

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 Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Hashim Thaçi
Defence Counsel for Rexhep Selimi
Defence Counsel for Jakup Krasniqi

Date: 21 July 2023

Language: English

Classification: Public

Public Redacted Version of ‘Thaçi, Selimi and Krasniqi Defence Response to “Prosecution Request to Add Intercepted Communications to the Exhibit List”’, KSC-BC-2020-06/F01637, dated 3 July 2023

Acting Specialist Prosecutor
Alex Whiting

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Victims
Simon Laws KC

Counsel for Kadri Veseli
Ben Emmerson KC

Counsel for Rexhep Selimi
Geoffrey Roberts

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Hashim Thaçi, Rexhep Selimi and Jakup Krasniqi (“Defence”) hereby opposes the Specialist Prosecutor’s Office (“SPO”) request to add intercepted communication (“Requested Materials”) to the Exhibit List.¹

2. The Request should be dismissed in full. The SPO has not shown that timely notice and good cause exist justifying the addition of almost 400 pages of allegedly intercepted communications at this stage of trial proceedings. Late obtainment and disclosure of alleged intercept reports is imputable to the SPO, which failed to act with diligence and due anticipation both before and after the Requested Materials were received. In parallel, adding the alleged intercept reports to the Exhibit List at this stage of the proceedings – after several witnesses have already testified and other witnesses are due to testify shortly - will impact the Accused’s right to have adequate time to prepare, and will have inevitable repercussions on the expeditiousness of the proceedings. Coupled with concerning issues of reliability affecting the Requested Materials, no justification exists for their late addition, and the Request should accordingly be rejected.

3. Should the Trial Panel ultimately grant the Request, in order to safeguard the rights of the Defence, the Defence requests the Trial Panel to: -

- a. Order the SPO to schedule the testimony of individuals on its witness list who were somewhat involved in the interception process, before the Requested Materials are used during witness examinations and tendered for admission; and

¹ KSC-BC-2020-06, F01622, Specialist Prosecutor, *Prosecution request to add intercepted communications to the Exhibit List* (“Request”), 23 June 2023, confidential.

b. Order the SPO not to use the Requested Materials during the examination of W04746 or, alternatively, order the SPO to re-schedule the testimony of W04746 to a later stage. The Defence does not have enough time to prepare, and to use these materials during the July block would infringe on the Accused's fair trial rights.

4. Pursuant to Rule 82(4) of the Rules,² this filing is classified as confidential as it responds to a document with the same classification.

II. APPLICABLE LAW

5. The right of an accused to a fair trial is enshrined in Article 31 of the Constitution of the Republic of Kosovo ("Constitution"), Articles 1(2) and 21(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Article 6(1) of the European Convention on Human Rights ("ECtHR"). As part of his or her fair trial rights, an accused is entitled to have adequate time and facilities for the preparation of his or her defence, pursuant to Article 30(3) of the Constitution, Article 21(4)(c) of the Law, and Article 6(3)(b) of the ECtHR; and to be tried within a reasonable time pursuant to Article 31(2) of the Constitution, Article 21(4)(d) of the Law, and Article 6(1) of the ECtHR.

6. Rule 102(1)(b) of the Rules states that within a time limit set by the Pre-Trial Judge, and no later than 30 days prior to the opening of the SPO's case, the SPO shall make available to the Defence, *inter alia*, the exhibits that the SPO intends to present at trial.³

² Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").

³ Rule 102(1)(b)(iii), emphasis added.

7. Rule 118 of the Rules provides that “[t]he Panel may permit, upon timely notice and a showing of good cause, the amendment of the lists of witnesses and exhibits filed pursuant to Rule 95(4)(b).”

8. According to paragraph 48 of the Order on the Conduct of Proceedings,⁴ “[a]ny request to amend [the witness and exhibit] lists shall be done at the earliest possible opportunity and, but for exceptional circumstances, sufficiently in advance of the commencement of the Party’s case.”⁵

9. The Trial Panel has previously held that the primary purpose of the Exhibit List is to give notice to the Defence of the documents the SPO intends to use at trial, so as to allow timely and effective Defence preparations.⁶ However, subject to *timely notice* and *good cause*, amendments to witness and exhibit lists may be permitted.⁷

10. 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.⁸ Exceptional circumstances must always be balanced with an adequate protection of the rights of the Accused: the Panel must be satisfied that amendments to the exhibit list at that stage of the proceedings provide the accused sufficient notice and do not

⁴ KSC-BC-2020-06, F01226/A01, Trial Panel II, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, public.

⁵ Emphasis added.

⁶ KSC-BC-2020-06, F01352, Trial Panel II, *Decision on Prosecution Request to Amend the Exhibit List and Related Matters* (“8 March Decision”), 8 March 2023, confidential, para. 28.

⁷ KSC-BC-2020-07, F00408, Trial Panel II, *Decision on the Prosecution’s Second Request for Additions to Its Witness and Exhibit Lists*, 1 November 2021, public, para. 18.

⁸ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1733, Trial Chamber VI, *Decision on Prosecution Application under Rule 68(2)(B) and Regulation 35 for Admission of Prior Recorded Testimony of Witness P-0551*, 19 January 2017, para. 7; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1191, Trial Chamber VII, *Decision on Prosecution Request to Add 12 Items to its List of Evidence*, 27 August 2015, para. 9.

adversely affect his ability to prepare for trial.⁹ Throughout this balancing exercise, the rights of the Accused remain the primary concern.¹⁰

11. Additionally, the Trial Panel has previously held that amendments to the Exhibit List should not be granted with respect to items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence.¹¹ Other relevant factors to consider include whether the proposed evidence is *prima facie* relevant and of probative value to the charges against an accused, the complexity of the case, ongoing investigations, and translation of documents and other materials.¹²

12. Timely notice, in turn, requires that any amendment does not adversely affect an accused's ability to prepare for trial.¹³ In line with its instructions on the Order on the Conduct of Proceedings, the Trial Panel has previously considered whether the Request was filed before or after the commencement of trial proceedings.¹⁴

⁹ 8 March Decision, para. 31; KSC-BC-2020-06, F01544, Trial Panel II, *Decision on Prosecution Request to Add Five Items Relating to Expert Witness to the Exhibit List* ("23 May Decision"), 23 May 2023, public, para. 11. *See also* ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-379, Pre-Trial Chamber II, *Decision on Two Requests to Vary the Time Limit for Disclosing Incriminating Evidence*, 6 May 2021, para. 27; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, *Decision on Prosecution's Motion for Leave to Amend its Exhibit List*, 19 October 2011 ("Karadžić Decision"), para. 9.

¹⁰ KSC-BC-2020-06, IA019/F00006, Court of Appeals Panel, *Decision on Thiçi Appeal against Decision on Specialist Prosecutor Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 12 July 2022, public, para. 21.

¹¹ 8 March Decision, para. 31; 23 May Decision, para. 11. *See also* ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Chamber I, *Decision on Sixteenth Prosecution Motion for Leave to Amend its Rule 65 Ter Exhibit List with Confidential Annex (Mladić Notebooks)*, 7 October 2010, para. 11.

¹² 8 March Decision, para. 31; 23 May Decision, para. 11. *See also* Karadžić Decision, para. 9.

¹³ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber I, *Decision on the Prosecution's Request to Add Two Witnesses to Its Witness List and to Substitute one Witness for Another*, 1 November 2007, para. 4.

¹⁴ 23 May Decision, para. 10.

III. SUBMISSIONS

A. THE SPO DID NOT SHOW TIMELY NOTICE OR GOOD CAUSE

13. Contrary to its submissions in the Request, the SPO did not exercise the required diligence in requesting, obtaining, translating and disclosing the alleged intercept reports it now seeks to add to its Exhibit List, almost three months into the trial. The delay in obtaining and disclosing these materials is not the result of unforeseeable circumstances of exceptional nature; on the contrary, it is imputable to the SPO's inactivity. On this basis alone, the Request should be rejected.

14. Reports of communications allegedly intercepted by [REDACTED] were first requested in February 2019.¹⁵ In the first Request for Assistance ("RFA"), the SPO sought the transmission of all recordings and interceptions logs of oral communications between persons known to be or suspected to be members of the KLA, which were intercepted between 1998 and 2000 (inclusive).¹⁶ This RFA was complemented in June 2020, when the SPO reiterated its previous request, and provided [REDACTED] with a list of persons of interest, including the four Accused and other alleged JCE members or prominent people in the KLA.¹⁷

15. In July 2020, [REDACTED] informed the SPO that they had identified several interception reports dated between 1998 and 2000, involving the individuals mentioned in the SPO's second RFA.¹⁸ In October 2020,¹⁹ the [REDACTED] provided additional alleged intercept reports to the SPO.

¹⁵ Request, para. 6; 5013313-5013392 RED, p. 5013332.

¹⁶ 5013313-5013392 RED, p. 5013332, emphasis added.

¹⁷ 5010349-5010394 RED, p. 5010361. This list of individuals includes: [REDACTED], Hashim Thaçi, Kadri Veseli, Rexhep Selimi, Jakup Krasniqi, [REDACTED].

¹⁸ 076927-076935, p. 076928.

¹⁹ 082648-082654; 084272-084284.

16. On 9 December 2020, the SPO sent a further request to the [REDACTED]; notably, however, the SPO did not express dissatisfaction with what had been provided, nor did it request additional reports of allegedly intercepted communications. The SPO simply asked the [REDACTED] to identify the operators who were involved in the interception of 45 identified call records, together with their managers and supervisors, and to make them available for an interview.²⁰

17. In summary, the last SPO request for alleged intercepts is dated in June 2020 - more than three years ago. Since then, the SPO has not followed-up with [REDACTED], nor has it sent any other request - let alone any urgent request – seeking additional reports of allegedly intercepted communications. Even after having obtained a substantial amount of alleged intercept reports in the first half of 2021,²¹ the SPO has had almost two years to convey that this material was not fully responsive to the RFAs, and to request, obtain, translate and disclose additional records before the commencement of trial. No record of any such action is referenced in the Request. The lack of any reference in support of the SPO's claim that "this was raised with [REDACTED] on a number of occasions"²² is also telling: the SPO is trying to masquerade its own inertia in a scant attempt to show the timeliness of the Request.

18. Basic considerations of diligence would have required the SPO to do everything in its power to ensure timely receipt and disclosure of this evidentiary material, of which it has been aware since 2019. This would include continuously liaising with – and exercising pressure on – its [REDACTED] interlocutors during the pre-trial phase, in an effort to minimise, if not avoid, the prejudice caused to the Defence. Regrettably, the SPO failed to do so. The delay in obtaining and disclosing this material - which, as

²⁰ 5011346-5011393 RED, pp. 5011371-5011374.

²¹ Request, para. 6.

²² *Idem*, para. 7.

outlined below, seriously impacts the Defence ability to prepare – is not the result of ‘exceptional circumstances’ outside the control of the SPO, but rather of the SPO’s inactivity throughout the pre-trial phase.

19. Furthermore, at no point did the SPO seek to apprise the Trial Panel of the outstanding request and the [REDACTED] unresponsiveness in that respect, as its due diligence obligation would have required. Rather, in January 2023, the SPO explained that it had completed the disclosure of all the evidence it proposed to present at trial, and confirmed that its lists of proposed witnesses and exhibits were final, subject to the request to amend its exhibit list that was filed later that month.²³ It was incumbent upon the SPO to inform the Panel of the difficulties associated with the production of the evidence it now brings up for the first time, and to give notice to the Parties and participants of this outstanding request. The SPO has markedly failed to do so.

20. Moreover, even after having received the Requested Materials on 22 March 2023, the SPO did not act with due diligence. While the Defence acknowledges that the materials are voluminous, and that translation from [REDACTED] can require additional time, the SPO could have disclosed to the Defence the translated records on a rolling basis,²⁴ which would have at least alleviated the prejudice caused by receiving the materials in one voluminous batch only three weeks before the scheduled testimony of W04746.

21. Further, the Request must be contextualised in a never-ending pattern of SPO amendments requests, which condemns the Defence to continuously adjusting its preparations to what is effectively a moving target. Since it filed its first Witness and

²³ KSC-BC-2020-06, Transcript of Hearing, 18 January 2023, public, p. 1782.

²⁴ Translations were received by the SPO on a rolling basis. *See* Request, para. 8.

Exhibit List, on 17 December 2021,²⁵ the SPO has filed at least nine requests to amend its Exhibit List,²⁶ which, despite continuous Defence objections, were all granted by the Pre-Trial Judge²⁷ or the Trial Panel.²⁸ Already in February 2022, the Pre-Trial Judge had expressed concern with the SPO's continuous investigations after the filing of its pre-trial brief, witness list and exhibit lists, and had clearly stated that the transmission of the case-file to the Trial Panel should mark the end of investigations and crystalize the Prosecution case to allow for Defence preparations:

²⁵ KSC-BC-2020-06, F00631/RED/A03/CONF/RED, Specialist Prosecutor, *Annex 3 to Public Redacted Version of 'Submission of Pre-Trial Brief, with Witness and Exhibit Lists'*, KSC-BC-2020-06/F00631, dated 17 December 2021", 21 December 2022, confidential.

²⁶ KSC-BC-2020-06, F00670/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Notice of Rule 102(1)(b) Disclosure and Related Requests'*, 31 January 2022, confidential; F00708, Specialist Prosecutor, *Prosecution Rule 102(2) Submission and Related Requests*, 24 February 2022, confidential, with Annexes 1-2, confidential, and Annex 3, strictly confidential and *ex parte*; F00767, Specialist Prosecutor, *Prosecution Request to Amend the Exhibit List and for Protective Measures*, 13 April 2022, confidential, with Annexes 1, 4-9, confidential, and Annexes 2-3, strictly confidential and *ex parte*; F00774/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Request to Amend the Exhibit List and for Protective Measures (KSC-BC-2020-05)'*, 20 April 2022, confidential, with Annex 1, confidential, and Annexes 2-16, strictly confidential and *ex parte*; F00890/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Rule 102(2) Submission and Related Requests'*, KSC-BC-2020-06-F00890, dated 20 July 2022, 21 July 2022, confidential; F00891/CONF/RED, Specialist Prosecutor, *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/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials*, 2 September 2022, confidential, with Annexes 1-2, strictly confidential and *ex parte*; F01238, Specialist Prosecutor, *Prosecution Request to Amend the Exhibit List and Related Matters with Confidential Annexes 1-47*, 30 January 2023, confidential; F01405, Specialist Prosecutor, *Prosecution Request to Add Five Items Relating to Expert Witness to the Exhibit List with Confidential Annexes 1-5*, 29 March 2023, confidential.

²⁷ KSC-BC-2020-06, F00727/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 8 March 2022, confidential, para. 54; F00779, Pre-Trial Judge, *Decision on Specialist Prosecutor's Rule 102(2) and Related Requests*, 22 April 2022, confidential, para. 55; F00876/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 8 July 2022, confidential, para. 107; F00957/CONF/RED, Pre-trial Judge, *Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 6 September 2022, confidential, para. 107; F01057/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on Prosecution Rule 102(2) Submission and Related Requests*, 27 October 2022, confidential, para. 304; F01142/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on Prosecution Request to Amend the Exhibit List and for Protective Measures*, 6 December 2022, confidential, para. 58; F01058/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials*, 27 October 2022, confidential, para. 47.

²⁸ 8 March Decision; 23 March Decision.

“[T]he factual basis of the case of the SPO shall be set before trial and **that SPO investigations in this case should largely be completed by the time the case is transmitted to the Trial Panel. General investigations should not continue throughout the trial.** There needs to be a case file that is properly transmitted to the Trial Panel. Rule 102(4) confirms that objective. Only under exceptional circumstances can additional evidence be disclosed and subsequently used at trial. **The Defence cannot be expected to prepare a defence on a case that is constantly evolving.**”²⁹

22. Such concerns were then echoed by the Trial Panel, which in January 2023 sought and received confirmation from the SPO that there would be no additional requests for amendments of the Exhibit List:

PRESIDING JUDGE SMITH: [...] can you also reassure the Panel that this is a one-off blip caused by your trial preparation and that we will not get similar applications every time a new group of witnesses is put forward.

[...]

MR. QUICK: In relation to Your Honours' question about assurance of whether this will be done again. **The SPO can confirm that at this point there is no additional request to amend that is foreseen.** But as is acknowledged in the Order on the Conduct of Proceedings, there may be circumstances where additional documents that the SPO wishes to use with the witness, that we may, in those circumstances, seek to add those documents to the exhibit list. I'm happy to provide further clarification.

PRESIDING JUDGE SMITH: Well, **surely after all these years, and having claimed to be ready for trial for more than two years, you must be confident and ready to go to trial with your list of witnesses and your exhibits,** and yet we get a new list now. We don't want to have a new list next week. **We don't want -- the next time you get 12 more witnesses, we don't want to be told there are some more exhibits you forgot.** We want your assurance that you're finished, that you've found everything there is to find. It's your file. Those are your files. Nobody else owns them.

MR. QUICK: Yes, that is totally understood, Your Honour. And we understand that there is a procedure in the Rules and in the Conduct of Proceedings for amending the exhibit list, and **there is a higher threshold as we move along, and we acknowledge that.**³⁰

23. Yet, the Request moves to add almost 400 pages of allegedly intercepted communications to the Exhibit List. On the one hand, the SPO now claims that it was liaising with the [REDACTED] to receive this material in a timely fashion,³¹ on the other, it did not hesitate to state on the record, just a few months ago, that “there is no

²⁹ KSC-BC-2020-06, Transcript of Hearing, 4 February 2022, public, p. 928 (emphasis added).

³⁰ KSC-BC-2020-06, Transcript of Hearing, 15 February 2023, public, pp. 2015-2018 (emphasis added).

³¹ Request, paras 7-8.

additional request to amend that is foreseen". This practice shows that the SPO's reassurances cannot be trusted. Such requests cannot be tolerated because it will lead to yet more late requests for amendments, to the prejudice of the Accused. The SPO's failure to conduct its case in a diligent manner cannot be tolerated at the expense of the Accused's fair trial rights.

B. THE REQUEST CAUSES UNDUE PREJUDICE TO THE DEFENCE

24. Regardless of the timeliness of the Request, the addition of new materials at this stage of the proceedings should not be permitted in light of the undue prejudice it would cause to Defence preparations.

25. By now, the SPO is three months into the presentation of its case, and 11 witnesses have already testified, either live or pursuant to Rule 154. The testimonies of these witnesses have covered several locations, events, and individuals, many of which, as submitted by the SPO, feature in the Requested Materials.³² The Defence has already begun to put forward its case through the cross-examination of SPO witnesses and the evidence submitted for admission. Should the Request be granted, the overall Defence case would have to be revisited in full, and the Defence would have lost the opportunity to shape its strategy and cross-examination lines on the basis of *all* the material the SPO intends to rely on to prove its case. Notably, such prejudice could not even be cured by re-calling some of these witnesses.

26. Looking forward, the addition of the Requested Materials to the Exhibit List would be even more prejudicial, both to the Accused's right to have adequate time to prepare and to the expeditiousness of the proceedings. The alleged intercept reports comprise almost 400 pages. Over 75 calls are allegedly attributed to the Accused. The

³² See *e.g.*, Request, fns 25-31.

vast majority of the remaining alleged intercept reports either name one of the Accused, or refer to alleged members of the JCE or indicted events. The presentation of evidence cannot continue until the Defence has had adequate time to review and analyse the content of the Requested Materials, receive instructions from the Accused, and investigate both the events and individuals mentioned therein, and all the reliability issues associated with this evidentiary material. Should the Request be granted, the Defence would be compelled to move for an adjournment, with inevitable repercussions on the expeditiousness of the proceedings.

27. The purpose of the Exhibit List is to give notice to the Defence of the documents the SPO intends to use at trial.³³ It is on the basis of these documents that the Defence prepares to respond to the SPO case. If allowed to change constantly, the purpose of the Exhibit List is effectively defeated. It is noteworthy that in ruling on previous SPO requests to amend its Exhibit list, the Trial Panel found that the prejudice to Defence preparation was alleviated by the fact that notice of the requested addition was given within the time limit set by Rule 102(1)(b)(iii), *i.e.* no later than 30 days prior to the opening of the Prosecution case.³⁴ The Request was filed almost three months *after* the opening of the Prosecution case. Any interest militating in favour of the addition of the Requested Materials is far outweighed by the prejudice that such an addition would cause to the Defence and to the expeditiousness of the proceedings.

28. The fundamental issues of reliability associated with these reports also weigh against the requested amendment to the Exhibit List. The Defence acknowledges that issues of reliability pertain mostly to assessments of *admissibility*, and refrains from including extensive submissions in the present response. However, the Trial Panel has previously held that amendments to the Exhibit List should not be granted with

³³ 8 March Decision, para. 28.

³⁴ *Ibidem*.

respect to items which would ultimately be denied admission into evidence.³⁵ For this reason – and without prejudice to further submissions should the Request be granted and should the SPO seek to tender the Requested Materials into evidence – the Defence submits that the intercept reports are fundamentally unreliable because, *inter alia*:

- a. **The original audio recordings do not exist,**³⁶ preventing the Defence from verifying the occurrence of the allegedly intercepted communication, the accuracy of the transcripts and related information, and check for errors, mistranslations, and potential instances of tampering with the evidence. It also prevents the Defence from obtaining expert evidence to verify the authenticity and reliability of the recordings;
- b. **The allegedly intercepted Albanian conversations were transcribed [REDACTED],**³⁷ meaning that there was never any written record of the original Albanian words allegedly spoken;
- c. **These original transcriptions were destroyed.**³⁸ What was disclosed to the SPO are only subsequent notes drafted on the basis of the original transcriptions. This also prevents the Defence from verifying the accuracy of the transcripts and related information, and check for errors, mistranslations, and potential instances of tampering with the evidence;
- d. **The alleged intercepts were obtained in the absence of a valid legal basis,**³⁹ and must be excluded pursuant to Rule 138(2);
- e. **For several alleged calls, the attribution of communications to specific individuals is wholly unreliable,** as it was admittedly based solely on voice

³⁵ 8 March Decision, para. 31; 23 May Decision, para. 11.

³⁶ 076927-076935, p. 076928; 101505-TR-ET Part 1, p. 11.

³⁷ 101505-TR-ET Part 1, pp. 13-14.

³⁸ 088739-TR-ET Part 1 RED, pp. 25-26.

³⁹ 076927-076935, p. 076929.

recognition,⁴⁰ despite voices being unrecognisable on satellite phones,⁴¹ and there were frequent mistakes in the identification of the individuals on the call;⁴²

- f. Several reports contain summaries of allegedly intercepted communications, rather than *verbatim* records,**⁴³ which further exacerbates their issues of reliability;
- g. A large number of conversations were not transcribed,**⁴⁴ which renders the alleged intercept reports an incomplete record of communications;
- h. Many of the alleged intercepts reflect inadequate recording,** as they contain large inaudible parts, as well as missing names, phone numbers, or information about who transcribed the alleged conversation, and where. Other documents only transcribed certain parts of the alleged conversations, or stopped the transcription on the basis that “the rest of the conversation is irrelevant”⁴⁵ depriving the reader of relevant context and showing that transcriptions were done selectively. Moreover, without any explanation by the SPO on their relevance, considerable parts of the Requested Materials concern alleged conversations between individuals who are not identified at all, let alone identified as being relevant to the present proceedings; and in whose conversations no issue material to the present case appears to be discussed;
- i. Transcription checks were done only on a sample basis,**⁴⁶ meaning that most of the alleged transcript reports remained unchecked;⁴⁷

⁴⁰ 101505-TR-ET Part 1, p. 19.

⁴¹ *See, e.g.*, [REDACTED].

⁴² 101505-TR-ET Part 1, p. 22.

⁴³ *See, e.g.*, [REDACTED].

⁴⁴ 101505-TR-ET Part 1, p. 11.

⁴⁵ [REDACTED].

⁴⁶ 101505-TR-ET Part 1, p. 15.

⁴⁷ 089987-TR-ET Part 1, p. 11.

- j. **No explanation has been given** to explain why some alleged intercepts were provided to the SPO during pre-trial, whereas the Requested Materials were only provided in March 2023;
- k. **No alleged participant in the conversations can verify the content of the Requested Materials**, since no witness can be expected to recall the words used in telephone conversations which allegedly took place 24 years ago;
- l. **The witness statements** of SPO witnesses who were somewhat involved in this process are **contradictory, vague, and often admit that they have no knowledge** of large parts of the process, which remain unexplained;
- m. **The retrieval, selection, and processing of these documents** was not done by the SPO, but **by [REDACTED]**, which represents [REDACTED] and [REDACTED].⁴⁸ [REDACTED], stated that these intercepts were [REDACTED], in order to hide information and share data selectively.⁴⁹ He also admitted that methods employed by [REDACTED] are to [REDACTED]⁵⁰ and [REDACTED].⁵¹

29. When read together, these issues are not matters of weight, but rather considerations affecting the reliability and probative value of the Requested Materials, and thus, in turn, their chances of admission. As such, these factors mitigate against their addition to the SPO Exhibit List.

C. THE SPO SHOULD BE ORDERED NOT TO USE THE INTERCEPT LOGS
WITH W04746

⁴⁸ These issues were explained at length in [REDACTED].

⁴⁹ 078004-TR-ET Part 6, pp. 15, 19; 078004-TR-ET Part 9 Revised RED, p. 9. *See also* 105725-TR-ET Part 1, p. 5.

⁵⁰ 078004-TR-ET Part 9, p. 8.

⁵¹ 105725-TR-ET Part 1, pp. 6-9; 105725-TR-ET Part 4, p. 5.

30. As a minimum, should the requested amendment be granted, the SPO should not be permitted to use the alleged intercept reports forming the object of the Request during the examination of W04746.⁵² The Defence does not have enough time to prepare, and the use of this material would infringe on the Accused's fair trial rights.

31. [REDACTED] is mentioned [REDACTED] times in the Requested Materials. For at least [REDACTED] calls, [REDACTED] is recorded as either the caller or the receiver. In addition to these calls, adequate preparation would require the in-depth review of all allegedly intercepted communications concerning the organisation of the [REDACTED] and any event occurred therein. Notably, various locations in [REDACTED], are mentioned in the Requested Materials. Moreover, the Defence would have to analyse each and every call allegedly made or received by – or otherwise relevant to – a number of individuals who, in the SPO's case, allegedly held a role [REDACTED], including [REDACTED]. This analysis is further complicated by the use of pseudonyms (often shared by more than one individual), unclear language or inaudible parts, which, as also identified above,⁵³ make it difficult to determine the relevance of intercepted conversations. Overall, this exercise cannot be performed without a comprehensive review of the recently disclosed intercept reports if, as submitted by the SPO, they need to be considered holistically and they complement each other.⁵⁴

32. It is unrealistic to believe that this exercise, which includes scheduling sessions with the Accused to receive instructions, performing necessary investigative actions, and reviewing related materials, can be performed in 22-23 days, *i.e.* the period of time between the disclosure of these files on 20 June 2023 and the testimony of W04746, which should commence around 12-13 July 2023. This is all the more so in light of the

⁵² Request, para. 13.

⁵³ *Supra*, para. 28(h).

⁵⁴ Request, para. 12.

limited resources of the Defence teams and their contemporaneous undertakings, including first and foremost the preparation of W04337 and W04746's cross-examinations.

33. In this context, the SPO submission that "the Defence has had access to the Intercept Files since 6 April 2023, shortly after the SPO obtained them"⁵⁵ is wholly without merit. The working language of the proceedings is English.⁵⁶ Receiving intercept reports in [REDACTED] is of little to no use. The Defence does not have the necessary resources to dedicate to the urgent translation of such a large document, an issue which is further complicated by the confidential classification of the Requested Material. The Defence could not effectively begin its preparations until it received the English translations of the alleged intercepts.

34. A comparison of timelines can be helpful to understand the prejudice to the Defence: the SPO has received these files on 22 March 2023, and since then, it has benefitted from translations being provided on a rolling basis.⁵⁷ With the SPO having possessed these files for over three months, it would be ludicrous to require the Defence to complete a full review and be ready to respond to their use in court in only [REDACTED].

35. In a similar situation, the Trial Panel was called to balance the prejudice caused to the Accused by an SPO request to amend its Exhibit List shortly before the commencement of trial. The Trial Panel held that "[s]hould any of the material be used early in the proceedings, the Defence can seek further relief from the Panel if the SPO's early usage of this material causes demonstrable difficulties to the Defence".⁵⁸ This is

⁵⁵ Request, para. 15.

⁵⁶ KSC-BC-2020-06, Trial Panel II, *Oral order – Working Language*, 16 December 2022.

⁵⁷ Request, paras 7-8.

⁵⁸ 8 March Decision, para. 33.

exactly one of those situations contemplated by the Panel: the use of this material during [REDACTED] examination causes demonstrable difficulties to the Defence, which does not have enough time to prepare, and further relief from the Panel is thus justified.

36. Moreover, the use of the Requested Materials with [REDACTED] is not indispensable to the presentation of the SPO case. According to the Response, the alleged intercepts are of a similar nature to other evidentiary material on its Exhibit List, and relate “to known areas of the SPO’s case”.⁵⁹ The SPO can thus easily conduct its examination of [REDACTED] on the basis of material which is already on the Exhibit List and that the Defence has had time to analyse and prepare. Moreover, no witness can be required to confirm the content of an alleged phone-call which occurred 24 years ago, nor would any confirmation of this sort carry any evidentiary weight. Little to no prejudice is caused to the SPO by not using this material during the [REDACTED] evidentiary block.

37. In light of the above, the most practical solution would be for the Trial Panel to order the SPO not to use the Requested Materials during the examination of [REDACTED]. Alternatively, if the SPO does not wish to examine [REDACTED] without using these files, the Defence would not oppose the rescheduling of [REDACTED] testimony to a later stage.⁶⁰

38. Finally, the Defence notes that several individuals involved in the alleged interception process are currently on the SPO List of Witnesses.⁶¹ It is essential that these witnesses are heard and cross-examined before the Trial Panel takes any

⁵⁹ Request, para. 15.

⁶⁰ The Thaçi Defence requests that in case of postponement of W04746’s testimony, he be not called between 14 and 17 August 2023, the Counsel assigned to his cross-examination being unavailable at these dates.

⁶¹ [REDACTED].

decision to admit these exhibits into evidence. As mentioned above,⁶² the statements of these witnesses expose a large number of issues with the reliability and probative value of the files the SPO now seeks to add to its Exhibit List. In line with the practice at other international or hybrid tribunals,⁶³ the SPO should be ordered to call these witnesses *before* intercept reports are used with witnesses and eventually tendered for admission. Establishing the foundation and reliability of these documents, in light of their specific features, is a *conditio sine qua non* to properly assess whether they meet the requirement for admission pursuant to Rule 138(1) of the Rules. The SPO cannot be permitted, 24 years after the events, to tender an alleged intercept by showing it to one of the alleged participants in the intercepted call in circumstances where no witness could reliably verify the detail and content of the conversation.

IV. CONCLUSION

39. In light of the foregoing, the Defence respectfully requests the Trial Panel to **REJECT** the Request.

40. However, should the Trial Panel decide to grant the Request, the Defence subordinately requests the Trial Panel to:

- a. **ORDER** the SPO not to use the Requested Materials during the examination of W04746; *or, alternatively,*
- b. **ORDER** the SPO to reschedule the testimony of W04746 at a later stage to allow the Defence sufficient time to prepare; *and*

⁶² *Supra*, para. 28(l).

⁶³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC/F1937, Trial Chamber, *Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution*, 6 May 2015, para. 115 and Disposition.

- c. **ORDER** the SPO schedule the testimony of [REDACTED], before the Requested Materials are used during the examination of witnesses or tendered for admission.

Word count: 5,759

Respectfully submitted on 21 July 2023.



Gregory W. Kehoe

Counsel for Hashim Thaçi



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



Venkateswari Alagenda
Lead Counsel for Jakup Krasniqi



Aidan Ellis
Co-Counsel for Jakup Krasniqi



Victor Băieșu
Co-Counsel for Jakup Krasniqi