



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-07
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 05 January 2021

Language: English

Classification: Public

Prosecution Submissions for first Status Conference

Specialist Prosecutor's Office

Jack Smith

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I. INTRODUCTION

1. Pursuant to the Status Conference Order,¹ the Specialist Prosecutor's Office ('SPO') hereby provides written submissions on the agenda items identified by the Pre-Trial Judge² and related matters.³

2. Certain of the information provided is necessarily provisional at this time. Nonetheless, the SPO anticipates being in a position to provide complete witness and exhibit lists, and to have fulfilled related Rule 102(1)(b)⁴ disclosure, by 19 February 2021, subject only to any applicable protective measures and provided that pretrial proceedings are nearing completion and the commencement of trial is scheduled soon thereafter. The SPO sees no reason why trial in this matter could not be scheduled to commence in the spring of this year.

II. SUBMISSIONS

1. General Questions

3. A small number of investigative steps remain ongoing in this case. Depending on the outcome of those limited investigations, there is a likelihood that further evidence will be adduced. However, the SPO does not foresee this impacting the speedy conduct of proceedings, as the remaining identified investigative steps are likely to be concluded during the pre-trial proceedings. At the same time, the investigative work of the SPO will continue throughout the proceedings, and therefore additional evidence relevant to this case may be uncovered. In that event,

¹ Order Setting the Date for the Plea Hearing and the First Status Conference and on Related Matters, KSC-BC-2020-07/F00089, 18 December 2020, Public ('Status Conference Order').

² Annex 1 to Status Conference Order, KSC-BC-2020-07/F00089/A01, 18 December 2020, Public ('Annex 1').

³ Status Conference Order, KSC-BC-2020-07/F00089, paras 21-22, 25(c).

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

the evidence will be disclosed to the Defence and provided to the court pursuant to the applicable provisions.

4. The SPO anticipates presenting documentary evidence at trial, including audio/video materials, reports, photographs, and open source publications. A more detailed, although preliminary, overview of the evidence to be presented is provided in Sections 2 and 3 below.

5. In addition, subject to the outcome of further investigative steps that are being carried out, the SPO currently anticipates including up to ten witnesses on its witness list for trial.

2. Rule 102(1)(a) Material (Indictment Supporting Material)

6. Table A provides, to the extent possible, the details requested by the Pre-Trial Judge regarding the breakdown of the Rule 102(1)(a) material.⁵ The SPO disclosed all indictment supporting material to the Defence on 4 January 2021 together with Albanian translations thereof, well in advance of the deadline required by Rule 102(1)(a).

Table A. Rule 102(1)(a) Already disclosed to the Accused (Disclosure 2)

| | |
|--------------------------------------------------------|-------------------------------------|
| Total number of items | 114 |
| Total number of pages | 838 |
| Total number of hours/minutes of audio-visual material | 18:59:30 |
| Number of witness statements | 0 |
| Number of statements obtained from the Accused | 0 |
| Number of transcripts ⁶ | 52 (including English and Albanian) |

⁵ See Annex 1, KSC-BC-2020-05/F00089/A01, para.2 (a).

⁶ This category refers to transcripts of audio/video materials.

| | |
|----------------------------------------|-------------------------------------|
| Number of reports | 4 (including English and Albanian) |
| Number of audio/video material | 27 |
| Number of photographs | 0 |
| Number of objects | 0 |
| Number of other documents ⁷ | 31 (including English and Albanian) |

7. No redactions were applied to the indictment supporting materials. The detailed outline submitted with the indictment does not require redactions for the purposes of disclosure to the Defence on a strictly confidential basis. Accordingly, the SPO will not be filing a request for protective measures, for the purposes of disclosure to the Defence, in relation to victims and witnesses identified in the Indictment, related documents, and supporting material.⁸

8. Prior to the confirmation of the Indictment, the Accused were invited to attend an interview, as suspects, with the SPO but declined to do so.

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

9. In addition to the material falling under Rule 102(1)(a), the SPO intends to disclose further material under Rule 102(1)(b). The SPO expects to be ready to disclose all such material to the Defence by 19 February 2021 or, in any case, no later than 30 days prior to the opening of the Specialist Prosecutor's case, subject only to any protective measures being granted.

10. The additional Rule 102(1)(b) material is currently anticipated to include documentary evidence, such as audio/video materials, reports, photographs, and open source publications. Furthermore, subject to the outcome of ongoing

⁷ This includes, for example, press articles and copies of electronic materials obtained from open sources.

⁸ See Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020, para.155(j).

investigative steps, additional Rule 102(1)(b) material may include the statements of up to ten witnesses. The SPO anticipates presenting approximately one hundred and fifty (150) exhibits at trial. This preliminary estimate may vary depending upon, *inter alia*, the results of the limited further investigative steps and the outcome of the ongoing analysis of seized electronic items.

11. Transcription and translation remain ongoing in relation to some of the audio/video materials and other documentary evidence. In addition, the SPO intends to submit revised versions of the transcription and translation of a limited number of items included in the indictment supporting materials. It is also likely that some of the evidence yet to be obtained by the SPO will require translation. The translation process is expected to be completed within the proposed timeline for the disclosure of material under Rule 102(1)(b).

12. Some of the Rule 102(1)(b) material may require limited redactions, which would be applied in line with the Pre-Trial Judge's eventual decision concerning the applicable redaction regime, and appropriate protective measures.

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

13. The SPO anticipates providing the Defence with detailed notice of evidence material to it, pursuant to Article 21(6)⁹ and Rule 102(3), by 19 February 2021, upon finalisation of, and together with, the disclosure of material falling under Rule 102(1)(b). The items in the Rule 102(3) notice will comprise any other residual

⁹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

information potentially material to the Defence after the items to be presented at trial¹⁰ and the potentially exculpatory items¹¹ have been disclosed.¹²

14. The SPO expects that some of the Rule 102(3) material may require redactions, which would be applied in line with the Pre-Trial Judge's eventual decision concerning the applicable redaction regime, and appropriate protective measures.

5. Rule 103 Material (Exculpatory Evidence)

15. The SPO estimates that it is in possession of about one hundred and fifty (150) potentially exculpatory items, including audio/video materials, several of which have already been disclosed under Rule 102(1)(a) on 4 January 2021. The SPO intends to disclose a first batch of potentially exculpatory material to the Defence prior to the first Status Conference. No redactions will be required in relation to the material in this first batch. Subsequent to the first disclosure of potentially exculpatory material, the SPO will continue to review and, following application of any required redactions, immediately disclose on a rolling basis any Rule 103 material within its custody, control or actual knowledge.

6. Rule 107 Material (Protected Material)

16. Rule 107 clearances are unnecessary for material which the SPO currently anticipates tendering into evidence at trial in this case. A limited amount of Rule 107 information is potentially subject to disclosure under Rule 102(3). The SPO is actively

¹⁰ Rule 102(1)(b).

¹¹ Rule 103.

¹² The scope of Rule 102(3) material is necessarily impacted by, and to a large extent dependent upon, the witnesses and evidence intended to be presented at trial. It is therefore not possible to provide an accurate estimate of volume at this time. Nonetheless, based on ongoing review, the SPO anticipates the number of Rule 102(3) items to be less than 100 in total.

taking appropriate steps to comply with its disclosure obligations and does not anticipate any impact on the provisional timelines proposed above.

17. The SPO will promptly inform the Pre-Trial Judge should any further material relevant to the case be identified which falls under Rule 107 restrictions.

7. Procedure for Disclosure of Evidence

18. Pursuant to Rule 109(c) the parties must, as far as practicable, categorise disclosed information with reference to underlying crimes, contextual elements, conduct of the Accused, or, as applicable, evidence to be presented by the Specialist Prosecutor. This requirement is satisfied in the *Mustafa* case through the use of a detailed disclosure chart.¹³ The SPO is minded to submit a proposal to the Defence for each of the Accused based on a format similar to that adopted in the *Mustafa* case, with a view to ensuring that any proposal adequately reflects the circumstances of this particular case and meets the needs of the parties, while also taking account of the resource constraints of each. Consistent with the approach in the *Mustafa* case, the SPO also proposes that the chart be provided after submission of the parties' Pre-Trial Brief (if any), since analysis required to generate the chart would be drawn from that brief.¹⁴

8. Redaction Regime

19. The SPO requests the Pre-Trial Judge to adopt the redaction regime applied in the *Thaçi et al.* case.¹⁵ Pursuant to this regime, the parties may redact information

¹³ See Annex 1 to Joint Submission of Rule 109(c) categorisation chart, KSC-BC-2020-05/F00045/A01, adopted in Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal, KSC-BC-2020-05/F00046, 5 November 2020, Public.

¹⁴ Pursuant to the SPO's proposal, an overview of the content of each disclosure package would also be immediately available at the time of disclosure of that package through a basic categorisation provided through Legal WorkFlow, conforming with the categories of information identified in Rule 109(c).

¹⁵ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020, Public, paras 86-98 (*Thaçi et al.* Framework Decision on Disclosure).

contained in material falling within their disclosure obligations under Article 21(6) of the Law and Rules 102-104 according to a set of pre-approved categories.

20. Drawing on cumulative experience and practice at other courts,¹⁶ and consistent with the applicable legal framework,¹⁷ the regime proposed will improve the efficiency of the proceedings, in particular, the expeditiousness of the disclosure process, while ensuring that the proceedings are conducted with full respect for the rights of the Accused and due regard for the protection of witnesses, victims and other persons at risk on account of the activities of the court. Such a redaction regime also enhances the ability of judicial panels at all stages of proceedings to effectively and efficiently exercise oversight of the disclosure process, as required by the Law and Rules. In particular, the redaction regime adopted previously by the Pre-Trial Judge envisages a judicial ruling on any contested redaction. No changes to the *Thaçi et al.* redaction regime are needed for its application in the present case.¹⁸

Word Count: 1941



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Tuesday, 05 January 2021
At The Hague, the Netherlands

¹⁶ See, for example, International Criminal Court ('ICC'), Chambers Practice Manual (December 2019), pp.31-34; ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-64-Red, Public Redacted Version of 'Decision on Disclosure and Related Matters', 23, January 2019, paras 23-26. See also ICC, Chambers Practice Manual (May 2017) p.3 (noting that the Manual, including the redaction system, reflects best practices based on 'the experience and expertise of judges across trials at the Court') and pp.28-30 (addressing a redaction regime).

¹⁷ See Articles 21(6) and 35(2)(f) and Rules 80, 106, 108 and 111 (providing for exceptions to disclosure, including to protect persons at risk and avoid prejudice to investigations).

¹⁸ The SPO does not object to the *Mustafa* redaction regime, referred to in the Status Conference Order, subject to the modification adopted in para.97 of the *Thaçi et al.* Framework Decision on Disclosure.