

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: Trial Panel II
Judge Charles L. Smith III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

Date: 24 February 2023

Language: English

Classification: Public

Public Redacted Version of

Krasniqi Defence Response to Prosecution Request for Compliance with

Third Oral Order (F01310), KSC-BC-2020-06/F01319, dated 24 February 2023

Acting Specialist Prosecutor

Alex Whiting

Counsel for Victims

Simon Laws KC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson KC

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. On 22 February 2023, the Defence for Jakup Krasniqi (“Defence”) was notified of the Prosecution Request for Compliance with Third Oral Order Regarding Proposed Duration of Cross-Examination and Related Matters¹ in which the Specialist Prosecutor’s Office (“SPO”) requests the Trial Panel to order the Defence to comply fully with the Third Oral Order² and to provide immediately estimated durations of cross-examination for all of the first 12 witnesses.³

2. Since the disclosure to the Defence of 56,072 pages of previously withheld, lesser redacted or unredacted material on 30 January 2023,⁴ a substantial amount of which related to the first 12 witnesses, the Defence has been straining every sinew to prepare for trial. The physical impossibility of preparing this amount of material in the time available led to the Joint Defence Request for Relief⁵ and to the postponement of the start of trial by the Trial Panel.⁶ Given the volume of disclosure recently received in relation to the very witnesses for whom the Defence was to estimate the duration of cross-examination, as the Defence explained in the Joint Defence Response to Prosecution Submission of List of First 12 Witnesses and Associated Information⁷ and to the SPO *inter partes*,⁸ despite its best efforts to comply with the Third Oral Order,

¹ KSC-BC-2020-06, F01310, Specialist Prosecutor, *Prosecution Request for Compliance with Third Oral Order Regarding Proposed Duration of Cross-Examination and Related Matters* (“Request”), 21 February 2023, public, with Annex 1, confidential.

² KSC-BC-2020-06, In Court – Oral Order, Third Order - Scheduling of First 12 SPO Witnesses (“Third Oral Order”), 16 December 2022, public.

³ Request, paras 1, 19.

⁴ Disclosure Package 656 (636 items); Disclosure Package 657 (1,358 items); Disclosure 658 (203 items); Disclosure 659 (361 items); Disclosure 660 (1 item).

⁵ KSC-BC-2020-06, F01271, Joint Defence, *Joint Defence Request for Relief Pursuant to Article 21(4) of the Law and Rule 143 of the Rules* (“Joint Defence Request for Relief”), 9 February 2023, confidential.

⁶ KSC-BC-2020-06, In Court – Oral Order, Opening of the Case and Postponement Requests, 15 February 2023, public.

⁷ KSC-BC-2020-06, F01286, Joint Defence, *Joint Defence Response to Prosecution Submission of List of First 12 Witnesses and Associated Information (F10243)* (“Joint Defence Response”), 13 February 2023, confidential, para. 2.

⁸ See Annex 2.

the Defence was simply not able to provide reliable estimates for the cross-examination of the newly disclosed witnesses. The Defence proposed to the SPO that it would provide these estimates “on a rolling basis” and “as quickly as we can”.⁹ The Defence expected the SPO to reply to this reasonable and practical proposal rather than immediately and unnecessarily seizing the Trial Panel of the issue.¹⁰

3. The Defence understands the logistical issues involved in scheduling witnesses (as shown by its willingness to commit to providing the information “as quickly as we can”). Nonetheless, the original timetable provided for the SPO to receive the time estimates only 15 days before the start of trial. It is difficult to understand why the SPO now asserts that it needs the time estimates immediately, when trial is some 37 days away. As the Trial Panel would expect, since the Joint Defence Response was filed, the Defence has continued to review newly received disclosures and has made its best efforts to provide the attached provisional estimated times for cross-examination.¹¹ The Request is therefore moot.

4. In the circumstances, however, the Defence must emphasise that these estimates remain provisional. The Defence has not had adequate time and facilities to review all the new disclosures or conduct the investigations necessary to prepare for cross-examination. The Defence may therefore need to request additional time for cross-examination once its preparations are complete.

5. Whilst this filing responds to a public filing, it is classified as confidential as it refers to the content of confidential filings.¹²

⁹ Annex 2, p. 8.

¹⁰ KSC-BC-2020-06, F01226/A01, Trial Panel II, *Annex 1 to Order on the Conduct of Proceedings* (“Order on the Conduct of Proceedings”), 25 January 2023, public, para. 43.

¹¹ Annex 1.

¹² Rule 82(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

II. PROCEDURAL HISTORY

6. On 16 December 2022, the Panel issued its Third Oral Order which required the Defence to notify the Panel and other parties and participants in respect of each of the first 12 SPO witnesses: (1) whether it intends to cross-examine the witness, and if so, the proposed duration of the cross-examination; (2) whether it objects to the admission of the witness's statement pursuant to Rule 154, if offered by the SPO under the rule, and the general grounds on which objection is taken to its admission; and (3) whether it objects to the admission of any or all of the documents which the SPO proposes to use with that witness and the general grounds on which objection is taken.¹³ The deadline was 3 February 2023, i.e. two days after receipt of the list of the first 12 witnesses.¹⁴

7. The Defence sought an extension of time to respond to the first submission of the list of the first 12 witnesses,¹⁵ and the Trial Panel granted an extension of time until 13 February 2023.¹⁶ The above information was thus due to be provided to the SPO around 15 days prior to 1 March 2023, which was the date then fixed for the opening statements.¹⁷ The SPO did not oppose the extension and, importantly, did not suggest that it needed to receive the required information more than 15 days prior to the start of trial.¹⁸

¹³ Third Oral Order.

¹⁴ KSC-BC-2020-06, F01243, Specialist Prosecutor, *Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, public, with Annex 1, confidential.

¹⁵ KSC-BC-2020-06, F01204, Joint Defence, *Joint Defence Request for a Variation of the Time Limit to Provide Information about the Examination of SPO Witnesses*, 13 January 2023, confidential.

¹⁶ KSC-BC-2020-06, In Court – Oral Order, Panel Grants the Joint Defence Motion Request F01204, 18 January 2023, public.

¹⁷ See KSC-BC-2020-06, In Court – Oral Order, Order Setting Dates for Specialist Prosecutor Preparation Conference and Commencement of Trial, 18 January 2023, public.

¹⁸ KSC-BC-2020-06, Transcript of Hearing (“Specialist Prosecutor’s Preparation Conference”), 18 January 2023, public, p. 1827, lines 24-25.

8. On 30 January 2023, the SPO disclosed to the Defence Disclosure Packages 656, 657, 658, 659, and 660 pursuant to Rule 102(1)(a), Rule 102(1)(b), Rule 103 and Rule 102(3), containing a total of 2,559 items, being lesser redacted, redacted or unredacted versions of material previously disclosed or previously withheld under those Rules. The Disclosure Packages received on 30 January 2023 amounted to 56,072 pages of material.

9. On 9 February 2023, the Defence filed its Joint Defence Request for Relief which sought a four week break between the opening statements and the calling of the first witness, to enable the Defence to have adequate time to prepare the newly disclosed material.¹⁹ The Defence explained within that motion that the newly received disclosure contained thousands of pages relevant to the first 12 witnesses. Without repeating all of the contents of the Joint Defence Request for Relief, the Defence highlights that: –

- a. The First Prosecution witness concerned the [REDACTED] location, in relation to which the identity of 15 witnesses was disclosed to the Defence on 30 January 2023, amounting to around 4,000 pages of material to review;²⁰
- b. The Second Prosecution witness' materials alone, subject to extensive redactions up to 30 January 2023, ran to 900 pages;²¹

¹⁹ Joint Defence Request for Relief, paras 2, 49-50.

²⁰ *Idem*, paras 21-22.

²¹ *Idem*, para. 24.

- c. The Third Prosecution witness related to [REDACTED] and three additional locations, [REDACTED], [REDACTED], and [REDACTED] in relation to which there was around 3,000 pages of new disclosure;²² and
- d. The Fourth Prosecution witness related to [REDACTED], in relation to which around 400 pages of new material were disclosed.²³

10. On 13 February 2023, the Defence submitted the Joint Defence Response. The Joint Defence Response identified that the Defence intended to cross-examine all 12 witnesses, provided time estimates for the cross-examination of the seven witnesses whose identity was known to the Defence prior to 30 January 2023, indicated whether the Defence objected to the admission of witness statements pursuant to Rule 154 and indicated objections to the admissibility of all the documents which the SPO intended to use with the witnesses.²⁴

11. In light of the volume of relevant material recently received, the Defence was simply not in a position to provide reliable time estimates for the cross-examination of the five newly disclosed witnesses. In those circumstances, the Defence did not wish to mislead the Trial Panel by providing unreliable guesses, which would have been of no use to the SPO in making logistical arrangements. Hence no time estimates for these witnesses could be provided. The Joint Defence Response explained this position by referring to the contents of the Joint Defence Request for Relief and submitting that in the light of the volume of material received “the Defence’s time-estimates for the cross-examination of witnesses, to the extent that it has been able to provide them, are necessarily provisional”.²⁵

²² Joint Defence Request for Relief, para. 27.

²³ *Idem*, para. 28.

²⁴ Joint Defence Response.

²⁵ *Idem*, para. 2.

12. On 14 February 2023 at 11:49, the SPO emailed the Defence to state that the Defence had provided “N/A” for time estimates without an accompanying explanation. The SPO asked the Defence to “explain the meaning of N/A, as the deadline for providing these estimates passed yesterday and your time estimates influence logistical preparations currently being made.”²⁶

13. On 14 February 2023 at 14:32 the Defence responded, referring the SPO to the Joint Defence Response and confirming that “our position is that we are not yet in a position to give time estimates for the newly disclosed witnesses”.²⁷ The SPO acknowledged receipt of this message on 14 February 2023 at 14:51.²⁸

14. On 15 February 2023, during the Specialist Prosecutor’s Conference, it was explained to the Trial Panel that subject, of course, to the Trial Panel’s decision, the parties had agreed that the SPO would not oppose the postponement of the opening statements until 3 April 2023 and the Defence would withdraw the remainder of the Joint Defence Request for Relief.²⁹ The Defence welcomes the *inter partes* discussions which preceded this agreement and presumed that the SPO’s non-opposition reflected, at least in part, an acceptance of the need for the Defence to have adequate time to prepare the newly disclosed material.

15. During the Specialist Prosecutor’s Preparation Conference, in the course of a discussion about the target time for the completion of the SPO’s case, the SPO submitted:

²⁶ Annex 2, p. 1.

²⁷ *Idem*, p. 2.

²⁸ *Idem*, p. 4.

²⁹ Specialist Prosecutor’s Preparation Conference, p. 2038, lines 20-23.

“We have noted that the Defence has filed their estimates for the first 12 witnesses. A lot of them are just yes/NA, not available, for the delayed disclosure ones, which is not in compliance with Your Honours' directions. So our ability to estimate is in part dependent upon information that we do need to receive.”³⁰

16. The Defence notes that the SPO did not invite the Trial Panel to make any order or set any deadline in relation to the missing cross-examination time estimates, nor did the SPO submit that its logistical preparations for trial were impeded by the missing time estimates.

17. On 16 February 2023 at 10:17, the SPO emailed the Defence and stated that it was “unable to effectively schedule witnesses and make necessary logistical preparations until we have [the time estimates] for all of the first 12 witnesses”. The SPO requested the Defence to provide complete time estimates before Monday 20 February, 16:00.³¹

18. On 17 February 2023, at 10:48, the Defence replied to the SPO. The Defence made it clear that “we are not yet in a position to give time estimates for the newly disclosed witnesses”. The Defence nonetheless provided provisional time estimates for the cross-examination of [REDACTED] and [REDACTED] and offered to provide the outstanding three time estimates not merely “on a rolling basis” but also “as quickly as we can”.³²

19. The SPO did not respond to or acknowledge that email. Instead the SPO filed the Request on 21 February 2023.

³⁰ Specialist Prosecutor’s Preparation Conference, p. 2012, lines 10-14.

³¹ Annex 2, p. 5.

³² *Idem*, p. 8.

III. SUBMISSIONS

20. The Defence respectfully submits that the Request was wholly unnecessary. First, as set out above and in various filings, it must have been clear to the SPO that in the light of the volume of new disclosure the Defence was not in a position to provide reliable time estimates for the cross-examination of the newly disclosed witnesses.

21. Second, the SPO had the opportunity to seek an order on this matter during the Specialist Prosecutor's Preparation Conference. The Defence estimates that dealing with the matter orally would have taken no more than ten minutes of court time. By reserving the issue instead to a written filing, and therefore requiring the parties to engage in written pleadings and the Panel to make a written ruling, the SPO has wasted precious time that the Defence desperately needs to review the voluminous newly disclosed material and prepare for trial

22. Third, whilst the Defence appreciates the need to make logistical preparation for trial, the Defence does not accept that "witness scheduling fundamentally depends on this information".³³ The original timetable required the Defence to provide the SPO with the time estimates no more than 15 days before the start of trial. The SPO did not object that receiving the estimates this close to trial would fundamentally impair its timetabling. The trial is now scheduled to commence on 3 April 2023 in some 37 days time. It is unpersuasive and opportunistic for the SPO to argue that it needs to receive the time estimates for the remaining three witnesses "immediately", when it was previously content to receive all the time estimates 15 days before trial.

23. Fourth, the Defence does not accept that the SPO had exhausted *inter partes* discussions before rushing to file the Request. The parties are expected to try to resolve

³³ Request, para. 11.

issues that arise between them and only to seize the Trial Panel when such resolution is “impossible”.³⁴ The full correspondence is now before the Panel. The Defence sought to explain its position to the SPO and to offer reasonable and practical solutions. The SPO fundamentally and deliberately mischaracterises the Defence position by asserting that the Defence “refuse to indicate” their collective cross-examination.³⁵ A fair reading of the correspondence shows that there was no such refusal. Instead, on 17 February 2023, the Defence provided two further time estimates and offered to provide the remaining three estimates “as quickly as we can”. It is difficult to see what else the Defence could have done. The Defence expected the SPO to respond to that proposal before seizing the Trial Panel of the issue.

24. Nonetheless, the Defence’s intensive review of the newly received material has continued apace. The Defence has prioritised reviewing as much as possible of the material in relation to the first 12 witnesses as quickly as possible. Although the review is not complete, the Defence is now in a better – though far from ideal – position to provide provisional estimates for the remaining three witnesses. The Defence attaches an Annex setting out their time estimates for the cross-examination of the first 12 witnesses.³⁶ The Defence respectfully submits that the Request is therefore moot.

25. In good faith, the Defence has hastened to make the best estimates possible in the time permitted by the Trial Panel to file this response. For all the reasons previously stated, these estimates are necessarily provisional. The Defence reiterates that it has not had adequate time and facilities to digest or analyse the newly disclosed material – which as set out above amounts to thousands of pages. Investigations into the newly disclosed material will be ongoing throughout the coming weeks and up to and after the start of trial. These investigations, and the detailed analysis which

³⁴ Order on the Conduct of Proceedings, para. 43.

³⁵ Request, para. 13.

³⁶ Annex 1.

remains required to prepare for cross-examination, may necessitate the Defence seeking additional time.

26. Moreover, pursuant to the Order on the Conduct of Proceedings, the Defence is likely to be the fourth team to cross-examine the relevant witnesses³⁷ and the time required for its cross-examination is likely to depend upon the conduct of previous cross-examinations. The Defence is mindful of the Trial Panel's instruction to avoid repetitive questioning³⁸ and does not intend, to the extent possible, to repeat questions already asked. As a result, its time estimates may also reduce in practice.

IV. CONCLUSION

27. Accordingly, the Defence respectfully requests the Trial Panel to: –

- a. Dismiss the Request as moot; and
- b. Remind the SPO to exhaust *inter partes* discussions in good faith before seizing the Panel with any issue.

³⁷ Order on the Conduct of Proceedings, para. 108.

³⁸ *Idem*, para. 106.

Word count: 2,805



Venkateswari Alagenda

Friday, 24 February 2023

Kuala Lumpur, Malaysia.



Aidan Ellis

Friday, 24 February 2023

London, United Kingdom.



Victor Băieșu

Friday, 24 February 2023

The Hague, the Netherlands.