



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 27 October 2022

Language: English

Classification: Public

**Public Redacted Version of
Decision on Prosecution Request to Add Two Witnesses and Associated Materials**

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Victims
Simon Laws

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 21(6), 23(1), and 39(11) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 80, 81, 95(2)(h), 95(4)(b) and (c), 102(1) and (2), and 108 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 30 October 2020, further to the Pre-Trial Judge's decision confirming the indictment against Hashim Thaçi ("Mr Thaçi"), Kadri Veseli ("Mr Veseli"), Rexhep Selimi ("Mr Selimi") and Jakup Krasniqi ("Mr Krasniqi") (collectively "Accused" or the "Defence"),² the Specialist Prosecutor's Office ("SPO") submitted the indictment as confirmed ("Confirmed Indictment"), with redactions as authorised by the Pre-Trial Judge.³

2. On 23 November 2020, the Pre-Trial Judge issued the Framework Decision on Disclosure of Evidence and Related Matters ("Framework Decision on Disclosure"), which sets out the principles governing the disclosure of evidence

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, confidential. A public redacted version was filed on 30 November 2020, F00026/RED.

³ KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. A further corrected confirmed indictment, correcting certain clerical errors, was submitted on 4 November 2020, strictly confidential and *ex parte* (F00045/A01), with confidential redacted (F00045/A02) and public redacted (F00045/A03) versions. A lesser confidential redacted version was submitted on 11 December 2020 (F00134). A further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED/A01) and public redacted (F00455/RED/A01) versions. A confidential further lesser redacted version of the confirmed indictment was filed on 17 January 2022, F00647/A01. A confirmed amended indictment was filed on 29 April 2022, strictly confidential and *ex parte* (F00789/A01), with confidential redacted (F00789/A02) and public redacted (F00789/A05) versions. A further amended confirmed amended indictment was filed on 30 September 2022, strictly confidential and *ex parte* (F00999/A01), with confidential redacted (F00999/A02) and public redacted (F00999/A03) versions.

between the Parties, establishes a calendar for disclosure and adopts the redaction regime applicable in the present case.⁴

3. On 17 December 2021, the SPO filed its pre-trial brief and related material, including a list of witnesses and a list of exhibits, including a list of witnesses and a list of exhibits, which were subsequently revised (“Revised Witness List”) and amended (“Amended Exhibit List”).⁵

4. On 2 September 2022, the SPO filed its request to add two witnesses and associated materials (“Request”).⁶

5. On 15 September 2022, the Defence for Mr Thaçi (“Thaçi Defence”), the Defence for Mr Veseli (“Veseli Defence”), Defence for Mr Selimi (“Selimi

⁴ KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public.

⁵ KSC-BC-2020-06, F00631, Specialist Prosecutor, *Submission of Pre-Trial Brief with Witness and Exhibit Lists* (“Pre-Trial Brief”), 17 December 2021, confidential, with Annexes 1-3, strictly confidential and *ex parte*. A public redacted version with confidential redacted Annexes 1-3 was filed on 21 December 2021, F00631/RED. A corrected confidential redacted version of Annex 2 was filed on 23 May 2022, F00631/RED/A02/COR/CONF/RED. An amended exhibit list was filed on 18 March 2022, F00738/A01, strictly confidential and *ex parte*, and F00738/A02, confidential (for which a corrected version was submitted on 14 April 2022 in F00768/A01, confidential). Upon judicial authorisation, the SPO submitted an amended exhibit list, F00788, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 29 April 2022, confidential, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. Upon further judicial authorisation, the SPO further submitted an amended exhibit list, F00896, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List and Related Submissions*, 25 July 2022, confidential, with Annexes 1 and 4-5, strictly confidential and *ex parte*, and Annexes 2-3, confidential. Upon further judicial authorisation, the SPO further filed an amended exhibit list, *see* F00967, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 13 September 2022, public, with Annex 1 (“Amended Exhibit List”), strictly confidential and *ex parte*, and Annex 2, confidential. A revised Witness list was filed on 18 July 2022, F00885/A01, strictly confidential and *ex parte*, and F00885/A02, confidential. A further revised witness list was filed on 2 September 2022, F00948/A01, strictly confidential and *ex parte* (“Revised Witness List”), and F00948/A02, confidential. *See also* F00952, Specialist Prosecutor, *Prosecution Submissions for Fourteenth Status Conference*, 5 September 2022, public, footnote 8.

⁶ KSC-BC-2020-06, F00947, Specialist Prosecutor, *Prosecution Request to Add Two Witnesses and Associated Materials* (“Request”), 2 September 2022, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F00947/CONF/RED.

Defence”) and the Defence for Mr Krasniqi (“Krasniqi Defence”) responded to the Request (collectively “Responses”).⁷ The SPO did not file a reply.

II. SUBMISSIONS

6. The SPO requests (i) leave to add two witnesses ([REDACTED] and [REDACTED]) and their associated material to the Revised Witness List and Amended Exhibit List, respectively; (ii) to maintain or grant protective measures for [REDACTED] and [REDACTED].⁸

7. The Thaçi Defence objects to the relief sought in the Request and submits that it 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, when the SPO had been in possession of the relevant information for years. The Defence submits that 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.⁹

8. The Veseli Defence responds that the Request is untimely and that neither of the proposed witnesses are sufficiently relevant to the case to justify their late addition. It also avers that the Request encroaches upon the rights of Mr Veseli to be accorded reasonable time to prepare his Defence. The Veseli Defence therefore submits that the Request should be denied.¹⁰

⁷ KSC-BC-2020-06, F00974, Specialist Counsel, *Thaçi Defence Response to Prosecution Request to Add Two Witnesses and Associated Materials (F00947)* (“Thaçi Response”), 15 September 2022, confidential; F00976, Specialist Counsel, *Veseli Defence Response to SPO Request to Add Two Witnesses and Associated Materials (F00947/CONF/RED)* (“Veseli Response”), 15 September 2022, confidential; F00975, Specialist Counsel, *Selimi Defence Response to Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials* (“Selimi Response”), 15 September 2022, confidential; F00973, Specialist Counsel, *Krasniqi Defence Response to Prosecution Request to Add Two Witnesses and Associated Materials (F00947)* (“Krasniqi Response”), 15 September 2022, confidential.

⁸ Request, para. 1.

⁹ Thaçi Response, paras 2-3.

¹⁰ Veseli Response, paras 2, 4, 6.

9. The Selimi Defence responds that none of the provisions of the Law or the Rules relied upon by the SPO endow the Pre-Trial Judge with authority to rule upon the SPO's Request. It also argues that the Request is as untimely as it is unjustified, and that it misunderstands or misrepresents the unfair prejudice which would be caused to the Defence if the Request were granted. It therefore requests the Pre-Trial Judge to defer adjudication of the Request to the Trial Panel or reject the Request.¹¹

10. The Krasniqi Defence responds that the Request: (i) is not timely; (ii) fails to establish good cause; and (iii) would unduly impact on Defence preparations. It therefore submits that the Request should be rejected.¹²

III. APPLICABLE LAW

11. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in possession of the SPO which are for or against the accused shall be made available to him or her before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

12. Pursuant to Rule 95(4)(b) and (c) of the Rules, the Pre-Trial Judge shall order the Specialist Prosecutor to file, within a set time limit, the list of witnesses the Specialist Prosecutor intends to call and the list of proposed exhibits the Specialist Prosecutor intends to present.

13. Pursuant to Rule 102(1)(b) of the Rules, within a time limit set by the Pre-Trial Judge, and no later than 30 days prior to the opening of the Specialist Prosecutor's case, the SPO shall make available to the Defence the following material: (i) the statements of all witnesses whom the SPO intends to call to testify

¹¹ Selimi Response, paras 1-2, 24, 33.

¹² Krasniqi Response, paras 1, 24.

at trial, in a language the Accused understand and speak; (ii) all other witness statements, expert reports, depositions, or transcripts that the SPO intends to present at trial; and (iii) the exhibits that the SPO intends to present at trial.

14. Pursuant to Rule 102(2), any statements of additional SPO witnesses, which have not been set in the time period prescribed by the panel, and whom the SPO intends to call or testify at trial, shall be made available to the Defence as soon as possible and shall be accompanied by reasons for the late disclosure.

15. Pursuant to Article 23(1) of the Law and Rules 80(1) and 108(1)(b) of the Rules, the Pre-Trial Judge may order, *proprio motu* or upon request, appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings, as well as other persons at risk on account of testimony given by witnesses. Pursuant to Rule 108(1)(b) of the Rules, such measures may include withholding information from the Defence, in whole or in part.

16. Pursuant to Rule 108(3) and (4) of the Rules, when information which is subject to disclosure is withheld from the Defence, appropriate counter-balancing measures may be adopted, *proprio motu* or upon request by a Party, to ensure the accused's right to a fair trial.

IV. DISCUSSION

A. PRELIMINARY ISSUE

17. The Selimi Defence submits that none of the provisions of the Law or the Rules relied upon by the SPO endow the Pre-Trial Judge with authority to rule upon the SPO's Request. The Selimi Defence notes that the SPO has conspicuously avoided referring to Rule 118(2) of the Rules, even though this is the only specific rule addressing amendments of the witness list. The Selimi Defence further avers that the Pre-Trial Judge's previous finding that "he can rule on a request to amend the exhibit

list at the pre-trial stage” appears to conflict with a logical interpretation of Rule 118 of the Rules and that, to the extent that the Pre-Trial Judge considers that he may still rely on Rule 118 of the Rules to entertain requests to amend the exhibit list, its ambit should be limited to requests to add exhibits that relate to witnesses already on the SPO exhibit list. The Selimi Defence argues that there is no prior decision which would allow the Pre-Trial Judge to interpret his general authority pursuant to Rules 95 and 102 of the Rules to authorise a request to add witnesses to the SPO list. It therefore submits that the Pre-Trial Judge should order the deferral of the Request to the Trial Panel.¹³

18. The Pre-Trial Judge recalls that Rule 118(2) of the Rules empowers a Panel, during trial preparation, upon timely notice and a showing of good cause, to permit the amendment of the list of witnesses and exhibits filed pursuant to Rule 95(4)(b) of the Rules. The Pre-Trial Judge further recalls that he is empowered to rule on the Request pursuant to Rule 95(2)(b) of the Rules, seeing as the Request ultimately concerns disclosure under Rule 102(1)(b) of the Rules and how such disclosure has been memorialised through the Revised Witness List and Amended Exhibit List.¹⁴ In addition, Rule 95(4)(b) of the Rules provides that the Pre-Trial Judge shall order the SPO to file, within a set time-limit, a list of witnesses it intends to call. Furthermore, Rule 102(2) of the Rules provides that statements of additional SPO witnesses, which have not been disclosed in the time period prescribed under Rule 102(1)(b) of the Rules, shall be made available to the Defence as soon as possible and shall be accompanied by reasons for the late disclosure. The Selimi Defence’s reading of the Law and the Rules would prevent the Defence from receiving such statements as soon as possible as applications such as the present one would have to be put on hold and

¹³ Selimi Response, paras 1-7, 33(a).

¹⁴ KSC-BC-2020-06, F00779, Pre-Trial Judge, *Decision on Specialist Prosecutor’s Rule 102(2) and Related Requests*, 22 April 2022, confidential, para. 22; KSC-BC-2020-06, F00727, Pre-Trial Judge, *Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 8 March 2022, strictly confidential and *ex parte*, paras 23-24. A confidential redacted version was filed the same day, F00727/CONF/RED.

addressed by Trial Panel at some unknown date after the transfer of the case to the Trial Panel. In addition, it would be contrary to the Pre-Trial Judge's obligation under Rule 95(2) of the Rules to take all necessary measures for the expeditious preparation of the case for trial if a request to amend a witness or exhibit list could not be entertained before the start of trial. In this regard, the Pre-Trial Judge remarks that international criminal jurisprudence has generally treated the addition of witnesses and exhibits at the pre-trial stage with flexibility.¹⁵ Thus, and contrary to the Selimi Defence's submission, the Pre-Trial Judge does not consider that Rule 118 of the Rules limits the power of the Panel or of the Pre-Trial Judge in such a way that it can only entertain requests to add exhibits that relate to witnesses already on the SPO exhibit list.¹⁶ The Selimi Defence's request to defer the decision on the Request to the Trial Panel is therefore dismissed. The Pre-Trial Judge will assess whether the SPO has provided timely notice and shown good cause for the requested amendments to its Revised Witness List and Amended Exhibit List.

B. AMENDMENT OF THE REVISED WITNESS LIST AND AMENDED EXHIBIT LIST

19. The SPO submits that its request to add [REDACTED] and his associated material to the Revised Witness List and Amended Exhibit List, respectively, should be granted because: (i) [REDACTED] provides unique and important evidence about the acts and conduct of an accused ([REDACTED]) and a named JCE member

¹⁵ 12 July 2022 Decision, para. 21, referring to IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-PT, *Decision on Prosecution Motions to Amend its Witness and Exhibits Lists*, 10 May 2022, p. 3; ICTY, *Prosecutor v. Đordjević*, IT-05-87/1-T, [Decision on Prosecution's Motion to Amend the Rule 65ter Exhibit List with Annexes A and B](#), 4 March 2009, paras 20, 22. See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, [Decision on the Prosecution's Second Submission Pursuant to Rule 91\(G\)\(II\) and \(III\)](#), 18 October 2013, para. 14; *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, [Decision on the Prosecution Submission Pursuant to Rule 91\(G\)\(II\) and \(III\)](#), 18 September 2013, para. 11; *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, [Decision on Two Prosecution Submissions in Relation to Amending the Prosecution Rule 91 Filings](#), 5 August 2013, para. 20.

¹⁶ See KSC-BC-2020-06, IA019/F00006, Court of Appeals, *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 Decision")*, 12 July 2022, para. 21.

([REDACTED]);¹⁷ and (ii) the requested addition will cause no undue prejudice to the Accused as the Defence has been aware of [REDACTED]'s evidence for over three months prior to the Request and the SPO is not requesting delayed disclosure of [REDACTED]'s identity.¹⁸ With respect to its request to add [REDACTED] and his associated material, the SPO submits that: (i) [REDACTED] is able to give elements of a crime base victim's account, an insider witness's account, and a modern witness interference account all at the same time;¹⁹ and (ii) no undue prejudice is caused to the Defence by the addition of [REDACTED] or his associated material, [REDACTED].²⁰ The SPO argues that its Request is timely as the necessity of adding these witnesses became apparent in the course of the streamlining exercise for the Pre-Trial Judge's 2 September deadline.²¹ The SPO also argues that the Request should be treated with flexibility in a complex multi-accused case of this kind.²²

20. The Thaçi Defence responds that the SPO has failed to provide timely notice.²³ With respect to the addition of [REDACTED] and his associated material to the Revised Witness List and Amended Exhibit List, respectively, the Thaçi Defence argues that the SPO has been aware of [REDACTED]'s potential relevance since at least [REDACTED] and the Request is therefore clearly untimely.²⁴ With respect to the addition of [REDACTED] and his associated material, the Thaçi Defence submits that the information provided demonstrates that the relevance of [REDACTED] must have been evident to the SPO for at least two years, and it cannot reasonably be argued that the SPO was exercising "due diligence" in taking two years after their interview with [REDACTED], [REDACTED], to determine his relevance to the current proceedings

¹⁷ Request, paras 3-6.

¹⁸ Request, para. 7.

¹⁹ Request, para. 9.

²⁰ Request, paras 11-12.

²¹ Request, para. 14, referring to 13 July Transcript, p. 1474.

²² Request, para. 14.

²³ Thaçi Response, paras 17-19.

²⁴ Thaçi Response, paras 23-25.

and seek his admission to the witness list.²⁵ The Thaçi Defence maintains that the SPO has 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.²⁶ It adds that it cannot be argued that the SPO has given timely notice, in light of the advanced procedural stage of these proceedings.²⁷ The Thaçi Defence further argues that the SPO has failed to demonstrate good cause for the requested additions, in that it only provided the justification that [REDACTED] and [REDACTED] were identified in the course of the SPO's internal streamlining exercise.²⁸ The Thaçi Defence submits that 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.²⁹ According to the Thaçi Defence, [REDACTED]'s and [REDACTED]'s evidence is neither sufficiently necessary nor important to justify their late addition to the Revised Witness List.³⁰ The Thaçi Defence argues that the SPO has failed to explain why neither witness was included in the various iterations of its witness list, its Pre-Trial Brief or other key documents.³¹ Lastly, the Thaçi Defence avers that the Request is highly prejudicial as: (i) the associated material will involve hundreds of pages that the Defence will be required to review and investigate as well as two new individuals;³² and (ii) the addition of two new witnesses at this juncture may impact the upcoming procedural timetable and is contrary to the requirement for the SPO to streamline its case.³³ The Thaçi Defence therefore requests the Pre-Trial Judge to dismiss the Request.³⁴

²⁵ Thaçi Response, paras 20-22.

²⁶ Thaçi Response, para. 26.

²⁷ Thaçi Response, paras 27-28.

²⁸ Thaçi Response, paras 29-30, 34.

²⁹ Thaçi Response, para. 30.

³⁰ Thaçi Response, paras 31-32, 34.

³¹ Thaçi Response, para. 33.

³² Thaçi Response, para. 35.

³³ Thaçi Response, paras 36-37.

³⁴ Thaçi Response, para. 39.

21. The Veseli Defence responds that the request is untimely as it was filed more than nine months after the expiration of the deadline to file a witness list pursuant to Rule 95(4)(b) of the Rules.³⁵ The Veseli Defence also submits that the SPO has failed to show good cause for the requested additions as “witnesses cannot be simply ‘overlooked’ and identified for addition ‘in the course of the SPO’s internal streamlining exercise’”.³⁶ According to the Veseli Defence, the addition of the two witnesses is not in the interests of justice, since neither of them are sufficiently relevant to the case to justify their late addition.³⁷ Lastly, the Veseli Defence argues that the Request: (i) constitutes a surprise; (ii) encroaches upon the rights of Mr Veseli to be accorded reasonable time to prepare his Defence; and (iii) goes against the very rationale of case streamlining.³⁸ The Veseli Defence therefore submits that the Request should be denied.³⁹

22. The Selimi Defence responds that the Request is neither timely nor demonstrates good cause as no explanation has been provided by the SPO as to: (i) the reasons justifying its delay in disclosing [REDACTED] and [REDACTED]’s statements under Rule 103;⁴⁰ and (ii) the reasons why [REDACTED] and [REDACTED] were not included in its preliminary witness list.⁴¹ The Selimi Defence submits that good cause has been equated in other international criminal tribunals with “exceptional circumstances” outside of the control of the submitting party, which have rendered it impossible to include the witness or exhibit in a timely manner.⁴² According to the Selimi Defence, no circumstances have been demonstrated by the SPO which could meet such standard.⁴³ Furthermore, the Selimi Defence contends that the Request fails

³⁵ Veseli Response, para. 2.

³⁶ Veseli Response, para. 2, *citing* Request, para. 1.

³⁷ Veseli Response, paras 4-5.

³⁸ Veseli Response, para. 6.

³⁹ Veseli Response, para. 7.

⁴⁰ Selimi Response, paras 9-12.

⁴¹ Selimi Response, paras 13, 15.

⁴² Selimi Response, para. 14.

⁴³ Selimi Response, para. 16.

to put the Pre-Trial Judge on notice regarding the allegations in the indictment that [REDACTED] is expected to testify on, as well as to include specific references to charges and relevant paragraphs in the indictment.⁴⁴ The Selimi Defence contests the *prima facie* relevance and probative value of [REDACTED]'s evidence.⁴⁵ As for the evidence of [REDACTED], the Selimi Defence does not contest, at this stage, its *prima facie* relevance or probative value, but submits that it appears to be corroborative of other evidence on the SPO witness list.⁴⁶ The Selimi Defence further argues that the Request misunderstands or misrepresents the unfair prejudice which would be caused to the Defence if the Request were granted.⁴⁷ It submits that investigating [REDACTED] and [REDACTED] will require the Defence to refocus its investigative resources at a late stage of pre-trial proceedings.⁴⁸ The Selimi Defence therefore requests the Pre-Trial Judge to reject the Request.⁴⁹

23. The Krasniqi Defence responds that the request to add [REDACTED] and [REDACTED] is neither timely nor justified.⁵⁰ In particular, it underlines that, despite possessing the relevant information related to these witnesses well before the submission of its Witness List, the SPO has chosen only to apply for an amendment after investigations were largely complete.⁵¹ The Krasniqi Defence submits that it is prejudicial to the Defence to introduce two new witnesses at the very point when the Defence is preparing its Pre-Trial Brief.⁵² The Krasniqi Defence challenges the SPO's argument that the nature and complexity of this case require "flexibility" in permitting amendments to Witness and Exhibit Lists, and reiterates that the pre-trial phase in this case has unreasonably extended for twenty-two months and further flexibility should

⁴⁴ Selimi Response, para. 17.

⁴⁵ Selimi Response, paras 18-22.

⁴⁶ Selimi Response, para. 23.

⁴⁷ Selimi Response, paras 24-26.

⁴⁸ Selimi Response, paras 27-31.

⁴⁹ Selimi Response, para. 33(b).

⁵⁰ Krasniqi Response, paras 16-17, 19, 21-22.

⁵¹ Krasniqi Response, paras 16, 19.

⁵² Krasniqi Response, paras 18, 20.

not be tolerated at this stage of the proceedings.⁵³ The Krasniqi Defence therefore submits that the request should be rejected.⁵⁴

1. [REDACTED]'s Prior Statements and Associated Material

24. As concern timely notice, the Pre-Trial Judge notes that [REDACTED]'s SPO interview and the SPO Official Note regarding a telephone conversation with him date back to [REDACTED] and [REDACTED], respectively.⁵⁵ The SPO was therefore aware of the scope and nature of [REDACTED]'s evidence before the filing of its preliminary witness List.⁵⁶ The Pre-Trial Judge is therefore of the view that the SPO should have made the Request at an earlier stage. The Pre-Trial Judge is mindful that inadvertence cannot be the sole 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.⁵⁷ However, the Pre-Trial Judge remarks that, contrary to the Thaçi Defence's submission, the SPO did not seek to justify its requested amendments based on mere inadvertence or late identification of evidence.

25. The Pre-Trial Judge notes that at the 13th Status Conference he ordered the SPO to file an updated witness list by 2 September 2022.⁵⁸ The Pre-Trial Judge is satisfied that the necessity of adding [REDACTED] and his associated material became apparent to the SPO when recently preparing its Revised Witness List in compliance with the Pre-Trial Judge's order to this effect. Considering that the Pre-Trial Judge ordered the SPO to update its witness list with a view to streamlining the case and that the Request was filed in the context and within the timing of this streamlining

⁵³ Krasniqi Response, para. 23.

⁵⁴ Krasniqi Response, para. 24.

⁵⁵ Request, para. 7; Annex 1 to Request.

⁵⁶ KSC-BC-2020-06, F00542, Specialist Prosecutor, *Prosecution Submission of Preliminary Witness List*, 22 October 2021, public, with Annex 1, strictly confidential and *ex parte*, Annex 2, confidential.

⁵⁷ Thaçi Response, para. 30.

⁵⁸ 13 July Transcript, p. 1474, lines 20-22.

exercise – which also resulted in the SPO’s withdrawal of seven witnesses – the Pre-Trial Judge finds that the SPO provided timely notice for the requested amendments to its Revised Witness List and Amended Exhibit List.

26. The Pre-Trial Judge recalls that Rule 118(2) of the Rules provides that, upon timely notice and a showing of good cause, the amendment of the lists of witnesses and exhibits may be permitted. In particular, as regards good cause, leave should not be granted with respect to items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.⁵⁹ The Pre-Trial Judge finds that [REDACTED]’s prior statements and associated material are *prima facie* relevant and of sufficient importance as [REDACTED] personally witnessed uncharged events which may nonetheless be relevant to establish [REDACTED]’s and [REDACTED]’s commitment to the policy underlying the joint criminal enterprise (“JCE”) in the Confirmed Indictment.⁶⁰ The Pre-Trial Judge notes the Selimi Defence’s submission that good cause has been equated in other international criminal tribunals with “exceptional circumstances” outside of the control of the submitting party, which have rendered it impossible to include the witness or exhibit in a timely manner.⁶¹ However, the Pre-Trial Judge is of the view that, in complex multi-accused trials in which a considerable amount of evidence is presented by the prosecution, a certain level of flexibility must be maintained with respect to amendments of witness and exhibit lists, provided that adequate protection of the accused’s rights is guaranteed.⁶²

⁵⁹ KSC-BC-2020-07, F00321, Trial Panel II, *Decision on Prosecution’s Request for Leave to Amend its List of Exhibits*, 23 September 2021, public, para. 16; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Prosecution’s Motion for Leave to Amend its Exhibit List](#), 19 October 2011, para. 9; *Prosecutor v. Hadžić*, IT-04-75-T, [Decision on Seventh Prosecution Motion for Leave to Amend its Rule 65 ter Exhibit List](#), 26 April 2013, para. 5.

⁶⁰ See ICTY, *Prosecutor v. Strugar*, IT-01-42-T, [Decision on the Defence Objection to the Prosecution’s Opening Statement Concerning Admissibility of Evidence](#), 22 January 2004, pp. 1-2.

⁶¹ Selimi Response, para. 14.

⁶² 12 July 2022 Decision, para. 21, referring to ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, [Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 ter Exhibit List](#), 25 October 2007, para. 18; *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, [Decision on Appeals Against Decision Admitting Material Related to Borovčanin’s Questioning](#), 14 December 2007, para. 38.

27. As concerns the impact of the late addition on the Accused's preparations for trial, the Pre-Trial Judge notes that: (i) the above-mentioned SPO Official Note was disclosed to the Defence in May 2022 pursuant to Rule 103 of the Rules;⁶³ (ii) the remaining associated material – [REDACTED] – has been disclosed to the Defence⁶⁴ and is relatively limited in length; and (iii) the SPO has not requested delayed disclosure of [REDACTED]'s identity and will therefore disclose [REDACTED]'s interview to the Defence upon issuance of the present decision. The Pre-Trial Judge notes the Defence concerns that the addition of [REDACTED] and his associated material to the Revised Witness List and Amended Exhibit List, respectively, is prejudicial to the Defence and runs contrary to the need to streamline the case.⁶⁵ However, given that the SPO has filed the Request while the pre-trial phase is still ongoing and considering that the requested late additions are limited in length, especially when compared to the volume of the evidence disclosed, the Pre-Trial Judge considers that the Defence will be afforded meaningful time to process [REDACTED]'s evidence, refocus its investigations, if needed, and prepare for trial.

28. The Pre-Trial Judge accordingly finds that the SPO has demonstrated good cause for the late additions and authorises the SPO to add [REDACTED] and his associated material to the Revised Witness List and Amended Exhibit List, respectively.

2. [REDACTED]'s Prior Statements and Associated Material

29. As concerns timely notice, the Pre-Trial Judge observes that [REDACTED]'s evidence was generated [REDACTED].⁶⁶ The Pre-Trial Judge notes the Thaçi Defence's argument that [REDACTED] was interviewed by the SPO on [REDACTED] 2020 and

⁶³ Request, para. 7; Disclosure Package [REDACTED]; 095407-095413 RED.

⁶⁴ Request, para. 7; Disclosure Packages [REDACTED]; 032287-032344; 032345-032363.

⁶⁵ Thaçi Response, paras 35-37; Veseli Response, para. 6; Selimi Response, paras 24-31; Krasniqi Response, para. 18.

⁶⁶ Request, paras 10-11.

[REDACTED],⁶⁷ and agrees that the SPO should have made the Request at an earlier date. However, the Pre-Trial Judge is of the view that the requested amendments are not due to mere inadvertence or to the late identification of evidence. The Pre-Trial Judge recalls that at the 13th Status Conference he ordered the SPO to file an updated witness list by 2 September 2022.⁶⁸ The necessity of adding [REDACTED] became apparent to the SPO when recently preparing its Revised Witness List, as ordered. The Pre-Trial Judge notes that the SPO's update of its witness list was conducted with a view to streamlining the case and resulted in the withdrawal of seven witnesses. Since the Request was filed in the context and within the timing of this streamlining exercise, the Pre-Trial Judge finds that the SPO has demonstrated that the Request was made in a timely manner.

30. As concerns good cause, the Pre-Trial Judge notes the Thaçi Defence's and Veseli Defence's submissions that [REDACTED]'s evidence and associated material are not sufficiently relevant to justify their late addition to the Revised Witness List and Amended Exhibit List.⁶⁹ The Pre-Trial Judge recalls the threshold for late additions to the witness and exhibit lists.⁷⁰ The Pre-Trial Judge also recalls that, in the context of amendments of witness and exhibit lists in complex multi-accused trials in which a considerable amount of evidence is presented by the prosecution, a certain level of flexibility must be maintained, provided that adequate protection of the accused's rights is guaranteed.⁷¹ The Pre-Trial Judge finds that [REDACTED]'s prior statements and associated material are *prima facie* relevant and of sufficient importance as [REDACTED], [REDACTED] whose support for [REDACTED] led to him receiving veiled threats from [REDACTED], is a former KLA member who is alleged to have been detained, interrogated, and beaten [REDACTED] and is therefore able to give

⁶⁷ Thaçi Response, para. 20.

⁶⁸ 13 July Transcript, p. 1474, lines 20-22.

⁶⁹ Thaçi Response, para. 32; Veseli Defence Response, para. 5.

⁷⁰ See *supra* para. 26.

⁷¹ See *supra* para. 26.

elements of a crime base victim's account, an insider witness's account, and a modern witness interference account. Furthermore, as [REDACTED] is able to give an insider account as well as witness interference account, the Pre-Trial Judge finds that [REDACTED]'s evidence is not duplicative of other [REDACTED].

31. As concerns the impact of the late addition on the Accused's preparations for trial, the Pre-Trial Judge observes that: (i) [REDACTED];⁷² (ii) two associated exhibits have already been disclosed to the Defence under Rule 102(1)(b) of the Rules;⁷³ (iii) an associated exhibit has already been disclosed the Defence under Rule 102(3) of the Rules;⁷⁴ and (iv) the redacted version of [REDACTED]'s statement (with corresponding official note and photograph) will be disclosed to the Defence sufficiently in advance of the witness's testimony to enable adequate Defence preparations. In light of the current stage of proceedings, the Pre-Trial Judge considers that the Defence will be afforded meaningful time to process [REDACTED]'s evidence, refocus its investigations, if needed, and prepare for trial.

32. The Pre-Trial Judge accordingly finds that the SPO has demonstrated good cause for the late additions and authorises the SPO to add [REDACTED] and his associated material to the Revised Witness List and Amended Exhibit List, respectively.

3. Conclusion

33. In light of the foregoing, the Pre-Trial Judge orders the SPO to file its amended witness list and exhibit list by no later than Wednesday, 2 November 2022.

⁷² Request, para. 11; [REDACTED].

⁷³ Request, footnote 16; Disclosure Packages [REDACTED]; [REDACTED]; [REDACTED].

⁷⁴ Request, footnote 16; Disclosure Packages [REDACTED]; [REDACTED]. The Pre-Trial Judge notes that this item was recently disclosed to all Defence teams. *See* Disclosure Package [REDACTED].

C. SPO REQUEST FOR PROTECTIVE MEASURES

34. The SPO submits that [REDACTED] provides a highly incriminating account accusing [REDACTED] and [REDACTED] and that, [REDACTED], his family members [REDACTED] would be placed at considerable risk were the public to know his identity when testifying.⁷⁵ The SPO therefore requests that [REDACTED] be granted the following protective measures: (i) assignment of a pseudonym; (ii) redactions of the witness's name and identifying information from the public records; (iii) non-disclosure to the public of any records identifying the witness; (iv) testimony with face and voice distortion; and (v) closed or private sessions for any in-court discussion or testimony identifying the witness.⁷⁶ With respect to [REDACTED], the SPO submits that [REDACTED], and his support [REDACTED] led to him receiving veiled threats from [REDACTED].⁷⁷ The SPO also submits that [REDACTED] granted in-court protective measures and delayed disclosure of his identity until 30 days prior to testimony [REDACTED], and the Request is to be understood as superseding the non-standard redactions previously requested for [REDACTED] in the Rule 102(3) context.⁷⁸ The SPO states that, if the Request is granted, it will disclose [REDACTED] and the non-standard redacted version of [REDACTED]'s statement (with corresponding official note and photograph) granted by the Pre-Trial Judge [REDACTED], while [REDACTED] would be provided in accordance with the delayed disclosure timeline.⁷⁹ Moreover, since [REDACTED] ("Item 8")⁸⁰ cannot be meaningfully redacted without revealing his identity, the SPO requests the Pre-Trial Judge to authorise that this item be withheld until disclosure of [REDACTED]'s identity.⁸¹

⁷⁵ Request, para. 8.

⁷⁶ Request, para. 8.

⁷⁷ Request, para. 9.

⁷⁸ Request, para. 10.

⁷⁹ Request, para. 11.

⁸⁰ Annex 2 to the Request, [REDACTED].

⁸¹ Request, para. 11.

35. The Thaçi Defence, Veseli Defence, Selimi Defence and Krasniqi Defence have not addressed the SPO request for protective measures in their Responses.

1. [REDACTED]

36. At the outset, the Pre-Trial Judge recalls the legal test for the non-disclosure of information to the opposing party.⁸²

37. As regards the existence of an objectively justifiable risk to [REDACTED], the Pre-Trial Judge notes that [REDACTED] provides evidence which may be relevant to establish [REDACTED]'s and/or [REDACTED]'s commitment to the policy underlying the JCE in the Confirmed Indictment. The Pre-Trial Judge finds that, as a consequence, both [REDACTED] and his family members [REDACTED] would be placed at considerable risk were the public to know his identity when testifying. In his determination, the Pre-Trial Judge also pays regard to the general climate of witness interference and intimidation prevailing in Kosovo, particularly in criminal proceedings against former KLA members, which results in the risk of intimidation or interference for witnesses and/or their family members being ongoing and escalating.⁸³ The Pre-Trial Judge therefore finds that disclosure to the public of the identity of [REDACTED] poses an objectively justifiable risk to the witness and his family members.

38. As concerns the necessity of the requested measures, the Pre-Trial Judge considers that the witness's evidence against [REDACTED] and [REDACTED] is likely to antagonise certain individuals or communities in Kosovo, which may include persons close to the Accused, their former subordinates, and alleged perpetrators and members of the JCE named in the Confirmed Indictment, who have the means to

⁸² Framework Decision on Disclosure, para. 85.

⁸³ KSC-BC-2020-06, F00133/COR, Pre-Trial Judge, *Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures*, 10 December 2020, strictly confidential and *ex parte*, para. 119. A corrected confidential redacted version was filed on 14 December 2020, F00133/COR/CONF/RED. *See also* KSC-BC-2020-07, F00611, Trial Panel II, *Trial Judgment*, 18 May 2022, confidential, paras 576-579. A public redacted version was filed on the same day, F00611/RED.

interfere with witnesses. The Pre-Trial Judge therefore finds that the requested in-court protective measures are necessary.

39. Turning to the proportionality of the requested measures, the Pre-Trial Judge notes that: (i) [REDACTED]'s code and name are known to the Defence and the Defence has already received the SPO Official Note regarding a telephone conversation with [REDACTED] as well as [REDACTED];⁸⁴ and (ii) the SPO will disclose [REDACTED]'s SPO interview upon issuance of the present decision.⁸⁵ The Pre-Trial Judge finds that these counterbalancing measures are appropriate under Rule 108(2) of the Rules and uphold the Accused's rights under the Law and the Rules. The Pre-Trial Judge therefore finds that the measures sought by the SPO in relation to [REDACTED] are proportionate under the circumstances and that there are no less restrictive measures that could overcome or reduce the risk for this witness and his family members.

40. The Pre-Trial Judge remarks that determinations made at this stage with respect to in-court protective measures are without prejudice to any future rulings by the relevant Trial Panel in this regard.

41. In light of all of the above, the Pre-Trial Judge grants the SPO's request for protective measures for [REDACTED] as requested in paragraph 8 of the Request.

2. [REDACTED]

42. The Pre-Trial Judge observes that protective measures have already been granted to [REDACTED], namely: (i) the delayed disclosure of his identity until

⁸⁴ Request, para. 7; Disclosure Package [REDACTED]; 095407-095413 RED; 032287-032344; 032345-032363.

⁸⁵ Request, para. 7; 102761-TR-ET (three parts). The Pre-Trial Judge takes note that the SPO will apply to [REDACTED]'s SPO interview standard redactions comparable to those applied to the SPO Official Note regarding a telephone conversation with [REDACTED] (095407-095413 RED). *See* Request, footnote 11.

30 days before testimony;⁸⁶ (ii) a set of in-court protective measures;⁸⁷ and (iii) non-standard redactions to and the withholding of certain associated material until his identity is disclosed.⁸⁸ The Pre-Trial Judge recalls that, [REDACTED], the protective measures granted to [REDACTED] shall continue to have effect, [REDACTED]. Accordingly, the non-standard redactions to [REDACTED]'s statement (with corresponding official note and photograph)⁸⁹ granted by the Pre-Trial Judge [REDACTED] apply [REDACTED]. Similarly, [REDACTED]⁹⁰ shall not be disclosed to the Defence until disclosure of [REDACTED]'s identity.

43. Turning to the protective measure further requested by the SPO – *i.e.* the withholding of [REDACTED], the Pre-Trial Judge observes that there has been no change in circumstances that would require reassessing the risks to this witness. The Pre-Trial Judge will therefore only assess whether such measure is strictly necessary and proportionate to ensure the effectiveness of the protective measures granted to the witness.

44. As concern necessity, the Pre-Trial Judge is satisfied that Item 8 cannot be meaningfully redacted as its disclosure in a redacted form would reveal [REDACTED] and risk the witness's identification. The Pre-Trial Judge therefore finds that withholding such item until the identity of [REDACTED] is disclosed is necessary to give effect to the protective measures already in place for [REDACTED].

⁸⁶ [REDACTED]. [REDACTED].

⁸⁷ [REDACTED]. The following in-court protective measures were granted to [REDACTED]: (i) assignment of pseudonym and identification of the witness accordingly throughout the public proceedings; (ii) redaction of the witness's name and identifying information from the SC's public records; (iii) non-disclosure to the public of any records identifying the witness; (iv) testimony with face and voice distortion; and (v) closed or private sessions for any in-court discussion or testimony identifying the witness.

⁸⁸ [REDACTED]. [REDACTED].

⁸⁹ Annex 2 to the Request, [REDACTED].

⁹⁰ Annex 2 to the Request, [REDACTED].

45. Turning to the proportionality of the requested measures, the Pre-Trial Judge notes that: (i) [REDACTED];⁹¹ (ii) two associated exhibits have already been disclosed to the Defence under Rule 102(1)(b) of the Rules;⁹² (iii) one associated exhibit has been disclosed to the Defence under Rule 102(3) of the Rules;⁹³ (iv) the SPO will disclose the redacted version of [REDACTED]'s statement (with corresponding official note and photograph); (v) 30 days before [REDACTED]'s testimony, the SPO will disclose the identity of [REDACTED] and all his material in unredacted form; and (vi) the Defence will have access to the witness's complete evidence and testimony in the courtroom. The Pre-Trial Judge finds that these are appropriate and proportionate counterbalancing measures, in the present circumstances, to uphold the Accused's rights under the Law. The Pre-Trial Judge is satisfied that there are no less restrictive measures that could overcome or reduce the risk for this witness.

46. In light of all of the above, the Pre-Trial Judge grants the SPO's request for protective measures for [REDACTED] in the present proceedings as requested in paragraphs 10-11 of the Request.

V. DISPOSITION

47. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **GRANTS** the Request;
- b. **AUTHORISES** the SPO to amend the Revised Witness List to include [REDACTED] and [REDACTED] and further amend the Amended Exhibit List to include their prior statements and associated material as set out in Annexes 1-2 to the Request;

⁹¹ [REDACTED].

⁹² Disclosure Packages [REDACTED]; [REDACTED]; [REDACTED].

⁹³ Disclosure Packages [REDACTED]; [REDACTED]. The Pre-Trial Judge notes that this item was recently disclosed to all Defence teams. *See* Disclosure Package [REDACTED].

- c. **ORDERS** the SPO to disclose Item 1 of Annex 1 to the Request by **Wednesday, 2 November 2022**;
- d. **ORDERS** the SPO to disclose Items 1-4 of Annex 2 to the Request by **Wednesday, 2 November 2022**;
- e. **ORDERS** the SPO to file an amended witness list and exhibit list by no later than **Wednesday, 2 November 2022**;
- f. **ORDERS** the following protective measures for [REDACTED]:
- (i) assignment of a pseudonym;
 - (ii) redactions of the witness's name and identifying information from the public records;
 - (iii) non-disclosure to the public of any records identifying the witness;
 - (iv) testimony with face and voice distortion;
 - (v) closed or private sessions for any in-court discussion or testimony identifying the witness;
- g. **NOTES** that the protective measures ordered in respect of [REDACTED];
and
- h. **AUTHORISES** the SPO to withhold Item 8 of Annex 2 to the Request, until the identity of [REDACTED] is disclosed to the Defence.

[signed]

Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 27 October 2022

At The Hague, the Netherlands.