



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

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Trial Panel II
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 14 February 2023

Language: English

Classification: Public

**Prosecution Submission in advance of Specialist Prosecutor's preparation conference
with Confidential Annexes 1-3 and Strictly Confidential and *Ex Parte* Annexes 4-6**

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. In recognition of the Trial Panel's requests and oral orders at the trial preparation conference,¹ the Agenda,² the Decision,³ Articles 37 and 40 of the Law,⁴ and Rules 95(4), 137-139 and 153-155,⁵ the Specialist Prosecutor's Office ('SPO') hereby provides submissions concerning its witness list, including the mode of testimony and time estimates, and the steps that it has taken to streamline and reduce the duration of the Prosecution case.
2. Furthermore, in response to the Panel's Decision⁶ and requests,⁷ the SPO provides additional information on its case presentation. This implicates the protective measures regime, and the SPO hereby provides updated information about the timing of disclosure for certain of the remaining delayed disclosure witnesses and the impact this disclosure has on witness scheduling.⁸

¹ See Transcript (Trial Preparation Conference), 18 January 2023, pp.1812-1814 and Eighth Oral Order, p.1904. See also Transcript (Status Conference), 16 December 2022, pp.1731-1734 (discussing plans and logistics for the admission of written statements pursuant to Rules 153, 154 and 155), 1736-1737 (discussing the time estimates for Rule 154 witnesses), 1774-1775 (discussing the presenting party's responsibility to ensure that a subsequent witness can be called as soon as the evidence of the previous witness is concluded so as to avoid any delay in the proceedings).

² Agenda for Specialist Prosecutor's Preparation Conference with Confidential Annex 1, KSC-BC-2020-06/F01227, 26 January 2023, ('Agenda'). Unless otherwise stated, all references to Kosovo Specialist Chambers ('KSC') filings are to this case.

³ Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Decision'), paras 51 (encouraging 'Parties and participants to consider making effective use of Rules 153, 154 and 155, to the greatest extent possible'), 60 (encouraging the Parties and participants to consider the submission of evidence through bar table motions).

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the Law, unless otherwise specified.

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules of Procedure and Evidence.

⁶ Decision, KSC-BC-2020-06/F01226/A01, para.72 ('The presenting Party is instructed to present its case in a logical manner, and to notify the Trial Panel of the overall sequence in which it proposes to present its case.').

⁷ See e.g. Transcript (Trial Preparation Conference), 18 January 2023, pp.1818-1823; Transcript (Status Conference), 16 December 2022, pp.1728-1731.

⁸ See Annex 3 (Confidential version). See also Annex 6 (Strictly Confidential and *Ex Parte* version). Further information concerning the case presentation and related witness security implications can be found in the

3. Given the breadth of topics covered by the Agenda for the SPO Preparation Conference and the common interest in an efficient meeting, the SPO has prepared this submission to facilitate more focused and informed discussions. To the extent possible, discussion about particular witnesses, by witness code or name, should be avoided to prevent unnecessary publicity related to their upcoming testimony.

II. REDUCTIONS TO WITNESS LIST AND HOURS ESTIMATES

4. The SPO has consistently expressed its commitment to keeping its witness list and time estimates under review during the proceedings.⁹ In recent submissions, the SPO has informed the Panel and the parties of witnesses the SPO no longer intends to call and reductions in time estimates.¹⁰

5. The process of calling witnesses requires continuous evaluation of witness security and availability. It also requires careful consideration of the sufficiency of the evidence required to be placed before the Panel, in light of admitted evidence—an assessment that must be made on a rolling basis throughout the Prosecution case. The SPO has always been mindful of the need to try this case within a reasonable timeframe, as determined by the particular needs and challenges of this case.¹¹ During pre-trial proceedings, the SPO has decided not to call witnesses and modified hours estimates based on witness availability, witness security, and the sufficiency of the expected evidence. In preparing these submissions, the SPO has understood that the Panel seeks information reflecting

Prosecution Response to Defence Requests for Multi-Week Adjournments, KSC-BC-2020-06/F01290, 14 February 2023 ('Adjournment Response'), and the Strictly Confidential and *Ex Parte* Annex thereto. *See also* Prosecution submission pertaining to select delayed disclosure witnesses, KSC-BC-2020-05/F01208/CONF/RED, Confidential, 13 January 2023, para.25.

⁹ *See e.g.* Prosecution submission of revised witness list, KSC-BC-2020-06/F00948, Public, 2 September 2022 ('Revised Witness List Submission'), para.9 and Annex 3; Transcript (Status Conference), 16 December 2022, pp.1736-1737.

¹⁰ *See e.g.* Revised Witness List Submission, KSC-BC-2020-06/F00948, para.9; Prosecution submission of amended witness and exhibit lists, KSC-BC-2020-06/F01078, Confidential, 2 November 2022, para.2b.

¹¹ In this respect, comparisons to other trials at other institutions have limited value.

further reductions in the length of the SPO case.¹² At this juncture, within weeks of the commencement of trial, it is apparent that some witnesses can no longer be reasonably expected to testify due to their location or personal circumstances.¹³

6. As a sum of all these factors and current circumstances, the SPO has reduced the number of witnesses on its witness list and has reduced its hours estimates for particular witnesses. The SPO intends to seek admission of the evidence of 312 witnesses and projects an estimate of 545.5 hours to present its case. This constitutes a 24% reduction in hours from the estimate filed on 2 November 2022.¹⁴

7. Multiple measures were employed to achieve this reduction in case length.¹⁵ In short, the SPO has decided not to call 11 witnesses,¹⁶ has determined that it will not rely on events at one scheduled site to prove the charges,¹⁷ has converted witnesses from fully live testimony to Rule 154 or 153, or from Rule 154 to 153, has reduced the time estimates for Rule 154 and live testimony witnesses, and has adjusted the hours for three witnesses who now require admission of their evidence under Rule 155.¹⁸

8. For Rule 154 witnesses, the SPO has reduced the estimated hours based on its assessment of the sufficiency of the written evidence and in the interests of an expeditious

¹² See e.g. Transcript (Trial Preparation Conference), 18 January 2023, pp.1812-1813, Eighth Oral Order, p.1904; Transcript (Status Conference), 16 December 2022, pp.1736-1737 (discussing the length of the estimates to question Rule 154 witnesses).

¹³ In some cases, that has led to decisions not to call witnesses. In other cases, Rule 155 applications will be made.

¹⁴ See Annex 4 to Submission of amended witness and exhibit lists, KSC-BC-2020-06/F01078/A04, Confidential, 2 November 2022, p.19. The reductions noticed in the filing on the first 12 witnesses are included herein. See further Annex 1 to Prosecution submission of list of first 12 witnesses and associated information, KSC-BC-2020-06/F01243/A01, Confidential, 1 February 2023.

¹⁵ The SPO was ordered to illustrate the measures taken in this regard (see Transcript (Trial Preparation Conference), 18 January 2023, Eighth Oral Order, p.1904) and provide information about shortening the estimated length of its case-in-chief (see Agenda, KSC-BC-2020-06/F01227, para.7(f)).

¹⁶ See Annex 1 (Confidential version). See also Annex 4 (Strictly Confidential and *Ex Parte* version).

¹⁷ After consideration of all relevant circumstances, the SPO has decided not to call the sole witness who was expected to testify about events at one location. Accordingly, the SPO does not intend to lead evidence related to paragraphs 91 and 132 of the Indictment (see Schedule A, 2.1).

¹⁸ See Annex 2 (Confidential version). See also Annex 5 (Strictly Confidential and *Ex Parte* version).

trial. Similarly, for Rule 153 witnesses, the SPO has chosen this mode as part of its streamlining efforts. Of course, the SPO's ability to present its case pursuant to these estimates is plainly dependent on the outcome of its Rule 153 and Rule 154 motions. If the SPO is precluded from tendering the selected prior statements and associated exhibits as proposed under Rule 154, the hours reductions will have to be adjusted. If the Panel determines under Rule 153(3) that some of the proposed witnesses should appear for cross-examination pursuant to Rule 154, this would also impact the projections.¹⁹

9. The hours estimates are also conditioned on the admission of exhibits from the bar table. While it is too early in the trial to accurately indicate the precise number or percentage of exhibits which will be admitted in writing, the SPO will tender as many exhibits by bar table motion as it can and intends to offer at least 50-60% of its exhibits in written submissions.²⁰ While the SPO does not have the benefit of the Panel's decisions on its first Rule 154 motion²¹ or its first bar table motion,²² which were both filed last week, based on the caselaw of similarly-situated courts²³ and the expressed preferences of the

¹⁹ In such cases, the SPO will increase its hours to accommodate limited questioning by the SPO.

²⁰ The exhibits will be tendered by bar table motion or as associated exhibits to Rules 153-155 statements/transcripts. Of the 18,565 exhibits on the exhibit list, approximately 4,977 are prior statements of witnesses, which are not bar-table eligible. The SPO's estimate excludes these exhibits.

²¹ Prosecution motion for admission of evidence of Witnesses W04474, W04421, W04355, W02161, W04337, and W03165 pursuant to Rule 154, KSC-BC-2020-06/F01262, Confidential, 7 February 2023 ('Rule 154 motion').

²² Prosecution application for admission of material through the bar table, KSC-BC-2020-06/F01268, Public, 8 February 2023.

²³ See e.g. ICTY, *Prosecutor v. Sainović et al.*, IT-05-87-A, Appeal Judgement, 23 January 2014, para.135 ('the Appeals Chamber recalls that the parties are expected to present their cases as efficiently as possible, taking advantage of all available avenues for presentation of relevant evidence, including those provided for under Rules 92bis and 92ter of the Rules'); ICC, Trial Chamber V, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-685, Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, para.26. In particular, the current corresponding provision in the ICC Rules—Rule 68—has resulted from an amendment adopted by the Assembly of States Parties adding instances when prior recorded testimony may be introduced in the absence of a witness and had the explicit purpose 'to reduce the length of ICC proceedings and streamline evidence presentation'. See ICC, Assembly of States Parties, Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, Annex II.A, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para.8; ICC, Assembly of States

Panel,²⁴ admission in writing is planned as it reduces the time spent on such matters in the courtroom and does not, in any way, preclude the use of relevant exhibits in the courtroom.

10. Going forward, the SPO will make further changes to its witness list and hours estimates as it can,²⁵ based on availability, security, and its assessment of the necessity of testimony in light of other evidence being elicited and admitted. As such, these are dynamic, not static, matters. Examination estimates reflect the time needed based on currently available information about a witness's cooperation. In the event that a witness refuses to testify or recants, the SPO may need to increase the hours of direct examination with the witness. It may also need to present the evidence of other witnesses to meet its burden. Thus, the witness list and the witness order have been prepared in line with the realistic understanding that due to the number and nature of variables that may affect securing the testimony of a witness, a degree of flexibility is needed in order to ensure that important evidence is admitted. In short, the SPO may be forced to revise its hours estimate for individual witnesses and its plans on how best to prove a particular allegation as circumstances change.

11. The SPO estimates that, based on currently available information and bearing in mind the preliminary nature of such an estimate, its case may conclude at the end of 2024, though it may continue into 2025, depending on numerous factors. This target estimate

Parties, Resolution ICC-ASP/12/Res.7, pp.52-53. See also SCSL, Trial Chamber II, *Prosecutor v. Taylor*, SCSL-03-01-T-556, Decision on Prosecution Notice Under Rule 92bis for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice under Rule 92bis for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008 (admitting prior trial transcripts and related exhibits into evidence provided the Prosecution made the witnesses available for cross-examination).

²⁴ Decision, KSC-BC-2020-06/F01226/A01, paras 51, 60. See also *Specialist Prosecutor v. Mustafa*, Decision on the submission and admissibility of evidence, KSC-BC-2020-05/F00169, Public, 25 August 2021, para.29; *Specialist Prosecutor v. Mustafa*, Decision on the Prosecution application pursuant to Rule 153 of the Rules, KSC-BC-2020-05/F00286/RED, Public, 17 December 2021, paras 21, 27, 34.

²⁵ These changes will be conveyed to the parties and the Panel promptly and regularly throughout the SPO's case.

cannot fully account for the time spent in cross-examination, nor can it fully predict the impact to the proceedings of the ongoing climate of intimidation and interference.²⁶

12. To be clear, the SPO believes it is in the interests of justice, and of the victims, the witnesses and the Accused for the trial to be expeditious. This office is committed to doing all it can to ensure that happens, while also balancing this interest against its burden of proof and the paramount priority of ensuring the safety of witnesses.

III. CASE PRESENTATION AND DISCLOSURE

13. The SPO has made submissions on the factors which inform scheduling of the first group of witnesses who will testify in this case.²⁷ Those submissions will not be repeated here. Without a doubt, the need to present a coherent, understandable case animates the SPO's case presentation, along with the need to ensure an expeditious and fair trial and ensure the safety of witnesses.

14. Given the importance of providing the Defence with relevant materials for cross-examination purposes and the desire to avoid a stay of proceedings or having to recall any witness, the SPO is continuously reviewing the relevant circumstances in order to disclose witness-related materials of certain delayed disclosure witnesses. This review requires taking into account both the security situation and interests of witnesses and the fair trial rights of the Accused. At this time, the SPO intends to lift non-standard redactions in the materials of select delayed disclosure witnesses before 22 February 2023.²⁸ Moreover, the SPO will call certain witnesses at an earlier date, after the requisite

²⁶ This time estimate reflects the SPO's commitment to resolve issues as they arise as much as possible through *inter partes* cooperation and discussion. As to the disruptive nature of witness intimidation already present in this case, see Adjourment Response, KSC-BC-2020-06/F01290 and the Strictly Confidential and *Ex Parte* Annex thereto.

²⁷ See Adjourment Response, KSC-BC-2020-06/F01290, and the Strictly Confidential and *Ex Parte* Annex thereto.

²⁸ See Annex 3 (Confidential version). See also Annex 6 (Strictly Confidential and *Ex Parte* version).

period following disclosure, to limit the length of time that they are facing the highest risk of exposure, interference, and intimidation.²⁹

IV. CONCLUDING REMARKS

15. The SPO must prove this case beyond a reasonable doubt. Like other cases before the KSC, this involves presenting sufficient evidence for the Panel to be satisfied as to the contextual elements for the charged crimes. Unlike other cases, this case also requires presenting sufficiently reliable and probative evidence demonstrating (i) criminality across many locations and spanning an 18-month Indictment period, (ii) the contributions of four accused persons, JCE Members, and tools, (iii) the exercise of command and control, and (iv) the Accused's role in, and the existence of, a common criminal plan to gain and exercise control over all of Kosovo by means including unlawfully intimidating, mistreating, committing violence against, and removing those deemed to be opponents.

16. Given the climate of intimidation that may require additional adjustments to the time and presentation of evidence, the provided information reflects the SPO's best forecast at this time. In order to prove every element of every crime charged, the SPO must be entitled to present a case of sufficient depth,³⁰ which requires calling necessary witnesses

²⁹ For witnesses with security concerns which warranted the imposition of delayed disclosure until 30 days before testimony, the SPO is scheduling them, to the extent possible, in line with the need to limit the length of time between the disclosure of their identity and when they give evidence, as the greater the length of time, the greater the potential for interference. *See Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, KSC-BC-2020-06/F00133/COR/CONF/RED, Confidential, 10 December 2020, para.21, and the authorities cited in fn.43. There is no change to the first twelve witnesses.*

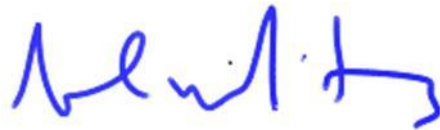
³⁰ In this regard, the *Orić* Appeals Chamber noted that 'The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt.' (*See ICTY, Prosecutor v. Orić, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para.7.*) This was endorsed by the Appeals Chamber in *Ndayambaje et al.*, which also noted that where the Trial Chamber exercises its discretion to limit the number of witnesses a party may call, 'it must be subject to the full respect of the rights of the party concerned' (*see ICTY, Prosecutor v. Ndayambaje et al., ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, para.26.*)

and tendering compelling documentary evidence with a degree of flexibility to accommodate ever-changing circumstances.

CLASSIFICATION

17. This submission is filed as public, with confidential and strictly confidential annexes containing detailed information about protected witnesses.

Word Count: 2927



Alex Whiting

Acting Specialist Prosecutor

Tuesday, 14 February 2023

At The Hague, the Netherlands.