



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Specialist Prosecutor

Date: 7 October 2022

Language: English

Classification: Confidential

Prosecution disclosure report

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I. Introduction

1. As ordered by the Pre-Trial Judge,¹ the Specialist Prosecutor's Office ('SPO') hereby files this disclosure report relating to the discharge of its obligations under Rule 103.²

2. The SPO takes its Rule 103 obligations very seriously. It has adopted a broad approach to what is potentially exculpatory, and has disclosed over 6100 items to date under Rule 103 in this case. Dozens of SPO reviewers - including the senior management of the office - have spent 1000s of hours since 2020 in a continuing, collective effort to review the SPO's collection under this rule.

3. Rule 103 is part of a broader disclosure scheme with provisions like Rule 102(3) which ensure, in a manner that is unprecedented at international tribunals, that the Accused have access to all relevant materials at a very early stage in the proceedings. Subject to protective measures, this scheme approaches an open-file disclosure process before the trial has even begun. The SPO has every incentive to discharge its disclosure obligations to the highest standard, and will continue to do so as it has done in all other cases before the KSC.

II. Rule 103 Procedure

4. Although the SPO in fact initiated reasonable advance steps, reviews, and preparations to facilitate Rule 103 disclosure before submission of the initial Indictment in this case, review and disclosure of potentially exculpatory material is an obligation which only began as part of the *inter partes* pre-trial process.³ After the

¹ Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, KSC-BC-2020-06/F00936, 26 August 2022, Confidential ('Decision'), para.37. See also Transcript, 8 September 2022, p.1489.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ See Decision, KSC-BC-2020-06/F00936, para.28.

confirmation of the initial Indictment in October 2020, the SPO began systematically discharging its Rule 103 obligations in light of the confirmed charges, Framework Decision,⁴ and applicable protective measures regime. The initial Rule 103 reviews happened at the height of the COVID pandemic restrictions. The pandemic resulted in regular staff absences due to illness of staff or their close family members, but also necessitated that the majority of staff worked predominantly remotely, without access to centralised evidentiary databases.

5. While the SPO promptly implemented alternative, work-around systems in order to maintain continuity of work throughout, this involved very significant, complex, and time-consuming additional logistical and administrative challenges. Despite these conditions, everyone qualified to do disclosure reviews prioritised reviewing all items in the SPO's collection. Within 30 days of the initial appearance, on 10 December 2020, the SPO disclosed 1309 potentially exculpatory items under Rule 103.⁵ After, the Rule 103 process was conducted transparently in the ordinary course of the pre-trial process and by March 2022, had resulted in the disclosure of 4035 items under Rule 103.⁶

6. After the pandemic abated and as the proceedings progressed, including with the granting of protective measures and filing of Rule 95(4) materials, the SPO's practices for reviewing and disclosing Rule 103 material likewise evolved. As part of both current and past practices, the Rule 103 procedure involved manual review of all documents, quality and consistency checks, and clear direction from senior management to disclose information as exculpatory in the face of any doubt. The latest practices are as follows.

⁴ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020 ('Framework Decision'), para.68.

⁵ Disclosure Package 8.

⁶ See also Prosecution response to THAÇI and KRASNIQI motions concerning Rule 103 disclosure, KSC-BC-2020-06/F00736, 17 March 2022, Confidential, paras 5-7.

7. Whenever a new item is registered, it is first screened to determine whether the item is relevant to the case or contains Rule 103 content. Items are marked as falling under Rule 103 if any part of them: (i) reasonably suggests the innocence of any Accused; (ii) mitigates the guilt of any Accused; or (iii) affects the credibility or reliability of the SPO's evidence.⁷ This screening is done on a continuous basis by experienced SPO prosecutors.

8. If an item is determined to fall under Rule 103 in this initial screening, it is then reviewed for redactions. Following this review, the item is then sent for processing. This phase involves a series of checks aimed to ensure, *inter alia*, that: (i) the metadata of the document is correct; (ii) any duplicate pages within the document are disclosed consistently; and (iii) the item is not covered by any disclosure restrictions, including under Rules 80-81 and/or 107.

9. Once processed, the item is typically grouped with other Rule 103 items and disclosed as soon as the consolidated package is prepared. Grouping items ready to be disclosed around the same time can create economies of scale in processing, such that - whenever this is faster - the Defence gets all such items disclosed in a group rather than as a series of individual items in separate packages. There is no periodic schedule for such packages; Rule 103 packages are disclosed immediately after the process above is complete. When Rule 103 items require protective measures, applications are prepared with appropriate relief sought.⁸

⁷ *Egs Confidential Redacted Version of 'Second Prosecution request for protective measures for items containing Rule 103 information', KSC-BC-2020-06/F00825, dated 31 May 2022, KSC-BC-2020-06/F00825/CONF/RED, 2 June 2022, Confidential, paras 5, n.9 (regarding a particular commander giving instructions on how to treat civilians and prisoners), 9, n.14 (referring to lack of structure in the KLA; lack of awareness of detention locations); Confidential Redacted Version of 'Prosecution request for protective measures for items containing Rule 103 information', KSC-BC-2020-06/F00821, dated 27 May 2022, KSC-BC-2020-06/F00821/CONF/RED, 2 June 2022, Confidential, para.25 (prior criminal proceedings against a witness).*

⁸ As part of this application process, English translations of materials are also prepared for the Pre-Trial Judge's consideration.

10. Should the initial review of the item determine that it does not fall under Rule 103 but is relevant to the case, such items are considered again for Rule 103 content whenever reviewed for any other reason. This includes Rule 102(3) reviews, motion drafting, evidence analysis, and investigations in other cases. Reassessments are then processed and disclosed no differently than any other Rule 103 item.

11. Reassessments have been a common reason why items in Rule 103 disclosure packages were not disclosed earlier, as can be seen, for example, by Disclosure Package 418.⁹ A forthcoming Rule 103 disclosure package is also being prepared in accordance with the process described above. As is inherent in any disclosure review process, human errors in recording or reviewing items also occur.¹⁰

12. The SPO's procedures are put in place to avoid any such delays, consistent with its obligation to ensure effective information and evidence management.¹¹ As noted above - and while all items have been reviewed pursuant to Rule 103 - each time items are reviewed again for other purposes, they are again reviewed for Rule 103. In this respect, as SPO prosecutors prepare for trial, they will necessarily re-review evidence related to the SPO's evidence presentation. Should this lead to identification of any further material not previously disclosed under Rule 103, it will be immediately disclosed pursuant to the above procedure.

⁹ Disclosure Package 418, disclosed 31 August 2022, contains the following items: (i) four items were received/registered after 16 June 2022; (ii) three items were disclosed following Decision F00918; (iii) two items were identified during further review of the Case 5 trial record (these items have multiple parts, for a total of eight items); and (iv) 226 items had previously undergone Rule 103 review and were designated as not potentially exculpatory. For the last category, this assessment was changed when they were re-reviewed in July and August 2022, including in the course of the Rule 102(3) review process. 16 of these items have multiple parts, for a total of 72 items. Six items, which were received before 16 June 2022, were inadvertently not included in previous Rule 103 reviews and were identified and reviewed during recent verification checks of the SPO's records. One of these items is a two-part transcript.

¹⁰ Confidential Redacted Version of 'Corrected Version of Fourth Prosecution request for protective measures for items containing Rule 103 information', KSC-BC-2020-06/F00941/COR/CONF/RED, 31 August 2022, Confidential (redacted version notified 1 September 2022), paras 6, 18-20, 31.

¹¹ Rules 46 and 109(a).

III. Substantive Difficulties

13. This Rule 103 review procedure has entailed the review of voluminous records, amounting to many tens of thousands of documents from many different sources, in many different languages, subject to various provider applied conditions and restrictions, and concerning hundreds, if not thousands, of (sensitive) witnesses and victims, in proceedings before the KSC and other criminal investigations and proceedings conducted over the last twenty plus years.

14. The climate of witness intimidation in Kosovo is a persistent difficulty in all disclosure procedures, including Rule 103 review.¹² The imperative to protect sensitive persons and information demands a careful and deliberate disclosure procedure.

15. Redactions must be applied consistently across the SPO's thousands of disclosures, requiring quality control to ensure precision. Many of the crimes charged in this case were investigated by different agencies across different times. These agencies often shared information with each other, which has led to the SPO obtaining a substantial number of duplicate items and/or information. Any inconsistency in redacting any duplicate can lead to endangering witnesses and other persons. These duplicates also lead to a great deal of information falling under Rule 103 which had already been disclosed in another item under the same rule.

16. The act of bringing a case properly reflective of the Accused's individual criminal responsibility has led to an enormous volume of material needing to be reviewed under Rule 103. While the SPO discharges its Rule 103 obligations as a priority,¹³ it has also been identifying, reviewing, preparing, and disclosing tens of

¹² Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F00994, 29 September 2022, Confidential, para.35; Decision on Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00987, 26 September 2022, para.25. *See also Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of the Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022, paras 577-81.

¹³ *See* Decision, KSC-BC-2020-06/F00936, para.37.

thousands of items falling under Rule 102(1) and 102(3), while some of those items contain many hundreds of pages each. The sheer quantity of reviews inevitably leads to reviewing and recording errors, but the processes put in place are intended to keep them to an absolute minimum and ensure that any errors identified are promptly remedied.

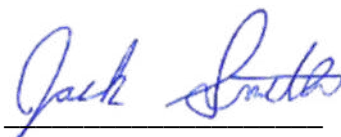
IV. Conclusion

17. The SPO has disclosed Rule 103 items since the very beginning of the proceedings, and has made a deliberate choice to err on the side of marking items under this rule. The SPO has been discharging its disclosure obligations, including of potentially exculpatory material, in good faith and consistent with its mandate to, *inter alia*, contribute to the establishment of the truth and respect the fundamental rights of the Accused.¹⁴ It will continue to do so.

V. Classification

18. This report is submitted confidentially in accordance with the Pre-Trial Judge's order¹⁵ and to protect the SPO's internal working methods.

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Friday, 7 October 2022

At The Hague, the Netherlands.

¹⁴ See, *inter alia*, Rule 62.

¹⁵ Decision, KSC-BC-2020-06/F00936, para.37.