

**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:** Defence

**Date:** 17 November 2020

**Language:** English

**Classification:** Public

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**DEFENCE SUBMISSIONS FOR FIRST STATUS CONFERENCE**

**ON BEHALF OF JAKUP KRASNIQI**

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**Specialist Prosecutor's Office**

Jack Smith

**Counsel for Hashim Thaçi**

David Hooper QC

**Counsel for Kadri Veseli**

Ben Emmerson QC

**Counsel for Rexhep Selimi**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagendra

## I. INTRODUCTION

1. On 11 November 2020, the Pre-Trial Judge issued an Order scheduling a Status Conference and requesting the parties to provide written submissions on the agenda items identified in the Scheduling Order.<sup>1</sup>
2. On 13 November 2020, the Specialist Prosecutor's Office ("SPO") filed its written submissions.<sup>2</sup>
3. The Defence for Jakup Krasniqi ("Defence") hereby provides its submissions.

## II. THE DEFENCE MUST HAVE ADEQUATE TIME TO INVESTIGATE

4. The Defence will carry out a thorough investigation in this case. The Defence have not received any disclosure from the SPO thus far and hence cannot give an estimate of how much time it will take to conclude its investigative activities. Nor can the Defence provide any indication of whether any affirmative defences may be advanced at this stage.
5. The number and scope of the charges in the Further Redacted Indictment<sup>3</sup> and the volume of material indicated in the SPO submissions demonstrate the need for an extensive Defence investigation. The Further Redacted Indictment charges the accused with 10 different counts, allegedly committed in at least 16 localities over the period of 18 months from March 1998 to September 1999.<sup>4</sup> The geographical

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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.

<sup>2</sup> Prosecution Submissions for First Status Conference, KSC-BC-2020-02/F00076, 13 November 2020, Public ("SPO Submissions").

<sup>3</sup> Further Redacted Indictment, KSC-BC-2020-06/F00045/A03, 4 November 2020, Public.

<sup>4</sup> Ibid., paras. 32, 59-93, 97-134, 173.

and temporal scope of the Indictment, together with the number of specific crimes alleged is sufficient on its own to evidence the need for a lengthy Defence investigation.

6. The SPO submits that a substantial volume of documentary evidence, witness statements and other material will be disclosed. The SPO submissions indicate *inter alia* that: the SPO relied on 153 witnesses for the purposes of the confirmed indictment and anticipates adding an additional 50 witnesses;<sup>5</sup> there are 43,108 pages of Rule 102(1)(a) material to be disclosed;<sup>6</sup> the SPO anticipates disclosing close to 100,000 Rule 102(3) items;<sup>7</sup> and there is additional Rule 107 and Rule 103 material.<sup>8</sup>
  
7. Mr. Krasniqi has the right to adequate time and facilities for the preparation of his defence.<sup>9</sup> The scope of the Indictment and the volume of disclosure mean that the Defence investigation will inevitably be lengthy. Until the SPO has made substantial progress in complying with its disclosure obligations, the Defence is unable to provide any meaningful assessment of the time it will require to complete its investigations. Further, the extent to which investigations will be impeded by the current coronavirus pandemic is unclear. It is likely the current global travel restrictions, curfews and similar measures will significantly delay investigations.

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<sup>5</sup> SPO Submissions, para. 5.

<sup>6</sup> *Ibid.*, para. 6.

<sup>7</sup> *Ibid.*, para. 16.

<sup>8</sup> *Ibid.*, paras 18-20.

<sup>9</sup> Law on Specialist Chambers and Specialist Prosecutor's Office, Article 21(4)(c).

### III. DISCLOSURE ISSUES

8. The Defence note that, at this stage, the questions in the Annex to the Order setting the Date for a Status Conference and Submissions are directed to the SPO.<sup>10</sup> The Defence are likely to have further observations to make on disclosure once the process is underway.
  
9. In relation to Rule 102(1)(a), the Defence note the SPO Submissions that the “full statutory timeframe” is required in this case and that the SPO does not currently anticipate being able to disclose anything in advance of that deadline.<sup>11</sup> The Defence submit that rolling disclosure should begin as soon as possible. As a practical matter, it is likely to be easier to manage a staggered disclosure rather than receiving all the material at one time. Further, Rule 102(1)(a) provides that disclosure of the Indictment supporting materials should be made “as soon as possible”. The Prosecution has already had significant time to prepare for disclosure, noting that the Revised Indictment was submitted for Confirmation on 24 July 2020.<sup>12</sup> Accordingly, the Defence submit that disclosure should begin as soon as possible and could usefully commence with the provision of any unredacted material.
  
10. As to the procedure for disclosure, the Defence have considered the proposal made by the SPO.<sup>13</sup> The Defence agree to the use of the detailed disclosure chart proposed. The Defence understand that discussions between the Prosecutor and the Defence teams is ongoing and the Defence will continue to participate in those

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<sup>10</sup> Order Setting the Date for a Status Conference and for Submissions, KSC-BC-2020-06/F00074, 11 November 2020, Public.

<sup>11</sup> SPO Submissions, para. 7.

<sup>12</sup> Public Redacted Version of Corrected Version of Arrest Warrant for Jakup Krasniqi, KSC-BC-2020-06/F00027, 26 October 2020, p1.

<sup>13</sup> SPO Submissions, para. 23.

discussions. However, the Defence do not agree with the SPO that a detailed disclosure chart should only be provided after the Pre-Trial Briefs. Rule 109(c) imposes an obligation on the Parties to categorise material in accordance with the charges in the indictment in the course of the procedure for disclosure. The intention behind that Rule must be to assist the Court and the receiving Party in efficiently processing the disclosed material. The SPO's proposal to delay the categorisation process until after the Pre-Trial Brief is inconsistent with the text and intention of the Rule. In the light of the volume of material likely to be disclosed in this case, it is particularly important that the Parties receive detailed disclosure charts with each package of disclosure as a guiding tool to assist the Parties during the preparation phase. The Defence also does not accept that the "analysis required to generate the chart" could only be drawn from the Pre-Trial Brief.<sup>14</sup> The SPO must, in reality, already understand the relevance of the documents that it relies upon and be able to categorise them appropriately. Accordingly, whilst a consolidated chart should certainly be prepared at the time of the Pre-Trial Brief and based on the analysis within the Pre-Trial Brief, the Defence submit that an appropriate chart should be submitted with each disclosure package.

11. The Defence do not agree that the SPO should not be required to disclose potentially exculpatory open source items.<sup>15</sup> The wording of Rule 103 is unequivocal: the SPO "shall immediately disclose to the Defence *any* information" (italics added) which may be exculpatory. The phrase "any information" clearly includes open source material. The Rule is broadly drawn in order to ensure that the rights of the defence are respected. It should not be necessary for the SPO to make an assessment of whether exculpatory material is accessible with due

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<sup>14</sup> SPO Submissions, para. 23.

<sup>15</sup> Contra SPO Submissions, para. 18.

diligence (itself a question which could lead to satellite litigation); the Rules simply requires immediate disclosure of *all* exculpatory material.

#### IV. REDACTION REGIME

12. Whilst the Defence understand that certain information may need to be redacted in a limited number of clearly defined circumstances, the concern of the Defence is that the application of too many redactions risks rendering the disclosure useless and denying the Defence adequate facilities to prepare the case. Heavily redacted disclosure will prevent the Defence from preparing effectively for trial, limit the ability of the Defence to file pre-trial motions and delay the Defence's ability to give advance notice of any affirmative defences.

13. With those considerations in mind, the Defence do not oppose the adoption of aspects of the redactions regime applied in the *Mustafa* case,<sup>16</sup> which itself underscores that redacting information is the exception rather than the norm and that any redactions must be strictly necessary for one of the defined reasons.<sup>17</sup> However, the Defence submit that there should be prior judicial approval of any redactions imposed.<sup>18</sup> The need for judicial approval is the natural consequence of the principle that redactions are exceptional and must be strictly necessary. The Defence propose that the procedure envisaged in the *Mustafa* case in relation to 'non-standard redactions' should be applied to all redactions.<sup>19</sup> The Defence reserve the right to challenge individual redactions or to request the Pre-Trial Judge to review the redactions regime should it become clear that excessive redactions are being imposed.

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<sup>16</sup> Disclosure Framework Decision, KSC-BC-2020-05/F00034, paras. 73-89.

<sup>17</sup> *Ibid.*, para. 73.

<sup>18</sup> Contrary to the Disclosure Framework Decision, KSC-BC-2020-05/F00034 para. 78.

<sup>19</sup> Disclosure Framework Decision, KSC-BC-2020-05/F00034, para. 79.

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*Venkateswari*

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Venkateswari Alagenda

Tuesday, 17 November 2020

Kuala Lumpur, Malaysia