

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 Kadri Veseli

Date: 12 April 2021

Language : English

Classification : Public

**Veseli Defence Reply to
“Prosecution Response to the Veseli Defence request relating to the pre-trial
brief”**

Specialist Prosecutor
Jack Smith

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David Hooper QC

Counsel for Kadri Veseli
Ben Emmerson CBE QC

Counsel for Rexhep Selimi
David Young QC

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Venkateswari Alagendra

1. The Defence for Mr Veseli files the following reply to the SPO response¹ to the Defence's renewed request to order the SPO to file the Pre-Trial Brief by 1 June 2021.²
2. The Defence submits that, contrary to the SPO's submissions, the KSC's legal framework does not support a connection between the timing of the filing of the Pre-Trial Brief and the start of the trial. The SPO's insistence in establishing a connection between the filing of the Pre-Trial Brief and the commencement of the trial, therefore implying that the filing of its Pre-Trial Brief should be postponed until three months before the start of the trial, is entirely arbitrary, unsupported in law and relies on cherry-picked statistical data. Under Rule 95(4), the Pre-trial Judge has the authority to order the SPO to file the Pre-Trial Brief at any time during the pre-trial phase.³
3. In the absence of a legal basis, the SPO has recourse to "significant reliance on statistics and comparison with cases from other courts and tribunals."⁴ However, it must first be noted that reliance on ICC cases is misplaced since the KSC framework is entirely different from that of the ICC, which involves a lengthy confirmation of the charges phase and where the Defence is put in a position to clearly understand the prosecution's case well ahead of the commencement of the trial.

¹ F00243, Prosecution response to the Veseli Defence request relating to the pre-trial brief, 6 April 2021.

² Transcript of Status Conference dated 24 March 2021, pp.369, 390. See also KSC-BC-2020-06/F00218.

³ RPE, Rule 95(4): The Pre-Trial Judge shall order the Specialist Prosecutor to file, within a set time limit: (a) the Specialist Prosecutor's Pre-Trial Brief, including, for each charge, a summary of the evidence which the Specialist Prosecutor intends to present regarding the commission of the alleged crime and the alleged mode of liability of the Accused. This brief shall include any admissions by the Defence, as well as a statement of matters that are not in dispute.

⁴ See for example, F00191, Prosecution submissions for third status conference, 8 February 2021, para. 14 ("Prosecution submissions for third status conference"); Prosecution Response, para. 2.

4. Secondly, unlike the ICC or ICTY, the KSC is a domestic court bound by the human rights standards developed by the case law of the ECHR and its strict requirements on ensuring that the Defence has adequate time and facilities to prepare its case.
5. Thirdly, even by looking at the ICC or ICTY's previous handling of cases, one can hardly find consistent practice which would suggest a standard three-month period between the filing of the prosecution's Pre-Trial Brief and the commencement of the trial or a three-month period between the disclosure of the materials to be used at trial and the Pre-Trial Brief. On the contrary, the practice differed widely between cases, ranging from instances where the Pre-Trial Brief was filed six months,⁵ nine months⁶, or even four years⁷ before the commencement of the trial. As the Trial Chamber in *Prosecutor v. Dominic Ongwen* (cited by the SPO)⁸ made it clear: "this case's deadline must be decided on its own facts."⁹ Each case has its own circumstances and specificities which warrant different timelines.
6. The rationale behind the existence of Rule 95(1) is precisely to avoid the possibility of the SPO delaying the requirement of stating its case until the very last minute to hamper the Defence's investigations and trial preparations.
7. The Defence submits that the Judge should order the SPO to file its Pre-Trial Brief as soon as he assesses that the SPO is in a position to do so. As clearly

⁵ [Prosecutor v. Radovan Karadzic, Case No. IT-95-5/18-PT, Prosecution's Submission of Interim Pre-Trial Brief, 8 April 2009](#); [Prosecutor v. Radovan Karadzic, Case No. IT-95-5/18-PT, Scheduling Order for the Commencement of Trial, 14 October 2009](#).

⁶ [Prosecutor v. Limaj et al, Case No. IT-03-66-T, Judgement](#), para. 760; 762.

⁷ [Prosecutor v. Stanisic and Simatovic, Case No. IT-03-69-T, Judgement](#), para. 2426; 2429.

⁸ Prosecution submissions for third status conference, para. 14.

⁹ *Prosecutor v. Dominic Ongwen*, Decision Setting the Commencement Date of the Trial, 30 May 2016, para. 6.

indicated by the SPO at the Status Conference in December 2020, it would be ready to file the Pre-Trial Brief, at the very least, in early July 2021.¹⁰ Had the Judge set a date for the filing of the Pre-Trial Brief based on this estimate already then, the SPO would have been able to manage its workload accordingly and work towards the Judge's deadline and their own estimate. The failure to set a timeframe for the filing of the Pre-Trial Brief only allows the SPO to advance ever-changing pretextual and misleading explanations to postpone the submission of the Pre-Trial Brief.

8. The Defence submits that the purported 'objective reasons'¹¹ raised by the SPO for delaying the submission of the Pre-Trial Brief is nothing more than an attempt to conceal the real 'policy reasons' which Mr Smith has openly acknowledged during the Status Conference on 16 February 2021:

[B]ut this Court has other considerations to consider in setting a trial date and in setting a pre-trial brief. One is the victims in this case and the witnesses in this case who have waited years for justice. A second is the reality, a reality we have been here for an hour and a half, a reality that has not been mentioned once today, that witness intimidation and obstruction of witnesses is a reality of this case, and it will be a reality going forward. And the plain simple fact of the matter is that if there is a large gap between the entire disclosure of our case and that trial, that will endanger witnesses. That is a plain truth that in all of these issues we have talked about today has not been spoken.

And yes, there are protective measures, and, yes, there are redactions, but the Court has to understand that those are tools to mitigate risk; they cannot reduce it entirely. And if these witnesses, who have put their faith in this institution, come to this courtroom, take that stand, and tell their story, if they are left for months and months and months between the time of the pre-trial brief and trial, we are doing no service to them.¹²

¹⁰ Status Conference, 17 December 2020, page. 199.

¹¹ Prosecution Response, para. 2.

¹² Status Conference, 16 February 2021, page. 277.

9. The Defence would like to emphasise that there is, in fact, no evidence or factual basis to support the SPO's submission that serving the Pre-Trial Brief as soon as practically possible (which the SPO accepts on its own account to be no later than 23 July 2021) would endanger witnesses. This amounts to a classic example of a generalised and deliberately misleading submission by the SPO. Moreover, the very fact that it was put forward by Mr Smith as the true reason for the SPO's approach to the submission of the Pre-Trial Brief (namely to limit the ability of the Defence to know the case it has to meet until the latest possible moment) is an improper prosecutorial notice, aimed at creating opportunities for trial by ambush. The fact that the SPO's witness protection argument is not advanced in the SPO's reply strongly indicates that the SPO is aware of this and is now trying to put forward wholly different reasons which are designed to conceal the true prosecutorial objective.
10. The SPO further seeks to misrepresent the Defence's submissions when referring to its previous experience with ICTY cases.¹³ As previously stated during the Status Conference on 16 February 2021, the Defence had made clear that "the ICTY indictments very much represented something that looked like a pre-trial brief. So you would have the counts, each incident would be separately identified, it would be described. Of course, witness names might be redacted, but you would have a full explanation of the relevance of each witness to each allegation. Here we have none of that."¹⁴
11. Relating to the SPO's misplaced comparison of the present case with the *Haradinaj* case specifically, the Defence has already highlighted during the Status Conference on 16 February 2021 that:

¹³ Prosecution Response, para. 4.

¹⁴ Status Conference, 16 February 2021, page. 266.

"The point that the Prosecution doesn't seem to have understood is that the indictment in *Haradinaj*, and all other ICTY proceedings, was a narrative indictment. In other words, it resembles a pre-trial brief. It enables you to go about understanding what it is you're alleged to have done and why, which incidents are supposed to have happened where and when, and precisely how it is said they're linked together. That is not the practice of the Prosecution in this proceeding. Therefore, a pre-trial brief is essential.¹⁵

12. The SPO is invited to read the Indictment¹⁶ in the *Haradinaj* case and compare it against the Prosecution's Pre-Trial Brief in the same case.¹⁷ It will discover that the Indictment was already narrative-based, clearly indicating the instances which, according to the Prosecution's allegations, involved the alleged personal responsibility of Mr Haradinaj and of the other accused.
13. By comparison, the present indictment -- which the SPO erroneously keeps repeating is "detailed" -- fails to identify the personal responsibility of Mr Veseli. The point that the Defence has reiterated several times, and that unfortunately, the SPO fails to tackle, is that in a case involving more than 40 locations, the SPO expects the Defence to guess the connections it alleges between Mr Veseli and the alleged crimes perpetrated.
14. The SPO's Reliance on the Rule 86(3)(b) Outline as a substitute for avoiding to state its case against Mr Veseli in a Pre-Trial Brief is grossly misplaced. Out of the 600-page Outline, there are only three paragraphs that point to Mr Veseli's alleged contributions to the supposed JCE¹⁸ with no indications on the specific incidents alleged - locations, crimes and timeframes - for which Mr Veseli is about to stand trial.

¹⁵ Status Conference, 16 February 2021, page. 312.

¹⁶ *Prosecutor v. Haradinaj et al*, Case IT-04-84-I, Initial Indictment, 4 March 2005; see also Indictment; and relevant revised Indictments.

¹⁷ *Prosecutor v. Haradinaj et al*, Case IT-04-84-PT, Prosecution's Pre-Trial Brief, 29 January 2007.

¹⁸ F0013, Public Redacted Version of ANNEX 2 to Request to present additional supporting materials, KSC-BC-2020-06/F00006/A02, 14 December 2020, pp. 36-37.

15. The SPO's argument on the outline in its response is also based on a misrepresentation of the Judge's reasoning in his Decision on Categorisation of Evidence of 12 March 2021.¹⁹ The quote, taken out of context by the SPO,²⁰ clearly refers to Rule 102(1)(a) material, the purpose of which is to familiarise the Defence with the case. The issues surrounding the Pre-Trial Brief, on the other hand, are linked to Rule 102(1)(b) material which "fulfils a crucial function for the preparation of the Defence".²¹ In that Decision, the Judge rejected the SPO's submissions²² and ordered a case-specific categorisation of Rule 102(1)(b) material in order to ensure the fair and expeditious conduct of the proceedings.²³
16. Finally, the Defence reiterates that, contrary to the SPO's submission,²⁴ the present application is filed in view of the fact that in his Decision of 12 March 2021, the Judge left open the question relating to the date when the SPO must file its Pre-Trial Brief.²⁵
17. In light of the above, the Defence requests the Judge to grant its application, noting that in any event, there is no excuse for the filing of the Pre-Trial Brief to be postponed further than 23 July 2021, which coincides with the deadline of the SPO to finalise the disclosure of Rule 102(1)(b) material.

¹⁹ F00218, Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, 12 March 2021, para. 14 ("Decision on Categorisation").

²⁰ Prosecution Response, para. 3.

²¹ Decision on Categorisation, para. 16.

²² Prosecution submissions for third status conference, paras. 10-11.

²³ Decision on Categorisation, paras. 16, 19-20.

²⁴ Prosecution Response, para. 5.

²⁵ Decision on Categorisation, para. 23; Status Conference, 24 March 2021, page. 392.

Word count 1992

A handwritten signature in blue ink, appearing to read "Ben Emmerson", positioned above a horizontal line.

BEN EMMERSON

Lead Counsel for Kadri Veseli