

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Public Redacted Version of ‘Thaçi Defence Response to Prosecution Request to Amend the Exhibit List and Related Matters (F01238)’

Specialist Prosecutor’s Office

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Prosecution request to amend the exhibit list and related matters.¹ The SPO requests:

- (i) leave to amend the Exhibit List to include the additional materials (“Requested Amendments”);
- (ii) authorisation to disclose additional Rule 102(1)(b)(i) materials, which the SPO does not seek to add to its Exhibit List (“Requested Disclosures”).²

2. The Defence asks the Pre-Trial Judge to dismiss the SPO Request in its entirety. It is untimely and the SPO fails to show good cause. It constitutes yet another attempt from the SPO to belatedly disclose and add material that has already been in their possession for years, and to circumvent deadlines that exist in order to safeguard the accused's right to be tried within a reasonable time. The Defence fully endorses the submissions made by the Veseli Defence and the Selimi Defence in response to the SPO Request.³

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”;⁴ it further added that the trial should commence in the

¹ KSC-BC-2020-06/F001238, Confidential, dated 30 January 2023, notified on 31 January 2023 (“Request”).

² Request, para. 1.

³ KSC-BC-2020-06/F01272, Veseli Defence Response to SPO Request to Amend the Exhibit List and Related Matters (F01238), 9 February 2023, Confidential (“Veseli Defence Submissions”); KSC-BC-2020-06/F01274, Selimi Defence Response to SPO Motion to Amend Exhibit List, 9 February 2023, Confidential (“Selimi Defence Submissions”).

⁴ KSC-BC-2020-06/F00076, Prosecution Submissions for first Status Conference, 13 November 2020, Public, paras. 2, 15.

summer of 2021.⁵ On 23 November 2020, the Pre-Trial Judge ordered the SPO to disclose all material falling under Rule 102(1)(b) of the Rules⁶ by 31 May 2021.⁷

4. Thereafter, on four occasions,⁸ 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 2022.⁹

5. On 22 October 2021, the SPO filed its Preliminary Witness List.¹⁰ 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 2021.¹¹

6. 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.¹² On the same

⁵ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14.

⁶ Rules of Procedure and Evidence Before the KSC, KSC-BD03/Rev3/2020, 2 June 2020 ("Rules").

⁷ KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, Public, para. 99(e).

⁸ KSC-BC-2020-06/F00218, Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters, 12 March 2021, para. 22; KSC-BC-2020-06, Transcript of Sixth Status Conference – Oral Order 1, 21 July 2021, Public, p. 536 lines 4-9; KSC-BC-2020-06, Transcript of Seventh Status Conference – Oral Order 2, 14 September 2021, Public, p. 625, lines 7-23; KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, Public ("Transcript of Eighth Status Conference"), p. 753 line 6 to p. 754 line 4.

⁹ Transcript of Eighth Status Conference – Oral Order 3, p. 753 line 6 to p. 754 line 4.

¹⁰ KSC-BC-2020-06/F00542/A02/COR, Corrected Version of Annex 2 to Prosecution Submission of Preliminary Witness List – Preliminary Witness List, 23 May 2022, Confidential ("Preliminary Witness List").

¹¹ KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Pre-Trial Brief; KSC-BC-202006/F00631RED/A02/CONF/RED, List of Witnesses; KSC-BC-202006/F00631/RED/A03/CONF/RED, List of Exhibits.

¹² KSC-BC-2020-06/F0667, Decision on Specialist Prosecutor's Request for Extension of time, 31 January 2022, Confidential.

day, the SPO filed a first application to amend its Exhibit List, related to 132 items.¹³ The Request was granted by a decision of the Pre-Trial Judge issued on 8 March 2022.¹⁴

7. On 24 February 2022, the SPO filed a second application to amend its Exhibit List, concerning 24 items (29 distinct documents, totalling approximately 350 pages).¹⁵ This application was granted by the Pre-Trial Judge on 22 April 2022.¹⁶

8. On 13 April 2023, the SPO filed a third request to amend the Exhibit List,¹⁷ granted by the Pre-Trial Judge on 8 July 2022.¹⁸

9. On 20 April 2022, the SPO filed a fourth application to amend its Exhibit List, related to 49 documents [REDACTED].¹⁹ It was granted by the Pre-Trial Judge on 6 September 2022.²⁰

10. On 21 July 2022, the SPO filed two additional requests to amend its Exhibit List.²¹ The Pre-Trial Judge granted the first one, related to the admission of two new

¹³ KSC-BC-2020-06/F00670, 'Prosecution notice of Rule 102(1)(b) disclosure and related requests', 31 January 2022.

¹⁴ KSC-BC-2020-06/F00727, Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022.

¹⁵ KSC-BC-2020-06/F00708, Prosecution Rule 102(2) submission and related requests with confidential Annexes 1 and 2 and strictly confidential *ex parte* Annex 3, 24 February 2022.

¹⁶ KSC-BC-2020-06/F00779, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 22 April 2022.

¹⁷ KSC-BC-2020-06/F00767, Prosecution request to amend the exhibit list and for protective measures with confidential Annexes 1 and 4-9 and strictly confidential and *ex parte* Annexes 2- 3, 13 April 2022.

¹⁸ KSC-BC-2020-06/F00876, Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022.

¹⁹ KSC-BC-2020-06/F00774, 'Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05), 20 April 2022.

²⁰ 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.

²¹ KSC-BC-2020-06/F00890/CONF/RED, Confidential redacted version of Prosecution Rule 102(2) submission and related requests, 21 July 2022; KSC-BC-2020-06/F00891, Confidential redacted version of 'Prosecution request to amend the exhibit list and for protective measures'.

witnesses, [REDACTED] and W04043, on 27 October 2022.²² It granted, for the most part, the second one, on 7 December 2022.²³

11. On 15 December 2022, the case file was transmitted to the Trial Panel,²⁴ and the next day the Trial Panel indicated that 1st March 2023 was an appropriate date for the start of the trial,²⁵ date confirmed during the Trial Preparation Conference of 18 January 2023.²⁶

III. APPLICABLE LAW

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

13. Pursuant to Rule 95(4)(c), the Pre-Trial Judge shall order the Specialist Prosecutor to file, "**within a set time limit**", the list of proposed exhibits the Specialist Prosecutor intends to present.

14. 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:

²² KSC-BC-2020-06/F01057, Confidential Redacted Version of Decision on Prosecution Rule 102(2) Submission and Related Requests.

²³ KSC-BC-2020-06/F01142/CONF/RED, Confidential Redacted Version of Decision on Prosecution Request to Amend the Exhibit List and for Protective Measures.

²⁴ KSC-BC-2020-06/F01166, Decision Transmitting the Case File to Trial Panel II, Public.

²⁵ KSC-BC-2020-06, Transcript of the Status Conference of 16 December 2022, Public, p. 1773.

²⁶ KSC-BC-2020-06, Transcript of the Trial Preparation Conference of 18 January 2023, Public, p. 1773

(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) 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.

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

the factual basis of the case of the SPO shall be set before trial and that SPO investigations in this case should largely be completed by the time the case is transmitted to the Trial Panel. General investigations should not continue throughout the trial. There needs to be a case file that is properly transmitted to the Trial Panel. Rule 102(4) confirms that objective. **Only under exceptional circumstances can additional evidence be disclosed and subsequently used at trial. The Defence cannot be expected to prepare a defence on a case that is constantly evolving.**²⁷

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

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

The Panel will assess, whether, at the current stage of proceedings: (i) the proposed evidence is prima facie relevant and of sufficient importance to justify the late addition; (ii) the proposed additions provide the Accused sufficient notice and do not adversely affect their ability to prepare for trial; and (iii) the SPO has shown good cause for the late request. In deciding whether to grant leave to add a particular item to a Party's exhibit list, the Panel need not assess its authenticity, relevance and probative value in the same way as it would when determining its admission at trial.²⁰ Accordingly, a

²⁷ KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022, p. 928 (emphasis added). See also ICC, *Prosecutor v. Kenyatta*, Trial Chamber, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, para. 118; ICC, *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, para. 55.

decision authorising the addition of an item to a Party's exhibit list is without prejudice to the Panel's subsequent decision on whether that item should be admitted into evidence. That being said, a Party should not be granted leave to add to its list of exhibits items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.²⁸

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

[...] when determining whether certain materials may be added to the prosecution's exhibit list, the prosecution's duty to present the available evidence to prove its case 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**[...].²⁹

IV. SUBMISSIONS

A. The Requested disclosures

18. The SPO's request to disclose additional Rule 102(1)(b) material is untimely, given that the deadline for disclosing inculpatory material was 31 January 2022. The SPO fails to show good cause for the late disclosure of such material, which was, for the most part, in its custody since several years. Indeed, the mere identification of such material '*during recent disclosure reviews and trial preparations*' is insufficient to justify their late disclosure pursuant to Rule 102(1)(b) – the SPO ought to know its case,

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

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

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

especially since it applied for an arrest warrant against the Accused in May 2020 and started to conduct investigations several years earlier.

19. The Defence notes that the SPO requests authorisation to disclose additional Rule 102(1)(b)(i) material which the SPO, purportedly, “does not seek to add to its Exhibit List.”³⁰ This statement is contradicted by footnote 13 of the SPO Request, pursuant to which this “should not affect the SPO’s ability to use such materials, for example, to refresh a witness’ recollection or, with leave of the Panel, confront an adverse witness” and the “SPO reserves the right to seek authorisation to tender such documents in future if justified due to a change in circumstances, for example if a witness’s mode of testimony changes to Rule 155”. Since the SPO anticipates that it may need to use such documents, *inter alia*, to refresh a witness’ memory or confront an hostile witness, then the only road to do so is to apply to have such items admitted to its exhibits list. This is the reasoning adopted by the Pre-Trial Judge in a prior decision issued on 6 December 2022.³¹ Therefore the SPO’s request to disclose the items pursuant to Rule 102(1)(b) without concomitantly requesting their addition to the Exhibit List should be dismissed as ill-funded³² and, in any events, untimely.

B. The Requested Amendments

20. Similarly, the Defence maintains that the SPO’s request to amend its Exhibit List is untimely, fails to demonstrate good cause and provides insufficient reasons as to why the Requested Amendments are relevant for the SPO’s case. It is extremely prejudicial to the Defence, a few weeks only before the start of the trial. The Defence

³⁰ Request, para. 1.

³¹ KSC-BC-2020-06/F01141/CONF/RED, Confidential Redacted Version of Decision on the Specialist Prosecutor’s Request for Protective Measures for Certain Information Requested by the Defence Pursuant to Rule 102(3), para 27 :
[REDACTED].

³² See also Selimi Defence Submissions, paras 5-17.

fully adopts the Veseli Defence Submissions and the Selimi Defence Submissions in this regard.³³

21. The SPO wrongly relies on the *'limited nature and scope of the Requested Amendments'*³⁴ to argue that its late addition to the Exhibit List would have a minimal impact on Defence preparations. This Request is in addition to the 56 000 pages of documents disclosed on 30 January 2023, that the Defence is still processing. The Requested Amendments concern numerous witnesses listed among the first twelve and the first forty witnesses called by the SPO and will necessary affect substantially the Defence preparations. The Defence will have again to review various witness' statements to confront them with the new exhibits, conduct further investigations, *etc.* Given the number of witnesses in this case and the number of documents related to each witness, this is extremely time-consuming. It is particularly prejudicial given that at this stage, the Defence should be focused on its own investigations and trial preparation.

22. In addition, the fact that some of the items may have been previously disclosed to the Defence pursuant to Rule 103 or Rule 102(3) does not remedy the prejudice caused by their late addition to the Exhibit List a few weeks before trial: a Rule 103 or Rule 102(3) disclosure does not put the Defence on notice of the fact that the SPO intends to use such item against the Accused; the Defence does review with the same care Rule 102(1) material and Rule 103 or Rule 102(3) material – especially given that the SPO Rule 102(3) Notice³⁵ contains more than 77 000 items.

23. The SPO tries again to justify the late disclosure and addition of the materials to the Exhibit List by the fact that most of the items were recently identified, during

³³ Veseli Defence Submissions, paras 12 – 33; Selimi Defence Submissions, paras 18-67.

³⁴ Request, para. 8.

³⁵ KSC-BC-2020-06/F01021/A01.

disclosure review and trial preparations. This does not constitute good cause, on the contrary, given that these items were in the SPO's custody since several months or years. Some had even been disclosed previously to the Defence pursuant to Rule 102(3) or Rule 103. One fails to understand how the SPO managed to miss their supposed relevance for the purpose of Rule 102(1)(b), at the time of these earlier disclosures to the Defence. This reveals once more the lack of proper management, by the SPO, of its database, as stressed earlier by the Defence.³⁶ If the SPO is unable to manage the current size of its case, it should therefore limit its scope.

24. Indeed, the Defence must know the case it will face for trial, including the Exhibits to be relied upon by the SPO. The KSC Rules have defined a system requiring the Pre-Trial Judge to impose strict deadlines on each party in order that that, *inter alia*, the Defence have enough time to prepare for trial. The SPO cannot circumvent this framework by applying regularly for leave to amend its Exhibit List, each time it stumbles across documents it forgot to include by the deadline.

25. The Defence further notes that the SPO asks leave to add the transcripts of witness interviews conducted after the 31 January 2022 deadline, in [REDACTED] 2022,³⁷ but it fails to explain why such interviews were not conducted earlier.

26. Similarly, the SPO requests leave to add to its Exhibit List several photographs and maps of the Kukës Metal Factory, which would have been obtained in December 2022, but it fails to justify why it did not or could not conduct such investigations related to one of the main alleged crime site earlier – the Indictment having been confirmed in October 2020.

³⁶ KSC-BC-2020-06/F00724, Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material.

³⁷ Request, paras 40, 44.

27. For the above reasons, as well as those developed in the Veseli and Selimi Defence Submissions, the Defence submits that the SPO has failed to show good cause for the late addition of the Requested Amendments.

V. CONCLUSIONS

28. For the foregoing reasons, the Defence asks the Pre-Trial Judge to:

- **DISMISS**, in its entirety, the SPO Request.

[Word count: 3,165 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

Friday, 10 February 2023

At Tampa, United States