

**In:** KSC-BC-2020-06

**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Kadri Veseli

**Date:** 3 August 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of Veseli Defence Response to SPO Rule 102(2)  
Submission and Related Requests (F00890, dated 3 August 2022)**

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## I. INTRODUCTION

1. The Defence for Mr Kadri Veseli (“Defence”) files this Response to the SPO’s Rule 102(2) submission and related requests.<sup>1</sup> The Request is untimely; fails to show good cause; is prejudicial to the Accused; and is not relevant to the SPO’s case. It should be denied in its entirety.

## II. SUBMISSIONS

### A. The Request is not Timely

2. The Defence notes that, unlike previous Rule 102(2) submissions, at issue is the status of new investigations.<sup>2</sup> It is recalled that the SPO was put on notice, at least six month ago, that its investigations cannot continue throughout the proceedings, and that “additional evidence will only be admitted with a very strict scrutiny from the Panel and really in exceptional circumstances”.<sup>3</sup> Asked whether it could identify a completion date for its investigations, the SPO submitted, in anticipation of the 11th Status conference, that no deadline would be necessary, considering that the “SPO’s investigation in this case is largely completed”.<sup>4</sup> During the Status conference, the Pre-Trial Judge understood that the deadline was already over for the SPO, because it had finalised its investigations, “except if [it] were to look for evidence due to unforeseen circumstances”.<sup>5</sup>

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<sup>1</sup> F00890/CONF/RED, Confidential redacted version of ‘Prosecution Rule 102(2) submission and related requests’, KSC-BC-2020-06/F00890, dated 20 July 2022 with strictly confidential and *ex parte* Annexes 1-7 and 9, and confidential Annex 8, 21 July 2022 (“Request”).

<sup>2</sup> F00779, Decision on Specialist Prosecutor’s Rule 102(2) and Related Requests, 22 April 2022, para. 23 (“The Pre-Trial Judge notes that [REDACTED] was included on the Witness list. At issue therefore is not the status of new investigations, but rather the addition of prior statements and associated exhibits which have not been previously included on the Exhibit List”).

<sup>3</sup> Transcript, 4 February 2022, pp. 930-931.

<sup>4</sup> F00742, Prosecution submissions for eleventh status conference, 21 March 2022, paras 11-13.

<sup>5</sup> Transcript, 24 March 2022, p. 1132.

3. The Defence further recalls and reconfirms its prior submissions concerning the legal test applicable for new evidence, namely the “fresh evidence” test, which can be summarised as unforeseen evidence which the SPO did not have access to – and could not, with reasonable diligence – have had access prior to the cut-off date.<sup>6</sup> While the Defence understands that such a test will be applied on a case-by-case basis, it stresses the need for strict scrutiny and careful approach in establishing a high threshold for the admission of fresh evidence.<sup>7</sup>
4. It follows that the Pre-Trial Judge’s test, as applied in F00779,<sup>8</sup> considered that the request in that case was filed before the SPO declared that its investigations was largely completed.<sup>9</sup>
5. Therefore, the starting point for assessing the timeliness of the SPO’s request should be the date when the SPO received information which led it to identifying [REDACTED] and [REDACTED] as potential witnesses.<sup>10</sup> Moreover, diligence requires that, at a minimum, the SPO should have informed the Pre-Trial Judge and the Defence of its intention to add these two witnesses to its Witness List well in advance and certainly when specifically asked by the Pre-Trial Judge about its disclosure obligations.

[REDACTED]

6. The Defence notes that, [REDACTED] may have been identified quite early in the process. However, despite having started its investigations more than a

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<sup>6</sup> *Ibid.*, pp. 1129-1130.

<sup>7</sup> ICTY, *Prosecutor v. Prlic et al*, IT-04-74-AR73.14, [Decision on the interlocutory appeal against the Trial Chamber’s Decision on presentation of documents by the prosecution in cross-examination of defence witnesses](#), 26 February 2009, para. 24.

<sup>8</sup> F00779, para. 24 [REDACTED]

<sup>9</sup> The Request was filed on 24 February 2022. See F00708, Prosecution Rule 102(2) Submission and Related Requests, 24 February 2022. Moreover, the instant case does not concern evidence already included in the Witness List (see for example, F00779, para. 23).

<sup>10</sup> ICTY, *Prosecutor v. Gotovina et al*, IT-06-90-T, [Decision on Cermal Defence’s Second and Third Motions to add a witness to its Rule 65ter \(G\) witness list](#), 22 September 2009, para. 12.

decade ago,<sup>11</sup> the SPO fails to indicate when the need to [REDACTED] arose<sup>12</sup> and why it was unsuccessful. Furthermore, a diligent prosecution would have followed-up and made several attempts to receive the requested assistance, instead of waiting more than a year for a response, especially if the evidence is truly “relevant, unique, and important.”<sup>13</sup> Even then, it is not clear why the SPO could not conduct a substantive interview on [REDACTED] based on information already in its possession and conduct a second interview once it obtained the outstanding information.<sup>14</sup> For instance, the SPO decided to include [REDACTED] in its Witness List despite that, by the time it filed its Witness List, it had yet to (i) review and assess documents relevant to [REDACTED]; (ii) discuss important topics; and (iii) undertake the closing formalities.<sup>15</sup>

7. Here, the SPO then took almost one year to finally decide to “arrange a comprehensive interview of [REDACTED]” and eventually hold the interview on [REDACTED], just [REDACTED] after it told the Pre-Trial Judge that its investigations were largely over.<sup>16</sup> Even after all these delays, the SPO submitted its request [REDACTED] after conducting its interview with [REDACTED].

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<sup>11</sup> It is recalled that the SPO took over the mandate and personnel of the Special Investigative Task Force (“SITF”), see Article 24(2) KSC Law.

<sup>12</sup> F00890/CONF/RED, para. 6.

<sup>13</sup> F00890/CONF/RED, para. 5.

<sup>14</sup> Considering that, in February and March 2021, the SPO was already pushing for trial to start in September 2021, which was 11 months ago. When by [REDACTED] the SPO received a response from [REDACTED], which lead to an interview on [REDACTED], and that on [REDACTED] the SPO was already looking for [REDACTED]. The SPO knew full well that both situations were incompatible. See F00191/CORR, Corrected version of Prosecution submissions for third status conference, 10 February 2021, para. 12; F00235, Prosecution submissions for fourth status conference and request for adjustment of time limits, 22 March 2021, para. 6.

<sup>15</sup> See F00891/CONF/RED, 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, para. 9.

<sup>16</sup> F00890/CONF/RED, para. 8.

8. Based on the above, the SPO's lack of diligence is patent.<sup>17</sup> Furthermore, at no time did the SPO indicate to the Pre-Trial Judge, or the Defence, its intention to add [REDACTED] to its Witness List.

[REDACTED]

9. Similarly, the SPO fails to provide information as to why it took one decade to "verify the identity and whereabouts" of [REDACTED]. This is particularly concerning, considering that the allegations made by [REDACTED] have already been thoroughly investigated by other Kosovo courts [REDACTED]. In any event, "scheduling", "logistical" issues and "COVID-19 complications"<sup>18</sup> fail, and are utterly insufficient, to justify a delay of more than one year to conduct an interview with [REDACTED].
10. Even for this case, with all the delays and extensions, taking an additional three months to submit such request demonstrates a serious lack of due diligence, particularly considering the circumstances of the case and the stage of the proceedings.<sup>19</sup>

**B. Adding Witnesses at This Advanced Stage Would Cause Significant Prejudice to the Accused**

11. In addition to the above, the Defence submits that adding these two witnesses and their associated exhibits would be prejudicial to the fair trial rights of Mr Veseli, due to the circumstances of the case, in particular the considerable delay of pre-trial proceedings compared to similar cases; the sheer amount of evidentiary material; as well as the fact that the Defence is already under a deadline to file its Pre-Trial Brief.

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<sup>17</sup> On the topic *see* F00779, para 22.; Code of Professional Conduct, art. 6.

<sup>18</sup> F00890/CONF/RED, para. 16.

<sup>19</sup> *See* F00799, para. 25: "The Pre-Trial Judge further considers that two weeks from the date of finalisation of the interviews to the filing of the present Request is not unreasonable."

12. Moreover, the SPO's Request runs contrary to the Defence's prior requests, and Pre-Trial Judge's directions, to streamline the case.<sup>20</sup> Instead of adjusting the already unprecedented number of witnesses it intends to call, the SPO deems it appropriate to add more witnesses, thus rendering the streamlining exercise meaningless.
13. In this regard, the SPO has stated at the 12<sup>th</sup> Status conference that it would communicate promptly information that would affect the scope of the Defence investigations. This is the opposite of what the SPO has done here. It now seeks to broaden its case, and it has done so without communicating the information in a timely manner to the Defence despite being specifically asked about its investigations and the status of its disclosure obligations.

**C. The Redactions Applied by the SPO are Overbroad and Will Cause Prejudice to the Defence**

14. Considering the extensive redactions to the Request, the Defence reserves its position regarding the necessity to request protective measures and withhold information in relation to [REDACTED]. As regards proportionality, the SPO requests to add [REDACTED] to its Witness List and disclose only a "summary of [REDACTED] evidence"<sup>21</sup> while simultaneously withholding all evidentiary material pertaining to this witness until disclosure of [REDACTED] identify 30 days before trial.<sup>22</sup> Such a request fails to outweigh the prejudice caused to Mr Veseli, especially considering that the proposed deadline would coincide with

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<sup>20</sup> Transcript, 24 March 2022, p. 1161. See also Transcript, 20 May 2022, pp. 1299 and seq.; F00806, Veseli Defence Submissions for Twelfth Status Conference, with Confidential Annexes 1 and 2, 18 May 2022, paras. 32-35; F00806/A01; F00806/A02.

<sup>21</sup> F00890/CONF/RED, para. 14.

<sup>22</sup> F00890/CONF/RED, paras 13-14. The Defence notes that the fact that "a number of [REDACTED] associated exhibits are already on the Exhibit list" (See F00890/CONF/RED, para. 9) is irrelevant considering that the Defence has no way of identifying such exhibits without knowing the identity of the witness.

several other witnesses whose delayed disclosures of identity will also expire 30 days before trial.

**D. The Substance of These Witnesses Does not Advance the SPO Case**

15. Finally, while the Defence reserves the right to comment on the substance of the witnesses' anticipated testimony, it notes that, based on the limited information provided by the SPO, none of these witnesses appear to advance the SPO's JCE case against Mr Veseli. [REDACTED].
16. The SPO has repeatedly claimed that the indictment is not against the KLA as an entity. Therefore, by simply alleging that crimes were committed by individuals who purported to be KLA members does not advance the SPO's case because they do not establish any link between the alleged crimes and any of the Accused. Considering that these witnesses do not establish a link to the Accused, it follows that the relevancy test is not met.

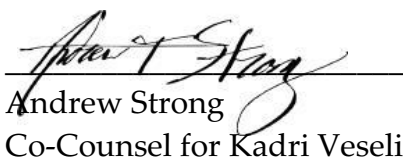
**III. CONCLUSION**

17. For the above reasons, the Defence respectfully requests the Pre-Trial Judge to deny the Request.

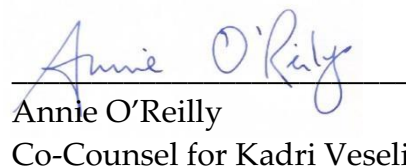
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