

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

Date: 17 November 2020

Language: English

Classification: Public

Defence 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 Alagendr

I. INTRODUCTION

1. Pursuant to the Status Conference Order,¹ the Defence for Mr. Rexhep Selimi hereby provides written submissions on the agenda items identified by the Pre-Trial Judge,² and related matters.³

II. SUBMISSIONS

A. General Questions

1. Prosecution Investigations

2. At the outset, the Defence notes with concern that the Specialist Prosecutor (“SPO”) appears to be planning “a number of investigative steps”⁴ after the confirmation of the indictment in this case and only “working towards completing any significant remaining investigative steps during pre-trial proceedings.”
3. The SPO, and its predecessor, the Special Investigative Task Force (“SITF”) have been investigating allegations contained in the Council of Europe Parliamentary Report of 7 January 2011, as well as other crimes connected to those allegations since September 2011. Indeed, since September 2016, over four years ago, the SPO has been specifically mandated to carry out a range of investigative steps under Article 35 of the Law establishing the KSC and SPO.⁵ While the Defence fully reserves the right to challenge aspects of the legality of this law at the appropriate time, the SPO and the SITF have had more than sufficient time to conduct a full investigation over this nine year period. Investigations could and should therefore have been completed before the Indictment against Mr. Selimi was submitted for confirmation by the SPO.

¹ *Prosecutor v. Thaci et al.*, Order Setting the Date for a Status Conference and for Submissions, KSC-BC-2020-06/F00074, 11 November 2020, Public (‘Status Conference Order’).

² *Prosecutor v. Thaci et al.*, Annex 1 to Order Setting the Date for a Status Conference and for Submissions, KSC-BC-2020-06/F00074/A01, 11 November 2020, Public (‘Annex 1’)

³ Status Conference Order, KSC-BC-2020-06/F00074, para.21(b).

⁴ *Prosecutor v. Thaci et al.*, Prosecution Submissions for first Status Conference, KSC-BC-2020-06/F00076, 13 November 2020, para 3 (“SPO Submissions”),

⁵ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office

4. Further, as experience before other international courts has shown, further investigations by the Prosecution after this stage, together with the resulting disclosure obligations upon material gathered has often been the cause of extensive delays in pre-trial and even trial proceedings. It would therefore greatly assist if regular updates are provided to both the Pre-Trial Judge, as well as the other Parties and Participants in this case, to mitigate the risk of such delays to uphold the SPO's suggestion that such further investigations won't "impact the speedy conduct of proceedings."⁶
5. Moreover, to ensure that any further investigations by the SPO will not cause such delays, it will be necessary for the Pre-Trial Judge to strictly assess any future request by the SPO to amend its exhibit and witness list pursuant to Rule 101(1)(b) to add any documents or witness statements after the date set by the Pre-Trial Judge obtained as a consequence of these additional investigations. Providing notice now that a robust approach will be taken to such filings will serve to encourage the SPO to complete its investigations as expeditiously as possible.

2. Evidence in possession of the Prosecution

6. The Defence makes no submissions on this issue.

3. Witnesses relied upon by the SPO for the indictment and trial

7. The Defence seeks clarification from the SPO as to the apparent discrepancy between the information provided by the SPO that 153 witnesses were relied upon for the purposes of the Confirmed Indictment⁷ and yet only 103 witness statements were provided to the Pre-Trial Judge.⁸
8. Further, the Defence notes the SPO's submission that it anticipates adding approximately 50 further witnesses to its witness list for trial. As explained above, any requests by the SPO to add such witnesses subsequent to the date for providing its

⁶ SPO Submissions, para. 3.

⁷ SPO Submissions, para 5.

⁸ SPO Submissions, Table, para 6.

Rule 101(1)(b) list should be strictly assessed by the Pre-Trial Judge to minimize the risk of delays in the process and allow the Defence to effectively exercise its right to prepare effectively in accordance with Article 21(4)(c) of the Law.

4. Defence investigations

9. The Defence envisages that it will need to conduct extensive investigations in this case.

10. At the present time, before being disclosed the indictment supporting material, the Defence is unable to provide any more specificity on the duration of such investigations. However, experience has shown that this duration will depend greatly upon various factors listed below:
 - a. The speed of disclosure by the Prosecution;
 - b. The degree of redactions applied to Prosecution evidence, both incriminating and exculpatory;
 - c. The fulfilment by the Prosecution of its disclosure obligations of exculpatory evidence and information which is material to the preparation of defence in a prompt, thorough and cooperative manner;
 - d. The level of cooperation displayed by States, International Organisations and other entities with the Defence;
 - e. The ability for Defence team members to travel and conduct confidential investigations during the current pandemic.

5. Notice of alibi or any other grounds excluding criminal responsibility

11. The Defence makes no submissions on this issue at the present time but will fulfil its obligations in accordance with Rules 95(5) and 104(1)(a) in due course as required.

B. Rule 102(1)(a) Material (Supporting Material to the Indictment)

- 1. The overall amount of Rule 102(1)(a) material and early disclosure of such materials**

12. The Defence recognizes the size of the case as described by the SPO as comprising over 34 times the number of pages submitted by the Prosecution as Rule 102(1)(a) Material in the *Mustafa* case.
13. However, despite this size, the Defence does not understand why some of this material could not be disclosed before the expiration of the 30-day deadline set out in this rule. If no redactions are requested for some of this material as the Prosecution implies,⁹ there is no reason why such unredacted materials, at the very least, could not be disclosed before this deadline. The Prosecution has been well aware of its obligation to disclose such material since it originally submitted the indictment for confirmation on 24 April 2020 and certainly since it submitted the revised version on 24 July 2020.¹⁰ As such, preparations should have been undertaken since that date to ensure for timely disclosure upon the confirmation of the indictment by the Pre-Trial Judge.
14. Further, as a practical matter, given the nature of disclosure through the Legal Workflow system, disclosing all 1,842 items comprising 43,108 pages as well as various videos and audios in one go, would also potentially overload the system. Disclosing these materials over several weeks, starting with the unredacted material would avoid this problem.

2. Translations into Albanian of witness statements

15. The Defence notes the commitment from the Prosecution that translation into Albanian of all indictment supporting material will be completed and disclosed within the 30-day statutory timeframe.¹¹ No further submissions are necessary as long as this deadline is met.

3. Redactions to Rule 102(1)(a) material and the Detailed Outlines

16. The Defence notes with concern the indication by the SPO that “significant redactions are required to both the Rule 102(1)(a) materials and the detailed outline submitted

⁹ SPO Submissions, paras 7-8.

¹⁰ *Prosecutor v. Thaci et al*, Public Redacted Version of Arrest Warrant for Rexhep Selimi, 26 October 2020.

¹¹ SPO Submissions, para 9.

pursuant to Rule 86(3)(b).”¹² While it is not disputed that such redactions must be applied with care and consistency in order to be effective as the SPO suggests, again this should have been a process that was initiated by the SPO concurrently with the submission of the indictment and completed in advance of the initial appearance of Mr. Selimi. Further submissions on the redaction regime proposed by the Prosecution are included below.

17. As for the Detailed Outline provided to the Pre-Trial Judge pursuant to Rule 86(3)(b), the Defence notes that this provision is a significant advancement on the indictment confirmation process operated by the *ad hoc* Tribunals where there was no equivalent provision.¹³
18. While this provision was primarily intended to assist the Pre-Trial Judge in reviewing the submitted indictment, the Detailed Outline also serves to assist the Defence in understanding the charges and the evidence purported underpinning them. It should have been drafted by the SPO in a manner that would have allowed for unredacted disclosure to the Defence if at all possible. Any redactions therefore requested for this document should be as limited as possible.

C. Rule 102(1)(b) Material (Additional Material Intended for Use at Trial)

19. The Defence notes the SPO’s intention to disclose all further material under Rule 102(1)(b) by 31 May 2021 or, in any case, no later than 30 days prior to the opening of the SPO’s case and that this material encompasses an additional 50 witness statements and approximately 1500 exhibits including those disclosed under Rule 102(1)(a). However, it is important to note that the deadline of 30 days before trial should only be used in exceptional circumstances and the Prosecution should justify why any evidence falling under Rule 102(1)(b) could not be disclosed before that date.
20. In this regard, the SPO has not explained why it would be unable to commit to earlier disclosure of Rule 102(1)(b) material, such as that not requiring redaction, before this

¹² SPO Submissions, para 8.

¹³ See eg. ICTY Rule 47.

deadline.¹⁴ Disclosure of such material as it becomes available would assist both the Defence and the Pre-Trial Judge to understand that evidence and would also ensure that any issues that arise from it are raised and addressed promptly and efficiently.

21. Further, in order to ensure there are no delays to the trial proceedings, the deadline of 30 days before trial for disclosure of all Rule 102(1)(b) material should apply to all evidence falling under that Rule. The Defence will strongly oppose any application for delayed disclosure beyond that point due to the severe impact it will have on Defence preparation. Submissions on the redaction regime to these materials are set out below.

D. Rule 102(3) Material (Evidence Material to Defence Preparation, Obtained from or Belonging to the Accused)

22. The Defence considers that there is no reason why the SPO could not provide any evidence obtained from or belonging to the accused immediately, and at the latest by the deadline for disclosure of material pursuant to Rule 102(1)(a) rather than by 30 April 2021.
23. As for the rest of the material falling under this provision, the Defence notes the immense scale of potentially relevant documents falling under this provision, namely 100,000 Rule 102(3) items and recognises the careful balance that must be struck by the SPO and the Pre-Trial Judge in ensuring that only evidence of true relevance is disclosed, as opposed to the greatest volume of evidence.¹⁵
24. In this regard, while the Prosecution should still *proprio motu* disclose material that it believes fall under this Rule, it should also respond promptly, transparently and effectively to requests for disclosure pursuant to this provision as submitted by the Defence. These requests may relate directly to the substantive guilt or innocence of the accused or various procedural motions that the Defence intends to file, both in relation to bail and the jurisdiction of the Specialist Chambers. In this regard, in line

¹⁴ SPO Submissions, para 14.

¹⁵ *Prosecutor v. Salih Mustafa*, Framework Decision on Disclosure of Evidence and Related Matters, 9 October 2020, para 39 (“Framework Decision”).

with procedures employed before other International Tribunals, the Defence requests the Pre-Trial Judge to Order the Prosecution to respond to any Defence disclosure request pursuant to Rule 102(3) or 103 within a fixed period which the Defence suggests should be 3 working days in the current case, or sooner if the nature of the request requires an earlier response. If the SPO accedes to a Defence disclosure request, the material sought by the Defence shall then be disclosed within a further 2 working days.

25. To assist with the review and analysis of this substantial amount of evidence, it is vital that the disclosed material pursuant to Rule 102(3) is categorised effectively and disclosed through Legal Workflow in a manner which allows for the Defence to understand its relevance and therefore focus on its preparation.¹⁶ This need is accentuated by the professed need for redactions to a significant percentage of these materials as explained by the Prosecution¹⁷ which will make the disclosed material more difficult to comprehend and analyse.

E. Rule 103 Material (Exculpatory Evidence)

26. The Defence notes the existence of approximately 1,000 potentially exculpatory items which will be disclosed no later than the indictment supporting materials and the SPO's recognition of its continuing obligation to review and disclose any Rule 103 material on a rolling basis.¹⁸ It is not clear from the SPO Submissions whether any redactions have been applied to these already identified materials. Any redactions should be as limited as possible and the Defence should have a meaningful right to contest such redactions as explained below.
27. In line with the submissions above, the Prosecution should be required when disclosing such material to the Defence to explain how each piece of material is considered exculpatory by reference to the paragraph of the indictment, witness or other documentary evidence to which it relates.
28. The SPO's submission that it should be relieved of its disclosure obligations under Rule 103 if the existence of the relevant exculpatory evidence is known and the

¹⁶ Framework Decision, para 39.

¹⁷ SPO Submissions, para 16.

¹⁸ SPO Submissions, para 17.

evidence is accessible with the exercise of due diligence, is not without limits. Indeed, the example referred to by the SPO of disclosure of the *Haradinaj* Judgement to Mr. Haradinaj's former lead counsel and Mr. Krasniqi, only applies to those individuals. The obligations of the SPO may differ depending on each accused's individual situation. Knowledge by one accused or his counsel of exculpatory information from a previous case, may not be directly imputed to another accused and his Defence team who do not have such knowledge.

29. Similarly, the cases cited by the SPO do not relieve it from the obligation to notify the Defence of the existence of exculpatory material and provide a means by which the Defence can reasonably be expected to access it "with regard to non-public or non-referenced material from judgements from this Tribunal"¹⁹ including the *Haradinaj* Judgement, where that information is in the SPO's custody, control or actual knowledge.

F. Rule 107 Material (Protected Material)

30. The Defence takes note of the SPO's Submissions on Rule 107 Material and that any clearances to disclosure of this material should not jeopardise the timelines it outlined.

31. However, as requested by the Pre-Trial Judge, no specificity has been provided by the SPO as to whether the outstanding clearances:

- a. relate to Rule 102(2) of Rule 103 material;²⁰
- b. will require applications to the Pre-Trial Judge to be relieved of disclosure obligations under these rules;²¹
- c. whether redactions will be required to material disclosed;²² and,
- d. whether counterbalancing measures will be requested for material that cannot be disclosed.²³

¹⁹ Prosecutor v. Gotovina et al., 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 12.

²⁰ Annex 1, para. 6(b)

²¹ Ibid, para 6(d)

²² Id, para 6(e)

²³ Id, para 6(f).

32. Given the well-known potential for extensive interruptions to proceedings caused by delays in addressing these issues, full and forthright responses should be provided on these issues.

G. Procedure for Disclosure

33. As the Pre-Trial Judge is well aware, in the original Framework Decision issued in the *Mustafa* case, the Prosecution was ordered to provide a Detailed Disclosure Chart akin to the Detailed Outline provided for the indictment supporting material pursuant to Rule 86(3)(b), for all future disclosure packages of incriminating evidence falling under Rule 102(1)(b) of the Rules.²⁴ It was only after the SPO sought reconsideration of this aspect of the Framework Decision that the Defence in that case and SPO agreed to lessen the obligation under Rule 109(c) of the Rules and provide a consolidated chart only within one week from the filing of the SPO Pre-Trial Brief.²⁵ As such, the Defence opposes this aspect of the SPO Submissions to only provide such a Disclosure Chart after one week from the filing of the Pre-Trial Brief.²⁶
34. Given the size of this case in comparison with the *Mustafa* case, providing such charts on a rolling basis at the same time as Rule 102(1)(b) material rather than the Prosecution Pre-Trial Brief to be filed in the distant future, is the only way to ensure that the Defence will be able to properly assess and analyse the disclosed materials. This requirement is accentuated by the indications by the SPO of the extensive redactions that will be sought to this material. Understanding the relevance of this evidence would become even more complicated without the regular provision of such Disclosure Charts by the SPO.
35. As to the format of the Disclosure Chart, the proposed chart in *Mustafa* would not appear, at first sight, to be useful or suitable in this case. The Defence is however willing to discuss this matter with the Prosecution with the aim of coming to an agreement to ensure that Rule 109(c) is fully complied with. As this case involves

²⁴ Framework Decision, para 71.

²⁵ Reconsideration Decision, Disposition, para 23(c).

²⁶ SPO Submissions, para 23 referring to the Joint Submission of Rule 109(c) categorization chart, as adopted in *Prosecutor v. Salih Mustafa*, Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal, KSC-BC-2020-05/F00046, 5 November 2020

four separate accused, each with different perspectives and interests, these discussions with the SPO must involve all teams, in order to strive for a solution which is acceptable for all.

36. In this regard, the Defence notes that Legal Workflow will be used as the vehicle for disclosure at the KSC and this system incorporates various different technical solutions for recording and disclosing the information required by Rule 109(c). As such, this technical capacity should form the basis for discussions with the Prosecution regarding the appropriate format for the provision of disclosure charts for Rule 101(2) material as well as all other disclosed material.

H. Redaction Regime

37. The Defence opposes the application of the redaction regime from the *Mustafa* case in this case as proposed by the SPO.²⁷
38. As recognised by the Pre-Trial Judge in *Mustafa*, “full disclosure of all material and relevant evidence is the principle, while withholding information is the exception” and any restrictions to full disclosure must be strictly necessary.²⁸ However, despite this recognition the redaction regime established in that case, which the SPO proposes to follow in this case, allows either Party to disclose evidence with “redactions applied directly to pre-defined categories of information (“standard redactions”) without prior judicial authorisation.”²⁹
39. Following the *Mustafa* procedure in the current case would serve to shift the burden from the SPO to prove the necessity of redactions as an exception to the principle of full disclosure, onto the Defence to seek to lift redactions that have been imposed by the SPO with no judicial oversight. While the Defence has no doubt that this regime would make the work of the SPO easier by absolving it of the obligation to apply for and justify the redactions it seeks, it is hard to see how it could be said to be in “full respect for the rights of the Accused” or how it “enhances the ability of judicial panels at all stages of proceedings to effectively and efficiently exercise oversight of the

²⁷ SPO Submissions, para 24.

²⁸ Framework Decision, para 73.

²⁹ Framework Decision, para 78.

disclosure process.”³⁰ While the redaction regime adopted by the Pre-Trial Judge in the Framework Decision envisages a judicial ruling on any contested redaction, this is an insufficient substitute for the right to make submissions on redactions before they are applied.

40. The SPO proposes that it be permitted to apply Standard Redactions without judicial authorisation under Rule 108(1)(a), Article 21(1) of the Law and Rules 80(4)(a)(i)-(ii) and 108(1)(b)-(c). These proposed redactions cover a wide range of information which could be useful to Defence investigations. In light of the professional obligations of confidentiality weighing on Defence teams, such redactions are not justified and would also risk delaying proceedings.
41. Despite this opposition to *proprio motu* redactions without judicial oversight, the Defence does not oppose in principle the procedure set out in the Framework Decision whereby applications for Non-Standard Redactions are filed concurrently with disclosure of the proposed redacted statements of documents, along with a redacted version of the application.³¹ This allows for the Defence to review and analyse the redacted documents and statements pending judicial decision on the SPO’s request for redactions. Indeed, the Defence sees no reason why the same procedure should not apply to both Standard and Non-Standard Redactions.
42. In this regard, the Defence does not suggest that the categories of redactions should change, but simply that prior judicial oversight would be required for all requested redactions. As such, any delays caused by applying a different regime in this case from that applied in Mustafa, would be limited.

Respectfully submitted on 17 November 2020,



DAVID YOUNG

³⁰ SPO Submissions, para 25.

³¹ Framework Decision, para 88.

Lead Counsel for Rexhep Selimi