



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 Smith III, Presiding
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 21 February 2023

Language: English

Classification: Public

Prosecution request for compliance with Third Oral Order regarding proposed duration of cross-examination and related matters

with confidential Annex 1

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to the Third Oral Order¹ regarding the first 12 witnesses, the Specialist Prosecutor's Office ('SPO') requests the Panel to order all Defence teams to fully comply with the above order and submit the required information regarding duration of cross-examination immediately. In addition to the provision of this information being ordered by the Panel, without it the SPO cannot effectively engage in definitive scheduling preparations with any of the 12 witnesses.
2. To the extent the Joint Defence Response² makes additional requests concerning future filings and protective measures, which would amount to unwarranted modifications of the Conduct of Proceedings Order,³ the SPO also briefly responds to these requests below.

II. PROCEDURAL HISTORY

3. On 16 December 2022, the Panel issued its Third Oral Order regarding the first 12 witnesses, ordering the SPO to provide certain information regarding the first 12 witnesses by 1 February 2023, and all Defence teams to provide, *inter alia*, proposed duration of cross-examination for each of the 12 witnesses by 3 February.⁴
4. The SPO fully complied with this order.⁵

¹ Transcript (Status Conference), 16 December 2022, pp.1773-1775 ('Third Oral Order').

² Joint Defence Response to Prosecution Submission of List of First 12 Witnesses and Associated Information (F01243), KSC-BC-2020-06/F01286, 13 February 2023, Confidential ('Joint Defence Response'). While the Joint Defence Response is confidential, these submissions do not reveal any confidential information and are therefore filed publicly. Annex 1 is confidential as it concerns *inter partes* correspondence, including information pertaining to protected witnesses.

³ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01 ('Conduct of Proceedings Order').

⁴ Third Oral Order, pp. 1773-1774.

⁵ Prosecution submission of list of first 12 witnesses and associated information, KSC-BC-2020-06/F01243, 1 February 2023 ('Prosecution Submission').

5. On 13 January 2023, all Defence teams jointly requested an extension of time until 13 February 2023 to comply,⁶ which was not opposed by the SPO, and was granted.⁷
6. On 13 February 2023, the Joint Defence Response was filed. Three Defence teams,⁸ without requesting an extension, only partially complied with the Third Oral Order.⁹ For certain witnesses, the THAÇI, SELIMI, and KRASNIQI Defence teams indicate that they will cross-examine, but for proposed duration indicate only 'N/A'. In the Joint Defence Response, the Defence also requested modifications to the form of notice for groups of witnesses¹⁰ and scrutiny as to the necessity for in-court protective measures. Finally, the Defence made submissions on a number of procedural and admissibility issues, including in relation to Rule 154 statements, communiqués, seized materials, and statements of co-Accused.¹¹
7. On 15 February 2023, during the Specialist Prosecutor's Preparation Conference, the SPO brought non-compliance with the Defence's cross-examination estimates to the attention of the Panel and highlighted some of the complications that this causes.¹²
8. The SPO has sought to resolve this issue *inter partes*, but the relevant Defence teams have, to date, made it clear that they do not consider themselves bound by the 13 February 2023 deadline.¹³ This engagement has also confirmed that at least some witnesses marked 'N/A' by a Defence team will be cross-examined by that Defence team.

⁶ Joint Defence Request for a Variation of the Time Limit to Provide Information about the examination of SPO Witnesses, KSC-BC-2020-06/F01204, 13 January 2023.

⁷ Transcript (Trial Preparation Conference), 18 January 2023, p.1904, lines 11-16.

⁸ Only the VESELI Defence provided cross-examination duration estimates for all 12 witnesses.

⁹ See Annexes 1, 2, 3, 5, and 8 of the Joint Defence Response.

¹⁰ Joint Defence Response, KSC-BC-2020-06/F01286, paras 4-8, 31.

¹¹ Joint Defence Response, KSC-BC-2020-06/F01286, paras 9, 12-31.

¹² Transcript (Specialist Prosecutor's Preparation Conference), 15 February 2023, p.2038, lines 15-17.

¹³ See Annex 1: Email from SELIMI Defence to SPO dated 20 February 2023, at 14.18 (providing estimates for two additional witnesses and indicating that additional estimates will be provided in future 'with enough time for [the SPO] to make the necessary calculations'); Email from THAÇI Defence to SPO dated 16 February 2023, at 19.45 (providing an estimate for one additional estimate, indicating that it is not required to provide further estimates at this time, and undertaking to 'attempt' to provide further estimates

9. To date, even including the further information provided through the above referenced *inter partes* communications, only the VESELI Defence gives an estimate for the second, third, and eighth SPO witnesses, and an estimate remains outstanding from the THAÇI Defence on the fifth SPO witness.

III. SUBMISSIONS

10. The SPO notes as a preliminary matter that, notwithstanding the revised trial date, the Third Oral Order has not been modified by the Panel and remains binding. If a Defence team wished to deviate from an order, the proper course was to make a further extension request in advance,¹⁴ rather than to simply ignore the order based on a convenient belief that it no longer applies. The relevant Defence teams are surely aware of this, having already requested and been granted such an extension of time on this issue. Further, failure to comply, under these circumstances, calls into question the very purpose of that request.

11. On a more practical note, the SPO wishes to make clear that witness scheduling fundamentally depends on this information.

12. The Panel has generally provided for a sitting schedule of four days per week, five hours per day, for three-week periods, followed by breaks of either one or two weeks.¹⁵ This amounts to approximately 20 sitting hours per week. It is worth noting that among the cross-examination estimates that have been provided, for one witness there is an individual Defence team cross-examination estimate of 10 hours and an aggregate estimate of 20 hours.¹⁶ Therefore, especially given potential cross-examination times that

on a rolling basis); Email from KRASNIQI Defence to SPO dated 17 February 2023, at 10.48 (providing estimates for two additional witnesses and indicating that additional estimates would be provided on a rolling basis).

¹⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), Rule 9. All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

¹⁵ Transcript (Trial Preparation Conference), 18 January 2023, p.1810, lines 1-9.

¹⁶ Annex 6 of Joint Defence Response.

could last as long as an entire sitting week, without estimates it is difficult to discern which week, let alone day, a witness needs to be present.

13. The complex logistics of, *inter alia*, travel, witness preparation, and court familiarisation simply cannot be accommodated without realistic cross-examination estimations for all 12 witnesses. In addition to being people with work and family lives, witnesses have the added feature of being in a potentially stressful and traumatic situation which should not be prolonged or altered simply because Defence teams refuse to indicate whether their collective cross-examination will amount to an hour, a day, or a week.

14. There is, of course, the additional concern of making full use of limited court time. In that regard, after having received complete cross-examination estimates, the SPO intends to do a final review of witness order to maximise court utility and avoid witnesses having to stay over for an extra three days or more. This exercise, which cannot be conducted before complete cross-examination estimates have been received, may well necessitate changes in the definitive witness order.

15. Witnesses will already be asked to be available for a significant period of time around their testimony. With time needed for travelling, witness preparation at least 24 hours prior to their testimony, and being available early enough to ensure no courtroom time is lost between witnesses, most witnesses will have to make themselves available for a minimum of six days or longer.¹⁷ Timely and realistic cross-examination estimates are needed to avoid imposing unreasonable burdens on witnesses.

16. In addition to the non-compliance set out above, the relief requested in the Joint Defence Response concerning the filing of Provisional Lists¹⁸ and protective measures

¹⁷ This schedule is based on the understanding that witness preparation can be conducted also during weekend days.

¹⁸ The term 'Provisional List(s)' refers to the list(s) to be provided pursuant to paragraphs 73-74 of the Conduct of Proceedings Order.

amounts to an unwarranted modification of the Third Oral Order and Conduct of Proceedings Order. The Prosecution Submission fully complied with the Third Oral Order and the Defence had all necessary information. As the Defence itself acknowledged, the additional metadata requested for purposes of future Provisional Lists is already available on Legal WorkFlow.¹⁹ Further, the Defence does not explain why any modification of the timeline established in the Conduct of Proceedings Order for uploading a presentation queue²⁰ for each witness is necessary at the time of submitting the Provisional List. Considering the nature and timing of the Provisional List and that, at the time of filing each Provisional List, decisions on, *inter alia*, related bar table motions and Rule 154 applications are outstanding, uploading presentation queues along with the Provisional List would be premature and ultimately could result in unnecessary use of resources.

17. In relation to the request for ‘scrutiny’ of applicable protective measures,²¹ the Conduct of Proceedings Order establishes a procedure, consistent with the framework and standards set out in Rules 80-81.²² This includes the opportunity for the Parties and Victims’ Counsel to request variations and the obligation on the calling Party to notify the Panel when protective measures are no longer required. Considering that the necessary and proportionate protective measures ordered by the Pre-Trial Judge continue unless varied pursuant to Rule 81, the submissions in the Joint Defence Request do not include any clear and specific reasons²³ concerning why any particular measures are no longer justified. Such submissions and the related request should therefore be disregarded.

¹⁹ Joint Defence Response, KSC-BC-2020-06/F01286, para.5.

²⁰ The Conduct of Proceedings Order addresses the uploading of presentation queues in Legal WorkFlow in paragraph 79.

²¹ Joint Defence Response, KSC-BC-2020-06/F01286, paras 7-8, 31.

²² Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 63-70, 75-76.

²³ See Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 64, 76(i).

18. Finally, the Defence preliminary submissions on a number of procedural and admissibility issues, including in relation to Rule 154 statements, communiqués, seized materials, and statements of co-Accused,²⁴ relate to motions that have already been or will be made by the SPO and, as appropriate, the Parties and Panel will have the opportunity to address such matters in that context, namely, when the SPO seeks their admission into evidence.

IV. RELIEF REQUESTED

19. For the foregoing reasons, the SPO respectfully requests that the Panel (i) direct the THAÇI, SELIMI, and KRASNIQI Defence teams to fully comply with the Third Oral Order and that the relevant information regarding estimated duration of cross-examination be provided immediately; and (ii) reject the Defence requests to modify the portions of the Conduct of Proceedings Order concerning the Provisional List (in particular, any requirement to submit a 'preliminary' presentation queue) and protective measures.

Word count: 1787



Alex Whiting

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Tuesday, 21 February 2023

At The Hague, the Netherlands.

²⁴ Joint Defence Response, KSC-BC-2020-06/F01286, paras 9, 12-31.