

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

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Thaçi Defence Submissions for the Sixth Status Conference

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I. INTRODUCTION

1. On 12 July 2021, the Pre-Trial Judge (“PTJ”) issued an Order Setting the Date for a Sixth Status Conference and for Submissions.¹
2. The Defence for Mr Hashim Thaçi (“Defence”) hereby submits its observations on the issues listed by the PTJ in his Order of 12 July 2021.

II. SUBMISSIONS

Item 1: Disclosure

3. The Defence recalls that during the Status Conference of 24 March 2021, the PTJ ordered the SPO to prioritise the disclosure of items referred to in witness statements and interviews, both when disclosing such material in the future as well as in relation to those disclosed so far.²
4. The Defence has not yet received all items mentioned in witness statements and interviews, but expects the SPO to disclose such material by the 23rd of July at the latest, which corresponds to the SPO deadline to disclose Rule 102(1)(b) material.

Item 4: Defence investigations and next steps

5. The Defence reiterates the difficulties it is encountering in the conduct of its investigations in light of the COVID pandemic, delayed and partial disclosure by the SPO, extensive redactions applied by the SPO in the material disclosed as well as SPO’s purported ongoing investigations.

¹ KSC-BC-2020-06/F00393.

² KSC-BC-2020-06, Transcript of Status Conference, 24 March 2021, p. 344, l. 9-13.

6. The Defence is waiting to be given a presentation of the Registry witness protection and support office.

7. The Defence reserves its right to make requests concerning unique investigative opportunities and to give a notice of an alibi or of grounds for excluding responsibility.

Item 5: Points of agreement on matters of law and fact

8. As previously indicated,³ the Defence will comment on the SPO's proposed points of agreement on matters of law and fact once – *inter alia* – the SPO has confirmed that its investigations have been concluded and after the Defence has been provided with and reviewed the SPO's pre-trial brief.

Item 6: Detention

9. The Defence notes that, as of 15 July 2021, in-person counsel visits are now authorized for all counsel regardless of vaccination status, and can take place in the same room with Mr. Thaçi, with the ability to directly exchange paper documents. The Defence welcomes this decision, but notes that such visits still remain limited to three persons at once, which is an ongoing obstacle to broader team discussions, particularly given that in the case of Mr. Thaçi, one of the three participants needs to be a translator.

10. The Defence is currently organising a family visit for Mr Thaçi in the course of the month of July.

³ KSC-BC-2020-06, Transcript of Status Conference, 24 March 2021, p. 382, l. 1-3.

Other matters

11. The Defence respectfully requests the PTJ to order the SPO to provide a preliminary witness list by 2 August 2021, identifying:

- i. The witnesses that it is already certain it will call to testify; and
- ii. The witnesses that it is certain it will not call to testify.

12. The Defence recalls that the SPO initially submitted, on 13 November 2021, that it anticipated “being in a position to provide complete witness and exhibit lists, and to have fulfilled related Rule 102(1)(b) disclosure, by **31 May 2021**”.⁴ The first Status Conference was held on 18 November 2021 and the SPO disclosed to the Defence the first incriminating witness statements and interviews on 12 December 2020.⁵ During the second Status Conference of 17 December 2020, the SPO submitted that it now anticipated being able to file its pre-trial brief and related materials in early July, with trial starting in September 2021.⁶ On 22 March 2021, the SPO again modified this estimate, and said that it envisaged being in a position to submit its Rule 95(4) material (being the SPO pre-trial brief and witness and exhibit lists) by the second week of September 2021, with trial to begin in December 2021.⁷ Then, on 18 May 2021, the SPO submitted that it now anticipated “being in a position to submit its Rule 95(4) material by **mid-October 2021**”,⁸ *i.e.* almost 5 months later than its initial estimate.

⁴ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, para. 2.

⁵ Disclosure package n° 9 (Rule 102(1)(a)).

⁶ KSC-BC-2020-06, Transcript of Status Conference, 17 December 2020, p. 199. See also KSC-BC-2020-06/F00191, Prosecution submissions for third status conference, 8 February 2021, paras. 14, 17.

⁷ KSC-BC-2020-06/F00235, Prosecution submissions for fourth status conference and request for adjustment of time limits, 22 March 2021 (“SPO Submissions for Fourth Status Conference”), para. 7; KSC-BC-2020-06, Transcript of status conference, 24 March 2021 (“Transcript of Fourth Status Conference”), p. 363.

⁸ KSC-BC-2020-06/F00314, Prosecution submissions for fifth status conference, 18 May 2021, para. 10 (Emphasis added). See also KSC-BC-2020-06, Transcript of Status Conference, 19 May 2021, pp. 420-421 (“Transcript of Fifth Status Conference”).

13. Since the first Status Conference, the SPO has disclosed incriminating material relating to **196** potential witnesses. This figure includes both persons who have been allocated a witness number by the SPO and persons who have not been allocated any witness number but for whom the SPO has disclosed statements or transcripts of interview pursuant to Rule 102(1)(a) and Rule 102(1)(b).

14. It should be noted that the Indictment does not refer to any witness and does not contain any footnotes.⁹ While the SPO has disclosed its Rule 86(3)(b) outline, this is a complex document which contains 604 pages and 4133 footnotes, and does not allow the Defence to identify which witnesses the SPO may call to testify.

15. The Defence submits that the SPO should be ordered to provide a preliminary witness list as soon as possible, given the ongoing COVID pandemic which delays and complicates investigations; the complexity of the current case, involving four accused, 10 counts relating to multiples incidents in various locations over a period of one year and a half (March 1998 to September 1999) and approximately 200 potential witnesses; and the uncertainty of the SPO estimates with regard to the notification of its witness list.

16. The failure of the SPO to provide a preliminary witness list is exacerbated by SPO's purported ongoing investigations.¹⁰ The SPO is yet to identify the reasons warranting such investigations and the legal basis under which these investigations are being conducted. As already noted by the Defence,¹¹ this not only deprives Mr. Thaçi of his constitutional and human rights to know the charges against him in

⁹ KSC-BC-2020-06/F00134, Confidential 'Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020', 11 December 2020.

¹⁰ KSC-BC-2020-06, Transcript of Status Conference, 19 May 2021, p. 420, l. 6-19.

¹¹ KSC-BC-2020-06, Transcript of Status Conference, 19 May 2021, p. 422, l. 6-25 and p. 423, l. 1-10.

advance, and prepare his defence accordingly,¹² but may also derail and delay these proceedings to his detriment.

17. As noted above, the submission of a preliminary witness list is required to ensure the accused's rights to a fair trial and to have adequate time to prepare his defence. It would substantially assist the Defence in assessing priorities for its investigations and for the preparation of the trial.

18. Preliminary lists of witnesses have been required in cases before the International Criminal Court ("ICC"). In the *Yekatom and Ngaïssona* case, Trial Chamber V ordered the Prosecution to provide a preliminary witness list, noting that this would give "due regard to the accused's right to a fair and expeditious trial and to have adequate time to prepare their defence", taking into account in particular the need to "to mitigate the delays caused by the Coronavirus Pandemic". In its preliminary witness list, the Prosecution was required to list: "(i) The witnesses that it is already certain it will call to testify; and (ii) The witnesses that it is certain not to call to testify".¹³

19. ICC practice also requires the Prosecution to file a "provisional list of witnesses" prior to the final disclosure deadline, "in order to facilitate the Chamber's understanding of the upcoming case and the Defence's preparation", together with summaries of the anticipated testimonies of witnesses and the estimated number of hours necessary for questioning.¹⁴ In *Yekatom and Ngaïssona*, for example, the Trial

¹² Constitution of the Republic of Kosovo, arts. 30-31; ICCPR, art. 14(3); ECHR, art. 6(3).

¹³ ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-528, Trial Chamber V, Order to provide a Preliminary Witness List, 22 May 2020.

¹⁴ See ICC Chambers Practice Manual (2019), <https://www.icc-cpi.int/iccdocs/other/191129-chamberannual-eng.pdf>, para. 76 (iii).

Chamber ordered the Prosecution to file such a 'provisional list of witnesses' after the filing of its 'preliminary witness list':¹⁵

3. The Chamber recalls that on 15 June 2020 the Prosecution, as instructed by the Chamber in light of the special circumstances under the Coronavirus Pandemic, filed preliminary submissions regarding its anticipated witnesses for trial. These submissions contain a list of witnesses that the Prosecution is already certain it will call to testify (the 'Preliminary Witness List'), as well as a list of witnesses it is already certain it will not to call to testify.

4. In light of the delays caused by the Coronavirus Pandemic, the Preliminary Witness List served as a crucial step to ensure the accused's rights to a fair trial and to have adequate time to prepare their defence. Nonetheless, the Chamber is mindful of its exceptional nature under the present circumstances and the early stage when it had to be provided. Therefore, and as indicated during the Status Conference, the Chamber considers that in line with the practice at the Court, a provisional list of Prosecution witnesses (the 'Provisional Witness List') must be provided, along with brief summaries of their anticipated testimonies. These summaries should include information on (i) the type of witness (e.g. crime base, expert, insider witness, etc.), (ii) the intended mode of testimony (i.e. viva voce or Rule 68 of the Rules) and (iii) estimated length of testimony.

5. As regards the timeline, the Chamber notes the Prosecution's proposal to submit the Provisional Witness List and the list of evidence (the 'List of Evidence') 90 days before the start of trial; the Trial Brief and witness summaries 30 days before the start of trial. The Chamber further notes the Prosecution's submission that the Provisional Witness List and the List of Evidence should 'follow the disclosure or the completion of disclosure'.

6. In accordance with the practice at this Court,¹⁶ the Chamber however considers that receiving this list prior to the disclosure deadline and the reception of the Trial Brief, even if later revised, would facilitate the Defence's preparation for trial, as well as the Chamber's understanding of the Prosecution's upcoming evidence presentation. The Prosecution is therefore ordered to provide a Provisional Witness List with anticipated testimony summaries by 31 August 2020. In this regard, the Chamber also reminds the Prosecution to take the Chamber's remarks during the Status Conference regarding the number of witnesses into account.

¹⁵ ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18-589, Trial Chamber V, Decision Setting the Commencement Date of the Trial, 16 July 2020 (emphasis added).

¹⁶ With reference to: Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449 (the 'Ongwen Decision'), para. 3; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision Setting the Commencement Date of the Trial, 6 January 2020, ICC-01/12-01/18-548, para. 5 (the 'Al Hassan Decision'). See also Chambers Practice Manual (2019), <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 76.

7. These documents must be made available to the Defence and the CLRV, with redactions as applicable. This Provisional Witness List may be changed by the Prosecution between this date and the final list of witnesses' deadline without leave of the Chamber. Nonetheless, the Chamber recalls that such changes are expected to be limited. Major changes should be limited to instances where a concrete justification exists.

24. The Chamber is mindful of its obligation to ensure a fair and expeditious trial and that the accused are tried without undue delay. Moreover, the Chamber recalls that the accused must be provided with adequate time and facilities to prepare their defence. In light of these factors, and taking into consideration the duration of the pre-trial proceedings and of the detention of the accused, the Court's obligations with regard to the protection of victims and witnesses pursuant to Article 68(1) of the Statute, the special circumstances under the Coronavirus Pandemic, as well as the above final disclosure deadline, the Chamber decides that the trial will commence on 9 February 2021.

20. Similarly, an order from Pre-Trial Judge that the SPO file a preliminary witness list by the 2 August 2021 would facilitate not only the Defence's preparation for trial but also the Chamber's understanding of the SPO's upcoming presentation of evidence. If the SPO is not in a position to submit its final witness list and pre-trial brief by mid-October 2021, contrary to its own estimates, then the Defence requests that the PTJ order the SPO to file at least a provisional witness list, with accompanying summaries of the anticipated testimonies of witnesses, by mid-October 2021.

III. REQUESTED RELIEF

21. Accordingly, the Defence respectfully requests the PTJ to:

ORDER the SPO to file a preliminary witness list no later than 2 August 2021, indicating, at a minimum:

- i. The witnesses that it is already certain it will call to testify; and
- ii. The witnesses that it is certain not to call to testify.

22. The Defence reserves its right to request the filing of a provisional witness list by the SPO in due course.

[Word count: 2,235]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "G. W. Kehoe", is written over a white rectangular redaction box.

Gregory W. Kehoe
Counsel for Hashim Thaçi

Friday, 16 July 2021

At Tampa, United States