

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: 1 November 2022

Language: English

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Public Redacted Version of

Krasniqi Defence Submissions for Fifteenth Status Conference,

KSC-BC-2020-06/F01073, dated 31 October 2022

Specialist Prosecutor

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby provides written submissions for the Fifteenth Status Conference in accordance with the Order Setting the Date for a Fifteenth 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. A public redacted version will be filed shortly.

II. DISCLOSURE

Rule 102(3)

3. The SPO did not comply with the deadline imposed by the Pre-Trial Judge, which required the disclosure of Rule 102(3) items from the original Rule 102(3) Notice by 30 September 2022.³ Despite a very late flurry of activity which saw 2,648 items disclosed to the Defence over the night of 30 September 2022,⁴ the SPO has now conceded that it failed to disclose as many as 1,162 items to the Defence.⁵ The SPO only disclosed these items on 13 October 2022.

¹ KSC-BC-2020-06, F01039, Pre-Trial Judge, *Order Setting the Date for a Fifteenth Status Conference and for Submissions*, 17 October 2022, public.

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

³ KSC-BC-2020-06, In Court – Oral Order, *Order on Disclosure of Rule 102(3) Material*, 20 May 2022, public.

⁴ The Defence notes that Disclosure Packages 524, 530, 535 and 536 were disclosed between 22:09 and 23:41 on 30 September 2022; and Disclosure Packages 539, 540, 541, 542, 544, 545, 551, 558 and 559 were disclosed between 00:17 and 04:43 on 1 October 2022. The SPO attributed its failure to comply with the deadline to the “complexities of loading and releasing the final packages”, *see* KSC-BC-2020-06, F01005, Specialist Prosecutor, *Prosecution Notification of Compliance*, 3 October 2022, public, fn. 2.

⁵ KSC-BC-2020-06, F01034, Specialist Prosecutor, *Prosecution Notification of Disclosure*, 13 October 2022, public, para. 3; Disclosure Package 571.

4. The SPO provided its disclosure spreadsheets to the Defence on 14 October 2022. The Defence is currently reviewing these in order to determine if any further items are missing. While the Defence appreciates the SPO's efforts in providing these spreadsheets and recognises the high volume of Rule 102(3) items disclosed, the way in which disclosure has been conducted makes it extremely cumbersome for the Defence to review them. For instance: (i) issues such as items being split into multiple parts or the disclosure of translations, which the Defence has previously pointed out,⁶ inevitably affect the number of items disclosed compared to the number of items requested and frustrate any simple comparison exercise; (ii) contrary to the SPO's previous submission that items from different requests are not mixed in the same disclosure package,⁷ recently the SPO has disclosed items from more than one Rule 102(3) request in the same package;⁸ and (iii) some items cannot be found listed in any of the SPO disclosure spreadsheets,⁹ forcing the Defence to search for each and every one of them to confirm their disclosure. The process of searching for these items is even more burdensome considering that some ERNs of the documents disclosed differ from the Rule 102(3) Notice. As a result, the Defence is not currently able to confirm that SPO has disclosed, challenged materiality or sought protective measures in relation to all requests from the original Rule 102(3) Notice.

5. The Defence continues to receive disclosure of Rule 102(3) items. On 25 October 2022, the SPO disclosed Disclosure Package 578, which contained 7 items, and on 26 October 2022, the SPO disclosed Disclosure Package 579, which contained 21 items,

⁶ KSC-BC-2020-06, F00954, Krasniqi Defence, *Krasniqi Defence Submissions for Fourteenth Status Conference* ("Fourteenth SC Submissions"), 5 September 2022, confidential, para. 4.

⁷ KSC-BC-2020-06, Transcript of Hearing, 4 February 2022, public, p. 885, line 23 to p. 886, line 4.

⁸ *E.g.* Disclosure Package 539 contains items from the Sixth and Seventh Rule 102(3) Requests; Disclosure Package 559 contains items from the Second, Fourth and Sixth Rule 102(3) Requests; Disclosure Package 571 contains items from the Third, Fourth, Fifth, Sixth, Seventh and Eighth Rule 102(3) Requests.

⁹ *See, e.g.*, [REDACTED].

both pursuant to Rule 102(3). Further disclosures will follow the pending decisions on protective measures applications and materiality challenges and potentially follow any outstanding Rule 107 clearances.¹⁰ So far as possible, the Defence submits that these disclosures should be complete before transfer to the Trial Panel.

6. On 7 October 2022, the SPO filed its Prosecution Supplemental Rule 102(3) Notice which contains around 8,712 items.¹¹ The Defence is reviewing this Notice. Consistent with its approach to previous requests, the Defence is likely to request a significant proportion of the items on the Supplemental Notice. The Defence will soon start making requests for these items.

7. The Defence notes that there is currently no deadline either for the Defence to request items from the Supplemental Rule 102(3) Notice or for the SPO to respond to such requests. In establishing previous deadlines for disclosure of Rule 102(3) material, the Pre-Trial Judge has taken into consideration (i) the Parties' submissions; (ii) the amount of items falling under this category; (iii) the time needed for the Defence to go through the detailed notice to be provided by the SPO; (iv) the need for redactions to Rule 102(3) items to be disclosed; and (v) the need to ensure that disclosure is completed expeditiously.¹² Whilst further requests may need to be made later as investigations develop and redactions are lifted, the Defence proposes an initial deadline for Defence requests from the Prosecution Supplemental Rule 102(3) Notice of 4 December 2022, with the SPO to provide disclosure, request protective measures and/or challenge materiality by 4 January 2023.

¹⁰ The Defence estimates that around 600 requested items from the original Rule 102(3) Notice are subject (in total or in part) to protective measures.

¹¹ Supplemental Rule 102(3) Notice.

¹² KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public, para. 64.

Rule 103

8. The SPO has continued to disclose new packages of Rule 103 material. On 24 October 2022, the SPO disclosed Disclosure Package 577, which contained 113 items of Rule 103 material. [REDACTED].¹³ That, however, leaves as many as 99 items in relation to which the SPO's only explanation is that they were recently re-assessed as falling under Rule 103. In other words, that represents 99 exculpatory items which – as with numerous other instances of Rule 103 items handled by the SPO - were not disclosed to the Defence immediately, in breach of Rule 103.

9. The explanation provided by the SPO for this breach of Rule 103 is far from satisfying. First, the SPO fails to explain why at least some of the 99 “remaining” items that are now deemed to contain exculpatory information, may not have been included in the original Rule 102(3) Notice after failing the initial Rule 103 screening.¹⁴ Second, the Defence queries whether a further exculpatory review of the Supplemental Rule 102(3) Notice is ongoing or will be conducted once Defence requests are made, as the SPO did in relation to the original Rule 102(3) Notice.

Rule 107

10. The Defence reiterates its request for an order imposing a deadline for the SPO to complete Rule 107 disclosure.¹⁵ 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

¹³ [REDACTED].

¹⁴ KSC-BC-2020-06, F01019, Specialist Prosecutor, *Prosecution Disclosure Report*, 7 October 2022, confidential, para. 7.

¹⁵ KSC-BC-2020-06, F00872, Krasniqi Defence, *Krasniqi Defence Submissions for Thirteenth Status Conference (“Thirteenth SC Submissions”)*, 8 July 2022, public, para. 9; *Fourteenth SC Submissions*, para. 7.

interests of all parties and participants for the Pre-Trial Judge to set a deadline for the completion of Rule 107 disclosure,¹⁶ which should be resolved prior to the transfer of the case file to the Trial Panel.

III. DEFENCE INVESTIGATIONS

11. The Defence investigation is ongoing. Indeed, in light *inter alia* of the number of witnesses relied upon by the SPO, the number of redactions and the vast amount of pages of material affected by redactions, the Defence investigation will be ongoing for the foreseeable future.

12. On 8 September 2022, the Pre-Trial Judge ordered the Defence to “provide by 18 November 2022 any objections regarding the admissibility of evidentiary material disclosed to the extent possible”.¹⁷

13. As previously submitted, it is not possible at this stage for the Defence to submit individual objections to the admissibility of the 18,226 items on the SPO’s list of exhibits.¹⁸ First, on 27 October 2022, the Pre-Trial Judge issued two decisions on SPO requests to amend the exhibit and witness list and for protective measures, [REDACTED].¹⁹ It appears to remain at least one outstanding application by the SPO for permission to amend its list of exhibits. The list of exhibits thus remains a moving target.²⁰ Second, the Defence cannot challenge admissibility in the abstract.²¹ It is for

¹⁶ Thirteenth SC Submissions, para. 10; Fourteenth SC Submissions, para. 7.

¹⁷ KSC-BC-2020-06, In Court – Oral Order, Order to Defence to provide any objections regarding the admissibility of evidentiary material by 18 November 2022, 8 September 2022, public.

¹⁸ KSC-BC-2020-06, F00967/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Amended Exhibit List*, 13 September 2022, confidential.

¹⁹ [REDACTED].

²⁰ 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.

²¹ Thirteenth SC Submissions, para. 19; Fourteenth SC Submissions, para. 12(e).

the SPO to request the mode of testimony to be employed for witnesses, to identify 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 before the Trial Panel on a case-by-case basis, including to challenge admissibility as appropriate.²² Third, the number and extent of the redactions in this case prevents the Defence from formulating all admissibility challenges. A total of 555 items listed in the SPO exhibit list are themselves redacted. The SPO recently submitted that a total of 36,000 pages of material will either be disclosed for the first time or re-disclosed with redactions lifted in the period 30 days before trial.²³ At that time, decisions were pending in relation to a further 11,000 pages.²⁴ An unknown number of pages of material will be disclosed for the first time or re-disclosed with redactions lifted when protective measures are lifted 30 days prior to the testimony of various witnesses. These redactions limit the ability of the Defence to formulate objections to admissibility at this time.

14. The Defence anticipates that, on 18 November 2022, it will be able to notify the Pre-Trial Judge and the SPO of certain categories of material in relation to which there will be objections to admissibility. This notification will enable the Pre-Trial Judge to give an indication to the Trial Panel in the Handover Document of the matters which remain unresolved.²⁵ However, for the reasons set out above, the Defence notification cannot and will not be exhaustive, is unlikely to challenge documents on an individual basis and the Defence reserves the right to raise additional admissibility issues before the Trial Panel pursuant to Rule 138.

²² KSC-BC-2020-06, F00810, Krasniqi Defence, *Krasniqi Defence Proposals for Streamlining the Case*, 20 May 2022, confidential, para. 20.

²³ KSC-BC-2020-06, F00952, Specialist Prosecutor, *Prosecution Submissions for Fourteenth Status Conference*, 5 September 2022, public, para. 11.

²⁴ *Ibid.*

²⁵ Rule 98(1)(e)(ix).

IV. TRANSFER TO TRIAL PANEL

15. The Defence supports the transfer of this case to a Trial Panel around the end of this year. The above submissions regarding disclosure will not delay transfer to the Trial Panel; laying down a timetable for disclosure from the Supplemental Rule 102(3) Notice will facilitate transfer, bearing in mind the Pre-Trial Judge's previously expressed intention to send a clean case file to the Trial Panel.²⁶

16. The Defence would additionally support an early Status Conference before the Trial Panel. An early Status Conference is particularly desirable because there will be a number of issues which the Trial Panel needs to resolve before the start of the trial, including the issues previously raised regarding the streamlining of the trial.

V. NEXT STATUS CONFERENCE

17. The Defence does not foresee the need for a further Status Conference before the transfer of the case to the Trial Panel. Matters which remain outstanding can be timetabled by the Pre-Trial Judge at the current Status Conference. Unless there are substantive issues requiring a further oral hearing, the Defence respectfully suggests that any subsequent notifications and updates could be provided in writing.

²⁶ KSC-BC-2020-06, Transcript of Hearing, 20 May 2022, public, p. 1268, lines 9-21, *see also* p. 1256, lines 8-15.

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