



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
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Prosecution submissions for twelfth status conference

Specialist Prosecutor's Office

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1. In accordance with the Order,¹ the Specialist Prosecutor's Office ('SPO') provides its submissions in advance of the twelfth status conference.

Status Conference Submissions

Item 1:² Disclosure

a. Rule 103

2. The SPO has finalised the initial review of exculpatory evidence in its collection up to the end of January 2022. This includes the 2,500 items whose review was ordered by the Pre-Trial Judge.³

3. The SPO is aware that its Rule 103 obligations require continued vigilance following the conclusion of this initial review. The SPO must review new materials acquired under Rule 103 and disclose them immediately to the defence. When Rule 102(3) items are selected by the Defence, the SPO re-reviews these items for Rule 103 prior to disclosure. Finally, reflecting best practices of the ICTY and ICC prosecution offices, the SPO will conduct targeted searches throughout the proceedings to ensure that upcoming witnesses have all Rule 103 disclosures duly accounted for.

4. For these reasons, Rule 103 disclosures will necessarily continue as they would in all other cases of this nature. For those identified Rule 103 items requiring restrictions on disclosure, such as non-standard redactions, the applications for these items will be made by the end of May 2022.

b. Rule 102(3)

5. In the interval from the 11th status conference to now, the SPO directed its resources primarily to the Rule 103 reviews necessary to comply with the Pre-Trial

¹ Order Setting the Date for a Twelfth Status Conference and for Submissions, 12 May 2022, KSC-BC-2020-06-F00798 ('Order').

² The numbering follows that indicated in the Order.

³ 11th Status Conference, T.1161-62.

Judge's orders. This led to comparatively less progress on Rule 102(3) disclosures. This said, the SPO disclosed 14,711 items during this interval, and further packages are being prepared. The SPO also foreshadows that materiality challenges and requests for redactions will be necessary in respect of certain Rule 102(3) requests in the near future.

6. With the additional capacity following compliance with the Pre-Trial Judge's Rule 103 order, the SPO is in a position to accelerate its Rule 102(3) disclosure efforts. If it can focus on its Rule 102(3) obligations between now and 22 July 2022 as anticipated, the SPO estimates it will be in position to address 40,000 further requests.

7. The SPO does not consider that Rule 102(3) is an area of the pre-trial disclosure process for which an ultimate deadline can be fixed. It is a process. The SPO is obligated to provide notice of further items it receives which are relevant to the case throughout the trial proceedings. Moreover, the Defence teams can select existing or new Rule 102(3) items at any moment – indeed, over 25,130 additional Rule 102(3) items have been requested by the Defence just since the last status conference.

8. Due to the KSC's limited jurisdiction, the scale of the confirmed indictment, and the low 'relevance to the case' threshold for noticing items, the Rule 102(3) notice obligations in *Thaçi et al.* are extremely broad. 97% of the items on the original Rule 102(3) notice have now been requested by at least one defence team, creating disclosure obligations more demanding than any imposed for prosecution offices at institutions like the ICTY or ICC.⁴ Due to the climate of witness intimidation which has defined so much of the background in this case – including assessments on continuing detention and delayed disclosure orders for 100 witnesses – time and care is needed to process selected items in a manner which keeps people safe and ensures the effectiveness of the Pre-Trial Judge's protective measures. Protecting victims and

⁴ See also Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020, para.54.

witnesses is a central component of the KSC's mandate,⁵ and thoughtful review and processing of Rule 102(3) items is necessary to protect the safety, physical and psychological well-being, dignity and privacy of these persons.

9. It is, as such, important to recall that – in contrast to materials intended to be relied upon at trial (Rules 102(1)(a) and (b)), or potentially exculpatory materials (Rule 103) - Rule 102(3) items are residual by nature. Although the SPO has adopted a policy of limiting challenges in order to avoid litigation and facilitate the Defence receiving maximum disclosure, a significant number of Rule 102(3) items are in fact of limited, if any, materiality.

10. Full completion of their disclosure should not serve to act as a procedural bar to transfer the case to the Trial Panel.⁶ When the Defence asserts that there should be no deadline to select materials off the Rule 102(3) notice,⁷ it is an attendant consequence that this process will continue into the trial phase.

c. Rule 107

11. The SPO is continuing to work on concluding discussions with Rule 107 providers. Significant further progress, narrowing the scope of remaining items and issues, has been made.

12. Currently, two further Rule 107(2) applications are in process, and will be submitted as soon as finalised (including conclusion of counterbalancing discussions as relevant).

⁵ Article 23; Rules 80 and 108.

⁶ Previous versions of the rules required that Rule 102(3) (then numbered Rule 102(2)) disclosure must be finalised during the pre-trial stage. *See* Rule 102(2)-(3) of the Rules (version 2), KSC-BC-2020-06/F0BD-03/Rev2/2020, 5 July 2017. The latest version of the Rules removed this requirement. *See* Rule 102(4) (not referencing Rule 102(3)).

⁷ *See* Status Conference, 29 October 2021, T.683-84, 754.

Item 3: Proposals for streamlining the case

13. In light of *inter partes* correspondence with the Defence since the last status conference, there appears to be agreement that the parties should be entitled to call evidence as they see fit within an overall hours limit.⁸ The SPO considers this an appropriate way forward, and – as outlined below - is continuing to review its witness and evidence lists and case presentation proposals within those parameters.

14. There has not been agreement on the specifics of the streamlining. No Defence team made a proposal to accept the admissibility of any evidence on the SPO witness list.⁹ The Veseli Defence raised substantive streamlining suggestions which could not be agreed to, including proposals to permit Defence counsel to review redacted material – which effectively is a request to reconsider prior protective measures rulings¹⁰ - and for the SPO to cut all allegations which do not involve the personal conduct of the accused or other named JCE members.¹¹ The latter proposal in particular does not appear to be made in good faith, ignoring, as it does, the charged modes of liability.¹²

15. In line with the Pre-Trial Judge's directions during the 11th status conference, the SPO is conducting an internal review exercise to streamline its hours estimates which remains ongoing. As a result of its initiative, the SPO is in position to say that it will significantly reduce its examination hours. The reductions thus far have

⁸ See also 11th Status Conference, T.1153 (Veseli Defence: 'Our position - let me make it clear - is that the only way of achieving some discipline in the presentation of the Prosecution case is to do what all other international criminal Tribunals have done, and to say, This is the length of time that the Prosecution has to present its case, and it's for the Prosecution to decide which witnesses it wants to focus on.').

⁹ As requested by SPO in 11th Status Conference, T.1151.

¹⁰ In this regard, see Rule 80(4)(d).

¹¹ Letter from Veseli Defence to SPO, 3 May 2022, p.2 ('First, the Defence submits that a sensible course of action would be for the SPO to drop any allegations where reliable evidence does not link the alleged crime to the Defendants or at least to one of the named Joint Criminal Actors [...] the SPO should abandon any allegations where the only link to the Defendants is that the perpetrators are purportedly members of the KLA').

¹² Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA008/F00004/RED, 1 October 2021, para.24.

resulted from a reduction in time per witness, including through greater use of Rule 153 and 154.

16. No witnesses or crime sites have been dropped to date. Victims have waited 20 years to testify and need an opportunity to do so. Whether any reparations are available to them at the end of trial may also depend on whether their duly confirmed crime site is maintained in the Indictment.¹³ The SPO is cognizant of the need to streamline, but this must be done in light of these competing considerations.

17. Since the Rules determine that this time limit may be set by the Trial Panel,¹⁴ the SPO will be ready at the transfer of the case to make a concrete proposal for the number of hours to be allotted to a streamlined SPO case. In the meantime, and to facilitate Defence preparations, the SPO will promptly notify the Defence should any witness or crime site be dropped in the course of the internal review.

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At The Hague, the Netherlands.

¹³ Article 22(8); Rule 168.

¹⁴ Rule 118(1)(d).