

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

Date: 1 February 2022

Language: English

Classification: Public

Thaçi Defence Submissions for the Tenth Status Conference

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. On 25 January 2022, the Pre-Trial Judge issued an 'Order Setting the Date for a Tenth Status Conference and for Submissions'.¹

2. The Defence for Mr Hashim Thaçi ("Defence") hereby provides written submissions regarding the issues listed by the Pre-Trial Judge in the Order.

II. SUBMISSIONS

3. The Defence reserves the right to present additional submissions orally at the Tenth Status Conference.

III. APPLICABLE LAW

4. Rule 95 of the Rules of Procedure and Evidence defines the 'Functions of the Pre-Trial Judge after Confirmation of the Indictment':

[...]

(2) The Pre-Trial Judge shall ensure that the proceedings are not unduly delayed and shall take all necessary measures for the expeditious preparation of the case for trial.

The Pre-Trial Judge shall, *inter alia*:

- (a) set out a calendar and working plan for any pre-trial obligations of the Parties;
- (b) set time limits for disclosure in accordance with Chapter 7, take any measures to ensure timely disclosure, and prepare a disclosure report for the Trial Panel;
- (c) take steps to identify and narrow down the **list of issues subject to dispute between the Parties and those which are not**;
- (d) hold any hearing necessary to ensure fair and expeditious proceedings;
- (e) set time limits for motions, until the transmission of the case file to the Trial Panel, including **objections from the Parties to the admissibility of evidentiary material disclosed pursuant to Rule 102**;
- (f) decide on preliminary motions filed pursuant to Rule 97 before the transmission of the case file to the Trial Panel;
- (g) decide on filed motions pursuant to Rule 52, Rule 56 and Rule 57;

¹ KSC-BC-2020-06/F00655, Pre-Trial Judge, Order Setting the Date for Tenth Status Conference and for Submissions, 25 January 2022 ("Order").

- (h) decide on motions related to protective measures filed before the transmission of the case file to the Trial Panel;
- (i) decide on applications for admission as victim participating in the proceedings filed before the transmission of the case file to the Trial Panel; and
- (j) set a **target date for the readiness of the case for trial**.

In performing these functions, the Pre-Trial Judge may hear the Parties and, where applicable, Victim's Counsel in the absence of the Accused and other persons. Such a hearing may take place *in camera*. Minutes of the hearing shall be taken by the Registrar.

- (3) Having heard the Parties, the Pre-Trial Judge shall record the **points of agreement on matters of law and fact**.

[...]

- (5) After the submission by the Specialist Prosecutor of the items mentioned in paragraph (4), the Pre-Trial Judge shall invite the Defence to file, within a set time limit, a **Pre-Trial Brief** indicating:

- (a) in general terms, the nature of the Accused's defence;
- (b) the charges and matters which the Accused disputes, by reference to particular paragraphs in the Specialist Prosecutor's Pre-Trial Brief, and the reasons why the Accused disputes them; and
- (c) a list of potential witnesses the Defence intends to call, without prejudice to any subsequent amendment or filing thereof. In relation to each witness, the Defence shall specify to which particular relevant issue the evidence relates.

In addition, within a time limit set by the Pre-Trial Judge, the Defence shall notify the Specialist Prosecutor of its intent to offer a defence of alibi or any other grounds excluding criminal responsibility, including that of diminished or lack of mental capacity, intoxication, necessity, duress, and mistake of fact or law.

A. DISCLOSURE

1. Rule 102(1)(b) Material

- 5. The deadline for the SPO to complete disclosure of Rule 102(1)(b) material was **Monday, 31 January 2022**.² At the Ninth Status Conference, the SPO indicated that it still had approximately 1,050 documents to be disclosed under Rule 102(1)(b), including translations of previously disclosed material.³

² KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021 ("Eighth Status Conference Transcript"), Oral Order 3, p. 753 Line 6 to p. 754 Line 4.

³ KSC-BC-2020-06/F00609, SPO, Prosecution submissions for ninth status conference, 10 December 2021, paras. 2-3; KSC-BC-2020-06, Transcript of Ninth Status Conference, 15 December 2021 ("Ninth Status Conference Transcript"), p. 774 lines 4-22 and p. 787 lines 1-8.

6. Since the last status conference, the SPO has disclosed seven disclosure packages pursuant to Rule 102(1)(b), comprising 1,954 items.⁴ This is nearly double the SPO's previous estimate of the materials remaining to be disclosed and 12% of the total Rule 102(1)(b) disclosure. Further, and regrettably, six of these seven packages (totalling 1,613 items) were disclosed late on 31 January 2022, the last day of the deadline.

7. Given the last-minute and voluminous nature of the SPO's disclosure, the Defence has not had the opportunity to carefully review the materials disclosed. Thus, notwithstanding the "limited number of Rule 102(1)(b) items" for which an extension of time was granted,⁵ the Defence requests that the SPO confirm whether disclosure pursuant to Rule 102(1)(b) has now been completed. In particular, has the Defence now been disclosed: (i) English translations of all documents disclosed as incriminating by the SPO; and (ii) all items mentioned in witness statements and interviews.

8. As it has in the past, the Defence objects to any further general extension of this deadline, should this be requested by the SPO.

2. Rule 102(3) Material

9. The Defence continues to advance the Rule 102(3) process: the Defence has made one further request for Rule 102(3) material since the last status conference and is also preparing further disclosure requests which it intends to submit in the coming weeks. These requests will largely be for material that was not captured in the

⁴ Disclosure Package No. 137, 18 December 2021; Disclosure Package Nos. 154, 155, 156, 157 and 158, 31 January 2022; Disclosure Package No. 159, 1 February 2022.

⁵ KSC-BC-2020-06/F00657, SPO, Prosecution request for extension of time, 27 January 2022, para. 1; KSC-BC-2020-06/F00667, PTJ, Decision on Specialist Prosecutor's Request for Extension of Time, 31 January 2022, para. 13.

previous requests, due to the SPO subsequently providing additional information about some documents as well as the identities of some of the SPO's witnesses being recently disclosed to the Defence.

10. The Defence notes the Pre-Trial Judge has asked whether it is possible to complete the requests for Rule 102(3) material by 4 March 2022.⁶ As indicated by the Defence previously,⁷ the Defence opposes the re-establishment of any deadlines for requesting Rule 102(3) material at this time.

11. Imposing a deadline for Rule 102(3) requests at this juncture prejudices the Defence, since the Defence will need to make further requests for Rule 102(3) material in the future. This is as a result of a number of factors, including: (i) the significant number of witnesses for whom disclosure of their identity is delayed; (ii) the current redactions to the evidentiary material and the indictment; (iii) the SPO's recent disclosure of a significant amount of Rule 102(1)(b) material; and (iv) the Defence having the opportunity to conduct more fulsome investigations. In light of these considerations, the Defence must have the ability to conduct further reviews of the Rule 102(3) Notice in the future, and make further requests, each time new information is received.

12. The Defence therefore invites the Pre-Trial Judge to order that the deadline for requesting Rule 102(3) material be held in abeyance.

3. Rule 103 Material

⁶ Order, para. 16(1)b.

⁷ See, e.g., KSC-BC-2020-06/F00608, Thaçi, Thaçi Defence Submissions for the Ninth Status Conference, 10 December 2021, para. 5; Ninth Status Conference Transcript, p. 796 lines 3-9; Eighth Status Conference Transcript, p. 681 lines 3-23.

13. The Defence have previously raised concerns that the disclosure of potentially exculpatory materials is still outstanding.⁸ Notwithstanding these concerns being repeatedly raised (and supported by other Defence teams), at the time of filing the current submissions, only one package of material has been disclosed under Rule 103 since the last status conference, and the package comprised only 45 items.⁹

14. The Defence therefore reiterates its request that the SPO confirm:

- (i) whether and what amount of exculpatory evidence remains in its custody, control or actual knowledge; and
- (ii) when disclosure of such material currently in its possession will be completed (acknowledging, of course, the SPO's ongoing obligation to disclose material pursuant to Rule 103).

4. Legal Workflow

15. Representatives of each of the parties met to discuss various issues related to Legal Workflow on 17 January 2022. Progress was made in relation some Legal Workflow-related issues, such as achieving greater clarity on the SPO's process for linking translations and lesser redacted or corrected versions to their originals. However, a number of issues remain outstanding.

16. One such issue is the populating of witness entities. The witness entities that are currently available in Legal Workflow contain only the witness pseudonym. During preparations for the Legal Workflow forum, the SPO indicated that no additional information will be included in the witness entities at this time, since the material is already available to the Defence, and adding it in Legal Workflow involves questions of safety and security, as well as allocation of resources. The Defence notes

⁸ See, e.g., Ninth Status Conference Transcript, p. 812 line 4 to p. 814 line 2; Eighth Status Conference Transcript, p. 702 line 23 to p. 703 line 9.

⁹ Disclosure Package No. 152, 28 January 2022.

that, as they currently appear, the witness entities on Legal Workflow have limited utility to the parties. Populating the witness entities with additional information, such as the witnesses' names, dates of birth and protective measures, will be beneficial for all the parties, the Pre-Trial Judge and the eventual Trial Panel. In any event, given this information will need to be incorporated in Legal Workflow at the trial stage (at the latest), it is a matter of efficiency to deal with it now. The Defence also fails to understand the SPO's concerns in relation to the safety and security of the witness information if it is added to the witness entities on Legal Workflow, particularly given such information has already been provided to all parties in another (arguably less secure) format.

B. SPO INVESTIGATIONS

17. The Defence takes note of the Pre-Trial Judge's first attempt to set a final date for the completion of the SPO investigations, by 4 March 2022. The Defence submits that any further investigations by the SPO risk delaying the proceedings by leading to the delayed disclosure of evidence, to the prejudice of Mr Thaçi, who has been incarcerated since 5 November 2020. The Defence requires advance disclosure of evidence to be able to conduct meaningful investigations and to prepare for trial.

C. DEFENCE INVESTIGATIONS AND NEXT STEPS

18. As submitted previously, the Defence has commenced and is continuing investigations. However, the efficiency and effectiveness of the Defence investigations is hampered by:

- (i) the ongoing COVID-19 pandemic, including travel restrictions;
- (ii) extensive redactions applied by the SPO to the material already disclosed;
- (iii) delayed and partial disclosure by the SPO, particularly since approximately 104 witnesses remain anonymous to the Defence; and

- (iv) the ongoing disclosure process and disclosure review, particularly in light of the voluminous disclosure received from the SPO in the last few months and the issues the Defence have faced with the disclosure process.

19. 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.

20. The Defence, having been notified of the SPO's Pre-Trial Brief on 21 December 2021,¹⁰ has started to review the SPO proposal for agreement on facts pursuant to Rule 95(3) and intends to engage with the SPO and the other defence teams on this issue in the following days or weeks.

21. The Defence considers it premature to identify either: (i) objections to the admissibility of evidentiary material disclosed pursuant to Rule 95(2)(e) of the Rules; and (ii) lists of issues subject to dispute and not subject to dispute, pursuant to Rule 95(5)(b) of the Rules. The Defence was notified of the SPO's exhibits list on 21 December 2021 only, during the winter recess, and this list, of 1,595 pages, refers to 16,304 documents.¹¹ The Defence has obviously not had the time to review each document to identify potential admissibility issues. Similarly, the SPO's Pre-Trial Brief, notified on the same date, contains 280 pages of statements from the SPO; the Defence, while having started to review it, is not in a position, at this stage, to indicate whether it will be able to identify a list of disputed or undisputed issues.

22. The Defence also considers it is premature to ask for a time estimate for its pre-trial brief, just one month after the SPO filed its brief on a case it has been investigating

¹⁰ KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Confidential Redacted Pre-Trial Brief.

¹¹ KSC-BC-2020-06/F00631/RED/A03/CONF/RED, Confidential Redacted List of Exhibits.

for years. As noted above, the SPO's deadline to complete disclosure of Rule 102(1)(b) material was 31 January 2022, one day ago, and the Defence was only provided with the Rule 109(c) chart on this date. Given the amount of material the SPO has disclosed and continues to disclose, the Defence is likely to require substantial time to review it, conduct investigations and prepare its pre-trial brief. The Defence further stresses that the Pre-Trial Judge has authorised the SPO to withhold the identify of 106 witnesses, being noted that the identity of 69 witnesses will be disclosed only 30 days before trial. Each of the Indictment,¹² the Rule 86(3)(b) Outline¹³ and the SPO pre-trial brief remain extensively redacted. In such circumstances, the Defence cannot provide any estimate of when it would be ready to file a pre-trial brief.

D. OTHER MATTERS

23. The Defence wishes to address the following additional matters during the forthcoming status conference:

- (i) The pre-detention review of Mr Thaçi – the Defence requires a hearing to address any subsequent submissions on this issue to the Pre-Trial Judge; and
- (ii) The requirement to hold a hearing to discuss the SPO's submissions on confidential information and contacts with witnesses.

E. ELEVENTH STATUS CONFERENCE

24. The Defence will be available for the Eleventh Status Conference at the Court's convenience on Thursday, 24 March 2022.

¹² KSC-BC-2020-06/F00647/A01, 'Confidential Lesser Redacted Version of 'Indictment', KSC-BC-202006/F00455/A01, dated 3 September 2021', 17 January 2022.

¹³ KSC-BC-2020-06/F00647/A02, Rule 86(3)(b) Outline, 17 January 2022.

Word count: [2,355] words

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Tuesday, 1 February 2022

At Tampa, United States of America