

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: 18 May 2022

Language: English

Classification: Public

Thaçi Defence Submissions for the Twelfth Status Conference

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I. INTRODUCTION

1. On 12 May 2022, the Pre-Trial Judge issued the 'Order Setting the Date for a Twelfth 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. The Defence reserves the right to present additional submissions orally at the Twelfth Status Conference.

II. SUBMISSIONS

A. DISCLOSURE

1. Rule 103 Material

3. Since the Eleventh Status Conference, the SPO has disclosed 1,054 documents pursuant to Rule 103 of the Rules,² across 12 disclosure batches.³ Once again, the Defence expresses concern that such a significant amount of exculpatory material has only recently been disclosed by the SPO, and not "immediately" or "as soon as it is in his or her custody, control or actual knowledge", as required by Rule 103.

4. Pursuant to the third oral order of the Pre-Trial Judge on 24 March 2022, by 20 May 2022, the SPO is required to "to complete its review of the 2.500 items remaining to be assigned for exculpatory review and disclose the material found to be exculpatory".⁴ However, the Defence understands that this order only applies to

¹ KSC-BC-2020-06/F00798, Pre-Trial Judge, Order Setting the Date for a Twelfth Status Conference and for Submissions, 12 May 2022, Public ("Order").

² KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

³ Disclosure Packages 204, 209, 212, 219, 220, 232, 233, 234, 242, 243, 247 and 248.

⁴ KSC-BC-2020-06, Transcript of Eleventh Status Conference, Oral Order Three, 24 March 2022 ("Transcript of Eleventh Status Conference"), p. 1161 line 22 to p. 1162 line 3.

material received by the SPO or cleared up to 31 January 2022.⁵ The Defence therefore asks the SPO to confirm:

- (i) Whether and what amount of exculpatory material (beyond that which is due to be reviewed and disclosed by 20 May) remains in its custody, control or actual knowledge. This is particularly in light of the SPO's dual obligation under Rule 103 to disclose both material that "reasonably suggest[s] the innocence or mitigate[s] the guilt of the Accused or affect[s] the credibility or reliability of the Specialist Prosecutor's evidence" (emphasis added); and
- (ii) When disclosure of such material currently in its possession will be completed, acknowledging the SPO's ongoing obligation to disclose material pursuant to Rule 103.

5. In addition, since February 2022, the Defence has submitted a number of *inter partes* requests to the SPO, requesting disclosure of specific categories of exculpatory material. To date, the SPO has substantively replied to only one of these requests. The Defence therefore asks the SPO to confirm when disclosure of the requested material will be completed, or at least confirm when a substantive response from the SPO will be provided.

6. The Defence reminds the Court that ongoing late disclosure of Rule 103 material has a prejudicial impact on the Defence investigations and its ability to prepare for trial.⁶ For example, delays in disclosure cause corresponding delays in Defence investigations as the Defence is hampered in its ability to identify possible

⁵ Transcript of Eleventh Status Conference, p. 1087 lines 3-12.

⁶ See, e.g., KSC-BC-2020-06/F00724, Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material, 7 March 2022, Confidential, paras. 42-47.

investigative avenues, conduct interviews and investigative missions and review relevant documents in a timely manner.⁷

2. Rule 102(3) Material

7. Since the Eleventh Status Conference of 24 March 2022, the Defence has made two further requests for material from the Rule 102(3) notice, comprising over 1,700 documents, and the SPO has disclosed 969 documents pursuant to Rule 102(3), across seven disclosure packages.⁸ Thus, the total Rule 102(3) disclosure received by the Defence since February 2022 is 976 documents,⁹ when 6,700 have been requested.

8. The Defence remains concerned about the time taken by the SPO to meet its Rule 102(3) obligations, and the backlog of Rule 102(3) disclosure yet to be completed.¹⁰ The SPO's inability to respond in a timely manner to Rule 102(3) requests is particularly concerning given the delays it is causing to the proceedings, and the fact the Thaçi Defence has been more targeted in its Rule 102(3) requests than the other accused.¹¹ The Defence therefore supports the Pre-Trial Judge's initiative to impose an ultimate deadline of 22 July 2022 for the SPO's review of currently pending Defence requests.¹²

9. The Defence advises that it intends to make further requests for Rule 102(3) material. Requests will include material that has not been captured in previous requests, due to additional information being provided by the SPO, for instance, once redactions are lifted from the evidentiary material and/or the Indictment, or when the

⁷ Transcript of Eleventh Status Conference, p. 1096 lines 1-5.

⁸ Disclosure Packages 205, 211, 223, 225, 227, 228 and 229.

⁹ This figure includes seven documents disclosed pursuant to Rule 102(3) in Disclosure Packages 162 on 4 February 2022 and 171 on 2 March 2022.

¹⁰ See, e.g., Transcript of Eleventh Status Conference, p. 1073, lines 6-8.

¹¹ KSC-BC-2020-06/F00769, Thaçi Defence Submissions on Third Detention Review, 19 April 2022, Confidential, para. 20.

¹² Order, para. 21(1)(b).

identity of additional SPO witnesses is disclosed. In consequence, the Defence opposes the re-establishment of any final deadlines for requesting Rule 102(3) material;¹³ it must be able to make further requests for Rule 102(3) material in the future, if items become material to the Defence investigations or trial preparations.¹⁴

B. DEFENCE INVESTIGATIONS AND NEXT STEPS

10. The Defence is continuing its investigations, including identifying potential witnesses, conducting investigative missions, reviewing the SPO's Pre-Trial Brief and evidentiary materials disclosed by the SPO, and otherwise progressing its analysis of the case against Mr Thaçi. However, as submitted previously,¹⁵ these investigations remain hampered by a number of factors outside of the control of the Defence, including:

- (i) Extensive redactions applied by the SPO to the evidentiary material already disclosed, and to the Indictment, including to allegations relating to the acts and conduct of the Accused;
- (ii) Delayed and partial disclosure by the SPO, particularly since approximately 100 witnesses remain anonymous to the Defence. This includes 69 witnesses who will remain anonymous to the Defence until 30 days before trial, and a further 24 witnesses who will remain anonymous until 30 days prior to their testimony; and

¹³ Transcript of Eleventh Status Conference, p. 1075, lines 21-24; KSC-BC-2020-06/F00671, Thaçi Defence Submissions for the Tenth Status Conference, 1 February 2022, Public ("Tenth Status Conference Submissions"), paras. 9-11; KSC-BC-2020-06/F00608, Thaçi Defence Submissions for the Ninth Status Conference, 10 December 2021, public, para. 5; KSC-BC-2020-06, Transcript of Ninth Status Conference, 15 December 2021, p. 796 lines 3-9; KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, p. 681 lines 3-23.

¹⁴ *See, e.g.*, Tenth Status Conference Submissions, para. 11; KSC-BC-2020-06/F00744, Veseli Defence Submissions for Eleventh Status Conference, 21 March 2022, public, para. 8.

¹⁵ *See, e.g.*, Tenth Status Conference Submissions, para. 18; Transcript of Eleventh Status Conference, p. 1138 line 15 to p. 1139 line 3.

- (iii) The ongoing disclosure process and disclosure review, particularly in light of the continuing disclosure under Rule 103, and the issues with the Rule 102(3) disclosure process.

11. The Defence provides notice that it will make requests concerning unique investigative opportunities, pursuant to Rules 99(1) and (3) and Rule 100 of the Rules. Rule 100 provides that:

Rule 100 Taking of Depositions upon Decision of the Pre-Trial Judge

- (1) Where there is reason to believe that the evidence of a potential witness may otherwise become unavailable, the Pre-Trial Judge may decide, proprio motu or upon request by a Party, that a deposition be taken for use at trial, regardless of whether or not the person whose deposition is sought is able physically to appear before the Specialist Chambers to give evidence.
- (2) The motion for the taking of a deposition shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined and of the circumstances justifying the taking of the deposition.
- (3) If the motion is granted, the Party on whose request the deposition is to be taken shall give reasonable notice to the other Party and, where applicable, Victims' Counsel, which shall be given the opportunity to attend the taking of the deposition and question the person whose deposition is being taken. The Pre-Trial Judge may observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons.
- (4) Deposition evidence may be taken either at or away from a seat of the Specialist Chambers, and it may also be given by means of a video-conference upon request by either Party. Rule 143 and Rule 144 shall apply mutatis mutandis.
- (5) The Pre-Trial Judge shall ensure that the deposition is taken in accordance with the Rules, and that it is accurately recorded by the Registrar. This record shall include the following information:
 - (a) the questions and the answers;
 - (b) any issue raised and decision taken thereon; and
 - (c) whether issues are referred to the Trial Panel.
- (6) The Pre-Trial Judge shall transmit the record to the Trial Panel, either as part of the complete case file referred to in Rule 98 or at any later stage as appropriate.

12. The Defence is considering a number of potential witnesses, located in America and in Europe, that may meet the criteria under Rule 99(1) and Rule 100 for their evidence to be preserved through the taking of a deposition, particularly those of advanced age and/or deteriorating health. The Defence anticipates that any such

requests will be submitted within the coming months in order that the depositions be taken before the end of the year.

13. The Defence also reserves its right to give notice of an alibi or grounds for excluding responsibility, pursuant to Rule 95(5) of the Rules. The Defence is unable to provide further information at this juncture, due to the scale of redactions in the Indictment and the evidentiary material disclosed by the SPO. It is not possible for the Defence to establish an alibi or grounds for excluding responsibility in circumstances where, for example, the date or location of an allegation is redacted.

14. The Defence has continued to review and engage with the SPO regarding the proposal for agreement on facts, pursuant to Rule 95(3) of the Rules. To date, the Defence have accepted nine of the facts proposed by the SPO. However, again, the Defence is unable to reach agreement on further proposed facts in light of the extensive redactions to the Indictment and materials disclosed by the SPO.¹⁶ In order to expedite the process of reaching agreement on the SPO's proposed facts, the Defence invites the SPO to provide a lesser redacted version of the Indictment, and lesser redacted evidentiary materials as soon as possible.

15. The Defence considers it is still premature to identify either: (i) objections to the admissibility of evidentiary material disclosed pursuant to Rule 95(2)(e) of the Rules; or (ii) lists of issues subject to dispute and not subject to dispute, pursuant to Rule 95(5)(b) of the Rules. There is a voluminous amount of material contained in the SPO's Exhibit List and Pre-Trial Brief, which the Defence obviously has not had sufficient time to review to identify potential admissibility issues. The Defence's problems are exacerbated by a number of issues, including:

¹⁶ See also paragraph 25, below.

- (i) The SPO continues to amend its Exhibit List to add more materials. For example, since the Exhibit List was filed in December 2021, the SPO has added a further 1,700 items, bringing the total to 18,008 items.¹⁷ The SPO also has two additional requests to amend the exhibit list pending;¹⁸ and
- (ii) Extensive redactions to the Exhibit List and Pre-Trial Brief, making it impossible for the Defence to fully understand the nature of the case presented by the SPO and the materials it intends to rely on in support of this case.

16. The Defence intends to file a pre-trial brief. At this stage, the Defence considers that it should be in a position to file its pre-trial brief by 16 September 2022, as suggested by the Pre-Trial Judge. As noted by the Veseli Defence,¹⁹ this proposed date is contingent on the SPO:

- (i) fulfilling all its disclosure obligations pursuant to Rule 103, Rule 102(3), and Rule 107 by 22 July 2022 at the latest; and
- (ii) giving notice of the witnesses that it intends to call during the first six months of trial, and the order in which it intends to call them, by 22 July 2022; and notice at the outset of trial as to the order of witnesses for the following six months of trial.

C. PROPOSALS FOR STREAMLINING THE CASE

17. The Defence supports the streamlining of the case, especially since Mr Thaçi has been detained, at the SPO's request, since November 2020.

¹⁷ KSC-BC-2020-06/F00788/A02, ANNEX 2 to Prosecution submission of amended exhibit list, 29 April 2022, Confidential.

¹⁸ KSC-BC-2020-06/F00767, Prosecution request to amend the exhibit list and for protective measures, 13 April 2022, Confidential; KSC-BC-2020-06/F00774/CONF/RED, Confidential redacted version of 'Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05), 20 April 2022.

¹⁹ See Veseli Defence Submissions for Twelfth Status Conference, 18 May 2022.

18. Nevertheless, the Defence stresses that it is for the SPO to streamline its own case and to determine which witnesses it will call to testify and which evidence it will tender through the bar – such decisions by the SPO are not dependent on the Defence’s position with regard to agreed facts for instance.

19. The SPO intends to rely on 326 witnesses pursuant to its witness list,²⁰ including: (1) 261 witnesses though ‘live’ testimony with 1863 hours of examination in chief; and (2) 65 witnesses though testimony ‘in writing’, of which 26 are deceased.

20. During the Eleventh Status Conference on 24 March 2022, the SPO indicated that it planned to reduce the questioning time for certain witnesses and to elicit more evidence through Rules 153 to 155 of the Rules.²¹

21. Despite a request from the Defence, the SPO has not provided any further details in this regard in the course of *inter partes* discussions.²²

22. The Defence submits that the admission of testimonies ‘in writing’ instead of *viva voce*, may be a way to accelerate trial proceedings, particularly for witnesses whose testimonies are duplicates or who do not refer to any Accused. However, its scope is necessarily limited; the Defence will object to the admission of testimonies ‘in writing’ which relate to the acts and conduct of the Accused.

²⁰ KSC-BC-2020-06/F00631RED/A02/CONF/RED, 17 December 2021.

²¹ Transcript of Eleventh Status Conference, p. 1151.

²² By email of 13 April 2022, the Defence teams asked to be SPO to:

- clarify how many hours of examination in chief in total it anticipated to request, which witnesses it planned to admit through Rules 153 and 155, and whether it intended to withdraw any witness from its witness list and if so, which ones;
- to provide a preliminary indication of the general themes of witnesses that the SPO will start with and, to the extent possible, the approximate order which the SPO anticipated adopting.

23. As suggested by the Veseli Defence during *inter partes* discussions, instead of limiting the number of witnesses by Party, it may be more efficient to set a global timeline for each Party's case. It will set clear parameters for the trial. Given that some delays may occur at trial for reasons beyond a Party's control, each Party should be entitled to apply before the Trial Panel for a limited extension of time, up to three months for instance, upon justification of extraordinary circumstances warranting such an extension of time.

24. The SPO, during *inter partes* discussions, indicated that while it supported the definition of a specific timeframe for the parties to present their case, it considered that it was a prerogative of the Trial Panel, to be discussed at the appropriate time before the Trial Panel, and therefore did not propose any particular timeframe for its own case. The Defence awaits a specific proposal from the SPO in order to provide further comments.

25. With regards to agreement on facts, the Defence recalls the Pre-Trial Judge's observations during the last Status Conference pursuant to which *'when the Defence hasn't received all disclosure, it is also difficult for the Defence to agree on facts. So once you will be done with disclosure, I will hear you with great interest. But for now, I think it is quite difficult for the Defence to conclude these discussions.'*²³ These observations are still valid today. The Amended Indictment remains extensively redacted, including, it is understood, certain paragraphs which relate directly to the acts and conduct of the Accused. The Defence is still waiting to be disclosed a significant number of Rule 102(3) items. The SPO has been ordered, by 20 May 2022, to complete its review of the 2,500 items remaining to be assigned for exculpatory review and to disclose the material found to be exculpatory.²⁴ In addition, the Defence will be disclosed the

²³ Transcript of Eleventh Status Conference, p. 1150.

²⁴ Transcript of Eleventh Status Conference, Oral Order 3, 24 March 2022.

identity of 69 witnesses 30 days before trial, 24 witnesses 30 days before their testimony, and 4 witnesses when the identity of either W04390 or W04391 will be revealed to the defence.

26. In this context, the Defence submits that the SPO should reconsider the necessity of the redactions applied to the Indictment and to the exhibits on its Exhibit List and disclose less redacted material sooner rather than later. It will enable the Defence to better ascertain the proposed agreed facts.

27. The Defence further notes that the disclosure of the identity of approximately 100 witnesses on the eve of, or in the middle of trial, may lead to further delays, the Defence likely having no choice but to apply for extensions of time, or eventually a stay of proceedings, to conduct investigations. To prevent such delays, the Defence submits that the Pre-Trial Judge and/or the Trial Panel should reconsider the timeframe for the disclosure of the identity of protected witnesses. The Defence asks that the identity of the 69 witnesses mentioned above be disclosed six months before trial instead of 30 days before trial.

D. THIRTEENTH STATUS CONFERENCE

28. The Defence will be available for the Thirteenth Status Conference at the Court's convenience on Thursday, 30 June 2022.

[Word count: 3,078 words]

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Wednesday, 18 May 2022

At Tampa, United States