

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: 17 November 2020

Language: English

Classification: Public

Defence for Hashim Thaçi's Submissions for first Status Conference

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

David Hooper

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. On 26 October 2020, the Pre-Trial Judge confirmed the Indictment against Mr Hashim Thaçi,¹ issued an arrest warrant against him² and ordered his transfer to the detention facilities of the Kosovo Specialist Chambers (“KSC”) in The Hague.³

2. At the beginning of November 2020, Mr Hashim Thaçi voluntarily surrendered to officials of the KSC in Kosovo, pursuant to a prior arrangement with them, and was then transferred to the KSC detention facilities in The Hague.

3. On 9 November 2020, Mr Hashim Thaçi pleaded not guilty to the charges during his initial appearance.⁴

4. On 11 November 2020, the Pre-Trial Judge issued an ‘Order Setting the Date for a Status Conference and for Submissions’,⁵ by which it decided to convene a status conference on 18 November 2020 and invited the parties to file observations on the items listed in the agenda annexed to its order, on the redaction regime to be applied in the proceedings and/or on any other related relevant topics deemed necessary.

5. On 13 November 2020, the Specialist Prosecutor’s Office (“SPO”) filed the ‘Prosecution Submissions for first Status Conference’.⁶

6. The Defence for Hashim Thaçi (“the defence”) hereby submits its observations on the issues listed by the Pre-Trial Judge in its agenda for the status conference.⁷

¹ See KSC-BC-2020-06/F00045/A03, Further redacted Indictment, 4 November 2020.

² KSC-BC-2020-06/F00027/A01/RED, Arrest Warrant for Hashim Thaçi, 26 October 2020.

³ KSC-BC-2020-06/F00027/A02, Order for Transfer to the Detention Facilities of the Specialist Chambers, 26 October 2020.

⁴ KSC-BC-2020-06, Draft Transcript, 9 November 2020.

⁵ KSC-BC-2020-06/F00074.

⁶ KSC-BC-2020-06/F00076.

⁷ KSC-BC-2020-06/F00074, 11 November 2020, public.

II. SUBMISSIONS

A. GENERAL QUESTIONS

7. The defence intends to investigate each charge raised in the Indictment against Mr Hashim Thaçi; in this regard, the defence stresses that it is still waiting to be disclosed a confidential, less redacted version of same.

8. In consequence, the defence requests that the SPO be ordered to disclose an unredacted version or, at the very least, a less redacted version of the Indictment to the defence within 3 days of the status conference.

9. In relation to defence investigations, at this stage, it is too early to give any clear estimate as to the time frame required, in particularly in light of the COVID-19 pandemic which is necessarily going to have a profound impact, if not halt, any investigations.

10. Given the number of witnesses on which the prosecution intends to rely at trial (around 200), the number of documents to be disclosed to the defence (around 1800 incriminating items, 100 000 Rule 102(3) items and over 1000 potentially exculpatory items), and the suggested deadline for such disclosure (31 May 2021),⁸ the defence estimates, from experience in other cases, that it will require at least eighteen months to assimilate the prosecution material, take instructions, conduct meaningful investigations and otherwise prepare for trial.

⁸ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, paras. 2, 5-6, 12, 16-17.

11. The defence will not, at this stage, provide a notice of alibi or any grounds excluding criminal responsibility, but reserves the right to do so in light of disclosure and investigations.

B. PROCEDURE FOR DISCLOSURE OF EVIDENCE

1. Disclosure to the Pre-Trial Judge

12. The defence notes that in the *Mustafa* case, the Pre-Trial Judge asked to be disclosed all evidence exchanged between the Parties, regardless of whether it will be relied upon at trial.⁹

13. The defence strongly objects to such general disclosure to the Pre-Trial Judge which does not appear necessary and is not envisaged by the Law on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") or the Rules of Procedure and Evidence ("RPE").

14. Such general disclosure to the Pre-Trial Judge would be prejudicial to the defence given that any material disclosed to the Pre-Trial Judge will be transferred to the Trial Panel ultimately appointed, pursuant to Rule 98 of the RPE, Transmission of Case File to the Trial Panel, which provides that:

"(1) After receiving the filings from the Specialist Prosecutor and the Defence pursuant to Rule 95(4) and (5), and Rule 97, and within thirty (30) days of any final decision on preliminary motions, **the Pre-Trial Judge shall transmit to the Trial Panel a complete case file consisting of:**

- (a) the indictment as confirmed, together with the supporting material under Rule 86(3);
- (b) all filings and material submitted through the electronic court management system;**
- (c) any evidentiary material received not subject to paragraph (1)(b);**
- (d) any other correspondence with respect to the case not filed with the Court Management Unit;
- (e) a Handover Document summarising:

⁹ KSC-BC-2020-05/F00034, Framework Decision on Disclosure of Evidence and Related Matters, 9 October 2020, para. 34.

- (i) the arguments of the Parties and, where applicable, Victims' Counsel on the facts and the applicable law;
 - (ii) the points of agreement;
 - (iii) a list of the orders and decisions rendered by the Pre-Trial Judge;
 - (iv) the evidentiary material produced by each Party;**
 - (v) suggestions as to the number and relevance of the witnesses to be called;
 - (vi) the questions of fact and law that are in dispute;
 - (vii) the state of advancement of the disclosure process;
 - (viii) all meetings with the Parties; and
 - (ix) any other matter that remained unresolved;
 - (f) any application and decision concerning disclosure; and
 - (g) any other material relevant to the case.
- (2) The transmission of the case file pursuant to paragraph (1) shall be completed by means of electronic access.
- (3) Prior to the transmission under paragraph (1), the Pre-Trial Judge shall provide adequate notice thereof to the President, in order to ensure the timely assignment of a Trial Panel."

15. At least, this material should not be automatically transferred to the Trial Panel which may be ultimately appointed in the current case. The Trial Panel may have access only to the evidence that the Parties intend to tender as exhibits in Court. Indeed, it would be unfair to the defence if the Trial Panel could access, review and eventually forge its opinion on evidence exchanged between the parties but not intended to be tendered in Court.

2. *Inter partes* disclosure

16. The Pre-Trial Judge has invited the parties to reply to the several questions relating to the procedure for disclosure:

"7. Procedure for Disclosure

- a) Can the Parties submit, together with each disclosure package, a chart categorising the information in accordance with the charges in the Confirmed Indictment, with specific reference to the underlying crimes, contextual elements of the crimes, the alleged conduct of the Accused, or where applicable, evidence to be presented by the Specialist Prosecutor;
- b) Can the Parties propose a model chart (that satisfies the requirements of Rule 109(c) of the Rules) to be discussed at the Status Conference;
- c) If this is not practicable, what is the Parties' alternative proposal that nevertheless satisfies the relevance requirement and degree of precision set forth in Rule 109(c) of the Rules and provides meaningful guidance to the receiving Party and the Pre-Trial Judge; and

d) Does the Defence agree to be provided with a consolidated chart at the time the SPO Pre-Trial Brief is submitted; by analogy, does the SPO agree to be provided with a consolidated chart at the time of the Defence Pre-Trial Brief.

17. The defence notes that Rule 109(C) of the RPE provides that:

"As far as practicable, a Party shall: (...) categorise the information in accordance with the charges in the indictment, with specific reference to the underlying crimes, contextual elements of the crimes, the alleged conduct of the Accused or, where applicable, evidence to be presented by the Specialist Prosecutor."

18. Rule 95(4) provides that:

"After the submission by the Specialist Prosecutor of the items mentioned in paragraph (4), the Pre-Trial Judge shall invite the Defence to file, within a set time limit, a Pre-Trial Brief indicating:

- (a) in general terms, the nature of the Accused's defence;
- (b) the charges and matters which the Accused disputes, by reference to particular paragraphs in the Specialist Prosecutor's Pre-Trial Brief, and the reasons why the Accused disputes them; and
- (c) a list of potential witnesses the Defence intends to call, without prejudice to any subsequent amendment or filing thereof. In relation to each witness, the Defence shall specify to which particular relevant issue the evidence relates."

19. Given these requirements, the defence submits that, at the time of making each disclosure, the Disclosing Party indicates, so far as practicable, and through the metadata available in Legal WorkFlow, whether the item in question primarily relates to underlying crimes, contextual elements, conduct of the accused or, as applicable, evidence to be presented by the Specialist Prosecutor. The corresponding chart could then be issued through an export of the relevant metadata registered for each document and annexed to each filing notifying a disclosure package.

20. A consolidated chart would then have to be issued by each Party after the filing of its Pre-Trial Brief, which would compile all the evidence the Party intends to tender in Court. A sufficient time should be allocated to each Party to submit such a Chart, within 15 days.

C. REDACTION REGIME

21. At this stage, and in the abstract, the defence has no particular observation to submit on the redaction regime adopted in the *Mustafa* case.¹⁰

D. MISCELLANEOUS / INTERIM RELEASE

22. As observed during Mr Hashim Thaçi's initial appearance, the decision to proceed by way of arrest rather than summons is both surprising and concerning.¹¹ It also fails to reflect the background to this case. Of note is that Mr Hashim Thaçi has cooperated with the KSC at all stages. He agreed to be interviewed by the SPO. Further, once the Indictment was issued, he voluntarily resigned from his office of President of Kosovo and surrendered voluntarily to KSC staff in Kosovo.

23. In this context, the defence intends to apply in early course for his interim release, pursuant to Rule 57(3) of the RPE. The defence was unable to make such an application in an informed manner before, since it was provided with the material and arguments presented by the SPO in support of its application for an arrest warrant only on the 16th of November 2020. In addition, should the prosecution oppose any such application for interim release, the defence should be fully and fairly informed sufficiently in advance of any and all further arguments and material that the prosecution may seek to present and rely on in addition to that which was presented to the Pre-Trial Judge.

¹⁰ KSC-BC-2020-05/F00034, Framework Decision on Disclosure of Evidence and Related Matters, 9 October 2020, paras 77-89.

¹¹ KSC-BC-2020-06, Draft Transcript of Mr Hashim Thaçi's Initial Appearance, 9 November 2020, p. 45 & seq.

24. The defence respectfully requests the Pre-Trial Judge to convene a hearing, to hear the Parties' submissions on Mr Hashim Thaçi's application for interim release, such hearing to take place at a time suitable to all the parties no sooner than 14 days following the status conference.

25. In relation to the proper procedure for determining any application for interim release, the defence submits that an oral hearing, in the presence of Mr Hashim Thaçi, is required given what is at stake, namely the freedom of the former President of Kosovo, for crimes allegedly committed 22 years ago, which he disputes, and given that it will be the first opportunity for the Pre-Trial Judge to hear the defence's informed submissions on this issue.

26. In light of Article 39(13) of the KSC Law and Rule 75(2) & (3) of the RPE, which provides that:


“(2) As a general rule and at the discretion of the Panel, submissions by the Parties and participants, orders and decisions on routine matters or matters of no or limited factual or legal complexity shall be made or rendered orally. Such orders and decisions shall be accompanied or followed by written reasons where necessary for their clarity or enforcement. The Registrar shall keep a record of any order or decision rendered orally.

(3) Without prejudice to paragraph (2) and unless otherwise ordered or provided in the Rules, written submissions by the Parties during the course of proceedings shall not be supplemented by oral arguments.”

the defence further submits that written submissions made firstly by the Prosecutor and responded to by the Defence would assist the presentation and resolution of the respective arguments to be presented at the hearing.

27. It should be noted that the Pre-Trial Judge will have, in any event, to review Mr Hashim Thaçi's detention on remand upon the expiry of two month from the last ruling on detention, ie by the 26th of December 2020, pursuant to Rule 57(1) of the RPE.

[Word count: 2186]

A handwritten signature in black ink, appearing to read 'D Hooper', with a long horizontal stroke extending to the left.

David Hooper

Specialist Counsel for Hashim Thaçi

Monday, 17 November 2020

At Arusha, Tanzania