

In: KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: Trial Panel II

Judge Charles L. Smith III, Presiding Judge
Judge Christoph Barthe,
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

Date: 8 May 2023

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**Public Redacted Version of Selimi Defence Response to SPO Motion to
Amend Exhibit List, KSC-BC-2020-06/F01274, dated 9 February 2023**

Acting Specialist Prosecutor

Alex Whiting

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Victims

Simon Laws

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. In accordance with Articles 21(6), 35 and 40 of the Law¹ and Rules 102(1)(b), 112 and 118(2) of the of the Rules,² the Defence for Mr. Rexhep Selimi, hereby files a response to the SPO Request to amend the exhibit list and related matters (“Request”).³
2. The SPO Request is comprised of two separate aspects. The first prong, a request to disclose various statements and materials under Rule 102(1)(b), is a disguised attempt to reconsider the Pre-Trial Judge’s directive that such requests should be formulated as a request to amend the exhibit list. The SPO has provided no legal or factual justification for reconsidering this directive and as such, this component should be rejected *in limine*.
3. The second prong constitutes a manifest dereliction of the SPO’s duty of diligence. The SPO has failed to demonstrate any cogent justification as concerns why these items were not included in earlier iterations of the exhibit list and leads to serious concerns that the SPO is not trial ready.
4. The sheer size of materials and witnesses impacted by the Request also militates against judicial approval. The SPO is seeking to add 85 items, totalling 683 pages, and a video of approximately 39 minutes. It includes several new items for the witnesses in the first tranche of 12 witnesses.⁴ The inclusion of such a significant volume of materials in the list at this advanced juncture will create an

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

³ KSC-BC-2020-06/F01238, Prosecution request to amend the exhibit list and related matters with confidential Annexes 1-47, 30 January 2023.

⁴ See Annex 1.

unnecessary and prejudicial diversion of Defence time and resources and trigger future adjournments and delays.

II. SUBMISSIONS

A. First Prong: The Requested disclosures constitute a hidden and unfounded attempt to reconsider the Pre-Trial Judge's prior ruling

5. This aspect of the Request ignores the clear legal directives issued by the Pre-Trial Judge. The SPO has failed to acknowledge that they are seeking the reversal of these determinations. They have also failed to demonstrate that reversal or reconsideration is justified.

6. In his decision of 6 December 2022, the Pre-Trial Judge found as follows:⁵

“The Pre-Trial Judge recalls that disclosure under Rule 102(1)(b) of the Rules has been memorialised through the lists of exhibits (“Exhibit List”). Accordingly, the Pre-Trial Judge considers that, if the SPO is seeking to disclose, or withhold, Annexes 7 and 21 to the Request under Rule 102(1)(b) of the Rules for the purpose of using these items at trial, the appropriate procedural recourse is for the SPO to **request an amendment** to the Exhibit List **showing timely notice** and **good cause** for such a request, keeping in mind that the Rule 102(1)(b) deadline elapsed on 31 March 2022.”

7. The terms of this ruling require the SPO to file an application to amend the exhibit list each and every time the SPO seeks to disclose materials falling under Rule 102(1)(b). For this reason, the Pre-Trial Judge refused to authorise the disclosure of several items “pursuant to Rule 102(1)(b) of the Rules until an appropriate application to amend the Exhibit List is provided.”⁶

⁵ KSC-BC-2020-06/F01141, 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), 16 December 2022 (“Request for Protective Measures”), para. 12.

⁶ See for example, Request for Protective Measures, para. 55.

8. The SPO did not request reconsideration or leave to appeal the 6 December 2022 decision. The current Request also reveals no cogent reasons for doing so.
9. The gravamen of the SPO's attempt to bypass the procedure delineated by the Pre-Trial Judge appears to hang on the question as to whether the SPO intends to tender these statements or items into evidence.⁷ In focusing on this point, the SPO has misconceived both the basis for the SPO's ruling and the underlying purpose of exhibit lists.
10. The Pre-Trial Judge did not make the amendment requirement contingent on the question as to whether the SPO intends to tender the items or not. The rationale of the Pre-Trial Judge was that the exhibit list must reflect (i.e. 'memorialise') the items disclosed under Rule 102(1)(b). Rule 102(1)(b) encompasses all prior statements of Prosecution witnesses (irrespective as to whether the Prosecution intends to tender such statements) and all other statements and exhibits that the SPO intends to 'present' at trial. Since the items that are the subject of the Request fall within the scope of Rule 102(1)(b), the SPO was obliged to follow the Pre-Trial Judge's directive that the SPO must submit a request to amend the exhibit list to include such items, demonstrating good cause and timeliness.
11. The Pre-Trial Judge's approach is also consistent with the purpose of an exhibit list, which is to ensure that the opposing party is put on notice as concerns the evidence that will be adduced at trial. There is a critical distinction between the act of disclosing evidence and the act of formally notifying the opposing party that such evidence will be used at trial. The exhibit list is the tool with which to make this distinction.
12. In the case of *viva voce* witnesses, the inclusion of prior statements on the list serves to define the permissible scope of *viva voce* testimony during trial

⁷ Request, para. 4.

proceedings. If the Prosecution has not placed the Defence on notice of its intention to elicit oral evidence on issues set out in a particular prior statement, it may be prohibited from doing so. For example, if the Prosecution has placed a prior statement concerning the events in village X on its exhibit list, but not a prior statement concerning the events in village Y, the Prosecution cannot fairly question the witness about the events in village Y without first amending the exhibit list.

13. Since the SPO has foreshadowed its intention to pose questions based on these statements (through witness refreshing or confronting an adverse witness),⁸ the SPO should be required to follow the exhibit list amendment process. This ensures that the Defence has timely notice as concerns the content of incriminating evidence that will be adduced at trial. Conversely, if the Pre-Trial Judge's requirements were to be eliminated, the SPO would have free rein to use Rule 102(1)(b) disclosure as a vehicle for covertly expanding the evidential scope of the Prosecution case, while avoiding judicial scrutiny and control as concerns the ramifications for defendant's right to be promptly informed of the nature cause and content of the case that will be brought against him.
14. It is also not permissible for the SPO to avoid the amendment process by claiming that it is still "making final determinations about which Rule 102(1) items it intends to produce".⁹ The SPO has a duty of diligence that is closely tied to the defendant's right to expeditious proceedings. The SPO is expected to know its case and to communicate this case to the Defence in advance of the commencement of the trial. If the SPO has not ascertained any basis for using these documents, after over eleven years of investigations and pre-trial

⁸ Request, fn. 13.

⁹ Request, para. 3.

preparation, then the documents clearly lack sufficient probative value and relevance to justify their late disclosure or future inclusion on the exhibit list.

15. The SPO's equivocation on this critical point will also generate additional prejudice for the Defence as concerns its ability to prepare for witnesses, who will be the subject of Rule 154 and 155 requests. As set out in Annex 2, the requested disclosures include prior statements relating to fifteen rule 154/155 witnesses. In order to formulate a position on such requests, it is critical that the Defence receives timely notice as concerns which prior statements will be formally introduced through these rules. This, in turn, will impact on the ability of the Defence to confront other witnesses with contradictions in these prior witness statements.
16. For example, there is a strategic difference between confronting a witness with contradictions in a statement that will never be tendered into evidence, as compared to one that is slated to be introduced through Rule 154/155. Further prevarication on such matters will therefore hamstring the ability of the Defence to make informed decisions as concerns the content of its cross-examination.
17. Since there is no basis for reconsidering the Pre-Trial Judge's procedure, the Disclosure Request should be dismissed *in limine* due to the SPO's failure to apply to amend its exhibit list to include these disclosures. This result would be without prejudice to the submission of such an application. The SPO would, however be precluded from using these items to refresh or confront a witness or in witness preparation sessions, unless the application is granted in advance.

B. Second Prong: The Requested Amendments**1. The SPO has not generally demonstrated good cause or timeliness as concerns the requested amendments**

18. The SPO's justifications fall into three general categories: (1) items where the SPO recently ascertained their relevance during the course of witness specific trial preparation; (2) items that are linked to delayed disclosure witnesses; and (3) items that were recently identified and disclosed as part of disclosure reviews. All three categories fail to satisfy the threshold for amendment at this stage of the proceedings.

a. Items which the SPO recently assessed as being relevant

19. The SPO's late realisation that an item may be relevant to its case does not constitute good cause. The SPO's arguments on this point suggests that they are only now, several years into an investigation and prosecution, making assessments concerning the relevance of these witnesses to the charges. This is not acceptable. Trial preparation should be directed towards ensuring the efficient and expeditious presentation of the existing parameters of the case, rather than pursuing new or alternative angles. Shifting inflections as to what is or is not important threaten the defendant's right to timely notice as concerns the nature, cause, and content of the charges.

20. The Trial Panel has also "encourage[d] the Parties and participants to set for themselves a high threshold of evaluation so as to ensure that only evidence of high probative value is tendered."¹⁰ This principle speaks to the need to streamline rather than expand the presentation of evidence. The goal of promoting efficient and expeditious proceedings is not served through the inclusion of cumulative items or items of peripheral relevance. If the SPO itself

¹⁰ KSC-BC-2020-06/F01226, Annex 1 to Order on the Conduct of Proceedings, para 49

determined that these items were not sufficiently relevant or probative to include on its initial list, then there is no basis to reopen this assessment on the very eve of trial.

b. Items linked to delayed disclosure witnesses

21. Although the SPO claims that “many of the Requested Amendments relate to delayed disclosure witnesses”,¹¹ the SPO has not provided any explanation as to how delayed disclosure has impacted its ability to include these items on its exhibit list. The SPO’s failure to include these items in its original list also means that the Pre-Trial Judge was deprived of relevant information that would have informed his assessment as concerns the prejudicial consequences of delayed disclosure on Defence preparation.

c. Items that were recently identified and disclosed as part of disclosure reviews.

22. A party cannot rely on its own transgressions to justify late additions. Remedies for late disclosure should be directed towards eliminating prejudice experienced by the Defence, rather than aggravating them.

d. Inclusion of these items at this stage would generate disproportionate prejudice for the Defence

23. The SPO has attempted to minimise issues of prejudice by basing its arguments on an inherent contradiction: on one hand, the SPO contends that the amendments all relate to ‘known aspects of the SPO’s case’,¹² but on the other, argues in relation to several items that the relevance was only ascertained during recent preparation sessions.¹³ If the relevance was already known, then the items

¹¹ Request, para. 8.

¹² Request, para. 8.

¹³ Request, para. 5.

should have been included on the initial list. Conversely, if the relevance was not evident to the SPO during the last year of pre-trial preparation, the relevance also could not have been guessed or 'known' by the Defence.

24. The need for flexibility is also subject to the Chamber's paramount duty to ensure a fair and expeditious trial. As explained by the Appeals Panel:¹⁴

"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**" (emphasis added)."

25. The question as to whether the inclusion of these items would undermine the defendant's right to timely notice and adequate time and facilities to prepare the Defence case must be assessed by reference to the Defence's right to conduct investigations and formulate a coherent Defence theory in advance of its cross-examination of the first Prosecution witness. It must also be assessed in a holistic manner, taking into account any other contemporaneous procedural developments that are likely to negatively affect Defence preparation.
26. While the Defence might have the capacity to absorb the additional workload associated with reassessing the evidentiary significance of one or two items, the same cannot be said in connection with 85 such items, particularly if this is occurring during a highly intense period where the Defence is also expected to: respond to lengthy bar table motions, prepare its opening statements, and prepare its exhibit lists and cross-examination for the first tranche of witnesses. The fact that this is occurring at the same time as the disclosure of a significant

¹⁴ KSC-BC-2020-06/IA019-F00006, 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, para. 21.

number of witness identities (77) thirty days before the start of the trial threatens to disrupt the delicate balance underpinning the delayed disclosure decision.

27. The factors cited by the SPO in favour of inclusion also militate against inclusion. This is a complex trial with a considerable volume of evidence.¹⁵ These factors speak to the need to place a strict cap on the amount of further evidence, particularly items that are being introduced on the eve of the commencement of the trial.

2. The SPO's justifications in relation to individual items fail to meet the requisite standard and cause prejudice to Defence preparation

a. Additional W02161 material¹⁶

28. The SPO failed to properly characterize this document as a prior statement and also omitted to include it on its exhibit list.¹⁷ The SPO has not provide any justification for its error or omission.
29. The addition of this material will also generate prejudice for the Defence. The SPO has conceded that the material is not wholly cumulative of existing evidence: it provides "additional information concerning various documents and publications prepared and drafted by the witness or under her instructions and supervision".¹⁸ The SPO's claiming that the addition of this item will expedite the proceedings is thus erroneous, as the inclusion of this material will expand the evidentiary scope of the trial proceedings.
30. This improper disclosure characterization negatively affected Defence preparation as it deprived the Defence of timely notice that the contents of this

¹⁵ Request para. 2.

¹⁶ Request, paras. 9-11.

¹⁷ The Defence reserves its right to challenge in the context of its Rule 154 response whether the material is in fact a 'statement'.

¹⁸ Request, para.10.

document could be used as a prior statement. This is accentuated by the SPO's intention to call this witness early in its case, as its sixth witness, thereby reducing the time available for the Defence.¹⁹

b. Additional W04746 material²⁰

31. The SPO has provided no cogent justification for the late addition of these items. Apart from the Facebook posts, all items were previously in the SPO's possession. The SPO has averred that the items are relevant to "potential biases, motives, and a fulsome understanding and assessment of his evidence";²¹ and although the SPO has indicated that the "importance" of these items was recently "reassessed",²² there is no indication that the SPO were not aware of the relevance of such matters at an earlier stage. The late inclusion of these items therefore appears to be predicated on a last-minute change in Prosecution strategy rather than genuine grounds giving rise to good cause.

c. Additional [REDACTED] material²³

32. The SPO has provided no cogent justification as concerns its omission to include this item on its list. This is all the more problematic, given the SPO's intention to call this as its [REDACTED] witness.

d. Additional [REDACTED] material²⁴

33. The SPO has provided no cogent justification as concerns its omission to include these items on its list. The late inclusion of these items will also generate a significant burden as concerns Defence preparation, especially in light of the SPO's intention to call this witness as one of its [REDACTED], and also to seek

¹⁹ KSC-BC-2020-06/F01243, Prosecution submission of list of first 12 witnesses and associated information with confidential Annex 1, 1 February 2023, Annex 1 ("SPO First 12 Witness Submission").

²⁰ Request, paras. 12-16.

²¹ Request, para. 12.

²² Request, para. 12.

²³ Request, para 17.

²⁴ Request, para. 18.

to admit his previous statements pursuant to Rule 154.²⁵ The Defence also has the right to identify and instruct an expert to analyse the results of the clinical examination, and to do so in advance of [REDACTED] testimony so that the Defence can put relevant issues and possible contradictions to [REDACTED] while he is on the stand. It is extremely onerous to conduct such preparations while trial proceedings are ongoing; diversion of resources to such tasks will negatively impact Defence preparation for the coming witnesses.

34. There is also no legal basis for the SPO to use these items at trial. The SPO has not indicated that it intends to call the expert who authored the report. The deadline for including experts in the witness list was 17 December 2021.²⁶ The expert who authored this report and [REDACTED], was not included on this list. Nor has the SPO filed an application to amend the list to include him, despite being explicitly reminded by the Pre-Trial Judge of the need to make any such application in a timely manner.²⁷ Since the transcripts and report are testimonial in nature, they cannot be tendered from the bar or tendered through a witness.²⁸

e. Additional [REDACTED] material²⁹

35. The Defence repeats that the SPO cannot benefit from its own disclosure transgressions. The statement should have listed the ERNs of the photographs so that the Defence could cross-reference the witness's responses to specific exhibits. Since these photographs were disclosed under Rule 102(3), the Defence had no means for ascertaining which photographs were in fact used during the witness interview.

²⁵ [REDACTED].

²⁶ KSC-BC-2020-06, Order on SPO's pre-trial brief and related material according to Rule 95(4)(a), Transcript, 29 October 2021, pp. 752-753.

²⁷ KSC-BC-2020-06, Transcript of Status Conference of 8 September 2022, p. 1479.

²⁸ See ICC *Prosecutor v. Gicheru*, "Decision on the Prosecution's Third Request to Introduce Evidence Other than Through a Witness and Ancillary Requests", ICC-01/09-01/20-324, paras. 16-17.

²⁹ Request, paras 19-20.

36. The fact that the SPO has made this linkage at such a late-stage effectively means that the Defence is only now being placed in a position to effectively review these aspects of [REDACTED] statement. The appropriate remedy in such circumstances is to exclude such issues from [REDACTED] evidence, on the grounds that the Defence was deprived of its right to timely notice and adequate time and facilities to prepare its Defence.

f. Additional [REDACTED] material³⁰

37. While the Defence agrees that the contents of the UNMIK statements cannot be effectively assessed in the absence of the corrections made by [REDACTED] to these statements, the prejudice caused to the Defence by their late addition is not minimal as the SPO asserts. The statement relates to [REDACTED] and to the importance placed on him by the SPO in relation to its case, which must be examined closely. The failure by the SPO to properly provide cogent reasons for its failure to have added this statement, taken over twenty years ago, is therefore even more glaring.

g. Additional W04752 material³¹

38. The SPO has characterized the document as 'important'.³² Given its 'importance', it is highly concerning that the SPO has provided no explanation as to why it first sought access to this important document (prior statement) in October 2022 even though the witness concerned has testified in multiple previous cases and the SPO will have known for many years that they intended to call him as a witness. Although it is three pages in length, the contents are very dense, providing substantive comments on 21 documents, and substantive evidence on an array of other matters.

³⁰ Request, paras 21-22.

³¹ Request, paras 23-24.

³² Request, para. 24.

h. Additional W04408 material³³

39. The SPO has provided no cogent justification for its failure to include an item that was authored by W04408 in its initial list.

i. Additional W03724 material³⁴

40. The SPO has implicitly conceded that it failed to notify the Defence that W03724 authored the statement in 050550-050556. This omission generated significant prejudice for Defence preparation, especially considering this witness is expected to give testimony implicitly relating to the personal acts of Mr. Selimi. In the specific circumstances of this case therefore, the appropriate remedy for late notification of such critical particulars is exclusion.

j. Additional W03885 material³⁵

41. The SPO has acknowledged that there is no good cause to add this item; it was omitted through inadvertence. The SPO has also failed to explain how it is in the interests of justice to admit the item, notwithstanding the absence of good cause.

k. Additional [REDACTED] material³⁶

42. The SPO has provided no explanation as to why this document was not identified as a statement and disclosed as such, when the other contemporaneous statement pertaining to [REDACTED] was disclosed.
43. The introduction of this evidence could require the Defence to instruct an expert to assess the reliability of the witness identification procedure that was used with the witness. The inclusion of this item on the exhibit list (or its use in preparation

³³ Request, paras 25-26.

³⁴ Request, paras. 27-28.

³⁵ Request, para 29.

³⁶ Request, paras 30-32.

sessions) would also interfere with the spontaneity and reliability of any identifications conducted during [REDACTED] testimony.

l. Additional [REDACTED] material³⁷

44. This item is a record of a witness identification procedure. Since it directly relates to the witness's statement [REDACTED] there is no excuse for such an omission.
45. Given the effluxion of time and the significant possibility of memory contamination through exposure to images on social media, the reliability of witness identification procedures will be a live issue in this trial. The item lacks sufficient information to assess the reliability of the witness's reaction to different images and to ascertain the methodology used to show different images to the witness.

m. Additional [REDACTED] materials³⁸

46. The SPO has provided no explanation as to why this document was not identified as a statement and disclosed as such.
47. The introduction of this evidence would require the Defence to instruct an expert to assess the reliability of the witness identification procedure that was used with the witness. The inclusion of this item on the exhibit list (or its use in preparation sessions) would also interfere with the spontaneity and reliability of any identifications conducted during [REDACTED] testimony.

³⁷ Request, para 33.

³⁸ Request, paras 34-35.

n. Additional [REDACTED] materials³⁹

48. The SPO has provided no explanation as to why this document was not identified as a statement and disclosed as such.
49. The SPO's justifications are also contradictory: it claims that the information in this statement is 'important', but also that the contents are broadly reflected in other prior statements.⁴⁰ If that is the case, then there is no basis to expand the volume of this case by adding additional items.

o. Additional W04410 material⁴¹

50. The SPO has provided no information concerning the circumstances under which W04410 provided the SPO with these video files. This information is critical to an assessment of diligence and good cause. In the absence of such particulars, the request should be rejected, or suspending the provision of further details.

p. Additional [REDACTED] material⁴²

51. The SPO has not provided any justification as concerns why it conducted a substantive interview on [REDACTED], rather than an earlier point in the proceedings. The late date of this interview is not compatible with the SPO's duty of diligence: interviews should have been conducted sufficiently in advance of deadlines to facilitate the inclusion of all related materials on the list of exhibits, by the initial deadline.

³⁹ Request, paras 36-37.

⁴⁰ Request, para. 36.

⁴¹ Request, paras 38-39.

⁴² Request, paras 40-41.

q. Additional [REDACTED] material ⁴³

52. The SPO has not provided any justification as concerns why it conducted a substantive interview on [REDACTED], rather than an earlier point in the proceedings. The late date of this interview is not compatible with the SPO's duty of diligence: interviews should have been conducted sufficiently in advance of deadlines to facilitate the inclusion of all related materials on the list of exhibits, by the initial deadline.

r. Additional [REDACTED] materials⁴⁴

53. The SPO has not provided any justification as concerns why it conducted a substantive interview on [REDACTED], rather than an earlier point in the proceedings. The late date of this interview is not compatible with the SPO's duty of diligence: interviews should have been conducted sufficiently in advance of deadlines to facilitate the inclusion of all related materials on the list of exhibits, by the initial deadline imposed by the Pre-Trial Judge at the end of 2021.

s. Additional W04765 material⁴⁵

54. Although the SPO used these exhibits during a November 2022 interview with W04765, it was in possession of the items in advance of the interview. The fact that it used these items during the interview demonstrates that the SPO already appreciated the relevance of these items to W04765's evidence as of November last year. The SPO has nonetheless provided no explanation or justification for its delay in introducing this amendment request.

⁴³ Request, paras 42-43.

⁴⁴ Request, paras 44-45.

⁴⁵ Request, para. 46.

t. Additional [REDACTED] material⁴⁶

55. The SPO has provided no explanation or cogent justification as concerns its failure to identify this item as constituting a 'prior statement' or disclosing it as a such, at an earlier juncture.
56. The introduction of this evidence could require the Defence to instruct an expert to assess the reliability of the witness identification procedure that was used with the witness. The inclusion of this item on the exhibit list (or its use in preparation sessions) would also interfere with the spontaneity and reliability of any identifications conducted during [REDACTED] testimony.

u. Additional W04379 material⁴⁷

57. The SPO cannot benefit from its own disclosure transgressions. The statement should have listed the ERN of the photograph so that the Defence could cross-reference the witness's response to the photograph in question. Since this photograph was disclosed under Rule 102(3), the Defence had no means for ascertaining which photograph was in fact used during the witness interview.
58. The fact that the SPO has only made this linkage now effectively means that the Defence is only now being placed in a position to effectively review this aspect of W04379's statement. The appropriate remedy in such circumstances is to exclude related issues from W04379's evidence, on the grounds that the Defence was deprived of its right to timely notice and adequate time and facilities to prepare its defence.

⁴⁶ Request, paras 47-49.

⁴⁷ Request, para. 50.

v. Additional [REDACTED] material⁴⁸

59. The SPO has provided no justification for its failure to register and disclose this item in a timely manner. Furthermore, the official note is dated 24 January 2023, sixteen months after the site visit in fact took place. The SPO cannot benefit from its own failures to diligently record evidence which goes to allegations of Mr. Selimi's criminal liability. The appropriate remedy is to exclude related aspects of [REDACTED] evidence, rather than expanding the evidentiary scope of the case with materials that were not disclosed in a timely manner.

w. Video footage of the Accused and other KLA/PGoK officials⁴⁹

60. The SPO has conceded that these items "could have been added to the Exhibit List earlier".⁵⁰ In the manifest absence of good cause, there is a very high threshold for inclusion of 45 minutes of additional content. The SPO has not however demonstrated how the late and unjustified inclusion of these items would advance the interests of a fair, efficient and expeditious trial.

61. The SPO has also not provided any explanation as to how or when these items will be introduced at trial. Given that the items relate to the roles of the Accused, the content potentially intersects with the upcoming bar table motions and the testimony of the first tranche of witnesses. Even if the SPO defers usage to latter witnesses, the Defence would have a clear interest in ascertaining whether any witnesses in the first tranche could contextualise the content in a manner that is helpful to the Defence. The late inclusion of such items will generate significant prejudice to Defence preparation and/or requirement an adjournment.

⁴⁸ Request, para. 51.

⁴⁹ Request, paras 52-53.

⁵⁰ Request, para. 54.

x. Kukes Metal Factory photographs and maps⁵¹

62. The SPO has provided no explanation as to why these documents were obtained in December 2022. The absence of particulars concerning the circumstances under which these items were requested and obtained undermines the ability of the Defence to provide meaningful comment on the threshold criterion as to whether there is good cause to include these items at this juncture.

y. KLA military police notebook⁵²

63. The SPO has failed to provide a cogent justification for its belated realization of the significance of this document. If it is of sufficient importance to justify late admission, then the relevance should have been apparent at an earlier juncture of the proceedings.
64. The SPO has also not provided any explanation as to how or when this item will be introduced at trial. The inclusion of this item will entail significant preparation and analysis on the part of the Defence, including the potential instruction of a handwriting expert, and further inquiries concerning chain of custody.

z. IT-03-066 P9⁵³

65. The SPO has failed to provide a cogent justification for its belated realization of the significance of this document. If it is of sufficient importance to justify late admission, then the relevance should have been apparent at an earlier juncture of the proceedings.

⁵¹ Request, para. 55.

⁵² Request, para. 56.

⁵³ Request, para. 57.

aa. KLA military police records⁵⁴

66. The SPO has failed to provide a cogent justification for its belated realization of the significance of this document. If it is of sufficient importance to justify late admission, then the relevance should have been apparent at an earlier juncture of the proceedings.
67. The SPO does not appear to have provided any information concerning the legality of the means through which the items were originally seized. This information, which is integral to any assessment of the authenticity and reliability of the items, should be disclosed before and not after the application to include on the list, so that the Chamber is fully apprised of the consequences and likely prejudice emanating from their inclusion.

C. Confidentiality

68. These submissions are filed confidentially pursuant to Rule 82(4), as they respond to confidential submissions filed by the SPO due to protective measures. The Defence does not object to their reclassification as public or will otherwise file a public redacted version after the SPO does the same.⁵⁵

III. CONCLUSION AND RELIEF REQUESTED

69. Prosecution motions to amend exhibit lists on the eve of, or even during trial proceedings, by have been all too routinely granted by Trial Chambers at different international or hybrid tribunals without properly assessing the impact of this additional material on Defence preparation. This was not supposed to occur at the KSC and the Pre-Trial Judge did take certain partial steps to ensure that it would not be the case, which have been ignored by the SPO.

⁵⁴ Request, para. 58.

⁵⁵ Request, para. 58.

70. The SPO's already swollen exhibit and witness lists, coupled with some of the most extensive protective measures ever granted, have already severely hampered effective Defence preparation. Adding further exhibits into the mix will only exacerbate this prejudice. The Trial Panel is requested to ensure this does not happen.

71. Therefore, the Defence hereby requests the Trial Panel to:

- (i) REJECT the First Prong of the SPO Motion *in limine*; and
- (ii) REJECT, the Second Prong of the SPO Motion in relation to each individual request to add exhibits to the SPO exhibit list.

Word count: 5518

Respectfully submitted on 8 May 2023,



GEOFFREY ROBERTS

Lead Counsel for Rexhep Selimi



ERIC TULLY

Co-counsel for Rexhep Selimi



RUDINA JASINI
Co-counsel for Rexhep Selimi



DAVID YOUNG
Co-counsel for Rexhep Selimi