

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 10 January 2023

Language: English

Classification: Confidential

**Thaçi Defence Consolidated Response to ‘Prosecution request for reconsideration or
leave to appeal Decision F01149’ (F01185) and ‘Prosecution request for suspensive effect
relating to Decision F01149’ (F01186)**

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I. INTRODUCTION

1. On 12 July 2022, Counsels for Kadri Veseli, Hashim Thaçi, Rexhep Selimi and Jakup Krasniqi jointly requested the Pre-Trial Judge to order the SPO to disclose, *inter alia*, “all requests for assistance, and/or other agreements reached between the SITF and/or the SPO and the Republic of Serbia or any of its organs or agents”; and “all requests for information and associated correspondence between the SITF and/or the SPO and the Republic of Serbia or any of its organs or agents”, pursuant to Rule 103 and/or Rule 102(3) of the Rules of Procedure and Evidence (“Defence Motion”).¹

2. On 9 December 2022, the Pre-Trial Judge issued the “Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR)” (“Decision”).² The Pre-Trial Judge ordered the Specialist Prosecutor’s Office (“SPO”) to amend its Rule 102(3) notice and, subject to any necessary protective measures, disclose any requests for assistance or information and related responses (collectively, “RFAs”) leading to the production of evidence in this case, by 13 January 2023.

3. On 4 January 2023, the SPO filed its request for reconsideration or leave to appeal the Decision (“SPO Motion”)³ and requested that the Panel grant suspensive effect in relation to the Pre-Trial Judge’s order for the submission of the amended SPO notice and to disclose the RFAs by 13 January 2023 (“SPO Request”), until a final decision by either the Panel or Court of Appeals on the issues raised in the Motion.⁴

¹ KSC-BC-2020-06/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), Confidential, paras 5, 81.

² KSC-BC-2020-06-F01149, Pre-Trial Judge, Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), 9 December 2022, confidential.

³ KSC-BC-2020-06-F01185, Prosecution Request for Reconsideration or Leave to Appeal Decision F01149, 4 January 2023, confidential.

⁴ KSC-BC-2020-06-F01186, Prosecution Request for Suspensive Effect Relating to Decision F01149, 4 January 2023, confidential.

4. The Defence for Mr Hashim Thaçi (the “Defence”) hereby responds to the SPO’s Motion and Request and submits that they should be both dismissed. The Pre-Trial Judge correctly assessed the relevance and necessity to disclose requests for assistance or information and related responses to the Defence pursuant to Rule 102(3).

II. SUBMISSIONS

A. REQUEST FOR RECONSIDERATION

5. The SPO argues that the Pre-Trial Judge erred in his interpretation and application of the standard for RFA disclosure because it failed to undertake a case-by-case assessment and to give due weight to relevant factors, such as the confidentiality of RFAs and the absence of adequate reasons provided by the Defence disclosure of RFAs.⁵

6. The SPO submissions are misleading. The Decision concerns only a limited number of RFAs, those reached with a particular State, Serbia, *and* which led to the production of evidence in the present case. Their disclosure is warranted because of the particular relationship between this State and Kosovo, the KLA, the Accused. The Pre-Trial Judge took into account this particular context, detailed extensively by the Defence in its initial Motion in support of a SPO Rule 103 disclosure obligation,⁶ to determine that the material requested was relevant for the Defence pursuant to Rule 102(3), which was the alternative legal basis raised by the Defence:⁷ “*it is clear from the*

⁵ SPO Motion, para. 2.

⁶ Defence Motion, paras 25-65.

⁷ Defence Motion, paras 79-80.

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.”⁸

7. Indeed, as developed in the Defence Motion,⁹ Serbia has a clear and persistent bias against the Kosovo Liberation Army and the Accused, as well as a proven record of manipulating evidence to incriminate the KLA and exculpate its own actions, raising well-founded concerns about the credibility and reliability of information emanating from this source.¹⁰ Serbia was against Kosovo independence during the 1998-1999 conflict and still refuses to recognise its independence to this day. Serbia was a direct adversary of the KLA and of the Accused during the 1998-1999 conflict.¹¹ Thus Serbia is not an ordinary State in these proceedings; it is not neutral. Thanks to the requested RFAs, Serbia has disclosed numerous items which are on the SPO Exhibit List and several witnesses on the SPO Witness list are of Serbian origin and/or are still living in Serbia. The SPO implicitly acknowledges that some of the RFAs concern witnesses called to testify against the Accused.¹² In consequence, the Pre-Trial Judge correctly found that such RFAs, emanating for a particular State, which led to the production of evidence in the present case, were disclosable to the Defence pursuant to Rule 102(3).¹³

8. Contrary to the SPO submissions, the Pre-Trial Judge did not contradict its findings in the Decision on Specialist Prosecutor’s Materiality Challenge for Items from Rule 102(3) Notice Requested by the Defence (“Materiality Decision”).¹⁴

⁸ Decision, paras 76, 78.

⁹ Defence Motion, para. 30.

¹⁰ Defence Motion, paras 27, 33.

¹¹ Defence Motion, para. 26.

¹² SPO Request, para. 3.

¹³ Decision, paras 76, 78.

¹⁴ KSC-BC-2020-06/F01161, Pre-trial Judge, Decision on Specialist Prosecutor’s Materiality Challenge for Items from Rule 102(3) Notice Requested by the Defence, 15 December 2022, Confidential, paras 36 et seq.

Implicitly, it did consider that there was a specific need to disclose such RFAs because of the State in question, Serbia, and of the impact of such RFAs, which led to the production of evidence in the present case. Thus the Pre-Trial Judge did make a case specific determination in the Decision.

9. In addition, the Defence maintains that it would be prejudiced by the lack of disclosure of the requested RFAs. They are necessary for the Defence to understand the conditions upon which information was requested and accepted, as this is likely to affect its credibility and reliability.¹⁵

10. The SPO wrongly argued that “[w]hile the Impugned Decision only concerns one State, the potential for disclosure of confidential correspondence without adequate justification could also have a chilling effect on the SPO’s relationships with other States and organisations.”¹⁶ Serbia is the only entity having such a particular, antagonist, relationship with Kosovo and the KLA, warranting a wider disclosure of RFAs having led to the production of evidence in the current case. Thus the Decision does not affect the cooperation of the SPO with any other States or organisation. This is further demonstrated by the fact that the Pre-Trial Judge did refuse to order the disclosure of RFAs from Germany or Croatia in the Materiality Decision for instance.¹⁷

B. REQUEST FOR LEAVE TO APPEAL

11. For the reasons developed above, the Defence submits that the SPO request for leave to appeal the Decision should be similarly dismissed. Each of the Issues identified by the SPO fails to meet the certification test. The SPO merely challenges the Pre-Trial Judge's exercise of his discretion without demonstrating any appealable

¹⁵ Defence Motion, para. 5.

¹⁶ SPO Motion, para. 12.

¹⁷ Materiality Decision, para. 42.

issue, and instead merely disagrees with the Decision. Moreover, the SPO has not established that the Issues significantly affect the fairness and expeditiousness of the proceedings. As noted above, the Impugned Decision deals only with the SPO disclosure obligation related to RFAs exchanges with Serbia and does not have any impact on the SPO cooperation with other entities. Finally, the SPO fails to demonstrate that an immediate resolution of the Issues may materially advance the proceedings.

C. REQUEST FOR SUSPENSIVE EFFECT

12. The Defence submits that the SPO request for suspensive effect should be dismissed, as unwarranted and prejudicial for the Defence. The Defence would be extremely prejudiced by the delayed disclosure of the requested RFAs while the trial is deemed to start in only a few weeks. These RFAs concern witnesses relevant for the current proceedings, some being called to testify against the Accused.¹⁸ They may be useful to assess their credibility as well as the reliability of some items on the SPO Exhibit List which may have been disclosed to the SPO by Serbia. Contrary to the SPO unsubstantiated submissions, the disclosure of the RFAs exchanged with Serbia will not put in jeopardy the SPO cooperation with any other State or organisation.

¹⁸ SPO Request, para. 3.

III. RELIEF SOUGHT

13. For the above reasons, the Defence respectfully requests the Trial Panel to dismiss the SPO's Motion and Request.

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Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Tuesday, 10 January 2023

At Tampa, United States