

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

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**Public Redacted Version of Thaçi Defence Response to Prosecution notice of Rule
102(1)(b) disclosure and related requests**

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Prosecution notice of Rule 102(1)(b) disclosure and related requests.¹ The SPO requests the Pre-Trial Judge to authorise: (i) the SPO to amend the Exhibit List to add 132 documents, comprising prior statements of witnesses and exhibits associated with prior statements, as well as five other exhibits and their translations (“Further Materials”); (ii) protective measures for certain of those items. The Defence asks the Pre-Trial Judge to dismiss the SPO’s request to amend its Exhibit List and to refuse, in part, the protective measures sought.

II. PROCEDURAL BACKGROUND

2. On 23 November 2020, the Pre-Trial Judge issued its Framework Decision on Disclosure of Evidence and Related Matters.² He defined the redaction regime, pursuant to which evidence may be disclosed by either Party with redactions applied directly to certain pre-defined categories of information (“standard redactions”) without prior judicial authorisation; for any redactions falling outside the aforementioned pre-defined categories (“non-standard redactions”), the disclosing Party must submit a discrete application to the Pre-Trial Judge seeking authorisation to restrict disclosure.³ The Pre-Trial Judge ordered the SPO to submit its requests for protective measures by 7 May 2021 at the latest and to disclose such material with redactions, if granted, within two weeks from the Pre-Trial Judge’s decision on

¹ KSC-BC-2020-06/F00670/CONF/RED, dated 31 January 2022, notified on 1 February 2022 (“SPO Requests”).

² KSC-BC-2020-06/F00099 (“Framework Decision”).

³ *Ibid.*, paras 87-88.

protective measures; he further ordered the SPO to complete the disclosure of all material falling under Rule 102(1)(b) of the Rules⁴ by 31 May 2021.⁵

3. At the eighth status conference held on 29 October 2021, the SPO said that it would be able to file its pre-trial brief, witness list and exhibits list on 17 December 2021,⁶ seven months later than its own initial estimates.⁷ Further, it could not file the Rule 109(c) chart until 28 January 2022 at the earliest. The Pre-Trial Judge confirmed those dates by an oral order issued the same day. The Pre-Trial Judge further decided to extend the SPO deadline to disclose Rule 102(1)(b) material by 31 January 2022, after having granted several extensions of time at the SPO's request.⁸

4. On 17 December 2021, the SPO filed a strictly confidential and *ex parte* version of its Pre-Trial Brief, Witness and Exhibit lists; it filed a confidential redacted version of these documents only on 21 December 2021,⁹ four days after the deadline set by the Pre-Trial Judge, in violation of the Pre-Trial Judge's order.¹⁰

5. On 28 January 2022, the SPO filed its Rule 109(c) chart, notified on 31 January 2022.¹¹

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD0-3/Rev3/2020, 2 June 2020 ("Rules").

⁵ *Ibid.*, para. 99.

⁶ KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, pp. 725-726.

⁷ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, paras. 2, 15.

⁸ *Ibid.*, pp. 752-754.

⁹ KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Confidential Redacted Pre-Trial Brief; KSC-BC-2020-06/F00631/RED/A02/CONF/RED, Confidential Redacted List of Witnesses; KSC-BC-2020-06/F00631/RED/A03/CONF/RED, Confidential Redacted List of Exhibits.

¹⁰ KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022 ("Tenth Status Conference"), p. 871.

¹¹ KSC-BC-2020-06/F00663, Prosecution submission of Rule 109(c) chart with strictly confidential and *ex parte* Annex 1 and confidential redacted Annex 2

6. On 31 January 2022, the SPO notified its disclosure package n° 157, containing 132 documents, subject of the SPO Requests, some of them bearing non-standard redactions not approved by the Pre-Trial Judge.

III. APPLICABLE LAW

7. The right to a fair trial is an essential component of any democratic society, enshrined in Article 31 of the Kosovo Constitution, Articles 1(2) and 21(2) of the Law and Article 6(1) of the ECHR. To ensure the fairness of the proceedings, any accused is entitled to the following fundamental rights, in full equality: to have **adequate time** and facilities for the preparation of his defence, as per Article 30(3) of Kosovo's Constitution, Article 21(4)(c) of the Law and Article 6(3)(b) of the ECHR; and to be tried **within a reasonable time**, in accordance with Article 31(2) of Kosovo's Constitution, Article 21(4)(d) of the Law and Article 6(1) of the ECHR.

8. Rule 95(2) of the Rules enumerates the functions of the Pre-Trial Judge after confirmation of the indictment, who shall "ensure that the proceedings are **not unduly delayed** and shall take all necessary measures for the **expeditious** preparation of the case for trial." In particular, pursuant to Rule 95(4), the Pre-Trial Judge shall order the Specialist Prosecutor to file, "**within a set time limit**:

- (a) the Specialist Prosecutor's Pre-Trial Brief, including, for each charge, a summary of the evidence which the Specialist Prosecutor intends to present regarding the commission of the alleged crime and the alleged mode of liability of the Accused. This brief shall include any admissions by the Defence, as well as a statement of matters that are not in dispute;
- (b) the list of witnesses the Specialist Prosecutor intends to call [...];
- (c) the list of proposed exhibits the Specialist Prosecutor intends to present stating, where possible, any objection of the Defence regarding authenticity."¹²

¹² Our emphasis.

9. Pursuant to Rule 95(5), after the submission by the SPO of the items mentioned above, the Pre-Trial Judge shall invite the Defence to file, within a set time limit, a Pre-Trial Brief.

10. According to Rule 102(1) of the Rules, the SPO shall make available to the Defence:

“(b) within the time limit set by the Panel, and no later than thirty (30) days prior to the opening of the Specialist Prosecutor’s case:

(i) the statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial;

(ii) all other witness statements, expert reports, depositions, or transcripts that the Specialist Prosecutor intends to present at trial; and

(iii) the exhibits that the Specialist Prosecutor intends to present at trial.”

11. Pursuant to Rule 102(2) of the Rules,

“Any statements of additional Specialist Prosecutor witnesses, which have not been disclosed within the time limit pursuant to paragraph 1(b) and whom the Specialist Prosecutor intends to call to testify at trial, shall be made available to the Defence as soon as possible and shall be accompanied by reasons for the late disclosure. The Defence may seize the Panel where grounds to dispute the late disclosure exist. »

12. According to Rule 102(3) of the Rules,

“The Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. [...]”

IV. DISCUSSION

A- THE SPO’S REQUEST TO AMEND ITS EXHIBIT LIST

13. The SPO has failed to submit any valid reason justifying the late disclosure of the 132 documents pursuant to Rule 102(1)(b) of the Rules and their addition to the Exhibit List after the deadline of 17 December 2021.

14. The SPO argues that it should be authorised to amend its Exhibit List because the *“Further Materials were either obtained between late 2021 and January 2022 or identified during the preparation of the Rule 95(4) materials and Rule 109(c) chart filed on 17 December 2021 and 28 January 2022, respectively. Once identified, the SPO promptly took necessary measures, including, as appropriate, translation and transcription, to review and, as relevant, prepare the Further Materials for disclosure.”*¹³

15. The Defence notes that the date of 118 documents is anterior to late 2019. Among the 14 remaining documents, 6 documents are ‘SPO transcripts of interview of W04323’ dated [REDACTED],¹⁴ 4 documents are ‘SPO transcripts of interview of W04798’ dated [REDACTED],¹⁵ and 4 documents are ‘information extracted from SPO internal documents’ dated [REDACTED].¹⁶ In addition, over the 132 documents concerned, 10 had already been disclosed to the Defence pursuant to Rule 102(3)¹⁷ and 31 pursuant to Rule 103.¹⁸

16. Thus, 128 documents were in the custody of the SPO prior to the 19 December 2021 deadline to file an Exhibit List. The SPO itself acknowledges that only the documents 104585-104586 and 104587-104587, corresponding to the ‘[REDACTED]’, were obtained *after* this deadline, in January 2022,¹⁹ but it does not indicate why they could not have been obtained earlier. The SPO further acknowledges, for instance, that it obtained the transcripts for 095381, corresponding to the SPO transcripts of

¹³ SPO Requests, para. 3.

¹⁴ [REDACTED].

¹⁵ [REDACTED]

¹⁶ [REDACTED].

¹⁷ Disclosure package n° 96.

¹⁸ Disclosure package n° 8, 36 and 45.

¹⁹ SPO Requests, footnote 12.

interview of [REDACTED], in September 2021, which could thus have been disclosed and added to the Exhibit List by 17 December 2021.²⁰ In addition, among the Further Materials, 41 documents had already been disclosed to the Defence pursuant to Rule 102(3) or Rule 103. In such circumstances, there is no reason justifying the late addition of these items to the Exhibit List. The fact that the SPO seems to have simply overlooked those documents while preparing its Exhibit List due on 17 December 2021 is not a sufficient ground justifying the amendment of the Exhibit List.²¹ One fails to understand how the SPO forgot to disclose its own transcripts of interview of incriminating witnesses by such date.

17. The Pre-Trial Judge has set the 17th of December 2021 as the deadline for the SPO's Exhibit List, in accordance with the SPO's own request, pursuant to Rule 95(2) and Rule 95(4), in order to prepare the transmission of the case file to the Trial Panel and to ensure that the Defence has adequate time for its preparation. As stressed during the Tenth Status Conference, deadlines don't seem to mean anything to the SPO.²² However, this case should cease to expand at some point so that it can be sent to the Trial Panel, and also to allow enough time to the Defence to digest the considerable volume of material disclosed, conduct investigations, draft a pre-trial brief and more generally prepare for trial. When the SPO discloses additional statements or exhibits related to incriminating witnesses, the Defence must review again all the material previously disclosed for such witnesses in order to assess the relevance of the new information provided, identify any discrepancies, *etc.* Any amendment of the Exhibit List may lead to a further amendment of the SPO Pre-Trial Brief, the Rule 86(3) Outlines, the Rule 109(c) Chart, requiring further analysis from the Defence.

²⁰ *Ibid.*

²¹ See also Tenth Status Conference, p. 871.

²² Tenth Status Conference, p. 872.

18. Thus, the addition of any documents, at this stage, to the Exhibit List is prejudicial to the Defence; it will necessarily impact and delay its preparation for trial and affect the expeditiousness of the proceedings, while, at the same time, Mr Taçi remains in detention, at the SPO's own request.

19. During the 10th status conference, the Pre-Trial Judge rightly stressed, in reaction to the SPO's statement that it anticipated to continue its investigations for the foreseeable future, that:

"the factual basis of the case of the SPO shall be set before trial and that SPO investigations in this case should largely be completed by the time the case is transmitted to the Trial Panel. General investigations should not continue throughout the trial. **There needs to be a case file that is properly transmitted to the Trial Panel.** Rule 102(4) confirms that objective: Only under exceptional circumstances can additional evidence be disclosed and subsequently used at trial. **The Defence cannot be expected to prepare a defence on a case that is constantly evolving.** [...] [A]dditional evidence will only be admitted with a very strict scrutiny from the Panel and really in exceptional circumstances."²³

20. For the above reasons, the Defence submits that the SPO request to be authorised to add the Further Materials to its Exhibit List should be dismissed. It is both ill-founded and prejudicial to the Defence.

B- THE SPO'S REQUEST FOR PROTECTIVE MEASURES

21. The SPO puts the Pre-Trial Judge and the parties before a *fait accompli* by disclosing the Further Materials with non-standard redactions applied unilaterally, without the prior authorisation of the Pre-Trial Judge, in violation of the redaction regime defined since the beginning of this case by the Framework Decision.

²³ Tenth Status Conference, pp. 928, 931.

22. As noted during the Tenth Status Conference, the SPO should have asked the Pre-Trial Judge, prior to 31 January 2022, whether it could redact those documents, but it did not.²⁴

23. Therefore, the Defence invites the Pre-Trial Judge to review with caution the redactions applied by the SPO, in order that the material disclosed not be meaningless. While the redactions to the names, initials and/or signatures of witnesses who benefit from the delayed disclosure of their identity to the Defence may be justified at this stage,²⁵ the SPO appears to have applied extensive redactions to the testimony of some witnesses.

24. For instance, the redactions to *'certain details relating to [W04323's] position, unit, and events only he would be in a position to know about'*²⁶ are too broad. Similarly, the redactions of *'unique and specific details relating to the abduction of W04393, including the identity of his abductor',*²⁷ appear excessive, especially since, at the same time, the witness gives the name of one of the persons who allegedly [REDACTED]. The SPO has also applied numerous redactions to W01143' statement, allegedly *'to protect [REDACTED], who has been granted protective measures, including delayed disclosure of his identity'*.²⁸ The SPO's arguments related to this witness being further redacted, the Defence invites the Pre-Trial Judge to ensure that the proposed redactions remain as limited as possible.

25. Last, the Defence strongly objects to the SPO's request to withhold a prior statement of W04371 until his identity is disclosed.²⁹ The Defence submits that it should be disclosed a redacted version of this statement; the fact that the SPO has already disclosed [REDACTED] documents referring to this witness tends to

²⁴ *Ibid.*, p. 872.

²⁵ SPO Requests, para. 8 (i).

²⁶ SPO Requests, para. 8(ii), referring to [REDACTED].

²⁷ SPO Requests, para. 8 (iii), referring to [REDACTED].

²⁸ SPO Requests, para. 10, referring to [REDACTED].

²⁹ SPO Requests, para. 12.

demonstrate that the disclosure of a redacted version of another prior statement of this witness is possible. In the alternative, the SPO should be ordered to disclose a summary of such statement, pending the disclosure of its unredacted version.

C- CONCLUSION

26. For the foregoing reasons, the Defence asks the Pre-Trial Judge to:

- Dismiss the SPO's request to amend its Exhibit List to add the Further Materials;
- Refuse, in part, the protective measures sought, on the basis of the above submissions.

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Respectfully submitted,



Gregory W. Kehoe

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Thursday, 11 February 2022

At Tampa, United States