

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: Counsel for Kadri Veseli

Date: 3 July 2023

Language: English

Classification: Public

**Public Redacted Version of Veseli Defence Response to Prosecution Request
to add Intercepted Communications to the Exhibit List, With Confidential
Annex 1**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli (“Defence”) hereby files this response to the Prosecution request to add intercepted communications to the Exhibit List (“Request”).¹
2. The Prosecution seeks to amend its Exhibit List to include 398 pages of intercepted communications of various purported KLA members from January to March 1999 (“Intercepts”). The Intercepts are said to have been collected by the [REDACTED] and/or the [REDACTED] during the war and, for the most part, pertain to completely innocuous conversations between unknown, unidentifiable or otherwise irrelevant individuals.² The Defence has been provided with written records of the intercepts only, many of which comprise summaries as opposed to transcriptions.
3. The Defence submits that the Request must be rejected, as it is decidedly untimely, fails to show good cause due to a lack of specificity and is prejudicial to Mr Veseli’s fair trial rights. In the alternative, should the Panel deem portions of the Request to be appropriate for addition to the Exhibit List, the Prosecution should be ordered refile the Request with a view to identifying specific Intercepts that it seeks to rely on as the evidence continues to unfold.

II. PROCEDURAL BACKGROUND

4. On 6 April 2023, Disclosure Package 747 was made available to the Defence pursuant to Rule 102(3) of the Rules; the Package contained [REDACTED] versions of the Intercepts.³

¹ F01622, *Prosecution request to add intercepted communications to the Exhibit List*, 23 June 2023, confidential.

² F01622, paras 1 and 6-8. *See further*, 111491-111682/111491-111682-ET and 111687-111889/111687-111889-ET.

³ *See*, Disclosure Package 747 containing 111491-111682 and 111687-111889.

5. On 7 April 2023, the Defence requested that the Prosecution provide it with English translations of the Intercepts due to their “potential significance.”⁴
6. On 11 April 2023, the Prosecution responded to the Defence’s inquiry, stating that the Intercepts “were recently provided to the SPO by the [REDACTED] authorities in response to earlier requests” and that “courtesy translations into English” would be provided “when they [became] available.”⁵
7. On 20 June 2023, the Prosecution made the English versions of the Intercepts available to the Defence through Disclosure Package 829. Again, the Intercepts were disclosed under Rule 102(3) of the Rules.⁶
8. On 23 June 2023, the Prosecution filed the Request at issue which seeks to have both language versions of the Intercepts added to its Exhibit List under Rule 102(1)(b) of the Rules.⁷ The Defence notes that this is the tenth time the Prosecution has sought to amend its Exhibit List.⁸ The Prosecution last motioned to have its Exhibit List amended on 29 March 2023.⁹ On that occasion,

⁴ See, Annex 1, p. 1.

⁵ See, Annex 1, p. 1.

⁶ See, Disclosure Package 829 containing 111491-111682-ET and 111687-111889-ET.

⁷ See generally, F01622.

⁸ See generally, F00670, *Prosecution notice of Rule 102(1)(b) disclosure and related requests*, 31 January 2022, confidential; F00708, *Prosecution Rule 102(2) submission and related requests with confidential Annexes 1 and 2 and strictly confidential ex parte Annex 3*, 24 February 2022, confidential; F00767, *Prosecution Request to Amend the Exhibit List and for Protective Measures with Annexes 1, 4-9, confidential, and Annexes 2-3, strictly confidential and ex parte*, 13 April 2022, confidential. A public redacted version was released on 3 April 2023 F00767/RED. F00774, *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, confidential; F00890, *Prosecution Rule 102(2) submission and related requests’*, KSC-BC-2020-06/F00890, dated 20 July 2022 with strictly confidential and ex parte Annexes 1-7 and 9, and confidential Annex 8, 21 July 2022, confidential; F00891, *Confidential Redacted Version of ‘Prosecution Request to Amend the Exhibit List and for Protective Measures’*, KSC-BC-2020-06-F00891, dated 20 July 2022, 21 July 2022, confidential; F00947, *Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials with Annexes 1-2, strictly confidential and ex parte*, 2 September 2022; F01238, *Prosecution Request to Amend the Exhibit List and Related Matters with Confidential Annexes 1-47*, 30 January 2023, confidential; F01405, *Prosecution Request to Add Five Items Relating to Expert Witness to the Exhibit List*, 29 March 2023, confidential, with Annexes 1-5, confidential. A public redacted version was filed on 12 April 2023, F01405/RED.

⁹ See generally, F01405.

it sought to have **five** items added to the Exhibit List.¹⁰ Given the limited scope of that request, none of the defence teams responded. As such, the Trial Panel approved the request on 23 May 2023.¹¹

III. APPLICABLE LAW

9. Article 21 of the Law protects the Accused's right to have adequate time and facilities for the preparation of his or her Defence,¹² as well as the right to be tried within reasonable time.¹³
10. According to Rule 102(1)(b)(iii) of the Rules, the Prosecution is required to provide the Defence "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 [...] the exhibits that the Specialist Prosecutor intends to present at trial."
11. Moreover, Rule 118(2) of the Rules states that the Prosecution must provide "timely notice and a showing of good cause," for any amendments to its witness or exhibit list.
12. The Defence notes that the Trial Panel previously stated that the Exhibit List's primary function was "to give notice to the Defence of the documents the SPO intends to use during its case, which will allow timely and effective Defence preparation and ensure the efficient presentation of evidence during trial."¹⁴

¹⁰ F01405, para. 1.

¹¹ F01544, *Decision on Prosecution Request to Add Five Items Relating to Expert Witness to the Exhibit List*, 23 May 2023, confidential, para. 16.

¹² Article 21(4)(c) of the Law. *See also*, Article 6(3)(b) of the European Convention on Human Rights ("ECHR").

¹³ Article 21(4)(d) of the Law. *See also*, Article 6(1) of the ECHR.

¹⁴ F01352, *Decision on Prosecution Request to Amend the Exhibit List and Related Matters*, 8 March 2023, confidential, para. 28 referring to KSC-BC-2020-07/F00321, *Decision on Prosecution's Request for Leave to Amend its List of Exhibits*, 23 September 2021, public, para. 15.

13. Lastly, The Defence recalls that in determining the legitimacy of proposed additions to the Exhibit List, the following factors must be considered:
- a. Whether the proposed evidence was *prima facie* relevant and of sufficient importance to justify the late addition;
 - b. Whether the proposed additions were notified sufficiently in advance of trial and do not cause undue prejudice to the Accused's trial preparations;
 - c. Whether good cause is shown for the late additions.¹⁵

IV. SUBMISSIONS

14. The Defence submits that the Request does not satisfy the requirements for amending the Exhibit List at this stage of the proceedings.¹⁶ It is untimely, fails to show good cause, and comprises a significant volume of material that is irrelevant to the Prosecution's case. The Request should be rejected in order to avoid significant and unfair prejudice to the Defence.

A. The Request is Untimely

15. The Prosecution has failed to provide the Defence with timely notice of the Intercepts. Despite obfuscating this problem by referring to three disclosed requests for [REDACTED] ("[REDACTED]") addressed to [REDACTED],¹⁷ the reality is that two of those requests were entirely general and covered a broad range of activities,¹⁸ and the third pertained to a discrete selection of 45

¹⁵ KSC-BC-2020-07/F00321, para. 15.

¹⁶ See paragraph 13 above referring to KSC-BC-2020-07/F00321, para. 16

¹⁷ See, 5013313-5013392 RED ([REDACTED] from 12 February 2019); 5010349-5010394 RED ([REDACTED] from 19 June 2020); 5011346-5011393 ([REDACTED] from 9 December 2020).

¹⁸ See, **5013313-5013392 RED ([REDACTED] from 12 February 2019)**, p. 5013331 (Activity 1/1: [REDACTED]), pp. 5013331-5013332 (Activity 2: [REDACTED] "[REDACTED]"), p. 5013332 (Activity 3: request for intercepted communications), pp. 5013332-5013333 (Activity 4: [REDACTED]), p. 5013333 (Activity 5: [REDACTED]), pp. 5013334- 5013337 (Activity 6: [REDACTED]), p. 5013337 (Activity 7:

communications nestled within a larger request for assistance.¹⁹ It would be completely unreasonable to suggest that these [REDACTED] would have put the Defence on notice of the current request.

16. Moreover, the Prosecution's claim that it followed-up "on a number of occasions" with the [REDACTED] authorities about the Intercepts – given that the materials provided were "not (fully) responsive to the [REDACTED]" – makes no reference whatsoever to any correspondence between the Prosecution and the [REDACTED] authorities. Instead, the Request makes the rather general and unsupported statement that the Prosecution raised the issue of the Intercepts with the [REDACTED] authorities "on a number of occasions."²⁰ To this end, the Defence further notes that the third [REDACTED] referred to by the Prosecution was issued in **December 2020**. In the absence of any other correspondence between the Prosecution and [REDACTED] authorities, the Defence is forced to take the Request at face value and assume that the Prosecution's last formal inquiry about the Intercepts was approximately two and half years ago. Any claim that the Prosecution acted diligently in seeking timely provision of the Intercepts is, at this stage, entirely baseless and incapable of scrutiny by any of the Parties to these proceedings.
17. None of this, of course, detracts from the obvious issue that the Prosecution seeks to minimise the untimely notice of the Intercepts with reference to the disclosure of the [REDACTED] and English versions of the Intercepts on 6 April and 20 June 2023 respectively.²¹ In reality, however, this merely demonstrates

redacted); **5010349-5010394 RED ([REDACTED] from 19 June 2020)**, pp. 5010359-5010360 (Activity 1: [REDACTED]), pp. 5010360-5010362 (Activity 2: request for intercepted communications).

¹⁹ See, **5011346-5011393 ([REDACTED] from 9 December 2020)**, pp. 5011371-5011374 (Activity 1: request for authentication of matters associated with interception of communications), pp. 5011374-5011375 (Activity 2: [REDACTED]), pp. 5011375-5011377 (Activity 3: [REDACTED]), p. 5011377 (Activity 4: [REDACTED] of Activity 3).

²⁰ F01622, para. 7.

²¹ F01622, para. 8.

that the Prosecution continues to disclose Rule 102(1)(b) material (albeit misrepresented as Rule 102(3) material) in the middle of trial, which any reasonable Prosecutor would have obtained and disclosed at a much earlier stage and certainly before the start of the evidentiary proceedings.

18. Furthermore, a crucial detail which the Prosecution neglects to acknowledge is that the Defence had requested translations of the Intercepts on 7 April 2023, noting their obvious potential importance to the case.²² The Prosecution's response on 11 April 2023 indicated that "courtesy translations" would be provided "when they [became] available" but provided no indication whatsoever of its forthcoming request to add these items to its Exhibit List.²³ Notwithstanding the Defence's request, as well as the Prosecution's own assurance that it would translate the Intercepts, it took over **one month** to finalise their translation. Then, just **three days** after the translations were disclosed under Rule 102(3), the Prosecution determined that the Intercepts should be reclassified as inculpatory and used with, *inter alia*, W04746 – a key witness who is due to testify imminently.²⁴
19. There is simply no excuse as to why it took **four years** to acquire, process, translate, disclose and ultimately re-categorise the intercepts as inculpatory. The Defence recalls that whilst the Exhibit List is to be treated with some "flexibility," the Request at issue was filed approximately four months after the deadline for amending the Exhibit List had elapsed.²⁵ Indeed, the Request is ostensibly late and it is within the remit of the Trial Panel to reject it on this basis alone.

²² See, Annex 1, p. 1.

²³ See, Annex 1, p. 1.

²⁴ W04746 will testify in the next evidentiary block, commencing on 7 July 2023.

²⁵ See, Rule 102(1)(b)(iii) of the Rules.

B. The Request Fails to Show Good Cause

20. The Prosecution relies upon the Intercepts' purported relevance, importance and probative value to demonstrate that good cause exists for their late addition to the Exhibit List.²⁶ In practice, however, the Request lacks specificity and attempts to inundate the Exhibit List with 398 pages of material which, for the most part, are not probative of the allegations against Mr Veseli, or at all. Whereas the Defence concedes that some intercepts *might* be relevant, important and probative, the Prosecution fails to identify which ones *actually* fulfil this criteria. Instead, it has opted to cite hundreds of pages of Intercepts under broad categories that give the impression of specificity, yet, upon closer inspection, make it plainly evident that many of them are entirely immaterial to the case at hand.
21. First, the Defence observes that out of the 398 pages for which addition to the Exhibit List is sought, no reference is made to approximately 121 pages across both sets of Intercepts.²⁷ It is quite simply insufficient for the Prosecution to argue that *all* the intercepts are relevant, important and probative whilst simultaneously (i) making no reference to almost 30% of the pages contained therein; and (ii) claiming that the Request cites "a non-exhaustive selection of the communications" from the larger repository it seeks to add to the Exhibit List.²⁸

²⁶ F01622, paras 9-14.

²⁷ See, **111485-111682-ET**, pp. 111492, 111498, 111506-111508, 111512, 111518, 111520-111521, 111524-111526, 111530, 111538, 111541, 111547, 111551-111554, 111560, 111570, 111575, 111576, 111581, 111583, 111587, 111589, 111600, 111604-111605, 111614, 111621-111623, 111626-111627, 111629, 111639-111640, 111644, 111646, 111657-111658, 111662, 111665, 111667, 111670, 111674-111675, 111677, 111679, 111681; **111687-111889-ET**, 111189-111690, 111695, 111697, 111700, 111703, 111706, 111707, 111711, 111718-111720, 111725-111726, 111729-111730, 111735, 111739, 111747, 111750, 111757, 111760, 111766, 111772-111774, 111779, 111781-111784, 111789, 111790, 111795, 111802-111808, 111810-111811, 111816, 111821, 111825-111826, 111830-111831, 111835, 111837, 111839, 111843, 111846, 111850, 111854, 111856, 111859, 111864, 111872, 111874-111876, 111881, 111884, 111886, 111887, 111888.

²⁸ See, F01622, para. 9, footnote 22.

22. Second, the Prosecution refers exclusively to entire pages of the Intercepts without acknowledging that the vast majority comprise two or more intercepted conversations per page. Therefore, even if a claim is ‘supported’ by reference to a page (or page range), it is wholly unclear which specific conversation is at issue. Indeed, as it currently stands, the burden of sifting through the Intercepts and identifying which conversations are relevant, important and/or probative to the Prosecution’s case is shifted to the Defence, at a moment when it is preparing to cross-examine a key organisational witness. As a matter of law, however, the precise identification of evidence upon which the Prosecution seeks to base its case is an obligation that lies with the Prosecution. This issue is further compounded by the unavoidable fact that large portions of the Intercepts concern mundane conversations²⁹ between people who, more often than not, are either unknown, unidentified or otherwise irrelevant to the case at hand.³⁰ Frankly speaking, there are an inordinate number of examples supporting the Defence’s concerns in this respect, all of which are neatly encapsulated by the following intercept between “[REDACTED]” and “[REDACTED]” on [REDACTED]:

[REDACTED].³¹

²⁹ In this respect, the Defence refers to the Trial Panel to a non-exhaustive selection of examples: **111485-111682-ET**, pp. 111526, 111546, 111556, 111557, 111560, 111639, 111641, 111648; **111687-111889-ET**, pp. 111791, 111794, 111797, 111843, 111846, 111848, 111870-111871, 111863.

³⁰ The Defence refers specifically to conversations concerning one or more interlocutors identified as “[REDACTED]”, “[REDACTED]” or otherwise have unknown aliases. Again, the Defence refers to a non-exhaustive selection of examples: **111485-111682-ET**, pp 111506-111508, 111510-111512, 111515-111516, 111520-111523, 111526, 111528, 111530-111531, 111533-111534-111536, 111539-111541, 111546-111547, 111549, 111552, 111556, 111558, 111564, 111567-111569, 111573-111574, 111576-111582, 111585, 111588-111590, 111592, 111594, 111596, 111603, 111605-111606, 111614-111615, 111618-111620, 111622, 111624, 111626-111627, 111629, 111634, 111637, 111640, 111645-111648, 111651, 111655-111656, 111662, 111669, 111672, 111674-111675, 111677, 111679, 111680; **111687-111889-ET**, pp. 111687, 111688, 111703-111704.

³¹ See, 111485-111682-ET, p. 111567.

23. Third, the Intercepts also comprise an alarming number of editorialised conversations presumably compiled by [REDACTED] officials.³² They do not articulate what was said verbatim but instead provide a summary of a conversation. This is obviously incapable of further scrutiny by the Defence precisely because the actual words uttered are unavailable. Whilst the Defence reiterates its concerns regarding the reliability of evidence emanating from [REDACTED],³³ it submits that editorialised intercepts from any source present issues of reliability. The same holds true in respect of the remaining Intercepts which are not summaries of conversations, for those are simply [REDACTED] translations of conversations conducted in Albanian. There is simply no way to check the veracity of the translations in this respect.³⁴ Under these circumstances, the Prosecution's argument that the Intercepts are sufficiently relevant, important and probative to justify their late inclusion cannot be sustained.
24. Fourth, the Defence takes issue with the Prosecution's intention to use the Intercepts with W04746 without actually having the information contained therein authenticated by witnesses who can speak to their content.³⁵ In essence, to use what can only be described as unverified verse purporting to be Intercepts is equivalent to putting the cart before the horse, and would result in a situation whereby W04746 is confronted with material about whose accuracy none of Parties can be completely sure. This is especially true

³² See for example, **111485-111682-ET**, pp. 111495, 111497, 111547, 111549, 111552, 111564, 111577-111581, 111605, 111619, 111622, 111624, 111633, 111640, 111648, 111651, 111656, 111680; **111687-111889-ET**, pp. 111688, 111703, 111710, 111711, 111731, 111749, 111751-111752, 111754, 111758-111759, 111762, 111802.

³³ See generally, [REDACTED].

³⁴ See generally, 111491-111682/111491-111682-ET and 111687-111889/111687-111889-ET.

³⁵ For example, [REDACTED].

considering there are no audio files capable of verifying the Intercepts' contents.

25. It follows that a responsible Prosecution would not categorise intercepts of the kind referred to above as *prima facie* relevant, important and/or probative. Indeed, a responsible Prosecution would either have obtained and reviewed this material at a much earlier date, or explained in clear terms why this was not possible despite its due diligence. In either case, it would then have identified the intercepts within this collection that clearly supported its case and communicated that to the Defence. The law is an endeavour predicated upon precision which enjoins the Prosecution to conduct its case in the most accurate and fastidious way possible. The Request at issue falls well short of that standard.
26. Given that the Prosecution "intends to tender the Intercept Files or use them during the examination of relevant witnesses, including certain interlocutors purportedly reflected in the intercepted communications,"³⁶ the Defence submits that, at a minimum, the Prosecution should be ordered to file an amended request with a comprehensive and accurate list of the precise Intercepts upon which it ultimately seeks to rely.
27. Accordingly, the threshold contained in Rule 118(2) of the Rules has not been met. The Prosecution has failed to demonstrate that good cause exists for the addition of the Intercepts to the Exhibit List. The Defence submits that the Request ought to be rejected as such.

³⁶ F01622, para. 2.

C. Amendment of the Exhibit List Greatly Prejudices Mr Veseli's Fair Trial Rights

28. In furtherance of the above, the Defence submits that if the entirety of the Intercepts are added to the Exhibit List, Mr Veseli's right to have adequate time to prepare a Defence would be invariably prejudiced. This is particularly true with respect to the intercepts concerning W04746. As mentioned above, W04746 is due to testify in approximately two weeks.³⁷ He is an important witness who is set to testify about issues going to the heart of the Prosecution's case and, consequently, Mr Veseli's innocence. The Defence is currently undertaking the arduous task of examining the many (prior) statements, associated exhibits and other evidentiary materials related to him. Adding more documents on the eve of his testimony only serves to further complicate the Defence's preparations.

29. The Defence reiterates the Pre-Trial Judges warning that it "cannot be expected to prepare a defence on a case that is constantly evolving."³⁸

V. CONCLUSION

30. In light of the foregoing, the Defence requests that the Trial Panel reject the Request. In the alternative, the Prosecution must be ordered to refile the request with a view to identifying individual intercepts which it seeks to add to the Exhibit List.

Word Count: 3,507



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³⁷ See, footnote 24 above.

³⁸ Transcript, 4 February 2022, p. 928.

Counsel for Kadri Veseli

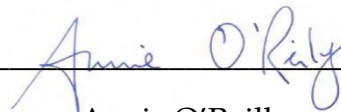
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