup>2</sup>

6. Thus, the SPO, as prosecutor, "is bound to exercise his or her duties to disclose both inculpatory and, in particular, exculpatory evidence in good faith"; it must "fulfil its disclosure obligations in an organised, comprehensible, useful and effective manner so as to ensure delays are minimised and the accused's fundamental rights to

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<sup>2</sup> KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020 ("Framework Decision"), para. 46.

a fair trial are respected.”<sup>3</sup> Moreover, “when there is a voluminous amount of material to be properly categorised, the Prosecution cannot, for all practical purposes, throw up its hands but must establish a suitable process for reviewing and disclosing documents in batches as appropriate.”<sup>4</sup> Rather, the SPO is expected “to take appropriate steps going forward - such as maintaining a 'correspondence log' or something similar for communications relating to a witness' evidence - to ensure it can meet its disclosure obligations under the Rules in an appropriate and timely manner.”<sup>5</sup>

7. In the current case, the SPO has been ordered, *inter alia*, to disclose any material falling under Rule 102(1)(b) and Rule 103, which does not require redactions, as soon as practicable and on a rolling basis and to complete the disclosure of all material falling under Rule 102(1)(b) by 31 May 2020.<sup>6</sup> The Pre-Trial judge has previously stressed that “such deadlines are indicative of the minimum notice only. When possible, the disclosing Party should endeavour to disclose the material ahead of the established deadlines, so as to allow proper preparation by the receiving Party.”<sup>7</sup> He further emphasised that “either Party shall ensure that the disclosed evidence is complete”<sup>8</sup> and “disclosed in English, the working language of the proceedings, as determined in accordance with Article 20 of the Law and Rule 8(3) of the Rules.”<sup>9</sup>

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<sup>3</sup> STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/PTJ, Decision on the Sabra Defence’s First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012, para. 32; STL, *Prosecutor v Ayyash et al*, STL-11-01/T/TC, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017, para. 103.

<sup>4</sup> *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017, para. 103.

<sup>5</sup> STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/PTJ, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017, para. 103.

<sup>6</sup> Framework Decision, para. 68 and p. 39. The Pre-Trial Judge has further ordered the SPO to notify the Defence and the Pre-Trial Judge, by way of a filing, of all open-source material in relation to which it wishes to be exempted from disclosure under Rule 103. See Framework Decision, para. 67.

<sup>7</sup> Framework Decision, para. 52.

<sup>8</sup> Framework Decision, para. 53.

<sup>9</sup> Framework Decision, para. 75.

### III. SUBMISSIONS

8. Having received 12 disclosure packages to date,<sup>10</sup> the defence has identified the following recurring disclosure problems which are frustrating its efforts to investigate the case in an ordered and appropriate manner:

- a. the consistent failure to provide complete witness interview materials; and
- b. the consistent failure to provide witness numbers for documents and materials relating to witnesses whose identities have been withheld from the defence.

9. In order to demonstrate the pervasive nature of the above problems, the defence has prepared a table which provides a number of concrete examples.<sup>11</sup> This table does not attempt to document all such examples of the problems identified, but is merely illustrative of them.

#### A. FAILURE TO PROVIDE COMPLETE WITNESS INTERVIEW MATERIALS

10. Disclosure to date consists mainly of interview transcripts and statements, most of which are of significant length. The problem proving the most prejudicial to defence preparations is that this disclosure is incomplete, contrary to the Framework Decision.<sup>12</sup> More specifically, and as illustrated in the appended table, the SPO is repeatedly failing to disclose all the documents and material to which a witness is referred during the course of interview. This failure extends even to the interviews of the accused. The missing materials comprise, *inter alia*, prior statements,<sup>13</sup> drawings, maps, photographs, reports and videos.

11. Plainly, all the materials referred to by a witness during the course of their interview are integral to that witness' evidence. As they refer to, and are questioned

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<sup>10</sup> Disclosure packages 7, 8, 9, 10, 11, 12, 13, 16, 17, 20, 21, 22.

<sup>11</sup> See Annex 1 hereto.

<sup>12</sup> Framework Decision, para. 53 which requires that "the disclosed evidence is complete."

<sup>13</sup> As is clear from the table provided in Annex 1, most witnesses have multiple prior statements.

about the material, it constitutes part of the witness' narrative.<sup>14</sup> Without access to the material, a full and proper understanding of that witness' evidence (including an assessment of his/her credibility) is difficult or impossible to reach. For example, how can the defence understand a witness' answers to questions about a prior statement he or she gave unless that prior statement is disclosed? Or, how can the defence make sense of an SPO interview with Mr Thaçi largely concerned with discussion of KLA communiqués unless the communiqués are disclosed to the defence? Similarly, photographs of individuals shown to a witness should be disclosed as they form an integral part of their evidence. This should be done even when the witness makes no identification - the fact that they do not recognise an individual could be as significant as if they do.

12. The result of this failure to disclose documents and material shown to a witness is that the disclosed interview transcripts and statements are incomplete. Self-evidently, if the witness interview materials are incomplete, they will have to be reviewed again once the missing material is disclosed. The time and effort required to do so, particularly given the length of interviews, should not be underestimated. Incomplete disclosure also has a profound effect on the timing of investigations as the defence is understandably reluctant to embark on investigating a particular witness in a piecemeal manner. To investigate a witness before the relevant material is

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<sup>14</sup> See, for instance, *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017, para. 12:

*"12. The Trial Chamber has identified the following general disclosure principles under international criminal law procedural law:*

*(i) The Prosecution has an obligation to disclose witness statements under the Rules equivalent to Rule 110 (A) (ii);*

*(ii) All stages of the preparation of a 'witness statement' can be important, as they enable the Chamber and the opposing Party to know how a witness' version has evolved;*

*(iii) It is not just the final signed witness statement which is subject to disclosure; questions and answers, investigator's notes and emails can also constitute 'witness statements' under Rule 110 (A) (ii);*

*(iv) The exemption from disclosure under the Rules equivalent to Rule 111 is confined to what has been created by a Party and its agents. The rule has no application to witness statements, which are not the Party's work product but are the witness' product;*

*(...)"*

provided is highly impractical as it may mean that further and repeated missions will be necessary. It will also have serious resource implications.

13. This failure to disclose extends to the material on which the accused is questioned in their interviews.<sup>15</sup> For example, many of the KLA communiqués shown and discussed in interview with Mr Thaçi remain undisclosed to the defence. The interviews make little sense without them. What possible reason can there be for their not having been disclosed by now? Protective measures do not enter into it. Surely the SPO understand that they have a duty to provide the interviews in a comprehensible form. So why has the SPO not provided a sensible disclosure package?

14. On 15 February 2021, the defence asked the SPO to disclose all exhibits numbered and listed in the four accused's interview transcripts, as well as all KLA communiqués in the SPO's possession and in particular those discussed with Mr Thaçi. The SPO replied on 16 February 2021 that it will review these interviews and will disclose any outstanding exhibits used, as part of the ongoing disclosure process 'based on the Framework Decision' and nominating, presumably sheltering behind the Framework Decision, the 31<sup>st</sup> May. But why should the defence have to wait a further three months in order to have basic disclosure relating to an accused's interviews? Mr Thaçi's interviews run to some 700 pages. To have to return to them again and again because of inadequate disclosure is no way to have to prepare a case.

15. A further problem arising from the SPO's system of disclosure relates to ERN numbers. The ERN number is the key constant in identifying documents. Yet, when an accused or a witness is shown an exhibit during an interview conducted by the

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<sup>15</sup> See, *inter alia*, Annex 1, 071840-TR-ET Part 5, transcript of SPO interview of Mr Thaçi dated 13 January 2020, referring to Exhibits 2, 4, 5 and 6, not disclosed.



SPO, the SPO regularly either fails to provide an ERN number for such exhibit,<sup>16</sup> provides a wrong ERN number, or provides an incomplete ERN number.<sup>17</sup> In any case, the defence are unable, or able only with difficulty and time, to trace documents. This is placing a further burden on defence resources and should simply not happen.

16. The defence has not had this experience at other international courts and tribunals, at least not in such a pervasive and systematic manner. It appears to be unique to this case and the defence is unsure why this is so. What is so different about this case that the SPO cannot ensure that disclosure in relation to each witness interview, including the accused, is complete and to discharge its disclosure obligations in an “organised, comprehensible, useful and effective manner”?

17. In so far as the SPO’s above approach might be rooted in protection issues,<sup>18</sup> then non-disclosure of the materials at issue is excessive. If there are objectively justified security concerns, then these can be addressed by the application of redactions pursuant to the Pre-Trial Judge’s pre-approved categories and in the usual manner.<sup>19</sup> Non-disclosure should not be the default.

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<sup>16</sup> See, for instance, Annex 1, 076563-TR-ET Part 6, Transcript of SPO Interview with Mr Thaçi, dated 14 July 2020, referring to exhibit 17, for which no ERN is given; 076563-TR-ET Part 13, Transcript of SPO Interview with Mr Thaçi, dated 15 July 2020, referring to exhibit 34, for which no ERN is given; 076563-TR-ET Part 14, Transcript of SPO Interview with Mr Thaçi, dated 15 July 2020, referring to exhibit 35, for which no ERN is given; 076563-TR-ET Part 18, transcript of SPO Interview with Mr Thaçi, dated 16 July 2020, referring to exhibits 40 and 24, for which no ERN are given.

<sup>17</sup> See, for instance, 071840-TR-ET Part 5, transcript of SPO Interview of Mr Thaçi, dated 13 January 2020, referring to exhibit 3, communique 28, allocated ERN U0162666 pursuant to the interview but disclosed as SPOE00209303-00209303 and SPOE00209303-SPOE00209303-ET Revised. See also 071840-TR-ET Part 6, transcript of SPO Interview of Mr Thaçi, dated 13 January 2020, referring to:

- Exhibit 7, Communique 42, allocated ERN U0162707 through -708 pursuant to the interview, but disclosed as IT-04-84 P00966 and IT-04-84 P00966.E;
- Exhibit 8, Communique 47, allocated ERN U0081614 pursuant to the interview, but disclosed as U008-1614-U008-1614-ET Revised and U008-1614-U008-1614-AT;
- Exhibit 9, relating to an interview of Mr Thaçi in 2004, allocated ERN U0081968 through U0081979 pursuant to the interview, but disclosed as U008-1968-U008-1979 and U008-1957-U008-1967.

<sup>18</sup> See KSC-BC-2020-06, Status Conference, 16 February 2021, p. 236, l. 6-10.

<sup>19</sup> See Framework Decision, paras. 94-98.



18. Related to the foregoing request to be provided with complete witness interview materials, is the request for disclosure of all audio/video recordings relating to the witness and accused interviews disclosed to date and, indeed, going forward. Disclosure of these recordings permits the defence to check the accuracy of the transcripts and to conduct a full assessment of the witness.

B. FAILURE TO PROVIDE WITNESS NUMBERS

19. The second recurring disclosure problem identified by the defence concerns the SPO's failure to provide witness numbers for certain documents and materials. This problem arises where the identity of a witness has been redacted and the corresponding witness number is not provided in the metadata. In this situation, the defence is simply in possession of a disclosed document with no ability to link that document to any witness or other linked documents and translations. The defence understands that a witness' identity will only be withheld pursuant to an order of the Pre-Trial Judge.<sup>20</sup> Therefore, it is reasonably anticipated that the witness at issue will have been allocated a witness number. The SPO should be ordered to provide this number when disclosing material for protected witnesses. The disclosure requested will not only assist the defence. The Pre-Trial Judge and the Legal Representative of Victims, once appointed, will also be assisted by the provision by the SPO of materials via Legal Workflow in a manner that is complete, logically structured, and that allows for meaningful searches and analysis.<sup>21</sup>

C. JUDICIAL INTERVENTION IS WARRANTED

20. To date, the defence has been raising its concerns with the SPO direct. However, given the number of issues arising and the fact that the disclosure problems appear to

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<sup>20</sup> See Framework Decision, para. 97.

<sup>21</sup> See, for example, STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, [Decision on Joint Defence Motion for an Order Regarding Legal Workflow Witness Entities](#), 16 April 2013, para. 20.

be systematic, it is proving cumbersome and time consuming to address the SPO failings in an *ad hoc* manner.

21. As explained above, the defence experience of the practical reality of the SPO's approach to disclosure is that it is often incoherent and disorganised and is frustrating the accused's fair trial rights. The defence does not suggest that this is a deliberate tactic on the part of the SPO. But, regardless of motive and whether or not it is based on a fair interpretation of the Framework Decision, if the defence is to be able to make any progress with its pre-trial preparations, the SPO's disclosure processes need to be re-addressed without any further delay.

22. Indeed, the SPO submission, during the last Status Conference, that "items that may have been shown to a witness during the course of various interviews, will be disclosed and linked in due course *in accordance with the timeline in the Framework Decision*" is unsatisfactory and will not remedy the systematic failures within a timeframe that will facilitate defence investigations. It appears from the SPO submissions that the material may not be disclosed until 31 May 2021 or later, which would hamper the defence's review of the material already disclosed and delay investigations. The Framework Decision should not be invoked by the SPO to excuse inadequate and systematic failures to disclose what should clearly have been disclosed.

23. For these reasons, the defence seeks the immediate assistance of the Pre-Trial Judge to address the problems identified in order that trial preparations can progress as efficiently and effectively as possible. In particular, the defence requests the Pre-Trial Judge to augment his Framework Decision by imposing further deadlines to the SPO with regards to the categories of material identified above.

#### IV. RELIEF REQUESTED

24. For the above reasons, the defence respectfully requests the Pre-Trial Judge to:

**ORDER** the SPO to disclose all materials and documents to which an accused or a witness is referred in an interview at the same time as disclosure of the interview and, in so far as this approach has not been followed to date in the interviews already disclosed by the SPO in its 12 previous packages, to provide complete disclosure of all and any material commented upon by an accused within 14 days and of a witness within 28 days; and

**ORDER** the SPO to provide the complete and accurate ERN number of any exhibit referred in an accused or a witness' interview, within the transcript of their interview or statement and, in so far as this approach has not been followed to date, to remedy any deficiencies within 4 weeks; and

**ORDER** the SPO to disclose all audio/video recordings for all witness and accused interviews and, in so far as this approach has not been followed to date, to disclose all audio/video recordings relating to the witness and accused interviews disclosed to date within 4 weeks; and

**ORDER** the SPO to provide the witness numbers for all materials and documents relating to witnesses whose identities have been withheld from the defence and, in so far as this approach has not been followed to date, to remedy any deficiencies within 4 weeks.

[Word count: 3 346]

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D Hooper', with a long horizontal flourish extending to the left.

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**David Hooper**

**Specialist Counsel for Hashim Thaçi**

8 March 2021

At The Hague, The Netherlands