

**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:** 6 May 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of**

**Krasniqi Defence Submissions Pursuant to Decision KSC-BC-2020-06/F00635,**

**KSC-BC-2020-06/F00669, dated 31 January 2022**

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**Specialist Prosecutor**

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## I. INTRODUCTION

1. Redactions prevent the Defence for Jakup Krasniqi ("Defence") from making submissions on whether all of the First Category Amendments proposed by the Specialist Prosecutor's Office ("SPO") meet the required standard for confirmation. Lesser redacted versions should be provided. Nonetheless, it is clear from the unredacted material that the SPO has failed to establish a well-grounded suspicion in relation to the proposed Second Category Amendments regarding murder / wilful killing at [REDACTED]. Those proposed amendments should not be confirmed.

## II. PROCEDURAL HISTORY

2. On 8 September 2021, the SPO filed the confidential redacted version of its Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b).<sup>1</sup> The SPO sought permission to make three categories of amendments: the First Category Amendments alleged crimes at previously unpleaded detention centres at [REDACTED]; the Second Category Amendments alleged additional crimes at [REDACTED]; and the Third Category Amendments related to additional allegations of personal participation of the Accused.

3. On 20 September 2021, the Defence opposed the amendments.<sup>2</sup> In particular, the Defence argued that it could not meaningfully respond when much of the proposed amendments and of the evidence said to support them remained redacted.<sup>3</sup>

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<sup>1</sup> KSC-BC-2020-06, F00455/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)'*, KSC-BC-2020-06/F00455, dated 3 September 2021 ("Request"), 8 September 2021, confidential, with redacted Annexes 1-3, confidential, Annex 4, confidential, and redacted Annex 5, confidential.

<sup>2</sup> KSC-BC-2020-06, F00480, Krasniqi Defence, *Krasniqi Defence Response to the SPO Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)*, 20 September 2021, confidential.

<sup>3</sup> *Ibid.*, paras 2, 7-11, 16.

4. On 23 December 2021, the Pre-Trial Judge granted the SPO's request regarding the Third Category Amendments and allowed the Defence until 31 January 2022 to provide submissions on whether a well-grounded suspicion exists in relation to the First Category and Second Category Amendments.<sup>4</sup> The Pre-Trial Judge considered that the Defence was "in an overall position to provide meaningful challenges", but ordered the SPO to scrutinise the Confirmed Indictment, Rule 86(3)(b) Outlines and the Request and provide lesser redacted versions, if possible, by 17 January 2022.<sup>5</sup>

5. On 17 January 2022, the SPO filed lesser redacted versions of the Confirmed Indictment and original Rule 86(3)(b) Outline.<sup>6</sup> However, the SPO submitted that it was not possible to provide lesser redacted versions of the Request, the proposed amendments or the additional outlines.<sup>7</sup> As a result, the Defence is in no different position to make meaningful submissions on the proposed amendments than it was in September 2021.

### III. APPLICABLE LAW

6. Article 39(2) of the Law<sup>8</sup> provides that "[t]he Pre-Trial Judge shall review the indictment. If satisfied that a well-grounded suspicion has been established by the Specialist Prosecutor, the Pre-Trial Judge shall confirm the indictment. If he or she is not so satisfied, the indictment or charges therein shall be dismissed".

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<sup>4</sup> KSC-BC-2020-06, F00635, Pre-Trial Judge, *Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)* ("Decision"), 23 December 2021, confidential, para. 53(a), (d).

<sup>5</sup> *Ibid.*, para. 47.

<sup>6</sup> KSC-BC-2020-06, F00647, Specialist Prosecutor, *Prosecution Submission of Lesser Redacted Versions of Indictment and Rule 86(3)(b) Outline*, 17 January 2022, public, para. 1.

<sup>7</sup> *Ibid.*, para. 2.

<sup>8</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

7. Rule 86(4) of the Rules<sup>9</sup> provides in part that “[t]he Pre-Trial Judge shall examine the supporting material in relation to each of the charges and shall determine whether a well-grounded suspicion has been established against the suspect”.

8. Rule 90(2) of the Rules provides that Rule 86(4) applies *mutatis mutandis* where the SPO seeks to amend the indictment to include new charges. The Pre-Trial Judge has confirmed that the First Category and Second Category Amendments are new charges.<sup>10</sup> Accordingly, the Pre-Trial Judge must examine the supporting material and determine whether a well-grounded suspicion has been established in relation to the First Category and Second Category Amendments.

9. Article 19.1.12 of the Kosovo Criminal Procedure Code of 2012, No. 04/L-123 (“CPC”), provides that a well-grounded suspicion is reached when the evidence “would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence”.

10. The Pre-Trial Judge has previously determined that a well-grounded suspicion requires more than mere theory or suspicion and needs concrete and tangible supporting material.<sup>11</sup>

#### IV. THE REDACTIONS DO PREVENT MEANINGFUL DEFENCE SUBMISSIONS

11. The Defence maintains that without lesser redacted versions of the First Category Amendments and, particularly, the additional outline said to support them, the Defence cannot meaningfully make any submissions on many of the proposed

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<sup>9</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

<sup>10</sup> Decision, para. 28.

<sup>11</sup> KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 19 November 2020, confidential, para. 48.

amendments. The SPO should therefore be ordered to provide lesser redacted versions and the resolution of the Request should be delayed until the Defence is able to read, understand, put into context and therefore make any or any meaningful submissions on the amendments.

12. The Defence emphasises that Rule 90(1)(b) guarantees to the Defence the procedural right to be heard on applications to amend the Indictment. That right will be illusory rather than practical and effective,<sup>12</sup> if the Defence is forced to make submissions on underlying evidence which is heavily redacted. Moreover, equality of arms generally requires that the Defence, like the SPO, has access to the evidence before making submissions upon it. This does not necessarily mean that every redaction must be lifted at this stage, but it does require that the Defence is provided with sufficient information to make meaningful submissions. In relation, for instance to detention review, the European Court of Human Rights (“ECtHR”) has held that the defence did not have to be given full access to the case file but “must nonetheless receive sufficient information” in order to be able to make the necessary submissions.<sup>13</sup> Similarly, the ECtHR held that equality of arms was violated where the defence was denied access to documents which were essential to effectively challenge the lawfulness of detention (even where there was concern about interference with evidence).<sup>14</sup> In the present circumstances, the Defence therefore submits that the critical question is whether the Defence has access to sufficient information and evidence to effectively assess and challenge whether a well-grounded suspicion has been established in relation to each proposed amendment. The procedural right

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<sup>12</sup> ECtHR, *Moreno Gómez v. Spain*, no. 4143/02, *Judgment (Merits and Just Satisfaction)*, 16 February 2005, paras 56, 61; *Dubetska and Others v. Ukraine*, no. 30499/03, *Judgment (Merits and Just Satisfaction)*, 10 May 2011, para. 144.

<sup>13</sup> ECtHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02, *Judgment (Merits and Just Satisfaction)*, 12 October 2005, para. 427.

<sup>14</sup> ECtHR, *Lietzow v. Germany*, no. 24479/94, *Judgment (Merits and Just Satisfaction)*, 13 February 2001, paras 44, 47.

guaranteed by Rule 90(1)(b) is not complied with if it is only the Pre-Trial Judge and the SPO who have access to the evidence in question.

13. This issue is not foreclosed by the Pre-Trial Judge's earlier finding that the Defence is in an "overall position" to provide meaningful challenges to the proposed amendments.<sup>15</sup> First, the position is different from that anticipated in the previous decision. The Pre-Trial Judge had ordered the SPO to scrutinise its prior submissions and to prepare lesser redacted versions if possible.<sup>16</sup> It is only following the SPO's submission of the lesser redacted version of the Confirmed Indictment, that it has become clear that the SPO would not lift any redactions relevant to this application. Second, the issue now before the Pre-Trial Judge is materially different from that addressed in the previous decision. In the previous decision, the Pre-Trial Judge had to determine the legal issue of whether the amendments amounted to new charges and certain discretionary issues regarding prejudice to the Accused and prosecutorial delay.<sup>17</sup> The issue now before the Pre-Trial Judge, on which the Defence has the procedural right to be heard, is whether the evidence relied on by the SPO in support of the amendments is sufficient to establish a well-grounded suspicion. This issue turns on the evaluation of the evidence supporting each amendment. In contrast to the prior position, it is plainly impossible to make any or any meaningful submissions on the evaluation of evidence supporting an amendment if that evidence is wholly or substantially redacted.

14. The Defence's manifest inability to make any or any meaningful submissions is demonstrated by the specific examples below:-

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<sup>15</sup> Decision, para. 47.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, paras 19-37.

- a. [REDACTED].<sup>18</sup> Not one piece of information or evidence about that alleged victim or those alleged crimes is given to the Defence. It is not possible for the Defence to make any submissions about whether the SPO has established a well-grounded suspicion that the alleged crimes were committed against that specific victim;
- b. [REDACTED] is also redacted, so that the Defence cannot and cannot be expected to make any submissions about that evidence either;<sup>19</sup>
- c. The partially redacted evidence said to support other allegations is so obscured that it prevents meaningful Defence submissions. [REDACTED];<sup>20</sup> [REDACTED];<sup>21</sup> [REDACTED].<sup>22</sup> [REDACTED]. [REDACTED]. [REDACTED];
- d. [REDACTED].<sup>23</sup> The Defence cannot meaningfully make submissions on whether a well-grounded suspicion has been established in relation to this allegation. A well-grounded suspicion might or might not have been established, depending on the content of the redacted material;
- e. [REDACTED].<sup>24</sup> [REDACTED].<sup>25</sup> [REDACTED]. The Defence cannot meaningfully make submissions on whether a well-grounded suspicion [REDACTED] has been established in circumstances where the overwhelming majority of the evidence said to support the allegation has not been disclosed.

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<sup>18</sup> [REDACTED].

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

15. In the concrete circumstances of this filing, where the Defence has a procedural right to make submissions about whether the evidence establishes a well-grounded suspicion that offences were committed, while the Defence is well-aware of the importance of compliance with protective measures, those submissions cannot meaningfully be made without the evidence being made available to the Defence in some form. The Defence notes that the SPO has not volunteered any counter-balancing measures, such as providing summaries of the withheld evidence, which might enable the Defence to make submissions on these issues. Accordingly, the only available solution is that a lesser redacted version must be provided prior to the determination of the Request.

#### **V. NO WELL-GROUNDED SUSPICION OF MURDER OR KILLING AT [REDACTED]**

16. The Defence understands that at this stage of the proceedings the Pre-Trial Judge is not generally concerned with the weight or admissibility of evidence. Accordingly, for the purpose of these submissions only, the Defence accepts the evidence at face value, without prejudice to its right to challenge the evidence fully in the course of trial. Mindful of this standard, the Defence refrains from making extensive submissions about the evidence supporting the proposed amendments at this time. Nonetheless, in order to establish a well-grounded suspicion, the SPO must still produce concrete and tangible material supporting each necessary element of each offence. The SPO has failed to do so in relation to the Second Category Amendments regarding murder or killing at [REDACTED].



17. The *actus reus* of the offences of murder or killing require that an act of the direct perpetrator caused or substantially contributed to the death of the victim.<sup>26</sup> The evidence relied on by the SPO in support of its proposed amendments does not establish that the deaths of the victims were caused or contributed to by the alleged direct perpetrators.

18. [REDACTED]. [REDACTED].<sup>27</sup> [REDACTED].<sup>28</sup> [REDACTED]<sup>29</sup> [REDACTED];<sup>30</sup> [REDACTED];<sup>31</sup> [REDACTED];<sup>32</sup> [REDACTED].<sup>33</sup>

19. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

20. [REDACTED]. [REDACTED]. [REDACTED].

21. [REDACTED]. [REDACTED].<sup>34</sup> [REDACTED]; [REDACTED].

22. Moreover, there is no well-grounded suspicion that Mr. Krasniqi committed or participated in these alleged crimes in any way. [REDACTED]. [REDACTED]. [REDACTED].<sup>35</sup>

23. The evidence relied upon by the SPO thus fails to establish a well-grounded suspicion in relation to the Second Category Amendments.

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<sup>26</sup> ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, *Judgement*, 20 February 2001, para. 422; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Chamber II, *Judgement*, 1 September 2004, paras 381-382.

<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> [REDACTED].

<sup>34</sup> [REDACTED].

<sup>35</sup> [REDACTED].

## VI. CONCLUSION

24. The ability of the Defence to participate in these submissions is heavily constrained by the ongoing redactions. The Defence maintains that it cannot make any or any meaningful submissions about the First Category Amendments without a less redacted version of the supporting outline and the underlying evidence being provided. It is impossible to evaluate the adequacy of evidence without being able to read the evidence (or at least without some other counter-balancing measure such as a summary or gist of the evidence). Since the Defence has the right to make submissions on proposed indictment amendments, the amendments should not be granted or the relevant paragraphs of the amended Indictment should not be confirmed until the Defence has had the opportunity to review this material and to make meaningful submissions upon it.

25. In relation to the Second Category Amendments, the Defence submits that the SPO has failed to establish a well-grounded suspicion of [REDACTED] and the Pre-Trial Judge should therefore reject these amendments and should not confirm the relevant paragraphs of the proposed amended Indictment.

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