

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: 1 November 2022

Language: English

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**Public Redacted Version of Thaçi Defence Submissions for Fifteenth Status
Conference**

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I. INTRODUCTION

1. On 17 October 2022, the Pre-Trial Judge issued the ‘Order Setting the Date for a Fifteenth Status Conference and for Submissions’.¹

2. The Defence for Mr Hashim Thaçi (“Defence”) hereby provides written submissions regarding the issues listed by the Pre-Trial Judge in the Order, as well as raising additional matters for consideration. The Defence reserves the right to present additional submissions orally at the Fifteenth Status Conference.

II. SUBMISSIONS

A. DISCLOSURE

1. Rule 102(3)²

3. On 20 May 2022, the Pre-Trial Judge ordered the SPO to finalise disclosure of all requested Rule 102(3) items by 30 September 2022.³ On 3 and 13 October 2022, the SPO filed notifications to the Pre-Trial Judge stating that they had completed all disclosure pursuant to Rule 102(3).⁴ While the Defence is still attempting to review and catalogue all of the materials disclosed by the SPO, it appears to the Defence that there are a number of materials it requested prior to 20 May 2022 which have not been disclosed by the SPO.

4. Further, the Defence made additional requests pursuant to Rule 102(3) after 20 May 2022 (but well in advance of the 30 September deadline). The Defence therefore

¹ KSC-BC-2020-06/F01039, Pre-Trial Judge, Order Setting the Date for a Fifteenth Status Conference and for Submissions, 17 October 2022, Public (“Order”).

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

³ KSC-BC-2020-06, Transcript of Twelfth Status Conference, 20 May 2022, Public, Oral Order 3, p. 1323 lines 16-25.

⁴ KSC-BC-2020-06/F01005, Prosecution notification of compliance, 3 October 2022, Public; KSC-BC-2020-06/F01034, Prosecution notification of disclosure, 13 October 2022, Public.

requests that SPO provide an indication of when it expects to finalise disclosure of these materials.

2. Rule 103

5. The Defence once again raises the issue of ongoing late disclosure of exculpatory materials pursuant to Rule 103. Since the last status conference, the SPO has continued to disclose additional packages of exculpatory material pursuant to Rule 103. Some of these packages contain material that was disclosed pursuant to a judicial order, for example, pursuant to protective measures decisions.⁵ However, two of these packages, disclosed on 1 and 24 October 2022,⁶ contain a significant number of new exculpatory items. While the packages contain a few items that were allegedly recently entered into the SPO's database,⁷ the vast majority of the materials had been in the SPO's collection for a significant amount of time and, by their own admission, had only recently been reassessed as falling under Rule 103.⁸ Notwithstanding these oversights, the SPO again attempted to justify these late disclosures by stating they were made in a [REDACTED].⁹

6. The Defence intends to file a written response to the Fifth Request, but would also like to address the ongoing late disclosure of Rule 103 materials at the status conference. In particular, the Defence submits that it is necessary for the Pre-Trial Judge to make a finding of a violation by the SPO of its Rule 103 disclosure obligations,

⁵ See, for example, Disclosure Package 576, which was disclosed pursuant to: KSC-BC-2020-06/F01016/CONF/RED, Pre-Trial Judge, Confidential Redacted Version of Decision on the Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, 7 October 2022 ("Fourth Decision").

⁶ Disclosure Packages 562 and 577, containing 12 and 113 items respectively

⁷ For example, Disclosure Package 577 contained 11 such items (or approximately 8% of the total new disclosures), see: KSC-BC-2020-06/F01055/CONF/RED, Confidential Redacted Version of 'Fifth Prosecution request for protective measures for items containing Rule 103 information with strictly confidential and ex parte Annexes 1-11', 26 October 2022 ("Fifth Request"), para. 21.

⁸ Fifth Request, paras. 20-21.

⁹ Fifth Request, para. 18.

and to reimpose a deadline for the SPO to finalise the assessment as exculpatory of any item in their current custody within one month. This order is warranted, as the SPO is exhibiting a systematic failure to meet its obligations under Rule 103. This is demonstrated most clearly by the following sequence of events:

- (i) As a result of consistent late disclosure of Rule 103 materials, the Defence provided evidence in **March 2022** of the failure of the SPO to disclose material 'immediately', in accordance with the Rules, and sought the intervention of the Pre-Trial Judge;¹⁰
- (ii) On two separate occasions since then, the Pre-Trial Judge has found that the SPO has not been fully diligent in the disclosure of Rule 103 material, and had not shown good cause for the late filing of such material;¹¹
- (iii) The SPO has also twice been ordered to file disclosure reports identifying why items were filed late, indicating the Pre-Trial Judge had concerns about the SPO's compliance with the legal requirements;¹²
- (iv) When justifying its ongoing late disclosures, the SPO has repeatedly relied on factors that are clearly insufficient, such as lack of resources, issues related to a former staff member and the volume of material;¹³
- (v) The SPO continues to 'find' and disclose additional materials pursuant to Rule 103, including materials that have been in their possession for a significant period of time.¹⁴ The SPO's obligations pursuant to Rule 103 are to **immediately** disclose all relevant material in its, custody, control

¹⁰ KSC-BC-2020-06/F00724, Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material, 7 March 2022, Confidential.

¹¹ Fourth Decision, paras. 28-29; KSC-BC-2020-06/F00936, Pre-Trial Judge, Public Redacted Version of Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, 26 August 2022 ("Disclosure Decision"), para. 32.

¹² Fourth Decision, para. 29; Disclosure Decision, para. 37.

¹³ KSC-BC-2020-06/F01019, Prosecution disclosure report, 7 October 2022, paras. 13-16; KSC-BC-2020-06/F01036/CONF/RED, Confidential Redacted Version of 'Prosecution submissions pursuant to Decision F01016', 17 October 2022, paras. 4-10.

¹⁴ For example, Disclosure Package 577 includes a number of contemporaneous news articles and international organisation materials from 1999 and 2000, as well as SPO documents from 2015, 2018 and 2020.

or actual knowledge. In light of this standard, the weak justifications advanced by the SPO demonstrate that:¹⁵

[REDACTED].

7. Thus, the Defence requests that the Pre-Trial Judge review the totality of the disclosures made pursuant to Rule 103, and the inadequate justifications that continue to be provided by the SPO, and find that the SPO has violated its obligation to disclosure Rule 103 material 'immediately'.

B. DEFENCE INVESTIGATIONS

8. The Defence has previously filed submissions regarding the status of its investigations, which it is continuing to progress along the same lines.¹⁶ It incorporates these submissions by reference.

9. To date, the Defence have agreed 18 facts with the SPO. On 31 October 2022, the Defence also intend to circulate a list of proposed agreed facts relating to crimes committed by Serbs in 1998 and 1999. Consequently, while the Defence will endeavour, in good faith, to file a complete notice of agreement on facts by 18 November 2022,¹⁷ its ability to do so may depend on the expediency of *inter partes* discussions between the parties. At a minimum, the Defence can file a notice setting out the 18 facts that have previously been agreed with the SPO.

10. The Defence do not currently foresee any difficulty in filing a notice of objections to the admissibility of evidentiary material, pursuant to Rule 95, by 18

¹⁵ KSC-BC-2020-06/F01043, Joint Consolidated Defence Response to Prosecution Disclosure Reports (F01019 and F01036), 19 October 2022, Confidential, para. 6.

¹⁶ See, e.g., KSC-BC-2020-06/F00870, Thaçi Defence Submissions for the Thirteenth Status Conference, 8 July 2022, Public, para. 6; KSC-BC-2020-06, Transcript of Fourteenth Status Conference, 8 September 2022, Confidential, pp. 1543-1545.

¹⁷ See, Order, para. 25(3)(b).

November 2022.¹⁸ It will not focus on particular items but on categories of evidence, which may be the object of specific challenges.

C. OTHER MATTERS

11. The Defence do not foresee any difficulty in transferring this case to a Trial Panel in the timeframe proposed by the Pre-Trial Judge.¹⁹ However, the Defence notes that, prior to transfer of the case, the SPO must have completed all outstanding disclosure obligations. In addition, the Defence submits that the implementation of the measures requested in its request for unique investigative opportunities²⁰ should not prevent the transfer.

12. Further, the Defence would be willing to appear before the Trial Panel after the hand-over of the case, and notes this process is, in particular, set out in Rule 117 of the Rules. However, the Defence observes that, based on this rule and the previous proceedings in this court, there are a number of issues to be discussed during this conference and may therefore require some time to address these issues before appearing before the Trial Panel for a Trial Preparation Conference.

D. ADDITIONAL ISSUES TO RAISE

13. The Defence wishes to raise three additional issues for discussion at the Fifteenth Status Conference.

1. Request relating to disclosure of lesser redacted materials

¹⁸ See Order, para. 25(3)(c).

¹⁹ See Order, para. 25(4)(c).

²⁰ KSC-BC-2020-06/F01068, Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 October 2022, Confidential (“Motion for Unique Investigative Opportunities”).

14. The Defence requests an order from the Pre-Trial Judge requiring the SPO to systematically identify the portions of a lesser redacted document where redactions have been removed. The Defence submits that one possible method of achieving this would be to highlight in a distinctive colour the material which has been de-redacted.

15. In accordance with the timetable for lifting of protective measures, the SPO is starting to disclose lesser redacted versions of its evidentiary material. However, it is often not clear where the redactions have been removed, requiring the Defence to expend significant time and resources undertaking a comparison exercise. Highlighting the new information would allow a reviewer to, at a glance, determine exactly what is new and is therefore required to be considered. This is particularly important in the context of the significant volume of material that will be de-redacted in the upcoming months and during trial. For example, the SPO has previously stated that the Defence will be provided with 36,000 pages of less or unredacted materials 30 days before trial.²¹ Without a system for clear identification of new information, the Defence will be forced to continually request extensions of time in order to process the volume of new information disclosed, immeasurably delaying proceedings.

16. This proposal was raised *inter partes* with the SPO in the course of the Legal Workflow Forum, attended by representatives from each of the parties to these proceedings on 25 October 2022. [REDACTED]. The Defence therefore now seeks a judicial order to resolve this issue.

2. Request for waiver of the Framework²²

²¹ KSC-BC-2020-06/F00952, Prosecution submissions for fourteenth status conference, 5 September 2022, Public, para. 11.

²² 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, pp. 85-91 containing the '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' ("Framework").

17. In its request for unique investigative opportunities, the Defence has identified W04147 as one of the potential witnesses that it seeks to have participate.²³ Currently however, W04147 is also included on the SPO's Witness List,²⁴ and contact with him is therefore subject to the provisions of the Framework.

18. W04147 is an [REDACTED]. [REDACTED]. There is no threat posed through Defence contact with W04147 outside the bounds of the Framework, and no privacy issues faced by W04147. Equally, for the unique investigative opportunities to be properly and usefully conducted, the Defence requires confidential contacts with W04147.

19. The Defence therefore repeats its request made in the Motion for Unique Investigative Opportunities, that the application of the Framework be stayed in relation to W04147, to allow for preparation for the unique investigative opportunities.²⁵ The Defence requests that the Pre-Trial Judge:

- (i) If agreement is reached with the SPO, endorse the agreement of the SPO to waive the application of the Framework in relation to W04147; or
- (ii) In the alternative, *proprio motu* order the requested waiver.

3. SPO designation of persons as 'suspects'

20. The Defence notes that the SPO adopted a practice of advising some people they interviewed that they were present in the capacity of a 'suspect', because [REDACTED].²⁶ This practice was applied most commonly to former members of the Kosovo Liberation Army.

²³ Motion for Unique Investigative Opportunities, para. 9.

²⁴ KSC-BC-2020-06/F00948/A02, Annex 2 - Revised Witness List, 2 September 2022, Confidential ("SPO Witness List").

²⁵ Motion for Unique Investigative Opportunities, para. 30.

²⁶ See, e.g., [REDACTED].

21. This SPO practice is prejudicial to the Defence and has resulted in significant psychological pressure on those designated as 'suspects'. In particular, the result is that people designated as suspects by the SPO are unwilling to testify on behalf of the Defence, or even sometimes talk to the Defence, as they are concerned about the insecurity of their own circumstances. This is a problem of fundamental fairness for those designated as suspects, who are kept in a state of perpetual uncertainty while the SPO continues its investigations indefinitely. Further, since the SPO has taken a broad approach to those it interviewed as 'suspects', the Defence investigations have been significantly impeded.

22. The Defence is aware that the SPO is still conducting investigations, and is continuing to interview or re-interview those it deems suspects. For example, [REDACTED]. [REDACTED].²⁷

23. In light of the impact of this practice on Defence investigations, and as a matter of fundamental fairness, the Defence submits that the SPO should be ordered to advise all those who are no longer under investigation that they are no longer suspects.

[Word count: 2,249 words]

Respectfully submitted,



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Tuesday, 1 November 2022

At Tampa, United States

²⁷ [REDACTED].