In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Pre-Trial Judge** Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Defence Submissions in relation to Third Status Conference

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1. The Defence hereby files brief submissions in relation to the Order issued by the Pre-Trial Judge[1] and in response to the Submissions by the Specialist Prosecutor.[2] These submissions do not address all the issues raised therein and may be supplemented by oral submissions during the status conference.

2. First, the Defence addresses the issue of disclosure under Rule 109(c) for which agreement with the SPO cannot be reached, despite the efforts of the parties. In this regard, the Defence does not seek to repeat its prior written and oral submissions on these issues which are reiterated in full.

3. The position of the SPO, that the Defence should effectively accept the regime in the *Mustafa* case, again ignores the differences between the cases. The allegations in the Mustafa case relate to a Joint Criminal Enterprise comprising at most six people, at the Zllash Detention Compound between 1 April 1999 and 19 April 1999 who appeared to have been physical perpetrators.[3] By contrast, this case concerns an alleged vast JCE comprising multiple individuals many of which are unnamed,[4] alleged to have been responsible for crimes at 42 alleged detention sites[5] over the period from at least March 1998 through September 1999.[6] Indeed, the crimes for which Mustafa is allegedly responsible relate to only one of these 42 sites.[7] There is simply no comparison between these two cases and no realistic basis to repeat the regime employed in that case, which was less favourable to the accused than originally ordered by the Pre-Trial Judge on this issue.

4. The suggestion that it is not practicable to provide sub-categorisation in Legal Workflow is without merit. The electronic system specifically allows for this. The obligation upon the SPO to review its previously disclosed documents to carry out this task, is far less extensive than claimed, especially as in light of the redactions, the SPO is the only party that can reasonably make this assessment. The SPO should not be able

[1] *Prosecutor v. Thaci et al.,*Order Setting the Date for a Third Status Conference and for Submissions, 2020-06/F00185, 3 February 2021 ("Order").
[2] *Prosecutor v. Thaci et al.,* Prosecution submissions for third status conference, KSC-BC-2020-06/F00191, 8 February 2021 ("Response").
[3] Prosecutor v. Mustafa, Public Redacted Version of Indictment, KSC-BC-2020-05/F00019, 19 June 2020.
[4] Indictment, para 35.
[5] Indictment, pages. 54 – 58.
[6] Indictment, para 32.
[7] Indictment, para 72.

to benefit from the fact that good faith discussions have been ongoing to reach an agreement on this question and have been unsuccessful to now claim that it is too late to impose this requirement. Had the SPO accepted the Defence proposal two months ago when it was made, they would have saved themselves this additional work.

5. Indeed, the main justification for the SPO seeking to avoid properly categorising its evidence appears to be that it would be obliged to know why it was disclosing a document with some specificity, whether it be incriminating or exculpatory. This is a somewhat staggering justification. Surely having investigated Mr. Selimi for many years and submitted an indictment against him, the SPO are fully aware of the supposed relevance of the evidence they rely upon. Similarly, when disclosing exculpatory evidence, the SPO is able to explain why it is doing so and is best placed to do so at the moment of disclosure, when the reason is fresh, rather than many months later. In these circumstances, there is no reason why this information cannot be included in Legal Workflow at the point of disclosure.

6. The assertion that "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"[8] is nothing more than a thinly veiled threat that has no basis in reality. The SPO doesn't need to have drafted its Pre-Trial Brief to know which crime site a document relates to. The SPO will surely have such information readily available and can provide it to both the Pre-Trial Judge and the parties.

7. Finally, the Defence does not suggest that the Prosecution would be definitively bound by the sub-categorisation it makes during the disclosure process. A document that is disclosed as relating to crimes against humanity may also be used as a mode of liability and vice-versa. All that is requested, and indeed required by Rule 109(C) is a good faith assessment of the specific relevance of a document and a recording of that information.

8. In these circumstances, when the positions of the parties are clear, and no agreement is possible, the Pre-Trial Judge is requested to render a decision on this remaining aspect of the disclosure process as soon as possible.

[8] Response, para 10.

9. Second, the Defence addresses the issue of the timing of the commencement of the trial, as the Prosecution dedicated the vast majority of its Response to this issue and appears to request the Pre-Trial Judge to "set a trial date in reasonable accordance with the SPO's projections."[9]

10. While the Defence generally welcomes the opportunity to discuss this crucial issue, the reality remains that, it is simply far too early in pre-trial proceedings for the parties to have an informed discussion about the specific date for the commencement of trial, and certainly premature to request such a date as the SPO has done. It is evident that the authority of the Pre-Trial Judge to "set a target date for the readiness of the case for trial" pursuant to Rule 95(2)(j) is deliberately placed after his extensive other obligations set out in Rules 95(2)(a)-(i). It is surely only when these previous obligations are fulfilled that the Pre-Trial Judge will be able to even consider an appropriate target date for trial, in large part because that decision will substantially depend on his predicate decisions.

11. Therefore, the Defence will not address the substance of the SPO submissions herein. However, the Defence does wish to highlight its concerns regarding one matter, namely the glaring absence in the Response to the Covid global pandemic and its obvious and significant impact on these proceedings. Despite including a detailed analysis of ICTY cases which occurred many years ago, the SPO failed to even make a passing reference to Covid-19 in the Response. In its desperation to counter certain Defence submissions made at the last status conference, which it should have responded to orally when given the opportunity, the SPO failed to fulfil its role in providing complete, forthright and realistic submissions on this issue to the Pre-Trial Judge. When the appropriate time comes to properly raise and discuss this issue in due course, it is sincerely hoped that the SPO will adopt a more responsible and realistic position when they make their submissions to the court.

Respectfully submitted on 10 February 2021,

[9] Response, para 33.

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