

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 Jakup Krasniqi

Date: 13 December 2022

Language: English

Classification: Public

**Public Redacted Version of Joint Consolidated Defence
Response to Prosecution Disclosure Reports
(F01019 and F01036) (F01043, dated 19 October 2022)**

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I. INTRODUCTION

1. Pursuant to Articles 21(6) and 39(1) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, and Rules 95(2)(b) and 103 of the Rules of Procedures and Evidence before the Kosovo Specialist Chambers, the Defence for Messrs Kadri Veseli, Hashim Thaçi and Jakup Krasniqi (together, "Defence") hereby respond to the SPO Disclosure Reports F01019 and F01036 of 7 and 17 October 2022 on the fulfilment of its Rule 103 disclosure obligation.¹
2. The Defence submits that the SPO has failed to justify or demonstrate good cause for the late disclosure of exculpatory material and for its late application for protective measures for such material. The Defence reiterates its concern as to the methodology employed by the SPO to identify, review and disclose exculpatory material which – it is submitted – is unsatisfactory. The two disclosure reports filed by the SPO have not diminished the Defence' concerns; on the contrary, the SPO does not appear to have taken any initiative to improve its disclosure system or to remedy the prior failures and lack of diligence identified by the Pre-Trial Judge.

II. PROCEDURAL BACKGROUND

3. On 26 August 2022, the Pre-Trial Judge issued the 'Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations'.² The Pre-Trial Judge noted, *inter alia*, that the SPO's "delay in disclosing the [Rule 103] material concerned is in some instances significant, especially as it concerns exculpatory evidence that can be critical for the trial preparation of the Defence." He also found that "the SPO has not been

¹ F01019, Prosecution disclosure report, 7 October 2022; F01036/CONF/RED, Confidential Redacted Version of 'Prosecution submissions pursuant to Decision F01016', F01036, dated 14 October 2022, 17 October 2022.

² F00936, Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, 26 August 2022.

fully diligent in the disclosure of these items.” While the Pre-Trial Judge considered that this did not amount to non-compliance with disclosure obligations,³ he ordered the SPO to file a comprehensive report to confirm its full compliance with its Rule 103 obligations:

“[G]iven that the end of the pre-trial phase is approaching, there is a need **to ensure that the disclosure of exculpatory material is timely and fully effective**. Therefore, in accordance with Article 39(1) of the Law and Rule 95(2)(b) of the Rules, the Pre-Trial Judge instructs the SPO to provide a **comprehensive disclosure report**, to be filed confidentially and to be notified to the Defence as well, explaining the difficulties it is still facing in fulfilling its Rule 103 disclosure obligations and satisfying the Pre-Trial Judge that **everything is being done to comply with the legal requirements set in the Rules**. In particular, the SPO shall: (i) indicate whether it still encounters substantive difficulties in carrying out the disclosure of exculpatory material; and (ii) provide a **detailed explanation of how it conducts the review of documents in its possession** for identifying Rule 103 material, how it determines which documents should be disclosed pursuant to Rule 103 of the Rules, and how does it plan and execute the release of disclosure packages, having particular regard to the formation of the batches and the timing of their disclosure. Such a report shall be filed by no later than 7 October 2022”.⁴

He further “strongly urg[ed] the SPO to abide by its obligation to disclose exculpatory material immediately, as soon as it is in its custody, control, or actual knowledge and to prioritise disclosure of exculpatory material over other competing deadlines and disclosure materials.”⁵

4. At the Status conference on 8 September 2022, upon learning that the SPO had disclosed further Rule 103 material after the deadline, the Pre-Trial Judge further ordered the SPO to provide “detailed explanations” as to its late disclosure.⁶
5. On 7 October 2022, the Pre-Trial Judge issued a Decision on the Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information.⁷ The Pre-Trial Judge observed that:

³ *Ibid.*, para. 32.

⁴ *Ibid.*, para. 37 (emphasis added).

⁵ *Ibid.*, para. 37.

⁶ Transcript, 8 September 2022, p.1480-1489.

⁷ F01016/CONF/RED, Confidential Redacted Version of Decision on the Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, 14 October 2022.

(i) the reassessment of documents as exculpatory information, without any further justification; (ii) the reassessment of the need for protective measures when documents have been identified as Rule 103 material at a prior date, without any further justification; (iii) staff turnover without detailed justification as to why and how such changes impacted the review of the material; and/or (iv) that documents were overlooked, are not adequate justifications to justify a late filing.

He concluded that “[c]oncerning the 17 documents that were reassessed as exculpatory material in July and August 2022, [...] the SPO has not shown good cause for the late filing”⁸ and “has not been fully diligent in the disclosure of these items.”⁹ While the Pre-Trial Judge did not find that this amounted to non-compliance with the SPO’s Rule 103 disclosure obligations, he ordered the SPO to file a disclosure report providing detailed explanations as to the lateness of its request for protective measures regarding 39 items.¹⁰ He again urged the SPO to comply with its Rule 103 disclosure obligation and to prioritise disclosure of exculpatory material over other competing deadlines and disclosure materials.¹¹

III. SUBMISSIONS

6. Having reviewed the SPO disclosure reports, the Defence maintains its prior submissions that the SPO has failed to implement an organized, efficient, and thorough system for the review of documentary evidence, to ensure that all material falling within the disclosure-related Rules is provided to the Accused in a prompt manner, especially Rule 103 material.

A. Rule 103 Material From Rule 102(3) Notice

7. The SPO fails to confirm that it has identified and disclosed (or requested to withhold) all Rule 103 items on the Rule 102(3) Notice.¹² Without such

⁸ *Ibid.*, para. 28.

⁹ *Ibid.*, para. 29.

¹⁰ *Ibid.*, para. 29.

¹¹ *Ibid.*, para. 29.

¹² F00543/A01, Annex 1 to Prosecution Amended Rule 102(3) Notice Pursuant to F00421 with confidential Annexes 1 and 2, 22 October 2021; F01021/A01, Prosecution supplemental Rule 102(3) notice, 7 October 2022.

assurance, it cannot be confirmed that its Rule 103 obligations have been fully discharged.

8. As the SPO confirms in its disclosure report F01036, certain items were only identified as falling within Rule 103 as a consequence of their being reviewed for disclosure pursuant to a Defence Rule 102(3) request.¹³ The Defence recalls that the SPO identified the need to “re-review” items on the Rule 102(3) to ensure compliance with its Rule 103 disclosure obligations over a year ago.¹⁴ Since then, the SPO has repeatedly disclosed items pursuant to Rule 103 which were originally listed as Rule 102(3), as it continued to process Defence Rule 102(3) requests.¹⁵
9. The SPO fails to justify how such a large number of documents was not immediately marked as containing exculpatory information, despite being screened and reviewed specifically for Rule 103 purposes right after registration.¹⁶ Indeed, some of the documents disclosed after the ‘re- review’ obviously fall within Rule 103; to give but one example, 095244-0952440 is a one-page official note dated 12 April 2021, which was extracted from an SPO internal document dated 2019. The document clearly affects the credibility of an SPO witness, [REDACTED]. Yet, the document was somehow missed during the first screening and was disclosed to the Defence pursuant to Rule 103 almost a year later, in March 2022. This is but one example of a litany of oversights. The SPO’s generic reference to “human errors” is far from satisfactory.¹⁷

¹³ F01036, para. 4.

¹⁴ Transcript, 14 September 2021, p. 583.

¹⁵ As noted in, for example, F00880, Veseli Defence Response to Third Prosecution Request for Protective Measures for Items Containing Rule 103 Information (F00861), 13 July 2022, para. 3; F00744, Veseli Defence Submissions for Eleventh Status Conference, 21 March 2022, para. 5.

¹⁶ F01019, paras 7-10.

¹⁷ F01019, para. 11.

10. The Defence also observes that a number of items from the Rule 102(3) Notice have not been requested by any Defence team. As it appears that only documents that the Defence requested were ‘re-reviewed’ for Rule 103 information, the Defence has reason to believe that those items that were not requested by any of the Defence teams were not re-reviewed. Given how many Rule 102(3) items were reclassified as Rule 103 over the course of the last year, it is imperative that the SPO specifically confirms that it has reviewed the remaining items not requested by any teams. Otherwise, there can be no confidence in the SPO’s assertion that it has complied with its disclosure obligations.
11. The Defence further underscores that neither of the SPO’s disclosure reports explain how the original disclosure review resulted in so many Rule 103 items being incorrectly classified as Rule 102(3). Without such knowledge, it is impossible to assess whether the SPO’s “latest practices” represent a genuine improvement on previous practices, which are likely to generate greater compliance.¹⁸ The Defence therefore requests that the Pre-Trial Judge order the SPO to explain how the original review was conducted and what specific steps have been taken since, to ensure that such errors are not repeated in future.

B. SPO Resources

12. In its report of 7 October 2022 (F01019), the SPO details the difficulties it faced as a consequence of the Covid-19 Pandemic. The Defence reiterates that lack of resources is never a justification for the Prosecution to not meet its obligations.¹⁹ The obligation is to ensure disclosure, not to attempt to do so.

¹⁸ F01019, paras 7-12.

¹⁹ Transcript, 29 October 2021, p.734; Article 6 ECHR; ECtHR, *Eckle v. Germany*, App. no. 8130/78, [Judgement](#), 15 July 1982, paras 92-95.

13. In the same report, the SPO also attempts to justify its 15 months delay in the disclosure of material falling under Rule 103 by discharging responsibility on a former member of the SPO's witness security team, who allegedly requested documents from a provider in December 2020 but left his position before the documents were received.²⁰ The SPO's submissions fall short of any persuasive justification: the lack of internal organisation in the logging and processing of material received by external providers cannot be a reason to justify such a substantial delay. If anything, it points to concerning dysfunctionalities in the SPO's disclosure practices.
14. In this regard, the Defence observes that the SPO implies that it somehow exceeded its legal obligations by commencing the Rule 103 review process prior to the service of indictments.²¹ The Defence stresses that the obligation under Rule 103 is to ensure immediate disclosure once there is an Accused who has a right to receive such disclosure. Whether this requires steps to be taken prior to the service of indictments is a matter for the SPO to determine in the proper preparation of its case; the SPO should be able to identify Rule 103 material as soon as it applies for the confirmation of an Indictment before the Pre-Trial Judge.

C. Protective Measures – Withdrawn Witnesses

15. The SPO has failed to adopt a proper procedure with respect to protected witnesses on whose testimony it no longer relies.²² In F01036, the SPO explains in one, heavily redacted, sentence why it believes that protective measures in relation to one such witness ought to be maintained – having previously failed

²⁰ F01019, para. 8.

²¹ F01019, para. 4.

²² F01036, para.2.

to offer any explanation for the maintenance of protective measures whatsoever.

16. The Defence recalls that the Framework Decision states:

Redactions falling under this category shall be lifted upon order of the relevant Panel or **as soon as the reasons justifying them cease to exist**. Should a Party intend to lift a non-standard redaction concerning the name of a witness because it believes that the reasons justifying the withholding of identity have ceased to exist, it shall notify the Pre-Trial Judge and WPSO thereof five days prior to the lifting of any such redaction.²³

17. While protective measures generally apply until varied, the Framework Decision clearly states that they shall be lifted *as soon as* the reasons justifying them cease to exist. Considering that the central justification for these protective measures – the person for whom they are sought being on the SPO witness list – ceased to exist,²⁴ the SPO should have applied to the Pre-Trial Judge to maintain these protective measures, if that was indeed its wish. Because protective measures constitute a restriction on the Accused’s fair trial rights, it is imperative that their legal basis remains clear and well-founded. Otherwise, such restrictions become arbitrary and unlawful. The Defence requests that the Pre-Trial Judge rescind protective measures each time the SPO elects to withdraw its reliance on a witness, unless the SPO submits a properly justified request for protective measures to be maintained despite the change of circumstances.

IV. CONCLUSION


18. For the above reasons, the Defence requests the Pre-Trial Judge to:

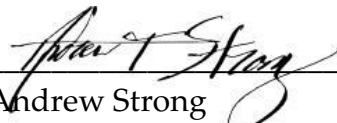
²³ F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 98, (“Framework Decision”), (emphasis added).

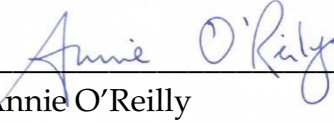
²⁴ The Defence notes that similar considerations also apply to W03594 and W04840. See F00948, Prosecution submission of revised witness list with strictly confidential and *ex parte* Annex 1 and confidential Annexes 2-3, 2 September 2022; F00631, Submission of Pre-Trial Brief, with witness and exhibit lists with strictly confidential and *ex parte* Annexes 1-3, 17 December 2021, Fn. 13.


- a. Find that the SPO failed to comply with its orders F00936 and F01016, its disclosure reports being incomplete;
- b. Order the SPO file supplemental submissions on the matter, as requested in the Defence submissions above.

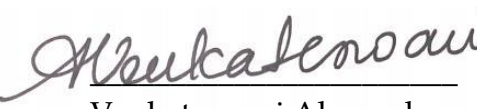
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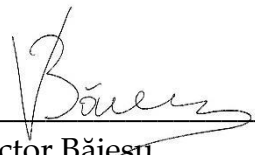

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