

**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 Rexhep Selimi

**Date:** 15 March 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of Selimi Defence Response to Confidential redacted version of Prosecution request to add two witnesses and associated materials, KSC-BC-2020-06/F00975, dated 15 September 2022**

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## I. INTRODUCTION

1. The SPO's latest request<sup>1</sup> to add two further witnesses and associated materials to its already bloated witness and exhibit list is as untimely as it is unjustified. Adding witnesses whose evidence is vague, lacks relevance and probative value and does not even purport to relate to the existing charges in the Indictment, will not compensate for the evidentiary gaps in the SPO's case. It will neither assist in streamlining proceedings nor contribute to a fair and expeditious trial and must therefore be rejected.

## II. SUBMISSIONS

### A. Absence of Jurisdiction of the Pre-Trial Judge to Rule Upon the SPO Request

2. None of the provisions of the Law<sup>2</sup> or the Rules<sup>3</sup> relied upon by the SPO, endow the Pre-Trial Judge with authority to rule upon the SPO's Request. All relate to the authority and obligation to disclose evidence or the protection of witnesses. Without irony, the SPO even relies on Article 21(6), protecting the rights of the accused, in support of the SPO Request. Neither this provision, nor any other relied upon by the SPO, permits the Pre-Trial Judge to authorise the addition of completely new witnesses to the SPO witness list over Defence opposition at this stage of proceedings.
3. The Defence notes that the SPO has conspicuously avoided referring to Rule 118(2) of the Rules, which authorises the Trial Panel to "permit, upon timely

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<sup>1</sup> KSC-BC-2020-06/F00890, 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, 2 September 2022 ("SPO Request").

<sup>2</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

notice and a showing of good cause, the amendment of the list of witnesses and exhibits filed pursuant to Rule 95(4)(b)” even though this is the only specific Rule addressing amendments of the witness list. This is the exclusive rule that must be applied for amending a witness list and it falls outside the jurisdiction of the Pre-Trial Judge to apply it. This is consistent with *Ntiramassuhuko*, where it was confirmed that the final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Trial Chamber.<sup>4</sup>

4. The Pre-Trial Judge has previously considered that he is permitted to rely on Rule 118 as the basis for adjudicating requests to amend the SPO exhibit list, as such requests ultimately concern disclosure under Rule 102(1)(b) of the Rules and how such disclosure has been memorialised through the Exhibit List.<sup>5</sup> While he accepted that the Rules “do not explicitly provide for such an amendment”<sup>6</sup> he considers 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.”<sup>7</sup>
5. This appears to conflict with a logical interpretation of Rule 118 which is deliberately located in Chapter 9, entitled Trial Proceedings. Rule 118 itself specifically refers to the “Specialist Prosecutor’s Preparation Conference.” In these circumstances, it would be consistent with the definition of “Panel” in Rule 2, to exclude the ambit of the Pre-Trial Judge from Rule 118(2) as well as consistent with Rule 95, which does not specifically include any authority to

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<sup>4</sup> ICTR-98-42-T, *Prosecutor v Ntiramassuhuko et al.*, Decision on the Prosecutor’s Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, 22 January 2003, para. 14.

<sup>5</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. 25 (“Second Exhibit List Amendment Decision”).

<sup>6</sup> KSC-BC-2020-06/F00727, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022, para. 24 (“First Exhibit List Amendment Decision”).

<sup>7</sup> Ibid.

grant amendments to witness or exhibit lists. As such, the Request falls outside the scope of the Pre-Trial Judge's authority and should be deferred to the Trial Panel when the Case File is transmitted pursuant to Rule 98.

6. Alternatively, to the extent that the Pre-Trial Judge considers that he may still rely on Rule 118 to entertain requests to amend the exhibit list, its ambit should be limited to requests to add exhibits that relate to witnesses already on the SPO exhibit list, such as associated exhibits or previously, newly discovered statements as such requests more accurately fall within the Pre-Trial Judge's supervision of the SPO's fulfilment of its Rule 102(1)(b) disclosure obligations. This is consistent with both the First and Second Exhibit List Amendment Decisions which both authorised requests to add items to the SPO list of exhibits, that directly relate to existing witnesses.
7. Indeed, there is no other prior decision which would allow the Pre-Trial Judge to interpret his general authority pursuant to Rules 95 and 102 to authorise a request to add witnesses to the SPO list. While the Appeals Panel upheld the First Exhibit List Amendment Decision by the Pre-Trial Judge which granted the SPO's request to add exhibits to the SPO exhibit list, no challenge was made therein to the Pre-Trial Judge to authorise amendments to the Witness List.<sup>8</sup> The other request by the SPO to specifically add new witnesses, is currently pending with the Pre-Trial Judge.<sup>9</sup> No decision on this request has yet been issued. Interpreting his authority strictly, and in accordance with the text of Rule 118, to limit requests to those which do not add new witnesses, would require the Pre-

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<sup>8</sup> KSC-BC-2020-06/IA019/F00006, 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 ("Thaçi Appeal Decision").

<sup>9</sup> KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022.

Trial Judge to order the deferral of this request to the Trial Chamber to rule upon it.

## **B. Merits of the SPO Request**

8. The SPO generically asserts that the request is “timely, shows good cause, and would have no impact on Defence preparations”<sup>10</sup> appearing to base itself on Rule 118(2) even if no specific reference is made to this provision. These SPO Request, at least in relation to [REDACTED], fails on all these fronts.

### **1. The Request is neither timely nor demonstrates good cause.**

9. The SPO has not disclosed to the Defence the statements of either [REDACTED]. The screening note for [REDACTED] was disclosed to the Defence under Rule 103 on 22 May 2022. It appears [REDACTED] was [REDACTED], but the Defence is unaware when this occurred.
10. At the outset, it appears that despite the screening note falling under Rule 103, the SPO has yet to disclose the SPO interview pursuant to the same rule, with the same standard redactions they applied to the screening note,<sup>11</sup> despite the obligation to do so immediately. No explanation has been provided by the SPO as to the reasons justifying this delay.
11. As to the timeliness of this application, the screening note was [REDACTED] and only disclosed to the Defence in May 2022, and only because the SPO considered it fell under Rule 103. Had the SPO actually complied with its Rule 103 disclosure obligations in an effective and timely manner, it may credibly be able to claim that this Request was timely as the screening note would have been disclosed last year. Instead, due to its own disclosure delays, this is far from the case.

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<sup>10</sup> SPO Request, para. 2.

<sup>11</sup> SPO Request, fn. 11.

12. The same concerns apply to the evidence of [REDACTED] which has also not been disclosed to the Defence, even though [REDACTED],<sup>12</sup> over [REDACTED]. Further, [REDACTED] also provided one other prior statement in addition to his interview.<sup>13</sup> While the Defence is not privy to the precise date of this interview, this further demonstrates the length of time between when the SPO first became aware of the importance of his evidence and when the Request was actually filed, thereby rendering this delay unacceptable in line with the jurisprudence of other international courts.<sup>14</sup>
13. The SPO thus became aware of the substance of both [REDACTED] and [REDACTED] well before it filed its preliminary list of witnesses.<sup>15</sup> No plausible explanation has been provided as to why they were not included at that stage. Nor were they included in the final list of witnesses with the SPO Pre-Trial Brief. Waiting until September 2022 to file the Request, when Mr. Selimi has been detained for all but two years, clearly demonstrates the absence of timeliness of the Request.
14. Good cause has been equated in other international criminal tribunals with “exceptional circumstances” outside of the control of the submitting party, which have rendered it impossible to include the witness or exhibit in a timely manner.<sup>16</sup> Similarly, in the context of the good cause regarding the Prosecution meeting its disclosure obligations in *Sesay* it was held that the Prosecution must satisfy the Chamber that “the evidence the Prosecution is now seeking to call,

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<sup>12</sup> SPO Request, Fn. 13.

<sup>13</sup> SPO Request, para 12.

<sup>14</sup> ICTR-00-56-T, *Prosecutor v Nindliiyimana et al.*, Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 bis(E) of the Rules, 11 February 2005, para. 24.

<sup>15</sup> KSC-BC-2020-06/F00542, Prosecution submission of preliminary witness list with strictly confidential and ex parte Annex 1 and confidential redacted Annex 2.

<sup>16</sup> ICC-01/04-02/06-1733, *Prosecutor v. Ntaganda*, Decision on Prosecution Application under Rule 68(2)(B) and Regulation 35 for Admission of Prior Recorded Testimony of Witness P0551, 19 January 2017, para. 7; ICC-01/05-01/13-1191, *Prosecutor v. Bemba et al.*, Decision on Prosecution Request to Add 12 Items to its List of Evidence (“Bemba Decision”), 27 August 2015, para. 9.

could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence on their part”.<sup>17</sup> The same standard should apply to the present request which the SPO conspicuously fails to meet.

15. The SPO explains that “the necessity of adding these witnesses became apparent in the course of the streamlining exercise for the Pre-Trial Judge’s 2 September deadline.”<sup>18</sup> This tacitly implies that the SPO did not conduct a diligent assessment of its evidence in this case at the time of filing the SPO Pre-Trial Brief, as should have occurred, but instead relied upon an Order by the Pre-Trial Judge to consider reducing its case, prompted by legitimate Defence complaints about the scope and duration of the SPO case, as cover to seek to add two more witnesses.
16. No circumstances have been demonstrated by the SPO which could meet the standard set out above. Nothing prevented the SPO from having included both of these witnesses along with its Pre-Trial Brief in December 2021 even if they were not available before its preliminary list was filed. While the SPO may have wished to [REDACTED] before submitting its Request, it had already been in possession of the screening note for this witness for many months by that stage, which does not appear, from the summary of [REDACTED] interview in the SPO Request, to be so different from [REDACTED]. If this witness was genuinely capable of providing unique and important evidence about [REDACTED] as the SPO contends,<sup>19</sup> it should have been evident at the time of the screening note. The same applies to the evidence of [REDACTED] as set out above.
17. However, when assessing good cause, it is not only the circumstances of the collection of the evidence which is relevant. Its relevance, reliability and

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<sup>17</sup> SCSL-04-15-T, *Prosecutor v. Sesay, Kallon, Gbao*, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para. 35.

<sup>18</sup> SPO Request, para. 14.

<sup>19</sup> SPO Request, para. 3.

credibility must also all be taken into consideration. At the very minimum, it must be “*prima facie* relevant and probative.”<sup>20</sup> Indeed, under Article 95(4)(b)(v) and (vi) of the Rules, the SPO ought to have put the Pre-Trial Judge on notice regarding the allegations in the indictment that [REDACTED] is expected to testify on, as well as include specific references to charges and relevant paragraphs in the indictment.<sup>21</sup> The SPO Request fails to do so.

18. First, [REDACTED] evidence relates to an incident involving the [REDACTED]. However, the SPO noticeably failed to mention that this occurred on the [REDACTED], as confirmed [REDACTED].<sup>22</sup> By contrast the alleged JCE at the heart of this case, only commenced in March 1998<sup>23</sup> after this alleged incident.
19. The other allegation made by [REDACTED], namely of [REDACTED], is similarly irrelevant. Although falling within the time period of the Indictment, it is neither mentioned in the Indictment nor the SPO Pre-Trial Brief. Not only does this mean that these murders are not charged, but they are simply not relevant to the case the SPO charges against [REDACTED].
20. When it comes to newly discovered incriminating evidence, the Prosecution needs to show that this new evidence is either more compelling than evidence already disclosed to the Defence, or that it bring to light facts previously unknown which have a significant bearing upon the case.<sup>24</sup> Yet, the Prosecution first categorised this evidence as exonerating, but now proceeds to justify its

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<sup>20</sup> STL-11-01/T/TC, *The Prosecutor v. Ayyash et al.*, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence,' 9 July 2015, para. 66.

<sup>21</sup> ICTR-98-41-T, *Prosecutor v Bagosora et al.*, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter Motion, 23 May 2002, para. 12.

<sup>22</sup> [REDACTED].

<sup>23</sup> Indictment, para. 32.

<sup>24</sup> ICC-01/04-01/07, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chu*, Decision on the disclosure of evidentiary material relation to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009, 9 October 2009, para. 37.



request to add this witness to the witness list on the basis of the highly incriminating evidence he provides.

21. Second, the SPO relies on [REDACTED] purported evidence that [REDACTED]. However, the screening note of the same witness, continued to mention that [REDACTED].<sup>25</sup>
22. The SPO seeks to rely on this evidence as providing [REDACTED].<sup>26</sup> While [REDACTED] recounts that [REDACTED],<sup>27</sup> this appears to demonstrate that whatever [REDACTED], which one could expect to be relatively common during the stress of war, [REDACTED]. For this to somehow provide some motivation for [REDACTED], or otherwise be probative of [REDACTED] to the policy underlying the JCE is absurd.
23. As for the evidence of [REDACTED], based on the limited information available, the Defence does not contest at this stage that is arguably *prima facie* relevant and probative. However, based on that same information it also appears to be corroborative of substantial other evidence that already appears on the SPO witness list. There are already six SPO witnesses who will testify to the same alleged facts. In *Ruto and Sang*, the Trial Chamber considered it premature to add extra witnesses that may or may not be called upon to replace evidence that - based on the current state of the Prosecution case and its list of witnesses - will be given by other witnesses.<sup>28</sup> In granting a prosecution request to add witnesses, the Chamber in *Norman et al.*, noted that the proposed evidence purported to be direct evidence of the individual criminal responsibility of the Accused,

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<sup>25</sup> [REDACTED].

<sup>26</sup> SPO Request, para. 6.

<sup>27</sup> [REDACTED].

<sup>28</sup> ICC-01/09-01/11, *Prosecutor V. William Samoei Ruto and Joshua Arap Sang*, Decision on prosecution requests to add witnesses and evidence requests to reschedule the trial start date, 3 June 2013, para. 36.

distinguishable from corroborative or cumulative evidence.<sup>29</sup> This does not apply to [REDACTED] which does not even mention [REDACTED] as far as the Defence is aware. As such, in line with the assessment of such evidence by other international tribunals, the SPO Request must be rejected on this basis.

## 2. Unfair prejudice

24. The SPO Request misunderstands or misrepresents the unfair prejudice which would be caused to the Defence if the Request were granted.
25. In assessing unfair prejudice caused by requests to amend witness or exhibit lists, the SPO correctly cites to the finding in the relevant Appeals Panel Decision on this issue, that, when assessing such requests, “the prosecution’s duty to present the available evidence to prove its case 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”<sup>30</sup> which is consistent with the test applied at other international tribunals.<sup>31</sup> However, when selectively relying upon the subsequent finding that such requests should be treated with flexibility in a complex multi-accused case of this kind, particularly at this stage of proceedings,<sup>32</sup> the SPO neglects to highlight that the Appeals Panel also held that “the adequate protection of the accused’s rights remains the primary concern.”<sup>33</sup>

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<sup>29</sup> SCSL-04-14-T, *Prosecutor v. Norman, Fofana, Kondewa*, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004, para. 24.

<sup>30</sup> *Thaçi* Appeal Decision, para. 21.

<sup>31</sup> IT-95-5/18-T, *Prosecutor v. Karadžić*, Decision on Prosecution’s Motion for Leave to Amend its Witness List to Add Witness KDZ597, 30 June 2010, para. 4; STL-11-01/T/TC, *The Prosecutor v. Ayyash et al.*, Decision on ‘Prosecution Motion for the Admission of Locations Related Evidence’, 9 July 2015, para. 66.

<sup>32</sup> SPO Request, para. 14.

<sup>33</sup> *Thaçi* Appeal Decision, para. 21 citing to ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 ter Exhibit List, 25 October 2007, para. 18; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin’s Questioning, 14 December 2007, para. 38.

26. With this in mind, an assessment of the impact of granting the SPO Request on Mr. Selimi's rights would find that their impact is unfairly prejudicial.
27. If the SPO is permitted to add [REDACTED] to the SPO Witness List, the Defence will be obliged to expend substantial investigative resources to review and analyse these allegations regardless of whether he ultimately testifies and, if he does, whether he testifies on all aspects of his statement. While the Defence reiterates that neither the [REDACTED] are charged or even relevant, and do not form part of the Indictment or Pre-Trial Brief, the serious and direct nature of the allegations means that at the very least, the individuals mentioned by the witness who were allegedly witnesses to these events will have to be interviewed, as well as the other [REDACTED] who allegedly [REDACTED].<sup>34</sup>
28. An investigation into [REDACTED] will also have to be undertaken to demonstrate that [REDACTED] had nothing to do with it.
29. All of these investigations will have to be undertaken due to the prejudicial nature of the allegations, which will pull investigative resources away from other pressing tasks. Defence investigations into these new allegations will also be completely different to those which are already underway based on the allegations in the Indictment and SPO Pre-Trial Brief. It will require extensive time and resources to seek to make contact with these individuals who, in all likelihood, have not been contacted before in relation to the case in light of the nature of the allegations.
30. By the same token, investigating [REDACTED], although falling within the charged incidents in the Indictment, will still require the Defence to further refocus its investigative resources at a late stage of pre-trial proceedings.

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<sup>34</sup> [REDACTED].

31. In this regard, the SPO suggestion that “the requested amendments, [...] considered in context, are limited in scope”<sup>35</sup> misses the point. The SPO appears to be suggesting that because there are already 320 witnesses on its list, adding a couple more will make little difference. The contrary is true. Defence investigative resources are already severely stretched because of the bloated nature of the SPO Witness List. When some of the protective measures are lifted in relation to the witnesses thirty days before trial, the Defence will be required to conduct intensive and wide-ranging investigations at that stage due to finally receiving information on all of these witnesses which had previously been redacted and which goes to the heart of their evidence. Increasing the investigative burden on the Defence at this stage, will therefore seriously risk undermining the Defence’s ability to investigate effectively.

### III. CLASSIFICATION

32. The present Response is filed confidentially pursuant to Rule 82(4). The Defence intends to file a public redacted version of the Request in due course.

### IV. RELIEF REQUESTED

33. The Defence hereby requests the Pre-Trial Judge to:
- a. Defer adjudication of the SPO Request to the Trial Chamber; Or,
  - b. Reject the SPO Request to add [REDACTED] to the SPO Witness List.

Word count: 3465

Respectfully submitted on 15 March 2023,

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<sup>35</sup> SPO Request, para. 14.



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