

**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:** 8 July 2022

**Language:** English

**Classification:** Public

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**Krasniqi Defence Submissions**  
**for Thirteenth Status Conference**

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**Counsels for Jakup Krasniqi**

Venkateswari Alagenda, Aidan Ellis

## I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby provides written submissions for the Thirteenth Status Conference in accordance with the Order Setting the Date for a Thirteenth Status Conference and for Submissions.<sup>1</sup> The Defence reserves the right to develop additional submissions orally at the Status Conference.

2. As explained below, the Defence is endeavouring to arrange its investigations so that it can file its Pre-Trial Brief by 21 October 2022. Meeting this deadline remains contingent on factors outside the control of the Defence, including the completion of disclosure by the Specialist Prosecutor’s Office (“SPO”) by 30 September 2022.

## II. DISCLOSURE

### Rule 102(3) Disclosure

3. At the Twelfth Status Conference, the Pre-Trial Judge ordered the SPO to (i) finalise the processing of currently pending Defence requests for the disclosure of Rule 102(3)<sup>2</sup> material; (ii) request protective measures or submit materiality challenges; and (iii) disclose all material not subject to protective measures requests or materiality challenges by 30 September 2022.<sup>3</sup>

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<sup>1</sup> KSC-BC-2020-06, F00863, Pre-Trial Judge, *Order Setting the Date for a Thirteenth Status Conference and for Submissions* (“Scheduling Order”), 1 July 2022, public.

<sup>2</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

<sup>3</sup> KSC-BC-2020-06, In Court – Oral Order, *Order on disclosure of Rule 102 (3) material*, 20 May 2022, public.

4. The Defence, at the time of writing, awaits the disclosure of at least **25,809** items requested by the Defence. As clarified at the Twelfth Status Conference, the Defence does not intend to submit any further Requests at this time.<sup>4</sup>

5. Rule 102(3) items are, by definition, material to the preparation of the defence and an important component in Defence investigations. The Defence needs to be afforded a fair opportunity to review this volume of disclosure. Any delay in disclosure of Rule 102(3) material will have a knock-on effect on the remainder of the procedural timetable for this case.

6. Pursuant to the terms of the Pre-Trial Judge's Order on Disclosure of Rule 102(3) material, the deadline of 30 September 2022 will not necessarily be the date when the disclosure of Rule 102(3) material to the Defence is complete but a deadline for the SPO to submit materiality challenges or seek protective measures.

7. Despite the SPO's submission that the Defence is "routinely selecting items that are highly unlikely to be material to their preparation",<sup>5</sup> the SPO has not raised any issues of materiality with the Defence in the seven weeks since the last Status Conference. Indeed, there has been very little *inter partes* correspondence about materiality. In February and March 2022, the SPO and the Defence corresponded about the materiality of certain items contained in the Defence's second Rule 102(3) request (which was submitted on 7 October 2021). The Defence has not received any other correspondence about materiality or any challenge to the materiality of any of the items requested in its third, fourth, fifth, sixth, seventh or eighth requests.

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<sup>4</sup> KSC-BC-2020-06, Transcript of Hearing, 20 May 2022 ("Twelfth SC Transcript"), public, p. 1267, lines 13-18. The Defence, of course, reserves the right to make further requests if there is good reason, for example upon the lifting of redactions.

<sup>5</sup> Twelfth SC Transcript, p. 1260, lines 9-11.

8. The deadline of 30 September 2022 is only three weeks before the deadline of 21 October 2022 for the Defence to file its Pre-Trial Brief. If the SPO holds back a substantial number of materiality challenges, or requests for protective measures, until close to the 30 September 2022 deadline, the inevitable result will be that the Defence will not receive the actual disclosure until after the deadline for its Pre-Trial Brief and the weeks prior to the submission of the Pre-Trial Brief will be spent litigating disclosure issues. The Defence therefore requests the SPO to engage with the Defence on materiality and protective measures sufficiently in advance of the deadline to allow for meaningful *inter partes* discussions and so that the ongoing timetable is not disrupted.

#### Rule 107

9. The Defence requests an order requiring the SPO to complete Rule 107 disclosure by 30 September 2022. The Defence understands that there are approximately **400** items (with an unknown number of pages) for which clearance decisions remain pending. It is not known under which Rule these items fall or whether they are exculpatory.

10. Fundamentally, disclosure should be completed in sufficient time that the Defence can review and analyse the material prior to submitting the Pre-Trial Brief. Whilst the Defence appreciates that the SPO is in discussions with third party providers regarding these documents, the Accused have been in detention since November 2020 and these discussions must have been ongoing for many months.<sup>6</sup> It is now in the interests of all parties and participants for the Pre-Trial Judge to set a firm deadline for the completion of disclosure by the SPO of all Rule 107 material.

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<sup>6</sup> The Defence does not know when the SPO first sought the relevant clearances.

Rule 103

11. The Defence also requests that the Pre-Trial Judge set a deadline for the SPO to complete its current targeted searches for exculpatory material. At the Eleventh and Twelfth Status Conferences, the SPO divided the remaining exculpatory disclosure into two categories and indicated that it anticipated completing “the review side” of exculpatory disclosure by the Thirteenth Status Conference, but submitted that in relation to the distinct category of targeted searches the SPO “really cannot give an accurate estimate”,<sup>7</sup> that “there needs to be targeted re-reviews and searches throughout the proceedings”,<sup>8</sup> and that “further disclosures will be generated from those searches”.<sup>9</sup> No deadline has been set for the completion of the SPO’s targeted searches.<sup>10</sup>

12. Rule 103 requires exculpatory material to be disclosed immediately. Even without that unequivocal statutory requirement, complete disclosure of exculpatory material would now be urgent. Mr. Krasniqi has been in detention for twenty months already and the SPO’s delay in disclosing exculpatory material has prejudiced his fair trial rights. The Defence needs to receive the exculpatory disclosure as a basis for investigations and for the preparation of the Pre-Trial Brief. The SPO’s submission that it has completed its exculpatory review should not be allowed to obscure the fact that the SPO knows – and has previously submitted - that further targeted searches for exculpatory material are required. It cannot be consistent with the requirement of immediacy for this aspect of exculpatory disclosure to be delayed any further. Whilst there would, of course, remain a need for the SPO to review its holdings as the case

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<sup>7</sup> Eleventh SC Transcript, p. 1113, lines 5-15.

<sup>8</sup> Twelfth SC Transcript, p. 1226, lines 2-4.

<sup>9</sup> *Ibid.*, p. 1243, line 25 to p. 1244, line 1.

<sup>10</sup> In contrast to the ‘review side’ of exculpatory disclosure in relation to which the deadline was set in 20 May 2022, KSC-BC-2020-06, In Court – Oral Order, Oral Order on the Disclosure of Rule 103 Material, 24 March 2022, public.

develops, that is not a reason for the SPO to delay the targeted searches that it has already started or can already perform. The Defence therefore respectfully requests the Pre-Trial Judge to issue an order requiring the SPO to complete all Rule 103 disclosure including the targeted searches currently contemplated, by 30 September 2022.

### III. DEFENCE INVESTIGATIONS

13. The Defence has continued to take steps to progress its investigations and confirms that investigations are ongoing. More specifically, since the last Status Conference, the Defence has conducted an investigative mission and intends to conduct further investigative missions before the filing of the Pre-Trial Brief.

14. Whilst the specific matters raised in the agenda are addressed in turn below, the Defence underscores that whilst disclosure is ongoing, whilst redactions to the Indictment and evidence remain in place, and whilst the Defence is considering the full implications of the recently received Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant,<sup>11</sup> the Defence is simply not in a position to commit to many of the suggested deadlines.

15. Furthermore, the Defence has sent Requests for Assistance seeking documents and information relevant to the case from Third States, international organisations and other entities. More specifically, 11 Requests for Assistance have been sent to States, five to international organisations and two to other entities. The Defence acknowledges the assistance of the Registry in making certain of these Requests. One

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<sup>11</sup> KSC-BC-2020-06, F00854, Pre-Trial Judge, *Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, 24 June 2022, public.

entity has refused to provide the requested material and the Defence anticipates seizing the Pre-Trial Judge with an application to request assistance and cooperation from an international organisation under Rule 208(2) of the Rules. It is reasonable to anticipate that further such applications may be required.

16. Based on the material currently reviewed and on its investigations to date, the Defence does not intend to make any imminent requests concerning unique investigative opportunities pursuant to Rule 99(1) of the Rules. The Defence reserves the right to make such requests in the future and respectfully submits that no deadline for making Rule 99(1) requests should be imposed.

17. Similarly, the Defence should not be ordered to provide notice of an alibi or grounds for excluding responsibility pursuant to Rule 95(5) of the Rules by 1 September 2022. By that date, the SPO's disclosure will still be ongoing. The SPO has disclosed more than 23,000 documents since the last Status Conference and those documents require review and analysis. Moreover, the scale of redactions in the Indictment and the evidentiary material disclosed by the SPO mean that it is not possible for the Defence to plead an alibi or grounds for excluding responsibility. For instance, where the date or location of an allegation is redacted, the Defence does not have the material upon which to investigate an alibi. The Defence does, however, intend to address these matters in the Pre-Trial Brief to the extent that the Defence is able to at that point in time.

18. The Defence has reviewed the SPO's proposed agreed facts pursuant to Rules 95(3) and 156 of the Rules. On 6 July 2021, the Defence agreed to four facts. On 7 July 2022, the Defence informed the SPO of its agreement to four additional facts. The Defence has no knowledge of the dates of birth or identity numbers of the other Accused (specifically proposed agreed facts 1.1, 1.3, 1.15, 1.17, 1.28 and 1.33) and will therefore defer to the relevant accused on those specific issues. The Defence will

continue to review the SPO's proposed agreed facts and does intend to complete that review by 1 September 2022 (whilst noting that disclosure will remain ongoing at that time). The Defence reserves the right to submit its own list of proposed agreed facts to the SPO under Rule 95(3) of the Rules, however, the Defence will not be able to complete this work until after the completion and review of disclosure.

19. The Defence cannot identify objections to the admissibility of evidentiary material disclosed by 8 September 2022. The SPO's Rule 95(4)(c) list of exhibits contains 18,008 items. The ability of the Defence to identify objections to the admissibility of the evidentiary material is necessarily contingent upon the SPO informing the Defence which of the exhibits on its exhibit list the SPO actually intends to rely on and the modalities of introducing its evidence. As previously submitted, it is in the first instance for the SPO to request the mode of testimony to be employed, the admission of written evidence or the use of bar table motions. The Defence will then respond to each request made by the SPO on a case-by-case basis, including to challenge admissibility or the use of bar table motions as appropriate.<sup>12</sup> The Defence cannot at this stage identify admissibility challenges in the abstract: if the SPO proposes to tender a document through a witness who can attest to its veracity, the admissibility issues would be entirely different compared to if the SPO proposes to admit the same document through a bar table motion.

20. The Defence maintains that the admissibility of evidence would ordinarily, pursuant to Rule 138, be a matter for the Trial Panel to determine. Accordingly, there is no procedural advantage to requiring the Defence to challenge the admissibility of specific items at this stage.

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<sup>12</sup> KSC-BC-2020-06, F00810, Krasniqi Defence, *Krasniqi Defence Proposals for Streamlining the Case ("Streamlining Proposals")*, 20 May 2022, confidential, para. 20.



21. If the Pre-Trial Judge does require the Defence to identify challenges to admissibility at this stage, a necessary first step would be to require the SPO to identify which documents it intends to admit through bar table motions and which documents it intends to tender through witnesses (linking each document to the specific witness concerned). Only then will the Defence be able to begin to identify its objections to the admissibility of evidentiary material.

22. On the assumption that the SPO is able to comply with its disclosure obligations, the Defence does not currently foresee any difficulty in the filing of the Pre-Trial Brief by 21 October 2022. Difficulties will obviously arise if the SPO is unable to complete Rules 102(3), 103 and 107 disclosure by 30 September 2022.

#### IV. STREAMLINING THE CASE

23. In accordance with the deadline previously set by the Pre-Trial Judge, the Defence has submitted its Proposals for Streamlining the Case which support the setting of a global time limit for each Party's case and submit that one calendar year should be the global time limit for the SPO's case.<sup>13</sup> The Defence stands by its proposals.

24. Whilst the Defence maintains that the Pre-Trial Judge should make a suggestion as to the global time limit for the SPO's case in the handover document, there is naturally a limit to the number of trial management issues which can productively be discussed at this stage of proceedings. Matters such as the appropriate time limits for each witness, and the number of hours per day or days per month that the parties are able to sit, appear to be *prima facie* within the discretion of the Trial Panel. However,

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<sup>13</sup> Streamlining Proposals, paras 19-36.

in an attempt to assist the Court, the Defence submits the preliminary observations below.

25. It is premature to consider a time limit for the Defence case at this stage. Pursuant to Rule 119(1), the Defence is not required to decide whether to present evidence at all until the conclusion of the SPO's case. It is only at that stage that the Trial Panel will order the Defence to file a list of witnesses including time estimates pursuant to Rule 119(2) and thereafter determine the time allowed for the Defence case pursuant to Rule 119(3).

26. The Defence does accept the basic principle of equality of arms and the need for a relationship of proportionality between the length of the SPO case and the length of the Defence case. However, those principles do not require strict mathematical equality, instead requiring the Trial Panel to consider all the circumstances of the case, including the specific strategies of each Defence team and the lines of defence being pursued. Those matters cannot be assessed at this stage of proceedings.

27. The Defence opposes any suggestion that the Defence should designate one representative for cross-examining certain witnesses. Mr. Krasniqi's right to examine the witnesses against him is guaranteed by Article 21(4)(f) of the Law.<sup>14</sup> Whilst the Defence is, of course, aware of the need to avoid duplication and will not delay proceedings unnecessarily, designating one representative to cross-examine witnesses at this stage is unnecessary and interferes with fair trial rights.

28. Any proposals about the average number of hours per day or days per month that the Defence would be ready to sit, must necessarily be tentative at this point. Moreover, the Defence expects the Trial Panel to adopt a flexible approach depending

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<sup>14</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

on the exigencies of the court proceedings. Nonetheless, for the purposes of planning, the Defence does not believe that it is realistic to anticipate sitting 5 days per week. Time will be needed for preparation during the trial process, not least because of the need to investigate and prepare for the evidence of a substantial number of delayed disclosure witnesses whose identities will be revealed 30 days before trial or during trial. Experience shows that written motions will frequently be submitted during trial and will require time for the parties and participants to prepare and respond to, and for the Panel to determine. The Defence therefore tentatively proposes that the trial schedule should be set to 4 sitting days per week, from Monday to Thursday, with Friday being a non-sitting day, and with a defined number of additional days per month defined as non-sitting days.

29. The Defence observes that these issues would benefit from *inter partes* discussions and it may be productive to invite the SPO, the Defence, the Victims' representative and the Registry to discuss them prior to the next Status Conference.

## V. NEXT STATUS CONFERENCE

30. The Defence will be available on 8 September 2022 at the Court's convenience.

Word count: 2,872



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**Venkateswari Alagenda**

Friday, 8 July 2022

Kuala Lumpur, Malaysia.



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Friday, 8 July 2022

London, United Kingdom.



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**Victor Băieșu**

Friday, 8 July 2022

The Hague, the Netherlands.