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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
Counsel for Hashim Thaçi
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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Public Redacted Version of
Joint Defence Reply to SPO Response to Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00910)
(F00928, dated 15 August 2022)

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I. INTRODUCTION

1. Counsel for Kadri Veseli, Hashim Thaçi, Rexhep Selimi, and Jakup Krasniqi (together, "Defence") jointly file this reply to the SPO's Response[1] to Motion for disclosure pursuant Rule 103.[2]

2. The Defence recalls that the reason which prompted the Motion was an email, by an SPO representative, contending that the SPO's cooperation with Serbia did not, *without more*, affect the credibility or reliability of the SPO's evidence.[3] The Motion answered such concerns precisely. It demonstrated, through numerous examples, that the SPO's relationship with the Serbian State and/or its agents stands apart from its relationships with any other provider on account of (i) Serbia's bias against the KLA generally, and against all the Accused specifically,[4] and (ii) Serbia's extensive history of manipulating evidence.[5] The Motion established that, in light of these specific circumstances, failure to disclose the requested items would have a deleterious impact on the legitimacy of the present proceedings.[6] This naturally includes disclosure of the legal basis of the SPO's relationship with Serbia which, it appears, may be founded on the unacceptable and illegal assumption that Kosovo is part of Serbia.[7] In the view of the Defence, the simple fact that Serbia was a direct adversary – and aggressor – in the conflict with the KLA is sufficient, without more, to grant the Motion.

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[1] F00910, Prosecution response to 'Joint Defence Motion for Disclosure Pursuant to Rule 103', 3 August 2022 ("Response").
[2] F00877, Joint Defence Motion for Disclosure Pursuant to Rule 103, 12 July 2022 ("Motion").
[3] F00877, para. 10.
[4] F00877, paras 29-31.
[5] F00877, paras 33-65.
[6] F00877, paras 66-77.
[7] *See* below, para. 17.

PUBLIC
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II. SUBMISSIONS

A. Information Regarding Provenance

3. The Defence clarifies that its primary concern as regards "originator" information lies with documents that are **not** obviously of Serbian origin,[8] *e.g.* KLA documents where the originator is unlisted, or listed simply as ICTY/MICT although it may originally have been provided by Serbia.[9] At the time of filing, the Defence has been disclosed approximately: [10]

- 1,300 items where the originator field blank;[11]
- 13,000 items originating from the ICTY/MICT;[12]
- 10,500 items originating from EULEX;[13] and
- 8,000 from the SPRK.[14]

These items amount to nearly half the items disclosed under those Rules, significantly burdening the Defence.[15]

4. The Defence stresses that the disclosure of "originator" information is required for all documents, though it will not always be sufficient to resolve the issue of provenance.[16] For example, the "provenance" of the evidence provided by Witness 81 in the *Haradinaj* retrial was – it transpired – the Serbian War Crimes

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[8] *Contra*, F00910, paras 5-6.
[9] *See*, for example, items, U000-5386-U000-5386; SITF00243091-00243150; SITF00285610-00285612; SITF00009595-SITF00009597.
[10] The following numbers are based on disclosures to the Veseli Defence. The numbers for the other Defence Teams will vary depending on the Rule 102(3) items they requested.
[11] Most of these falls under Rules 102(1)(a), 102(1)(b), and 103 28 items under Rule 102(3).
[12] Approximately half under Rules 102(1)(a), 102(1)(b), and 103.
[13] Approximately 1,500 under Rules 102(1)(a), 102(1)(b), and 103.
[14] Approximately 1,000 under Rules 102(1)(a), 102(1)(b), and 103.
[15] The Veseli Defence estimates that footnotes 11-14 amount to 32,000 items, whilst it has been disclosed slightly over 63,000 items as the time of this filing.
[16] *Contra*, F00910, fn. 19, where the SPO conflates the two notions.

PUBLIC
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Prosecutor.[17] Only by uncovering this fact were the Parties and the Court able to comprehend how a witness, without even passing familiarity with the relevant locations in that case, had been identified and called by the Prosecution. It is dishonest for the SPO to suggest that the circumstances that led the OTP to adduce such unreliable evidence (so unreliable that it later sought to disassociate itself from it)[18] were irrelevant or unimportant.[19]

B. Any Material Originating from Serbia and/or its Agents Should be Disclosed Under Rule 103[20]

5. The SPO fails to engage with the core argument of the Defence, namely whether material emanating from the Serbian State should be treated differently than material originating from non-biased information providers. Instead, the SPO claims, without merit, that the "vast majority of the incidents presented have no connection whatsoever to evidence that the SPO intends to rely on, or even events in the Indictment, and so cannot relate to challenging the credibility or reliability of the SPO's evidence".[21] This is not the correct legal test; it is entirely irrelevant whether the requested items are to be relied upon by the SPO during trial.

6. As regards the incidents concerning the Mazreku cousins; Witness 81 in the *Haradinaj* ICTY trial; [REDACTED] Zoran Stijović; and the statement of Lekë Përvorfi, believed to have been obtained under torture,[22] the SPO misses the point: all these incidents – including the incidents which the SPO fails to engage with –[23] demonstrate that the Serbian State is not a reliable partner. In this

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[17] F00877, paras 59-60.
[18] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84*bis*-T, Public Judgement with Confidential Annex, 29 November 2012, para. 462.
[19] F00910, para. 31.
[20] F00910, paras 29-34.
[21] F00910, para. 29.
[22] F00910, paras 30-34.
[23] *See*, F00877, paras 34-46; 52-58.

PUBLIC
Date original: 15/08/2022 21:21:00
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respect, the SPO fails to rebut the Defence's argument that the Serbian State has interfered with potential KSC witnesses, manipulated testimony, and obtained evidence under torture and duress.[24] Serbia's history of malfeasance raises serious questions about the admissibility of the evidence it has provided, which can only be properly investigated through the requested disclosure. Just like the case of a witness with a criminal past, it is Serbia's utter unreliability as a *bonafide* actor which makes all the material originating from Serbia subject to Rule 103 disclosure. This is not to be conflated with instances where certain material is, in addition to its originator, also subject to Rule 103 or 102(3) disclosure.

C. Challenges Concerning the Applicable Law[25]

7. The Defence observes that Rules 102(3) and Rule 103 have already been interpreted by the KSC.[26] In particular, the Defence recalls that the position advanced by the SPO in proceedings before Trial Panel II caused that Panel to be concerned about the SPO's full compliance with its disclosure obligations and to warn the SPO that such disclosure obligations are not duties to be "circumvented through sophistries, but legal obligations to be fulfilled with the greatest of care, urgency and diligence".[27] The Defence observes that the SPO engages in the similar attempts at sophistry in its Response[28] which fail to alleviate its legal obligations and ought to be rejected out of hand.

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[24] This raises particular admissibility concerns under Rules 138(2) and (3) of the Rules.

[25] F00910, paras 9-17.

[26] F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, paras 62-68; KSC-BC-2020-07/IA005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure, 29 July 2021, paras 38-57; KSC-BC-2020-07/F00413/RED, Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, 3 November 2021, paras 41-48.

[27] KSC-BC-2020-07/F00413/RED, para. 48.

[28] F00910, paras 9-17.

PUBLIC
Date original: 15/08/2022 21:21:00
Date public redacted version: 17/08/2022 16:17:00

8. Regardless, the Defence clarifies that the authorities cited in the sections concerning the applicable law support the arguments that (i) information pertaining to cooperative agreements is disclosable;[29] (ii) the obligation to disclose exculpatory material is not strictly limited to evidence that will be used at trial;[30] and (iii) the relation between the opposing party to the conflict and the source of documents is a central issue in determining disclosure and, ultimately, the credibility and reliability of evidence.[31]

9. Finally, the SPO is wrong to characterise this as a "fishing expedition"[32] which the Court of Appeals Panel has defined as requests, "in search of materials which the SPO has indicated, acting under a presumption of good faith, do not exist".[33] This is clearly not the case here.

D. SPO Obligations Under Rule 102(3) to Provide Detailed Notice of any Material and Evidence in its Possession Relevant to the Case

10. The SPO provides no legal basis for leaving the requested items off of the Rule 102(3) list. Instead, it challenges disclosure of documents requested by the Defence pursuant to Rule 102(3) "on the basis of relevance and/or materiality".[34] The Defence notes that the SPO has conflated materiality and relevance and confused the Rule 102(3) procedure. As the Appeal Panel noted, "the dispute mechanism foreseen under the last limb of Rule 102(3) of the Rules

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[29] The *Bemba* Appeals Chamber confirmed that requests for assistance may fall within the Prosecutor's residual obligation under rule 77 of the ICC Rules. *See*, ICC, *Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08 A, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, para. 641.
[30] *Contra*, F00910, para. 15. It is unclear as to why the legal principle identified by the STL Chamber should be inapplicable because the decision refers to telecommunication data, central to the prosecution in that case.
[31] F00877, paras 22-23.
[32] F00910, paras 9-11.
[33] KSC-BC-2020-07/IA005/F00008/RED, para. 57.
[34] F00910, para. 18.

concerns challenges to the materiality of the requested materials, not their relevance (*i.e.* the basis for inclusion in the Rule 102(3) Notice)" [emphasis added].[35]

11. The "degree of initial assessment" by the SPO in terms of which materials are "relevant to the case" should leave little discretion to the SPO.[36] Considering that the SPO itself considers the test pertaining to material to include on the Rule 102(3) list a "lower and […] and extremely broad standard"[37] such as to include a "photo of a salamander in a dug-out hole",[38] then the items requested by the Defence must, *a fortiori*, easily pass such test and must therefore be included.

12. It follows that by failing to list these items on the 102(3) list, the SPO has "deprived the Defence of such notice and place[d] a higher burden on it to identify, with specificity, material not in its possession and potentially not even within its knowledge".[39] The Pre-Trial Judge should order the SPO to file an updated Rule 102(3) list which includes the items identified in the Motion. Any dispute by the SPO concerning the materiality[40] of such items must be entertained at a different stage, following a request by the Defence for such items.

13. In any event, the SPO's materiality challenges as "too remote, hypothetical or speculative"; or "insufficiently specific" are unfounded.[41] The Defence has requested clearly identifiable material. Here, the SPO's arguments avoid the core issue and misapply relevant jurisprudence.

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[35] KSC-BC-2020-07/IA005/F00008/RED, para. 45.
[36] KSC-BC-2020-07/IA005/F00008/RED, para. 46.
[37] Transcript of 20 May 2022, p. 1260.
[38] *Ibid*.
[39] KSC-BC-2020-07/IA005/F00008/RED, paras 44-45.
[40] F00910, paras 21-26.
[41] *Ibid*.

PUBLIC
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14. As regards claims about specificity, the Defence submits that the Motion is self-evidently specific in identifying the parameters of the request, namely materials originating from Serbia and the relationship – including any formal agreements – between Serbia and the SPO/SITF. These are clearly identifiable and specific requests. Finally, the Motion must be assessed against the exceedingly "broad nature of the charges" against the Accused.[42]

15. As regards the jurisprudence, the SPO cites, namely the *Al Hassan* decision(s).[43] In doing so, the SPO fails to note that the reason that the ICC Single Judge considered the request "speculative and hypothetical" was because it regarded that the defence had not supported its claim of prosecutorial "complicity in torture or cruel and inhuman treatment".[44] This is, once again, clearly not the case here.

E. The Legal Basis of SPO Cooperation with Serbia is a Constitutional Requirement

16. The Defence notes that Article 55 Law is subject to Article 4.[45] As with extradition matters, agreements for cooperation in criminal justice are typically concluded in the form of treaties, in view of their importance and their direct impact to fundamental rights. This principle guides Article 18 of the

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[42] ICTR, *Karemera et al. v. Prosecutor*, ICTR-98-44-AR 73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, para. 42 (wherein the ICTR Appeals Chamber reversed a Trial Chamber's decision considering a request soliciting 'all documents obtained by the Prosecution from the Government of Rwanda, any of its departments, or its Gacaca jurisdictions […], as impermissibly broad, paras 36-37; 43). It is recalled that the confirmed indictment includes a JCE that extends to all of General Staff, Zone, brigade, and unit commands, police and intelligence of the KLA and PGoK, as well as "other KLA soldiers and PGoK officials" and also "others acting on behalf of the KLA or PGoK" and extends to all of Kosovo.

[43] F00910, fn. 51.

[44] ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-859, Decision on Defence request for disclosure of material related to Mr Al Hassan's arrest and detention in Mali, 5 January 2021, para. 20.

[45] It is clear that Article 4(4) of the Law applies to both the SC and SPO as there is no reason why the SPO would be treated differently than the Specialist Chambers or engage the international responsibility of Kosovo *vis-à-vis* other states or international organizations without the agreement of Kosovo authorities.

PUBLIC
Date original: 15/08/2022 21:21:00
Date public redacted version: 17/08/2022 16:17:00

Constitution, which mandates that international agreements relating to, *inter alia*, fundamental rights and freedoms, are subject to ratification. In addition, as with any modern treaty, such international agreements must be made public.[46] Based on the above consideration, it follows that any agreement concerning cooperation in criminal matters with States or International Organisations (and especially with Serbia) is subject to ratification by the Assembly and must be available on the KSC website.

17. Additionally, the SPO grossly misrepresents Defence submissions, which clearly are not concerned with any violation of Serbian law.[47] Instead, the Defence points to violation of Kosovar law and the risk that SPO-Serbia cooperation is made on the unacceptable and illegal assumption that Kosovo is part of Serbia.

18. The crux of the SPO's position is that the credibility of information emanating from Serbia is no different from that of any other information provider. This attempt to ignore the political context in which this case is being tried comes at great risk to the integrity of the proceedings. Anti-Kosovo and anti-KLA sentiment remain an important and influential factor in mainstream Serbian politics up to the present day.[48]

19. Seen in this light, the SPO's position is clearly at odds with the definition of Rule 103 and it would have significant ramifications for future proceedings and conflicts. Not all information or information providers are equal, and material

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[46] For instance, the SPO conveniently omits to note that, while Requests for Assistance may not be disclosable per se (which is irrelevant to the KSC legal framework) – the legal basis for cooperation is usually published in the ICC website or the UN Treaty Collection, https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf; https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280317ea8&clang=_en.

[47] *Contra*, F00910, para. 37.

[48] *See e.g.*, Foreign Policy, Serbia is Playing with Matches Again, 3 August 2022; Balkan Transitional Justice, Kosovo War-Era General Elected as Serbian Parliament Official 3 August 2022.

PUBLIC
Date original: 15/08/2022 21:21:00
Date public redacted version: 17/08/2022 16:17:00

emanating from Serbia to support a trial against the leadership of the Kosovo Liberation Army must be classified as Rule 103.

III. CONCLUSION

20. For the foregoing reasons, the Defence requests, in addition to granting the request, a declaration that the SPO has violated its obligation under Rule 102(3) to list all material in its possession which is relevant to the case as well as any remedy the Pre-Trial Judge will consider appropriate.

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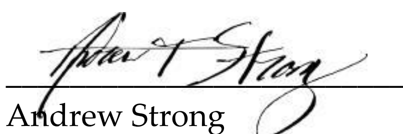

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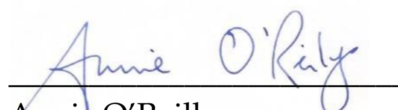

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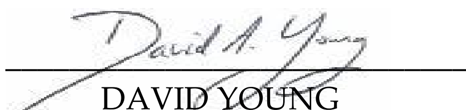

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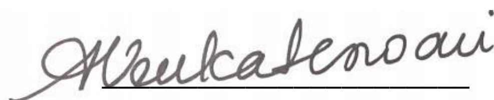

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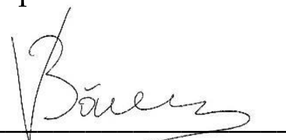

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