



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Acting Specialist Prosecutor

**Date:** 13 July 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of 'Prosecution consolidated reply to Defence responses concerning addition of intercepted communications to the Exhibit List', KSC-BC-2020-06/F01652, dated 7 July 2023**

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## I. INTRODUCTION

1. The Responses<sup>1</sup> focus on matters going to the admissibility and weight of the concerned intercepts, not the standard for Exhibit List amendments, and make unsubstantiated, speculative, and premature claims of prejudice. The Request<sup>2</sup> should be granted so this relevant and important, contemporaneous record of events during the Indictment period is available for the Prosecution to prove its case and, if ultimately admitted, the Panel to consider in its final assessment of the evidence.

## II. SUBMISSIONS

2. To grant the Request, the Panel need only satisfy itself that the proposed evidence is *prima facie* relevant and of sufficient importance to justify addition to the Exhibit List, without prejudice to any future determination of admissibility or weight.<sup>3</sup> In this respect, Defence assertions of unreliability are unfounded and would be inadequate even at the admissibility stage. No Party is obliged to tender 'perfect evidence'<sup>4</sup> and the lack of audio recordings or original transcriptions,<sup>5</sup> incomplete records,<sup>6</sup> alleged attribution issues and unidentified interlocutors,<sup>7</sup> and the length of time since the relevant conversations<sup>8</sup> are matters of weight, insufficient to

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<sup>1</sup> Thaçi, Selimi and Krasniqi Defence Response to 'Prosecution Request to Add Intercepted Communications to the Exhibit List', KSC-BC-2020-06/F01637, 3 July 2023, Confidential ('Joint Response'); Veseli Defence Response to Prosecution Request to add Intercepted Communications to the Exhibit List, KSC-BC-2020-06/F01638, 3 July 2023, Confidential ('VESELI Response'; collectively with the Joint Response, 'Responses').

<sup>2</sup> Prosecution request to add intercepted communications to the Exhibit List, KSC-BC-2020-06/F01622, 23 June 2023, Confidential ('Request').

<sup>3</sup> Decision on Prosecution Request to Amend the Exhibit List and Related Matters, KSC-BC-2020-06/F01352, 8 March 2023, Confidential ('Amendment Decision'), paras 29, 31.

<sup>4</sup> ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on the Admission into Evidence of Intercept-Related Materials, 18 December 2003 ('*Blagojević Decision*'), para.25.

<sup>5</sup> See, similarly, ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on the Admission of Intercepts and Authentication Charts, 6 February 2014, para.15. *Contra* Joint Response, KSC-BC-2020-06/F01637, para.28(a)-(c), (f); VESELI Response, KSC-BC-2020-06/F01638, paras 23-24.

<sup>6</sup> See, similarly, *Blagojević Decision*, para.23. *Contra* Joint Response, KSC-BC-2020-06/F01637, para.28(g)-(h).

<sup>7</sup> See, similarly, ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Admissibility of Intercepted Communications, 7 December 2007, para.75. *Contra* Joint Response, KSC-BC-2020-06/F01637, para.28(e); VESELI Response, KSC-BC-2020-06/F01638, para.22.

<sup>8</sup> Joint Response, KSC-BC-2020-06/F01637, para.28(k).

demonstrate that the intercepts should not be added to the Exhibit List or, when tendered, admitted.<sup>9</sup> The Specialist Prosecutor's Office ('SPO') intends to present evidence and witnesses, including interlocutors on the relevant calls and [REDACTED], that will corroborate the contents of the intercepts and/or establish their reliability.<sup>10</sup>

3. The Defence does not substantiate its broad claims of prejudice, which underlie the threat of an adjournment if the Request is granted.<sup>11</sup> Adjournments are only exceptionally justified in concrete circumstances in the interests of justice, when other potential measures, including recall of witnesses (upon a showing of good cause), are inadequate.<sup>12</sup> The Defence does not explain how the intercepts were important to the cross-examination of any specific witness that has testified thus far in the trial, none of whom were interlocutors on or specifically concerned by the intercepts.<sup>13</sup> Likewise, claims that the 'Defence case would have to be revisited in full' are exaggerated, considering that the intercepts are corroborative of and complementary to other evidence on the record and do not impact the scope of the charges or the SPO's case.<sup>14</sup> The Defence is able to process and review disclosures while trial proceedings are ongoing, including in light of regular recesses and breaks between evidentiary blocks. The Defence's generalised submissions thus fail to demonstrate undue prejudice, and

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<sup>9</sup> Undeveloped Defence assertions concerning the manner in which the intercepts were obtained and the alleged absence of a legal basis are also wholly inadequate to demonstrate that amendment of the Exhibit List is not justified. *See, similarly*, ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Decision Granting Prosecution's Motion for Leave to Amend Rule 65 *ter* List to Add Documents Related to Witness ST092, 20 October 2009, para.8. *Contra* Joint Response, KSC-BC-2020-06/F01637, para.28(d), (j), (m).

<sup>10</sup> *See also* Request, KSC-BC-2020-06/F01622, paras 11-12.

<sup>11</sup> Joint Response, KSC-BC-2020-06/F01637, para.25.

<sup>12</sup> *See, for example*, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Suspension of Proceedings Prior to Start of Srebrenica Evidence, 22 November 2021, para.13. It is not sufficient to, as the Defence does, merely assert that recall is an insufficient remedy. *See* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para.10.

<sup>13</sup> *Contra* Joint Response, KSC-BC-2020-06/F01637, para.25.

<sup>14</sup> Request, KSC-BC-2020-06/F01622, paras 4, 9-14.

on balance, the intercepts – which, as set out in the Request, are *prima facie* relevant and important<sup>15</sup> – should be available to the Prosecution to prove its case.

4. The majority of the Defence claims of prejudice focus on the potential use of the intercepts with W04746. Submissions about the burden of ‘contemporaneous undertakings’, *inter alia*, to prepare for W04746’s cross-examination<sup>16</sup> fail to acknowledge the ample time the Defence has had to prepare for W04746’s testimony. The Defence has been aware that the SPO would call W04746 from, at least, 22 October 2021, when the SPO’s initial witness list was filed.<sup>17</sup> He was thereafter notified on 18 November 2022 as being among the first 40 witnesses, and on 1 February 2023,<sup>18</sup> as being among the first 12 witnesses.<sup>19</sup> Further, following an *inter partes* Defence request, the testimony of W04746, which was initially scheduled to take place in May 2023, was rescheduled to July 2023.

5. In addition to the time it has had to prepare for W04746’s cross-examination before and since the Request, the Joint Response demonstrates that the Defence was also able to effectively identify (and thus prioritise for review) the relatively limited parts of the intercepts that are directly relevant to W04746’s evidence.<sup>20</sup> Such intercepts

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<sup>15</sup> Request, KSC-BC-2020-06/F01622, paras 9-14. *See also* Joint Response, KSC-BC-2020-06/F01637, para.26. The VESELI Defence acknowledges that some intercepts might be relevant, important, and probative. *See* VESELI Response, KSC-BC-2020-06/F01638, para.20. In the Request, the SPO explained why the collection in full is relevant and of sufficient importance. *See* Request, KSC-BC-2020-06/F01622, paras 9, 12.

<sup>16</sup> Joint Response, KSC-BC-2020-06/F01637, para.32; VESELI Response, KSC-BC-2020-06/F01638, para.28.

<sup>17</sup> Prosecution submission of preliminary witness list, KSC-BC-2020-06/F00542, 22 October 2021.

<sup>18</sup> Prosecution submission of provisional list of first 40 witnesses to be called at trial, KSC-BC-2020-06/F01117, 18 November 2022.

<sup>19</sup> Prosecution submission of list of first 12 witnesses and associated information, KSC-BC-2020-06/F01243, 1 February 2023.

<sup>20</sup> *See* Joint Response, KSC-BC-2020-06/F01637, para.31. The intercepts, which generally consist of only a few lines, on the following pages concern W04746 and/or communications relating to the Llap Operational Zone: 111491-111682-ET, pp.111493-111494, 111496, 111499, 111509-111510, 111513, 111517, 111520, 111522-111523, 111527, 111529, 111535-111536, 111538-111539, 111547, 111549-111552, 111557, 111561-111562, 111564-111565, 111567-111568, 111573-111575, 111579, 111584, 111589, 111593-111594, 111603, 111608, 111616, 111628, 111633, 111636, 111646, 111648-111649, 111654-111656, 111658-111659, 111661-111663, 111666, 111668-111669, 111674, 111680; 111687-111889-ET, pp., 111691, 111696-111697, 111712, 111718, 111727, 111733-111735, 111743-111744, 111746, 111748-111752, 111754, 111756, 111758-

were disclosed in [REDACTED] on 6 April 2023 under Rule 102(3)<sup>21</sup> and in English more than three weeks before the anticipated start of W04746's cross-examination.<sup>22</sup> When considered in light of the months, if not years, the Defence has had to prepare for W04746's testimony, the volume of additional, directly relevant materials among the intercepts, or indeed, the collection as a whole, does not show that an adjournment at this stage is necessary or would be, in practical terms, conducive to the expeditious and efficient conduct of the proceedings.

6. The interests of justice militate in favour of the Request, including the ability of the SPO to use relevant intercepts with W04746. If and when it does so, the Defence has the opportunity to request appropriate measures in the concrete circumstances that present themselves and in light of any demonstrable prejudice to its preparations.

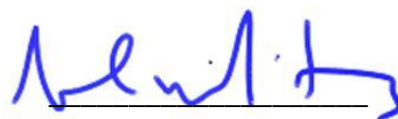
### III. CLASSIFICATION

7. This submission is confidential pursuant to Rule 82(4) of the Rules.<sup>23</sup> A public redacted version will be filed.

### IV. RELIEF REQUESTED

8. For the foregoing reasons and those given previously, the Request should be granted.

**Word Count: 1374**



**Alex Whiting**

**Acting Specialist Prosecutor**

Thursday, 13 July 2023

At The Hague, the Netherlands.

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111759, 111762-111763, 111765-111768, 111770-111771, 111774-111776, 111785-111786, 111791, 111796-111797, 111823-111824, 111847-111848, 111851, 111863, 111869.

<sup>21</sup> While Rule 102(3) disclosure does not put the Defence on notice that the SPO intends to use such materials, it provides an opportunity for review, and the Defence cannot claim that it was therefore unknown to them. *See* Amendment Decision, KSC-BC-2020-06/F01352, para.33.

<sup>22</sup> Joint Response, KSC-BC-2020-06/F01637, para.32.

<sup>23</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').