

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 Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Public Redacted Version of

Krasniqi Defence Response to Prosecution Rule 107(2) Request

KSC-BC-2020-06/F00555, KSC-BC-2020-06/F00564, dated 12 November 2021

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi ("Defence") opposes the request¹ by the Specialist Prosecutor's Office ("SPO") to be relieved of its disclosure obligations in relation to around 13 documents pursuant to Rule 107(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers.²

2. This filing is confidential because it refers to the SPO Request which is confidential and to the content of confidential documents.

II. PROCEDURAL HISTORY

3. On 7 September 2021, the SPO filed the confidential redacted version of its Eleventh Request for Protective Measures, which included a request to be relieved of disclosure obligations relating to around 45 documents pursuant to Rule 107(2).³

4. On 17 September 2021, the Defence responded to the Eleventh Request for Protective Measures and, in particular, opposed the request insofar as it related to Rule 107(2).⁴

¹ KSC-BC-2020-06, F00555/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Rule 107(2) Request'*, KSC-BC-2020-06/F00555, dated 1 November 2021 ("Request"), 2 November 2021, confidential.

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 KSC-BC-2020-06, F00456/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Eleventh Request for Protective Measures'*, KSC-BC-2020-06/F00456, dated 3 September 2021 ("Eleventh Request"), 7 September 2021, confidential, paras 8-27.

⁴ KSC-BC-2020-06, F00475, Krasniqi Defence, *Krasniqi Defence Response to the SPO Eleventh Request for Protective Measures* ("Response to Eleventh Request"), 17 September 2021, confidential, paras 2, 18-25, 27.

5. On 21 September 2021, the SPO replied, maintaining its Rule 107(2) requests.⁵
6. On 1 November 2021, the SPO submitted the Request and a confidential version was made available to the Defence on 2 November 2021.

III. APPLICABLE LAW

7. Rule 107 provides in part:

(1) If the Specialist Prosecutor has custody or control over information which has been provided on a confidential basis and solely for the purpose of generating new evidence, such information and its origin shall be protected under Article 58 of the Law. The initial material or information shall not be disclosed without the consent of the provider and shall, in any event, not be tendered into evidence without prior disclosure to the Accused.

(2) Where the information is subject to disclosure, the Specialist Prosecutor shall apply confidentially and *ex parte* to the Panel to be relieved in whole or in part of his or her obligation under Rule 102 and Rule 103 to disclose the initial material. The application shall include the information in question. The Specialist Prosecutor may also apply for counterbalancing measures pursuant to Rule 108(2).

IV. SUBMISSIONS

8. The Defence opposes the SPO's request to be relieved of its disclosure obligations in relation to certain Rule 107 material.⁶

9. The Defence repeats and adopts its previous submissions that:-

- a. Rule 107 only applies to material provided to the SPO "solely for the purpose of generating new evidence".⁷ There is no evidence or indication that the relevant material was provided to the SPO solely for the purpose of

⁵ KSC-BC-2020-06, F00482, Specialist Prosecutor, *Prosecution Reply to Defence Responses and Corrections to Eleventh Request for Protective Measures*, 21 September 2021, confidential.

⁶ Request, paras 1, 3-9.

⁷ Rule 107(1).

generating new evidence.⁸ Indeed, as in the Eleventh Request for Protective Measures,⁹ the SPO appears to be relying on Rule 107(2) to withhold information contained in an SPO witness interview and witness statement intended to be relied upon at trial.¹⁰ The contents of witness interviews and statements to be relied upon at trial are not information provided solely for the purpose of generating new evidence and Rule 107 therefore does not apply to those documents;

- b. Rule 107(2) should not be relied upon to withhold information which affects the factual and contextual information provided to the Defence;¹¹
- c. Rule 107(2) should only be used where the information withheld is genuinely limited because to withhold more extensive information is inconsistent with the rights of the Accused.¹²

10. Applying those considerations to the SPO Request, the Defence opposes the withholding of information pursuant to Rule 107(2) for the following reasons. First, withholding the names of individuals should not be permitted.¹³ The names of these individuals are highly relevant to the factual and contextual information provided to the Defence. All the individuals whose names the SPO seeks to withhold are potential Defence witnesses. If the meetings that they attended and the documents that they are connected to are significant enough to appear in the interviews or statements of W02114 and W02160, then the identity of those individuals is material to the Defence because those individuals may contradict the evidence given by SPO witnesses

⁸ Response to Eleventh Request, para. 19.

⁹ [REDACTED]; Eleventh Request, para. 20; Response to Eleventh Request, paras 19, 23.

¹⁰ Request, paras 3, 8.

¹¹ Response to Eleventh Request, paras 2, 20.

¹² *Ibid.*, paras 21, 24.

¹³ This applies to SPOE00309143-00309175, SPOE00309176-00309205 RED, SPOE00209605-00209619, SPOE00210266-00210280, SPOE00209620-00209634, SPOE00210213-00210227, SPOE00203123-00203124.

W02114 and W02160 about those meetings or documents. If these names are withheld from the Defence, the possibility of contacting them and interviewing them is denied to the Defence. Moreover, knowing the identity of the individuals involved may be directly relevant to trial preparation and cross-examination because it increases the Defence knowledge of the context of the documentary evidence, the structure of the relevant organisations and the relationship between them.

11. Second, the Request goes far beyond the limited withholding of information which might be consistent with the rights of Mr. Krasniqi. For instance, the SPO seeks to be permitted to withhold SITF40001621-40001623 in its entirety.¹⁴ The fact that six paragraphs of the statement of W02160 are spent discussing this document¹⁵ emphasises its relevance and importance to the Defence. It appears to relate to one of the Accused.¹⁶ Moreover, W02160 is on the SPO's Preliminary Witness List and is expected to give live evidence.¹⁷ It is impossible and obviously unfair to expect the Defence to be able to cross-examine W02160 at all or effectively, including on the evidence in his witness statement about SITF40001621-40001623, without having sight of that document. In any event, the disclosure of a witness statement commenting on a document does not counterbalance the unfairness resulting from withholding the document. It is the document which is the primary evidence, not a witness' recollection of it twenty years later. By withholding the document itself, the Defence is prevented from assessing whether the witness' view of the document is reliable, credible and complete.

12. There are further occasions where the information which the SPO proposes to withhold appears to go to important issues in the case. In the SPO statement of

¹⁴ Request, para. 7.

¹⁵ SPO Statement of W02160, [REDACTED].

¹⁶ Request, para. 7.

¹⁷ KSC-BC-2020-06, F00542/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Preliminary Witness List*, 22 October 2021, confidential, p. 89.

W04856,¹⁸ paragraphs relating to potentially important meetings have been redacted. For instance, passages relating to [REDACTED].¹⁹ These are all potentially highly relevant to the Defence, indeed potentially exculpatory. In any event, they are included within the SPO witness interview and plainly relevant to the Defence preparation for the cross-examination of this witness. Testimony cannot be fairly elicited from this witness if the Defence is unaware of relevant aspects of his statement.

13. Furthermore, SPOE00203094-00203096 appears to have redacted sections relating to [REDACTED] during the Indictment period and referring to [REDACTED], an Indictment location.²⁰ Similarly, SPOE00203172-00203173 has the entire final section redacted and, for some reason, redacts a comment on [REDACTED].²¹ Meetings with or comments about any of the Accused in an alleged joint criminal enterprise and the full context of documents referring to those meetings are essential to the preparation of the Defence and should not be withheld.

14. Third, in relation to SPOE00203360-00203365, the SPO seeks to withhold a substantial amount of information which might include an entire cable.²² The Defence has no way of assessing the relevance of the redacted material in the face of the extent of the redactions.

15. Fourth, the redaction of SPOE00212698-00212700 appears entirely pointless since the SPO would withhold the name and signature on the document, despite identifying

¹⁸ SPO Statement of W04856, [REDACTED].

¹⁹ *Ibid.*, para. 76 (internal quotation marks omitted).

²⁰ Request, para. 6.

²¹ *Ibid.*

²² *Ibid.*, para. 4.

plainly in the Request who wrote the document.²³ Withholding that information could only cause confusion and creates no benefit.

16. Accordingly, the Defence submits that the SPO should not be relieved of the obligations to disclose this material. Instead, the SPO should be required to continue negotiations with the information-providers at this stage. This will cause no delay because the SPO is continuing negotiations with other information providers²⁴ and the date for completion of Rule 102(1)(b) disclosure was extended to 31 January 2022 at the Eighth Status Conference.²⁵

V. CONCLUSION

17. The Defence respectfully invites the Pre-Trial Judge to reject the Request.

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²³ Request, para. 9.

²⁴ *Ibid.*, para. 2.

²⁵ KSC-BC-2020-06, In Court – Oral Order, Oral Order Concerning the SPO's Deadline Related to Rule 102(1)(b) Material, 29 October 2021, public.