In:	**KSC-BC-2020-06**
	The Prosecutor v Hashim Thaci, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Judge Nicolas Guillou**
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Defence Counsel for Kadri Veseli
Date:	9 November, 2020
Language:	English
File name:	**Public**
Classification:	Pre-Trial Judge

Submissions on behalf of Kadri Veseli

Status Conference - Wednesday 18 November

Specialist Prosecutor's Office

Jack Smith

Specialist Counsel for the accused, Kadri Veseli

Ben Emmerson CBE QC

I. GENERAL QUESTIONS

1. In answer to question 1(d), the defence of Mr. Veseli requires a period of at least 18 months from the time the SPO has given full disclosure, in order to fully investigate each of the offences alleged in the Indictment, and the evidence relied upon in support of the alleged joint criminal enterprise and command responsibility.

2. The SPO case entails a large number of separate crimes allegedly committed by numerous individual perpetrators over a prolonged period of time, across the entire territory of Kosovo and parts of Albania. The investigation of these alleged offences can only begin in earnest once the SPO has disclosed the evidence on which it intends to rely for each of them.

3. For the accused to be afforded his right to adequate time and facilities for the preparation of his defence, it will be necessary for the Pre-Trial Judge to closely monitor the disclosure and redaction process, to ensure that it is reasonably possible for the defence to identify the incidents in question, and the alleged participants with sufficient particularity to be able to conduct effective investigations of the crime base evidence.

4. From past experience, it is likely that the defence will need to make applications for the de-redactions of key witness statements to enable incidents and witnesses to be identified so that evidence can be tested effectively and so that meaningful investigations can be conducted. This is all the more likely if the SPO is permitted to self-authorise redactions by category, with specific prior judicial authority. Adequate disclosure of de-redacted information will be essential to ensure that the trial process respect the principles of basic procedural fairness and to secure the requisite equality of arms.

5. SPO disclosure will inevitably occur in tranches. There will thus be a dialectic between the extent and efficiency of the SPO disclosure and de-redaction process, and the effectiveness of the defence investigation. The earlier the SPO discloses unredacted or de-redacted witness testimony, the sooner the defence can investigate it. As a general principle, however, it should be common ground that the defence will not be in a position adequately to investigate an allegation until it has been given proper notice of the particulars of the events and persons allegedly involved.

6. In this context, the timetable mooted by the SPO is unrealistic. The SPO submission for this hearing suggests that it will complete its disclosure by about May of 2021, on the assumption that the trial would begin soon thereafter. This approach makes no allowance for the substantial investigative burden that will fall upon the defence once full disclosure has been given. Accordingly, even if the SPO holds to its commitment to give full disclosure by May 2021, the earliest the trial could start would be June 2022.

7. Based on the Kosovo trials at the ICTY, which were significantly less extensive in their scope, a period of 12 months following the full discharge of the SPO's disclosure obligations is the minimum period that could afford adequate time and facilities to the defence. It is to be borne in mind that the SPO has spent five years investigating these allegations, with vastly greater resources than those that are available to the defence. Preliminary defence investigations can begin following the first tranche of disclosure, but the evidence base is bound to evolve as additional evidence is served, initial redactions are lifted, and further investigations conducted by the SPO.

8. The defence is accordingly unable to envisage a realistic start date for the trial before June 2022. Depending on the circumstances, it may well be necessary for the trial to start after that.

9. As to the length of the trial, ICTY experience shows that if it is firmly managed, it may be possible to conclude the trial within a period of 18 months. However, it could well take longer, given that the SPO estimates that there will be approximately 200 witnesses, and there are four accused, each of whom has to be allocated time for the presentation of their individual defence cases. After the evidence is closed and closing submissions have been made, there will then likely be a further period necessary for the Trial Chamber to assimilate the evidence, deliberate and draft its judgment.

10. These proceedings are thus likely to take a minimum of four years from now to reach a conclusion, and possibly up to five years. It is against that background that the Pre-Trial Judge will need to consider any defence applications for provisional release pending trial (as to which, see paragraph 15 below)

II. DEFENCES AND GROUNDS TO EXCLUDE CRIMINAL RESPONSIBILITY

11. In answer to question 1(e), the defence of Mr. Veseli reserves its position as to any specific defences that may be relied upon, such as *alibi*, and will comply with its notification obligations in due course.

12. Notwithstanding this position, the defence of Mr. Veseli makes the following voluntary statement as regards "other grounds excluding criminal responsibility". There are five points excluding criminal responsibility that Mr. Veseli would like to put on the record at the outset:

a. **First point:** To the extent that the SPO is able to prove the commission of particular crimes by individuals who were (or who purported to be) members of the Kosovo Liberation Army, as alleged in the Indictment, the accumulation of those individual crimes does not establish the existence of

a joint criminal enterprise. No joint criminal enterprise existed as alleged on the Indictment, and there is no other legal basis to hold Mr. Veseli liable for the criminal acts of others alleged in the Indictment.

b. **Second point:** In the application of international criminal law, context is everything. The Kosovo `Liberation Army was a largely spontaneous and minimally organised popular uprising, that operated in defence of the Albanian civilian population in the face of a carefully planned campaign of crimes against humanity, arguably, amounting to an attempted genocide, the so-called crime of crimes. More than 10,000 Kosovo Albanians were killed by the combined Serbian forces, in numerous planned massacres, as the country descended into chaos, lawlessness and wholly asymmetrical civil war. They were buried by in mass graves by the Serb forces, and many were later exhumed and their remains taken to Serbia where they were hidden to cover up the dreadful mass crimes that had occurred. The ICTY has convicted six very senior Serbian army and military police personnel for their part in a co-ordinated plan to ethnically cleanse Kosovo of its Albanian civilian population through the commission of widespread crimes against humanity, with the express purpose of driving almost the entire ethnic Albanian population out of the country, and across the borders into Macedonia, Montenegro and Albania. To allege any sort of equivalence between that organised criminal conspiracy and the wrongful actions taken by a few members of the target community is a distortion of the facts, and an inversion of the reality on the ground. When the SPO's evidence is viewed in its full context, this Indictment will be come to be seen as a travesty of the truth.

c. **Third point**: The joint objective of the KLA was self-defence. In the context of a co-ordinated and sustained attack by the combined professional armed

forces of the SFRY, Kosovar Albanian civilians who had taken up arms tried to organise themselves, village by village, into some kind of fighting force to defend their communities. In that context, there were sporadic and dislocated acts of armed resistance. It is no doubt also true that in the political upheaval and military maelstrom that swept across the country, some crimes were committed by certain individuals. Those crimes were inexcuseable. But they were individual crimes on a minor scale, in comparison with the industrial scale systematic slaughter that was inflicted on the ethnic Albanians by the SFRY. The only joint enterprise that existed within the Kosovo Liberation Army was a joint enterprise to defend the civilian population against the crimes being perpetrated by the SFRY. There was no shared intention to achieve their objective through the commission of crimes against civilians. The opposite is true. The modest victories and indeed the very existence of the KLA depended on the continuing consent and support of the people of Kosovo. That is not something they could have hoped to achieve, or could have achieved, if they were pursuing a joint enterprise to commit war crimes and crimes against humanity. These so-called leaders were the commanders of the men and women who, on any given day, chose to follow them. They were farmers by day and volunteer soldiers by night. The one thing they had in common was a common purpose to act in self-defence of their community.

d. **Fourth point:** The issue of common purpose has been examined before in this context, during two lengthy trials at the ICTY. The ICTY has previously recognised that, in the particular context of the KLA, an accumulation of individual crimes during the Indictment period cannot be equated with a joint criminal enterprise. Nor did the commission of such crimes prove the existence of a joint criminal enterprise by inference. The defence of Mr.

Veseli will rely on these findings as persuasive conclusions of mixed fact and law.

e. **Fifth point:** Lastly, the evidence will establish that the level of operational organisation and lines of authority and communication within the Kosovo Liberation Army during the Indictment period were so rudimentary that it is impossible to assert or prove and legal basis to justify the SPO's reliance on the doctrine of command responsibility. This position was expressly recognised by the Prosecutor of the ICTY, following extensive investigation.

III. DISCLOSURE, REDACTION AND THE CHART SYSTEM

13. The defence of Mr. Veseli notes the proposed schedule put forward by the SPO, and currently has no observations to make on that subject. The defence considers that the SPO should be given a fair opportunity to discharge its obligations in the manner proposed, and reserves the right to make further submissions at the next status conference in light of experience.

14. As regards the proposed chart, the defence of Mr. Veseli notes the positions taken by the SPO and the other accused, and has nothing to add at this stage. Again, this position may change in light of experience.

IV. PROVISIONAL RELEASE PENDING TRIAL

15. Mr. Veseli formally applies for provisional release pending trial, and invites the Pre-Trial Judge to fix a timetable for an exchange of written submissions, to be followed by a short oral hearing unless he is minded to grant provisional release on the basis of the written submissions alone. The order of written submissions is a matter for the Pre-Trial Judge, save that there is a strong presumption in favour of provisional

release pending trial, derived from Article 5 of the European Convention on Human Rights and the caselaw thereunder. The burden of justifying pre-trial detention rests on the SPO, and can only be discharged by reference to specific and identified considerations relating to the particular accused, and providing the SPO is able to establish precisely how any particular risk would be prevented by holding the accused in custody for the duration of these proceedings (which are likely, in reality, to last four to five years) despite a faithful application of the presumption of innocence. Accordingly, once the SPO has identified the objections to provisional release, the defence must be given an adequate opportunity to respond.

Word count: 2001

_____

Ben Emmerson CBE QC

Specialist Counsel for Kadri Veseli

Tuesday 17 November, 2020

At The Hague, the Netherlands