



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Public Redacted Version of 'Prosecution consolidated reply relating to its request to amend the Exhibit List (F02279)'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Responses¹ amount to nothing more than unsubstantiated, alarmist attempts to unjustly deprive the Specialist Prosecutor's Office ('SPO') of the opportunity to present – and the Panel to consider – *prima facie* relevant and important evidence, which may be necessary for the determination of the truth and the proper administration of justice.² As set out in the Request,³ the Requested Amendments⁴ concern potential interference with [REDACTED] witnesses, including [REDACTED], and may be relevant to the subject matter and circumstances of their testimony, and the charges.⁵ The SPO foresees the potential need to, *inter alia*, use or tender the materials encompassed by the Requested Amendments to clarify, challenge, and/or contextualise the evidence of [REDACTED].

¹ Thaçi Defence Response to 'Prosecution request to amend the Exhibit List' (F02279), KSC-BC-2020-06/F02314, 15 May 2024, Confidential ('THAÇI Response'); Selimi Defence Response to Prosecution Request to Amend the Exhibit List (F02279), KSC-BC-2020-06/F02315, 15 May 2024, Confidential ('SELIMI Response'); Krasniqi Defence Response to Prosecution Request to Amend the Exhibit List (F02279), KSC-BC-2020-06/F02316, 15 May 2024, Confidential ('KRASNIQI Response'); Veseli Defence Response to Prosecution Request to Amend the Exhibit List (F02279), 15 May 2024, KSC-BC-2020-06/F02317, Confidential ('VESELI Response'; collectively with the THAÇI Response, SELIMI Response, and KRASNIQI Response, 'Responses').

² Notably, the Panel has full discretionary power in evidentiary matters, including to ensure it has all relevant information to assess witness credibility and evidentiary weight. This may include evidence of motivations to lie, witness interference, false testimony, contradictions, and inconsistencies. See ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Judgement, 4 December 2012 ('*Lukić and Lukić Appeal Judgment*'), para.79; ICTR, *Bikindi v. Prosecutor*, ICTR-01-72-A, Judgement, 18 March 2010 ('*Bikindi Appeal Judgment*'), paras 114, 116.

³ Prosecution request to amend the Exhibit List, KSC-BC-2020-06/F02279, 1 May 2024, Confidential ('Request'), paras 1-7.

⁴ See Request, KSC-BC-2020-06/F02279, para.1 (defining the 'Requested Amendments' and 'Exhibit List').

⁵ *Contra* VESELI Response, KSC-BC-2020-06/F02317, paras 18, 32, 36; SELIMI Response, KSC-BC-2020-06/F02315, para.20; KRASNIQI Response, KSC-BC-2020-06/F02316, para.30; THAÇI Response, KSC-BC-2020-06/F02314, para.34. To the extent the Defence claims that the SPO's submissions on relevance are insufficient, it fails to explain what more was required. For each Requested Amendment, the SPO summarised relevant portions, which it foresees the need to use and/or tender. The relevance of the summarised portions, which concern, *inter alia*, [REDACTED], is apparent when read with the underlying purposes of the Request.

2. In this context, the SPO agrees with the Defence that: (i) the ‘particular nature of the Requested Amendments should be at the forefront of the Panel’s mind’;⁶ and (ii) use of materials encompassed by the Requested Amendments with witnesses may be relevant to – albeit not determinative of – their admissibility.⁷ The Request should be granted.

II. SUBMISSIONS

3. As a preliminary matter, Defence submissions concerning the number of exhibit list amendments in this case and items on the Exhibit List,⁸ and speculation about the potential impact of ongoing or future investigations, proceedings, and requests⁹ are irrelevant to consideration of this Request and should be summarily dismissed. The Panel will assess the Requested Amendments *in concreto* in light of present circumstances and the established standard for exhibit list amendments.¹⁰

4. For a proper determination of the truth, evidence of witness interference – including allegations that are ‘unproven’ or ‘unindicted’¹¹ – may be added to the

⁶ VESELI Response, KSC-BC-2020-06/F02317, para.12. *See also* Request, KSC-BC-2020-06/F02279, para.3 (concerning the heightened responsibility where there are possible efforts to distort witness evidence or the truth-finding process).

⁷ SELIMI Response, KSC-BC-2020-06/F02315, para.29.

⁸ VESELI Response, KSC-BC-2020-06/F02317, para.10; SELIMI Response, KSC-BC-2020-06/F02315, para.23; KRASNIQI Response, KSC-BC-2020-06/F02316, paras 2, 17-18; THAÇI Response, KSC-BC-2020-06/F02314, para.4. Similar (inflated and inaccurate) submissions have been made in the context of other Defence responses. *See e.g.* Prosecution reply relating to its request to amend the Exhibit List (F02099), KSC-BC-2020-06/F02138, 19 February 2024, Confidential, para.2; Prosecution reply relating to its motion to admit Llap Zone documents (F02138), KSC-BC-2020-06/F02266, 25 April 2024, para.1, fn.3.

⁹ VESELI Response, KSC-BC-2020-06/F02317, paras 42-43; SELIMI Response, KSC-BC-2020-06/F02315, para.25; KRASNIQI Response, KSC-BC-2020-06/F02316, para.41; THAÇI Response, KSC-BC-2020-06/F02314, paras 27-28.

¹⁰ *See e.g.* Decision on Prosecution Request to Amend the Exhibit List (F01689 and F01747), KSC-BC-2020-06/F01785, 12 September 2023, Confidential, paras 16, 21.

¹¹ *See Lukić and Lukić Appeal Judgment*, paras 77 (the Trial Chamber considered that allegations of interference may impact its assessment of the evidence in the proceedings as a whole, notwithstanding its decision not to proceed with contempt charges), 79 (the Appeals Chamber found no error in the Trial Chamber’s approach); *Bikindi Appeal Judgment*, para.115 (considering that a credibility determination may be based, but does not depend, on a judicial finding that a witness had given false testimony; the fact that the Prosecution did not prove or allege that witnesses were giving false testimony did not

Exhibit List, used with witnesses, admitted, and considered by the Panel in its holistic assessment of the evidence at the conclusion of the trial.¹² There is no risk of a ‘trial within a trial’ on charges other than those contained in the Indictment, and whether the Accused are indicted for any Article 15(2)¹³ offences is irrelevant, as the evidence cannot be relied upon as proof of any uncharged crimes.¹⁴ Further, contrary to Defence submissions,¹⁵ there is nothing extraordinary or fundamentally unfair about Panels in different cases considering the same evidence in light of distinct charges and records, and coming to their own conclusions.¹⁶

5. Defence submissions on prejudice are general, without any concrete explanation of why the Defence has insufficient time to investigate or prepare in relation to the

prevent the Chamber from exercising its discretion in assessing the weight to be attached to their evidence). While [REDACTED] claim that they were not approached in relation to the subject matter of their testimony, these assertions do not detract from [REDACTED]. *Contra* VESELI Response, KSC-BC-2020-06/F02317, paras 18, 32, 36, 40; SELIMI Response, KSC-BC-2020-06/F02315, paras 20-21; KRASNIQI Response, KSC-BC-2020-06/F02316, paras 29-30; THAÇI Response, KSC-BC-2020-06/F02314, para.34.

¹² See e.g. *Lukić and Lukić* Appeal Judgment, paras 56-63, 76-79; ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Judgement, 20 July 2009, para.21 (noting that, after receiving reports concerning allegations of witness interference, the Chamber permitted the Parties to make applications to introduce evidence or call witnesses relevant to the allegations, with a view to assessing whether the alleged witness interference had an impact on the reliability of evidence), 170, 177, 211 (considering evidence of witness interference in its assessment of witness credibility), 1164-1165. See also Council of Europe, Committee of Ministers, Recommendation CM/Rec(2022)9 on the protection of witnesses and collaborators of justice, 30 March 2022, Appendix, Section II, para.5 ([...] procedural law should enable the impact of intimidation on testimonies to be taken into consideration [...]); Request, KSC-BC-2020-06/F02279, para.3, fn.9 (and sources cited therein).

¹³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ are to the Law, unless otherwise indicated.

¹⁴ See, similarly, Decision on Thaçi Defence’s Motion to Strike Part of the Record of Testimony of W02652, KSC-BC-2020-06/F01623, 23 June 2023, Confidential, paras 30 (that evidence cannot be relied upon to established un-pleaded allegations or charges does not mean it cannot be used as evidence of pleaded allegations and charges in the Indictment), 39. *Contra* VESELI Response, KSC-BC-2020-06/F02317, paras 28, 35, 45-46; SELIMI Response, KSC-BC-2020-06/F02315, para.16; KRASNIQI Response, KSC-BC-2020-06/F02316, paras 29, 33; THAÇI Response, KSC-BC-2020-06/F02314, para.32.

¹⁵ THAÇI Response, KSC-BC-2020-06/F02314, para.35; VESELI Response, KSC-BC-2020-06/F02317, paras 46-48.

¹⁶ See e.g. ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.17, Decision on Joseph Nzirorera’s Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009, paras 16-22; ICTR, *Simba v. Prosecutor*, ICTR-01-76-A, Judgement, 27 November 2007, para.132.

Requested Amendments.¹⁷ Considering that the Requested Amendments concern, *inter alia*, the subject matter and circumstances of their testimony, Defence claims that prior preparation for [REDACTED] did not encompass the materials concerned by the Requested Amendments are groundless.¹⁸ Moreover, Defence claims that the timing of the Request was strategic¹⁹ are unsupported and ignore relevant submissions on, *inter alia*, the need to protect witnesses, investigations into a [REDACTED] witness interference, and the integrity of the proceedings.²⁰

6. Arguments throughout the Responses concern admissibility,²¹ exceed the scope of the Request, and should be disregarded by the Panel. In this respect, submissions on claimed rights violations will be addressed in the SPO's response to the THAÇI Motion.²² To the extent the THAÇI Defence raises these arguments as a basis for denying the Request,²³ and even if Rule 138(2)²⁴ applied to Exhibit List amendments – which it does not – the THAÇI Response²⁵ fails to make or substantiate any argument

¹⁷ VESELI Response, KSC-BC-2020-06/F02317, paras 22, 24, 26; KRASNIQI Response, KSC-BC-2020-06/F02316, paras 16, 21, 25; THAÇI Response, KSC-BC-2020-06/F02314, para.23.

¹⁸ VESELI Response, KSC-BC-2020-06/F02317, paras 28, 40-41, 44. Notably, the Defence has had ample opportunity to prepare for these witnesses, considering the relevant, procedural history. *See* Prosecution response to Defence request for extension of time (F02289), KSC-BC-2020-06/F02296, 8 May 2024, Confidential ('Extension Response'), para.3.

¹⁹ VESELI Response, KSC-BC-2020-06/F02317, paras 21-23, 25-26, 31.

²⁰ *See* Request, KSC-BC-2020-06/F02279, paras 8-9; Extension Response, KSC-BC-2020-06/F02296, para.5.

²¹ *See e.g.* THAÇI Response, KSC-BC-2020-06/F02314, paras 29-30, 32-33. Likewise, Defence submissions about their ability to test and challenge the materials encompassed the Requested Amendments are speculative at this stage, and in any event, concern admissibility. *Contra* VESELI Response, KSC-BC-2020-06/F02317, paras 49-52; KRASNIQI Response, KSC-BC-2020-06/F02316, paras 34-35; THAÇI Response, KSC-BC-2020-06/F02314, para.33.

²² Thaçi Defence Motion for exclusion of materials *in limine*, KSC-BC-2020-06/F02312/CONF, 17 May 2023, Confidential and *Ex Parte* ('THAÇI Motion').

²³ THAÇI Response, KSC-BC-2020-06/F02314, paras 3, 29-30.

²⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), 137-138. All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

²⁵ The THAÇI Defence cannot sidestep applicable requirements by incorporating by reference arguments in THAÇI Motion, as it does in the THAÇI Response. In any event, the THAÇI Motion specifically states that it is not a response to the Request and does not address the relief sought therein, which is limited to Exhibit List amendment. *See* THAÇI Motion, KSC-BC-2020-06/F02312/CONF, paras 3, 17-18, 54.

that any claimed violation would affect the reliability of the evidence or that admission would seriously damage the integrity of the proceedings.²⁶ Such submissions should therefore be dismissed, without prejudice to the Panel's decision on the THAÇI Motion.

7. Finally, Defence requests for briefing schedules to address the admissibility of the materials encompassed by the Requested Amendments²⁷ are premature, as admission has not yet been requested, and unnecessary, considering applicable procedures and time limits already existing in the legal framework.²⁸ Likewise, SELIMI and KRASNIQI Defence submissions concerning access to confidential information in other cases do not take into account the SPO's disclosure obligations, which it has discharged and will continue to discharge in good faith, and the ability of the Defence to seek access to confidential records from the relevant Panel(s).²⁹

III. CLASSIFICATION

8. This filing is confidential pursuant to Rule 82(4).

IV. RELIEF REQUESTED

9. For the reasons given above and previously, the Request should be granted.

²⁶ Rule 138(2). *See also Specialist Prosecutor v. Shala*, Decision on Shala's Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, paras 80-82 (finding that, notwithstanding a violation of human rights law in the collection of evidence, the violation was limited and admission of the relevant interview did not render the evidence unreliable or cause damage to the integrity of the proceedings).

²⁷ SELIMI Response, KSC-BC-2020-06/F02315, paras 2, 29, 31(b); KRASNIQI Response, KSC-BC-2020-06/F02316, paras 36, 43.

²⁸ For example, when the SPO tenders the items, the Defence may seek an extension of time or, as appropriate, leave to make written submissions. Further, if there were any change in circumstances following a decision on admission, Rule 79 enables the Parties to seek reconsideration.

²⁹ *See also* Email from Panel to THAÇI Defence dated 14 March 2024 at 12.38.

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At The Hague, the Netherlands.