

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 September 2022

Language: English

Classification: Public

Public Redacted Version of

Krasniqi Defence Submissions for Fourteenth Status Conference,

KSC-BC-2020-06/F00954, dated 5 September 2022

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws QC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson QC

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra, Aidan Ellis

I. INTRODUCTION

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

2. Pursuant to Rule 82(3) of the Rules,² this filing is classified as confidential as it refers to the content of confidential filings and evidentiary material. A public redacted version will be filed shortly.

II. DISCLOSURE

Rule 102(3) Disclosure

3. At the time of writing, in the more than seven weeks since the Thirteenth Status Conference, the Defence has received 22 batches of Rule 102(3) disclosure containing 10,421 items in total. Ten of these batches, comprising 5,080 items, were disclosed in the last week.

4. It is not possible for the Defence to give an accurate figure for the number of items which remain outstanding. As a result of certain items on the Rule 102(3) Notice being split into multiple items when disclosed to the Defence³ and other issues such as the disclosure of translations,⁴ the number of items disclosed by the Specialist

¹ KSC-BC-2020-06, F00940, Pre-Trial Judge, *Order Setting the Date for a Fourteenth Status Conference and for Submissions* (“Scheduling Order”), 30 August 2022, public.

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

³ [REDACTED].

⁴ The SPO has confirmed that it is adding English translations to Rule 102(3) requests where available, KSC-BC-2020-06, Transcript of Hearing, 15 December 2021, public, p. 823, lines 13-15.

Prosecutor's Office ("SPO") in response to a Rule 102(3) request invariably exceeds the number of items in the request itself. Nonetheless, the Defence believes, at the time of writing, that over **13,000** items remain outstanding.

5. Between 18 August 2022 and 1 September 2022, the SPO and the Defence corresponded about the materiality of around 34 items identified by the SPO, with the result that the SPO agreed to process 13 items for disclosure and the Defence withdrew its request for the remaining 21 items at this stage. On 2 September 2022, the Defence received two further emails addressing materiality, which the Defence is currently considering.

6. The Defence previously raised the concern that if the SPO holds back materiality challenges and protective measures requests until close to the 30 September 2022 deadline, that would have the effect of preventing the Defence from receiving documents in time to use them in the preparation of the Defence Pre-Trial Brief and miring the parties in procedural litigation at a time when the Defence should be able to focus on the Pre-Trial Brief.⁵ The Defence requested the SPO to engage on materiality and protective measures issues sufficiently in advance of the deadline so as not to disrupt the ongoing timetable.⁶ The time available for useful *inter partes* engagement is running out.

Rule 107

7. The Rule 107 disclosure process cannot continue indefinitely. The Defence reiterates its request for an order imposing a deadline for the SPO to complete Rule 107

⁵ KSC-BC-2020-06, F00872, Krasniqi Defence, *Krasniqi Defence Submissions for Thirteenth Status Conference* ("Thirteenth SC Submissions"), 8 July 2022, public, para. 8.

⁶ *Ibid.*

disclosure.⁷ The Defence needs to be able to review the relevant material and use it in investigations and trial preparations considering, in particular, that such material presumably includes exculpatory information. It is therefore in the interests of all parties and participants for the Pre-Trial Judge to set a deadline for the completion of Rule 107 disclosure.⁸

Rule 103

8. On 26 August 2022, the Pre-Trial Judge held that the Defence request to set a deadline for the SPO to disclose exculpatory material was moot on the basis of the SPO submissions that it had completed its exculpatory review both up to 31 January 2022 and between 31 January 2022 and 16 June 2022.⁹

9. On 31 August 2022, the SPO disclosed Disclosure Package 418 which comprises 304 exculpatory items. Whilst some are re-disclosures of material previously disclosed to the Defence under other Rules, most are new disclosures. By way of example, the new disclosures include an SPO Investigator's Report from September 2018 and transcripts of an SPO interview from December 2019 which are obviously exculpatory.¹⁰ The SPO has explained that some items were "[REDACTED]" [REDACTED] "[REDACTED]".¹¹ This late disclosure of hundreds of exculpatory documents is yet further evidence that the SPO has "[REDACTED]"¹² in its disclosure

⁷ Thirteenth SC Submissions, para. 9.

⁸ *Ibid.*, para. 10.

⁹ KSC-BC-2020-06, F00936, Pre-Trial Judge, *Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations* ("Remedies Decision"), 26 August 2022, confidential, paras 39, 40(c).

¹⁰ [REDACTED].

¹¹ KSC-BC-2020-06, F00941/COR/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of Corrected Version of Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information*, 1 September 2022, confidential, para. 6.

¹² Remedies Decision, para. 32.

obligations. Defence investigations and preparations for the Pre-Trial Brief are prejudiced by this delay

III. DEFENCE INVESTIGATIONS

10. The Defence filed detailed submissions in relation to its investigations in preparation for the Thirteenth Status Conference.¹³ The Defence stands by those prior submissions and incorporates them by reference, without the need to repeat them here *verbatim*.

11. The Defence was notified on 5 September 2022 that the SPO was no longer relying upon six witnesses¹⁴ but, at around the same time, the SPO also made an additional application to add another two witnesses and their associated materials.¹⁵ The Defence thus continues to be presented with a moving target which inevitably delays the Defence investigations and trial preparations.

12. The Defence responds below to the specific questions posed by the Pre-Trial Judge¹⁶:-

- a. At present, and subject to the SPO complying with its disclosure obligations, the Defence does not foresee any difficulty in filing the Pre-Trial Brief on 21 October 2022;

¹³ Thirteenth SC Submissions, paras 13-22.

¹⁴ KSC-BC-2020-06, F00948, Specialist Prosecutor, *Prosecution Submission of Revised Witness List*, 2 September 2022, public, para. 6.

¹⁵ KSC-BC-2020-06, F00947/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials* ("SPO Request"), 5 September 2022, confidential, with Annexes 1-2, strictly confidential and *ex parte*.

¹⁶ Scheduling Order, para. 24(2).

- b. The Defence does not currently intend to make any requests concerning unique investigative opportunities pursuant to Rule 99(1) of the Rules. However, the need to make a Rule 99(1) application may arise suddenly and unexpectedly. Accordingly, the Defence reserves the right to make such an application in the future, should the need arise, and opposes the imposition of a deadline in this regard;
- c. Insofar as the Defence is able, it intends to address issues of alibi and any other grounds excluding criminal responsibility within the Pre-Trial Brief. However, the ongoing redactions in the Indictment, the SPO Pre-Trial Brief and the evidentiary material, as well as other ongoing processes including disclosure, mean that it is unlikely to be possible for the Defence to provide a complete Rule 95(5) Notice and any associated disclosure by 28 October 2022;
- d. With regard to the SPO's proposed agreed facts, the Defence has agreed to eight facts in total.¹⁷ A notice summarising these and any additional points of agreement could indeed be prepared by 28 October 2022. The Defence intends to submit its own list of proposed agreed facts to the SPO under Rule 95(3) of the Rules and will endeavour to do so in sufficient time that the resulting *inter partes* discussions will also be concluded by 28 October 2022;
- e. The Defence cannot identify objections to the admissibility of the evidentiary material disclosed by 28 October 2022. As explained in previous submissions, the Defence cannot challenge admissibility in the abstract.¹⁸ It is for the SPO to request the mode of testimony to be employed, to identify

¹⁷ Thirteenth SC Submissions, para. 18.

¹⁸ Thirteenth SC Submissions, para. 19.

through which witness an exhibit will be tendered or to specify that bar table motions will be used. The Defence will then respond to each request made by the SPO on a case-by-case basis, including to challenge admissibility as appropriate.¹⁹ In addition, the Defence notes that four SPO requests to amend the List of Exhibits are still pending and the List of Exhibits therefore remains a moving target.²⁰ In any event, the Defence opposes setting a deadline for Defence to respond to a List of Exhibits containing more than 18,000 items only one week after the deadline for the Defence Pre-Trial Brief;

- f. The Defence respectfully submits that the preparation of a separate list of issues in dispute and not in dispute, in addition to the notice of agreed facts discussed above, is unlikely to assist the Trial Panel in this case. Any facts or issues not expressly agreed by the Defence are in dispute and the SPO must prove them to the required standard.

IV. NEXT STATUS CONFERENCE

13. The Defence respectfully requests that the date for the next Status Conference be set in the week commencing 24 October 2022.

¹⁹ KSC-BC-2020-06, F00810, Krasniqi Defence, *Krasniqi Defence Proposals for Streamlining the Case*, 20 May 2022, confidential, para. 20.

²⁰ KSC-BC-2020-06, F00774/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Request to Amend the Exhibit List and for Protective Measures (KSC-BC-2020-05)*, 20 April 2022, confidential, with Annex 1, confidential, and Annexes 2-16, strictly confidential and *ex parte*; F00890/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Rule 102(2) Submission and Related Requests'*, KSC-BC-2020-06/F00890, dated 20 July 2022, 21 July 2022, confidential, with Annexes 1-7, strictly confidential and *ex parte*, and Annex 8, confidential; F00891/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Request to Amend the Exhibit List and for Protective Measures'*, KSC-BC-2020-06/F00891, dated 20 July 2022, 21 July 2022, confidential, with Annexes 1, 5-6, 10, 12, strictly confidential and *ex parte*, and Annexes 2-4, 7-9, 11, and 13, confidential; SPO Request.

14. The deadline for the Defence Pre-Trial Brief is 21 October 2022.²¹ It is reasonable to anticipate that the Defence will be working intensely on the drafting of the Pre-Trial Brief in the week prior to filing. During that time, the Defence will also need to confer regularly with Mr. Krasniqi. In the circumstances, the Defence is unlikely to be able to contribute meaningfully to a Status Conference on 18 October 2022. Furthermore, if any issues related to the 21 October 2022 deadline will need to be raised with the Pre-Trial Judge, the Defence anticipates raising them significantly prior to 18 October 2022 – which is after all only three days before the deadline for the Defence Pre-Trial Brief.

Word count: 1,749



Venkateswari Alagenda

Tuesday, 6 September 2022

Kuala Lumpur, Malaysia.



Aidan Ellis

Tuesday, 6 September 2022

London, United Kingdom.



Victor Băieșu

Tuesday, 6 September 2022

The Hague, the Netherlands.

²¹ KSC-BC-2020-06, In Court – Oral Order, Order on Deadline for Filing Defence Pre-Trial Brief, 20 May 2022, public.