

**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 Rexhep Selimi

**Date:** 5 September 2022

**Language:** English

**Classification:** Public

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**Selimi Defence Submissions for Fourteenth Status Conference**

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**Specialist Prosecutor**

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**Counsel for Kadri Veseli**

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## I. INTRODUCTION

1. The Defence for Mr. Selimi hereby files submissions in response to the Order of the Pre-Trial Judge scheduling the Fourteenth Status Conference.<sup>1</sup> The Defence reserves the right to develop additional submissions orally at the Status Conference both in relation to the topics addressed herein and others.

## II. SUBMISSIONS

### A. Disclosure

1. **102(3) Material**
2. Since the Thirteenth Status Conference of 13 July 2022, 9,372 additional Rule 102(3) items have been disclosed to the Defence by the SPO. Thus, as of 5 September 2022, the Defence has received 42,830 Rule 102(3) items disclosed under Rule 102(3) out of a total of 63,903 items requested, leaving 21,073 items from the list yet to be disclosed.<sup>2</sup> As a result of *inter partes* discussions regarding materiality challenges, addressed further below, the Defence has withdrawn its request for 28 items on its list.
3. Since the previous Status Conference, the Defence has received 15 Excel spreadsheets accompanying disclosed batches of Rule 102(3) material with an index key indicating the connection between the ERN of each disclosed item with its respective number on the Rule 102(3) list. This has been somewhat helpful with regard the Defence's own cross-checks on, and organisation of, the items requested *versus* those disclosed, and has allowed for a clearer picture as to the nature of the items still outstanding from the list, although tracking of the

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<sup>1</sup> KSC-BC-2020-06/F00940 Order Setting the Date for a Fourteenth Status Conference and for Submissions, 30 August 2022.

<sup>2</sup> Note that the previous submissions of the Defence, [KSC-BC-2020-06/F00871, Selimi Defence Submissions for Thirteenth Status Conference, ("SC Submissions") 8 July 2022], erroneously stated the number of items requested under Rule 102(3) to be 57,328 items. This figure inadvertently omitted from the calculation a request for items dated 7 March 2022.

disclosure history of the items has not been included in these batch spreadsheets, which continues to cause confusion due to the erratic disclosure categorisation of certain items.

4. The Defence looks forward to receiving the consolidated spreadsheets for the individual Rule 102(3) requests once completed/closed,<sup>3</sup> “tracking where particular items might have been disclosed, especially under a different rule” in the very near future.<sup>4</sup>

## 2. Materiality Challenges

5. Since the previous Status Conference, the Defence has received two *inter partes* communications from the SPO on asking that requests be withdrawn for Rule 102(3) items requested by the Selimi Defence. In the first request, the SPO asked the Selimi Defence to withdraw its request for 29 items (out of a total 34 items listed in the email), or for further explanation as to why the listed items are considered potentially material for the Defence’s case in order for the SPO to make a more informed decision as to whether or not to challenge materiality.<sup>5</sup> The Defence withdrew its request for 28 of the listed items, and maintained its request for one of the items, providing the basis upon which the item is considered to be potentially material to the case. Nevertheless, on 1 September 2022, the SPO informed the Defence that it no longer asked it to withdraw its request for 11 out of 29 items, which would be disclosed in due course.<sup>6</sup>
6. On 2 September 2022, the SPO asked the Selimi Defence to withdraw its request for items falling under the following categories: personal IDs (18 items),

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<sup>3</sup> Transcript of Thirteenth Status Conference, 13 July 2022, p. 1363.

<sup>4</sup> Transcript of Eleventh Status Conference, 24 March 2022, p. 1074.

<sup>5</sup> Email from SPO to all Defence Teams, 18 August 2022.

<sup>6</sup> Email from the SPO to the Selimi Defence Team, 01 September 2022.

summons documents (6 items), personal photos (55 items), *ex parte* documents (6 items), and lists of contacts (3 items), amounting to a total of 88 items.<sup>7</sup>

7. With a deadline of 30 September 2022 set by the Pre-Trial Judge for the SPO's review, including any materiality challenges and/or protective measures requests, in relation to currently pending Defence requests for the disclosure of Rule 102(3) material, the Defence is increasingly concerned with the potential number of outstanding challenges to materiality yet to be raised by the SPO.
8. As noted by the Defence in the previous Status Conference, even at the lower scale of the estimated percentage provided by the SPO, the potential number of materiality challenges to individual items (which may vary greatly in terms of type and size) may run into the many hundreds.<sup>8</sup>
9. While in mid-July it may have been the case that the SPO was unable to predict with precision the items for which it could anticipate lodging challenges on materiality, the present submissions are filed a little over three weeks out from the 30 September 2022 deadline, with no further indication as to the total number of materiality challenges expected to be lodged.
10. With the deadline for the Defence Pre-Trial Brief falling exactly three weeks after this date, the Defence will be devoting most of its efforts to its completion. As such, clarification as to actual number of challenges would allow the Defence to plan accordingly for potentially extensive litigation and thus allocate resources accordingly.
11. As such, the Defence respectfully requests that the Pre-Trial Judge order the SPO to provide, at the very least and as soon as possible, an approximate figure of the expected materiality challenges, and to which Defence team(s) these challenges

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<sup>7</sup> Email from the SPO to all Defence Teams, 02 September 2022.

<sup>8</sup> Transcript of Thirteenth Status Conference, 13 July 2022, p. 1364.

may pertain. As noted by the Prosecutor in the previous Status Conference, it is not September 30<sup>th</sup> yet,<sup>9</sup> but today at 5<sup>th</sup> September with just over three weeks left until the deadline, it is reasonable to expect that the number of potential challenges is clearer to the SPO than it was almost two months ago in July 2022.

### 3. Rule 107 Material

12. Regarding the potentially hundreds of remaining items on the Rule 107 clearance list,<sup>10</sup> the Defence eagerly anticipates full clarification from the SPO at the upcoming Status Conference as to the present state of those negotiations. Further, the Defence respectfully requests that the Pre-Trial Judge, given the late-stage of this issue relative to the life-span of the Pre-Trial phase and the upcoming deadline for SPO Rule 102(3) disclosure and Defence Pre-Trial Briefs, directs the SPO to provide not just a status update on the requests, but also a specific breakdown of the nature of the documents in terms of which disclosure Rule they fall under.
13. Since the previous Status Conference, there has been no further update on Rule 107 requests that have been notified to the Defence, with the exception of one confidential redacted filing, to which the Defence responded and is currently being considered by the Pre-Trial Judge. As a preliminary matter, and without discussing the substance of the request, the Defence reiterates its concern over the extensive redactions to that request which negatively affect the Defence's ability to respond in a meaningful manner.
14. Though the concerns of the SPO regarding its obligations to abide by the Rules under which it is bound are understood, the redactions to Rule 107 requests must nonetheless be applied in a manner which at least allows for actual Defence

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<sup>9</sup> Ibid, p. 1365.

<sup>10</sup> Approximately 400 items as of the date of the Thirteenth Status Conference. See, KSC-BC-2020-06/F00869, Prosecution Submissions for Thirteenth Status Conference, para. 6.

participation in its litigation, where relevant/exculpatory material will not be notified pursuant to the SPO's assertion that the interests of the Defence are adequately protected by counterbalancing measures under Rule 108(2).

#### 4. Expert Witnesses

##### a. Updated Expert Reports

15. Rule 149 governs the evidence provided by expert witnesses. Specifically, Rule 149(1) governs the provision of expert reports, setting out that "*the final report of any expert witness to be called by a Party shall be disclosed to the opposing Party and, where applicable, to Victims' Counsel within the time limit set by the Pre-Trial Judge or the Panel pursuant to Rule 102(1)(b)*" [emphasis added]. The deadline for the SPO's provision of Rule 102(1)(b) material has passed (after having that deadline extended on SPO request for approximately a year), with the SPO filing notice of Rule 102(1)(b) material indicating that it has disclosed all previously identified Rule 102(1)(b) material on 31 January 2022. By the wording of Rule 149(1), any expert reports included on the Rule 102(1)(b) list is tacit assertion by the SPO that they are, in fact, final.
16. If the SPO does intend to substantively update any of the previously disclosed expert reports, given the explicit wording of Rule 149(1) set out above, this will constitute a new report. Therefore, it must apply to amend its exhibit list in the same way as it would for any other document not previously notified on the Rule 102(1)(b) list, subject to the "greater scrutiny" that must be applied to any further amendments to the exhibit list past the 31 January 2022 deadline,<sup>11</sup> and with any updated report added to the Rule 102(1)(b) list subject to the provisions of Rule 149(2).

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<sup>11</sup> KSC-BC-2020-06/F00727/CONF/RED Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022, para. 30.

**b. Additional Experts**

17. Any submissions by the SPO to add expert witnesses to the Witness List at this relatively late stage of proceedings must also be subject to the greatest of scrutiny particularly in terms of whether it can show good cause for not having included these witnesses on its Witness List in December 2021, or at the very least, having not sought an amendment to add such witnesses to that list in the almost 10 months since it was initially filed.
18. The present case concerns crimes alleged to have occurred over two decades ago. Several cases related to the same conflict have been investigated and tried at the ICTY, and subsequently investigated for many years prior to the present case now approaching two years in its Pre-Trial phase. The issues for which an expert may be required to assist the court in understanding issues which may be outside of its knowledge and expertise must, for many years, have been manifest to the SPO.
19. In addition, as experts provide evidence of opinion and not of fact, an expert witness is not a unique source of evidence in the same way that it could be argued, in certain circumstances, a fact witness may be. As such, the SPO has been in a position, for many years, to solicit the advice and participation of experts well ahead of time and should it choose to request the addition of such witnesses, it must provide an airtight reason as to why this could not have been done sooner.

**B. Defence Investigations and Next Steps****1. Status of Defence Investigations**

20. Defence investigations are continuing at pace since the previous Status Conference and will continue to proceed with increasing intensity throughout the Pre-Trial period and beyond into trial, with investigative leads being

continually identified, prioritised and developed, particularly as the disclosed material continues to be reviewed and analysed. However, two main obstacles remain in place which affect these investigations.

21. First, the difficulties posed to the flexibility of the Defence to conduct its investigations by virtue of the Decision on Contact with Witnesses (“Contact Decision”), are set out in the previous Status Conference submissions and remain.<sup>12</sup> As before, while the Defence is in no way attempting to improperly challenge the Contact Decision, currently before the Appeals Panel, the impact of this decision on the strategy and timing of the Defence investigations cannot be ignored.<sup>13</sup>
22. Further, it remains unclear to the Defence whether or not the SPO has made every person on its witness list aware of the fact that they are to be called as SPO witnesses. As a consequence, when the Defence requests to meet with witnesses, and the SPO informs them of such requests and by definition informs them of their status as an SPO witness, it may well be the first time that this information is conveyed to them. This will likely result in a certain amount of confusion and delay which would be best mitigated by the SPO being required to inform each of these 326 witnesses now that they are prosecution witnesses. The Pre-Trial Judge should order the SPO to make this notification at the earliest opportunity, and within a set deadline, or in the alternative, to clarify whether, and how many of, its witnesses have been informed of this fact.
23. Second, the Defence continues to be severely hampered by the extensive redactions to the Indictment, the SPO Pre-Trial Brief and the witness statements that purport to support both. As with the Contact Decision, the Defence is not improperly challenging or seeking reconsideration of redaction decisions made

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<sup>12</sup> SC Submissions, paras 18, 19.

<sup>13</sup> SC Submissions, para. 21.



by the Pre-Trial Judge. This issue has been set out numerous times both in written and oral submissions since the Defence first raised it in response to the SPO's first Request for Protective Measures in December 2020:

“Finally, when assessing a request for protective measures, the Pre-Trial Judge must respectfully always keep at the forefront of his mind, the impact of the proposed measures on the ability of the Defence to investigate and effectively and efficiently confront the evidence at trial.”<sup>14</sup>

24. In a small counterbalance to both of the issues outlined above, Defence investigations would be greatly assisted by an indication from the SPO as to the provisional appearance of witnesses for the first three months trial. It is well understood that setting definite schedules for witnesses to appear at trial is not an exact science, and as such, this list would not have to be final, or even in any particular order.
25. Such a list would allow the Defence to organise and focus its investigative efforts on a compartmentalised group of witnesses out of the hundreds currently listed for appearance by the SPO. This would also allow the Defence to prioritise and make applications for consent of specific witness to be interviewed and the setting in place the required interview conditions currently mandated by the Contact Decision, which as noted above, will be time consuming. Thus, the Defence respectfully requests that the Pre-Trial Judge order the SPO to provide a provisional list of witnesses, without prejudice to further amendments or variations, for the first three months of trial and within a set deadline.
26. In relation to the specific question of the Pre-Trial Judge relating to the filing of the Pre-Trial Brief and despite certain difficulties outlined above; as of now, the

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<sup>14</sup> F00127, Selimi Defence Response to Confidential Redacted Version of Specialist Prosecutor's 'Request for Protective Measures' and Supplement to Request for Protective Measures', 8 December 2020, para. 15.

Defence does not foresee any difficulty in meeting the filing deadline of 21 October 2022. This remains subject to the caveats previously expressed.<sup>15</sup>

## **2. Remaining Questions of the Pre-Trial Judge for the Defence**

27. At the present time, no unique investigative opportunities are envisaged.<sup>16</sup>
28. The Defence currently envisage potentially needing to give notice of an alibi or grounds for excluding responsibility, pursuant to Rule 95(5) of the Rules, subject to the redacted allegations in the Indictment being unredacted.<sup>17</sup>
29. The Defence is still actively reviewing facts to determine whether or not it can agree to them and notes the exchange of correspondence on certain facts between other teams which may facilitate agreement on some issues.<sup>18</sup>
30. As set out in submissions before the previous Status Conference,<sup>19</sup> the Defence respectfully submits that objections to the admissibility of evidentiary material pursuant to Rule 95(2)(e) remain premature, regardless of the deadline suggested.<sup>20</sup> However, the Defence repeats its offer to constructively assist the Pre-Trial Judge in fulfilling his statutory duty to prepare the case for trial and reiterates its willingness to enter into preliminary discussions with the SPO on which documents the Defence may not oppose being admitted during trial proceedings if the SPO can provide relevant information on which documents it will seek to rely upon at trial and why.<sup>21</sup>
31. The Defence does not foresee creating a list of issues subject to dispute and those not subject to dispute beyond the agreed facts. The burden rests on the SPO to

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<sup>15</sup> SC Submissions, para. 37.

<sup>16</sup> Order, Section 2.b.

<sup>17</sup> Order, Section 2.c.

<sup>18</sup> Order, Section 2.d.

<sup>19</sup> SC Submissions, para. 33.

<sup>20</sup> Order, Section 2.e.

<sup>21</sup> See SC Submissions, paras 34 – 36.

prove its case to the appropriate standard and is required to do so for every relevant underlying fact unless explicitly agreed to by all four Accused.<sup>22</sup>

### III. PROPOSED DATE FOR NEXT STATUS CONFERENCE

32. The Defence is amenable to the setting of a date for a Status Conference in October 2022. However, due to the fact that Tuesday 18 October 2022 will fall three days before the deadline for the filing of the Defence Pre-Trial Briefs, it is respectfully requested that the proposed date be moved to a day during the week beginning Monday 24 October 2022.

### IV. RELIEF REQUESTED

33. The Defence respectfully requests that the Pre-Trial Judge order the necessary practical steps set out in paragraphs 11, 22 and 25.

Word count: 2,859

Respectfully submitted on 5 September 2022,



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<sup>22</sup> Order, Section 2.f.



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