

In: KSC-BC-2020-06
**The 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: Specialist Counsel for Hashim Thaçi

Date: 3 August 2022

Language: English

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**Public Redacted Version of ‘Thaçi Defence Response to Prosecution Rule 102(2)
submission and related requests (F00890)’**

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I. INTRODUCTION

1. On 21 July 2022, the SPO filed the 'Prosecution Rule 102(2) submission and related requests',¹ requesting the Pre-Trial Judge to:

- (i) authorise the SPO to amend its Witness List² to include [REDACTED] and W04043 (together, "Proposed Witnesses") and amend its Exhibit List³ to include their associated materials;
- (ii) grant protective measures for [REDACTED], including in-court measures and delayed disclosure of his identity and related material until 30 days before trial; and
- (iii) relieve the SPO of its disclosure obligations in relation to the Rule 107 information redacted from SPOE00233960-00233960, an exhibit associated with W04043's SPO interview.⁴

2. The Defence for Mr Hashim Thaci ("Defence") objects to the relief sought in the SPO Request. The SPO Request represents yet another attempt to expand its case with additional witnesses and documents after the court-ordered deadlines, when the SPO had been in possession of the relevant information for years. Specifically, the SPO has failed to either provide timely notice or demonstrate good cause for the late addition of the two Proposed Witnesses and their associated materials to the SPO's Witness and Exhibit Lists, which is highly prejudicial to the Defence. Further, the SPO's request for protective measures for [REDACTED] has not been justified, and is not warranted.

¹ KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022, Confidential ("SPO Request").

² KSC-BC-2020-06/F00885/A02, Annex 2 to Submission of Corrected and Lesser Redacted Versions of Witness List – List of Witnesses, 18 July 2022, Confidential ("SPO Witness List").

³ The SPO cites KSC-BC-2020-06/F00788/A01, Annex 1 to 'Prosecution submission of Amended exhibit list', 29 April 2022, but this version has been superseded by: KSC-BC-2020-06/F00896/A02, Annex 2 to Prosecution Submission of amended Exhibit List and Related Submissions – Amended Exhibit List, 25 July 2022, Confidential ("SPO Exhibit List").

⁴ SPO Request, para. 20.

II. PROCEDURAL BACKGROUND

3. 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) disclosure, by 31 May 2021”;⁵ adding the trial should commence in summer 2021.⁶ On 23 November 2020, the Pre-Trial Judge ordered the SPO to disclose all material falling under Rule 102(1)(b) of the Rules⁷ by 31 May 2021.⁸

4. On four occasions,⁹ 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 2022.¹⁰

5. On 22 October 2021, following a Defence request, the SPO filed its Preliminary Witness List, containing 327 witnesses.¹¹ Neither [REDACTED] nor W04043 were included in this list, nor mentioned in any of the witness summaries.

6. 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

⁵ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, Public, paras. 2, 15.

⁶ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, Public, para. 14.

⁷ Rules of Procedure and Evidence Before the KSC, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

⁸ KSC-BC-2020-06/F00099, Pre-Trial Judge, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, Public, para. 99(e).

⁹ (1) KSC-BC-2020-06/F00218, Pre-Trial Judge, Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, 12 March 2021, para. 22; (2) KSC-BC-2020-06, Transcript of Sixth Status Conference – Oral Order 1, 21 July 2021, p. 536 lines 4-9; (3) KSC-BC-2020-06, Transcript of Seventh Status Conference – Oral Order 2, 14 September 2021, p. 625 lines 7-23; (4) KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021 (“Transcript of Eighth Status Conference”), p. 753 line 6 to p. 754 line 4.

¹⁰ Transcript of Eighth Status Conference – Oral Order 3, p. 753 line 6 to p. 754 line 4.

¹¹ 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.

2021, seven months later than its own initial estimates.¹² The Pre-Trial Judge confirmed this deadline by an oral order issued the same day.¹³

7. 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 2021.¹⁴

8. On 31 January and 1 February 2022, the SPO notified six disclosure packages under Rule 102(1)(b).¹⁵ 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.¹⁶

9. In the seven months since the first Exhibit List was provided to the Defence, the SPO has sought amendments on six occasions.¹⁷ To date, the Pre-Trial Judge has granted the first three SPO requests,¹⁸ resulting in the addition of 1,844 documents.¹⁹

¹² Transcript of Eighth Status Conference, pp. 725-726.

¹³ Transcript of Eighth Status Conference – Oral Order 2, p. 752 line 20 to p. 753 line 5.

¹⁴ KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Confidential Redacted Pre-Trial Brief; KSC-BC-202006/F00631RED/A02/CONF/RED, Confidential Redacted List of Witnesses; KSC-BC-202006/F00631/RED/A03/CONF/RED, Confidential Redacted List of Exhibits.

¹⁵ Disclosure Packages 154, 155, 156, 157, 158 and 159.

¹⁶ KSC-BC-2020-06/F00667, Pre-Trial Judge, Decision on Specialist Prosecutor's Request for Extension of time, 31 January 2022, Confidential, para. 13.

¹⁷ (1) KSC-BC-2020-06/F00670/CONF/RED, Prosecution notice of Rule 102(1)(b) disclosure and related requests, 31 January 2022, Confidential; (2) KSC-BC-2020-06/F00708, Prosecution Rule 102(2) Submission and Related Requests, 24 February 2022, Confidential ("First Rule 102(2) Request"); (3) KSC-BC-2020-06/F00767/CONF, Prosecution request to amend the exhibit list and for protective measures, 13 April 2022, Confidential; (4) KSC-BC-2020-06/F00774/CONF/RED, Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05), 20 April 2022, Confidential; (5) KSC-BC-2020-06/F00891/CONF/RED, Prosecution request to amend the exhibit list and for protective measures, 21 July 2022, Confidential ("KSC-BC-2020-06/F00891/CONF/RED"); (6) SPO Request.

¹⁸ See KSC-BC-2020-06/F00727/CONF/RED, 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. 54; KSC-BC-2020-06/F00779, Pre-Trial Judge, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 22 April 2022, Confidential ("Decision on First Rule 102(2) Request"), para. 55; KSC-BC-2020-06/F00876/CONF/RED, 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. The last three SPO requests mentioned in the footnote above are pending.

¹⁹ 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.

In particular, on 22 April 2022, the Pre-Trial Judge authorised the SPO to amend its Exhibit List to add material related to [REDACTED].²⁰

10. The current version of the SPO Witness List contains 326 witnesses.

III. APPLICABLE LAW

11. Pursuant to Rule 95(4) of the Rules, the Pre-Trial Judge shall order the SPO to file, within a set time limit, its pre-trial brief, witness and exhibit lists. Pursuant to Rule 95(2), “[t]he Pre-Trial Judge shall ensure that the proceedings are not unduly delayed and shall take all necessary measures for the expeditious preparation of the case for trial”. Rule 118(2) further provides that “the Panel may permit, **upon timely notice and a showing of good cause**, the amendment of the lists of witnesses and exhibits filed pursuant to Rule 95(4)(b)” [Emphasis added].

12. 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 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) further 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.

²⁰ Decision on First Rule 102(2) Request, para. 55.

13. During the Tenth Status Conference 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.**²¹

14. A KSC Court of Appeals Panel has clarified that:

21. [...] 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 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.** [...] ²²

15. International courts and tribunals have previously determined that the request to amend a witness list may only be granted if it is in the interests of justice, and no prejudice will arise to the defence.²³ For example, the ICTY has stated that:

[...] a Trial Chamber may grant a motion requesting an amendment of the witness list if it is satisfied that doing so is in the interests of justice. In exercising its discretion, the Trial Chamber must balance the Prosecution's duty to present available evidence to prove its case with the right of the Accused, pursuant to Articles 20(1) and 21(4)(b) of

²¹ KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022, p. 928 lines 10-19 (emphasis added).

²² 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).

²³ See, ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65^{ter} Witness and Exhibit Lists, and Admit Evidence Pursuant to Rule 92^{ter}, 26 January 2012 ("*Haradinaj* 2012 Witness Decision"), para. 19; ICTY, *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65^{ter} Witness List to Add Wesley Clark, 16 February 2007, para. 12.

the Statute of the Tribunal, to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence.²⁴

16. Factors that may be relevant to this determination include whether:

the proposed evidence is prima facie relevant and of probative value, and whether its probative value is substantially outweighed by the need to ensure a fair trial. When assessing whether it is indeed in the interests of justice to permit the Prosecution to vary its witness list, the Chamber should also consider whether any prejudice would be caused to the defence by the amendment of the witness list, whether the Prosecution has shown good cause for the amendment of the witness list, the repetitive or cumulative nature of the proposed testimony, and whether the defence has adequate time to prepare its cross-examination of the proposed new witness. The Trial Chamber may further consider the stage of the trial, whether the witness sought to be added is of sufficient importance to justify his or her inclusion on the witness list, whether granting the amendment would result in undue delay in the proceedings, and other circumstances specific to the case.²⁵

17. The requirement to show ‘good cause’ has been interpreted as requiring the prosecution to demonstrate exceptional circumstances, such that it was unable to file the application within the designated time frame for reasons outside its control.²⁶ ‘Good cause’ also requires consideration of factors such as “the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements, and corroboration of evidence”.²⁷

²⁴ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Motion for Leave to Amend its Witness List to Add Witness KDZ597, 30 June 2010, para. 4.

²⁵ *Ibid.*, para. 5 (footnotes omitted). See also: ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material related to Borovcanin’s Questioning, 14 December 2007, para. 37; ICTY, *Prosecutor v. Dordević*, IT-05-87/1-T, Decision on Prosecution’s Motion for Leave to Amend its Rule 65ter Witness List, 14 May 2009, para. 5; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Decision on the Prosecution’s Request to Add Two Witnesses to its Witness List and to Substitute One Witness for Another, 1 November 2007 (“*Haradinaj 2007 Witness Decision*”), para. 4.

²⁶ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1733, Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, paras. 6-7.

²⁷ ICTR, *Prosecutor v. Nsengimana*, ICTR-2001-69-T, Decision on Prosecution Motion for Varying the Witness List, 4 February 2008, para. 3.

IV. SUBMISSIONS

A. ADDITION OF PROPOSED WITNESSES & ASSOCIATED MATERIALS

18. The SPO seeks to add:

- (i) [REDACTED] to its Witness List, along with an indeterminate number of related documents to its Exhibit List;²⁸ and
- (ii) W04043 to its Witness List, as well as eight related documents to its Exhibit List.

19. As expanded directly below, the SPO has failed (1) to provide timely notice, (2) to demonstrate good cause for the late addition of the two Proposed Witnesses and their associated materials, which is (3) highly prejudicial to the Defence.

1. The SPO has failed to provide timely notice

20. The SPO has failed to provide adequate justification for its request to add the Proposed Witnesses and their related materials to the Witness and Exhibit Lists at such a late stage, or why the witness interviews were conducted only in 2022.

(a) [REDACTED]

21. A large portion of the SPO's submissions regarding the timeliness of its request to add [REDACTED] are redacted. Consequently, the following submissions are necessarily incomplete, based only on the limited unredacted information available to the Defence.

22. The SPO states that its own efforts to locate and contact [REDACTED] were unsuccessful, without explaining when these efforts commenced or for how long they

²⁸ The redactions in para. 5, fn. 9 of the SPO Request make it impossible to determine the exact number of items in question.

continued. The SPO then requested the assistance of a third party on 5 February 2020.²⁹ This indicates that the SPO was aware of the identity of [REDACTED], and his potential relevance to the case more than **two and a half years** ago.

23. In addition, the SPO managed to meet [REDACTED] in person on [REDACTED] 2021, *i.e.* around [REDACTED] ago, but these meetings appear to have been limited to discussions about “security and logistical matters” and did not enable the SPO “to ascertain [REDACTED]’s relevance and importance to the SPO’s case”.³⁰ The SPO’s submissions demonstrate a failure to exercise sufficient diligence in obtaining the evidence of [REDACTED] given that, in [REDACTED] 2021, the Accused had already been detained, at its request, for several months. In two meetings, the SPO would reasonably have been able to establish the relevance and importance of [REDACTED], even without conducting a full formal interview, particularly given that: (i) the SPO was in possession of materials which gave a good indication of the evidence and value that [REDACTED] could provide; and (ii) had already identified him as, at a minimum, a potential witness.

24. Even if, for the sake of argument, additional material was required prior to conducting a full interview of [REDACTED], such as, for instance, his prior statements, the SPO Request details that the required materials for this witness were received throughout 2021, culminating in receipt of the (seemingly) final batch in October 2021.³¹ However, the SPO did not conduct its interview with [REDACTED] until [REDACTED] 2022. The SPO provides inadequate justifications for this [REDACTED] delay, including delays in the processing and review of the received materials, “several significant pre-trial deadlines in this case”, and “scheduling conflicts arising from the personal and professional commitments of [REDACTED]

²⁹ SPO Request, para. 6.

³⁰ *Ibid.*

³¹ SPO Request, para. 7.

and [REDACTED]”.³² It is 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. The lateness of the SPO’s request to add [REDACTED] to its Witness List would be even harder to accept if this witness has already testified in any other Kosovo-related war crimes trials, before UNMIK, ICTY, EULEX or Kosovo courts, which seems to be the case from the abundant related material.³³ The SPO should therefore clarify whether the witness has already testified before another court and, if so, under what conditions.

25. Consequently, it cannot reasonably be argued that the SPO was exercising “due diligence” in taking more than two and a half years to interview [REDACTED], determine his relevance to the proceedings and seek his admission to the Witness List.

(b) W04043

26. The SPO states that it engaged [REDACTED] to locate W04043 on 9 February 2021,³⁴ without providing any information about their efforts to locate him independently, or how long this process took. The SPO also fails to adequately explain why it then took 14 months to organise a witness interview, citing only “scheduling and logistical issues, including complications arising from the COVID-19 pandemic”.³⁵ This generic description is insufficient to justify such a lengthy delay, particularly in light of other witnesses that the SPO managed to contact and interview during the COVID-19 pandemic.³⁶ The SPO could, and should, have used all the means at its disposal to conduct an earlier interview, such as via videoconference,

³² SPO Request, paras. 7-8.

³³ SPO Request, para. 7.

³⁴ SPO Request, para. 16.

³⁵ SPO Request, para. 16.

³⁶ *See, e.g.*, [REDACTED].

particularly given the Accused had already been detained for several months at its request.

27. Further, this is not a case where the witness' relevance was not clear to the SPO until the time of his interview; not least because it was the SPO who sought contact with this witness.³⁷ The SPO already had in its possession materials relating to W04043, including his [REDACTED] prior statement, which demonstrated his relevance. Indeed, in July 2021, the SPO provided the Defence with its Rule 102(3) notice which includes three items relating to W04043,³⁸ including two the SPO now seeks to admit to its Exhibit List. Under the column entitled 'Relevance', the SPO had stated 'Yes' for all of these documents. The materials sought to be admitted by the SPO regarding this witness had been available for a number of years, and certainly prior to its decision to submit its Witness and Exhibit Lists, including:

- (i) SITF40004070-40004093, [REDACTED]; and
- (ii) SITF00010993-00011013, [REDACTED], and SPOE00078072-00078086, [REDACTED].

28. There is no suggestion that the SPO did not have access to these other materials earlier. The SPO has therefore failed to demonstrate that, prior to April 2022, "it was not in a position to become cognisant of the proposed evidence", which was easily accessible.³⁹ Thus, the SPO has not demonstrated that it acted with due diligence or gave timely notice when seeking the addition of W04043 on 21 July 2022, more than one and a half years after first attempting to locate him, and while having custody of his prior [REDACTED] statements for, presumably, several years.

³⁷ Compare the situation of [REDACTED], who sought out contact with the SPO: *see* Decision on First Rule 102(2) Request, para. 24.

³⁸ KSC-BC-2020-06/F00421/A01, Annex 1 to Prosecution Rule 102(3) Notice – Rule 102(3) Notice, 31 July 2021, Confidential, Item Nos. 11204, 41466 and 45293 (items not previously disclosed to the Defence).

³⁹ *ICTY, Prosecutor v. Mrksic et al.*, IT-95-13/1-T, Decision on Prosecution Motion to Amend its rule 65ter List, 6 June 2006, para. 5.

(c) [REDACTED] and W04043

29. For both Proposed Witnesses, the SPO acknowledges that the interviews took place in [REDACTED] and April 2022, but fails to adequately explain why it took until June 2022 to translate and transcribe the interviews, and until 21 July 2022 to file this Request.⁴⁰

30. Further, the SPO Request has been filed at a time when “a number of procedural steps have been completed with a view to transmitting the case for trial before the end of the year”.⁴¹ In particular, the SPO has completed its disclosure under Rule 102(1)(b) of the Rules, completed its review of the Rule 103 material in its possession up to 16 June 2022 and is approximately 65% complete with processing requests for disclosure pursuant to Rule 102(3).⁴² Further, and most importantly, the Defence has been given a deadline of 21 October 2022 to file its pre-trial brief.⁴³ It therefore cannot be argued that the SPO has given timely notice, in light of the advanced procedural stage of these proceedings.

31. Had the SPO been diligent in conducting its investigations, it would have been aware of the potential relevance of these witnesses at an earlier stage and expended greater efforts on interviewing them earlier. The SPO has not discharged its responsibility for “orderly and timely case management”,⁴⁴ and has consequently failed to provide timely notice of the Proposed Witnesses.

2. *The SPO has failed to show good cause*

⁴⁰ SPO Request, paras. 8, 16.

⁴¹ KSC-BC-2020-06/F00897, Pre-Trial Judge, Decision on Periodic Review of Detention of Kadri Veseli, 26 July 2022, para. 44.

⁴² *Ibid.*

⁴³ KSC-BC-2020-06, Transcript of Twelfth Status Conference, 20 May 2022, Public (“Transcript of Twelfth Status Conference”), p. 1324, lines 3-5.

⁴⁴ *Haradinaj 2007 Witness Decision*, para. 7.

32. No good cause has been shown by the SPO in seeking the proposed additions. The starting point must necessarily be that the SPO issued both its Indictment and its Pre-Trial Brief without considering it was necessary to rely on the evidence and materials of these witnesses to successfully make their case. However, the following specific arguments can be made about the necessity of these witnesses.

33. The Defence does not have access to the materials for [REDACTED] which would enable it to make its own determination of the relevance and importance of this witness. The Defence can only rely on the SPO's summary, which states that [REDACTED] will testify about:⁴⁵

certain important events involving, [REDACTED], joint criminal enterprise ('JCE') members who include the Accused SELIMI and THAÇI (particularly in meetings around [REDACTED], as pleaded in the Indictment), as well as KRASNIQI. [REDACTED] also (i) corroborates key aspects of other witnesses' evidence; (ii) authenticates a number of contemporaneous records, including documents already on the Exhibit List; and provides [REDACTED] evidence concerning (iii) the structure of the Kosovo Liberation Army ('KLA') and the relationship between the KLA, FARK, and government-in-exile; and (iv) the targeting of opponents pursuant to the alleged common purpose.

34. In its general effect, this evidence is not unique, and appears repetitive of other evidence offered by the SPO.⁴⁶ There are already several witnesses on the SPO Witness List that testify about the matters identified in [REDACTED]'s summary, particularly regarding [REDACTED], the structure of the KLA, the relationship between the KLA and other bodies, and the targeting of opponents.⁴⁷ Further, even the SPO acknowledges that the role of [REDACTED] is primarily one of corroboration and authentication: self-evidently, his evidence can therefore be obtained from other existing witnesses.

⁴⁵ SPO Request, para. 5 (footnotes omitted).

⁴⁶ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E), 21 May 2004, paras. 25, 28, 31.

⁴⁷ See, e.g., [REDACTED].

35. Similarly, the SPO states that W04043 is the only live witness that can corroborate [REDACTED].⁴⁸ However, and as acknowledged by the SPO, there are other witnesses that can also testify about the circumstances of [REDACTED], including [REDACTED]. Further, less than a quarter of W04043's SPO transcript actually directly relates to the circumstances of [REDACTED].⁴⁹ Instead, as is to be expected, most of the transcript details the circumstances of [REDACTED] of W04043, an incident which does not fall within the indictment in this case. Further, his SPO transcripts of interview do not contain any references to Mr Thaçi or any of the co-Accused. This witness therefore offers testimony about a small portion of an incident, which is already described by other witnesses, and for which there is no direct link to the Accused.⁵⁰

36. Finally, the SPO fails to explain why neither witness was included in the SPO's Witness List, its Pre-Trial Brief or other key documents.⁵¹ In particular, the SPO fails to demonstrate why greater steps were not taken to ensure [REDACTED] was interviewed earlier, when he allegedly will testify about events involving the Accused. The SPO had ample time and opportunity to consider the (potential) evidence of these witnesses and their associated materials, in order to make the determination of what to include in its Witness and Exhibit Lists. It can be therefore be inferred that, either their evidence is not truly probative to the SPO's case, or the SPO made a strategic decision not to include these witnesses earlier. In either circumstance, the SPO should not be allowed to amend its case at such a late stage of the proceedings.

⁴⁸ SPO Request, para. 15.

⁴⁹ Discussion of the [REDACTED] occurs on approximately 19 pages of the SPO's transcript of interview, out of a total of 85 (i.e. 22%); see 106336-TR-ET Parts 2 and 3.

⁵⁰ See similar findings in: *Haradinaj* 2012 Witness Decision, para. 33.

⁵¹ ICTR, *Prosecutor v. Nchamihigo*, ICTR-01-63-T, Decision on the Prosecution Motion for Leave to Amend the Witness List, 9 January 2007, para. 9.

37. In these circumstances, and in light of the number of SPO witnesses already on the Witness List, neither [REDACTED] nor W04043 are sufficiently necessary or important to justify their late addition, particularly in the context of the prejudice to the Accused that will result.

3. *The SPO Request is highly prejudicial*

38. Mr Thaçi is entitled to know the case against him, and to have adequate time and facilities to prepare his defence.⁵² Inevitably, the Defence will require additional time to analyse the totality of the new material, and conduct additional investigations into the new witnesses. The prejudice is only heightened by the stage of proceedings, and the impact of the recent decision imposing a protocol for contact with SPO witnesses. At this stage, the Defence should be focused on its own investigations and pre-trial preparation.

39. The Defence is further prejudiced by the lack of clarity in the SPO Request as to how much material is being sought to be added to the Exhibit list for [REDACTED], or the type or content of these materials. If the SPO Request is granted, the Defence will not be provided with anything more than a summary of the information of [REDACTED] until 30 days prior to trial.

40. The addition of two new witnesses at this juncture, including at least one that allegedly provides evidence directly relevant to the Accused, may also impact the upcoming procedural timetable. In particular, the Defence's pre-trial brief is scheduled to be submitted on 21 October 2022, but may be delayed by the addition of these witnesses and their associated materials, not least because of the additional investigations that will be required. Consequently, all subsequent procedural steps, including transmission of the proceedings to the Trial Panel, will also be delayed. As

⁵² Article 21(4)(c), KSC Law.

noted by the Pre-Trial Judge, the Defence is not responsible for the scope of the case, which has been determined by the SPO; the Pre-Trial Judge must send “a clean case file to the Trial Panel” and should not “send this case to a Trial Panel that would be consistently obliged to stay proceedings because the Defence would be disclosed specific information that would lead to new investigations. That would not be a good practice, and that would slow down the proceedings at a later stage.”⁵³ At some point, this case must stop expanding, so it can be sent to the Trial Panel, and allow the Defence sufficient time to review the considerable volume of material disclosed, conduct its own investigations and generally prepare for trial. The prejudice is therefore clear: the addition of these witnesses and materials will necessarily impact and delay the Defence’s preparation for trial and affect the expeditiousness of proceedings, while Mr Thaçi remains in detention.

41. The prejudice to the Defence is further emphasised when considering the recent procedural history of the case regarding proposals for streamlining. Discussions about streamlining the case have been ongoing between the parties since at least March 2022,⁵⁴ in recognition of the fact the size and scope of the SPO case has become disproportionate and unnecessary. During this period, the Defence has repeatedly stressed the need for the SPO to reduce the size of its Witness and Exhibit Lists.⁵⁵ The Pre-Trial Judge appears to agree the SPO’s case must be reduced, recently querying whether “the SPO is amenable to streamlining their case by dropping some crime sites, limiting the number of witnesses per crime site, limiting the number of viva voce witnesses, limiting the total number of witnesses and/or limiting the number of items on the Exhibit List”.⁵⁶ The Pre-Trial Judge has thus ordered the SPO to file a witness

⁵³ Transcript of Twelfth Status Conference, p. 1268.

⁵⁴ See, e.g., KSC-BC-2020-06, Transcript of Eleventh Status Conference – Oral Order 2, 24 March 2022, p. 1161, lines 11-21.

⁵⁵ KSC-BC-2020-06, Transcript of Thirteenth Status Conference, 13 July 2022, Confidential (“Transcript of Thirteenth Status Conference”), p. 1420 line 19 to p. 1422 line 10.

⁵⁶ KSC-BC-2020-06/F00863, Pre-Trial Judge, Order Setting the Date for a Thirteenth Status Conference and for Submissions, 1 July 2022, Public, para. 22(3)(c).

list which updates the mode of questioning and presentation time for each witness by 2 September 2022.⁵⁷ In this context alone, it is neither logical or defensible that the SPO would seek to **add** two witnesses and new exhibits to its Witness and Exhibit Lists. The SPO cannot contend that it is making legitimate efforts to streamline its case, when it is simultaneously increasing its size and scope. Indeed, the SPO Request, and its prejudicial effect on the Defence, must be assessed in conjunction with the SPO's request to amend the exhibit list, filed on the same day.⁵⁸

42. Most egregiously, the SPO failed to provide **any** indication during discussions on streamlining at the most recent status conference that this Request would be forthcoming. In fact, the SPO stated that it would "promptly notify" the parties "as soon as" any decision was taken regarding changes to the Witness List – and yet failed to do this at the status conference. The SPO must have known when making these statements that the SPO Request, made only nine days later, would soon be filed. It is dishonest for the SPO to have failed to identify this forthcoming request, and instead maintain that "[t]he Prosecution case is not going to change. The scope of the case, the nature of the case is not going to change by the streamlining proposals or the updated witness list."⁵⁹

43. Unlike the previous Rule 102(2) Request, these are not witnesses that were previously included in the SPO Witness List, and the majority of their relevant material is not already part of the Exhibit List. Again, the SPO had both the time and the opportunity to identify and select the witnesses and evidence that it would choose to rely upon at trial, having investigated the circumstances of this case for at least seven years. The SPO should not be allowed to change and/or develop the evidence it will present at trial at such a late stage, as it will result in real prejudice for the Defence.

⁵⁷ Transcript of Thirteenth Status Conference, p. 1474.

⁵⁸ KSC-BC-2020-06/F00891/CONF/RED.

⁵⁹ Transcript of Thirteenth Status Conference, p. 1433 lines 22-25.

Any probative value that the proposed evidence may have is outweighed by such prejudice and the need to maintain the fairness of these proceedings.

B. REQUEST FOR PROTECTIVE MEASURES FOR [REDACTED]

44. The SPO has sought protective measures for [REDACTED], including: (i) delayed disclosure of his identity until 30 days before trial; (ii) withholding various Rules 102(1)(b) and 102(2) disclosure until 30 days before trial; and (iii) in-court protective measures.⁶⁰ As a counterbalancing measure, the SPO proposes to disclose a summary of [REDACTED]'s evidence.⁶¹

45. Again, the vast majority of the details relating to protective measures, including the risks faced by this witness, have been redacted. The Defence is therefore unable to make substantive submissions on the protective measures sought. In particular, it is not clear from the unredacted information that there is an objectively justifiable risk to the witness. The SPO states that [REDACTED] has been subjected to threats and intimidation, but the Defence does not have access to the material that is cited in support of this statement, leaving it unable to independently assess his security situation. The Defence is therefore reliant only on the witness' own (unreferenced) subjective fears for his safety and that of his family.⁶²

46. Further, [REDACTED] allegedly provides evidence relating to events involving three of the Accused. The Defence submits that any evidence which allegedly relates to the acts and conduct of the Accused should be disclosed at the earliest opportunity, to ensure a fair trial and adequate preparation for the Defence.⁶³ Therefore the Defence

⁶⁰ SPO Request, paras. 11-12.

⁶¹ SPO Request, para. 14.

⁶² SPO Request, para. 10.

⁶³ See, e.g., ICC, *Prosecutor v. Muthaura & Kenyatta*, ICC-01/09-02/11-580-Red2, Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, paras. 40, 46.

strongly objects to the delayed disclosure of [REDACTED]'s identity, which is not proportionate. Similarly, the Defence objects to the withholding of prior statements of [REDACTED], who would incriminate directly several Accused, given such materials are essential to identifying investigation leads and assessing the witness' credibility through identifying discrepancies in his account. Producing a summary of [REDACTED]'s evidence is insufficient and prejudicial, as it precludes meaningful Defence investigations.

C. REQUEST FOR RULE 107 REDACTIONS TO EXHIBIT FOR W04043

47. The SPO requests to be relieved of its disclosure obligations for Rule 107 information redacted from SPOE00233960-00233960. The Defence notes the redacted information includes the identities of W04043 and related victims, which is apparently available in the transcript of the SPO's interview with W04043.⁶⁴

48. However, the Defence also notes the disclosure of complete original documents is always preferable. To that end, the Defence therefore encourages the SPO to do its best to obtain clearance of the relevant redacted portions from the Rule 107 information provider.

V. RELIEF SOUGHT

49. For the foregoing reasons, the Defence requests the Pre-Trial Judge to dismiss the SPO Request.

[Word count: 5,865 words]

⁶⁴ SPO Request, para. 18.

Respectfully submitted,



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At Tampa, United States