



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Date: 23 August 2022

Language: English

Classification: Public

Decision on Veseli Defence Request for Reclassification of Evidentiary Material

Specialist Prosecutor
Jack Smith

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagenda

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 23(1) and 39(1) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 80(1) and 84(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 11 April 2022, the Defence for Kadri Veseli ("Veseli Defence") submitted a request for reclassification of evidentiary material ("Veseli Request").²
2. On 20 and 22 April 2022, respectively, the Defence for Hashim Thaçi ("Thaçi Defence") and the Defence for Jakup Krasniqi ("Krasniqi Defence") joined the Veseli Request ("Thaçi Joinder" and "Krasniqi Joinder", respectively).³
3. On 22 April 2022, the Specialist Prosecutor's Office ("SPO") responded to the Veseli Request ("SPO Response").⁴
4. On 29 April 2022 and 2 May 2022, respectively, the Veseli Defence and the Thaçi Defence replied to the SPO Response ("Veseli Reply" and "Thaçi Reply", respectively, and collectively, "Defence Replies").⁵ The Krasniqi Defence did not file a reply.

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00766, Specialist Counsel, *Veseli Defence Request for Reclassification of Evidentiary Material*, 11 April 2022, public.

³ KSC-BC-2020-06, F00773, Specialist Counsel, *Thaçi Defence Joinder to the Veseli Defence Request for Reclassification of Evidentiary Material*, 20 April 2022, public; F00776, Specialist Counsel, *Krasniqi Defence Joinder to Veseli Defence Request for Reclassification of Evidentiary Material*, 22 April 2022, public.

⁴ KSC-BC-2020-06, F00778, Specialist Prosecutor, *Prosecution Response to Veseli Request for Reclassification*, 22 April 2022, public.

⁵ KSC-BC-2020-06, F00785, Specialist Counsel, *Veseli Defence Reply to Prosecution Response to Veseli Request for Reclassification*, 29 April 2022, public; F00793, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to Veseli Request for Reclassification*, 2 May 2022, public.

II. SUBMISSIONS

5. The Veseli Defence, Thaçi Defence and Krasniqi Defence (collectively, “the Defence”) submit that the SPO has, without providing reasons, classified as confidential all evidentiary material disclosed thus far to the Defence, thereby violating Rule 83(1) of the Rules and, more generally, the right of the Accused to a fair and public hearing as enshrined, *inter alia*, in Article 21(2) of the Law.⁶ The Defence requests that the Pre-Trial Judge: (i) order the SPO to reclassify any non-confidential material as public; (ii) order the SPO to justify the confidential classification of non-publicly available evidentiary material; and (iii) set a deadline for the completion of reclassification of disclosure material by the SPO.⁷

6. The SPO responds that the Defence misapprehends the scope of the principle of publicity of proceedings and that at the current pre-trial stage of proceedings, in particular, a confidential classification remains appropriate for a significant proportion of evidentiary items, including items which may appear to be public.⁸ However, the SPO “advises that it shall be reviewing, and where appropriate revising, the classification of evidentiary materials prior to the commencement of trial and [...] [that] such classifications shall remain under review throughout the proceedings”.⁹

7. The Defence Replies mainly reiterate the submissions made in the Veseli Request, the Thaçi Joinder and the Krasniqi Joinder.

⁶ Veseli Request, paras 2, 8, 10; Thaçi Joinder, paras 2-3; Krasniqi Joinder, paras 2-3.

⁷ Veseli Request, paras 1, 14-16; Thaçi Joinder, paras 1, 5; Krasniqi Joinder, paras 1, 6.

⁸ SPO Response, paras 2-3.

⁹ SPO Response, para. 7.

III. APPLICABLE LAW

8. Pursuant to Article 21(2) of the Law, the accused is entitled to a fair and public hearing.

9. Pursuant to Article 23(1) of the Law and Rule 80(1) of the Rules, the Specialist Chambers shall provide for the protection of victims and witnesses including their safety, physical and psychological well-being, dignity and privacy.

10. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall have the power to, *inter alia*, make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

11. Pursuant to Rule 83(1) of the Rules, any non-public record of proceedings and evidence shall indicate the reasons for such classification, and whether and when it may be reclassified.

12. Pursuant to Rule 84(1) of the Rules, the Panel shall review on an ongoing basis the classification of records of proceedings and evidence and, where applicable, order their reclassification.

IV. DISCUSSION

13. At the outset, the Pre-Trial Judge recalls that, pursuant to Rule 83(1) of the Rules, any non-public record of proceedings and evidence shall indicate the reasons for such classification, and whether and when it may be reclassified. Furthermore, the Pre-Trial Judge recalls the Framework Decision on Disclosure of Evidence and Related Matters (“Framework Decision on Disclosure”),¹⁰ which specifies that “[...] when disclosing evidence, the Parties shall determine the appropriate level of classification of each item and shall register evidence as

¹⁰ KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public.

public, unless there exist reasons to classify the material otherwise, in accordance with Rule 83(1) of the Rules”.¹¹

14. For a substantial part of the evidentiary material disclosed, in particular witness-related material (statements taken by the SPO and other institutions, as well as material connected to those statements) or material received from other international institutions,¹² the Pre-Trial Judge has ordered protective measures upon reviewing appropriate justifications provided by the SPO. Hence, such material retains its classification until the time the judicially ordered protective measures will be lifted, or as otherwise ordered by a Panel. The Veseli Request accurately does not concern this material.

15. As regards material which is otherwise publicly available, the Pre-Trial Judge finds that, despite its public availability, reasons may exist for confidential classification of such material in the proceedings before the Specialist Chambers. For instance, publicly available material may need to be kept confidential, at this stage: (i) in order to protect the safety, physical and psychological well-being, dignity, and privacy of witnesses, victims participating in the proceedings, and other persons at risk on account of the testimony given by witnesses of the Specialist Chambers;¹³ or (ii) because certain details contained therein or conclusions the SPO draws therefrom are not (yet) in the public domain.¹⁴ Moreover, the issue of (re-)classification of non-confidential material must further be considered against the general climate of witness interference and intimidation

¹¹ Framework Decision on Disclosure, para. 48, which refers in footnote 66 to ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-64-Red, Pre-Trial Chamber II, [Public Redacted Version of "Decision on Disclosure and Related Matters"](#), 23 January 2019, para. 17.

¹² Article 58 of the Law.

¹³ See also Framework Decision on Disclosure, para. 82.

¹⁴ See for example, KSC-BC-2020-06, Transcript of Hearing, 24 March 2022, public, p. 1160, line 14 to p. 1161, line 10 (Oral Order on Reclassification of F00744). Similarly, KSC-BC-2020-07, F00556, Trial Panel II, *Decision on the Application for Reclassification of F00500*, 8 February 2022, public, para. 13.

prevailing in Kosovo. Hence, such material also retains its classification, unless a Panel orders otherwise.

16. The Defence claims that reclassification is necessary to render effective the Accused's right to publicity. While publicity of proceedings is a fundamental right of the Accused under Article 21(2) of the Law, the Pre-Trial Judge recalls that this right is not absolute, but subject to necessary restrictions to protect other interests, including the safety and security of witnesses. Moreover, evidence is not discussed at the pre-trial stage, but at trial. As a result, evidentiary material can remain confidential at the pre-trial stage, as described above.

17. On the other hand, the pre-trial proceedings are at an advanced stage, the submission of the Defence's Pre-Trial Briefs has been ordered,¹⁵ the delayed disclosure period has ended for certain witnesses and their identities have been disclosed to the Defence,¹⁶ Defence investigations have been underway for several months,¹⁷ a framework for handling confidential information is in place,¹⁸ and the transmission of the case file to a Trial Panel will occur in the near future.

18. In this context, the Pre-Trial Judge notes that the SPO readily accepts the Defence's submission that it has classified all evidentiary material disclosed so far as confidential. At the same time, the Pre-Trial Judge is mindful of the fact that disclosure of evidence at the pre-trial stage may encompass material that may not be relied upon and discussed by either Party at trial. It is therefore more appropriate to address the classification of non-confidential evidentiary material closer to its discussion at trial.

¹⁵ KSC-BC-2020-06, Transcript of Hearing, 20 May 2022, public, p. 1324, lines 1-6.

¹⁶ KSC-BC-2020-06, F00647, Specialist Prosecutor, *Prosecution Submission of Lesser Redacted Versions of Indictment and Rule 86(3)(b) Outline*, public, para. 1, with confidential redacted Annexes 1-2.

¹⁷ See the submissions made by the Defence in February 2022, KSC-BC-2020-06, Transcript of Hearing, 22 February 2022, public, p. 985, lines 7-11; p. 1020, lines 15-16.

¹⁸ KSC-BC-2020-06, F00854, Pre-Trial Judge, *Decision on Framework for the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, 24 June 2022, public.

19. In light of Rule 83(1) of the Rules and in view of a proper and expeditious preparation of the case for trial, the Pre-Trial Judge considers it appropriate, moving forward, that the SPO review the evidentiary non-confidential material disclosed so far (“Non-Confidential Material”) and identify: (i) material which can be reclassified as public at this stage; (ii) material which must remain confidential until trial stage, the reasons therefore, and at what particular moment of the trial stage such material can be reclassified as public; and (iii) material which must remain confidential throughout the proceedings and the reasons therefore. The Pre-Trial Judge opines that all Non-Confidential Material must be reviewed as the Defence currently conducts investigations.

20. The information about the potential reclassification of certain non-confidential material at trial will be included in the Handover Document for the Trial Panel’s further consideration.

V. DISPOSITION

21. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REJECTS** the Request to the extent it requests the Pre-Trial Judge to order now the reclassification of non-confidential evidentiary material;
- b. **ORDERS** the SPO to review the Non-Confidential Material and to submit, by **Friday, 4 November 2022**, a list indicating:
 - i. which material can be reclassified as public at this stage;
 - ii. which material must remain confidential until trial stage, the reasons therefore, and at what particular moment of the trial stage such material can be reclassified as public;
 - iii. which material must remain confidential throughout the proceedings and the reasons therefore; and

- c. **ORDERS** the SPO, when disclosing further non-confidential material to the Defence, to determine the appropriate level of classification, to indicate the reasons for any non-public classification, and to indicate whether and when such non-confidential material may be reclassified, in accordance with Rule 83(1) of the Rules.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Tuesday, 23 August 2022

At The Hague, the Netherlands.