

**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:** 15 September 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of 'Thaçi Defence Response to Prosecution request to  
add two witnesses and associated materials (F00947)'**

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## I. INTRODUCTION

1. On 2 September 2022, the SPO filed the ‘Prosecution request to add two witnesses and associated materials’,<sup>1</sup> requesting the Pre-Trial Judge to:

- (i) grant leave to add two witnesses, [REDACTED] and [REDACTED] (together, “Proposed Witnesses”), and their associated materials to the SPO’s Witness List<sup>2</sup> and Exhibit List;<sup>3</sup> and
- (ii) maintain protective measures for [REDACTED], and grant protective measures for [REDACTED], including in-court measures.<sup>4</sup>

2. The Defence for Mr Hashim Thaci (“Defence”) objects to the relief sought in the SPO Request. The SPO Request represents the second request by the SPO to add witnesses to its Witness List, and the seventh request to add materials to its Exhibit List. In each instance, the SPO has been in possession of the relevant information for years.

3. In February 2022, the SPO was put on notice that “additional evidence will only be admitted with a very strict scrutiny from the Panel and really in exceptional circumstances”.<sup>5</sup> In its Request, the SPO has failed to demonstrate the necessary exceptional circumstances, and in fact, has failed to provide any adequate justification for the lateness of this request. Specifically, the SPO has failed to either provide timely

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<sup>1</sup> KSC-BC-2020-06/F00947/CONF/RED, Prosecution request to add two witnesses and associated materials, 2 September 2022, Confidential (“SPO Request”).

<sup>2</sup> The SPO cites ‘Annex 1 to ‘Prosecution submission of corrected and lesser redacted witness list’, KSC-BC-2020-06/F00885/A01, 18 July 2022, Strictly Confidential and Ex Parte’, but this version has been superseded by KSC-BC-2020-06/F00948/A02, Annex 2 to Prosecution submission of revised witness list – Revised Witness List, 2 September 2022, Confidential (“SPO Witness List”).

<sup>3</sup> The SPO cites ‘Annex 1 to Prosecution submission of amended exhibit list, KSC-BC-2020-06/F00896/A01, 25 July 2022, Strictly Confidential and Ex Parte’, but this version has been superseded by KSC-BC-2020-06/F00967/A02, ANNEX 2 to Prosecution submission of amended exhibit list – Amended Exhibit List, 13 September 2022, Confidential (“SPO Exhibit List”).

<sup>4</sup> SPO Request, paras. 1, 15.

<sup>5</sup> KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022, p. 931 lines 1-3.

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. The Defence therefore urges the Pre-Trial Judge to submit the SPO Request to the required strict scrutiny, and prevent further unjustified expansion of the SPO's case after court-ordered deadlines.

## 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) disclosure, by 31 May 2021";<sup>6</sup> adding the trial should commence in summer 2021.<sup>7</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>8</sup> by 31 May 2021.<sup>9</sup>

5. On four occasions,<sup>10</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>11</sup>

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<sup>6</sup> KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, Public, paras. 2, 15.

<sup>7</sup> KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, Public, para. 14.

<sup>8</sup> Rules of Procedure and Evidence Before the KSC, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules").

<sup>9</sup> KSC-BC-2020-06/F00099, Pre-Trial Judge, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, Public, para. 99(e).

<sup>10</sup> (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.

<sup>11</sup> Transcript of Eighth Status Conference – Oral Order 3, p. 753 line 6 to p. 754 line 4.

6. On 22 October 2021, following a Defence request, the SPO filed its Preliminary Witness List, containing 327 witnesses.<sup>12</sup> Neither [REDACTED] nor [REDACTED] were included in this list, nor mentioned in any of the witness summaries.
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>13</sup> The Pre-Trial Judge confirmed this deadline by an oral order issued the same day.<sup>14</sup>
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>15</sup>
9. On 31 January and 1 February 2022, the SPO notified six disclosure packages under Rule 102(1)(b).<sup>16</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>17</sup>

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<sup>12</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 (“SPO Preliminary Witness List”), Confidential.

<sup>13</sup> Transcript of Eighth Status Conference, pp. 725-726.

<sup>14</sup> Transcript of Eighth Status Conference – Oral Order 2, p. 752 line 20 to p. 753 line 5.

<sup>15</sup> 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.

<sup>16</sup> Disclosure Packages 154, 155, 156, 157, 158 and 159.

<sup>17</sup> KSC-BC-2020-06/F00667, Pre-Trial Judge, Decision on Specialist Prosecutor's Request for Extension of time, 31 January 2022, Confidential, para. 13.

10. In the nine months since the first Exhibit List was provided to the Defence, the SPO has sought amendments on seven occasions.<sup>18</sup> To date, the Pre-Trial Judge has granted the first four SPO requests,<sup>19</sup> resulting in the addition of 1,922 documents.<sup>20</sup>

11. On 21 July 2022, the SPO filed a request seeking the addition of two further witnesses, [REDACTED] and W04043, to its Witness List, and to include their associated materials on the Exhibit List (along with other related measures).<sup>21</sup> On 3 August 2022, the Defence filed its response requesting the Pre-Trial Judge dismiss the SPO July Request, on the basis that the SPO had failed to either provide timely notice or demonstrate good cause for the late addition of the requested materials, and the request was prejudicial to the Defence.<sup>22</sup> The Pre-Trial Judge has yet to issue a decision on this request.

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<sup>18</sup> (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 (“SPO Fourth Request”), 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) KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022, Confidential (“SPO July Request”); (7) SPO Request.

<sup>19</sup> 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; KSC-BC-2020-06/F00957/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 6 September 2022. The remaining SPO requests mentioned in the footnote above are pending.

<sup>20</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 18,226: see SPO Exhibit List, p. 1328.

<sup>21</sup> SPO July Request, paras. 1, 20.

<sup>22</sup> KSC-BC-2020-06/F00909, Taçi Defence Response to Prosecution Rule 102(2) submission and related requests (F00890), 3 August 2022, Confidential, para. 2 (“Defence Response”).

12. On 2 September 2022, pursuant to an order of the Pre-Trial Judge, the SPO filed the revised Witness List. This version of the SPO Witness List contains 319 witnesses.

### III. APPLICABLE LAW

13. 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.

14. The Defence otherwise refers to, and relies upon, the applicable legal principles that were previously cited in its Response.<sup>23</sup>

### IV. SUBMISSIONS

A. ADDITION OF PROPOSED WITNESSES & ASSOCIATED MATERIALS

15. The SPO seeks to add:

- (i) [REDACTED] to its Witness List, along with [REDACTED] related documents to its Exhibit List;<sup>24</sup> and
- (ii) [REDACTED] to its Witness List, as well as [REDACTED] related documents to its Exhibit List.<sup>25</sup>

16. As expanded 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.

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<sup>23</sup> Defence Response, paras. 11-17.

<sup>24</sup> SPO Request, fn. 21.

<sup>25</sup> SPO Request, fn. 21.

1. *The SPO has failed to provide timely notice*

17. 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. Concerningly, the SPO's submissions regarding the timeliness of its request to add the Proposed Witnesses are exceptionally limited. The SPO merely states that the request is "timely", because "[t]he necessity of adding these witnesses became apparent in the course of the streamlining exercise for the Pre-Trial Judge's 2 September deadline. The SPO has filed the present request on the same day as that deadline."<sup>26</sup> This is clearly insufficient justification.

18. Rule 102(2) requires the SPO to explain the reasons for late disclosure of witnesses. However, the SPO Request fails to specify basic details going to the timeliness of its submissions, including:

- (i) When the SPO first became aware of the Proposed Witnesses;
- (ii) Clear indications of what prior contact has been had with the Proposed Witnesses, particularly when the Proposed Witnesses were first interviewed by the SPO, allowing the SPO to determine their potential relevance to the case; and
- (iii) What prevented the SPO from determining their relevance earlier.

19. In the absence of this information, the Defence is unable to make complete submissions. Equally, however, the absence of this information is an indication that the SPO has failed to adequately justify its request.

(a) [REDACTED]

20. The information that is provided demonstrates the relevance of [REDACTED] must have been evident to the SPO for at least two years. First, the Defence has

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<sup>26</sup> SPO Request, para. 14.

identified that [REDACTED] was interviewed by the SPO on [REDACTED] 2020. The transcripts of this interview were included in the SPO's Rule 102(3) Notice provided to the Defence in July 2021.<sup>27</sup> Under the column entitled 'Relevance', the SPO had stated 'Yes' for all of these documents. Given [REDACTED] is alleged to be a former KLA member who was detained, interrogated and beaten at a site charged in the Indictment, the relevance of this witness must have been evident from at least the time of his SPO's interview.

21. Second, [REDACTED] was called on behalf of [REDACTED], and gave evidence on [REDACTED]. The Defence notes all the prosecution witnesses called to testify (live) [REDACTED]<sup>28</sup> were included in the SPO's preliminary witness list filed on 21 October 2021 in the current case,<sup>29</sup> except [REDACTED]. The SPO fails to justify why [REDACTED] was not added at the same time as these other witnesses in October 2021, or when it requested [REDACTED].<sup>30</sup> Even if, for the sake of argument, it could be alleged that the relevance of [REDACTED] was not evident until [REDACTED], the SPO fails to explain why it waited a further [REDACTED] to seek his admission as a witness in these proceedings. Finally, the relevance of [REDACTED] must have already been evident to the SPO given some of the witness' materials are already included on the Exhibit List.<sup>31</sup>

22. Consequently, it cannot reasonably be argued that the SPO was exercising "due diligence" in taking two years after their interview with [REDACTED], including [REDACTED], to determine his relevance to the current proceedings and seek his admission to the Witness List.

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<sup>27</sup> KSC-BC-2020-06/F00421/A01, Annex 1 to Prosecution Rule 102(3) Notice – Rule 102(3) Notice, 31 July 2021, Confidential, Item Nos. 4485-4488 (Not previously disclosed to the Defence).

<sup>28</sup> [REDACTED].

<sup>29</sup> See SPO Preliminary Witness List.

<sup>30</sup> [REDACTED], para. 1.

<sup>31</sup> SPO Request, para. 11, fn. 16.



(b) [REDACTED]

23. The SPO has been aware of the potential relevance of [REDACTED] since at least [REDACTED]. In its Rule 102(3) Notice, notified in July 2021, the SPO included one item relating to [REDACTED],<sup>32</sup> which the SPO now seeks to admit to its Exhibit List. This document is described as “SPO - Official Note on conversation with [REDACTED]”, and is dated [REDACTED]. This note is a seven page “detailed screening note”, and it is apparent from the contents that all of the relevant evidence from [REDACTED] was provided to the SPO during this [REDACTED]. It was disclosed to the Defence in Disclosure Package 252 on 20 May 2022, pursuant to Rule 103. Thus, the SPO had three prior opportunities to consider adding this witness to its witness list: in [REDACTED] when it first interviewed him, in July 2021 when it added this interview to the Rule 102(3) Notice, and in May 2022 when it decided to disclose his interview to the Defence pursuant to Rule 103.<sup>33</sup> The Defence notes that, in the past, the lack of interview transcripts has not prevented the SPO from adding witnesses to its witness list.<sup>34</sup>

24. The SPO request is therefore clearly untimely. The SPO fails to justify why it didn't include or seek the admission of this witness to its Witness List earlier, when it must have been aware of the relevance of this witness since at least [REDACTED] (prior to the filing of all iterations of its witness list).

25. Finally, the SPO acknowledges that at least one of the incidents discussed by this witness has been investigated and adjudicated by [REDACTED].<sup>35</sup> Again, the SPO

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<sup>32</sup> Rule 102(3) Notice, Item No. 4743.

<sup>33</sup> The SPO has not indicated the date of the subsequent interview with [REDACTED].

<sup>34</sup> For example: [REDACTED] were included in the SPO witness list KSC-BC-2020-06/F00631 while the SPO had not disclosed yet their transcripts of interviews, and had to request leave to add them to its Exhibit List after the 31 January 2022 deadline.

<sup>35</sup> SPO Request, para. 7, identifying [REDACTED].

has been in possession of the relevant [REDACTED] materials since at least July 2021.<sup>36</sup> Thus, the SPO has not demonstrated that it acted with due diligence or gave timely notice when seeking the addition of [REDACTED] on 2 September 2022, [REDACTED] after first contact with him.

(c) Both Proposed Witnesses

26. There is no suggestion that the SPO did not have access to the relevant materials or information about the Proposed Witnesses earlier, merely that they were previously overlooked by the SPO, such that their necessity became apparent recently. The SPO has therefore failed to demonstrate that, prior to September 2022, “it was not in a position to become cognisant of the proposed evidence”, which was easily accessible.<sup>37</sup>

27. It is also disingenuous for the SPO to suggest that such requests “should be treated with flexibility in a complex multi-accused case of this kind, particularly at this stage of proceedings”.<sup>38</sup> As previously submitted, 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”.<sup>39</sup> This submission is only heightened with the development of time: the SPO has now completed its disclosure under both Rule 102(1)(b) and Rule 103 of the Rules, and is scheduled to complete disclosure pursuant to Rule 102(3) by 30 September 2022 and Rule 107 within the coming months.<sup>40</sup> Further, and most importantly, the Defence has been given a

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<sup>36</sup> Rule 102(3) Notice, Item Nos. 1959 and 1964.

<sup>37</sup> 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.

<sup>38</sup> SPO Request, para. 14.

<sup>39</sup> KSC-BC-2020-06/F00897, Pre-Trial Judge, Decision on Periodic Review of Detention of Kadri Veseli, 26 July 2022, para. 44.

<sup>40</sup> *Ibid.* See also, KSC-BC-2020-06, Transcript of Fourteenth Status Conference, 8 September 2022, Public (“Transcript of Fourteenth Status Conference”), pp. 1462, 1501-1502, 1507.

deadline of 21 October 2022 to file its pre-trial brief.<sup>41</sup> Finally, it is anticipated that, by mid-November, the parties will have substantially completed all procedural steps necessary for the referral of the case to the Trial Panel.<sup>42</sup> Adding further witnesses at this stage of proceedings can only serve to delay this procedural timetable. It therefore cannot be argued that the SPO has given timely notice, in light of the advanced procedural stage of these proceedings.

28. The Defence reiterates that, had the SPO been diligent in conducting its investigations and the management of its case, it would have been aware of the potential relevance of these witnesses at an earlier stage and added them to its Witness List in a timely manner. The SPO has not discharged its responsibility for “orderly and timely case management”,<sup>43</sup> and has consequently failed to provide timely notice of the Proposed Witnesses.

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

29. No good cause has been shown by the SPO in seeking the proposed additions. As with the previous SPO request to add witnesses, 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.

30. In addition, the SPO fails to demonstrate good cause for this specific application, in only providing the weak justification that these witnesses were identified “in the course of the SPO’s internal streamlining exercise”.<sup>44</sup> The aim of this

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<sup>41</sup> KSC-BC-2020-06, Transcript of Twelfth Status Conference, 20 May 2022, Public (“Transcript of Twelfth Status Conference”), p. 1324, lines 3-5.

<sup>42</sup> Transcript of Fourteenth Status Conference, p. 1582 line 1 to p. 1584 line 2.

<sup>43</sup> 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, para. 7.

<sup>44</sup> SPO Request, para. 1.

streamlining exercise was to **diminish** the size of the prosecution case, by, *inter alia*, diminishing the number of witnesses, not to increase its scope by adding new witnesses. Other international courts have determined that inadvertence is not an adequate justification for late amendments of the witness and exhibit lists, nor is the fact that the prosecution recently identified an item in their possession as being important or helpful for the case.<sup>45</sup> For example, in *Gbagbo*, it was determined that the Prosecutor's application to add documents to her exhibit list originated from an ongoing process of review of her file, resulting in a wish to modify the approach taken in respect of a number of issues. However, the ICC Trial Chamber found this was an insufficient justification, stating that:<sup>46</sup>

allowing the Prosecutor to modify her list of evidence simply on the basis of the fact that her appreciation of a given item changes over time would be tantamount to depriving not only the disclosure deadline, but even the list of evidence of any meaningful content, and would significantly compromise its very usefulness for the purposes of the preparation of the Defence.

31. The following specific arguments can also be made about the necessity of these witnesses to the SPO's case. The SPO states that [REDACTED] is [REDACTED] whose role is to provide "unique and important evidence about the acts and conduct of an accused [REDACTED] and a named JCE member [REDACTED]." <sup>47</sup> However, on the basis of the material available to the Defence, [REDACTED]'s evidence is neither sufficiently necessary or important to justify his late addition to the Witness List. The SPO acknowledges that [REDACTED] provides no evidence relevant to the crimes charged in the indictment.<sup>48</sup> In addition, the SPO's Pre-Trial Brief is already replete with examples allegedly demonstrating the policy underlying the joint criminal

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<sup>45</sup> See, e.g., ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1191, Trial Chamber VII, Decision on Prosecution Request to add 12 Items to its List of Evidence, 27 August 2015, para. 10; ICC, *Prosecutor v. Gbagbo and Ble Goude*, ICC-02/11-01/15-1120, Trial Chamber I, Decision on the Prosecutor's request for an extension of time pursuant to regulation 35 of the Regulations of the Court and application to submit six documents under paragraph 43 of the Directions on the conduct of the proceedings, dated 21 December 2017, 2 February 2018 ("*Gbagbo* Decision"), paras. 10-12.

<sup>46</sup> *Gbagbo* Decision, para. 12.

<sup>47</sup> SPO Request, para. 3.

<sup>48</sup> SPO Request, para. 6.

enterprise. This includes specific examples relating to the alleged behaviour of [REDACTED]<sup>49</sup> and [REDACTED]<sup>50</sup> which would exhibit this policy, based on the evidence of various witnesses that are already on the SPO's Witness List.<sup>51</sup> Consequently, it cannot reasonably be argued that [REDACTED]'s evidence is 'unique', nor that it advances the SPO's case against the Accused.

32. The SPO alleges that [REDACTED] can testify about his detention, interrogation and beatings at [REDACTED], identify fellow detainees (including a murder victim), and contribute information about the climate of witness intimidation in Kosovo.<sup>52</sup> Once again, the alleged evidence that can be given by [REDACTED] is not unique, and is in fact repetitive of other evidence offered by the SPO. First, there are already several witnesses on the SPO Witness List that were also detained at the [REDACTED] and identify fellow detainees,<sup>53</sup> as well as KLA members operating in this area.<sup>54</sup> Further, the SPO overstates the significance of the fact that [REDACTED]'s evidence allegedly fulfils a number of roles. There are other witnesses on the SPO Witness List whose evidence serves multiple purposes; for example, witnesses who are both a crime base witness and former KLA member.<sup>55</sup> This witness therefore offers testimony about the events at one crime site, which is already described in detail by other witnesses, and for which there is no direct link to the Accused. Again, the addition of this witness does not advance the SPO's case. The fact that the witness may

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<sup>49</sup> See, e.g., KSC-BC-2020-06/F00709/A02, Annex 2 to Prosecution submission of corrected Pre-Trial Brief and related request - Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief, 24 February 2022, Confidential ("SPO Pre-Trial Brief"), paras. 74, 77, 79, 80, 86, 111(c), 112, 197, 209 (and the footnotes cited therein).

<sup>50</sup> See, e.g., SPO Pre-Trial Brief, paras. 65, 112 (and the footnotes cited therein).

<sup>51</sup> See, e.g., [REDACTED].

<sup>52</sup> SPO Request, para. 9.

<sup>53</sup> [REDACTED].

<sup>54</sup> [REDACTED].

<sup>55</sup> For example: [REDACTED].

be “able to contribute information underlying the climate of witness intimidation in Kosovo”<sup>56</sup> is irrelevant to the charges.

33. Finally, and as previously submitted in relation to the SPO July Request, the SPO fails to explain why neither witness was included in the various iterations of the SPO’s Witness List, its Pre-Trial Brief or other key documents.<sup>57</sup> In particular, the SPO fails to demonstrate why greater steps were not taken to ensure [REDACTED] was included on the Witness List earlier, when he allegedly will testify about events involving the Accused. The SPO had ample time and opportunity to consider the 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.

34. In these circumstances, and in light of the number of SPO witnesses already on the Witness List, the SPO has not demonstrated good cause showing why [REDACTED] and [REDACTED] 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***

35. The SPO’s submissions that the requested amendments are “limited in scope and cause no undue prejudice”,<sup>58</sup> ignores the context of these proceedings and the

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<sup>56</sup> SPO Request, para. 9.

<sup>57</sup> 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.

<sup>58</sup> SPO Request, para. 14.

rights of the Accused. Mr Thaçi is entitled to know the case against him, and to have adequate time and facilities to prepare his defence.<sup>59</sup> These new materials will involve hundreds of pages that the Defence is required to review and investigate, not to mention two completely new individuals, on top of the already significant volume of material and witnesses in this case. The fact that part of the material has already been disclosed to the Defence three months ago ([REDACTED]'s screening note) or is publicly available in a redacted format ([REDACTED]) does not remedy the prejudice caused by the late addition of these witnesses to the SPO Witness List. The purpose of a Witness List is to put the Defence on notice of who is going to testify against the Accused, in order for the Defence to prepare for trial. Until an individual is on the SPO Witness List, the Defence is not going to focus on him/her, investigate his/her credibility, *etc.* Inevitably, the Defence will require additional time to analyse the totality of the new material, and conduct these additional investigations. 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.

36. The addition of two new witnesses at this juncture, including at least one that allegedly provides evidence relevant to the Accused, may also impact the upcoming procedural timetable. For example, it appears likely that this issue will not be resolved in time for the filing of the Defence Pre-Trial Brief on 21 October, therefore requiring either amendment of the timetable or the potential to file supplementary submissions at a later date. Similarly, the Defence will not be able to submit all of the information required by the Pre-Trial Judge to transfer the case to the Trial Panel, such as objections to admissibility of evidence, if the Exhibit and Witness Lists continue to expand. As 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

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<sup>59</sup> Article 21(4)(c), KSC Law.

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.”<sup>60</sup> 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, at the SPO’s request.

37. The Defence also reiterates that the SPO Request is contrary to the requirement for the SPO to streamline its case.<sup>61</sup> The Defence maintains its submissions that it is neither logical or defensible that the SPO would seek to **add another** two witnesses and new exhibits to its Witness and Exhibit Lists, when it is supposed to reducing the size of its case. Indeed, the SPO cannot argue it is making legitimate efforts to streamline its case when it removes seven witnesses at the same time it seeks to add four.<sup>62</sup>

38. The SPO’s Request is yet another attempt to impermissibly change and/or develop its case at a late stage of proceedings, to the prejudice of the Defence. In combination with their previous request, the SPO now seeks to add four witnesses, none of which were previously included in the SPO Witness List, and in circumstances where 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

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<sup>60</sup> Transcript of Twelfth Status Conference, p. 1268.

<sup>61</sup> Defence Response, paras. 41-42.

<sup>62</sup> KSC-BC-2020-06/F00948, Prosecution submission of revised witness list, 2 September 2022, Public, para. 6.



witnesses and evidence that it would choose to rely upon at trial, having investigated the circumstances of this case for at least seven years. Any probative value that the proposed evidence may have is outweighed by such prejudice and the need to maintain the fairness of these proceedings.

**V. RELIEF SOUGHT**

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

[Word count: 4,889 words]

Respectfully submitted,

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

**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Thursday, 15 September 2022

At Tampa, United States