

**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:** 29 March 2021

**Language:** English

**Classification:** Public

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**Public redacted version of**

**Thaçi Defence Reply to “Prosecution Response to “Thaçi Defence Request for Orders related to Disclosure””**

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**Specialist Prosecutor**

Jack Smith

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Ben Emmerson

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David Young

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Venkateswari Alagenda

## I. INTRODUCTION

1. The defence for Mr Hashim Thaçi (“defence”) submits that the following brief reply to the “Prosecution Response to ‘Thaçi Defence Request for Orders related to Disclosure’” (“Response”)<sup>1</sup> is merited.
2. The present reply is filed as confidential, since it refers to *inter partes* exchanges and to the testimonies of protected witnesses. Nevertheless, the defence has no objection to its reclassification as public.

## II. SUBMISSIONS IN REPLY

3. Contrary to the assertions of the Specialist Prosecutor’s Office (“SPO”), the defence is acutely aware “of the stage of proceedings and of the applicable framework”<sup>2</sup> relevant to the present case. The case is currently in the pre-trial phase when the defence should be able to know, understand and properly investigate the charges levelled against Mr Thaçi. This essential work includes analysing the evidence in order to prepare investigation strategies and mission plans.<sup>3</sup>
4. It is this awareness, combined with the obstacles to the proper and efficient discharge of its pre-trial functions, which has led the defence to seek the immediate assistance of the Pre-Trial Judge to address the problems identified in its Request.<sup>4</sup> The SPO’s suggestion that this defence is motivated to “create a record of disclosure failures where none exist” is wrong,<sup>5</sup> and displays none of the constructive reflection that the defence had hoped might be generated by the filing.

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<sup>1</sup> KSC-BC-2020-06/F00229, Prosecution Response to ‘Thaçi Defence Request for Orders related to Disclosure’, 18 March 2021.

<sup>2</sup> Response, para. 1.

<sup>3</sup> *Contra* Response, para. 26.

<sup>4</sup> KSC-BC-2020-06/F00213, Thaçi Defence Request for Orders related to Disclosure, 8 March 2021 (“Request”)

<sup>5</sup> Response, para. 1.

5. Indeed, the SPO's criticism that judicial intervention is "premature and unwarranted" and "a misuse of the Panel's time"<sup>6</sup> ignores the considerable amount of time it is taking the defence to engage in *inter partes* communications to resolve disclosure issues. Further, given the disclosure problems which are the subject of the Request are recurring, the defence considered that the most efficient way in which to address them effectively was to bring them before the Pre-Trial Judge.

6. In relation to the burden placed on the defence when pursuing *inter partes* resolution, some necessary context for the Request is required.

7. On 5 February 2021, the defence asked for the ERN number of the documents linked to three witnesses benefiting from protective measures, W04673, W04677 and W04782, having not found any document bearing their pseudonyms in Legal Workflow.

8. On 12 February 2021, the SPO re-disclosed nine documents related to these three witnesses in a Rule 102(1)(a) disclosure package with amended descriptions containing their corresponding pseudonyms.<sup>7</sup>

9. On 15 February 2021, the defence asked the SPO to disclose, as soon as possible:

- all the KLA communiques in its possession, and in particular, the KLA communiques shown to the accused; and
- if not already served by time of request, all of the other "exhibits" numbered and listed in the four accused's transcripts of interview, and in particular, in the transcripts of interview of Mr Thaçi.

10. On 16 February 2021, the SPO replied that:

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<sup>6</sup> Response, para. 3.

<sup>7</sup> SPO Disclosure Package n° 21, Rule 102(1)(a).

- all exhibits used during the second interview of Mr Thaçi had been disclosed as part of the Indictment Supporting Material under Rule 102(1)(a), and many KLA communiques had already been disclosed; and
- they would be reviewing the first interview of Mr Thaçi and the interviews of the other Accused and would be disclosing any undisclosed exhibits, “as part of the ongoing disclosure process based on the Pre-Trial Judge’s Framework Decision.” Likewise, they would disclose the KLA communiques in due course. However, noting the defence’s interest in the exhibits used during the interviews of Mr Thaçi and the KLA communiques, they would make sure to prioritise their disclosure.

11. On 18 February 2021, the SPO reiterated that these items would be provided “in the course of the ongoing disclosure process, pursuant to the Framework Decision,” but noting the defence’s interest, they would aim to prioritise them.

12. Yet, it was only on 17 March 2021, *i.e.* one month after the initial defence request, and following the defence motion, that the SPO disclosed 54 Exhibits shown to Mr Thaçi during his interview with the SPO on 13-16 July 2020.<sup>8</sup> Such a delay is wholly unjustified for such significant material relating to one of the Accused. It should be noted that when the July interview took place, counsel Mr Pierre Prosper, who was present at the interview through video link, was provided with a complete package of the exhibits to be used in the interview on his undertaking not to make a copy. It is therefore apparent that the SPO had the bundle of exhibits to hand, and could easily have provided it at the same time as the transcript of the interview.

13. To date, the defence has not been disclosed any other exhibits shown to the three co-accused, nor the remaining KLA communiques in possession of the SPO.

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<sup>8</sup> SPO Disclosure Package n° 24, Rule 102(1)(b).

14. As is evident from the foregoing, the defence has a consistent record of seeking to resolve issues *inter partes*. However, the SPO's stance on these issues, in particular its reliance on the Framework Decision<sup>9</sup> in its refusal to provide complete witness interview materials, has led the defence to address the court.

15. In considering the issues raised in the Request, the defence submits that all parties should be interested in ensuring that the disclosure regime is fit for purpose. This should mean disclosing materials in a manner which can be easily comprehended by the defence. The defence necessarily reviews the material in a manner and for purposes different to those of the Pre-Trial Judge.<sup>10</sup> By way of concrete examples, [REDACTED] explains events with reference to an undisclosed drawing which depicts various landmarks and buildings, without which it is impossible to follow this part of his interview;<sup>11</sup> [REDACTED] is questioned on the basis of an undisclosed map on which he is asked to mark positions, directions, and draw lines between various locations, without which it is impossible to follow this part of his interview;<sup>12</sup> [REDACTED] is shown a series of 10 undisclosed photographs and then a series of 9 undisclosed photographs as part of an identification exercise, without which these parts of his interviews are meaningless. For example, [REDACTED] claims that "the uniforms were different" or "none of the uniforms are similar" making it impossible for the defence to review this evidence without the photographs in question;<sup>13</sup> [REDACTED] is shown a wealth of undisclosed material without which it is impossible to follow much of his interview, including video footage of a crime scene where he identifies various objects and people.<sup>14</sup>

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<sup>9</sup> See definition provided in Request, fn. 2.

<sup>10</sup> *Contra* Response, para. 25.

<sup>11</sup> [REDACTED].

<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> See, e.g., [REDACTED].

16. The SPO's claim that not every item referenced in an interview is necessary in order for that witness's evidence to be understood,<sup>15</sup> cannot circumvent the fact that all these interviews will need to be re-analysed by the defence when the SPO's piecemeal approach results in this underlying material actually being produced, at the expense of defence time and resources. This approach is unworkable, and means the current regime of disclosure is not achieving its purpose. Witness interviews must be disclosed together with the documents and materials to which the witness is referred. It is on this basis that the defence also included in the Request a request that the Pre-Trial Judge augment his Framework Decision if necessary.<sup>16</sup>

17. As regards the defence request for the audio/video recordings of Prosecution witness interviews, the SPO's reliance on the "relevant jurisprudence" of the International Criminal Court jurisprudence is only partial, and avoids reference to cases in which disclosure of audio recordings of Prosecution witness interviews was ordered, and in particular, the practice whereby "the Defence does not have to provide concrete examples to support its allegations relating to discrepancies between different statements by the witness concerned, or to the witness's credibility, in order to demonstrate that the audio records in question are material to the preparation of the defence".<sup>17</sup> The SPO's objection to the work its Office would need to undertake to apply the necessary redactions is not relevant to a consideration of the disclosability of the material requested.

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<sup>15</sup> Response, para. 25.

<sup>16</sup> Request, para. 23.

<sup>17</sup> ICC, Trial Chamber II, *Prosecutor v Katanga & Ngudjolo*, ICC-01/04-01/07-2309-Red-tENG, 'Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219', 20 August 2010, para. 4.

### III. RELIEF REQUESTED

18. 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 16 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

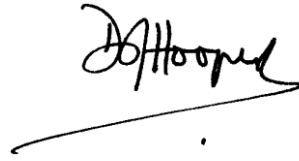
**ORDER** the SPO to provide the complete and accurate ERN number of any exhibit referred to in an accused or a witness' interview, within the transcript of their interview or statement and, in so far as this approach has not been followed to date, to remedy any deficiencies within 4 weeks; and

**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: 1654]

Respectfully submitted,

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

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**David Hooper**

**Specialist Counsel for Hashim Thaçi**

29 March 2021