



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 15 September 2023

Language: English

Classification: Public

**Decision on Joint Defence Request for a Finding of Disclosure Violation
Regarding W04714's Evidence**

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TRIAL PANEL II (“Trial Panel”, “Panel”), pursuant to Articles 21(6) and 40 of the Law No. 05/L-53 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 102(3), 103, 110 and 116 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 22 August 2023, Counsel for Hashim Thaçi (“Mr Thaçi”), Kadri Veseli (“Mr Veseli”), Rexhep Selimi (“Mr Selimi”) and Jakup Krasniqi (“Mr Krasniqi”) (collectively, the “Accused” or the “Defence”) filed a joint request before the Trial Panel seeking a finding of a disclosure violation on the part of the Specialist Prosecutor’s Office (“SPO”) (“Request”).¹
2. On 1 September 2023, the SPO filed a response to the Request (“Response”).²
3. On 11 September 2023, the Defence filed a joint reply (“Reply”).³

II. SUBMISSIONS

4. The Defence submits that W04714 provided the SPO with exculpatory information during an interview of 28 August 2020, which required immediate disclosure to the Accused pursuant to Rule 103.⁴ The SPO failed to disclose the information despite being in possession of it for several years.⁵ While an English version of the interview transcript was provided to the Defence on 7 August 2023 and an Albanian version was provided on 28 August 2023 pursuant to the SPO’s

¹ F01729, Specialist Counsel, *Joint Defence Request for a Finding of Disclosure Violation Regarding W04714’s Evidence*, 22 August 2023, confidential, with Annex 1, confidential.

² F01758, Specialist Prosecutor, *Prosecution Response to Joint Defence Request F01729*, 1 September 2023, confidential.

³ F01781, Specialist Counsel, *Joint Defence Reply to “Prosecution Response to Joint Defence Request F01729”*, 11 September 2023, confidential.

⁴ Request, paras 1-2.

⁵ Request, para. 29.

disclosure obligations under Rule 102(3),⁶ the Defence assert that an intervention by the Trial Panel is necessary.⁷

5. The Defence requests the Trial Panel to: (i) find that W04714's evidence is exculpatory; (ii) find that the SPO has failed to fully comply with its disclosure obligations under Rule 103 with respect to W04714's evidence; (iii) direct the SPO to review its holdings, including interviews with witnesses, and confirm that there are no additional materials which should have been disclosed pursuant to Rule 103 or Rule 102(3) which have yet to be turned over; (iv) reiterate that the SPO is directed to treat its disclosure obligations as a priority requiring time and resources commensurate to its importance, and to adopt a broad understanding of its disclosure obligations under Rule 103; and (v) give due consideration to any Defence requests to postpone the testimony of SPO witnesses whose associated evidentiary material was or will be disclosed in an untimely manner where the belated disclosure of relevant material demonstrably impacted the Defence's ability to prepare effectively.⁸

6. The SPO, in response, concedes that its disclosure of W04714's interview was made in an untimely manner.⁹ The SPO attributes this to a processing error associated with W04714's employment with a third state.¹⁰ The SPO argues that the Defence has suffered no prejudice because the transcript is a 37-page document which was disclosed three weeks prior to W03832's testimony, giving the Defence sufficient time to incorporate the new information into their preparations for cross-examining W03832.¹¹ The SPO further asserts that the Defence mistakenly characterises W04714's interview transcript as Rule 103 material.¹² The SPO claims

⁶ Request, para. 1. *See* Disclosure Package No. 882: 077611-TR-ET part 1 RED, 077611-TR-ET part 2; Disclosure Package No. 904: 077611-TR-AT part 1 RED, 077611-TR-AT part 2.

⁷ Request, para. 4.

⁸ Request, para. 5.

⁹ Response, paras 2, 11.

¹⁰ Response, paras 2, 7.

¹¹ Response, paras 2, 14-15.

¹² Response, paras 3, 16-21.

that the interview of W04714 closely aligns with the account offered in W03832's interview, and W04714's interview transcript should therefore be considered Rule 102(3) material.¹³ The SPO says that it has verified that interview transcripts related to similarly situated witnesses have been disclosed.¹⁴ The SPO also claims that it adopts a broad good-faith understanding of its Rule 103 disclosure obligations.¹⁵ Based upon these circumstances, the SPO claims that the relief sought by the Defence is unnecessary and disproportionate.¹⁶

7. The Defence replies that if the SPO believed that W04714's statement corroborated W03832's testimony, the SPO would have called W04714 as a witness.¹⁷

III. APPLICABLE LAW

8. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in possession of the SPO which are for or against the accused shall be made available to him or her before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

9. Pursuant to Rule 103 of the Rules, subject to Rules 107 and 108 of the Rules, the SPO shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility or reliability of the Specialist Prosecutor's evidence.

¹³ Response, para. 3.

¹⁴ Response, para. 4.

¹⁵ Response, para. 5.

¹⁶ Response, paras 5, 23.

¹⁷ Reply, para. 7.

10. Pursuant to Rule 110, the Panel may decide, upon request, by a Party or *proprio motu*, on measures to be taken as a result of non-compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.

IV. DISCUSSION

A. HAS THE SPO VIOLATED ITS DISCLOSURE OBLIGATIONS

11. Determining what material should be disclosed under Rule 103 is a fact-based assessment which primarily falls within the SPO's discretion and responsibility.¹⁸ Generally, a panel shall "respect the Prosecution's function in the administration of justice, and the Prosecution's execution of that function in good faith."¹⁹ Nevertheless, pursuant to Rule 110, a Panel may decide to take measures as a result of any finding of non-compliance with the SPO's disclosure obligations. Compliance with these obligations is an important element of fair trial proceedings in a normative system such as the one applicable before this court and has been said to be as important as the obligation to prosecute.²⁰

12. The Panel notes that Rule 103 demands disclosure of material "which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence." Material has been considered to affect the credibility of prosecution evidence if it undermines the case presented by the prosecution at trial.²¹ It is apparent from the discretionary

¹⁸ See e.g. [Kordić and Čerkez Appeal Judgment](#), para. 183; [Blaškić Appeal Judgment](#), para. 264; [Karadžić Decision](#), para. 15.

¹⁹ See e.g. [Kordić and Čerkez Appeal Judgment](#), para. 183; [Karadžić Decision](#), para. 15.

²⁰ See e.g. ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement ("[Kordić and Čerkez Appeal Judgment](#)"), 17 December 2004, paras 183, 242; *Prosecutor v. Krstić*, IT-98-33-A, Judgement ("[Krstić Appeal Judgment](#)"), 19 April 2004, para. 180; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement ("[Blaškić Appeal Judgment](#)"), 29 July 2004, para. 264; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures ("[Karadžić Decision](#)"), 29 September 2010, para. 15.

²¹ See e.g. [Karadžić Decision](#), para. 14; [Krstić Appeal Judgment](#), para. 178.

language in Rule 103 that the SPO is not expected to determine in a definite manner whether the material in question does or does not affect the credibility or reliability of the SPO evidence before disclosing it under that Rule. The SPO's duty is to turn over material that "may reasonably" affect the credibility or reliability of the SPO's evidence. Evidence that would contradict the account of an SPO witness on a material issue would generally fall within the category of information to be disclosed pursuant to Rule 103.²²

13. In order to establish a violation of the Prosecution's duties under Rule 103, the Defence must "present a *prima facie* case making out the probable exculpatory or mitigating nature" of the materials in question and the failure of the SPO to disclose it "immediately", i.e., promptly and without undue delay.²³ Where this has been established, the Panel will decide what measures are appropriate to address the violation.²⁴ The existence of a demonstrable prejudice to the Accused is a primary consideration in deciding what response or sanction is appropriate in a given case.²⁵

14. In the present case, the Panel need not determine whether the statement of W04714 did indeed contradict the account of W03832 on a material issue and whether it consequently should have been disclosed pursuant to Rule 103. This information was disclosed pursuant to Rule 102(3)²⁶ and, as a result, it could be

²² See e.g. ICTY: Prosecutor v. Gotovina, IT-06-90-T, [Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence](#), 7 August 2009, para. 11; Prosecutor v. Naser Orić, IT-03-68-T, [Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68](#), 27 October 2005, pp. 2, 4.

²³ See e.g. [Kordić and Čerkez Appeal Judgment](#), para. 179; [Karadžić Decision](#), para. 14.

²⁴ F00936, Pre-Trial Judge, [Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations](#), 26 August 2022, confidential, para. 15; F01245, Trial Panel, [Decision on Thaci Defence Request for a Finding of Disclosure Failure](#), ("Trial Panel Decision on SPO Disclosure Failure") 1 February 2023, paras 27-29.

²⁵ See e.g. [Karadžić Decision](#), para. 17; [Kordić and Čerkez Appeal Judgment](#), para. 179; [Blaškić Appeal Judgment](#), para. 268.

²⁶ See Disclosure Package No. 882: 077611-TR-ET part 1 RED, 077611-TR-ET part 2.

and was used by the Defence for its preparation and cross-examination of W03832.²⁷

15. As regards timeliness of the disclosure, the SPO acknowledges that it has fallen short in its disclosure obligations by failing to disclose W04714's interview at an earlier point in time.²⁸ The Pre-Trial Judge and this Panel had set specific deadlines for the completion of the SPO's disclosure obligations under Rule 102(3)²⁹ and Rule 103,³⁰ which the SPO failed to abide by in this instance. The Panel finds, therefore, that irrespective of whether the Rule 103 requirement of immediate disclosure, or the Rule 102(3) is applied, the SPO failed to disclose the material in a timely manner.

B. PREJUDICE

16. Disclosure of W04714's statements was effected on 7 August 2023.³¹ W03832's testimony began on the morning of 28 August 2023,³² providing the Accused three

²⁷ See e.g. Transcript, 28 August 2023, p. 6859; Transcript, 29 August 2023, pp. 6888-6892 (Defence Counsel referring to the interview transcript).

²⁸ Response, paras 11, 14.

²⁹ See e.g. F00370, Pre-Trial Judge, *Decision on Prosecution for Extension of Time Limit to Provide its Rule 102(3) Notice*, 24 June 2021, para. 16 (extending the deadline for the SPO to file Rule 102(3) notice of those items in its possession to 20 July 2021); Transcript, 13 July 2022, pp. 1475-1475 (Pre-Trial Judge reminding SPO of his order of 20 May 2022 to disclose all 102(3) material in its possession and not subject to protective measure requests or materiality challenges by 30 September 2022); F01226/A01, Trial Panel, *Annex 1 to Order on Conduct of Proceedings*, 25 January 2023, paras. 22, 24 (reminding the SPO that it has a continuing duty to disclose Rule 102(3) material without delay, and ordering that once trial has begun, the SPO must disclose new Rule 102(3) material in its possession immediately); Transcript, 15 February 2023, pp. 1948-1949 (Trial Panel noting that they wish SPO to complete disclosure of materials in its possession, to which SPO implies compliance with the exception only for Rule 102(3) items recently received, precipitating Trial Panel to order the SPO to produce a supplemental Rule 102(3) notice for these materials by 17 February 2023).

³⁰ See e.g. Transcript of Hearing, 24 March 2022, p. 1161, line 24 to p. 1162, line 2 (Pre-Trial Judge ordered the SPO to complete its review and disclosure of Rule 103 material received up to 31 January 2022); Trial Panel Decision on SPO Disclosure Failure, para. 33(b) (upon finding a Rule 103 violation, ordering the SPO to prioritize its disclosure obligations and take a broad understanding of those obligations under Rule 103).

³¹ See Disclosure 882: 077611-TR-ET part 1 RED, 077611-TR-ET part 2.

³² Transcript, 28 August 2023, p. 19.

weeks to incorporate the information in W04714's statements into their preparation of W03832's cross-examination. Notably, W04714's statement is approximately 37 pages,³³ and the comments at issue are encompassed within a few lines.³⁴

17. Based upon this timeframe and other relevant circumstances outlined above, the Panel is not convinced that the disclosure was made so late as to hinder the Accused's effective preparation of W03832's testimony to any significant degree. The Defence still had sufficient time to review the material and make use of it in their cross-examination of W03832.³⁵ Notably, the Accused did not ask the Panel to postpone the testimony of W03832.³⁶ The Panel therefore finds that the Accused have not been prejudiced by the late disclosure of W04714's statements.

C. APPROPRIATE MEASURES

18. The SPO's conduct meets the threshold of non-compliance within the meaning of Rule 110 of the Rules, and thus warrants the adoption of "appropriate measures".³⁷ The Panel will therefore turn to assess the appropriate measures to adopt in the particular circumstances of the case.

19. The existence of a demonstrable prejudice to the Accused is a primary consideration in deciding what response or sanction is appropriate in a given case.³⁸ The appropriate measures must be tempered by the fact that the Accused suffered no demonstrable prejudice as a result of the SPO's untimely disclosure.

³³ See : 077611-TR-ET part 1 RED, 077611-TR-ET part 2.

³⁴ See 077611-TR-ET part 1 RED, p. 23.

³⁵ See e.g. Transcript, 28 August 2023, p. 6859; Transcript, 29 August 2023, pp. 6888-6892 (Defence Counsel referring to the interview transcript); See also Reply, para. 5.

³⁶ Trial Panel Decision on SPO Disclosure Failure, para. 29 (reflecting this Panel's prior commitment to doing so).

³⁷ Trial Panel Decision on SPO Disclosure Failure, para. 11.

³⁸ Trial Panel Decision on SPO Disclosure Failure, para. 11 (citing [Karadžić Decision](#), para. 17; [Kordić and Čerkez Appeal Judgment](#), para. 179; [Blaškić Appeal Judgment](#), para. 268).

The Panel acknowledges, however, that the last-minute disclosure of relevant information to the Defence would put additional pressure onto the Defence when preparations for cross-examination are in their final stage.

20. The Panel, therefore, reiterates the importance of timely and diligent compliance on the part of the SPO regarding its disclosure obligations. In this regard, the Panel notes with satisfaction that the SPO took a number of steps to ensure that such a situation does not reoccur, including: (i) verifying disclosure of statements originating from individuals considered as witnesses, but ultimately not chosen; (ii) verifying disclosure of all SPO/Special Investigative Task Force interview transcripts; and (iii) engaging in further review of items, including those that may have been only partially disclosed in the past, or disclosed only as another version of the same item.³⁹ The Panel accordingly does not consider that there is a need for additional measures to be ordered at this stage. The SPO is bound to comply with its disclosure obligations under the Rules and is expected to do so in a diligent and timely manner.

V. DISPOSITION

21. For the above-mentioned reasons, the Panel hereby:

- a) **FINDS** that the disclosure of W04714's statement was untimely;
- b) **FINDS** that the Accused was not prejudiced by the late disclosure of W04714's statement;
- c) **REITERATES** the importance of timely and diligent compliance on the part of the SPO with its disclosure obligations; and
- d) **REJECTS** the remainder of the Defence's proposed remedial measures.

³⁹ Response, para. 11.



Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 15 September 2023

At The Hague, the Netherlands.