

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

Date: 10 December 2021

Language: English

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Selimi Defence Submissions for Ninth Status Conference

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

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I. INTRODUCTION

1. The Defence for Mr. Selimi hereby files submissions in response to the Order of the Pre-Trial Judge scheduling the Ninth Status Conference.¹
2. Despite the Defence requests at the Eighth Status Conference,² and Oral Orders³ on these requests by the Pre-Trial Judge, the SPO has failed to take the necessary steps to improve the implementation of its Rule 102(1)(b) disclosure obligations through the Legal Workflow system in a consistent and effective manner.
3. Rule 102(3) has virtually ground to a halt. Indeed, the likely schedule for receiving such disclosure is wholly unclear to the Defence despite its best efforts to make progress on this issue. The Defence must not be placed in the position of having to seek less disclosure than what is required in order to simplify the SPO's task.

A. Disclosure by the SPO

i. Rule 102(1)(b)⁴

4. The Defence reiterates its previous written and oral submissions on the capacity and willingness of the SPO to comply with its Rule 102(1)(b) obligations.⁵ The combined prejudice caused by repeated extensions to applicable Rule 102(1)(b) deadlines and disorganised Rule 102(1)(b) disclosure, limits the Defence's ability to know the case against Mr. Selimi.
5. Despite the Oral Orders issued by the Pre-Trial Judge during the last status conference, no information has been provided by the SPO on either the review of documents linked to Mr. Selimi or the efforts it has undertaken to link translations, lesser redacted

¹ F00593, Order Setting the Date for Ninth Status Conference and for Submissions, KSC-BC-2020-06/F00531, 2 December 2021 ("Order").

² KSC-BC-2020-06, Public Transcript of Hearing, 29 October 2021, from page 666 line 2 to page 667 line 12, page from page 676 line 2 to page 677 line 6, from page 688 line 9 to page 691 line 18.

³ KSC-BC-2020-06, Public Transcript of Hearing, Pre-Trial Judge, Oral Order- Selimi Defence request for further categorisation, linkage, and review of disclosed material, 29 October 2021, page 755 line 12 to page 756 to line 10; Public Transcript of Hearing, Pre-Trial Judge, Order concerning deadlines in relation to Rule 102(3) material, page 754 line 5 to page 754 to line 17.

⁴ Order, paras 15(1)(a), 15(1)(f) and 15(1)(g).

⁵ KSC-BC-2020-06, Public Transcript of Hearing, 29 October 2021, page 637 line 20 to page 638 line 11; F00550, Selimi Defence Submissions for Eighth Status Conference, 27 October 2021, paras 5-9 ("Defence Submissions for Eighth Status Conference"). KSC-BC-2020-06, Public Transcript of Hearing, 29 October 2021, page 555 line 7 to page 562 line 12.

versions, and corrected versions of documents to their originals in Legal Workflow as required by the Pre-Trial Judge.

6. Mistakes and omissions in Rule 102(1)(b) disclosure persist and the Defence wrote to the SPO on 1 December 2021 and on 9 December 2021 detailing various similar issues in relation to Batches 116, 118, 122 and categorisation of the disclosed material.⁶ No response has yet been received.
7. Having heard nothing from the SPO since the last Status Conference, the Defence also sought to meet the SPO to make further progress before this status conference.⁷ However, the SPO was unable to meet to discuss substantive issues until January 2022.⁸ Therefore, while the Defence is seeking to constructively engage with the SPO on the Rule 102(1)(b) disclosure process, this is dependent on the SPO responding in kind. Disappointingly, this has not yet occurred.

ii. Rule 102(3)⁹

8. During the Eighth Status Conference, the Defence noted that unless full disclosure of all documents on the Rule 102(3) list was ordered by the Pre-Trial Judge it would be obliged to request the first 39,839 Rule 102(3) documents.¹⁰ On 1 November 2021, the first working day after the Status Conference, these documents were requested from the SPO.¹¹
9. Since then, the Defence has actively engaged to identify which of these documents are priority disclosure requests and on 9 December 2021, identified 3,179 documents and notified the SPO of their priority status, out of the 39,839 listed, to ensure that the SPO's efforts were focused on these documents. Triggered by the proactivity of the Defence, the SPO finally acknowledged receipt of the Rule 102(3) request sent on 1 November

⁶ Email from the Selimi Defence to the SPO, Defence Observations on issues related to Disclosure Batch 116 and 118, 1 December 2021; Email from the Selimi Defence to the SPO, Defence Observations on issues related to Batch 122 and categorisation of the disclosed material, 9 December 2021.

⁷ Email from the Krasniqi Defence (in consultation with the rest of the Defence Teams) to the SPO and Victims' Counsel, Forum LWF, 7 December 2021.

⁸ Emails from the SPO to the the Krasniqi Defence and to the Selimi Defence, Forum LWF, 8 and 9 December 2021.

⁹ Order, para. 15(1)(b).

¹⁰ Defence Submissions for Eighth Status Conference, paras 32 and 39.

¹¹ Email from Selimi Defence to the SPO, Rule 102(3) disclosure - Selimi Defence team, 1 November 2021.

2021, a few hours before the filing of these submissions and more than a month after the initial request was submitted.¹²

10. As for the remaining 24,842 items from the Rule 102(3) list for which the Defence sought further information from the SPO on 24 September 2021 given the vague and unhelpful descriptions therein, the Defence for Mr. Krasniqi identified and requested 12,956 documents on 3 December 2021 (“Krasniqi Rule 102(3) Fourth Disclosure Request”). On 7 December 2021, the Defence for Mr. Selimi joined the Krasniqi Rule 102(3) Fourth Disclosure Request to facilitate the work of the SPO. Guidance from the SPO as to when it will be able to implement these requests is urgently needed to inform the Defence as to its possible options.
11. Further, the Defence and the Pre-Trial Judge would benefit from information from the SPO as to how the original list of 68,753 documents appearing on the Rule 102(3) list was compiled to ensure that the process is being conducted fairly and effectively.
12. Based on the SPO’s initial indication that there would be 100,000 Rule 102(3) items¹³ the reduction of approximately one third implies a significant amount of thinning out of the available materials. Given the Pre-Trial Judge’s indication in paragraphs 62 and 63 the Framework Disclosure Decision that “[t]he formulation material to the Defence preparation shall be construed broadly”, that “Defence preparation is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence, or related to the SPO’s case” and finally that “an indication as to the materiality of any such items is to be made by the Defence, based on each team’s strategy, and is not contingent on the SPO’s determination on behalf of the Defence”, it is crucial for the Defence to be able to verify and assess whether these criteria have been complied with in the current case.
13. In this regard, the Defence sought good faith answers from the SPO to the following three simple questions in light of the temporal, geographical and substantive scope of the JCE alleged in paragraph 35 of the Indictment:

¹² Email from the SPO to the Selimi Defence, Rule 102(3) disclosure - Selimi Defence team, 10 December 2021.

¹³ KSC-BC-2020-06, F00099, Framework Decision on Disclosure of Evidence and Related Matters, para. 26.

- (i) Approximately how many documents constitute the SPO's entire evidentiary holdings?
- (ii) From these entire evidentiary holdings, what criteria and methodology were applied to identify the 68,753 relevant documents identified by the SPO?
- (iii) What measures did the SPO take to ensure that such a selection was subject to appropriate review and consistent application across the SPO?¹⁴

14. It was hoped that by providing a proper response to this request, litigation could be avoided. Instead, on 8 December 2021, the Selimi Defence received the following response from the SPO:

“The SPO had regard to, inter alia, geographic, temporal and subject matter scope, as well as to particular individuals or entities. As previously indicated, relevance was determined on the basis of an individual review of the documents, with that determination then being subject to a second level check for the majority of items.”

15. The banality of this response is telling. It conspicuously and deliberately fails to provide any specific information on the methodology of the review and selection process. However, this response does confirm that every item on the Rule 102(3) notice is potentially of significant material assistance for the Defence in preparation for the case, and therefore justifies the Defence request for the majority if not all of the items from the Rule 102(3) Notice. It is expected that having made this determination, the SPO will not further frustrate the process by contesting the relevance of any documents sought from the list by the Defence.

16. Finally, the application of Rule 107 to the Rule 102(3) list remains unclear. In light of the confused responses from the SPO to this question at the Eighth Status Conference,¹⁵ the Defence wrote to the SPO on 1 November 2021 seeking clarification “as to whether there are any other documents in the possession of the SPO which are potentially relevant to the preparation of the Defence in accordance with the interpretation given by

¹⁴ This information was requested from the SPO on 6 December 2021.

¹⁵ KSC-BC-2020-06, Public Transcript of Hearing, 29 October 2021, from page 666 line 2 to page 667 line 12, from page 676 line 2 to page 677 line 6, from page 706 line 24 to page 707 line 16 and from page 707 line 25 to 708 line 4.

the Pre-Trial Judge in the Framework Decision, though which have not been included in the Rule 102(3) notice due to lack of clearance from by the provider?”

17. The SPO responded on 4 November 2021 that “there were items which we were unable to list on the Rule 102(3) notice as provider clearance had not yet been obtained” but that many decisions on clearance have now been reached and where clearance has been denied, the SPO is in the process of preparing a relevant filing to be submitted shortly to the court which will indicate the number of items in questions. No filing has yet been made by the SPO. Further, the supplement to the Rule 102(3) notice for additional Rule 107 items to be added has also not yet been provided.
18. Precise indications from the SPO as to these questions must therefore be provided expeditiously to the Pre-Trial Judge and the Defence.

iii. Witness entities in Legal Workflow

19. The Defence welcomes the creation of certain witness entities in Legal Workflow by the SPO. However, to the knowledge of the Defence so far, 123 witness packages have been created out of the preliminary list of 327 witnesses. In addition, very limited information has been populated into Legal Workflow by the SPO in relation to each entity, namely the creation simply of the witness pseudonym without including their name, authorised protective measures, intended testimony type or any other information relevant to the entity. While the SPO clearly can’t provide such information when the identities of the individuals concerned are subject to protective measures, for those whose identity has been provided this would enhance the effectiveness of witness entities and ensure consistency of information rather than the Defence having to individually populate such fields. It would also minimize the room for human error where the use of pseudonyms can create confusion if there is no name to cross-check against.
20. Additionally, the Defence notes that there is a confusing difference between Witness pseudonyms and the Index number of Witnesses on the Relationships folder in Legal Workflow. For example, for Witness W01129, the Relationships table is titled as ‘Relationships for Witness 25’, whilst Witness W00025 disclosed just below reads ‘Relationships for Witness 57’. Given that there is no other witness information currently disclosed for each witness entity that would assist the Defence to cross-check

when transferring witness data onto the Defence's internal work platform, this current practice can prove very time consuming. In the future, the Defence requests the SPO to work with the Registry to ensure coherence between the SPO Witness pseudonyms and Index numbers given by Legal Workflow.

21. In terms of the process moving forward, it is important that these entities are created logically and thoroughly, and all relevant evidence linked to them and then promptly notified to the Defence. If such linking is completed on a piecemeal basis, the Defence will be constantly having to check and compare such evidence to see if it has been updated, thereby again quadrupling the overall work that is necessary. The Defence is happy to engage with the SPO as to how such information will be provided in the most efficient manner.
22. Furthermore, the purpose of requesting witness entities and linking all relevant evidence to them¹⁶ was to properly categorise and simplify the disclosure process. This must include:
 - (i) All previous statements of witnesses disclosed under Rule 102(1)(b) in whatever form, including transcripts of prior proceedings, SPO interviews, statements and interviews or public statements given in any form;
 - (ii) All documents about a particular witness prepared by investigative authorities, including but not limited to the SPO, such as investigators notes, memos.
 - (iii) All exhibits shown to a witness during interviews; and,
 - (iv) Any filings or submissions directly relevant to these witnesses, including but not limited to protective measures or mode of testimony.
23. By establishing this robust and effective system for creating witness packages in Legal Workflow now, the SPO will also, in future be able to link the following information to each entity, thereby making the most effective use of the Legal Workflow system.
 - (v) Proposed exhibits by use of the Presentation Queue for each entity;

¹⁶ Defence Submissions for Eighth Status Conference, para. 24.

- (vi) Proofing notes; and,
- (vii) Transcripts of each witness' testimony.

B. Prosecution Pre-Trial Brief¹⁷

24. The Defence is confident that given the importance of the filing of the SPO pre-trial brief in this case on 17 December 2021 as ordered by the Pre-Trial Judge upon the SPO's proposal over significant Defence opposition¹⁸, any issues with meeting this deadline would have been brought to the attention of the Defence and the Pre-Trial Judge well before the deadline for filing submissions. There can be no genuine reason for any failure to comply in full with the SPO's obligations in this regard.
25. Further, as to the substance of the brief, the Defence will closely examine the SPO pre-trial brief to ensure it complies with the legal requirements of Rule 95(4) in terms of providing sufficient notice to the Defence of witnesses, exhibits and the Prosecution allegations while simultaneously ensuring that it does not seek to expand the case against Mr. Selimi beyond the parameters of the Indictment. The SPO is placed on notice that any attempt to do so will be rigorously challenged by the Defence and any delays caused from such actions will be squarely at the door of the SPO.
26. However, the Defence does seek reconsideration of the Pre-Trial Judge's hasty, and flawed, decision to grant the SPO's request¹⁹ for an extension of the word limit to 150,000 words for the filing of its pre-trial brief.²⁰ The decision was issued within three hours of the SPO request, despite no prior indication by the SPO to the Defence of the likelihood of such a request and no attempt by the Pre-Trial Judge to receive submissions by the Defence on it. Indeed, the Defence for Mr. Selimi had opposed the Request almost as quickly as the Pre-Trial Judge had granted it.²¹ However, as the Pre-Trial Judge did

¹⁷ Order, para. 15(3)(b).

¹⁸ F00520, Prosecution submissions regarding the date for filing of a pre-trial brief, 12 October 2021.

¹⁹ F00598, Prosecution request for extension of word limit, 9 December 2021 ("Request").

²⁰ F00600, Decision on Specialist Prosecutor's Request for Variation of Word Limit, 9 December ("Decision on PTB Word Limit Extension").

²¹ F00601, Selimi Defence Response to SPO Request for Extension of Word Limit, 9 December 2021, was filed at 15:19 and notified to the Parties at 15:30 and the Decision on PTB Word Limit Extension was filed on 9 December 2021 at 15:16 and notified to the Parties at 15:29.

not benefit from these submissions before issuing his decision, they are repeated in full here.

27. Rule 79 requires that the moving party or participant must demonstrate the existence of a clear error of reasoning or that reconsideration is necessary to avoid injustice.²² In this case, the injustice is demonstrated by the failure of the Pre-Trial Judge to respect the Defence's right to be heard and unjustly assuming that no prejudice will be incurred by the Defence.²³ The errors of reasoning are demonstrated below.
28. Article 44 of Registry Practice Direction Files and Filings before the Kosovo Specialist Chambers already establishes a suitable manner for assessing the length of pre-trial briefs, in multi-accused trials, "namely 10,000 words for the contextual background and 10,000 words for each accused." Nothing put forward in the Request even begins to seek to explain why this should not be sufficient in the current circumstances.
29. The SPO Request, which sought to triple the applicable word limit, is entirely devoid of reasoning. The generic arguments relied upon therein, namely that the case is complex and covers a long time-period and significant geographic area,²⁴ are manifestly insufficient to warrant such a massive extension. The same applies to the purported justification that the SPO requires additional words to comply with its legal obligations in referencing exhibits and witnesses in the footnotes to the pre-trial brief.
30. As recently held by the Appeals Panel when faced with a recent request for extension of words for an appeal, "the quality and effectiveness of appellate submissions do not depend on their length, but rather on the clarity and cogency of the presented arguments."²⁵ The same rationale applies directly to the SPO pre-trial brief. Allowing such an extension would simply cause greater confusion to pile on top of an already wholly vague case.
31. The timing of the request, only one week before the brief is to be filed borders on abusing the proceedings. The obligation of the SPO to file its pre-trial brief is no secret that has been sprung upon the SPO at the last minute. It has been discussed at every status

²² KSC-BC-2020-07/F00278, Decision on the Request for Reconsideration of the Decision on Recusal or Disqualification, 20 August 2021, paras 3-4.

²³ Decision on PTB Word Limit Extension, para.7.

²⁴ Request, para. 2.

²⁵ IA014/F00003, Decision on Veseli's Request for Variation of Word Limit, 2 December 2021, para. 4.

conference and been the subject of repeated litigation. To only make the Pre-Trial Judge aware at this stage of the supposed requirement for 150,000 words attempts to create a fait accompli by forcing a favourable decision for the SPO or to alternatively require the Judge to face a potential request for a further delay in filing the pre-trial brief if it is rejected. This should not be countenanced by the Pre-Trial Judge.

32. Finally, as referred to repeatedly, the translation of the SPO pre-trial brief is of significant importance to the accused. A tripling of its expected length as requested by the SPO, will have inevitable prejudicial consequences for Mr. Selimi and significantly undermines the assertion that such an extension will “ultimately advance, not prejudice, these proceedings.”²⁶ It will not advance the proceedings, and only cause prejudice to the accused.
33. For the foregoing reasons the Defence seeks reconsideration of the Extension Decision.

Word Count: 3237

Respectfully submitted on 10 December 2021,



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²⁶ Request, para. 3.