

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: 2 December 2022

Language: English

Classification: Public

Public Redacted Version of Thaçi Defence Response to ‘Prosecution request for reclassification of filings F01100-RED and F01101-RED’

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I. INTRODUCTION

1. On 24 November 2022, the parties were notified of the filing of the 'Public Redacted Version of 'Thaçi Defence Addendum to the Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR) With Confidential Annexes 1-4'.¹ It was not until 29 November 2022 that the SPO filed the 'Prosecution request for reclassification of filings F01100-RED and F01101-RED',² seeking reclassification of the Addendum on the basis that it allegedly contained confidential information.

2. The Defence for Mr Hashim Thaçi ("Defence") hereby objects to the SPO's Reclassification Request, because it lacks a legitimate basis: no confidential information remains in the Addendum, so further redactions are not required.

II. APPLICABLE LAW

3. The starting point is that the accused have the right to a fair and public hearing, enshrined in Article 21(2) of the KSC Law,³ Articles 31(2) and (3) of the Constitution of the Republic of Kosovo, and Article 6 of the European Convention on Human Rights.

4. The International Criminal Tribunal for the Former Yugoslavia has recognised that "the principle of publicity of the proceedings is of paramount importance to the public perception of the judicial process in ensuring not only that justice is done but also that it is seen to be done", such that "evidence will be in the public domain unless

¹ KSC-BC-2020-06/F01101/RED, Public Redacted Version of 'Thaçi Defence Addendum to the Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR) With Confidential Annexes 1-4', 23 November 2022 ("Addendum").

² KSC-BC-2020-06/F01127, Prosecution request for reclassification of filings F01100-RED and F01101-RED, 29 November 2022 ("Reclassification Request").

³ Law No.05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

a justification is established to keep the evidence confidential”.⁴ The KSC Court of Appeals has followed this approach, identifying that all submissions filed before the KSC should be public unless there are exceptional reasons to keep them confidential.⁵

5. Information may only be classified as confidential, and its disclosure restricted, if it concerns:

- (i) The safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings, and other persons at risk on account of the testimony given by witnesses of the court, provided that these measures are consistent with the rights of the Accused;
- (ii) Ongoing or future investigation; or
- (iii) Public interest and/or the rights of third parties.⁶

6. When assessing the need for redactions, the Pre-Trial Judge must strike a balance between the competing interests at stake, while ensuring the proceedings are fair and expeditious.⁷

III. SUBMISSIONS

7. The Defence notes that the SPO has not specifically identified the parts of the Addendum that should be further redacted. Instead, the SPO has given only vague paragraph references, including to paragraphs that are already heavily redacted.⁸ The first step is therefore for the SPO to identify exactly which parts of these paragraphs

⁴ ICTY, *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Trial Chamber III, Decision on Prosecution’s Motion to Change Private / Closed Session Testimony and 92^{ter} Statements Admitted Under Seal to Public Status, 10 July 2009, p. 3.

⁵ KSC-BC-2020-06/IA008-F00004/RED, Public Redacted Version of Decision on Kadri Veseli’s Appeal Against Decision on Review of Detention, 1 October 2021, para. 8.

⁶ KSC-BC-2020-06/F00099, Pre-Trial Judge, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020 (“Framework Decision”), para. 82

⁷ Framework Decision, para. 84.

⁸ Reclassification Request, fn. 3, referring to paras. 9, 14-15, 20, and 24 of the Addendum.

they allege are confidential and should be redacted. In the absence of such specificity, the Defence is unable to provide a complete response to the SPO's Reclassification Request. The following submissions are therefore, by necessity, general in nature.

8. There is no information remaining in the Addendum which satisfies the criteria for confidentiality, as identified above. First, based on the SPO's submissions at the Fifteenth Status Conference, particularly regarding the confidentiality of this matter, the Defence redacted all details of the relevant witnesses referred to in the Addendum, including their witness codes. This is an additional step that is not usually required, but was a conscious choice of both the Defence, and the Defence for Mr Veseli,⁹ in an effort to mitigate any perceived risk to these individuals. In the absence of such detail, there is no information remaining in the identified paragraphs that could be used to identify these people or link them to the substance of what is being said. Consequently, there can be no risk to the safety, physical and psychological well-being, dignity or privacy of the people referred to in the Addendum, nor is there any violation of their rights.

9. Second, in light of the extent of the redactions to the Addendum, the remaining information is so limited that it cannot possibly impact any of the confidentiality issues noted above, particularly any ongoing or future investigations. In fact, the redactions are so extensive, that anyone without familiarity with this issue (i.e. the general public) will not be able to comprehend the matters being discussed, nor to identify the persons referred-to.

⁹ See KSC-BC-2020-06/F01100/RED, Public Redacted Version of Veseli Defence Supplemental Submissions to Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), With Confidential Annexes 1-2 (F01100, dated 14 November 2022), 18 November 2022 ("Veseli Submissions").

10. Finally, the information left unredacted in the paragraphs identified by the SPO is evident from, or implicit in, the public version of the Fifteenth Status Conference Transcript and/or the public redacted version of the SPO Response.¹⁰ The following contains some non-exhaustive examples:

- (i) The issues raised in the first bullet point of paragraph 9 were explicitly dealt with in open session at the Fifteenth Status Conference;¹¹
- (ii) The link between this issue and the [REDACTED] authorities, as left unredacted throughout the Addendum but particularly in paragraphs 20 and 24, is clear from the public version of the Fifteenth Status Conference Transcript,¹² and the SPO Response.¹³ In fact, the Pre-Trial Judge himself made an explicit link to the prior filing dealing with problems of disclosure from the [REDACTED] authorities;¹⁴
- (iii) The link between this issue and the [REDACTED], including the alleged role of [REDACTED] as contained in paragraphs 14-15, is left unredacted in the SPO Response;¹⁵ and
- (iv) That this issue deals with [REDACTED] is also clear from the public transcript,¹⁶ and the SPO Response,¹⁷ and is therefore not required to be redacted from paragraphs 9, 20 and 24.

¹⁰ KSC-BC-2020-06/F01121/RED, Public Redacted Version of 'Prosecution consolidated response to F01100 and F01101 with strictly confidential and ex parte Annex 1', KSC-BC-2020-06/F01121, dated 24 November 2022, 29 November 2022 ("SPO Response").

¹¹ KSC-BC-2020-06, Transcript of the Fifteenth Status Conference, 4 November 2022 ("Transcript of Fifteenth Status Conference"), Public, p. 1590.

¹² Transcript of Fifteenth Status Conference, pp. 1591, 1615, 1617, 1685-1686.

¹³ SPO Response, paras. 20, 37.

¹⁴ Transcript of Fifteenth Status Conference, Oral Order 5 - p. 1692.

¹⁵ *See, e.g.*, SPO Response, p. 14 "(e) Alleged payment of money by Thaçi and Veseli in exchange for documents and/or influence of witnesses".

¹⁶ Transcript of Fifteenth Status Conference, pp. 1591-1593, 1617.

¹⁷ *See, e.g.*, SPO Response, paras. 1, 3-4, 11-12, 26-30, 41-47.

IV. CONCLUSION & RELIEF SOUGHT

11. In light of the above, the Defence submits that there is no legitimate basis for the SPO to request further redactions, particularly to the paragraphs of the Addendum identified by the SPO.

12. The Defence therefore requests the Pre-Trial Judge to dismiss the SPO Reclassification Request.

[Word count: 1,235 words]

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

Friday, 2 December 2022

At Tampa, United States