

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christophe Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 10 January 2023

Language: English

Classification: Confidential

**Veseli Defence Consolidated Response to Prosecution Requests
for Reconsideration or Leave to Appeal Decision F01149
and for Suspensive Effect**

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I. INTRODUCTION

1. Pursuant to the Trial Panel's Order of 6 January 2023,¹ the Defence for Mr Kadri Veseli hereby responds to the SPO's Request for reconsideration or leave to appeal,² the Pre-Trial Judge's Decision on disclosure of evidence pertaining to Serbia,³ and for suspensive effect relating to the same.⁴
2. The Defence maintains that the Decision to grant the Defence disclosure of Requests for Assistance and Information ("RFAs" and "RFIs") with Serbia, pursuant to Rule 102(3), was correct. As the Defence has previously demonstrated, Serbia has a long history of manipulating facts that includes a series of brutal false flag operations aimed at incriminating the KLA;⁵ the use of torture to extract false confessions;⁶ crime scene manipulation, including the mass-removal of civilian bodies to cover up its own atrocities;⁷ an ongoing misinformation campaign aimed at delegitimising Kosovo's claim to independence and undermining the existence of the State;⁸ and attempts to introduce false testimony before international courts.⁹ Significantly, evidence disclosed by the SPO in these proceedings indicates that it has also attempted to do so before the KSC.¹⁰ Conduct of this nature could prevent this Court from fulfilling its mandate to ensure the right to truth and access to justice.

¹ F01187, Order Setting the Deadline for the Response to F01185 and F01186, 6 January 2023.

² F01185, Prosecution Request for Reconsideration or Leave to Appeal Decision F01149, 4 January 2023.

³ F01149, Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), 9 December 2022.

⁴ F01186, Prosecution Request for Suspensive Effect Relating to Decision F01149, 4 January 2023.

⁵ F00877/COR, Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022), 21 July 2022, paras 34-45;

⁶ See, F00877/COR, paras. 66-72.

⁷ See, F00877/COR, paras. 46-58.

⁸ See, F00877/COR, paras 29-31.

⁹ See, F00877/COR, paras 59-62.

¹⁰ F01100, Veseli Defence Supplemental Submissions to Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR) With Confidential Annexes 1-2, 14 November 2022, especially paras. 39-41.

3. As such, it is the Defence's position that Serbia's involvement in the SPO's investigation and prosecution of the Accused is material to its case. The Defence avers that the Pre-Trial Judge's did not err in issuing the decision to grant the disclosure of the material at issue.
4. The SPO has failed to meet the requirements of the legal tests for any of the remedies it seeks, namely, (i) reconsideration; (ii) leave to appeal; or (iii) suspensive effect. Consequently, the Defence submits that the Requests should be denied.
5. While the Defence does not, at this time, seek its own reconsideration of the Pre-Trial Judge's Decision, it reserves the right to make further representations on the need for such disclosure in respect of individual witnesses, should circumstances require.

II. APPLICABLE LAW

6. Pursuant to Rule 79 of the Rules, reconsideration of an earlier decision is permissible in exceptional circumstances, where a clear error of reasoning is demonstrated, or to avoid injustice.¹¹
7. According to Article 45(2) of the Law and Rule 77 of the Rules, leave to appeal shall be granted if a decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and immediate resolution by an Appeals Panel may materially advance the proceedings.¹²

¹¹ See also, F00115, Decision on Defence Requests for Reconsideration and Extension of Word Limit, 1 December 2020, para. 17.

¹² See also, F00172, Decision on Thaci Defence Application for Leave to Appeal, 11 January 2021, paras 9-17; F00479, Decision on the Krasniqi Defence Application for Leave to Appeal, 20 September 2021, para. 11.

8. Rule 171 of the Rules dictates that suspensive effect of a decision shall only be granted in exceptional circumstances where implementation would defeat the purpose of the appeal.

III. SUBMISSIONS

A. **The SPO's Request for Reconsideration Should be Rejected**

i. The SPO Fails to Demonstrate the Existence of Exceptional Circumstances

9. The SPO's attempt to justify reconsideration is unfounded; it utterly fails to highlight the existence of any exceptional circumstances and merely offers the *prospect* that the RFAs *could* affect its relationship with States and organisations in a manner that is entirely speculative and unsupported by fact.¹³

10. The Defence for its part has repeatedly underscored that Serbia, by virtue of its prior and ongoing conduct, is in a class of its own.¹⁴ Indeed, the Defence's request was premised on the *sui generis* nature of Serbia's conduct. There is no reason to believe that a decision taken in respect of these very unique and particular circumstances would have a chilling effect on cooperation generally.

ii. The SPO Fails to Identify any Error of Reasoning

11. As the Pre-Trial Judge recounted in the Impugned Decision:

The Defence argues that is that all information emanating from Serbia, its organs and its agents should be disclosed pursuant to Rule 103 of the Rules, since in addition to being a direct adversary of the Kosovo Liberation Army ("KLA") and the Accused during the 1998-1999 conflict, Serbia: (i) has shown clear and persistent bias against the KLA and specifically the four Accused; (ii) has a proven record of manipulating evidence to incriminate the KLA; and (iii) may have provided to the SITF and the SPO evidence obtained through torture or duress.¹⁵

¹³ See, F01185, para. 12.

¹⁴ See for example, F00877/COR, paras. 30-68; F00928, Joint Defence Reply to SPO Response to Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00910), 15 August 2022, para. 2.

¹⁵ F01149, para. 27.

12. All of those claims were substantiated at length in the Request.¹⁶ While rejecting the requests for Rule 103 disclosure, the Pre-Trial Judge accepted that the RFAs and RFIs were disclosable under Rule 102(3), stating that it was “clear from the context of the Defence Request and Defence Reply that the Defence considers all of the requested material to be material to the preparation of its case.”¹⁷
13. The SPO claims that the Pre-Trial Judge erred by failing to weigh its interests in maintaining its cooperative relationships, arguing that such relationships are the starting point for determining issues of disclosure.¹⁸ On the contrary, the Defence submits that the rights of the Accused and his ability to prepare a defence are at the forefront of that assessment. If there are any valid, albeit ancillary, competing interests, then those are to be weighed.
14. Whilst the Defence concedes that the SPO’s cooperative relationships may be considered in order to determine how much weight to afford them in the analysis, the Defence avers that, in this particular context, the SPO’s relationship with Serbia is not a valid competing interest. It is precisely these concerns, which the Defence identified in its original Request, that require the SPO’s relationship with Serbia to be subjected to heightened scrutiny, and not shielded. Even if the Pre-Trial Judge was wrong not to explicitly consider this interest when determining whether the RFAs and RFIs ought to be disclosed, the assessment would have had no bearing on the outcome due to the – at most – minimal weight it could be afforded.
15. The SPO further contends that the Pre-Trial Judge erred by failing to follow the ICC Appeal Judgement in *Bemba et al.*¹⁹ The Defence submits that that decision

¹⁶ F00877CORR, paras. 30-72.

¹⁷ F01149, para. 78.

¹⁸ F01185, para. 7.

¹⁹ F01185, paras 8-10 referring to ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, [Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido](#)

is distinguishable from the present case.²⁰ Contrary to the SPO's suggestion, the Defence request was not premised solely on the ground that the RFAs and RFIs led to the production of evidence upon which it seeks to rely; that was only a part of the Defence's argument. The other part, to which the SPO failed to draw any attention, is that the partner to whom the relevant RFAs and RFIs were addressed is an actor with a long history of attempting to manipulate evidence in criminal proceedings relating to the Kosovo war through blackmail, torture, and misinformation.²¹ This, *combined* with their role in the collection of evidence relied upon by the SPO, is what renders these particular RFAs and RFIs material to the Defence's preparations; and it was against this backdrop that the Pre-Trial Judge recognised that the Defence "[considered] all of the requested material to be material to the preparation of its case."²² In this respect, the Defence avers that the circumstance which prompted the Pre-Trial Judge to consider the material disclosable affects *all* of RFAs and RFIs; thus, rendering *all* of them disclosable.

iii. No Injustice Results From Upholding the Original Decision

16. The Defence observes that the SPO failed to substantiate its claim that reconsideration is necessary to avoid injustice.²³ In this regard, the SPO's characterisation of the material as "technical, with no substantive information" and having "no content that bears any connection to this case" tends to undermine any suggestion that any great injustice results from the original decision.²⁴

[against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute"](#), 8 March 2018, para. 642.

²⁰ The Defence observes that, in any event, the Judgement is not binding on the Specialist Chambers; it being a precedent from another jurisdiction.

²¹ See for example, F00877/COR, paras. 30-68.

²² F01149, paras 76 and 78 referring to F00877/COR, paras 3, 75, 76 and 78.

²³ F01185, paras 2 and 7.

²⁴ F01185, para. 8.

iv. Failure to Uphold the Decision Would Unfairly Prejudice the Accused

17. The SPO contends that the Pre-Trial Judge's failure to strike an appropriate balance is further illustrated by the lack of prejudice non-disclosure of the RFAs would cause to the Defence.²⁵ The SPO mischaracterises the Defence's original Request. Whilst the Defence is well-aware that substantive information stemming from the RFAs has already been disclosed, it notes that the RFAs themselves would allow it to test the reliability of the procedure employed in collecting potential evidence against the Accused. In turn, the RFAs further contextualise the substance of the material with which they are associated – this is particularly relevant given Serbia's history of tainting and manipulating evidence.
18. Furthermore, the Defence submits that *inter partes* discussions are not a sensible avenue for obtaining the disclosure of material to which the Accused is entitled in these circumstances. In this respect, the Defence notes that the SPO fails to acknowledge the fundamental premise of the Defence's argument *i.e.*, that Serbia is an unreliable source, whose history of manipulating evidence is cause for concern. It seems, therefore, unlikely that *inter partes* correspondence would assist on this particular matter – which has been the subject of particularly heated litigation – and ignores the fact that such discussions have consistently proven to be fruitless. In the interests of expediency, as well as the lengthy amount of time which has been dedicated to disclosure related issues, the Defence does not wish to engage in such discussions. The ineffectiveness of *inter partes* discussions is further emphasised when considering that the case has been transferred to trial, a trial date has been set, and disclosure remains incomplete. *Inter partes* discussion would only cause further delays.

²⁵ F01185, para. 11.

19. As such, if the Defence were denied access to the RFAs in question, prejudice would be caused to the Accused's fair trial rights – specifically that which guarantees Mr Veseli's right to prepare a Defence.

B. The SPO's Request for Leave to Appeal Should be Rejected

20. The SPO fails to demonstrate how either of the issues it presents would significantly affect the fair and expeditious conduct of the proceedings and outcome of the trial, or how immediate appellate resolution would materially advance the proceedings. As noted above, the SPO frames the significance of the fairness issue, as well as, the potential impact on the outcome of trial, in terms of certain hypothetical, and generic, ramifications which *may* affect its cooperative relationships.²⁶ The Defence submits that this is clearly wrong and misleading. Accordingly, the Impugned Decision is limited solely to the SPO's relationship with one entity – Serbia – whose influence on these proceedings has been identified and established as material to the Defence.

C. The SPO's Request for Suspensive Effect Should be Rejected

21. The test for suspensive effect is whether implementation would defeat the purpose of the appeal. As the Defence understands it, the purpose of the appeal is to “correct” the law as regards the disclosability of RFAs and RFIs, so as to protect the SPO's cooperative relationships with external entities. The SPO's interest in protecting the information contained in the RFAs and RFIs appears to be secondary at best.²⁷ Considering the Accused's right to prepare himself for trial – which is due to commence in seven weeks' time – the Defence submits that it would be inappropriate to grant the SPO's request for suspensive effect. The Defence ought to have the ability to examine the material in question prior to the commencement of evidentiary proceedings.

²⁶ F01185, para. 16.

²⁷ *See*, F01185, para. 8.

IV. CONCLUSION

22. For the foregoing reasons, the Defence requests that the Trial Panel reject all of the Prosecution's requests for relief.

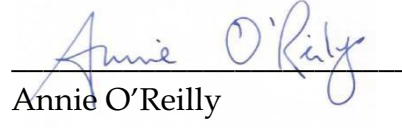
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