

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: 25 March 2022

Language: English

Classification: Public

**Public Redacted Version of
Veseli Defence Submissions for Eleventh Status Conference
(F00744, dated 21 March 2022)**

Specialist Prosecutor's Office

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. Pursuant to the Pre-Trial Judge's Order,¹ the Defence for Mr Kadri Veseli ("Defence") hereby provides written submissions for the Eleventh 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 on 31 January 2022, the PTJ extended the deadline for disclosure of the remaining Rule 102(1)(b) material to 31 March 2022.²

ii) Rule 102(3)

3. Since the last Status conference, the Defence has submitted one additional request, and has joined two requests submitted by the *Thaçi* Defence, amounting to 1,019 items and bringing the total number of items requested by the Defence under Rule 102(3) to 20,506. Since the last Status conference, the SPO has disclosed a further 1,210 items explicitly under Rule 102(3), bringing the total figure to 9,638.³
4. However, the Defence is not in a position to determine how many items from the Rule 102(3) Notice have been disclosed overall. This is because, the SPO has recently disclosed a number of items under Rule 103 that were requested under Rule 102(3), but failed to cross-refer these items to the Rule 102(3) Notice. Consequently, the number of items from the Rule 102(3) Notice that has now been disclosed is higher than 9,638, but it is not known by how much. The

¹ F00734, Order Setting the Date for Eleventh Status Conference and for Submissions, 15 March 2022.

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

³ As of the time of this filing.

Defence has requested that the SPO take steps to ensure that such documents are identifiable so that all parties can track Rule 102(3) disclosure more effectively.⁴ The Defence has not yet received a response to this request.

5. The late disclosure of these documents, which were owed to the Defence under Rule 103 *and* requested under Rule 102(3) has hampered Defence investigations. For instance, among the materials that have migrated from Rule 102(3) to Rule 103 in recent weeks is the SPO's 2019 [REDACTED],⁵ which the Defence requested under Rule 102(3) in November 2021. Having now received the transcript, the Defence can confirm that, as suspected, the interview contains obviously exculpatory information and should have been disclosed in the very early stages of the pre-trial phase. Its late disclosure – which was untimely under both Rule 103 and Rule 102(3) - has had a material impact on the Defence investigations as it will likely need to reinterview witnesses to whom his evidence relates. The Defence submits that stricter deadlines Rule 102(3) disclosure must be imposed on the SPO so as not to further impede Defence's preparations for trial.
6. The progress of Rule 102(3) requests and disclosure is further hampered by the sprawling nature of the SPO case. As the Defence has previously argued, the SPO must be ordered to reduce the scope of its case before it is transmitted to a trial panel.⁶ The sooner this happens, the sooner the Defence would be able to focus its requests in a more targeted manner, complete the bulk of its requests under this Rule, and prepare itself for trial.
7. As to translations, no further progress has been made. The Defence maintains that the Framework Decision is clear that “disclosing Party must ensure that

⁴ Email sent to the SPO, dated 17 March 2022, following the Legal Workflow Forum.

⁵ [REDACTED].

⁶ Transcript of 4 February 2022, p. 941 *et seq.*

the evidence, including witness statements, is disclosed in English, the working language of the proceedings.”⁷ The SPO maintains that such a duty does not exist, and that it is not in possession of summaries which could be made available to the Defence.⁸ As an interim measure, the Defence sought to inquire whether it was in possession of disclosable English language summaries for **any** documents in this category. It is the Defence’s understanding that no English summaries or translations of these documents have been kept by the SPO.⁹

8. Taking into account the sheer volume of items listed on the Rule 102(3); the absence of any coordinated approach within the SPO as regards its disclosure obligations under various Rules; the fact that Rule 103 disclosure has only recently commenced in earnest and remains ongoing; the wide-ranging temporal and geographical scope of the charges; and the absence, for many of these documents, of English translations at present, it remains impractical to impose a deadline for Rule 102(3) requests upon the Defence.

iii) Rule 103

9. With respect to Rule 103 material, the Defence requests that the Pre-Trial Judge set a deadline for completion of Rule 103 material within the next 30 days. The Defence, again, stresses that this information 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 when the parties can expect completion of Rule 103 Disclosure.

10. Indeed, the Defence has asked the SPO at the last two (2) Status Conferences to

⁷ F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 75.

⁸ F00673, Prosecution Submissions for Tenth Status Conference, 1 February 2022, paras 7-8.

⁹ Email from SPO of 24 February 2022, referring the Defence to para. 7 of its submissions for the Tenth Status Conference.

provide their best estimate for a date representing when it will complete disclosure of all Rule 103 material currently in its possession. The SPO has steadfastly refused to provide even an estimate. The Defence notes that it has now been over 16 months since the Accused were taken into custody and that they have a right to know when they can expect the SPO to complete its exculpatory disclosure. Failing to do so thus far has created a significant and unnecessary impediment to the speed of the pre-trial process (addressed in further detail below) and to the Accused's right to understand the case against him. With this in mind, the Defence respectfully submits that the moment for soliciting estimated deadlines is past and requests that the Pre-Trial Judge now fix a firm date by which the SPO must complete its Rule 103 Disclosure.

iv) Rule 107

11. The Defence notes that at the last Status conference on 4 February 2022 the SPO were working to complete discussions with Rule 107 providers and that discussions with providers would be completed within the "coming weeks".¹⁰ The Defence observes that the deadline is fast approaching and Rule 107 disclosure remains incomplete.

v) Legal Workflow Forum

12. On 15 February and 15 March 2022, two additional *inter partes* meetings were held between the Defence teams, the SPO, the Victims' Counsel and the Registry to further discussions on issues relating to disclosures on Legal Workflow.
13. Various issues were raised by the Defence teams, *inter alia*:

¹⁰ Transcript of 4 February 2022, pp 924-925.

- (i) Documents being disclosed in early packages now being re-disclosed with different titles which significantly confuses and impedes the Defence's evidence review;
 - (ii) Documents requested under Rule 102(3) Notice being disclosed under other rules (e.g. Rule 103) without any indication that they are part of the requested material from the Rule 102(3) Notice. This renders the process of identifying material to request and following the disclosure of the same extremely tedious;
 - (iii) The persisting discrepancies in the documents' descriptions – e.g. sometimes referring to a person's name and other times referring to a pseudonym. This issue has previously been raised on multiple occasions as it greatly hampers the Defence's capacity to run comprehensive searches in the disclosed material in an efficient manner. The Defence's ability to navigate disclosure is further impeded by sporadic misspellings and the use of last names only.
14. Once again, little progress was made during these meetings. The SPO was of the view that many of these issues were not "Legal Workflow issues" and thus requested the Defence to address them in writing. Following the last meeting, these issues were sent by email per the SPO's request and we are currently awaiting a response. A fourth meeting is scheduled on 20 April 2022.

B. Translations

15. The Defence has not made any urgent requests for translation.

C. SPO Investigation and Next Steps

16. The Defence recalls that the SPO currently intends to call over 320 witnesses and tender over 16,000 exhibits to prove its case. Further, it has had over a decade to collect and organise this information and 16 months since the SPO exercised its discretion to begin these proceedings. It is simply inconceivable that the SPO should, at this point, need *more time* investigate this case. Allowing further delay so that the SPO can add to the above – noted volume of information is counterproductive to all parties – including the SPO. It will not

serve the interests of justice and will simply tax the resources of the SPO, the Defence and the Court. The Defence submits that at this point, the Pre-Trial Judge should confidently fix 6 May 2022 as the date by which the SPO should complete their investigation.

D. Defence Investigations and Next Steps

i) Progress of Defence Case

17. The Defence has now completed an initial review of the SPO's Pre-Trial Brief. Its analysis of the case against Mr Veseli and in particular the sources used by the SPO is ongoing. The Defence has completed an initial investigative mission based on the SPO's Pre-Trial Brief. As to be expected, much of the time focused on building relationships with individuals and creating a level of trust to ensure a comfortable, productive and voluntary working relationship going forward. The Defence has identified the need for additional trips in the near future.
18. In addition, the Defence respectfully highlights two areas which are direct impediments to the Defence's investigation and submits one request to streamline the Defence Investigation and pre-trial process.
 - a. Scope of the Case
19. The SPO's case is unprecedented in its scope and this has direct implications for the Defence investigation.
20. The SPO intends to call 326 witnesses using 1,863 trial hours. **It intends to tender over 16,000 exhibits.** The Defence has previously raised its concern about the length of this case and used comparative trials at the ICTY as a benchmark for the reasonableness of this trial's length.¹¹ The SPO has proposed

¹¹ F00676, Veseli Defence Submissions for Tenth Status Conference, 1 February 2022, paras 15-16, noting comparisons to Prlić (296 hours to present the Prosecution case) and Šainović (166 hours).

for *ten times more* trial hours and exhibits than the *Šainović and Stanišić* cases and ten times the exhibits of the *Dordević case*.¹² At the last Status conference, the SPO dismissed the Defence's concern.¹³ The SPO was similarly disparaging towards the Defence when estimating the length of the pre-trial process for purposes of Detention Review.¹⁴

21. Despite the SPO's comments, and leaving to one side for a moment the length of the trial, the sheer volume of evidence proposed by the SPO creates significant logistical problems for all parties. For the Defence, it makes it nearly impossible to execute an expeditious and efficient investigation. To better understand how vast the information proposed by the SPO is in this case, the Defence has surveyed 51 international criminal cases at the ICTY, the ICC, ICTR and the SCSL which it attaches as Annex 1.¹⁵ None of the cases surveyed involved is even close to the volume of information the SPO proposes in this case.

(i) Witness: The average number of witnesses that prosecutors called across the 51 cases surveyed was 82.64 witnesses, or one quarter the number proposed in this case. The comparable Kosovo cases at the ICTY all fall within the average length (*Haradinaj et al*: 81 witnesses; *Limaj et al*: 61 witnesses; *Dordević et al*: 115 witnesses; *Šainović et al*: 117 witnesses; *Stanišić*: 97 witnesses). The proposed 326 witnesses in this case significantly exceeds the mean, and the number of witnesses in comparable cases connected to Kosovo.

(ii) Exhibits: The average number of exhibits Prosecutors have put into

¹² 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; ICTY, *Prosecutor v. Dorđević*, IT-05-87/1, [Case Information Sheet](#).

¹³ Transcript of 4 February 2022, pp. 952-953.

¹⁴ F00354, Prosecution response to Veseli Defence Submissions on Detention Review with confidential Annex 1, 17 June 2021, paras 22-23; Prosecution consolidated response to October 2021 Defence Submissions on Detention Review, 22 October 2021, F00540 paras 36-41.

¹⁵ Note these figures are based upon a survey of public documents which the Defence puts forward for informative guidance only. There has been no effort made to include or leave out any specific cases but the Defence does not represent that this is an exhaustive list.

evidence across the 51 cases surveyed was 1,307.76 per case. **The Prosecution here proposes over 16,000 exhibits.** To the best of the Defence's knowledge, the highest number of exhibits that has ever been put before an international criminal tribunal was in the *Karadić* case which saw the Prosecution put 6,671 exhibits.¹⁶

22. The effect of proposing 326 witnesses and over 16,000 exhibits on the Defence investigation has been to create an unprecedented sea of information which the Defence must sift through to determine what it can reasonably investigate. It has dramatically slowed the Defence's preparations and investigation and it presents a significant obstacle to the Defence's ability to discharge its professional obligations in a reasonably expedient time frame. What's more, the logistical challenges of expeditiously moving a case of this size forward creates a problem not just for the Defence but for the Court itself. Given that there are limited resources to expend and that all parties will benefit from an expeditious trial, the Defence respectfully submits that the number of witnesses and exhibits is unmanageable and must be significantly reduced. There are various approaches that could help reign in in the material, but for the sake of efficiency, this should be done as soon as possible so that time and resources are not expended unnecessarily on witnesses or exhibits which will ultimately not form a part of the SPO's case.

b. Rule 103

23. The second impediment the Defence has encountered through its investigation is the late disclosure of Rule 103 material. The Defence has, since the last Status conference received 723 items as Rule 103 material.¹⁷ Some of these items touch directly on the heart of the SPO case against Mr Veseli and have been in the

¹⁶ Even taking into account that proposed exhibits are higher than exhibits used at trial, the exhibits in this case greatly exceed any other cases the Defence is aware of.

¹⁷ See batches 170, 174-176, 180-181, 186, 188. Although some items had already been disclosed under other Rules.

SPO's possession for years. Leaving to one side the SPO's professional obligations, the lackadaisical pace of Rule 103 disclosure dramatically slows down Defence trial preparations, at the expense of the Accused who remain in pre-trial detention.

24. For instance, without access to certain Rule 103 material, the Defence expended months investigating an issue which a Rule 103 witness, interviewed by the SPO years ago, resolved in minutes. The result is that time is wasted and the Defence is unable to efficiently prioritise matters for investigation. At this point in the pre-trial process, 16 months after the SPO chose to bring the indictment, this is an untenable position. As such the Defence now respectfully requests a deadline be set for the SPO to complete its Rule 103 Disclosure.

c. Order of Witnesses

25. Finally, the Defence notes that the SPO has argued in several different motions that the Defence does not need to complete its investigation before the start of trial. Without commenting on the merits of that argument, the Defence submits that for this to be a workable solution for expediting the pre-trial process it follows that the SPO will need to direct the Defence to the witnesses it intends to call first. This should be done as soon as possible to allow the Defence to focus its investigation on the issues raised by those witnesses. To this end, the Defence respectfully requests that the SPO provide to the Defence as soon as possible: (i) the first 32 witnesses (10% of its total witness) it intends to call in the order it reasonably expects to call them; and (ii) the first 107 (30% of its total witness) witnesses it intends to call. This will provide the Defence the ability to better assess a reasonable start date for trial and more efficiently use its

resources.

ii) Unique Investigative Opportunities

26. The Defence is not in a position at the moment to request a unique investigative opportunity but has now identified two individuals from the SPO's witness list for whom a request may be made pending the outcome of further investigation.

iii) Notice of Alibi

27. The Defence's efforts to understand the areas of the indictment where alibi notice could be given pursuant to Rule 95(5) have been frustrated by the scale of redactions applied to many of the allegations. It is impossible to establish any grounds for excluding responsibility in instances where the date, location, and/or specific context of an allegation remain unknown to the Defence. To expedite Pre-Trial matters and in the interest of providing the SPO and the Court notice it will require under Rule 95(5) the Defence submits the following proposal.
28. Strictly for the purposes of allowing the Defence to understand any direct allegations so that proper and timely submissions can be made pursuant to Rule 95(5) and Rule 104(1) and (2) the Defence requests that the SPO allow Defence Counsel on a strictly confidential basis to see redacted material relating to any direct allegations against the Defence. Sharing the dates, locations and context of those few specific allegations with Defence Counsel can be accomplished without revealing the identity of any witness in this process. There is precedent for this approach in this case; it would dramatically assist the Defence in moving this process forward; and will allow the SPO and the Court more notice of potential alibi and/or other grounds for excluding

responsibility.

iv) Agreed facts

29. Correspondences have begun between parties on Agreed Facts and the Defence will be in a position to contribute to those discussions shortly.

v) Admissibility

30. The Defence is still assessing the evidence and again here the volume of exhibits makes this task difficult.
31. Nonetheless, the Veseli Defence can at this stage note its deep concern that many documents [REDACTED]. Some of these documents will presumably have a clear chain of custody or will be authenticated by SPO witnesses. In a separate category, however, are documents which appear to have simply been gathered by the Republic of Serbia during the conflict. For these documents the Defence notes that during 1998-1999 the Republic of Serbia: (i) was an adversary during the 1998-1999 conflict, (ii) has a documented history of manipulating evidence during the conflict including to specifically incriminate the KLA and exculpate criminal activity of its on forces, and (iii) detained individuals and collected 'evidence' during 1998-1999 using, among other illegal methods, torture and blackmail.
32. The Defence notes that it has received in disclosure correspondence between [REDACTED].¹⁸ [REDACTED]. In light of the volume of information that [REDACTED] and the desire of all parties to avoid relying upon evidence gathered illegally and in particular through torture and duress, the Defence requests disclosure of the following items:

- a. All Requests for Assistance and/or other agreements reached between

¹⁸ [REDACTED].

the SPO and cooperating governments;

- b. All requests for information between the SPO and [REDACTED];
- c. A list of all documents received by the SPO from [REDACTED]; and
- d. A summary of all contact related to this case between the SPO and [REDACTED] since the indictment has been made public.

vi) Timing of Defence Pre-Trial Brief

- 33. The Defence's ability to complete its Pre-Trial Brief by the summer recess is contingent upon the SPO finalising its case. This involves the SPO completing its investigation, completing its Rule 103 disclosure, responding to 102(3) requests in a reasonable amount of time, thoughtfully assessing and voluntarily reducing the size of the case, disclosing agreements with cooperating governments, disclosing evidence [REDACTED], providing Defence Counsel with the dates and locations of direct allegations against the accused.
- 34. To be clear, these requests are not arbitrary. The Defence requests this information because it constitutes the most basic components of the SPO's case that are needed in order to understand the case against the Accused, finalise Defence strategy and set out its case. Without the SPO completing these basic points, the Defence will need more the time to understand the case, to navigate and extraordinary amount of disclosure and to litigate issues where necessary.
- 35. At present, due to the state of the Prosecution's case, the Defence cannot commit to a date certain for filing its Pre-Trial Brief.

E. Other Matters

i. Redactions

- 36. The Defence wishes to allocate a few minutes at the Status Conference to raise a narrow issue related to redactions of the SPO's Pre-Trial Brief. Specifically, there are numerous instances where the source for SPO allegations is listed

merely, and unnecessarily, as “redacted” and the Defence wishes to highlight several specific examples to illustrate the problems this practice causes.

Word Count: 3546



Ben Emmerson, CBE QC
Counsel for Kadri Veseli



Andrew Strong
Co-Counsel for Kadri Veseli