

**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:** Specialist Counsel for Hashim Thaçi

**Date:** 16 January 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of “Thaçi Defence Response to Prosecution request to amend the exhibit list and for protective measures (F00891)”**

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## I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Prosecution request to amend the exhibit list and for protective measures.<sup>1</sup> The SPO requests:

- i) leave to amend the Exhibit List to include the additional Rule 102(1) materials identified below (“Additional Materials”);
- ii) authorisation to apply non-standard redactions to and withhold certain Additional Materials to give effect to existing protective measures; and
- iii) disclosure relief for certain Rule 107 information contained in two documents.<sup>2</sup>

2. As a premise, the Defence stresses that this request constitutes yet another attempt from the SPO to belatedly add material that has already been in their possession for years, and to circumvent deadlines that exist in order to safeguard the accused’s right to be tried within a reasonable time.

3. The Defence therefore asks the Pre-Trial Judge to dismiss, in part, the SPO’s request to amend its Exhibit List and to order counterbalancing measures for Rule 107 provider-applied redactions, and submits that non-standard redactions should be limited to those strictly necessary.

## II. PROCEDURAL BACKGROUND

4. On 13 November 2020, the SPO confirmed “being in a position to provide complete witness and exhibit lists, and to have fulfilled related Rule 102(1)(b)

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<sup>1</sup> KSC-BC-2020-06/F00891, Confidential redacted version of ‘Prosecution request to amend the exhibit list and for protective measures’, KSC-BC-2020-06/F00891, dated 20 July 2022, with strictly confidential and *ex parte* Annexes 1, 5-6, 10, 12, and 14 and confidential Annexes 2-4, 7-9, 11, and 13, 21 July 2022 (“SPO Request”).

<sup>2</sup> SPO request, para. 1.

disclosure, by 31 May 2021”;<sup>3</sup> it further added that the trial should commence in the summer of 2021.<sup>4</sup> On 23 November 2020, the Pre-Trial Judge ordered the SPO to disclose all material falling under Rule 102(1)(b) of the Rules<sup>5</sup> by 31 May 2021.<sup>6</sup>

5. Thereafter, on four occasions,<sup>7</sup> at the SPO’s request, the Pre-Trial Judge extended the deadline for disclosure of Rule 102(1)(b) material, culminating in an eventual deadline of 31 January 2022.<sup>8</sup>

6. On 22 October 2021, following a Defence request, the SPO filed its Preliminary Witness List.<sup>9</sup>

7. At the Eighth Status Conference on 29 October 2021, the SPO advised that it would be able to file its pre-trial brief, witness list and exhibit list on 17 December 2021, seven months later than its own initial estimates.<sup>10</sup> The Pre-Trial Judge confirmed this deadline by an oral order issued the same day.<sup>11</sup>

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<sup>3</sup> KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, Public, paras. 2, 15.

<sup>4</sup> KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14.

<sup>5</sup> Rules of Procedure and Evidence Before the KSC, KSC-BD03/Rev3/2020, 2 June 2020 (“Rules”).

<sup>6</sup> KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, Public, para. 99(e).

<sup>7</sup> KSC-BC-2020-06/F00218, Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, 12 March 2021, para. 22; KSC-BC-2020-06, Transcript of Sixth Status Conference – Oral Order 1, 21 July 2021, Public, p. 536 lines 4-9; KSC-BC-2020-06, Transcript of Seventh Status Conference – Oral Order 2, 14 September 2021, Public, p. 625, lines 7-23; KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, Public (“Transcript of Eighth Status Conference”), p. 753 line 6 to p. 754 line 4.

<sup>8</sup> Transcript of Eighth Status Conference – Oral Order 3, p. 753 line 6 to p. 754 line 4.

<sup>9</sup> KSC-BC-2020-06/F00542/A02/COR, Corrected Version of Annex 2 to Prosecution Submission of Preliminary Witness List – Preliminary Witness List, 23 May 2022, Confidential (“Preliminary Witness List”).

<sup>10</sup> Transcript of Eighth Status Conference, pp. 725-726.

<sup>11</sup> Transcript of Eighth Status Conference – Oral Order 2, p. 752 line 20 to p. 753 line 5.

8. On 17 December 2021, the SPO filed a strictly confidential and *ex parte* version of its Pre-Trial Brief, Exhibit List and Witness List, before filing a confidential redacted version of these documents on 21 December 2021.<sup>12</sup>
9. On 31 January and 1 February 2022, the SPO notified six disclosure packages under Rule 102(1)(b).<sup>13</sup> On 31 January 2022, the Pre-Trial Judge granted the SPO's request for an extension of time to disclose a limited number of Rule 102(1)(b) items.<sup>14</sup> On the same day, the SPO filed a first application to amend its Exhibit List, related to 132 items.<sup>15</sup> The Request was granted by a decision of the Pre-Trial Judge issued on 8 March 2022.<sup>16</sup>
10. On 24 February 2022, the SPO filed a second application to amend its Exhibit List, concerning 24 items (29 distinct documents, totalling approximately 350 pages).<sup>17</sup> This application was granted by the Pre-Trial Judge on 22 April 2022.<sup>18</sup>
11. On 13 April, the SPO filed a third request to amend the Exhibit List,<sup>19</sup> granted by the Pre-Trial Judge on 8 July 2022.<sup>20</sup>

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<sup>12</sup> KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Pre-Trial Brief; KSC-BC-202006/F00631RED/A02/CONF/RED, List of Witnesses; KSC-BC-202006/F00631/RED/A03/CONF/RED, List of Exhibits.

<sup>13</sup> Disclosure Packages 154, 155, 156, 157, 158 and 159.

<sup>14</sup> KSC-BC-2020-06/F0667, Decision on Specialist Prosecutor's Request for Extension of time, 31 January 2022, Confidential.

<sup>15</sup> KSC-BC-2020-06/F00670, 'Prosecution notice of Rule 102(1)(b) disclosure and related requests', 31 January 2022.

<sup>16</sup> KSC-BC-2020-06/F00727, Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022.

<sup>17</sup> KSC-BC-2020-06/F00708, Prosecution Rule 102(2) submission and related requests with confidential Annexes 1 and 2 and strictly confidential *ex parte* Annex 3, 24 February 2022.

<sup>18</sup> KSC-BC-2020-06/F00779, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 22 April 2022.

<sup>19</sup> KSC-BC-2020-06/F00767, Prosecution request to amend the exhibit list and for protective measures with confidential Annexes 1 and 4-9 and strictly confidential and *ex parte* Annexes 2- 3, 13 April 2022.

<sup>20</sup> KSC-BC-2020-06/F00876, Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022.

12. On 20 April 2022, the SPO filed a fourth application to amend its Exhibit List, related to 49 documents [REDACTED].<sup>21</sup> It is still pending.

13. On 21 July 2022, the SPO filed two additional requests to amend its Exhibit List,<sup>22</sup> which are also pending.

### III. APPLICABLE LAW

14. The right to a fair trial is an essential component of any democratic society, enshrined in Article 31 of the Kosovo Constitution, Articles 1(2) and 21(2) of the Law and Article 6(1) of the ECHR. To ensure the fairness of the proceedings, any accused is entitled to the following fundamental rights, in full equality: to have **adequate time** and facilities for the preparation of his defence, as per Article 30(3) of Kosovo's Constitution, Article 21(4)(c) of the Law and Article 6(3)(b) of the ECHR; and to be tried **within a reasonable time**, in accordance with Article 31(2) of Kosovo's Constitution, Article 21(4)(d) of the Law and Article 6(1) of the ECHR.

15. Rule 95(2) of the Rules enumerates the functions of the Pre-Trial Judge after confirmation of the indictment, who shall "ensure that the proceedings are **not unduly delayed** and shall take all necessary measures for the **expeditious** preparation of the case for trial." In particular, pursuant to Rule 95(4)(c), the Pre-Trial Judge shall order the Specialist Prosecutor to file, "**within a set time limit**", the list of proposed exhibits the Specialist Prosecutor intends to present.

16. Pursuant to Rule 102(1)(b) of the Rules, the SPO must provide, **within the time limit set by the Panel** and no later than 30 days prior to the opening of the SPO's case: (i) the statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial; (ii) all other witness statements, expert reports, depositions, or transcripts

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<sup>21</sup> KSC-BC-2020-06/F00774, 'Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05), 20 April 2022.

<sup>22</sup> SPO Request and KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022.

that the Specialist Prosecutor intends to present at trial; and (iii) the exhibits that the Specialist Prosecutor intends to present at trial. Rule 102(2) specifies that:

Any statements of additional Specialist Prosecutor witnesses, which have not been disclosed within the time limit pursuant to paragraph 1(b) and whom the Specialist Prosecutor intends to call to testify at trial, shall be made available to the Defence as soon as possible and shall be accompanied by reasons for the late disclosure. The Defence may seize the Panel where grounds to dispute the late disclosure exist.

17. During the Tenth Status Conference held on 4 February 2022, following the SPO's submissions that "investigations in fulfilment of its mandate are anticipated to continue for the foreseeable future", the Pre-Trial Judge stressed that:

the factual basis of the case of the SPO shall be set before trial and that SPO investigations in this case should largely be completed by the time the case is transmitted to the Trial Panel. General investigations should not continue throughout the trial. There needs to be a case file that is properly transmitted to the Trial Panel. Rule 102(4) confirms that objective. **Only under exceptional circumstances can additional evidence be disclosed and subsequently used at trial. The Defence cannot be expected to prepare a defence on a case that is constantly evolving.**<sup>23</sup>

18. In his Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, the Pre-Trial Judge considered that "*he can rule on a request to amend the exhibit list at the pre-trial stage, given that Rule 118 of the Rules allows for such a possibility at a later stage of the proceedings. [...] In this regard, the Pre-Trial Judge will assess whether the SPO has shown **good cause** for the requested amendments to its Exhibit List.*"<sup>24</sup>

19. In his decision on the third SPO request to amend its Exhibit List, the Pre-Trial Judge addressed the Defence argument relating to the prejudice caused by the

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<sup>23</sup> KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022, p. 928 (emphasis added). See also ICC, *Prosecutor v. Kenyatta*, Trial Chamber, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, para. 118; ICC, *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, para. 55.

<sup>24</sup> KSC-BC-2020-06/F00727, Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022.

cumulative nature of repeated additions to the Exhibit List. While he noted that there had been “only been two prior additions to the Exhibit List of limited additional material”,<sup>25</sup> he agreed with the Defence that “late addition of items to the Exhibit List could be prejudicial to the Defence in certain circumstances”, and consequently ordered counter-balancing measures for some of the items added which “could have an impact on the Accused’s ability to prepare for trial”.<sup>26</sup> Noting that the remaining materials consisted of short documents which were “only 23 pages” combined, and that the proceedings were still in the in the pre-trial phase, he found that the impact on the Accused’s right to prepare for the trial was limited.<sup>27</sup>

20. In the *Gucati & Haradinaj* case, Trial Chamber II ruled that:

At the outset, the Panel emphasises that the primary purpose of the Exhibit List is to give notice to the Defence of the documents the SPO intends to use during its case, which will allow timely and effective Defence preparation and ensure the efficient presentation of evidence during trial.

The Panel will assess, whether, at the current stage of proceedings: (i) the proposed evidence is prima facie relevant and of sufficient importance to justify the late addition; (ii) the proposed additions provide the Accused sufficient notice and do not adversely affect their ability to prepare for trial; and (iii) the SPO has shown good cause for the late request. In deciding whether to grant leave to add a particular item to a Party’s exhibit list, the Panel need not assess its authenticity, relevance and probative value in the same way as it would when determining its admission at trial.<sup>20</sup> Accordingly, a decision authorising the addition of an item to a Party’s exhibit list is without prejudice to the Panel’s subsequent decision on whether that item should be admitted into evidence. That being said, a Party should not be granted leave to add to its list of exhibits items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.<sup>28</sup>

21. The KSC Court of Appeals Panel has clarified that:

[...] when determining whether certain materials may be added to the prosecution’s exhibit list, the prosecution’s duty to present the available evidence to prove its case

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<sup>25</sup> KSC-BC-2020-06/F00876, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022, para. 95.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> KSC, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00321, Decision on Prosecution’s Request for Leave to Amend its List of Exhibits, 23 September 2021, paras 15-16 (footnotes omitted, our emphasis).

should be balanced with the right of the accused to have adequate time and facilities to prepare a defence and to be tried without undue delay. In striking such a balance in the context of a complex multi-accused trial in which a considerable amount of evidence is presented by the prosecution, a certain level of flexibility must be maintained, although **the adequate protection of the accused's rights remains the primary concern**[...].<sup>29</sup>

#### IV. SUBMISSIONS

##### A. Amendment of the SPO Exhibit List

22. The SPO requests leave to enlarge its Exhibit List, seeking to add Additional Materials related to at least 22 witnesses on its Witness List, documents already on its Exhibit List, and charged detention sites and victims.<sup>30</sup> The SPO submits that this request is made “promptly” after (i) receiving Rule 107 clearance for certain Additional Materials; (ii) obtaining certain Additional Materials and completing related assessments and reviews; or (iii) identifying certain Additional Materials during recent disclosure reviews.<sup>31</sup>

23. The Defence maintains that the SPO has failed to either provide timely notice or demonstrate good cause for the late addition of the majority of the Additional Materials to the Exhibit List, which is highly prejudicial to the Defence at this late stage of the pre-trial phase. The SPO wrongly relies on the ‘limited nature and scope of the Additional Materials’ to argue that its late addition to the Exhibit List would not be prejudicial to the Defence. The SPO, once again, fails to indicate clearly in its submissions how many

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<sup>29</sup> KSC-BC-2020-06/IA019/F00006, Appeals Panel, Decision on Thaçi’s Appeal against “Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures”, 12 July 2022, Public, para. 21 (emphasis added).

See also ICTY, *Prosecutor v Karadzic*, No. IT-95-5/18-T, Decision on Prosecution’s Motion for Admission of an Exhibit from the Bar Table Following Major Thomas’ Testimony, 28 October 2010, para. 9; ICTR, *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20; ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1336, Trial Chamber II, Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), paras. 28, 30.

<sup>30</sup> SPO Request, para. 5.

<sup>31</sup> SPO Request, para. 5.



documents and pages it seeks to add to its Exhibit List, but this appears to be the largest SPO request to amend its Exhibit List to date, despite the Pre-Trial Judge already authorising<sup>32</sup> the addition of 1,844 documents<sup>33</sup> to the Exhibit List since the deadline of 17 December 2021, and that two other similar requests are pending.

24. The SPO asks leave to add the transcripts of several witness interviews conducted after this deadline, but it fails to explain why such interviews were not conducted earlier.

25. Most of the remaining documents were in the SPO's custody prior to this deadline but were identified as relevant only in the course of "recent disclosure reviews". This is not a valid reason to authorise their late addition to the Exhibit List. The Defence must know the case it will face for trial, including the Exhibits to be relied upon by the SPO, and the KSC Rules have defined a system requiring the Pre-Trial Judge to impose strict deadlines on each party in order that that, *inter alia*, the Defence have enough time to prepare for trial. The SPO cannot circumvent this framework by applying every month for leave to amend its Exhibit List, each time it stumbles across documents it forgot to include by the deadline. In the six months since 17 December 2021 the SPO has applied six times to amend this List. This can no longer be considered exceptional, but is now a systematic practice which confirms the SPO's lack of proper and efficient management of its database, reinforcing the Defence's prior request that an independent expert be appointed to review, identify, and disclose exculpatory material in the SPO's custody.<sup>34</sup>

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<sup>32</sup> See KSC-BC-2020-06/F00727, Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022, para. 54; KSC-BC-2020-06/F00779, Pre-Trial Judge, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 22 April 2022, para. 55; KSC-BC-2020-06/F00876, Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022, para. 107.

<sup>33</sup> The total number of items in the first Exhibit List filed by the SPO on 21 December 2021 was 16,304, while the most recent SPO Exhibit List contains 18,148: see SPO Exhibit List, p. 1285.

<sup>34</sup> KSC-BC-2020-06/F00724, Taçi Defence Motion for an Independent and Impartial Review of Exculpatory Material.

26. As previously explained,<sup>35</sup> the SPO's continued mismanagement of its evidence and the late disclosure and addition of the corresponding material to the Exhibit List, by their cumulative nature, are extremely prejudicial to the Defence. The late disclosure of a witness' statement or associated exhibits means that the Defence is required to review again the items related to this witness, in order to identify new information, discrepancies, and further leads for investigations. Given the number of witnesses in this case and the number of documents related to each witness, this is extremely time-consuming. It is particularly prejudicial given that at this stage, the Defence should be focused on its own investigations and pre-trial preparation.

**(a) Additional W04868 materials**

27. This is a collection of documents related to W04868, totalling 281 pages (consisting of 137 pages of text, and 144 photographs), cleared for disclosure from the relevant authorities on 19 April 2022.

28. The SPO does not justify the delay of three months since clearance to apply for their addition to its Exhibit List. In addition, this witness was already the object of the second SPO request to amend its Exhibit List<sup>36</sup> and the SPO fails to justify why it was not able to obtain clearance for such material at the same time as W04868's SPO statement. While the Pre-Trial Judge previously admitted W04868's statements and associated exhibits on a delayed basis,<sup>37</sup> this time the context is different. The Pre-Trial Judge has already set a deadline for the Defence pre-trial brief and has ordered the SPO to file an amended witness list with a view to streamlining the case. In any events, the SPO does not justify why the additional materials related to this witness would be more compelling than the material already on the Exhibit List. In fact, the material appears to

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<sup>35</sup> KSC-BC-2020-06/F00781, Thiçi Defence Response to Prosecution Request to Amend the Exhibit List and for Protective Measures, para. 19.

<sup>36</sup> KSC-BC-2020-06/F00708, Prosecution Rule 102(2) submission and related requests with confidential Annexes 1 and 2 and strictly confidential *ex parte* Annex 3, 24 February 2022.

<sup>37</sup> KSC-BC-2020-06, F00779, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 22 April 2022, para. 33.

be duplicative, given that this witness' prior material already addressed, *inter alia*, the KLA structure at the Gjilan/Gnjilane Dormitory.

***(b) Additional W01193 materials***

29. These consist of 22 additional documents: 11 interview transcripts and 11 associated exhibits from a SPO interview with W01193 in April 2022.

30. The SPO's limited explanations do not suffice to justify a delay of over three months since the interview occurred. In addition, the witness was already interviewed extensively twice, in September and October 2020, which calls into question the necessity of a third interview after the 17 December 2021 deadline. The reasons advanced by the SPO are flimsy and vague; it is unclear how an interruption of the interview in October 2020 due to [REDACTED] would, together with "significant pre-trial deadlines in this case", lead to a delay until April 2022. In discussing the timely notice given for a previous item, the Pre-Trial Judge considered that "five days from the finalisation of the transcript to the filing of this Request is reasonable" and accordingly found that "the Request was made in a timely manner".<sup>38</sup> In relation to another set of documents, he considered that three weeks from the date of contact with the witness to the filing of the request to add related materials was "not unreasonable".<sup>39</sup> The same permissive reasoning does not apply here, where the SPO was much less prompt. It is also inappropriate for the SPO to cite court deadlines as a justification for a delay in conducting its investigations. If the SPO was not ready to prosecute this case, including the inevitable balancing of competing obligations, then it should not have issued the Indictment.

31. The SPO further states that this April 2022 interview would have given the SPO the ability to, *inter alia*, "address important topics that had not yet been discussed" but

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<sup>38</sup> KSC-BC-2020-06/F00876, Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022, para. 30.

<sup>39</sup> *Ibid.*, para. 49.

does not specify which ones; given that the SPO Exhibit List contains more than 18 000 references, the mere “knowledge of documents”<sup>40</sup> by a witness is not a sufficient reason to conduct an interview after the 17 December 2021 deadline and to add this interview to the Exhibit List.

*(c) Additional [REDACTED] interview transcripts*

32. These are transcripts of an interview that occurred in 2022 (date redacted), which would be a ‘follow-up’ to a 2019 interview ‘to clarify certain matters.’

33. The SPO does not justify why the interview could not be conducted prior to the 17 December 2021 deadline. The mere reference to resource constraints, such as restrictions arising from the COVID-19 pandemic and pre-trial deadlines, which should be predictable and accounted for, is insufficient.

*(d) Additional [REDACTED] materials*

34. These consist of transcripts and associated exhibits from the SPO May 2022 interview with [REDACTED].

35. The SPO fails to justify how a suspension of the witness’ interview for 48 hours in December 2020 would have led to a postponement until May 2022. The SPO did not act with due diligence.

*(e) Seven photographs relating to the Novobërdë/Novo Brdo detention site*

36. The SPO submits that it downloaded these photographs in late March 2022 from the Facebook page of a witness, [REDACTED], not on its List, interviewed in [REDACTED], and that “one photograph shows what appears to be the Novobërdë/Novo Brdo detention site in 1999” and the others show the witness with other KLA members.

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<sup>40</sup> SPO Request, para. 9.

37. The SPO submissions are clearly insufficient to warrant the late addition of these photographs to the Exhibit List. The SPO appears to be unsure of the location, the witness will not be called to authenticate them or confirm the location, and the pictures were posted on Facebook in [REDACTED], several [REDACTED] prior to the 17 December 2021 deadline.

*(f) Forensic documents relating to the Gjilan/Gnjilane crime site*

38. These are 17 documents, totalling 80 pages, “selected from a voluminous batch of documents received from EULEX on 17 March 2022”, which relate to the forensic investigations that identified the remains of [REDACTED].

39. The Defence notes that the Pre-Trial Judge authorised amendments to the Indictment pertaining to these victims only on 22 April 2022.<sup>41</sup> Nevertheless, the SPO fails to justify why it took three months to apply to add this material to its Exhibit List. Once again, the SPO failed to act with due diligence.

*(u) SPOE00291854-00291861*

40. These are two prior statements of W03724 (at ranges SPOE00291854-00291856 and SPOE00291857-00291861). The SPO submits that a less redacted duplicate version of SPOE00291857-00291861 is on the Exhibit List, and that the information contained in SPOE00291854-00291856 was used in compiling W03724’s signed statement, which is also included on the Exhibit List. In these circumstances, while deploring the lateness of the SPO request and its lack of justification, the Defence does not object to the addition of these documents to the Exhibit List.

*(w) [REDACTED] materials*

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<sup>41</sup> SPO Request, para. 19, fn 32.

41. These consist of Rule 102(1)(b) materials that were “generated during [REDACTED] ([REDACTED]). The SPO stresses that the final remaining official [REDACTED] was not provided until 1 July 2022.

42. Given that such material was generated after the SPO's deadline to file its Exhibit List, the Defence does not object to its addition to the Exhibit List.

*(x) Video of [REDACTED]*

43. This 2 minutes video was obtained on 7 February 2022 and thereafter reviewed and considered to determine its relevance and importance to the case. It depicts a group of victims and some KLA members. The last portion of the video contains some of the same footage seen in two other videos which are already on the Exhibit List, but is of better quality.

44. In these circumstances, the Defence does not object to its addition to the Exhibit List.

*(i) Accused's rights notifications*

45. The SPO does not advance any justification for this delayed request to add four documents in which Hashim THAÇI and Rexhep SELIMI acknowledge they have been notified of their rights before their SPO interviews. In addition, contrary to the SPO submissions, one of the documents is an extract from a SPO internal document, commenting Mr Thaçi's reaction to the notice of his rights and obligations, which was unknown to the Defence. The SPO request should be dismissed.

*(g) Document that uniquely corroborates [REDACTED]'s abduction*

46. This 157-page document was already in possession of the SPO, from an unspecified date, and only determined to be relevant in mid-May 2022 “in the course of recent Rule 102(3) reviews.”

47. It contains a single entry related to [REDACTED] but the SPO seeks to introduce it in its entirety because it provides “context to the [REDACTED] entries and record, *inter alia*, certain KLA activities in the relevant area and time period”. That the importance of the document was only identified by the SPO in May 2022, in the course of 102(3) reviews, reflects a failure by the SPO to get its evidence in order, which cannot and should not be redressed by granting such a late disclosure. Even more so when the SPO does not only seek to add the individual page containing the entry allegedly related to [REDACTED], but, the entire document, which is 157 pages long, despite the fact that this document has not been disclosed to the Defence pursuant to Rule 102(3). The mere inclusion of this document in the SPO Rule 102(3) Notice does not remedy the prejudice caused by its late disclosure and addition to the Exhibit List. As noted by the Pre-Trial Judge, “prejudicial impact on the Accused may increase if documents added to the Exhibit List are lengthy”.<sup>42</sup>

**(j) [REDACTED]**

48. This document is “likely a prior statement of [REDACTED]”, discovered in the course of “ongoing Rule 102(3) review”.

49. The SPO fails to justify its request; it is unsure of the author of the document and the late identification of the relevance of a document during disclosure reviews is not a sufficient ground to warrant its late addition to the Exhibit List.

**(k) SITF00301506-00301509:** The SPO states that while the document relates to another witness, “during recent disclosure reviews in July 2022, it was determined that the remaining pages constitute a limited statement of [REDACTED]”.

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<sup>42</sup> KSC-BC-2020-06/F00876, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022, paras. 32 and 43.

(l) **SITF00013585-00013586**: This is a one-page EULEX record of a meeting with [REDACTED], “recently identified during Rule 102(3) reviews” and “previously overlooked due to the incorrect spelling of the witness’s name.”

(n) **SPOE00078270-00078271 and SPOE00078312-00078314**: These documents contain short prior statements of [REDACTED], “identified during disclosure reviews after March 2022.”

(p) **[REDACTED]**: This is an ICTY statement from [REDACTED], “previously overlooked until recent disclosure reviews.”

(s) **W02160 associated exhibits**: These consist of eight photographs referenced in W02160’s SPO statement, “previously overlooked until recent disclosure reviews”.

(t) **100976-100976**: This is an SPO official note of a phone call with W04174, “not previously identified as a statement until closer examination in the context of recent Rule 103 reviews.”

(v) **SITF00408985-SITF00408986**: This is a prior statement that W00207 made to Serbian authorities on 15 May 2000, “previously overlooked until recent disclosure reviews.”

50. As submitted *supra*, the late identification of the relevance of documents during disclosure reviews is not a sufficient ground to warrant their late addition to the Exhibit List, especially when they are systematic and the result of a recurrent mismanagement of the SPO database. It is necessarily prejudicial to the Defence, which will then be required to review all the evidence related to a witness when additional material related to this witness is disclosed. Therefore, it significantly delays its preparation for trial.

(h) **Prior statements [REDACTED]**: These are four prior statements related to four delayed disclosure witnesses, which the SPO “inadvertently failed to add” to its Exhibit List.



(m) [REDACTED]: This is a prior statement of [REDACTED]; the SPO does not provide any explanation for the delay.

(o) 081900-081907: This is a *procès-verbal* relating to an interview with [REDACTED], “previously overlooked” and “only recently identified as requiring disclosure.”

(q) 107022-107022: This is an extract of a statement of [REDACTED] from an SPO official note dated 22 March 2022; no explanation is given for the delay of four months.

(r) 107023-107023: This is an extract of a statement of [REDACTED] from an SPO official note, related to information provided at the witness’s initiative on 14 April 2022, on the contents of a television interview given by the witness; no explanation is given for the delay of three months.

51. For these items, the only reason offered is that the SPO has previously overlooked the evidence, and inadvertently not included it in the Exhibit List; in relation to some items, no explanation at all is offered. This is simply not good enough to justify such a late addition, especially considering the previous four requests, three of which have already been granted. Rather, it shows a continued and concerning lack of diligence on the part of the SPO that necessarily negates the existence of good cause. The SPO’s lack of diligence should not be rewarded, but must have consequences.

52. Nor is the argument that documents are added for ‘completeness’ can or should be read as favourable to the Defence; if the SPO thought it had sufficient evidence to indict Mr Thaçi and the other accused when it first filed the Indictment in April 2020, the addition of documents to its exhibit list two years and three months later cannot be justified.

53. Furthermore, the repeated SPO argument that the additions proposed do not prejudice the Defence in relation to those witnesses for whom delayed disclosure of identity is already foreseen is flawed; the Defence reiterates that 30 days before trial will not be sufficient to review all the material related to the witnesses for which such a

protective measure has been granted. The continuous addition of material to this 'list' will have no other effect than delaying further the beginning of the trial, as the Defence will need even more time to meaningfully prepare.

54. The Defence has argued before, and continues to argue with more reason and vigour now, a few requests later, that repeated additions to the Exhibit List create undue prejudice for the accused. The Pre-Trial Judge's previous decisions allowing for additions to the Exhibit List indicated that any additions, even at this stage of the proceedings, would need to be balanced against the rights of the accused, and that such additions were allowed insofar as they concerned documents that were considered short and promptly disclosed. This, in the Pre-Trial Judge's reasoning, sufficed to limit the prejudicial impact on the accused that follows from late additions to the Exhibit List, especially when documents are lengthy and/or require the Defence to cross-reference them with numerous other items.<sup>43</sup> This further delayed SPO request, involving the greatest volume of documents so far, and so poorly justified, demonstrates the SPO's lack of regard for any of the relevant considerations raised by the Pre-Trial Judge in deciding previous requests.

55. In sum, the SPO has failed to show good cause for the late addition of most of the Additional Materials, which would be highly prejudicial for the Defence.

**B. The SPO request for authorisation to apply non-standard redactions to and withhold certain Additional Materials to give effect to existing protective measures**

56. The Defence requests that redactions and withholding of material be only granted insofar as they are necessary to give effect to existing protective measures, and invites the Pre-Trial Judge to ensure strict vigilance in this regard. The Defence stresses

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<sup>43</sup> E.g. KSC-BC-2020-06/F00876, Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022, para. 67.

that any delayed disclosure of material relevant for its preparation is prejudicial and may further delay the proceedings.

**C. The SPO request for disclosure relief for certain Rule 107 information contained in two documents**

57. The SPO submits that one associated exhibit used during the interview of [REDACTED] contains Rule 107 provider-applied redactions. The SPO considers that no counterbalancing measures are necessary because, *inter alia*, “insofar as such internal work product includes references to another witness’s ([REDACTED]) role during the Indictment period, this information is available in already disclosed documents”, whose references are redacted.<sup>44</sup> The Defence submits that the SPO should be ordered to provide the Defence with the reference of the document(s) containing the information redacted by the Rule 107 provider, particularly if it concerns a witness on the SPO Witness List.

58. The SPO further submits, concerning W03724’s prior statement, that while pages SPOE00291857-SPOE00291860 include certain provider-applied redactions, such redacted information is available in another version of the statement (076162-076199 RED2) previously disclosed.<sup>45</sup> However, the two documents are markedly different and it is difficult for the Defence to identify in 076162-076199 RED2 all the information redacted from SPOE00291857-SPOE00291860. In these circumstances, the SPO should be ordered to indicate to the Defence in which paragraphs of 076162-076199 RED2 would appear the information redacted from SPOE00291857-SPOE00291860.

**V. CONCLUSIONS**

59. For the foregoing reasons, the Defence asks the Pre-Trial Judge

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<sup>44</sup> SPO Request, para. 16, fn. 29-30.

<sup>45</sup> SPO Request, para. 43.

- Dismiss, in part, the SPO's request to amend its Exhibit List to add the Further Materials;
- Order counterbalancing measures for Rule 107 provider-applied redactions;
- Limit the non-standard redactions sought.

[Word count: 5836]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

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**Gregory W. Kehoe**  
**Counsel for Hashim Thaçi**  
Monday, 16 January 2023  
At Tampa, United States