

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

Date: 7 March 2022

Language: English

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**Public Redacted Version of Thaçi Defence Response to Prosecution Rule 102(2)
submission and related request**

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I. INTRODUCTION

1. On 24 February 2022, the SPO filed its Prosecution Rule 102(2) submission and related requests (“SPO Request”),¹ requiring that:

“a. the prior statements and associated exhibits relating to W04868 and W04870, as identified in Annexes 1 and 2 as not previously disclosed, be added to the SPO’s exhibit list;

b. W04870 be granted in-court protective measures in the form of (i) assignment of a pseudonym; (ii) redaction of the witness’s name and identifying information from the public records; (iii) non-disclosure to the public of any records identifying the witness; (iv) testimony with face and voice distortion; and (v) closed or private sessions for any in-court discussion or testimony identifying the witness; and

c. the SPO be relieved of its disclosure obligations in respect of Rule 107 provider redactions applied to two items.”²

2. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to this Request and objects to the relief sought.

II. PROCEDURAL BACKGROUND

3. On 13 November 2020, the SPO confirmed *“being in a position to provide complete witness and exhibit lists, and to have fulfilled related Rule 102(1)(b) disclosure, by 31 May 2021”*;³ it further added that the trial should commence in the summer 2021.⁴

4. In its Framework Decision on Disclosure of Evidence and Related Matters issued on 23 November 2020, the Pre-Trial Judge ordered the SPO to disclose all material falling under Rule 102(1)(b) of the Rules⁵ by 31 May 2021.⁶

¹ KSC-BC-2020-06/F00708.

² SPO request, para. 1.

³ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, paras. 2, 15.

⁴ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14.

⁵ Rules of Procedure and Evidence Before the KSC, KSC-BD03/Rev3/2020, 2 June 2020 (“Rules”).

⁶ KSC-BC-2020-06/F00099, para. 99(e).

5. On 12 March⁷ and 14 September 2021,⁸ at the SPO's request, the Pre-Trial Judge extended the deadline for the disclosure of Rule 102(1)(b) material, to 23 July 2021 and 1 November 2021, respectively.
6. On 22 October 2021, following a Defence request, the SPO filed its preliminary witness list, including W04870 and W04868 and a witness summary for each of them,⁹ specifying that once transcripts would be available, an application would be made for authorization to disclose their materials pursuant to Rule 102(1)(b).
7. 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 2021,¹⁰ seven months later than its own initial estimates. The Pre-Trial Judge confirmed this date by an oral order issued the same day. The Pre-Trial Judge further agreed 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.¹¹
8. On 15 December 2021, the SPO stated that it was "*on track to meet the deadline of 31 January 2022 for disclosure of remaining Rule 102(1)(b) items, including translations.*"¹²
9. On 17 December 2021, the SPO filed a strictly confidential and *ex parte* version of its Pre-Trial Brief, Exhibit List and Witness List, including W04870 and W04868; it filed a confidential redacted version of these documents on 21 December 2021.¹³

⁷ KSC-BC-2020-06/F00218, Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, 12 March 2021.

⁸ KSC-BC-2020-06, Oral Order, Hearing of 14 September 2021, p. 625.

⁹ KSC-BC-2020-06/F00542/A02, notified on 25 October 2021.

¹⁰ KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, pp. 725-726.

¹¹ *Ibid*, pp. 752-754.

¹² KSC-BC-2020-06, Transcript of Ninth Status Conference, 15 December 2021, p. 774.

¹³ KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Confidential Redacted Pre-Trial Brief; KSC-BC-202006/F00631RED/A02/CONF/RED, Confidential Redacted List of Witnesses; KSC-BC-202006/F00631/RED/A03/CONF/RED, Confidential Redacted List of Exhibits.

10. On 31 January 2022, the SPO notified five disclosure packages under Rule 102(1)(b);¹⁴ on 1 February 2022, a further disclosure package was notified.¹⁵

11. On 23 February 2022, the SPO notified its Disclosure Package 166 under Rule 102(2), containing 39 new documents related to W04868 and W04870. On the same day, it notified its Disclosure Package 167, containing 9 items previously disclosed under Rule 102(1)(b), with certain corrections to their metadata, related to W04870 and [REDACTED].

III. APPLICABLE LAW

12. Pursuant to Rule 95(4) of the Rules, the Pre-Trial Judge shall order the SPO to file, within a set time limit, its Pre-Trial Brief, Witness and Exhibit lists. Rule 118(2) of the Rules further provides that *“the Panel may permit, upon timely notice and a showing of good cause, the amendment of the lists of witnesses and exhibits filed pursuant to Rule 95(4)(b).”*

13. Rule 102 of the Rules defines the disclosure obligations of the SPO regarding incriminating material:

(1) Subject to the provisions of Rule 105, Rule 107 and Rule 108, the Specialist Prosecutor shall make available to the Defence and, where applicable, Victims' Counsel: [...]

(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.

The statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial shall be made available in a language the Accused understands and speaks.

¹⁴ Disclosure Packages 154, 155, 156, 157, 158.

¹⁵ Disclosure Package 159.

- (2) 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.
- (3) [...]
- (4) Disclosure pursuant to paragraph (2) shall be finalised during the pre-trial stage. Thereafter, the Specialist Prosecutor shall provide notice of any new disclosure accompanied by **reasons for the late disclosure**.

14. During the Tenth Status Conference held on 4 February 2022, following the SPO's submissions that "*investigations in fulfilment of its mandate are anticipated to continue for the foreseeable future*", the Pre-Trial Judge stressed 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.**"¹⁶

15. In the *Gucati & Haradinaj* case, Trial Chamber II ruled that

15. At the outset, the Panel emphasises that the primary purpose of the Exhibit List is to give notice to the Defence of the documents the SPO intends to use during its case, which will allow timely and effective Defence preparation and ensure the efficient presentation of evidence during trial.

16. The Panel will assess, whether, at the current stage of proceedings: **(i) the proposed evidence is prima facie relevant and of sufficient importance to justify the late addition; (ii) the proposed additions provide the Accused sufficient notice and do not adversely affect their ability to prepare for trial; and (iii) the SPO has shown good cause for the late request.** In deciding whether to grant leave to add a particular item to a Party's exhibit list, the Panel need not assess its authenticity, relevance and probative value in the same way as it would when determining its admission at trial.²⁰ Accordingly, a decision authorising the addition of an item to a Party's exhibit list is without prejudice to the Panel's subsequent decision on whether that item should be admitted into evidence. That being said, a Party should not be granted leave to add to its list of exhibits items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.¹⁷

¹⁶ Tenth Status Conference, p. 928.

¹⁷ KSC, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00321, Decision on Prosecution's Request for Leave to Amend its List of Exhibits, 23 September 2021, paras 15-16 (footnotes omitted, our emphasis).

16. Other international criminal courts have highlighted that investigation should be “largely completed” by the time charges are confirmed.¹⁸ The ICC Appeals Chamber in the *Lubanga* case recalled that “it is the responsibility of the Chamber to safeguard that the Prosecution’s right to continue investigating does not in any way undermine the right of the defence to have adequate time and facilities for the preparation of the trial”.¹⁹ In the *Katanga and Ngudjolo* case, ICC Trial Chamber II further noted that:

“although the Prosecution is allowed to continue its investigation after the confirmation of charges, there is no unlimited right to submit newly discovered material. [...] If the Prosecution seeks to disclose newly discovered incriminating evidence after the applicable time limit, it must convince the Chamber [...] that **the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case.** If the Chamber finds that this is the case, it may allow the Prosecution to submit such newly discovered incriminating evidence after the time limit has lapsed, bearing in mind the Chamber's responsibility to safeguard the right of the accused to have adequate time to prepare.”²⁰

17. The ICTY also confirmed that:

It is for the Prosecution to show good cause for any such request to add an item to its Rule 65 ter exhibit list, and **to establish the relevance and importance of the item sought to be added.** The Chamber must “carefully balance any amendment to the Prosecution’s exhibit list with an adequate protection of the rights of the accused. That is, the Trial Chamber must be satisfied that amendments to the exhibit list at that stage

¹⁸ ICC, *Prosecutor v. Kenyatta*, Trial Chamber, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, para. 118; ICC, *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, para. 44; ICC, *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54.

¹⁹ ICC, *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, 13 October 2006, para. 55.

²⁰ ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1336, Trial Chamber II, Decision on the “Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), paras. 28, 30 (our emphasis).

of the proceedings provide an accused sufficient notice, and do not adversely affect his ability to prepare for trial.”²¹

18. The ICTR has adopted similar approach with regard to the late amendment of the prosecution exhibits list:

20. In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.²²

IV. SUBMISSIONS

A- The amendment of the SPO Exhibit List

19. The SPO requests leave to add to its exhibit list the following transcripts of interviews, statements and associated exhibits related to W04868 and W04870, while these interviews occurred, and their statements were taken, prior to the SPO deadline to submit its exhibit list on 17 December 2021:

- a. Transcript of SPO interview with W04868 dated [REDACTED] 2021 (3 parts, in English and Albanian) and two associated exhibits, [REDACTED].²³
- b. Transcript of SPO interview with W04870 dated [REDACTED] 2021 (4 parts, in English and Albanian),
- c. [REDACTED] W04870 [REDACTED]

²¹ ICTY, *Prosecutor v Karadzic*, No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of an Exhibit from the Bar Table Following Major Thomas' Testimony, 28 October 2010, para. 9.

²² ICTR, *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20.

²³ KSC-BC-2020-06/F00708/A02. [REDACTED].

- d. –[REDACTED] and W04870 [REDACTED]
- e. [REDACTED]W04870’s statement [REDACTED]
- f. [REDACTED] statement of W4870 [REDACTED]
- g. [REDACTED] Witness statement of W04870[REDACTED]
- h. [REDACTED]interview with W04870 [REDACTED]
- i. [REDACTED]Collection of Witness Interviews of [REDACTED]
W04870[REDACTED]
- j. [REDACTED] Collection of Witness Interviews of
[REDACTED]W04870[REDACTED]
- k. [REDACTED] witness statement with W04870[REDACTED]
- l. [REDACTED] Collection of Witness Interviews of
[REDACTED]W04870[REDACTED]
- m. [REDACTED] (W04870)
- n. 4 associated exhibits related to W04870:
 - i. W04420W04870[REDACTED]
 - ii. [REDACTED] W04870 [REDACTED]
 - iii. [REDACTED]W04870[REDACTED]
 - iv. [REDACTED]W04870 during the SPO interview on
[REDACTED]2021.²⁴

²⁴ KSC-BC-2020-06/F00708/A01. SITF00240173-00240192.

20. The Defence submits that the SPO Request was not submitted in a timely manner.

21. The SPO applied only on 22 February 2022 to add to its Exhibit List the transcripts of interviews of the two witnesses it interrogated on [REDACTED]2021, *i.e.* [REDACTED] **months later**. There is no reason justifying such a late request, especially since these two witnesses were already mentioned on its preliminary witness list filed, together with a summary of their testimony, on 22 October 2021. Their witness summary included evidence not disclosed to the Defence yet. The SPO did not act with due diligence, contrary to its obligations;²⁵ indeed, international criminal tribunals regularly recall that the prosecution “*must take seriously its disclosure obligations and ensure that all necessary resources are dedicated to ensuring timely disclosure of material to th[e] accused*”.²⁶ The transcripts of interviews these witnesses should have been made available within a few days or weeks of their interviews.

22. Furthermore, the prior statements of W04870 and the associated exhibits of W04868 and W04870 are anterior to Mr Thaçi’s Indictment and could/should have been included in the SPO’s exhibit list filed on 17 December 2021, if they were deemed relevant by the SPO. Contrary to the SPO assertion, the disclosure of W04870’s and W04868’s remaining materials has not been made ‘in a timely manner’. The deadline for disclosure of Rule 102(1)(b) materials was already extended multiple times, from 31 May 2021 to 31 January 2022, the SPO having initially submitted that it was ready for the trial to start in the summer 2021. To apply for their late admission at this stage is unjustified, especially since it is not material which was recently discovered.²⁷

²⁵ See, for instance, KSC, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00321, Decision on Prosecution’s Request for Leave to Amend its List of Exhibits, 23 September 2021, where the SPO applied 12 days after a witness’ interview; See also ICTY, *Prosecutor v. Prlic*, No. IT-04-74-T, Decision on Motion to Amend Witness and Exhibit Lists, 3 December 2007.

²⁶ ICTY, *Prosecutor v Karadzic*, No. IT-95-5/18-T, Oral Interim Decision on Accused’s Twenty-Sixth Disclosure Violation, 3 November 2010, p. 8908.

²⁷ KSC, *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00294, Decision on the Specialist Prosecutor’s notice of disclosure pursuant to Rule 102(4) of the Rules, 21 January 2022, para. 11.

23. In addition, the SPO has failed to explain why these witnesses could not have been interviewed earlier. The mere existence of prosecution 'on-going investigations' is not in itself a sufficient reason to admit new statements.²⁸

24. In particular, the SPO necessarily has been in possession for several years of W04870's prior statements and testimonies [REDACTED]. The SPO could not ignore the nature of her testimony since it had already interviewed [REDACTED],²⁹[REDACTED]. The SPO argues that [REDACTED].³⁰ However, if the SPO really wanted to [REDACTED]. In any event the SPO does not justify the time elapsed between [REDACTED]her interview in [REDACTED] 2021, and then between her interview and the disclosure of her testimony in late February 2022.

25. With regard to W04868, the SPO argues that it was only in July 2021 that [REDACTED] authorised interviews of [REDACTED]. Nevertheless, the Defence notes that the SPO has had years to investigate this case and has already interviewed other [REDACTED], added to its Witness and Exhibits Lists.

26. The SPO further failed to show good cause for the addition of the disputed material to its exhibit list. As mentioned above, W04870 testifies essentially about the same facts [REDACTED],³¹ so the addition of her evidence to an exhibit list of 16 304 items may further delay the proceedings to the prejudice of the Accused who is detained, while her proposed evidence is not of sufficient importance to justify the late addition.

27. Similarly, pursuant to the SPO witness summary, W04868 would testify mainly about the crimes allegedly committed in [REDACTED], and about his knowledge of the KLA's organisation, without providing any information about the Accused. His

²⁸ ICTR, *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, Judgement, 7 June 2001, para. 12.

²⁹ [REDACTED].

³⁰ Transcript of SPO interview with W04870 [REDACTED].

³¹ SPO Request, para. 4.

SPO transcripts of interview contains [REDACTED].³² Several SPO witnesses on the SPO witness list already testify about alleged crimes in [REDACTED], such as [REDACTED], or about the KLA's organisation. In such circumstance, given the number of prosecution witnesses called – including [REDACTED] – and the number of exhibits on the SPO's exhibit list, the SPO has not demonstrated that the proposed evidence is of sufficient importance to justify its late addition to its exhibit list, which would be prejudicial to the Defence.

28. Indeed, the fact that W04870 and W04868 have been included in the SPO's witness list since October 2021, with a summary of their evidence, does not eliminate the prejudice to the Defence that would arise from the late addition of their SPO transcripts of interviews, statements and associated material to the SPO exhibits list. W04868's testimony is totally new for the Defence, and the Defence had previously been disclosed only a limited part of W04870's prior statements. The Defence will need to review carefully the 39 new documents disclosed on 23 February 2022, and confront W04870 and W04868's material to the testimony of [REDACTED], which will require a significant amount of work. It will further need to determine whether particular investigations need to be conducted on the basis of the newly disclosed material.

29. For these reasons, the Defence submits that the SPO request to add the prior statements and associated exhibits relating to W04868 and W04870 to its exhibit list should be denied.

B- The SPO request for protective measures for W04870

30. The Defence notes that W04870 [REDACTED]. In such circumstances, in-court protective measures may be warranted in the form of (i) assignment of a pseudonym; (ii) redaction of the witness' name and identifying information from the public records; (iii) non-disclosure to the public of any records identifying the witness; and

³² [REDACTED].

(iv) closed or private sessions for any in-court discussion or testimony identifying the witness. Nevertheless, the Defence submits that a testimony with face and voice distortion appears to be excessive, especially since the witness [REDACTED].

C- The SPO request for Rule 107 redactions

31. The Defence recalls that the withholding of any material from the Defence, subject to disclosure pursuant to Rule 102 or Rule 103 of the Rules, should be compensated by counterbalancing measures.

32. The Defence asks the Pre-Trial Judge to review carefully the documents in question and to order the SPO to continue its consultation with the providers to get full clearance. The Defence stresses that any delayed disclosure of material relevant for its preparation is prejudicial and may further delay the proceedings.

33. In particular, with regard to 088038-088045, the Defence submits that the redaction of [REDACTED] diminishes, to the prejudice of the Defence, the probative value of the document, especially for investigation purpose. The SPO maintains that the information redacted is '*publicly available and contained in other materials available to the Defence.*'³³ But the Defence cannot retrieve that publicly available information if it does not know [REDACTED]. As a counterbalancing measure, the SPO should therefore be ordered to disclose to the Defence such material, without delay: because [REDACTED] are redacted, the Defence is in a difficult position to be able to identify other documents containing the redacted information.

V. CONCLUSIONS

³³ SPO Request, para. 19.

34. For the foregoing reasons, the Defence asks the Pre-Trial Judge to dismiss the SPO Request.

[Word count: 3912]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "G. W. Kehoe", is written over a white rectangular redaction box.

Gregory W. Kehoe
Counsel for Hashim Thaçi

Tuesday, 7 March 2022
At Tampa, United States