

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: 15 December 2020

Language: English

Classification: Public

Defence for Hashim Thaçi - Submissions for Second Status Conference

Specialist Prosecutor

Jack Smith

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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. On 5 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 its first status conference on 18 November 2020.
5. On 8 December 2020, the Pre-Trial Judge issued its ‘Order Setting the Date for a Second Status Conference and for Submissions’,⁶ by which it convened a second status conference on 17 December 2020 and invited the parties to submit their observations, *inter alia*, on disclosure and investigations.
6. On 11 December 2020, the Defence for Hashim Thaçi (“the Defence”) received disclosure of 1309 potentially exculpatory documents pursuant to Rule 103 of the

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/F00130.

KSC Rules of Procedure and Evidence (“RPE”).⁷ On 12,⁸ 14⁹ and 15¹⁰ December 2020, it was notified of 1764 incriminating documents in support of the indictment, pursuant to Rule 102(1)(a) of the RPE. The Defence was further disclosed a less redacted version of the Indictment on 11 December 2020¹¹ and redacted versions of the SPO Rule 86(3)(b) Outlines on 14 December 2020.¹²

7. The Defence hereby submits its observations on the issues listed by the Pre-Trial Judge in its Order of 8 December 2020.¹³

II. SUBMISSIONS

A. DISCLOSURE

8. Having received the first batch of documents disclosed by the SPO, the Defence is now in a better position to make informed submissions on *inter partes* disclosure.

9. The Defence has been notified of one disclosure package (n°8) pursuant to Rule 103 of the RPE and four disclosure packages (n°9 to 12) pursuant to Rule 102(1)(a) of the RPE. The SPO has linked each item, in Legalworkflow, to at least one of four ‘Categories’. The descriptions provided for these Categories are wholly inadequate.

10. The description of the Categories provided lack specificity and is limited to the following terms;

⁷ Disclosure 8.

⁸ Disclosures 9 and 10.

⁹ Disclosure 11.

¹⁰ Disclosure 12.

¹¹ KSC-BC-2020-06/F00134, ‘Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020’.

¹² KSC-BC-2020-06/F00136, Submission of confidential redacted Rule 86(3)(b) Outlines.

¹³ KSC-BC-2020-06/F00130.

- "Evidence to be presented by the SPO"
- "Underlying crimes"
- "Alleged conduct of the Accused"
- "Contextual elements of the crimes"

without providing any further or sufficient precision.

11. The Defence submits that these four categories, which do not include any subcategory, are so lacking in detail that they serve no useful purpose. For instance, the category 'Alleged conduct of the Accused' does not specify either the Accused or the conduct. The category 'Underlying crimes' does not specify the underlying crime nor the relevant count. The accused are charged with 10 different counts. The category 'Contextual elements of the crimes' does not specify whether the item relates to war crimes or crimes against humanity. Lastly, the category 'Evidence to be presented by the SPO' does not add anything to the classification of a disclosure package as relying upon Rule 102(1)(a).

12. The Defence submits that it is entitled to receive further information with each disclosure package, pursuant to Rule 109(C) of the RPE, which 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."

13. More precisely, the Defence should be notified, for each item, which underlying crime (with a reference to the relevant count and, where possible, to the alleged place of events), which accused (with a reference to the name of the accused) and which conduct (with a reference to the relevant mode of liability) are concerned; the category 'contextual elements of the crimes' should also specify whether it relates to war crimes or crimes against humanity.¹⁴ Otherwise the exercise, as

¹⁴ The Defence thus confirms its support to the Selimi defence proposal mentioned in the SPO 'Submissions on Rule 109(c) categorisation', KSC-BC-2020-06/F00108, at para. 8 and footnote 9.

presently conducted by the SPO, does not assist the Defence in any meaningful way to identify the relevance of each item in relation to the Indictment. Indeed, Rule 109(C) refers explicitly to the duty of each Party to “categorise the information in accordance with the charges in the indictment”. As it is done now, this objective is not met.

14. In consequence, to fulfil its duty, the SPO should be ordered to provide, for each item disclosed, the subcategories mentioned above with each disclosure package, in Legalworkflow and, eventually, in a Chart, as suggested by the Pre-Trial Judge in the agenda for the First Status Conference.¹⁵ The SPO could use, as a starting point, its proposed Chart KSC-BC-2020-06/F00108/A01 for each disclosure package, where it could add a ‘Specific Reference’ to the Indictment instead of the Pre-Trial Brief. It would thus assist the SPO in preparing its consolidated Chart to be submitted after its Pre-Trial Brief and would not constitute an increase to its workload since it would have to classify all the documents it intends to tender at trial as per these categories in any event.

15. In addition, the Defence notes that the SPO has not completed the metadata ‘Record Type’ for each item (i.e. interview/video/photo/map/media, etc.), which is information that assists in identifying the most relevant documents. The SPO should be ordered to complete the ‘Record Type’ for each item disclosed.

16. More importantly, the metadata disclosed do not include the chain of custody, which is of paramount importance in assessing the reliability of the evidence. Each item has a category ‘Originator’, but it contains only basic information, such as ‘Bibliothèque cantonale et universitaire BCU’ or ‘SPO Witness Interview’, without

¹⁵ KSC-BC-2020-06/F00074/A01, §7: “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;”

any further precision. As a result, the Defence does not know which person gave the document to whom upon which date. This information is crucial, particularly where the SPO has had recourse to an intermediary. The metadata disclosed fall short of even the very minimum standard of disclosure at the ICC. The SPO should be ordered to provide a chain of custody for each item disclosed.

B. DEFENCE INVESTIGATIONS

17. To the Defence's surprise, the SPO reiterated, in its uninvited 'Submissions further to the status conference of 18 November 2020', that "trial in this matter should commence this summer or no later than September 2021."¹⁶ The Defence notes that the Pre-Trial Judge has not asked for further submissions on this subject and the Defence does not address that issue here in detail other than to repeat its oral submission that 18 months was the very minimum period that the Defence could see this case being trial ready and that the SPO submission is wholly unrealistic given the amount of material, the nature of the case and the exceptional, current difficulties. The case is still at an early stage and doubtless the Pre-Trial Judge will wish to hear further submissions on this issue in due course.

18. However, it should be noted that a defence analysis of the time taken by international courts over the past 25 years reveals that the average time between arrest/surrender of an accused, and the start of trial is as follows:

- ICC: 2 years 3 months; (9 months, 6 days to the confirmation hearing);
- ICTY: 2 years, 12 days;
- ICTR: 3 years, 8 months, 4 days;

¹⁶ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 December 2020, para. 14.

- STL: 1 year, 2 months, 24 days;¹⁷
- ECCC: 3 years, 5 months, 19 days.

That is an average, and few trials comprised four accused.

19. The Defence estimate¹⁸ given at the first status conference, of at least 18 months, proves to be conservative measured against these figures. Nor does it take into account the impact of the COVID-19 pandemic.

C. MISCELLANEOUS / INTERIM RELEASE

20. Last, the Defence reiterates its request that the Pre-Trial Judge convene a hearing to hear the Defence's submissions on Mr Hashim Thaçi's application for interim release.¹⁹

¹⁷ Of course, the STL was not burdened by having accused participating. This average from the STL derives from one case, where the starting point was not the date of arrest, since the defendants were never arrested, but the date of the Trial Chamber's decision to try the defendants *in absentia*. The Trial Chamber decided to try 3 of the accused in absentia in February 2012, with the trial commencing in January 2014. However, the Trial Chamber only agreed to try the fourth accused in absentia in December 2013, joining them to the main proceedings in February 2014. The portion of the trial for which the last accused was present commenced in June 2014. Thus while it took 716 days for the first 3 accused to start trial (1 year, 11 months, 15 days), it only took 180 days (5 months, 29 days) for the last accused to start trial. This affected the average.

¹⁸ KSC-BC-2020-06/F00085, Defence for Hashim Thaçi's Submissions for first Status Conference, 17 November 2020, para. 10.

¹⁹ KSC-BC-2020-06/F00120, Application for Interim Release on behalf of Mr Hashim Thaçi, 4 December 2020.

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

David Hooper
Specialist Counsel for Hashim Thaçi

Tuesday, 15 December 2020
At London, United Kingdom