



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:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 13 November 2020

**Language:** English

**Classification:** Public

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**Prosecution Submissions for first Status Conference**

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**Specialist Prosecutor**  
Jack Smith

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David Hooper

**Counsel for Kadri Veseli**  
Ben Emmerson

**Counsel for Rexhep Selimi**  
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**Counsel for Jakup Krasniqi**  
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## I. INTRODUCTION

1. Pursuant to the Status Conference Order,<sup>1</sup> the Specialist Prosecutor's Office ('SPO') hereby provides written submissions on the agenda items identified by the Pre-Trial Judge,<sup>2</sup> and related matters.<sup>3</sup>

2. Certain of the information provided is necessarily provisional at this time. Nonetheless, the SPO anticipates being in a position to provide complete witness and exhibit lists, and to have fulfilled related Rule 102(1)(b)<sup>4</sup> disclosure, by 31 May 2021, subject only to any applicable protective measures, and provided that pretrial proceedings are nearing completion and the commencement of trial is scheduled soon thereafter.

## II. SUBMISSIONS

### A. GENERAL QUESTIONS

3. A number of investigative steps remain ongoing in this case, including measures that could only be advanced once the case became public. Depending on the outcome of those investigations, there is a likelihood that further evidence will be adduced. A number of the steps in process rely on the cooperation or assistance of external parties or otherwise involve factors outside of the direct control of the SPO. Nonetheless, the SPO does not currently foresee this impacting the speedy conduct of

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<sup>1</sup> Order Setting the Date for a Status Conference and for Submissions, KSC-BC-2020-06/F00074, 11 November 2020, Public ('Status Conference Order').

<sup>2</sup> Annex 1 to Order Setting the Date for a Status Conference and for Submissions, KSC-BC-2020-06/F00074/A01, 11 November 2020, Public ('Annex 1').

<sup>3</sup> Status Conference Order, KSC-BC-2020-06/F00074, para.21(b).

<sup>4</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

proceedings, and is working towards completing any significant remaining investigative steps during pre-trial proceedings.

4. The SPO anticipates presenting documentary evidence including, for example, reports, photographs, and contemporaneous KLA documents such as orders, regulations and/or other publications. A more detailed, although preliminary, overview of the evidence to be presented is provided in Sections B and C below.

5. In addition, the SPO relied upon 153 witnesses for purposes of the Confirmed Indictment, and intends to rely upon the majority of them again for trial. The SPO currently anticipates adding approximately 50 further witnesses to its witness list for trial, although the final number of witnesses could vary, including depending on the outcome of the remaining investigative steps.

**B. RULE 102(1)(A): SUPPORTING MATERIAL TO THE INDICTMENT**

6. Table A provides, to the extent possible, the details requested by the Pre-Trial Judge regarding the breakdown of Rule 102(1)(a) material:

**Table A. Rule 102(1)(a) Material**

Total number of items	1,842 (including translations)
Total number of pages	43,108 (including translations)
Total number of hours/minutes of audio-visual material	20 hours, 17 minutes and 30 seconds
Number of witness statements	103
Number of statements obtained from the Accused	37 items <sup>5</sup> (English and Albanian)

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<sup>5</sup> The transcripts of SPO interviews are divided into parts, and each part represents an uploaded item.

Number of transcript parts (not including transcripts of the Accused) <sup>6</sup>	1,253
Number of reports	83
Number of audio/video material	17
Number of photographs	6
Number of objects	0
Number of other documents <sup>7</sup>	343

7. Rule 102(1)(a) requires the SPO to disclose the indictment supporting materials within 30 days of the initial appearance of the Accused. Noting the scope of the indictment and the volume of supporting materials,<sup>8</sup> the SPO requires the full statutory timeframe in this case. Should the SPO be in a position to disclose materials in advance of the statutory deadline it will do so. However, it is not currently anticipated that this will be possible in respect of any portion of the materials (whether requiring redaction or not).

8. Significant redactions are required to both the Rule 102(1)(a) materials and the detailed outline submitted pursuant to Rule 86(3)(b). These redactions must be applied with care and consistency in order to be effective. In addition to the redaction regime proposed below,<sup>9</sup> the SPO will be making a request for protective measures in respect of certain of the victims and witnesses mentioned in the Rule 102(1)(a)

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<sup>6</sup> The transcripts of SPO interviews are divided into parts, and each part represents an uploaded item.

<sup>7</sup> This includes, for example, books, KLA communiqués or political declarations, reports, military orders.

<sup>8</sup> The Rule 102(1)(a) materials in *Mustafa* concerned 1,248 pages of material. When compared to the pages contained in Table A, the Rule 102(1)(a) disclosure in this case is over 34 times larger.

<sup>9</sup> Section 2, I.

materials. That request will be filed within one week from completion of the initial appearances of the Accused, as previously ordered by the Pre-Trial Judge.

9. Translation into Albanian of indictment supporting material (including witness statements and transcripts) is ongoing, and these translations will be completed and disclosed within the 30-day statutory timeframe.

C. RULE 102(1)(B): ADDITIONAL MATERIAL INTENDED FOR USE AT TRIAL

10. In addition to the material falling under Rule 102(1)(a), the SPO does intend to disclose further material under Rule 102(1)(b). The SPO expects to be ready to disclose the additional Rule 102(1)(b) material by 31 May 2021 or, in any case, no later than 30 days prior to the opening of the Specialist Prosecutor's case (subject only to any protective measures granted).

11. The additional Rule 102(1)(b) material is currently anticipated to include the statements/testimonies of approximately 50 further witnesses.<sup>10</sup> Transcription and translation of the statements of witnesses upon whom the SPO intends to rely at trial will continue once all outstanding Rule 102(1)(a) translations are first completed. This is a labour intensive and time-consuming process, requiring careful review and revision.

12. With regard to documentary evidence, the SPO anticipates presenting approximately 1,500 exhibits at trial. This preliminary estimate may be varied depending upon, *inter alia*, the relevance of items recently seized (which are currently being processed and reviewed) and the results of further investigative steps. The

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<sup>10</sup> See para.4 above. The final number of witnesses (including the decision on whether to call expert testimony) will depend on the outcome of the limited remaining investigative steps.

exhibits are likely to include items produced by witnesses during the course of interviews, photographs, reports, contemporaneous documents, and video footage.

13. It will be necessary to apply redactions to forthcoming Rule 102(1)(b) disclosure. In respect of additional witnesses to be relied upon at trial, and in order to facilitate ongoing assessments, the SPO anticipates being in a position to file a second protective measures request in February 2021.

14. While the SPO intends to provide Rule 102(1)(b) material in batches as and when it is available for disclosure, in order to ensure an efficient pre-disclosure review process, it is not at this time possible to commit to an earlier disclosure date in respect of any particular portion of these materials (such as, for example, those not requiring redaction).

D. RULE 102(3): EVIDENCE MATERIAL TO THE PREPARATION OF THE DEFENCE,  
OBTAINED FROM OR BELONGING TO THE ACCUSED

15. The SPO anticipates providing the Defence with detailed notice of evidence material to it, pursuant to Article 21(6)<sup>11</sup> and Rule 102(3), by 30 April 2021, by which time identification of material falling under Rule 102(1)(b) is anticipated to be near completion. The items in the Rule 102(3) notice will comprise any other residual information potentially material to the Defence after the items to be presented at trial<sup>12</sup> and the potentially exculpatory items<sup>13</sup> have been disclosed.

16. The scope of Rule 102(3) material is necessarily impacted by, and to a large extent dependent upon, the witnesses and evidence intended to be presented at trial.

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<sup>11</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>12</sup> Rule 102(1)(b).

<sup>13</sup> Rule 103.

It is therefore not possible to provide an accurate estimate of volume at this time. Nonetheless, based on ongoing review, the SPO anticipates close to 100,000 Rule 102(3) items. The need for redactions is anticipated for a significant percentage of these items.

E. RULE 103: EXCULPATORY EVIDENCE

17. Over 1,000 potentially exculpatory items will be disclosed no later than the indictment supporting materials. The SPO shall continue to review and, following application of any required redactions, immediately disclose on a rolling basis any Rule 103 material within its custody, control or actual knowledge.

18. As concerns potentially exculpatory open source items, the ICTY/ICTR Appeals Chamber has found that the prosecution is relieved of its disclosure obligations if the existence of the relevant exculpatory evidence is known and the evidence is accessible with the exercise of due diligence.<sup>14</sup> This is a reasonable limitation on the SPO's Rule 103 disclosure obligations, as certain notorious materials, such as the ICTY acquittal of a named JCE member in this case, are clearly known to the Accused and their counsel.<sup>15</sup> The SPO requests that such limitations also be applied in this case.

F. RULE 107: PROTECTED MATERIAL

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<sup>14</sup> ICTY, *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions For Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, para.30; ICTR, *Niyitegeka v. The Prosecutor*, ICTR-96-44-R, Decision on Request for Review, 30 June 2006, para.51.

<sup>15</sup> ICTY, *Prosecutor v. Fatmir Limaj et al.* As an illustration, without this limitation the SPO would be in the position of having to 'disclose' the ICTY's *Haradinaj et al.* judgment to, amongst others, a witness who testified in the case (Jakup KRASNIQI) and Mr HARADINAJ's former lead counsel (Ben EMMERSON, Mr VESELI's lead counsel).

19. The SPO is actively seeking remaining Rule 107 clearances in respect of all materials of potential relevance to this case. The SPO has continuously and vigorously pursued obtaining such clearances for over 18 months, and has kept the concerned institutions apprised of applicable and anticipated deadlines in the case.

20. At this stage, it is not anticipated that obtaining such clearances will jeopardise the timelines outlined. However, the SPO will promptly inform the Pre-Trial Judge should this assessment change.

#### G. TRANSLATION OF DOCUMENTS AND EVIDENCE

21. The SPO will ensure that its evidence, including witness statements, is disclosed in English, the working language of the proceedings. The SPO will provide Albanian versions of the statements of all witnesses it intends to rely upon at trial,<sup>16</sup> and intends, to the maximum extent possible, to provide these translations within the same deadlines requested above for disclosure of English materials.

22. The KSC's framework makes clear that arranging further Albanian translations for the Accused is primarily a matter between the Defence and Registry. The Accused has the right to free assistance of an interpreter,<sup>17</sup> and the Registry must make all necessary arrangements for interpretation or translation as provided in the Rules or ordered by a Panel.<sup>18</sup> Appointed counsel are permitted to submit translation, interpretation or verification requests to the Registry.<sup>19</sup> To the extent further

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<sup>16</sup> Rule 102(1).

<sup>17</sup> Article 21(4)(g).

<sup>18</sup> Rule 8(4).

<sup>19</sup> Section 2 of the Registry Instruction on Requesting Translation, Interpretation and Verification Services, KSC-BD-14, 30 May 2019; Section 5 of the Policy on Translation and Interpretation, KSC-BD-13, 15 May 2019.



translation is needed for indigent accused, translation and interpretation costs are specifically envisaged within Defence counsel's legal aid fees.<sup>20</sup>

#### H. PROCEDURE FOR DISCLOSURE OF EVIDENCE

23. Pursuant to Rule 109(c) the parties must, so far as practical, categorise disclosed information with reference to underlying crimes, contextual elements, conduct of the Accused, or, as applicable, evidence to be presented by the Specialist Prosecutor. This requirement is satisfied in the *Mustafa* case through the use of a detailed disclosure chart.<sup>21</sup> On 12 November 2020, the SPO made a proposal to the Defence for each of the Accused based on a format similar to that adopted in the *Mustafa* case. Consistent with the approach in the *Mustafa* case, the SPO has also proposed that the chart be provided after submission of the parties' Pre-Trial Brief (if any), as analysis required to generate the chart would be drawn from that brief.<sup>22</sup> At the time of filing, *inter partes* discussions are ongoing, with a view to ensuring that any proposal adequately reflects the circumstances of this particular case and meets the needs of the parties, while also taking account of the resource constraints of each.

#### I. REDACTION REGIME

24. The SPO requests the Pre-Trial Judge to adopt the redaction regime applied in the *Mustafa* case.<sup>23</sup> Pursuant to this regime, the parties may redact information

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<sup>20</sup> Article 14 of the Legal Aid Regulations, KSC-BD-25, 3 September 2020.

<sup>21</sup> See Annex 1 to Joint Submission of Rule 109(c) categorisation chart, KSC-BC-2020-05/F00045/A01, adopted in Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal, KSC-BC-2020-05/F00046, 5 November 2020.

<sup>22</sup> Pursuant to the SPO's proposal, an overview of the content of each disclosure package would also be immediately available at the time of disclosure of that package through a basic categorisation provided through Legal WorkFlow, conforming with the categories of information identified in Rule 109(c).

<sup>23</sup> Disclosure Framework Decision, KSC-BC-2020-05/F00034, paras 73-89.

contained in material falling within their disclosure obligations under Article 21(6) of the Law and Rules 102-104 according to a set of pre-approved categories.

25. Drawing on cumulative experience and practice at other courts,<sup>24</sup> and consistent with the applicable legal framework,<sup>25</sup> the regime proposed will improve the efficiency of the proceedings, in particular, the expeditiousness of the disclosure process, while ensuring that the proceedings are conducted with full respect for the rights of the Accused and due regard for the protection of witnesses, victims and other persons at risk on account of the activities of the court. Such a redaction regime also enhances the ability of judicial panels at all stages of proceedings to effectively and efficiently exercise oversight of the disclosure process, as required by the Law and Rules. In particular, the redaction regime adopted previously by the Pre-Trial Judge envisages a judicial ruling on any contested redaction.

26. With one caveat,<sup>26</sup> no changes to the *Mustafa* redaction regime are needed for its application in the present case, and any such changes would in fact be counter-productive. Pending a ruling on the redaction regime in this case, the SPO has been preparing materials for disclosure, including provisionally redacting in accordance with the categories adopted by this judge in *Mustafa*. Any changes to those categories (including any renumbering) in the present case risk a significant delay, as the SPO

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<sup>24</sup> See, for example, International Criminal Court ('ICC'), Chambers Practice Manual (December 2019), pp.31-34; ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-64-Red, Public Redacted Version of 'Decision on Disclosure and Related Matters', 23, January 2019, paras 23-26. See also ICC, Chambers Practice Manual (May 2017) p.3 (noting that the Manual, including the redaction system, reflects best practices based on 'the experience and expertise of judges across trials at the Court') and pp.28-30 (addressing a redaction regime).

<sup>25</sup> See Articles 21(6) and 35(2)(f) and Rules 80, 106, 108 and 111 (providing for exceptions to disclosure, including to protect persons at risk and avoid prejudice to investigations).

<sup>26</sup>In order to avoid unnecessary disclosure of the same materials multiple times, the disclosing party should not be required to disclose material which contains non-standard category 'E' redactions simultaneous with the application for authorisation to apply such redactions, and instead should be permitted to await the relevant ruling, unless doing so would jeopardise an applicable disclosure deadline (*contra*. Disclosure Framework Decision, KSC-BC-2020-05/F00034, para.88)

would be required to revisit previously prepared documents in order to implement any amendments.

**Word Count: 2,521**



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**Jack Smith**

**Specialist Prosecutor**

Friday, 13 November 2020  
At The Hague, the Netherlands.