

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: 1 February 2022

Language: English

Classification: Public

Veseli Defence Submissions for Tenth Status Conference

Specialist Prosecutor's Office

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Law s

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to the Pre-Trial Judge's Order,¹ the Defence for Mr Kadri Veseli ("Defence") hereby provides written submissions for the Tenth Status conference. The Defence reserves its right to present additional submissions orally at the upcoming Status conference.

II. SUBMISSIONS

A. Disclosure

i) Rule 102(1)(b)

2. The Defence notes that the SPO has not yet completed its obligations under Rule 102(1)(b). On 31 January 2022, the Pre-Trial Judge, upon request from the SPO, extended from 31 January to 31 March 2022 the deadline for disclosure of the remaining Rule 102(1)(b) material.²

ii) Rule 102(3)

3. Since the last Status conference the Defence has submitted one additional request for access to Rule 102(3) material, bringing the total of items requested to 19 487. The Defence anticipates submitting further requests in the coming weeks.
4. 3682 items have been disclosed to the Defence since the last Status conference, all stemming from Defence requests submitted in October and November 2021. The total number of items disclosed to the Defence is now 5406.
5. In accordance with the Pre-Trial Judge's suggestion, the Defence has engaged in *inter partes* discussions with the SPO and other Defence teams with a view to solving various issues related to the 102(3) disclosure process. More

¹ F00655, Order Setting the Date for Tenth Status Conference and for Submissions, 26 January 2022.

² F00667, Decision on Specialist Prosecutor's Request for Extension of Time, 31 January 2022.

specifically, the Defence reached out to the SPO on 14 January 2022, to inquire whether it had disclosed all (draft or final) English translations of Rule 102(3) documents disclosed to the Defence so far and, for the documents for which no English translation currently exists, to confirm its willingness to disclose the English summary of these documents which was used to determine contents and relevance, as suggested by Pre-Trial Judge. Additionally, the Defence also suggested an *inter partes* meeting to explore possible ways to streamline the 102(3) disclosure process and in the alternative, that the issue be included in the agenda of the *inter partes* Legal Workflow meeting scheduled on 19 January.³

6. With regard to the documents for which no English translation currently exists, the SPO indicated on 18 January 2022 that “[w]e do not have English summaries of documents which could assist the Defence. Review of the documents was done primarily by SPO staff speaking the language or with the assistance of sight translations. The written internal work product of that review does not consist of English summaries of the documents.”⁴
7. With regard to the translations of documents disclosed to the Defence so far, the SPO indicated on 28 January 2022 that it had identified two Rule 102(3) requests for which translations were not included in the original disclosure and that they would review those packages to see whether there are any available associated translations and, if so, shall disclose them. The SPO specified that this process may take a couple of weeks given the Rule 102(3) requests which are currently being processed and the potential need to apply redactions to any such translations.⁵

³ Email from Veseli Defence to SPO, 14 January 2022.

⁴ Email from SPO to Defence teams, Response on Issues to discuss at the LW Forum of 19 January 2022, 18 January 2022.

⁵ Email from SPO to Defence teams, 28 January 2022.

8. The issue of streamlining the 102(3) disclosure process was briefly discussed during the *inter partes* Legal Workflow held on 19 January 2022. The Defence teams are currently exploring the possibility of submitting joint requests. This remains subject to the resolution of a number of preliminary technical issues.
9. The Defence still opposes the imposition of any deadline for Rule 102(3) requests, given that materiality is defined in relation to the contours of the case which continue to be made known to the Defence through the lifting of redactions. In this regard, the Defence notes that the Pre-Trial Brief filed by the SPO *ex parte* on 17 December 2021 is 10,000 words longer⁶ than the Pre-Trial Brief which was disclosed to the Defence several days later.⁷ As a result, there is a considerable body of information which forms a part of the Prosecution's case but which remains unknown to the Defence. The Defence cannot assess that information against the 102(3) list unless and until the majority of those redactions have been lifted. Any deadline that is imposed would therefore necessarily be subject to the understanding that the Defence is still entitled to disclosure of documents whose materiality only becomes apparent after the passage of such a deadline. Consequently, it appears that the case management benefits of imposing any deadline are slight.
10. In any event, given the volume of the material and ongoing discussion between the Parties on streamlining the process, 4 March is not a realistic deadline for 102(3) requests. The Defence could be in a position to propose a deadline for Rule 102(3) disclosure, subject to the conditions above, at the next Status conference.

iii) Rule 103

11. With respect to Rule 103 material, the Defence reiterates that this information

⁶ Email from SPO to Veseli Defence, 12 January 2022 ("The word count for the unredacted Pre-Trial Brief is 89,790 words.")

⁷ F00631/A01/CONF/RED. The word count is 78,455.

is of the utmost importance to the formation of its case and that the SPO's previous submissions have not provided any clear guidance as to the Disclosure of Rule 103. Specifically, the Defence requests that the SPO provide its best estimate of amount of Rule 103 material currently in its possession and to provide a date representing the SPO's best estimate as to when they it will complete disclosure of all Rule 103 material currently in its possession.

iv) Legal Workflow Forum

12. A brief *inter partes* meeting between the Defence teams, the SPO, the Victims' Counsel and the Registry was held on 19 January 2022 to initiate discussions on various issues relating to disclosures on Legal Workflow. At the Defence's request, the SPO clarified certain matters in relation to the process of creation of witness entities and linkage/population of metadata for evidentiary material. The Rule 102(3) disclosure process was also summarily discussed. Little progress was achieved during the meeting. Another meeting is scheduled on 15 February 2022 to further discussions on these issues.

B. Defence Investigations and Next Steps

13. The Defence is continuing its review of the SPO's Pre-Trial Brief and sources and is in the process of refining its investigation plan. The Defence has begun its investigation but the bulk of it remains to be conducted, given the scope of the SPO's case; the volume of disclosure; the on-going litigation; and the various issues caused by the global pandemic.
14. With respect to the other matters raised by the Court in setting out the Order for the Tenth Status Conference, the Defence submits that it is not in a position to meaningfully comment or to engage productively with the SPO on those issues at this time. Before the Defence is able to do so it must: (i) continue to review and analyse the SPO's case as set forth in the SPO's Pre-Trial Brief; (ii) conduct a preliminary investigation based on its understanding of the SPO's

case, and (iii) use the facts gathered during its review and investigation to finalise its Defence strategy. Without finalising, at least conceptually, the Defence case and strategy, the Defence cannot responsibly respond to many of the issues set out by the Pre-Trial Judge. It is for precisely this reason that the Defence has been so strenuously urging the SPO to meet its disclosure deadlines as this is the necessary first step towards advancing this case to trial. With this in mind:

- The Veseli Defence does not at this time anticipate the need to request measures to avail of a unique investigative opportunity. The Defence reserves its right to amend this position should its investigation uncover the need to do so.
- Having not yet completed its preliminary investigation or set its Defence case, the Defence is not able to comment at the present time as to whether it will provide notice of an alibi or grounds for excluding responsibility pursuant to Rule 95(5) of the Rules or any associate disclosure pursuant to Rule 104(1) and 104(2) of the Rules.
- For the same reasons, the Defence is not able at this time to discuss points of agreement on law and/or facts pursuant to Rule 95(3) and 156 of the Rules. The Defence believes, however, it will be in a position to provide an estimate for these discussions by the next Status conference.
- Similarly, having only just begun its review of the SPO's Pre-Trial Brief, the underlying sources and the proposed exhibits list, which proposes over 16,000 exhibits, the Veseli Defence is not able to identify objections to the admissibility of evidentiary material disclosed pursuant to Rule 95(2)(e) at the present time. Given the volume of exhibits, the Defence is not in a position to provide a meaningful estimate on this issue.
- Having not yet completed its preliminary investigation or set its Defence

case, the Veseli Defence is not in a position to responsibly identify and/or discuss a list of issues subject to dispute and ones with issues not subject to dispute pursuant to Rule 95(5)(b) of the Rules. The Defence is optimistic that it will be in a position to provide an estimate for these discussions by the next Status conference.

- Similarly, the Defence is not in a position at this time to provide a date or an estimate for filing its Pre-Trial Brief. The Defence notes that the SPO has requested an additional extension of its disclosure obligations, that the Defence still does not have the PTB in Mr Veseli's native language, and the scope and scale of the SPO's case is such that it requires further review. The Defence cannot discharge its professional obligations and meaningfully commit to a date at this time.

C. Other Matters

i. Length of trial

15. The Defence registers its concern and draws the Pre-Trial Judge's attention to the anticipated length of the trial. The SPO has indicated in its Rule 95(4)(b) List of witnesses that it requests a total of 1,863 hours to present its case.⁸ To put this request into perspective, the Defence has drawn two examples from similar multi-accused cases at the ICTY:

- In the *Prlić et al.* case, the Prosecution used a total of 296 hours to present its case,⁹ across approximately 1 year and 9 months;¹⁰

⁸ F00631/RED/A02/CONF/RED, p. 19.

⁹ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Allocating Time to the Defence to Present its Case, 25 April 2008, para.9.

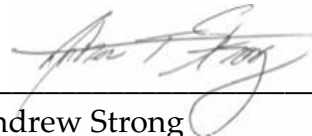
¹⁰ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74, Case Information Sheet.

- In the *Šainović et al. (Milutinović)* case, the Prosecution used a total of 166 hours,¹¹ across approximately 10 months.¹²
16. This means that, should the present case be conducted at a rate similar to the *Prlić et al.* case, the SPO case would last 132 months, *i.e.* over 11 years. Should it be conducted at a rate similar to the *Šainović et al. (Milutinović)* case, then the SPO case would last 112 months, *i.e.* over 9 years.
17. The Defence submits that such a prolonged trial will in no way serve the interest of justice for any of the Parties or for this Court. A more streamlined prosecution case would have a positive impact on all aspects of this case and is in the interest of all parties.

Word Count: 1944



Ben Emmerson, CBE QC
Counsel for Kadri Veseli



Andrew Strong
Co-Counsel for Kadri Veseli

¹¹ ICTY, *Prosecutor v. Šainović et al. (Milutinović)*, IT-05-87-T, Decision on Use of Time Remaining for Defence Phase of Trial, 21 November 2007, para. 1.

¹² ICTY, *Prosecutor v. Šainović et al. (Milutinović)*, IT-05-87, Case Information Sheet.