

**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:** 15 February 2022

**Language:** English

**Classification:** Confidential

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**Thaçi Defence Response to Prosecution Rule 107(2) request**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hashim Thaçi**

Gregory Kehoe

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Victims**

Simon Laws

**Counsel for Rexhep Selimi**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagenda

## I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Prosecution Rule 107(2) request.<sup>1</sup> The SPO requests the Pre-Trial Judge to relieve the SPO of its disclosure obligations in relation to 21 documents for which clearance has been denied by two Rule 107 providers, and maintains that no counterbalancing measures are necessary. The Defence submits that the SPO Request should be dismissed.

## II. APPLICABLE LAW

2. Pursuant to Article 21(6) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“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 him before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counterbalance protections are applied.

3. Rule 107(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”) provides that:

(1) If the Specialist Prosecutor has custody or control over information which has been provided on a confidential basis and solely for the purpose of generating new evidence, such information and its origin shall be protected under Article 58 of the Law. The initial material or information shall not be disclosed without the consent of the provider and shall, in any event, not be tendered into evidence without prior disclosure to the Accused.

(2) Where the information is subject to disclosure, the Specialist Prosecutor shall apply confidentially and *ex parte* to the Panel to be relieved in whole or in part of his or her obligation Under Rule 102 and Rule 103 to disclose the initial material. The application shall include the information in question. The Specialist Prosecutor may also apply for counterbalancing measures pursuant to Rule 108(2).

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<sup>1</sup> KSC-BC-2020-06/F00678/CONF/RED, dated 3 February 2022, notified on 4 February 2022 (“SPO Request”).

[...]

4. Pursuant to Rules 108(3) and (4) of the Rules, appropriate counter-balancing measures may be adopted by the Pre-Trial Judge, *proprio motu* or upon request, to ensure the accused's right to a fair trial.<sup>2</sup>

### III. DISCUSSION

5. The Defence submits beforehand that the SPO should be ordered to file a less redacted version of its Request, because not only the identity of the two providers of the documents is redacted, but also the topics addressed by the various documents; the SPO has only disclosed whether the documents fall within the indictment period. The Defence is thus unable to assess whether the material in question is relevant or not for its preparation and is prevented from responding to the submissions in any meaningful way.

6. The Defence asks the Pre-Trial Judge to review carefully the documents in question and to order the SPO to continue its consultation with the providers to get clearance.

7. The withholding of any material from the Defence, subject to disclosure pursuant to Rule 102 or Rule 103 of the Rules, should be compensated by counterbalancing measures. In the current case, the Defence notes that 10 documents fall during the indictment period (or are undated) or 'right at the end of the indictment period'.<sup>3</sup> The Defence submits that such material is necessary for its preparation, even if the events in question are not charged or do not relate directly to the Accused, because they may throw another light on the case alleged against the Accused and

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<sup>2</sup> KSC-BC-2020-06/F00652/CONF/RED, Confidential Redacted Version of Decision on Deferred Material from the Specialist Prosecutor's Rule 107(2) Request, 21 January 2022.

<sup>3</sup> SPO Request, paras. 6, 9.

may, for instance, contain leads for investigations. Moreover, it is precisely the “end of the indictment period” that is hotly disputed between the Parties: to the extent that these documents relate to the SPO’s frivolous claim that the armed conflict in Kosovo extended beyond June 1999, they relate to an essential element of four counts of the Indictment. Therefore, if such material is not disclosed, counterbalancing measures should be adopted, such as the disclosure of a summary of the information. The absence of any counterbalancing measures for the withholding of 21 documents cannot ensure the fairness of the trial for the Accused.

8. Last, with regards to the documents for which clearance discussions remain ongoing,<sup>4</sup> the Defence submits that the SPO should be ordered to accelerate this process. The Defence stresses that any delayed disclosure of material relevant for its preparation is prejudicial and may further delay the proceedings.

#### IV. CONCLUSION

9. For the foregoing reasons, the Defence respectfully requests the Pre-Trial Judge to:

- ORDER the SPO to file a lesser redacted version of its Request and to allow the Defence an additional 7 days to file a response;
- DISMISS the SPO Request; or, in the alternative;
- ADOPT appropriate counter-balancing measures to ensure the accused’s right to a fair trial.

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<sup>4</sup> SPO Request, paras. 10-11.

[Word count: 795 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "G. W. Kehoe", is written over a white rectangular redaction box.

**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Tuesday, 15 February 2022

At Tampa, United States