PUBLIC
Date original: 10/02/2021 10:11:00
Date public redacted version: 30/03/2023 10:03:00

| | |
|---|---|
| **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:** | 10 February 2021 |
| **Language**: | English |
| **Classification**: | Public |

---

# Public Redacted Version of Thaçi Defence Submissions for Third Status Conference

---

**Specialist Prosecutor**

Jack Smith

**Counsel for Hashim Thaçi**

David Hooper

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Rexhep Selimi**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagendra

# I. INTRODUCTION

1. On 3 February 2021, the Pre-Trial Judge ("PTJ") issued an Order Setting the Date for a Third Status Conference and for Submissions.[1]

2. On 8 February 2021, the SPO filed its Prosecution submissions for third status conference.[2] On the same day, the Registrar notified her Submission on Translations.[3]

3. On 9 February 2021, the PTJ issued an Order Rescheduling the Third Status Conference.[4]

4. The defence for Mr Hashim Thaçi ("defence") hereby submits its observations on the issues listed by the PTJ in his Order of 3 February 2021.

5. The current observations are filed as confidential since they relate, *inter alia*, to material disclosed *inter partes*. A public redacted version will be filed in due course.

# II. SUBMISSIONS

## ITEM 1: DISCLOSURE

### 1. Identification of SPO witnesses

6. The defence has identified 123 people who have been given a witness number in Legalworkflow by the SPO.

7. However, this group of 123 people does not represent all of the people who have been interviewed by the SPO. For instance, [REDACTED] have been interviewed by the SPO, are quoted in the SPO outline F136/A01, but have not been given a witness number in Legalworkflow. Similarly, the SPO has disclosed numerous statements or transcripts of interviews of witnesses interrogated by previous courts (ICTY, UNMIK

[1] KSC-BC-2020-06/F00185.
[2] KSC-BC-2020-06/F00191 ("SPO Submissions").
[3] KSC-BC-2020-06/F00192.
[4] KSC-BC-2020-06/F00193.

court of Pristina, etc.) or investigative entities (EULEX, SITF, etc.), also quoted in the SPO outline F136/A01, but who have not been given a witness number in Legalworkflow. It remains unclear whether the SPO will call these individuals as witnesses or not.

8. Without further clarity, as to the identity of the 200 witnesses the SPO presently intends to call, the defence will be required to investigate any person who has given a statement or interview which has been disclosed in Legalworkflow, which will have obvious implications for trial readiness. As such, the defence asks that the SPO be ordered to clarify its methodology for the numbering of witnesses, and disclose by 28 February at the latest, the names/numbers of the witnesses that it anticipates calling to testify at trial.

### 2. Identification of material related to each SPO witness

9. Review of the witness material disclosed by the SPO has revealed missing information. For example, for [REDACTED], the PTJ ordered only in-court protective measures (F00133-Corr-Conf-Red). For a third witness, [REDACTED], the PTJ authorised the delayed disclosure of his/her identity until 30 days before trial, but not delayed disclosure of the related material itself (F00133-Corr-Conf-Red). However there are currently no documents linked to these three witness numbers in Legalworkflow. A defence request to the SPO to provide the relevant document references has not received a response. The defence reiterates its request to be notified of the documents related to these witnesses, and asks more generally that the SPO be ordered to link the documents disclosed in Legalworkflow to the concerned witness on a systematic basis. Links should be made, for example, between a witness and any map or handwritten document annotated by them.

10. The transcripts of witness interviews reveal that some witnesses have been shown and asked to comment on certain documents, the reference of which is given in the transcript of interview. However, it appears that documents discussed by witnesses have either (i) not been disclosed to the defence, or (ii) been disclosed with

references which differ from those used in the interviews. For example, [REDACTED]'s transcript of interview 005402-TR-ET Part 2 Revised RED reveals that the witness was shown a previous statement from [REDACTED], reference number [REDACTED] (see p. 12 l. 5 of the transcript). The SPO has not disclosed a document with this ERN number. The defence accordingly asks that the SPO also be ordered to disclose any document shown and/or commented by a witness and to link it to the witness in Legalworkflow.

**ITEM 3: RULE 109(C) CHART**

11. Since the last Status Conference, no progress has been made, *inter partes*, in reaching agreement on the Rule 109(c) chart.

12. The defence therefore reiterates its previous submissions, namely:

- The four 'Categories', "Evidence to be presented by the SPO", "Underlying crimes", "Alleged conduct of the Accused", and "Contextual elements of the crimes", applied by the SPO to the documents disclosed in Legalworkflow, are insufficiently precise - they are so lacking in detail that they serve no useful purpose.[5]
- Pursuant to Rule 109(C) of the RPE, the defence is entitled to receive further information with each disclosure package [6] and therefore asks the PTJ to order the SPO to specify, for each item disclosed, with each disclosure package, which underlying crime (with a reference to the relevant count and, where possible, to the alleged place of events), which accused (with a reference to the name of the accused) and which conduct (with a reference to the relevant mode of

[5] KSC-BC-2020-06/F00143, Defence for Hashim Thaçi - Submissions for Second Status Conference, 15 December 2020, paras 10-11.
[6] *Ibid.*, para. 12.

liability) is concerned; the category 'contextual elements of the crimes' should also specify whether it relates to war crimes or crimes against humanity. [7]

- A consolidated chart would then have to be issued by each Party after the filing of its Pre-Trial Brief, which would compile all the evidence the Party intends to tender in Court, with the above-mentioned sub-categories. A sufficient time should be allocated to each Party to submit such a Chart, i.e. within 15 days.[8]
- The defence does not require that such sub-categorisation apply to Rule 103 material, i.e. exculpatory material.

13. The SPO contends that providing these sub-categorisations at the time of each disclosure would mean that disclosure of Rule 102(1)(b) items would effectively cease until the point at which drafting of the Pre-Trial Brief is significantly advanced.[9] But, the SPO has already started to link Rule 102(1)(b) material to the relevant crimes, accused and contextual elements of the crimes in the SPO outline F136/A01. In that context, linking each document to the identified sub-categories will not be unreasonably time-consuming and certainly does not justify any delay of disclosure to the prejudice of the accused.

---

[7] *Ibid.*, paras 13-14. The Defence confirms anew its support to the Selimi defence proposal mentioned in the SPO 'Submissions on Rule 109(c) categorisation', KSC-BC-2020-06/F00108, at para. 8 and footnote 9:

*"The specific example provided by the Selimi Defence consisted of:*
*(a) underlying crimes*
*(i) Type of crime eg. Illegal arbitrary arrests and detentions*
*(1) Sedlare etc;*
*(b) Contextual elements*
*(i) Crimes against humanity,*
*(ii) war crimes;*
*(c) conduct of the accused*
*(i) joint criminal enterprise,*
*(ii) Superior responsibility etc;*
*(d) Evidence to be presented*
*(i) linked to the relevant item of evidence."*

[8] KSC-BC-2020-06/F00085, Defence for Hashim Thaçi's Submissions for first Status Conference, para. 20.

[9] SPO Submissions, para. 10.

14. The requested sub-categorisations will benefit not only to the defence, but also the PTJ, who is invited to now rule on this issue, given the ongoing lack of agreement between the parties.

15. Last, the defence again asks the PTJ to order the SPO to complete:

- the metadata 'Record Type' for each item (i.e. interview/video/photo/ map/media, etc.), to allow the generation of lists of documents by type. Entering this data requires no substantial analysis on the SPO.[10]
- the chain of custody for each item, such as *"21/02/2020: From X to Z; 22/02/2021: From Z to A (etc.)*". As previously explained, this information is of paramount importance in assessing the reliability of the evidence. Each item has a category 'Originator', which contains only basic information, such as 'Bibliotheque cantonale et universitaire BCU' or 'SPO Witness Interview', without any further precision. Information about whom the items were given to, by who, and on what date is crucial, particularly where the SPO has relied on intermediaries.

**ITEM 2: TRANSLATION OF THE RULE 86(3)(B) OUTLINE (F00136/A01)**

16. The defence notes the Registry's submissions pursuant to which the translation of the Rule 86(3)(b) outline can be completed by the end of May 2021 and translations can be provided on a rolling basis, with a first portion of the document, of 150 pages, to be translated by 20 April 2021.[11]

17. A confidential redacted version of the Rule 86(3)(b) outline was first issued on 11 December 2020. The 20 April translation timeframe does not reflect the significance of the outline to the defence's preparation, and Mr Thaçi's understanding of the case against him. The defence respectfully asks that the Registry be ordered to re-prioritise

[10] KSC-BC-2020-06/F00143, Defence for Hashim Thaçi - Submissions for Second Status Conference, 15 December 2020, para. 15.
[11] KSC-BC-2020-06/F00192.

the translation of this document, and that it be provided to the defence as soon as possible.

**ITEM 5: DEFENCE INVESTIGATIONS AND NEXT STEPS**

18. Investigations depend on identifying avenues of inquiry which in turn depends on having access to material and the time to assess it. Considerable attention has and continues to be paid to setting up team structures, managing disclosure, addressing interim release issues and preliminary motions on jurisdiction and challenges to the indictment. A lead investigator has been appointed. Investigations cannot be conducted effectively given the current COVID-19 restrictions. [Counsel notes that the SPO refers to the transcript of the second status conference recording that he said investigations cannot start for 18 months. If said, that was a clear misstatement and clearly not meant – as can be seen from both the context and the consistent submission that the defence require 18 months to prepare for trial, not start investigations. The SPO also take words out of context in the reference to the first status conference.]

**ITEM 6: POINTS OF AGREEMENT ON MATTERS OF LAW AND FACT**

19. The SPO has indicated that it anticipates to be able to provide the defence with an agreed facts proposal by the end of this month.[12]

20. The defence will consider any proposal the SPO may present.

**ITEM 7: THE NEXT STATUS CONFERENCE**

21. The defence suggests that the next status conference be scheduled at a date after the 15th March 2021.

[12] SPO Submissions, para. 34.

**OTHER MATTERS**

**1. Disclosure of case material to Mr Thaçi**

22. Providing case material – papers/DVD material etc – to Mr Thaçi is presently subject to the burdensome practice whereby material has to be provided in a narrow time period of 30 minutes and then only on days between Tuesday and Friday. The defence is pleased to state that following a request from all defence counsel the Registry has announced its intention to create a real-time link between the defence and Mr Thaçi, hopefully in a month's time. This is a very welcome development and the defence thanks the Registry.

**2. Time to prepare for trial**

23. The defence do not suggest for one moment that the SPO is seeking an unfair trial. What the defence submits is that a trial date as early as July 2021 will be unfair as the defence case cannot be prepared in such a short time. The defence is surprised that the SPO thinks otherwise.

24. As to the further and lengthy comments made by the SPO in its submissions, it is important to note that while several members of the SPO have been immersed in the trial material for a long period of time - and some for even longer at the ICTY - most of the defence teams have had little or no experience of the background to the case.

25. Despite the fact that the Panel has made it clear that it is too early to discuss or decide a prospective trial date, the SPO again raises the issue and dedicates most of its submissions to it, covering nine pages – in effect an uncalled for filing. The defence does not wish to engage overmuch but addresses one matter.

26. The defence has consistently submitted that 18 months pre-trial is the minimum reasonable time based on the experience of all defence counsel in light of the nature and circumstances of the present case. That submission is buttressed by the experience of other courts dealing with similar cases. Given the lengthy comments made by the SPO on that point it would be amiss not to address those comments here.

27. It is incorrect to claim apparent wide acceptance of the fact that "the three largest and most complex cases at the ICTY were the *Milošević*, *Karadžić*, and *Mladić* prosecutions".[13] These were single accused cases (as opposed to, for example, the *Prlić et al* case in which six accused were charged, and the *Popović et al* case which charged seven). The *Karadžić* and *Mladić* cases were prosecuted at the end of the ICTY's operation, and the Prosecution's case relied in significant part on the judicial notice of adjudicated facts from prior cases, greatly simplifying matters for the Prosecution in terms of the scope of the case it was required to prove through direct evidence.[14] Moreover, any consideration of the number of pages of disclosure as a criterion for complexity must take into account the relationship between the volume of disclosable material and the timing of the case in the ICTY's operation. The existence of "millions"[15] of disclosable pages in later cases like *Karadžić* and *Mladić* was arguably just as closely linked to the fact that this material had been generated in prior cases as it was to the case's comparative complexity.

28. The SPO then suggests that the "outlier" lengthy pre-trial periods have been caused by the defence in those cases. The SPO points **only** to submissions from the ICTY Prosecution to support its contention that a 45-month pre-trial period in the

[13] SPO Submissions, para. 22.
[14] In the *Karadžić* case, for example, the Trial Chamber took judicial notice of 2,379 adjudicated facts from prior ICTY cases. See *Prosecutor v. Karadžić*, IT-95/5-81, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009; *Prosecutor v. Karadžić*, IT-95/5-81, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 October 2009; *Prosecutor v. Karadžić*, IT-95/5-81, Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 July 2009; *Prosecutor v. Karadžić*, IT-95/5-81, Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010; *Prosecutor v. Karadžić*, IT-95/5-81, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010.
[15] SPO Submissions, para. 22.

*Šešelj* case was "in large part attributable to the behavior of the accused". It then cites the *Krajišnik* case, which the SPO claims took 46 months between initial appearance and the start of trial "as a result, *inter alia*, of an eight-month delay when the entire defence team was replaced just before a scheduled trial".[16] Even if true, removing the delay aspect from the *Krajišnik* case reduces the pre-trial period from 46 months to 38 months (being 3 years and 2 months), making this case difficult to reconcile with the SPO's proposed six to eight month timeframe.

29. If the pre-trial period in prior cases is to be considered a useful guide, then a comprehensive survey is warranted, to avoid selective and misleading claims. When the body of international criminal cases is reviewed as a whole, a period of six to eight months between the arrest/surrender of the accused and start of trial represents a marked departure from international practice. In its submissions on behalf of Mr Thaçi, and having reviewed the body of cases, the defence presented the pre-trial periods not from the confirmation of indictment but from arrest or surrender.[17] In fact, the average time between arrest/surrender and the start of trial is:

- **ICC**: 822 days (2 years 3 months); (with 280 days (9 months 6 days) between arrest/surrender and the confirmation hearing)
- **ICTY**: 742 days (2 years, 12 days)
- **ICTR**: 1343 days (3 years, 8 months, 4 days)
- **STL**: 448 days (1 year, 2 months, 24 days)

30. Relevantly, the time taken in multi-handed cases of four or more accused is consistently between three and five years. The presentation of this landscape by the SPO is selective, and accordingly unhelpful.

**[Word count: 2658]**

[16] SPO Submissions, fn. 23.
[17] KSC-BC-2020-06/F00143, para. 18.

Respectfully submitted,

[SIGNED]

_____

**David Hooper**

**Specialist Counsel for Hashim Thaçi**

10 February 2021

At London, United Kingdom