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

In:	**KSC-BC-2020-06**
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
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Corrected version of

Prosecution submissions for third status conference

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1. In accordance with the Order,[1] the Specialist Prosecutor's Office ('SPO') hereby provides its submissions in advance of the third status conference.

Item 1: Disclosure

2. With the exception of materials for which a ruling on protective measures was initially deferred, disclosure of Rule 102(1)(a)[2] material is complete.[3] Pursuant to the Pre-Trial Judge's decision, that remaining Rule 102(1)(a) material is now also being prepared for disclosure not later than 12 February 2021.

3. Since the last status conference the SPO disclosed a batch of Rule 102(1)(b) material on 15 January 2021,[4] and is currently preparing a second batch for disclosure in the coming days. Collectively, these two disclosure batches comprise over 50 items. The SPO is working through remaining Rule 102(1)(b) materials in a systematic manner, and is currently focused on providing the Defence with additional prior statements of witnesses relied upon in the indictment supporting materials. As outlined in the SPO's submissions for the first status conference, the witnesses relied upon in the indictment supporting materials are estimated to comprise approximately three-quarters of the total number of witnesses to be relied upon at trial. Consequently, these statements constitute a significant proportion of the overall Rule 102(1)(b) materials.

4. The SPO filed its third request for protective measures on 5 February 2021. It is envisaged that, in accordance with the schedule outlined in the Framework Decision,[5]

[1] Order Setting the Date for a Third Status Conference and for Submissions, KSC-BC-2020-06/F00185, 3 February 2021, Public, ('Order')

[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

[3] In January 2021, following withdrawal of a protective measures request in respect of two persons, the SPO disclosed two additional Rule 102(1)(a) items in unredacted form (Disclosure 17, 20 January 2021), all other Rule 102(1)(a) disclosure was completed in December 2020 (Disclosures 9-13).

[4] Disclosure 16, 15 January 2021 (22 items).

[5] Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020 ('Framework Decision').

further protective measures requests relating to Rule 102(1)(b) material will be filed by 5 March 2021, as well as after that date.

5. With respect to potentially exculpatory items falling under Rule 103, the SPO is preparing two batches of material for imminent disclosure. These two batches comprise approximately 350 items in total. Review of further material remains ongoing, and the SPO will continue to immediately disclose any such material on a rolling basis.

6. In relation to Rule 107 material, the SPO is continuing to engage with a number of organisations on release of material. Discussions with one of those organisations is nearing completion and, as a result, the SPO anticipates making an application under Rule 107 in respect of certain information obtained from that organisation.[6]

Item 3: Rule 109(c) chart

7. The SPO believes the parties remain in agreement regarding the format of the proposed chart,[7] including the optional nature of the specific referencing column.[8] However, the other issues identified by the Pre-Trial Judge relating to Rule 109 categorisation[9] continue to be matters of dispute.

8. The SPO position remains that categorisation done in Legal WorkFlow at the time of each disclosure should, consistent with the regime approved in the *Mustafa* case, mirror the four categories in Rule 109(c). The SPO has undertaken to do – and has been doing – this categorisation in respect of all material disclosed under Rules 102(1)(a), 102(1)(b) and 103. These steps alone would ensure compliance with Rule 109(c).

9. Nevertheless, in an effort to do everything practicable, even beyond the strict requirements of the rule, and again consistent with the jurisprudence in the *Mustafa*

[6] The request in respect of this organisation will relate to less than 10 items. The request will be filed as soon as discussions regarding possible counterbalancing measures have been concluded.
[7] Order, KSC-BC-2020-06/F00185, para.15(f)(i).
[8] Order, KSC-BC-2020-06/F00185, para.15(f)(ii). *See also* Submissions on Rule 109 categorisation, KSC-BC-2020-06/F00108, 27 November 2020 ('Rule 109 Submissions'), para.3.
[9] Order, KSC-BC-2020-06/F00185, para.15(f)(iii), (iv) and (v).

case, the SPO voluntarily offered and agreed to provide a further breakdown of Rule 102(1)(b) material into sub-categories in the format of the proposed chart. Notwithstanding the limited utility of detailed further sub-categorisation,[10] this additional measure was offered by the SPO in light of the fact that Rule 102(1)(b) reflects the material upon which it is intended to rely at trial. The SPO's offer to provide the proposed chart further sub-categorising Rule 102(1)(b) material, within 15 days from the filing of any Pre-Trial Brief, remains in place.

10. However, providing a detailed sub-categorisation of that nature at the time of each disclosure is not practicable. As previously explained, the sub-categorisation required for generation of the proposed chart is required to be drawn from analysis in the SPO's Pre-Trial Brief, and the chart was designed and proposed with that context specifically in mind. Consequently, were such detailed sub-categorisations to be required at the time of each disclosure, disclosure of remaining Rule 102(1)(b) items would effectively cease until the point at which drafting of the Pre-Trial Brief is significantly advanced. In light of intervening obligations and deadlines, this is not anticipated to be the case for several months.

11. The SPO has also previously set out why expansion of any such detailed sub-categorisation requirement to material falling under Rule 103 would far exceed what is practicable.[11] Any such ruling would place an obligation upon the SPO to conduct a degree of analysis in relation to Rule 103 material that is not otherwise necessary to fulfilling its statutory obligations. As such, all progress the SPO has made in the exercise of identifying potentially exculpatory materials would essentially be negated by the need to go back and re-review such material. The SPO simply does not have the resources to undertake such a task in parallel to fulfilment of its core mandate in this and other cases. The resulting delay would also be directly contrary to the spirit

[10] Rule 109 Submissions, KSC-BC-2020-06/F00108, paras 5-6 (and references therein); Transcript of Status Conference dated 17 December 2020 ('Second Status Conference'), pp.189 (SPO), 192 (Veseli Defence).
[11] Rule 109 Submissions, KSC-BC-2020-06/F00108, para.5.

and language of Rule 103, requiring 'immediate' disclosure of such material. Moreover, the utility of the SPO undertaking such a time-consuming task is almost non-existent,[12] this is especially the case when it comes to material beyond that falling within Rule 102(1)(b).

Items 4 and 5: Investigations and next steps

12. As outlined at the Second Status Conference, SPO investigations in fulfillment of its mandate are anticipated to continue for the foreseeable future.[13] However, this should in no way hinder the court in setting a trial date in this case, and the SPO invites the Pre-Trial Judge to do so.

13. The SPO fully accepts that at some point prior to trial the submission of further materials upon which the SPO seeks to rely will become subject to judicial authorisation.[14] This is entirely appropriate and is predicated in significant part on the potential correlation between the length of time before trial that material is disclosed and the degree of resultant prejudice, if any, to the Defence. The timing of imposing a requirement for judicial authorisation (the so-called 'guillotine') and of the commencement of trial are therefore inextricably linked. The SPO sets out further submissions on each of these two inter-related issues below.

14. The SPO has previously urged the court to set a trial date no later than September 2021,[15] and on that basis indicated willingness and ability to provide its Rule 95(4) material in July 2021, as a consequence of which judicial authorisation for the introduction of any further material would ordinarily also come into effect. Notwithstanding the Defence's reflexive dismissal of the prospect that trial could

[12] Rule 109 Submissions, KSC-BC-2020-06/F00108, paras 5-6 (and references therein); Second Status Conference, pp.189 (SPO), 192 (Veseli Defence: 'each and every one of those documents will require the most meticulous individual analysis and examination by the Defence. No responsible Defence counsel would delegate an analysis of relevance to the Prosecution. Indeed, I find it very difficult to understand how that type of process is likely to take matters very much further' (emphasis added)).
[13] Second Status Conference, pp.198-199.
[14] Second Status Conference, p.198.
[15] Second Status Conference, p.199.

commence three months after the Prosecution Pre-Trial Brief is provided,[16] such a schedule is entirely consistent with the applicable framework, the fairness of proceedings, and established practice. Indeed, a three-month gap between completion of disclosure, and/or provision of the prosecution pre-trial brief and witness and exhibit lists, is a commonly applied standard for complex international cases.[17]

15. That the Veseli Defence should be fully aware of this is apparent not least from its implementation in the *Haradinaj* case. There, every time the trial date was reset the prosecution pre-trial brief deadline was also reset, each time to less than three months prior to the new trial date. Ultimately, the brief was filed only on 29 January 2007, less than six weeks before the scheduled trial commencement of 5 March 2007.[18]

16. As the SPO has previously made very clear,[19] neither the intent nor the consequence of this approach would be the deliberate withholding of materials intended to be relied upon at trial. The SPO has undertaken to disclose Rule 102(1)(b) material by 31 May 2021 and will do so, irrespective of any trial date. Rather, what the SPO rejects is the attempt to thereafter impose an evidential straight-jacket at a point in time bearing no reasonable relation to possible Defence prejudice, and that is entirely arbitrary relative to the Defence's far distant and almost undefined proposed trial commencement.

17. The SPO has outlined, here and previously, the proactive and rigorous approach it has adopted towards disclosure, one that will allow the trial to commence in September 2021. This demanding regime is being undertaken in the interests of

[16] Second Status Conference, p.205.
[17] International Criminal Court ('ICC'), *Prosecutor v. Ongwen*, Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449, 30 May 2016, paras 6-7, including footnote 11 noting a similar timeline having been also adopted in the *Ruto and Sang*, *Kenyatta*, *Ntaganda* and *Bemba* cases). *See also* EJIL:Talk – Part 1: What can be done about the length of proceedings at the ICC – Gumpert and Nuzban, 15 November 2019, ('Typically, judges require this process to be completed three months before the commencement of trial.').
[18] ICTY, *Prosecutor v. Haradinaj*, Judgment, 3 April 2008, Appendices, paras 7-8.
[19] Transcript of Status Conference dated 18 November 2020 ('First Status Conference'), p.129.

fulfilling the statutory obligations of a fair and expeditious trial date. The schedule outlined allows for many months of defence preparation and pre-trial investigation on a clearly defined case, while recognising the fundamental interests of victims and witnesses, and of justice, in reducing the risks of interference and intimidation inherent in a protracted pre-trial period.[20]

18. Nonetheless, the Defence has repeatedly attempted to characterise the timeline as an effort to undermine a fair trial, claiming that the trial could not possibly commence for a minimum of 18 months from the beginning of 2021, and likely even longer. In support of that position, a series of misleading or otherwise unfounded assertions have been put forward. These are individually addressed in the following paragraphs.

19. First, the Defence places significant reliance on statistics and comparison with cases from other courts and tribunals. For example, in the course of its attacks on the SPO, the Veseli Defence has relied heavily on an academic study of average pre-trial length in ICTY cases. In both written and oral submissions,[21] the Veseli Defence repeatedly represented the study to have found that the average time from initial appearance to trial at the ICTY was 3.6 years. This is a misrepresentation. What the study in fact claims to address is time from indictment to commencement of trial.

[20] Prosecution submissions further to the status conference of 18 November 2020, KSC-BC-2020-06/F00097, para.13.
[21] Second Status Conference, pp.203-204 ('[i]t will be sufficient for me to tell you that the statistics show that at the ICTY the average length of time between first appearance and at the start of trial was 3.6 years.'); Application for Interim Release of Kadri Veseli, KSC-BC-2020-06/F00151, 17 December 2020, paras 66 ('[b]y way of comparison, the average time taken at the ICTY between the first appearance of the accused and the start of trial was 3.6 years'); Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, KSC-BC-2020-06/F00174, 13 January 2021, para.71 ([a] trial in six months' time is quite obviously impossible. The statistics from the ICTY and ICC set out in Mr. Veseli's provisional release application bear this out. The SPO suggestion that these statistics should be ignored is difficult to fathom…').

Thus, the 3.6 year (43 months) figure presented appears to have included long delays for apprehension or surrender of the accused in a significant number of cases.[22]

20. When looking at actual timing from initial appearance to start of trial, the purported average of 3.6 years rarely occurred. The SPO has only identified two such instances, both involving unique circumstances that make them clear outliers.[23] Other comparisons presented were equally inapposite.[24] In any event, it is clear that such statistical averages cannot simply be mechanically applied to the Specialist Chambers ('KSC').[25]

21. Indeed, if the underlying claim by the Veseli Defence that the average length of prior pre-trial phases resulted primarily from the scope and complexity of the cases, rather than the substantial array of problems either irrelevant to the KSC or which the Rules have sought to redress,[26] one could expect that the largest and most complex cases at the ICTY - when considered proportionately - would support the Defence demand for at least twenty months from initial appearance to trial. This is not the case. Rather, such cases fall squarely within the SPO's projections.

22. It is widely accepted that the three largest and most complex cases at the ICTY were the *Milošević*, *Karadžić*, and *Mladić* prosecutions. The *Karadžić* and *Mladić* cases

[22] *Compare, for example,* the ICTY 'average' provided in Defence for Hashim Thaçi - Submissions for Second Status Conference, KSC-BC-2020-06/F00143, pp.6-7.
[23] The notorious *Šešelj* case took 45 months. The prosecution submitted there that delays in the proceedings were 'in large part attributable to the behaviour of the accused' or otherwise necessary to preserve the fairness of proceedings in the particular circumstances of the case (ICTY, *Prosecutor v. Seselj* Decision on Oral Request of the Accused for Abuse of Process, 10 February 2010, para.15). The *Krajisnik* case took 46 months as a result, *inter alia*, of an eight-month delay when the entire defence team was replaced just before a scheduled trial. *Compare also* Defence for Hashim Thaçi - Submissions for Second Status Conference, KSC-BC-2020-06/F00143, pp.6-7.
[24] The ICC 'average' (Defence for Hashim Thaçi - Submissions for Second Status Conference, KSC-BC-2020-06/F00143, pp.6-7; Second Status Conference, p.204 (Veseli Defence)) includes a lengthy confirmation hearing process, inapplicable to the Specialist Chambers context.
[25] Prosecution submissions further to the status conference of 18 November 2020, KSC-BC-2020-06/F00097, paras 8-10.
[26] Second Status Conference, p.204 (Veseli Defence: '[b]ut this is not about administrative delay. This is about how long it takes to conduct a proper investigation into cases of this gravity and complexity').

each encompassed four separate JCEs over the course of approximately four years, approximately 600 witnesses and more than 10,000 exhibits, and the disclosure of millions of pages. The *Milošević* case covered three separate wars over a period of nine years. From initial appearance to commencement of trial, these cases took:

a. Mladić: 11 months

b. Karadžić: 17 months

c. Milošević: 7 months

23. As outlined above, each of these cases was two or three time larger and more complex than the instant case. Assuming that the *Karadžić* and *Mladić* cases were approximately three times larger, the equivalent period from initial appearance to trial in this case would range from 4-6 months; if we consider those cases only twice the complexity and scale (which would clearly be an underestimate), a period of 6-8 months in this case would be the equivalent. Either way, the figures are consistent with SPO projections, and refute those of the Defence.

24. The timing of the *Milošević* pre-trial phase may be explained by the intention to conduct that case in compartmentalised phases, and thus the overall scale of the case was not necessarily implicated by the period before commencement of the first component. Nevertheless, particularly because that first phase was the Kosovo conflict and the extensive crimes alleged to have been committed by Serb forces attributable to Slobodan Milošević, the initial appearance to trial period of seven months is also instructive.

25. Second, it has been claimed that Defence investigation cannot begin in earnest – or, according to the Thaçi Defence, at all - until SPO disclosure is complete.[27]

[27] First Status Conference, p.120 (Thaçi Defence: describing fulfilment of disclosure obligations as a 'starting gun' for Defence investigations); Second Status Conference, pp. 213-214 (Veseli Defence: 'there are two phases to the Defence investigation. Phase 1, whilst the Prosecution investigation remains

26. It was apparently in the spirit of such a compartmentalised process that the Thaçi defence announced - more than a month after the initial appearance - that they hadn't begun to put an investigatory team together.[28] The fact that the Veseli Defence has done so merely demonstrates the obvious – that a team can and should be assembled and can proceed. To nonetheless persist with the position being put forward not only belies common sense but is contradicted by the experience of the very predecessor institutions on which the Defence otherwise purport to rely.[29]

27. Moreover, arguments regarding the purported centrality of the Pre-Trial Brief to Defence preparations are even less persuasive before the KSC, where a detailed, narrative-style outline of all indictment supporting material, prepared in accordance with Rule 86(3)(b), is available from the very outset of proceedings. It is thus apparent that, heeding the lessons of predecessor institutions which received widespread

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ongoing without any judicial scrutiny at all, lasts up until June, according to the timetable Mr. Tieger has envisaged. And in June or July, the guillotine comes down, and after that, the Prosecution must seek judicial authorisation to introduce any new evidence, and also at that time they are in a position to and should be required to file their pre-trial brief. That's the moment at which the Defence can say: Right, we now know what the Prosecution case is and where it begins and where it ends, subject to a judicial extension. And from that point onwards, I can tell you, Your Honour, from experience, the minimum time required will be 12 months.') *See also* First Status Conference, p.107 (Veseli Defence: '[t]he reality of the situation is that once we know the case against us, which will not be until the maximum due redaction process has been completed, then it will require 18 months minimum of investigation.')

[28] Second Status Conference, p.210 (Thaçi Defence 'we haven't begun to put our investigatory team together. It's going to take a while. It's going to take a good 18 months-plus to begin to investigate this case.')

[29] See paras 14-15 above. Indeed, even the institutional framework at the ICTY precluded the projections the Defence are attempting to present as basic minimums. For example, the Veseli Defense has announced its intention to devote six investigators to pursue the investigation. Under the ICTY framework, their work for a self-represented accused in the most complex of cases would necessarily have to be complete in less than seven months (According to the ICTY remuneration scheme for self-represented accused (in other cases, lead counsel received a lump sum for distribution to team members), a level 3 or highest complexity case was accorded five team members with a maximum of 6,000 hours during the pre-trial phase. Additionally, during the pre-trial stage there was a maximum allocation of hours to the team members of 150 hours per month. Six investigators (not to mention the international expert supervising them) working a maximum of 150 hours a month consume 900 hours and exhaust the 6,000 hours in the span of a little less than seven months. *See* www.icty.org/en/about/registry/legal-aid).

criticism for the length of their proceedings, the KSC has built-in procedures clearly intended to maximise fairness while rendering pre-trial processes more expeditious.

28. In this particular case, the detailed indictment, extensive supporting materials, Rule 86(3)(b) narrative outline and other disclosed materials, are further set against the backdrop of previous public cases directly addressing crimes at charged detention sites, as well as KLA organisation, hierarchy and policy. It is difficult to imagine a more instructive backdrop to inform investigative focus, direction and scope. The Defence cannot plausibly claim that they will be insufficiently aware of the case against them to conduct meaningful pre-trial investigations before the end of disclosure. That proposition was rebutted at the very first status conference when the Veseli Defence gave a lengthy elaboration of a sophisticated set of lines of defence.

29. The Veseli Defence attempts to circumvent the implications of this awareness by claiming that the instant case is unique, and therefore necessitates a uniquely exhaustive and time-consuming pre-trial period. Purportedly, the indictment is 'unprecedented' because it is comprised of a 'vast number of individual incidents' which are connected to the accused because of the perpetrators' 'allegiance' to the KLA.[30]

30. That is strikingly inaccurate. This is a JCE case charging the leaders of an armed group with liability for crimes committed by members of that armed group involved in the implementation of a common criminal purposes shared by those leaders. Every

[30] Second Status Conference, p.210 ('Can I just say that compared to other cases, this is rather an unusual one because in certainly every other case I've been familiar with at the ICTY or the ICC or, indeed, at the other regional tribunals, there has been a central allegation against the accused going beyond a mere attempt to associate a vast number of individual crimes, in none of which any of them were involved. This indictment is unprecedented in the sense that it is made up of simply a patchwork of a vast number of individual incidents which, as far as we can tell, are connected only to the extent that it is alleged that the people in them claimed at one stage or another allegiance to the emerging guerrilla group that called itself the KLA. And so it's a case where, unlike in may instances where the crime base itself is not usually a huge area of contest, each one of these requires an individual investigation and each one is necessarily going to require a critical examination before one can stand back, as the Prosecution invites the Trial Chamber to do, and view the implications of the total of the sum of the parts.')

such case, including those at the ICTY,[31] involved a 'vast number of individual incidents' which were connected to the accused on the basis of their commission by people 'claiming allegiance' to the group of which the accused was a leader. Far from unique, the framework of the indictment is immediately recognizable in the context of a leadership liability case, and any claim to the contrary must fail.

31. Finally, the Defence has cited the supposed length of the prosecution investigation in support of its own pre-trial investigation projections. To begin with, the predicate for the claim is untrue - the supposed length of the prosecution investigation is simply a generalised and inaccurate estimation based on the length the institution has been in existence. More to the point, the argument proceeds from a false premise. Unlike the SPO, the Defence is not called upon to conduct a wide-ranging investigation to identify and then establish the elements of proof related to an untold number of events over a long period, all to a standard of beyond reasonable doubt. It is called upon instead to respond to a distillation of that investigation which has produced concrete and focused information, both incriminatory and potentially exculpatory. And this is before even considering the often hostile environment in which SITF/SPO investigations have been undertaken.[32]

32. Whatever the justifications for delay, including potentially a determination to endlessly pursue the virtually infinite investigative possibilities that can arise, active pre-trial management and the setting of a trial date within a reasonable period is the most effective method to achieve a fair and expeditious trial. This principle is embodied in Rule 95(2)(j).

33. In exercising such responsibilities, judges are required to weigh and balance a variety of factors, in particular, the right of the defence to a fair trial, the rights of victims to see an end to impunity, and the rights of witnesses to be free from

[31] See para.22 above.
[32] *See also* Prosecution submissions further to the status conference of 18 November 2020, KSC-BC-2020-06/F00097, paras 6-7.

interference and intimidation. As the SPO has previously underscored, it is also concerned with each of those factors, all of which are central to the mission of this institution.[33] The SPO is fundamentally committed to ensuring a fair trial, both in the overall interests of justice, and so that the result of that trial will withstand any appeals process. However, an unnecessarily protracted pre-trial process inevitably increases the risk of interference with witnesses, and increases the opportunity of the accused, their subordinates and supporters to do so in a manner which could jeopardise the possibility of a fair trial. As reflected above, the Defence has relied upon unfounded arguments to advance its claim for an unduly long pre-trial period, and has chosen to falsely impugn the SPO's efforts to ensure the protection of the rights and interests of all concerned. The Prosecution urges the chamber to reject those arguments and set a trial date in reasonable accordance with the SPO's projections.

Item 6: Points of Agreement

34. The SPO is at an advanced stage in preparing an agreed facts proposal for this case, and would anticipate being in a position to provide it to the Defence for consideration by the end of this month.

35. The SPO would welcome continuing tight management of pre-trial proceedings in this case, and proposes that a further status conference be scheduled for the first half of March 2021.

Word count: 4,372

Jack Smith
Specialist Prosecutor

Wednesday, 10 February 2021
At The Hague, the Netherlands.

[33] Prosecution submissions further to the status conference of 18 November 2020, KSC-BC-2020-06/F00097.

Explanatory Note:

Paragraph 22(a) has been corrected to reflect that the time in the *Mladić* case from initial appearance to commencement of trial was 11 months (rather than 25 months).

Paragraph 23 has consequently also been corrected to reflect time ranges of 4-6 months and 6-8 months, respectively (rather than 6-8 and 8-12).