

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: 14 December 2020

Language: English

Classification: Public

Joint Defence Request for Variation of the Time Limit for Preliminary Motions

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 Alagenda

I. INTRODUCTION

1. The Specialist Prosecutor's Office ("SPO") finalised its disclosure of Rule 102(1)(a) material on 12 December 2020. Counsel for the four Accused jointly request a variation of the standard thirty day time limit set by Rule 97(2) of the Rules of Procedure and Evidence ("RPE"). Given the considerable volume of disclosure, the complex legal issues to be addressed and the particular circumstances of the case, good cause exists for the prolongation of this timeframe.

II. PROCEDURAL BACKGROUND

2. In the *Framework Decision on Disclosure of Evidence and Related Matters* of 23 November 2020, the Pre-Trial Judge set Friday, 11 December 2020, as the deadline for the SPO to complete disclosure of Rule 102(1)(a) material.¹
3. On 11 December 2020, the Defence received disclosure of 1309 potentially exculpatory documents pursuant to Rule 103 of the RPE.² On 12 December 2020, the Defence was notified of 1760 documents in support of the indictment, pursuant to Rule 102(1)(a) of the RPE.³

III. SUBMISSIONS

4. Rule 9(5)(a) of the RPE empowers the Pre-Trial Judge to extend any time limit prescribed by the rules "upon a showing of good cause".
5. The 30 day timeframe prescribed in Rule 97(2) is generic and without reference to the specific circumstances of a case, including matters such as the number of accused, the scope of the charges and the volume of material to be considered.

¹ KSC-BC-2020-06/F00099, para. 56.

² Disclosure 8.

³ Disclosures 9 and 10.

Given the need to tailor timeframes to the particular features of individual cases, extensions of time for filing preliminary motions have been commonplace, reflecting, for example the very recent assignment of counsel in the case of most of the Accused; the importance of preliminary motions to the fair and expeditious conduct of the trial; and the importance of “full consultations” with the client before “embarking on a step as significant as a preliminary motion”.⁴

6. Full consultation with the accused in the present case is necessarily more challenging as a result of the measures in place to address the on-going COVID-19 pandemic. Legal visits with those detained at the prison (‘DMU’) are currently limited to two visitors at a time, including an interpreter, and conducted via a telephone link and a separating window. In addition, counsel have travel limitations making visits to The Hague difficult. Taking instructions by video link – the alternative – is a proven, poor alternative. Providing material to detainees, whether in paper form or digital, is circumscribed by rules made all the more stringent by COVID-19. The circumstances in which this case is taking place are most exceptional and mitigate in favour of additional time to prepare such submissions.

⁴ *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision in Respect of Motion for Extension of Time, 30 March 2009; *Prosecutor v. Krajisnik*, IT-00-29, Order for Extension of Time, 31 May 2000; *Prosecutor v. Zigić*, Decision on Defence Motion to Extend the Time Limit for Submitting Preliminary Motions, 24 June 1998; *Prosecutor v. Strugar*, IT-01-42-PT, Decision on Motion by the Defence for an Extension of Time, 28 December 2001. *Prosecutor v. Drjlaka & Kovacević*, IT0-97-24, Order Granting Request for Extension of Time to File Preliminary Motion, 30 September 1997, *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-1, Decision on the Defence Request for Extension of Time to File Preliminary Motions under Rule 72(G) of the Rules of Procedure and Evidence, 17 December 2003; *Prosecutor v. Gatete*, ICTR-2000-61, Decision on the Defence Motion concerning Defects in the Amended Indictment, 3 July 2009; *Prosecutor v Setako*, ICTR-04-81-I, Decision on Defence Motion Concerning Defects in the Indictment, 3 March 2008; *Prosecutor v. Strugar*, IT-01-42-PT, Decision on Motion by the Defence for an Extension of Time, 28 December 2001, para. 3: “it is always the wiser course for counsel to consult their client fully before embarking on a step as significant as a preliminary motion, with the details which such a process may well entail”.

7. The 30-day time limit in this case also spans the Kosovo Specialist Chambers' ("KSC") winter judicial recess, which runs between 21 December 2020 and 1 January 2021, and includes three official court holidays.⁵ While not providing independent justification for a suspension or prolongation of the time limits,⁶ the judicial recess and official court holidays can be properly taken into account in determining the present application, given that Defence team members will not reasonably be able to maintain normal working hours throughout.⁷
8. The filing of preliminary motions is a significant procedural step in the proceedings. The link between preliminary motions and "issues of fundamental fairness and due process" have meant that on more than one occasion, they were

⁵ KSC Court Calendar, available at: <https://www.scp-ks.org/en/calendar>. See also Law No. 03/L-064 on Official Holidays in Republic of Kosovo, Article 2.1: "Taking into account the respect of history, culture and tradition of the people of Kosovo and its citizens, official holidays in the Republic of Kosovo are the following: a) New Year, 1st and 2nd January [...] h) Christmas Day (Catholic) – 25 December; i) Christmas Day (Orthodox) - 7 January". See also Article 4: "If official holidays mentioned in Article 2 are on Saturday or Sunday, the following working day will be a non-working day." In 2021, the designated 2 January holiday falls on a Saturday. Available at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2539>

⁶ RPE Rule 123(3): "During recess periods set by the President pursuant to Rule 13(1)(d), unless otherwise determined by a Panel, hearings shall be limited to urgent matters and time limits shall not be suspended."

⁷ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07 (OA), Decision in support of the "Prosecutor's Urgent Application for Extension of Time to File Document in Support of Appeal, 18 December 2007: "This week is unusual in that, **over and above the fact that it falls during the three week Court recess, it comprises two public holidays and special days of leave.** On that basis, the Appeals Chamber regards it as appropriate to extend the prescribed time limits to take those factors into account"; *Prosecutor v. Banda*, ICC-02/05-03/09 OA 5, Decision on Mr. Banda's request for extension of time for filing a document in support of the appeal, 24 December 2014, para. 6: "The Appeals Chamber notes the argument of Mr Banda that **the time limit for the filing of the document in support of the appeal runs at the time of judicial recess, when members of his defence team are unavailable to work.** In the particular circumstances of the present case, the Appeals Chamber is satisfied that, in light of these submissions, 'good cause' has been shown." *Prosecutor v. Bemba*, ICC-01/05-01/-08, Transcript, 3 December 2010, p. 31, lines 14-15: "As you will be aware, the judicial recess begins 18 December 2010 up to and including 9 January 2011. **This recess is not only to allow Judges and Chamber staff a break, but also for counsel**"; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Decision on Milan Lukić's Motion Seeking Extension of Time to File Appeal Brief and Motion for Stay of Proceedings, 30 October 2009, para. 12: "particularly given the **limited availability of staff over the winter recess.**"

entertained even though the “30 day period had long past”.⁸ Of fundamental importance is the ability of the Defence to file pleadings which comprehensively examine these central issues, while not unduly delaying the proceedings.

9. On this point, it is also relevant that the KSC has yet to rule on any preliminary motions challenging jurisdiction or alleging defects in the form of the Indictment, meaning the Defence does not have easy recourse to a body of guiding jurisprudence from the Court on these issues. Preparation of the preliminary motions in this case will therefore require an extensive review of the practice of other courts and tribunals, which will take more time. For the same reasons, any extension of time in this case will not set a precedent for any future proceedings, given that many of the challenges likely to arise in these first cases will then be settled.
10. Most significant, however, is the volume of material to be reviewed and discussed with the accused in preparation of any preliminary motions. Put simply, 1760 documents in support of the indictment will take time to read, analyse and take instructions. The triggering mechanism in Rule 97(2) of the RPE between the preparation of preliminary motions and Rule 102(1)(a) disclosure reflects an entitlement on the part of the accused to review the supporting material in advance of giving instructions on which, if any, preliminary motions should be brought on his behalf. Good cause exists for a variation of the time limit on the basis of the present application, which has been filed sufficiently in advance to allow the Pre-Trial Judge “to rule on the application before the expiry of the relevant time limit”, in compliance with Rule 76 of the RPE.

⁸ *Prosecutor v. Stanišić & Simatović*, MICT-15-96-T, Decision on Motion for Further Particularisation of the Prosecution’s Case, 2 May 2018, para. 13; *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Motions for Extension of Time to File Preliminary Motions, 14 December 2018, at p. 2.

IV. RELIEF REQUESTED

11. For the reasons outlined above, the Defence request that the Pre-Trial Judge:

FIND that good cause exists pursuant to Rule 9(5)(a) for a variation of the time limit set in Rule 97(2); and

ORDER that any preliminary motions under Rule 97(2) be filed by 10 February 2021.

[Word count: 1684]

Respectfully submitted,



David Hooper
Specialist Counsel for Hashim Thaçi



David Young
Specialist Counsel for Rexhep Selimi



Ben Emmerson CBE QC
Specialist Counsel for Kadri Veseli



Venkateswari Alagendra
Specialist Counsel for Jakup Krasniqi

Monday, 14 December 2020
At London, United Kingdom,
The Hague, The Netherlands
Kuala Lumpur, Malaysia