

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 29 July 2022

Language: English

Classification: Confidential

Veseli Defence Response to Prosecution Rule 107(2) Request (F00875)

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli ("Defence") hereby responds to the SPO Request of 18 July 2022 to be relieved of its disclosure obligations pursuant to Rule 107(2) ("Request").¹

II. SUBMISSIONS

2. The Defence observes that the SPO fails to state the nature of the disclosure obligation from which it seeks relief in relation to these documents, requiring the Defence to speculate whether the documents and information fall under Rule 103 or Rule 102(3), and rendering the tasks of assessing the impact of non-disclosure and the adequacy of proposed counterbalancing measures even more difficult. There can be no justification for failing to provide this information, and the Defence accordingly requests the Pre-Trial Judge to order the SPO to refile the request to include this information.
3. Yet again, the Defence observes that the SPO's over-zealous use of redactions severely impede the Defence's ability to respond to this Request, and effectively transforms this to an *ex parte* procedure. The Defence urges the Pre-Trial Judge to scrutinise each request with particular care, this being the only means remaining to ensure that the Accused's rights are not violated.
4. It also observes that documents may have been provided to the Pre-Trial Judge in violation of Article 11(b) of the Code of Professional Conduct and requests clarification on this point.

A. Inadequacy of the Information Provided

5. In making submissions on particular documents, the SPO frequently fails to state whether (i) the disclosure obligations from which they seek relief stems

¹ F00875/CONF/RED, Confidential Redacted Version of 'Prosecution Rule 107(2) request', KSC-BC-2020-06/F00875, 18 July 2022, (*ex parte* version filed 8 July 2022).

from Rule 101(1)(b)(i)² Rule 102(3), or Rule 103; and (ii) whether and why counterbalancing measures are, or are not, required. This creates significant unnecessary confusion.

6. For instance, in paragraph 7 of the Request, the SPO refers to an initial screening contact that is, it says, “predominantly” incriminatory in nature. The identity of the witness and the Information Provider are withheld. No indication is provided as to whether counterbalancing measures may be required. Based on the available information, it is plausible to suppose that the document in question is disclosable under:

- a) Rule 102(1)(b)(i) as a prior statement of an SPO witness;
- b) Rule 102(3) as a statement of a witness that the SPO does not intend to call and whose evidence is potentially material to the Defence; or
- c) Rule 103 because, although “predominantly” incriminatory, it nonetheless contains significant exculpatory information.³

7. Similar considerations apply to the document described in paragraph 8 of the Request, which is referred to as providing “mostly” general and generic information.⁴ Again, no indication is given as to whether counterbalancing measures may be required.⁵

² The Defence notes that the documents could only fall under Rule 102(1)(b)(i) (prior statements of trial witnesses), and not under Rule 102(1)(b)(ii)-(iii) which relate to material to be relied on at trial, because the SPO may not tender into evidence any documents for which clearance has been denied – *see* Rule 107(1).

³ Similar considerations apply to the document described in paragraph 8 of the Request, which is referred to as providing “mostly” general and generic information.

⁴ *See* also, para. 12 (referring to information that is “mainly” incriminating). And *see* para. 22 where it is entirely unclear to the Defence which disclosure Rule(s) applies to the documents, which is described as human resources and staffing information and is said to contain “no other” relevant or exculpatory information.

⁵ *Contra*, para. 13, where the SPO indicates that it is willing to counterbalance non-disclosure but redacts the means by which this would be done, rendering the Defence unable to respond to the adequacy of said measure.

8. In paragraph 9, the SPO describes a part of the document as “purely incriminatory,” and another part as providing background information that relates to other documents – leaving open the possibility that the document diverges from these other documents on potentially significant points. The latter, it should go without saying, could constitute important Rule 103 material for the Defence.
9. In paragraph 10, the SPO proposes an anonymised summary as a counterbalancing measure for potentially exculpatory information in the form of “self-serving” statements and that similar statements are available in other material already disclosed. The Defence underscores that the availability of “similar statements” does not obviate the need for counterbalancing measures. The fact that multiple individuals have made mutually corroborative statements that undermine the SPO’s case suggests that the document in question may be highly significant, and that non-disclosure may have very serious ramifications for the fairness of the trial.
10. Based on the available information, it appears to the Defence that, at a very minimum, an anonymised summary that pertains to all materials in this Section⁶ would need to be provided, given that they appear to be linked. Moreover, any such summary would need to be sufficiently detailed for the Defence to be able to identify discrepancies between the documents summarised, and other documents already disclosed to the Defence.
11. However, the Defence submits that, given the SPO’s failures to (i) identify the disclosure rule from which they seek relief; and (ii) specify in relation to each document whether and why counterbalancing measures are or are not required, the Pre-Trial Judge should first order the SPO to refile its request to

⁶ F00875/CONF/RED, Section IIA, paras 6-10.

provide such information as is necessary for these issues to be properly evaluated.

B. Scope of the SPO Disclosure Obligations

i. *Rule 102(1)(b)(i)*

12. The Defence observes that a number of documents at issue in the Request appear to contain prior statements of witnesses, the identity of which is redacted.⁷ The Defence has previously observed that the SPO has listed on its Rule 102(3) index prior statements of witnesses it intends to call at trial.⁸ The Defence reiterates that prior statements of trial witnesses are required to be disclosed pursuant to Rule 102(1)(b)(i).⁹ The Defence submits that requests for non-disclosure of such items should be subject to heightened scrutiny, particularly as they frequently provide significant Rule 103 material for the Defence.

ii. *Rule 102(3)*

13. In paragraph 24, the SPO justifies non-disclosure and failure to provide counterbalancing measures on the basis that the statement refers exclusively to an uncharged allegation.¹⁰ This apparently overlooks the fact that, pursuant to Rule 102(3), the Defence is entitled to disclosure of items that are “material to its preparation”, a provision which is to be construed broadly.¹¹ The Defence recalls that the SPO has alleged a JCE that encompasses all of Kosovo and parts of Albania, and is open-ended in terms of its membership. Under the

⁷ See, e.g., F00875/CONF/RED, Sections A, B, D.

⁸ F00755, Veseli Defence Response to SPO Request F00731 for Protective Measures Relating to Three Veseli Defence Rule 102(3) Requests, 28 March 2022, para. 2.

⁹ See, e.g., *Prosecutor v. Brima et al*, SCSL-04-16-T, [Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rule 66 and/or 68](#), 4 May 2005, para. 16.

¹⁰ See also, F00875/CONF/RED, para. 16.

¹¹ F00099, Framework Decision on Disclosure of Evidence and Related Matters, para. 62.

circumstances, materiality must necessarily be construed very broadly in this case.

14. Similarly, at several places, the SPO relies on the fact that the events described in the document occurred after the indictment period to justify its non-disclosure.¹² As the Pre-Trial Judge has instructed,¹³ and the Defence has previously observed,¹⁴ the timing of an event does not necessarily bear on its relevance or materiality.

iii. *Counterbalancing Documents*

15. The Defence observes that the SPO has redacted ERNs throughout this document, including those pertaining to documents that it intends to provide as counterbalancing measures.¹⁵ Given the vast amount of disclosure in this case, the Defence cannot be expected to locate this material without the SPO indicating where it can be found. The Defence submits that in general, the SPO must be required to provide the ERN of the counterbalancing material as failure to do in a case file of this magnitude deprives the Defence of any meaningful remedy.

C. Provision of Documents to Pre-Trial Judge

16. The Defence notes with concern that, in footnote 4 of the request, the SPO states that it has provided documents “directly to the Pre-Trial Judge” and appears not to have annexed these documents to the Request as filed with the Registry. The Defence observes that no legal basis has been provided to justify such a

¹² F00875/CONF/RED, paras 12, 19.

¹³ F00099, para. 62.

¹⁴ F00700, Veseli Defence Response to Prosecution Rule 107(2) Request KSC-BC-2020-06/F00678, 16 February 2022, para. 4.

¹⁵ See, e.g., F00875/CONF/RED, paras 17, 25-27. See also para. 13, due to redactions, it is not possible to determine whether the counterbalancing measure refers to a document bearing an ERN or, for instance, the URL of a publicly available document. See also, para 23, the SPO suggests that the withheld information is “available to the Defence in other documents”.

course of action and that none appears to exist in the legal framework of the KSC. Consequently, the provision of documents directly to the Pre-Trial Judge appears to constitute an unauthorised *ex parte* communication with the Pre-Trial Judge in violation of the Article 11(b) of the Code of Professional Conduct.¹⁶

17. In any event, these documents must be brought into the official case file, because any decision that is rendered in relation to these documents is liable to be re-examined, amended, or reversed - potentially years from now. If they do not form a part of the official case record, there is a much greater risk of these documents being subsequently unavailable, resulting in potentially irreversible prejudice to the Accused. Regardless of whether they are provided to the Defence, these documents and any decision relating to them form a part of the judicial record, the integrity of which must not be compromised.
18. Given the limited information provided by the SPO, the Defence is forced to speculate whether, for instance, the SPO may have acted in response to:
 - a) Distrust in the Registry and/or the systems put in place to ensure information security; and/or
 - b) A unilateral condition imposed by the Provider; and/or
 - c) Additional *ex parte* communications with the Pre-Trial Judge in which this method of providing documents was discussed and authorised.
19. With respect to the first point, the Defence points out that if there are concerns with the Registry and/or the current systems used to ensure information security, then these concerns would need to be properly ventilated, and addressed as a matter of urgency as they have far broader implications than just this issue or even this case. With respect to the second point, the Defence

¹⁶ Article 11: Communication with the Judges and Panels. Part B states that Prosecutors shall not "transmit evidence, notes or documents to a Panel or a Judge of that Panel, except through the Registry or in an emergency while at the same time transmitted to the Registry."

observes that no Provider has the authority to unilaterally place such conditions on the conduct of these proceedings. Such a requirement would need to be litigated *inter partes* and ruled upon by judicial authorities of this court. With respect to the third possibility, the Defence finds itself obligated to request confirmation that this has not occurred, and to request clarification as to the circumstances surrounding this matter generally so that further submissions can be made if necessary.

III. CONCLUSION

20. The Defence respectfully requests that the Pre-Trial Judge:
- a) Order the SPO to refile its Request to specify the disclosure rule(s) from which it seeks relief in respect of each document and provide additional information on counterbalancing measures including, where relevant, their ERNS; and
 - b) Ensure that the Defence is provided with the necessary clarifications as regards footnote 4 of the Request.

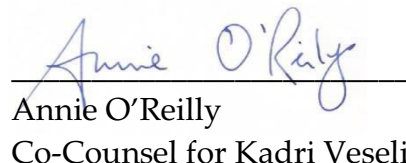
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