

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

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 2 May 2022

Language: English

Classification: Public

Public Redacted Version of Thaçi Defence Response to Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05)

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05).¹ The SPO Request seeks authorisation from the Pre-Trial Judge to:

- (i) amend the Exhibit List to include 49 documents – transcripts, statements and exhibits – generated during the *Prosecutor v. Salih Mustafa* case, concerning [REDACTED] (“Additional Materials”);
- (ii) apply non-standard redactions/withhold certain of the Additional Materials, and two further non-Rule 102(1)(b) items.

2. The Defence asks the Pre-Trial Judge to dismiss, in part, the SPO’s request to amend its Exhibit List and to limit non-standard redactions to those strictly necessary.

3. The Defence files this request as confidential in light of the classification of the SPO Request. However the Defence has no objection to its reclassification as public since it does not contain any identifying information.

II. PROCEDURAL BACKGROUND

4. On 23 November 2020, the Pre-Trial Judge issued its Framework Decision on Disclosure of Evidence and Related Matters, ordering the SPO to complete the disclosure of all material falling under Rule 102(1)(b) of the Rules² by 31 May 2021.³

¹ KSC-BC-2020-06/F00774/CONF/RED, Confidential redacted version of ‘Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05), with confidential Annex 1 and strictly confidential and ex parte annexes 2-16’, 20 April 2022 (“SPO Request”).

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD0-3/Rev3/2020, 2 June 2020 (“Rules”).

³ KSC-BC-2020-06/F00099 (“Framework Decision”), para. 99.

5. At the eighth status conference held on 29 October 2021, the SPO said that it would be able to file its pre-trial brief, witness list and exhibits list on 17 December 2021,⁴ seven months later than its own initial estimates.⁵ The Pre-Trial Judge confirmed this date by an oral order issued the same day. The Pre-Trial Judge further decided to extend the SPO deadline to disclose Rule 102(1)(b) material by 31 January 2022, after having granted several extensions of time at the SPO's request.⁶

6. On 16 November 2021, the Selimi Defence filed a Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case,⁷ including (i) all confidential closed and private session testimony transcripts; (ii) all closed session hearing transcripts; (iii) all confidential exhibits; (iv) all confidential filings, submissions and decisions of the Trial Chamber, in light of the overlap between the charges in *Mustafa* and in *Thaci et al.* This request was joined by the Thaçi and Krasniqi Defence.⁸ The SPO supported the request "*insofar as there is a legitimate forensic purpose for the materials in question*".⁹ On 1st February 2022, the Trial Panel I dismissed the request, considering that "*it is for the SPO to abide by its disclosure obligations, within the disclosure framework of Case 06, and for the Pre-Trial Judge to exercise control over such process up until the case file is transmitted to a Trial Panel, pursuant to Rule 98 of the Rules.*"¹⁰

⁴ KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, pp. 725-726.

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

⁶ KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021, pp. 752-754.

⁷ KSC-BC-2020-05/RAC001/F00001 ("*Selimi Request*").

⁸ KSC-BC-2020-05/RAC001/F00002, Krasniqi Defence Joinder to Selimi Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* Case, 18 November 2021; KSC-BC-2020-05/RAC001/F00003, Thaçi Defence Joinder to Selimi 'Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case', 22 November 2021 ("*Thaçi Joinder*").

⁹ KSC-BC-2020-05/RAC001/F00006, SPO response to the Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, 2 December 2021.

¹⁰ KSC-BC-2020-05/RAC001/F00009, Decision on the request of the Defence in KSC-BC-2020-06 to access confidential material in the *Prosecutor v. Salih Mustafa* case, para. 24.

7. On 17 December 2021, the SPO filed a strictly confidential and *ex parte* version of its Pre-Trial Brief, Witness and Exhibit lists; it filed a confidential redacted version of these documents only on 21 December 2021.¹¹

8. On 31 January 2022, the SPO filed a first application to amend its Exhibit List, related to 132 items;¹² it was granted by a decision of the Pre-Trial Judge issued on 8 March 2022.¹³ The Thaçi Defence filed an appeal against this decision,¹⁴ which is pending.

9. On 24 February 2022, the SPO filed a second application to amend its Exhibit List, related to various documents concerning W04868 and W04870;¹⁵ it was granted by a decision issued by the Pre-Trial Judge on 22 April 2022.¹⁶

10. On 13 April 2022, the SPO filed a third application to amend its Exhibit List, related to 16 items.¹⁷ On 20 April 2022, the SPO filed a fourth application to amend its Exhibit List, object of the present response.

III. APPLICABLE LAW

11. 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

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

¹² KSC-BC-2020-06/F00670/CONF/RED, Prosecution notice of Rule 102(1)(b) disclosure and related requests.

¹³ KSC-BC-2020-06/F00727-CONF, Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures ("Decision on SPO's Request to Amend its Exhibit List").

¹⁴ KSC-BC-2020-06/IA019-F00002, Thaçi Defence Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", 20 April 2022.

¹⁵ KSC-BC-2020-06/F00708-CONF, Prosecution Rule 102(2) submission and related requests.

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

¹⁷ KSC-BC-2020-06/F00767, Prosecution request to amend the exhibit list and for protective measures.

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.

12. Rule 95(2) of the Rules enumerates the functions of the Pre-Trial Judge after confirmation of the indictment, who shall "ensure that the proceedings are **not unduly delayed** and shall take all necessary measures for the **expeditious** preparation of the case for trial." In particular, pursuant to Rule 95(4), the Pre-Trial Judge shall order the Specialist Prosecutor to file, "**within a set time limit**:

- (a) the Specialist Prosecutor's Pre-Trial Brief, including, for each charge, a summary of the evidence which the Specialist Prosecutor intends to present regarding the commission of the alleged crime and the alleged mode of liability of the Accused. This brief shall include any admissions by the Defence, as well as a statement of matters that are not in dispute;
- (b) the list of witnesses the Specialist Prosecutor intends to call [...];
- (c) the list of proposed exhibits the Specialist Prosecutor intends to present stating, where possible, any objection of the Defence regarding authenticity."¹⁸

13. According to Rule 102(1) of the Rules, the SPO shall make available to the Defence:

- "(b) within the time limit set by the Panel, and no later than thirty (30) days prior to the opening of the Specialist Prosecutor's case:
 - (i) the statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial;
 - (ii) all other witness statements, expert reports, depositions, or transcripts that the Specialist Prosecutor intends to present at trial; and
 - (iii) the exhibits that the Specialist Prosecutor intends to present at trial."

14. Pursuant to Rule 102(2) of the Rules,

"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

¹⁸ Our emphasis.

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. In his Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, the Pre-Trial Judge considered that *"he can rule on a request to amend the exhibit list at the pre-trial stage, given that Rule 118 of the Rules allows for such a possibility at a later stage of the proceedings. [...] In this regard, the Pre-Trial Judge will assess whether the SPO has shown **good cause** for the requested amendments to its Exhibit List."*¹⁹

16. Good cause has further been defined as follow by the Pre-Trial Judge in the case of *Salim Jamil Ayyash et al.* before the Special Tribunal for Lebanon:

[...] What constitutes good cause will therefore be determined on a case-by-case basis; it must however be "**exceptional**" for relief to be granted. [...] In the Decision of 17 December 2012, upon finding that the good cause threshold had been met in the "exceptional instance" appertaining, the Pre-Trial Judge held that:

[...] it must be stressed at the outset that in the circumstances, the finding of "good cause" for such extensions of time is made with some reluctance and is heavily qualified [...]. As a matter of principle, internal organisational considerations, a heavy workload, or technical impediments alone are insufficient bases as "good cause" in seeking extensions of judicially set deadlines. Delays of a Party's own making are not a satisfactory reason to justify the "good cause" threshold. Moreover, they place the Pre-Trial Judge in the invidious position of ruling on what is in effect a *fait accompli*.

The Pre-Trial Judge has also stated that "the granting of the various extensions sought by the Prosecution may have an impact on the rights of the defence to have adequate time to prepare its case". Managing the potential prejudice occasioned to the Defence by authorising relief - upon good cause being shown - is a step subsequent to good cause being shown, and is not in itself a criterion for establishing good cause. As the Pre-Trial Judge has held previously:

[T]he absence of prejudice to opposing Parties or victims participating in the proceedings [...] *per se* is not a proper basis for demonstrating the element of "good cause". It is merely a consideration, and a distinct one from the "good cause" element, that a Chamber may take into account in determining overall whether to grant an extension of time request.

¹⁹ Decision on SPO's Request to Amend its Exhibit List, para. 24 (our emphasis).

The Prosecution therefore cannot base good cause on the absence of prejudice to the Defence or the Legal Representative of Victims ("LRV"); the two concepts are discrete.²⁰

17. Thus, it is for the Prosecution to show good cause for any request to add an item to its exhibit list, and to establish the relevance and importance of the item sought to be added. The Panel seized must "*carefully balance any amendment to the Prosecution's exhibit list with an adequate protection of the rights of the accused. That is, the Trial Chamber must be satisfied that amendments to the exhibit list at that stage of the proceedings provide an accused sufficient notice, and do not adversely affect his ability to prepare for trial.*"²¹

IV. DISCUSSION

18. The SPO applies to be authorised to amend the Exhibit List to include additional Rule 102(1)(b) materials '*recently generated during the course of the ongoing trial in the KSC-BC-2020-05 proceedings, up until the close of the SPO case on 4 February 2022*'.²²

19. However, the Defence notes that the first SPO witness in the *Mustafa* case testified on 20-22 September 2021²³ and that eight other SPO witnesses, [REDACTED], testified in the *Mustafa* case prior to 17 December 2021,²⁴ the SPO deadline to file its Exhibit List.

20. The SPO submits that "*collating these materials as done in this request following completion of the SPO case, [REDACTED], is in the interests of coherent review and judicial economy.*"²⁵

²⁰ STL, *Prosecutor v. Salim Jamil Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Prosecutor Request of 21 December 2012 to Amend the Witness and Exhibit Lists and for Authorisation for Further Disclosure, 27 February 2013, paras. 38-42 (our emphasis, footnotes omitted).

²¹ 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.

²² SPO Request, paras 3, 1.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ SPO Request, footnote 10.

21. Yet the SPO was informed about the will of the Defence to be disclosed such transcripts and related exhibits from the *Mustafa* case since, at least, the Selimi Request of 16 November 2021. The Taçi defence explicitly relied on Rule 102(3) and Rule 103 of the Rules in its Joinder.²⁶ In addition, the Defence has repeatedly stressed that any delayed disclosure of evidence related to SPO witnesses is prejudicial because it need to confront it to the material previously disclosed to identify discrepancies, credibility issues, conduct further investigations, *etc.*²⁷

22. Therefore, the SPO could, and should, have included all the material from the *Mustafa* case related to [REDACTED] in its Exhibit List filed on 17 December 2021, at the latest. Alternatively, such material should have been disclosed by this date pursuant to Rule 102(3) or Rule 103 of the Rules.

23. In these circumstances, the SPO has not shown good cause for the late disclosure and addition to the Exhibit List of the material related to [REDACTED] pursuant to Rule 102(2). Such material should be disclosed forthwith to the Defence pursuant to Rule 102(3) and Rule 103 of the Rules.

24. The Defence notes that [REDACTED] testified in the *Mustafa* case in [REDACTED] 2022, after the SPO's deadline to file its Exhibit List. In consequence, the Defence does not object to the addition of the material related to these witnesses to the SPO Exhibit List.

25. The SPO further applies to add two statements of [REDACTED] to its Exhibit List, presumably [REDACTED]. While the SPO does not specify when it was disclosed these statements, the Defence does not object to their addition to the Exhibit List.

²⁶ Taçi Joinder, paras 4-5.

²⁷ See, *inter alia*, KSC-BC-2020-06/F00688-CONF, Taçi Defence Response to Prosecution notice of Rule 102(1)(b) disclosure and related requests, 11 February 2022, paras 17-18; KSC-BC-2020-06/F00725-CONF, Taçi Defence Response to Prosecution Rule 102(2) submission and related request, 7 March 2022, para. 28.

26. The Defence asks the Pre-Trial Judge to ensure that any redactions to the above material be limited to those strictly necessary, in order not to render the material unintelligible.

27. The Defence does not object, at this stage, to the withholding of an extract of the video recording of [REDACTED], the witness benefiting from the delayed disclosure of his identity.

28. With regard to the SPO's request to withhold item [REDACTED], the Pre-Trial Judge is invited to determine whether a less prejudicial measure could be adopted, such as the provision of a summary of this item.

V. CONCLUSION

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

- Dismiss, in part, the SPO's request to amend its Exhibit List to add the Further Materials;
- Limit the non-standard redactions sought.

[Word count: 2574]

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 2 May 2022

At Tampa, United States