

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: 28 July 2022

Language: English

Classification: Confidential

Thaçi Defence Response to Prosecution Rule 107(2) request F00875

Specialist Prosecutor

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Prosecution Rule 107(2) request (“SPO Request”).¹ The SPO requests that the Pre-Trial Judge relieve the SPO of its disclosure obligations in relation to 25 documents for which clearance has been denied by three Rule 107 providers.² 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 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).

[...]

¹ KSC-BC-2020-06/F00875/CONF/RED, 18 July 2022, notified on 19 July 2022.

² SPO Request, paras. 1, 3-5.

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.³

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 three providers of the documents is redacted, but also the topics addressed by the various documents. The SPO, for instance, refers to notes of SITF/SPO contacts with certain individuals⁴ but it is unclear whether such individuals are on the SPO witness list or alleged victims pursuant to the SPO Indictment. Furthermore, while the SPO acknowledges that some of the Rule 107 material contains exculpatory information, it does not provide any details as to the nature of such exculpatory information.⁵ Even some of the proposed counterbalancing measures are redacted.⁶ 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. In particular, the Defence submits that notes of SPO contacts with certain individuals,⁷ *i.e.* material emanating from the SPO itself, are in principle disclosable to

³ 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.

⁴ SPO Request, paras. 3, 11, 18.

⁵ SPO Request, paras. 10, 13, 21.

⁶ SPO Request, para. 13.

⁷ SPO Request, paras. 3, 11, 18.

the Defence and it is only in exceptional circumstances that a Rule 107 provider could prevent such disclosure, which are not justified in the SPO Request.

8. Further, the Defence disagrees with the SPO submissions pursuant to which the withholding of Rule 107 material is not prejudicial to the Defence when the “incidents mentioned are covered by contemporary incident reports” or “described (...) in already disclosed materials”.⁸ The disclosure of different documents, from various sources, relating to the same incident is useful for the Defence because it enables the Defence to identify discrepancies in testimonies, investigation leads, etc.

9. 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, such as anonymised summaries, as suggested by the SPO.⁹

10. The SPO maintains that the content of some of the Rule 107 material “will be included on the updated relevance list”.¹⁰ The Defence asks the SPO, upon provision of the updated relevance list, to identify the documents linked to such Rule 107 material in order to assist the Defence in its assessment of their relevance.

11. The SPO further maintains that the content of some of the Rule 107 material could be obtained from open-sources.¹¹ The Defence submits that as a counterbalancing measure, the SPO should be ordered to provide the Defence with such open-source material, specifying that its content relates to Rule 107 information mentioned in the SPO Request.

⁸ SPO Request, paras. 9-10, 24, 31, 32.

⁹ SPO Request, paras. 10, 21.

¹⁰ SPO Request, paras. 26, 27.

¹¹ SPO Request, para. 29.

12. Finally, with regards to the documents for which clearance discussions remain ongoing,¹² 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

13. 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.

[Word count: 961 words]

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Thursday, 28 July 2022

At Tampa, United States

¹² SPO Request, para. 3.