

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: Defence Counsel for Jakup Krasniqi

Date: 10 February 2021

Language: English

Classification: Public

Krasniqi Defence Submissions

for Third Status Conference

Specialist Prosecutor

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. The Defence for Jakup Krasniqi (“Defence”) hereby provide written submissions for the Third Status Conference in accordance with the Order Setting the Date for a Third Status Conference and for Submissions.¹

II. PROCEDURAL HISTORY

2. On 3 February 2021, the Pre-Trial Judge listed the Third Status Conference to take place on 11 February 2021 and ordered the Defence to provide written submissions, if they so wish, no later than 10 February 2021.²

3. On 9 February 2021, the Pre-Trial Judge decided to reschedule the Third Status Conference to Tuesday, 16 February 2021 and noted that the deadline for the Defence to provide written submissions shall remain Wednesday, 10 February 2021.³

4. On 11 December 2020, the Specialist Prosecutor’s Office (“SPO”) released disclosure package 8 to the Defence, which comprises 1,309 documents disclosed to the Defence as exculpatory material pursuant to Rule 103 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).⁴

5. On 12 December 2020, the SPO released disclosure packages 9 and 10 to the Defence, which comprise 1,662 documents and 98 documents respectively, as material upon which the SPO relies pursuant to Rule 102(1)(a) of the Rules.⁵

¹ KSC-BC-2020-06, F00185, Pre-Trial Judge, *Order Setting the Date for a Third Status Conference and for Submissions*, 3 February 2021, public.

² *Ibid.*, para. 19(c).

³ KSC-BC-2020-06, F00193, Pre-Trial Judge, *Order Rescheduling the Third Status Conference*, 9 February 2021, public, paras 2-3.

⁴ Disclosure Package 8.

⁵ Disclosure Package 9, Disclosure Package 10.

6. Further disclosure packages were submitted on 14 December 2020,⁶ 15 December 2020,⁷ 19 December 2020,⁸ 22 December 2020,⁹ 15 January 2021,¹⁰ 20 January 2021,¹¹ and 2 February 2021.¹² The Defence have now received disclosure of around 3,162 documents.

7. On 8 February 2021, the SPO¹³ and the Registry¹⁴ filed their written submissions for the Third Status Conference.

III. SUBMISSIONS

Translation of the Rule 86(3)(b) Outline

8. Mr. Krasniqi does not speak or read English. The limited number of translations of decisions, filings and evidence that are available is slowing the work of the Defence.

9. The Registry submit that the translation of the Rule 86(3)(b) Outline will not be completed until the end of May 2021.¹⁵

10. The Rule 86(3)(b) Outline is a critical document for understanding the SPO's case, because it is the document which connects the evidence to the charges in the

⁶ Disclosure Package 11, 2 documents (Rule 102(1)(a)).

⁷ Disclosure Package 12, 2 documents (Rule 102(1)(a)).

⁸ Disclosure Package 13, 54 documents (Rule 102(1)(a)).

⁹ Disclosure Package 14, 2 documents (Rule 102(3)).

¹⁰ Disclosure Package 16, 22 documents (Rule 102(1)(b)).

¹¹ Disclosure Package 17, 2 documents (Rule 102(1)(a)).

¹² Disclosure Package 18, 9 documents (Rule 102(3)).

¹³ KSC-BC-2020-06, F00191, Specialist Prosecutor, *Prosecution Submissions for Third Status Conference* ("Prosecution Submissions"), 8 February 2021, public.

¹⁴ KSC-BC-2020-06, F00192, Registrar, *Registrar's Submission on Translations*, 8 February 2021, public.

¹⁵ *Ibid.*, para. 3.

indictment. The Decision on the Confirmation of the Indictment,¹⁶ which also analyses the evidence against the indictment charges, has also not been translated. Mr. Krasniqi will only be able to provide full instructions on the charges when he has had the opportunity to review the Albanian translation of the Rule 86(3)(b) Outline (and indeed the Decision on the Confirmation of the Indictment).

11. The translation of the Rule 86(3)(b) Outline is one aspect of a broader problem affecting the Defence. At the time of writing, there are only 58 filing items in Albanian compared to the 269 filing items in English.

Rule 109(c)

12. The Pre-Trial Judge asks whether any further progress has been made *inter partes* in reaching agreement on the level of categorisation of disclosed material pursuant to Rule 109(c) of the Rules.¹⁷

13. There has been no further progress *inter partes*. The Defence respectfully submit that further discussions between the parties are unlikely to be fruitful.

14. A key dispute between the parties is that when making each disclosure on Legal Workflow, the Defence proposes that the documents should be categorised according to the relevant count on the Indictment, location or mode of liability whereas the SPO proposes only to indicate whether four categorisations apply to each

¹⁶ KSC-BC-2020-06, F00026/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 30 November 2020, public.

¹⁷ KSC-BC-2020-06, F00185, Pre-Trial Judge, *Order Setting the Date for a Third Status Conference and for Submissions*, 3 February 2021, public, para. 15(3)(f).

document (underlying crimes, contextual elements, conduct of the accused and / or evidence to be relied on by the SPO).¹⁸

15. It remains the position of the Defence that the wording of Rule 109(c), which requires the SPO to “categorise the information in accordance with the charges in the indictment”, cannot be satisfied simply by stating whether the document relates to underlying crimes, conduct of the accused or contextual elements. Applying those generic labels does not categorise the information *in accordance with the charges* in the indictment. In order to comply with Rule 109(c) some effort must be made to categorise the documents in a way which corresponds to the individual charges laid down in the indictment.

16. Reviewing disclosure packages 9 – 10 highlights the deficiency in the SPO’s approach. In these two packages, around 1,178 items out of the total 1,760 (around two thirds) have been categorised as relating to underlying crimes. That label does nothing to assist the Court or the Defence in organising and understanding the material. In order to analyse and understand the material, each document relating to the underlying crimes needs to be linked to a location and a charge in the indictment. Whilst the Defence will read and analyse every document meticulously, and can therefore undertake the process of linking each document to the relevant location and charge, the clear intention of Rule 109(c) was to contribute to the efficiency of proceedings by placing that burden on the disclosing party.

17. The Defence do not accept that providing this information at the time of disclosure is not practicable. The SPO’s submissions are predicated on the need to draw the categorisation from its Pre-Trial Brief.¹⁹ But providing a categorisation on Legal Workflow at the time of disclosure does not depend on the Pre-Trial Brief. In

¹⁸ Prosecution Submissions, para. 10. *See, further, KSC-BC-2020-06, F00108, Specialist Prosecutor, Submissions on Rule 109(c) Categorisation, 27 November 2020, public, with Annex 1, public, paras 7-8.*

¹⁹ Prosecution Submissions, para. 10.

order to prepare the Indictment and the Rule 86(3)(b) Outline, the SPO must have already analysed which documents relate to which location and crime charged; the SPO must already be able to indicate, for example, which documents relate to which location. Nothing in the wording of Rule 109(c) suggests that this categorisation should only be provided with the Pre-Trial Brief. Accordingly, the Defence invite the Pre-Trial Judge to determine that Rule 109(c) requires the SPO to categorise the information in accordance with the charges (i.e. by reference to individual charges and locations) on Legal Workflow at the time of disclosure.²⁰

Defence Investigations

18. The Defence appreciate being offered the opportunity to update the Pre-Trial Judge. However, in light of the volume of material that has been provided less than two months ago (and just prior to the Christmas recess), the Defence are not able to provide any substantive update on the progress of investigations, any intention to make requests concerning unique investigative opportunities or any intention to give notice of an alibi or grounds for excluding responsibility. The Defence reserve the right to make such requests or to give such notice in due course and in accordance with the Rules.

19. More than 3,100 documents have now been disclosed to the Defence. While the length of the documents varies, some are themselves hundreds of pages long. The time involved in not only reading but also analysing those documents in terms of their relevance to specific offences or locations in the indictment or indeed thematically should not be underestimated. The Defence note that the SPO considers it to be too time-consuming to be practicable for the SPO to categorise the documents with each

²⁰ See KSC-BC-2020-06, F00143, Defence for Mr Taçi, *Defence for Hashim Taçi – Submissions for Second Status Conference*, 15 December 2020, public, paras 13-14.

disclosure package;²¹ that time-consuming categorisation is only part of the analysis that the Defence need to perform. Until the Defence have had the time to understand and analyse the material which has been disclosed, only preliminary investigative work can be undertaken.

20. As to the scope of the Defence investigation, the indictment allegations cover: at least 42 different detention centres;²² a temporal period of 18 months; 98 individual murders alleged in Schedule B (amongst other serious charges). The Defence understand that the SPO intend to rely on approximately 203 witnesses at trial.²³ Once the Defence have analysed the SPO's disclosure, each witness, each location and each charge need to be investigated individually and thoroughly by the Defence.

21. The presence of an "instructive backdrop"²⁴ consisting of prior cases addressing some of the detention allegations and the structure of the KLA does not reduce the time that will be taken by Defence investigations. That witnesses have previously given evidence and allegations have previously been litigated before different tribunals and courts, means in practice that in addition to carrying out their own investigations, the Defence will need to review and analyse records from those tribunals or courts, including seeking unredacted records where possible under the applicable protective measures regime. This will multiply the number of documents that the Defence need to consider and analyse in relation to each witness.

22. Against this backdrop, the SPO's submissions that trial should start in September 2021 is untenable.²⁵ The Defence are conscious that the Pre-Trial Judge did

²¹ Prosecution Submissions, paras 10-11.

²² KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, counting the locations listed in Schedule A.

²³ KSC-BC-2020-06, F00076, Specialist Prosecutor, *Prosecution Submissions for First Status Conference*, 13 November 2020, public, para. 5 noting that the SPO relied on 153 witnesses for the purposes of the Confirmed Indictment and intends to add approximately 50 further witnesses to its witness list for trial.

²⁴ Prosecution Submissions, para. 28.

²⁵ Prosecution Submissions, paras 14-33.

not ask for submissions on the trial start date. Hence, the Defence do not address this issue in detail in this filing, anticipating that the Pre-Trial Judge will invite specific submissions on this issue at an appropriate point. Nonetheless, in brief response to the SPO submissions:-

- a. The right of the Accused to “adequate time and facilities” for the preparation of the defence is a “minimum guarantee” protected by Article 21(4)(c) of the Law;
- b. The amount of “time” that is “adequate” has to be assessed in the particular circumstances of the case (including the ongoing coronavirus pandemic). The Defence count 262 days from the date of the first disclosure packages on 12 December 2020 to the start of September 2021. It is difficult to understand by what metric that could be considered “adequate time”. For instance, the SPO intends to call around 203 witnesses.²⁶ The SPO therefore appear to be expecting the Defence to be able to investigate and prepare for each witness in a little over one day (assuming working 7 days per week without break). Alternatively, 262 days would allow less than 3 days to investigate and prepare the defence for each allegation of murder, or around 6 days to investigate and prepare the defence for each detention location. These averages clearly understate the obstacles facing the defence since they do not take account of *inter alia*: the initial time to read, understand and organise the material disclosed; the fact that disclosure is being provided on a rolling basis, with extensive redactions; the need to invest time in investigating the broader allegations relating to joint criminal enterprise and command responsibility or the need to consider the SPO’s

²⁶ That appears to be more witnesses than the 169 witnesses who were called by the Prosecutor of the ICTY in the case of *Mladić*, which the SPO submits was two or three times larger than this case: Prosecution Submissions, para. 23.

ongoing investigations which are continuing “for the foreseeable future”.²⁷ Nevertheless, they make clear that to start trial in September 2021 would not allow adequate time for the preparation of the defence;

- c. The SPO does not address the time which was required to prepare for trial in the KLA cases before the ICTY. In *Limaj et al.*, the initial appearance was on 5 March 2003 and trial started on 15 November 2004 (20 months later). In *Haradinaj et al.*, the initial appearance was on 14 March 2005 and the trial commenced on 5 March 2007 (2 years later). The Indictments in those cases covered only a fraction of the allegations in this case. The time scales proposed by the SPO cannot be reconciled with the time that was required for investigations in those cases;
- d. Nor do the SPO submissions account for the timetable which has already been laid down in this case. The current disclosure timetable requires the SPO to disclose unredacted Rule 102(3) material or apply for redactions of Rule 102(3) material by 5 July 2021.²⁸ That is less than two months before the SPO’s proposed start date for trial (and if redactions are applied for, the Defence would, of course, not receive the material immediately). There are nearly 100,000 items of Rule 102(3) material.²⁹ Any substantial disclosure at that stage could not be processed and analysed in time for a trial starting in September 2021;
- e. Finally, no mention is made by the SPO of the corona-virus pandemic, which regrettably, is likely to remain an impediment to travel and investigations for months to come. The cases referred to by the SPO in its

²⁷ Prosecution Submissions, para. 12.

²⁸ KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public, para. 99(h).

²⁹ *Ibid.*, para. 64.

submissions did not face such impediments.³⁰ International travel is restricted. Many countries, including the Netherlands and Kosovo, have imposed detailed restrictions on freedom of movement and requirements of social distancing within the country. Any Defence team member travelling to conduct investigations will likely have to quarantine themselves for a period of time on their return. These restrictions will most certainly have an effect on Defence investigations. For instance, given that Mr. Krasniqi requires an interpreter and only two visitors are allowed to the DU at one time, only one member of the Defence team can currently meet Mr. Krasniqi at a time (even if travel to the Netherlands were straightforward).

23. There are many further issues such as the extent of redactions and the limited amount of translations into Albanian which are likely to slow the Defence investigation. Since the Pre-Trial Judge has not asked for detailed submissions on the trial start date, the Defence have not attempted to make this submission comprehensive. The Defence nevertheless wish to make it clear that the Defence are not seeking to delay trial by pursuing “virtually infinite investigative possibilities”.³¹ Nor has the Defence position changed at all since Mr. Krasniqi’s interim release application was denied, as the SPO previously suspected that it would.³² The Defence simply require, in accordance with the rights guaranteed to Mr. Krasniqi of a fair trial and adequate time and facilities for the preparation of the Defence, adequate time to investigate a case of the breadth and complexity of that presented in the Indictment. The Defence maintain previous submissions that the minimum time required is likely to be 18 months from the first provision of disclosure on 12 December 2020.

³⁰ Prosecution Submissions, paras 22-24.

³¹ Prosecution Submissions, para. 32.

³² KSC-BC-2020-06, F00097, Specialist Prosecutor, *Prosecution Submissions Further to the Status Conference of 18 November 2020*, 23 November 2020, public, para. 5.

Word count: 2,622 words

A handwritten signature in black ink, reading "Venkateswari Alagenda". The signature is written in a cursive style and is positioned above a horizontal line.

Venkateswari Alagenda

Wednesday, 10 February 2021

Kuala Lumpur, Malaysia.