

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 challenge to
disclosure of items in Rule 102(3) Notice (F01004)**

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I. INTRODUCTION

1. On 30 September 2022, the SPO filed the 'Prosecution challenge to disclosure of items in Rule 102(3) Notice' ("SPO Challenge"), contesting the materiality of certain items selected from the SPO's Rule 102(3) Notice by the Accused and/or alleging that certain items fell within Rule 106/Rule 107 and thus may be withheld. On the basis of these submissions, the SPO asked the Pre-Trial Judge to authorise its non-disclosure of the identified items.¹

2. The Defence for Mr Hashim Thaci ("Defence") objects in part to the relief sought in the SPO Challenge.

II. APPLICABLE LAW

3. Rule 102(3) of the Rules of Procedure and Evidence Before the KSC ("Rules")² provides that:

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. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the **materiality** of the information exist.

4. The Appeals Panel has stressed "the importance of the disclosure process in ensuring the fairness of the proceedings and that the rights of the defence are

¹ KSC-BC-2020-06/F01004/Conf/Red, Confidential redacted version of 'Prosecution challenge to disclosure of items in Rule 102(3) Notice with strictly confidential and ex parte annexes 1-13', dated 30 September 2022, notified on 6 October 2022, paras 1-2.

² KSC-BD-03/Rev3/2020, 2 June 2020.

respected, and that this should remain paramount in disclosure related decisions.”³

With regard to the materiality test, the Appeals Panel has noted that:

It transpires from well-established jurisprudence from international criminal tribunals that the concept of ‘material to the preparation of the defence’ is to be interpreted broadly and should not necessarily be confined to the temporal scope of the indictment, or confined to issues directly linked to exonerating or incriminating evidence or which would either directly undermine the prosecution case or support a line of argument of the defence. For instance, some documents may be deemed material to the preparation of the Defence because they: (i) are relevant to a breach of the accused’s rights under the Statute; (ii) are able “to support a colourable argument; that is, an argument that has some prospect of success”; (iii) could assist in the assessment of the credibility and reliability of Defence witnesses, and therefore the decision of whether to call them; or (iv) might dissuade a defendant from pursuing an unmeritorious defence. By contrast, information that bears no connection to the events relevant to the charges – such as items of a purely personal nature; too remote, hypothetical or speculative; not related to the charges against the accused; or which has only an “abstract logical relationship to the issues” – may be considered as not material to the preparation of the Defence.⁴

III. SUBMISSIONS

A- Documents which concern relations with external entities (Annexes 1 - 2)

5. The SPO objects to the disclosure of the following items to the Defence, on the ground that they are requests for (international) assistance (“RFAs”) which bear a presumption of confidentiality, to be lifted only in particular circumstances, and/or that they would not be material for the Defence:⁵

- [REDACTED], SPO - RFA to [REDACTED]
- [REDACTED], SPO - Request for Assistance to [REDACTED] (re Kukes)
- [REDACTED], SPO, Submission of a Request for International Legal Assistance in Criminal Matters to [REDACTED].
- [REDACTED], Response to Letter sent by the SPO regarding [REDACTED]
- [REDACTED], Legal Affairs Service, [REDACTED].

³ KSC-BC-202007/IA005/F00008/RED, Decision on the Appeals Against Disclosure Decision, 29 July 2021 (‘Appeals Disclosure Decision’), para. 35.

⁴ Ibid., para. 41.

⁵ SPO Challenge, paras 14, 18.

6. The Defence submits that the first four documents are directly material to its preparation since they relate to the circumstances surrounding the interview of four prosecution witnesses, W02549, W04754, W02618 and W02172. The Defence is necessarily interested in knowing the conditions, if any, proposed/accepted by States or international organisations for the testimony of these witnesses, given that these conditions may have impacted the scope of the witness' testimony and, eventually, their credibility. Any imposed conditions may also affect the appearance of these witnesses in Court.

7. The direct link between these documents and prosecution witnesses against the Accused warrant the lifting of the presumption of confidentiality, if any, that attaches to these RFAs. The SPO will not be prejudiced by the disclosure of such material to the defence since these are not general RFAs, but are limited to particular individuals who are on the SPO witness list.

8. At this stage, the Defence withdraws its request for the disclosure of [REDACTED], provided that it does not contain any exculpatory information.

B- Documents of a procedural character concerning contacts with witnesses and similar matters (Annexes 3 and 5)

9. The SPO further objects to the disclosure of the following items, allegedly of a purely procedural character, on the ground that they would not be material to defence preparation:⁶

- [REDACTED], Letter from [REDACTED].
- SITF00015982-00015985, [REDACTED].

⁶ SPO Challenge, paras 20-21.

10. However, the Defence is interested in knowing the reasons for the intervention of [REDACTED] regarding an interview with SPO witness W04601, since it may have had an impact on the scope of the testimony of this witness, particularly if the Ministry of Justice has imposed conditions on the conduct of this interview.

11. Similarly, the list of documents submitted by the SPRK in proceedings related to the Kukes case is material to the Defence preparation, given that Kukes and Cahan are two alleged crime sites listed in the Indictment. In particular, the list of documents submitted by the SPRK may contain information or leads relevant to ongoing Defence investigations.

C- Witness security notes (Annex 7)

12. The SPO objects to the disclosure of the following items to the Defence, relating to security concerns expressed by various individuals, on the ground that such “information is personal and should remain confidential”.⁷

- [REDACTED], SPO - Official Note - Telephone call [REDACTED]
- [REDACTED], SPO - Official Note on contact with [REDACTED]
- [REDACTED], UNMIK WCIS Report regarding the security situation of [REDACTED].
- [REDACTED], UNMIK Interoffice Memorandum from [REDACTED]
- [REDACTED], EULEX WCIU memo concerning [REDACTED]

13. The first two documents, which relate to two witnesses on the SPO witness list, are material for Defence preparation, as they are relevant to the Defence’s assessment of the reliability of these witnesses, for instance by determining whether they

⁷ SPO Challenge, para. 25.

expressed security concerns in order to obtain financial compensation such as relocation and whether they obtained such relocation.

14. The Defence further notes that, *a priori*, [REDACTED], an alleged victim named in the SPO Indictment,⁸ and that the SPO intends to call [REDACTED] family members of [REDACTED]. Therefore, information about/from the relatives of [REDACTED] is material to Defence preparation. In particular, the background information which may be provided by [REDACTED] while expressing his security concerns may contradict part of the testimony given by these [REDACTED] SPO witnesses.

15. The Defence has already withdrawn its disclosure request for [REDACTED], by email dated 3 October 2022.

16. Provided that [REDACTED] does not relate to any witness or victim in the current case and does not contain any exculpatory information, the Defence withdraws its request for disclosure of this item.

D- Certain materials related to non-witnesses

17. The SPO objects to the disclosure of [REDACTED], [REDACTED], on the ground that such material is “substantively, temporally and geographically remote from the charges”, “unrelated to the Accused”, and “not linked to any known live issue in the case”. The SPO further adds that his “passing reference to a person who was shot by the KLA does not render these items material, in particular as the information he shares is publicly available information disclosed elsewhere.”⁹

⁸ F00999/A02, para. 158.

⁹ SPO Challenge, para. 30.

18. The Defence notes that pursuant to the description of this item, [REDACTED] testifies about the fact that “[REDACTED] was shot several times by KLA” and that “Ramush HARADINAJ, a leader of KLA [REDACTED].” This information is material to Defence preparation since W02657 is on the SPO witness list and alleges that [REDACTED]. Furthermore, Ramush HARADINAJ was a prominent KLA leader during the indictment period; any information on his alleged [REDACTED] is material to the Defence preparation as it may demonstrate dissent as between various KLA members during and after the indictment period. Thus, the interview of [REDACTED] may contain significant investigative leads for the Defence.

E- Additional items

19. Provided that [REDACTED], ‘Document obtained from UNMIK: [REDACTED]’, does not contain any exculpatory information, the Defence withdraws its request for disclosure of this item.

20. The Defence maintains its request to be disclosed [REDACTED], ‘SPO - Handover Form regarding [REDACTED]’. The Gucati case relates to, *inter alia*, the offence of intimidation during criminal proceedings; such an allegation has been raised in the current case in order to justify protective measures. While the SPO maintains that it has inadvertently included this note in the Rule 102(3) Notice, the Defence submits this item is material for its preparation since it may assist it to better understand and, eventually challenge, the protective measures imposed in the current proceedings.

F- Various attorney notes concerning witness evidence (Annex 11)

21. The SPO objects to the disclosure of the following SPO notes of interview, which relate to three witnesses on the SPO witness list and one Rule 103 witness, on the ground that “notes prepared by attorneys and investigators at the conclusion of a

meeting are not disclosable, as they are akin to draft statements or rough notes, fully superseded by the disclosed transcripts or other formal record of the interview” and that “the transcripts of the interviews have been disclosed”, and “there is no additional disclosable information found in the notes”:¹⁰

- [REDACTED], SPO - Confidential Internal Work Product regarding Witness Interview Summary, [REDACTED]
- [REDACTED], SPO - Witness Interview summary of an Audio/Video recorded witness interview of [REDACTED] (see [REDACTED] etc)
- [REDACTED], SPO - Official Note re. interview with [REDACTED].
- [REDACTED], SPO - Internal Work Product, Summary of a Witness Interview conducted on [REDACTED].

22. The Defence notes that the Pre-Trial Judge has previously ruled, in the *Gucati and Haradinaj* case, that:

54. As regards the Official Witness Notes and the Declarations, the Pre-Trial Judge notes that these documents have been added to the SPO Exhibit List, indicating an intention by the SPO to rely on them at trial. While preliminary, rough notes taken by investigators or prosecutors during interviews with witnesses are not necessarily considered (part of) the witness statements so produced and are not typically disclosable under Rule 102(1)(b) of the Rules, they may be disclosed in specific circumstances if they are exculpatory in nature or if they are material to the preparation of the Defence.⁸⁵ Even though the SPO indicates that it does not intend to present the Official Witness Notes as witness statements under Rule 102(1)(b) of the Rules, the Pre-Trial Judge observes that these documents record answers given by the contacted individuals regarding the effects the conduct of the Accused purportedly had on them and their family members. Accordingly, any contemporaneous notes taken during the aforementioned interviews, containing the questions asked and the answers provided, are the product of the interviewed person and may, depending on the circumstances, be material for the preparation of the Defence.⁸⁶ In the present instance, the Pre-Trial Judge takes note of the SPO’s indication that the Official Witness Notes and the Declarations record all disclosable information arising from these contacts.⁸⁷ The Pre-Trial Judge accordingly finds that any contemporaneous notes taken during interviews with contacted individuals and on the basis of which the Official Witness Notes and the Declarations were prepared are subject to disclosure under Rule 102(3) of the Rules only to the extent that they contain disclosable information that has not been recorded in the Official Witness Notes and Declarations. The SPO is accordingly ordered to review any such contemporaneous notes and,

¹⁰ SPO Challenge, para. 38.

where they contain disclosable information, such as the questions posed to the contacted individuals, which has not been recorded in the Official Witness Notes and the Declarations, to disclose such notes to the Defence. Insofar as such contemporaneous notes contain internal analyses, opinions or conclusions of SPO staff members regarding the collected information, these parts fall within the scope of Rule 106 of the Rules and may be redacted.⁸⁸ The SPO may also apply redactions under Rule 108 of the Rules equivalent to those applied or authorised for the Official Witness Notes.¹¹

23. Given that the SPO has disclosed the transcripts of interviews corresponding to these four interview notes,¹² the Defence maintains its request for disclosure of these items to the extent that they contain any further disclosable information that has not been recorded in the SPO transcripts of interviews.

G- Rule 106 internal work product (Annex 12)

24. The Defence withdraws its request for disclosure of [REDACTED], 'SPO - Official Note of telephone call with [REDACTED] , and [REDACTED], 'SPO - Official Note of contact with [REDACTED] ', related to two witnesses on the SPO witness list, provided they are limited to "schedules for official travel detailing meetings with witnesses and others and records of conversations with witnesses on matters that are unrelated to the events, the Accused or any of the charges"¹³ and do not contain any Rule 102(1)(b) or Rule 103 information.

25. The Defence maintains its request for disclosure of [REDACTED], 'UNMIK List of follow up tasks re [REDACTED], which is material to defence preparation since it relates to the *Latif Gashi et al* case, involving an alleged JCE member. The SPO has not justified why this particular item should be covered by Rule 106; to state that "Rule

¹¹ KSC-BC-2020-07/F00210/RED, Decision on Prosecution Requests and Challenges Pursuant to F00172, 26 May 2021, para. 54.

¹² SPO Challenge, fn 56.

¹³ SPO Challenge, para. 42.

106 privilege also applies to similar materials prepared by UNMIK” is insufficient to warrant its withholding from the Defence in the present case.¹⁴

IV. RELIEF SOUGHT

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

REVIEW the items discussed in the present submission in order to determine whether they contain any Rule 102(1)(b) or Rule 103 information which should be disclosed to the Defence;

DISMISS, in part, the relief sought in the SPO Challenge, as per the Defence submissions above.

[Word count: 2899 words]

Respectfully submitted,



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Counsel for Hashim Thaçi

Thursday, 27 October 2022

At Tampa, United States

¹⁴ *Ibid.*