



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** **KSC-BC-2020-06/IA029**

**Before:** **A Panel of the Court of Appeals Chamber**  
Judge Michèle Picard  
Judge Kai Ambos  
Judge Nina Jørgensen

**Registrar:** Fidelma Donlon

**Date:** 23 August 2023

**Original language:** English

**Classification:** **Public**

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**Public Redacted Version of Decision on Veseli and Krasniqi Appeal against  
Second Decision on Specialist Prosecutor's Bar Table Motion**

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**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed on 27 July 2023 (“Appeal”),<sup>2</sup> by Mr Kadri Veseli (“Veseli”) and Mr Jakup Krasniqi (“Krasniqi”) (collectively, “the Accused” or “the Defence”) against the “Second Decision on Specialist Prosecutor’s Bar Table Motion” (“Impugned Decision”).<sup>3</sup> The Specialist Prosecutor’s Office (“SPO”) responded on 7 August 2023 (“SPO Response”)<sup>4</sup> that the Appeal should be dismissed. The Defence replied on 14 August 2023 (“Reply”).<sup>5</sup>

## I. BACKGROUND

1. On 16 December 2022, the Trial Panel issued an oral order inviting the SPO to file a bar table motion with respect to proposed exhibits for its first 40 witnesses and other evidentiary material it deemed important for the presentation of its case at that stage of the proceedings.<sup>6</sup>

2. On 8 February 2023, the SPO submitted an application requesting the admission of material from the bar table (“Bar Table Motion”)<sup>7</sup> pursuant to the Trial

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<sup>1</sup> IA029/F00001, Decision Assigning a Court of Appeals Panel, 18 July 2023 (confidential, reclassified as public on 23 August 2023) (“Assignment Decision”).

<sup>2</sup> IA029/F00002, Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor’s Bar Table Motion, 27 July 2023 (confidential) (“Appeal”).

<sup>3</sup> F01596/RED, Confidential Redacted Version of Second Decision on Specialist Prosecutor’s Bar Table Motion, 9 June 2023 (confidential) (confidential and *ex parte* version filed 9 on June 2023) (“Impugned Decision”).

<sup>4</sup> IA029/F00003, Prosecution response to ‘Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor’s Bar Table Motion’, 7 August 2023 (confidential) (“SPO Response”).

<sup>5</sup> IA029/F00004, Veseli and Krasniqi Defence Reply to “Prosecution response to ‘Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor’s Bar Table Motion’”, 14 August 2023 (confidential) (“Reply”).

<sup>6</sup> Fourth Order – SPO Bar Table motion, Transcript, 16 December 2022, pp. 1775-1776.

<sup>7</sup> F01268, Prosecution application for admission of material through the bar table, 8 February 2023 (“Bar Table Motion”).

Panel's oral order, which included 20 documents identified as having been collected during the searches of Krasniqi's and Mr Rexhep Selimi's ("Selimi") residences.<sup>8</sup>

3. On 21 March 2023, the Defence jointly responded to the Bar Table Motion, arguing, *inter alia*, that the inventories of the search and seizure operations provided by the SPO are inadequate and failed to comply with the requirements under Rule 39(4) of the Rules for a "detailed description of and information regarding each item seized".<sup>9</sup> Specifically, the Defence argued that the use of generic descriptive terms and references to "collections" of documents in the SPO's inventories violate Rule 39(4) of the Rules.<sup>10</sup>

4. On 31 March 2023, the Trial Panel issued a first decision on the SPO's Bar Table Motion.<sup>11</sup>

5. On 9 June 2023, the Trial Panel issued a second decision on the SPO's Bar Table Motion, the Impugned Decision, in which it, *inter alia*, rejected the Defence's arguments concerning the level of specificity of an inventory required under Rule 39(4) of the Rules.<sup>12</sup>

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<sup>8</sup> Impugned Decision, para. 101. See also F01268/A01, Annex 1 to Bar Table Motion, 8 February 2023 (confidential), items 37, 37A; F01268/A02, Annex 2 to Bar Table Motion, 8 February 2023 (confidential), items 17A, 17B, 17C, 18, 19; F01268/A06, Annex 6 to Bar Table Motion, 8 February 2023 (confidential), items 217, 229, 232, 234, 236, 238, 242, 252, 258, 260, 262, 266, 268.

<sup>9</sup> F01387, Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table, 21 March 2023 (confidential) ("Defence Response to Bar Table Motion"), paras 34-38.

<sup>10</sup> Defence Response to Bar Table Motion, paras 36, 38.

<sup>11</sup> F01409, Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023 (confidential).

<sup>12</sup> Impugned Decision, para. 110.

6. On 23 June 2023, the Defence applied for leave to appeal the Impugned Decision.<sup>13</sup> The SPO responded on 4 July 2023<sup>14</sup> and the Defence replied on 10 July 2023.<sup>15</sup>

7. On 17 July 2023, the Trial Panel granted the Defence leave to appeal the Impugned Decision on the following issue (“Certification Decision” and “Certified Issue”, respectively):

- (a) Whether the Trial Panel erred in its interpretation of Rule 39(4), with specific regard to the requirement that the inventory must contain “a detailed description of and information regarding each item seized”.<sup>16</sup>

## II. STANDARD OF REVIEW

8. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.<sup>17</sup>

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<sup>13</sup> F01624, Veseli and Krasniqi Defence Request for Certification to Appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”, 23 June 2023 (confidential, reclassified as public on 9 August 2023) (“Certification Request”).

<sup>14</sup> F01640, Prosecution response to ‘Veseli and Krasniqi Defence request for certification to appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”’, 4 July 2023 (confidential, reclassified as public on 9 August 2023) (“SPO Response on Certification”).

<sup>15</sup> F01661, Veseli and Krasniqi Defence Reply to the Prosecution Response to the ‘Request for Certification to Appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”’, 10 July 2023 (confidential, reclassified as public on 9 August 2023) (“Reply on Certification”).

<sup>16</sup> F01678, Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor’s Bar Table Motion, 17 July 2023 (confidential, reclassified as public on 9 August 2023) (“Certification Decision”), paras 5, 18, 28.

<sup>17</sup> KSC-BC-2020-07, IA001-F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also 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. 14.

### III. DISCUSSION

#### A. PUBLIC FILINGS

9. The Appeals Panel notes that the Trial Panel's Impugned Decision and Certification Decision were initially filed confidentially. As a result, all submissions on appeal were also filed confidentially. However, the Panel notes that, following the submission of the Appeal and SPO Response, the Certification Decision, the Parties' submissions on certification,<sup>18</sup> as well as the Assignment Decision, were reclassified as public. The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.<sup>19</sup> The Panel, therefore, orders the Parties to file public redacted versions of their filings on appeal,<sup>20</sup> or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.<sup>21</sup>

#### B. WHETHER THE TRIAL PANEL ERRED IN ITS INTERPRETATION OF RULE 39(4), WITH SPECIFIC REGARD TO THE REQUIREMENT THAT THE INVENTORY MUST CONTAIN "A DETAILED DESCRIPTION OF AND INFORMATION REGARDING EACH ITEM SEIZED" (CERTIFIED ISSUE)

##### 1. Submissions of the Parties

10. The Defence submits that the Trial Panel's interpretation of Rule 39(4) of the Rules with respect to the inventory requirement for a "detailed description" of "each

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<sup>18</sup> Namely, Certification Request (F01624); SPO Response on Certification (F01640); Reply on Certification (F01661).

<sup>19</sup> See e.g. IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), paras 8-9. See also KSC-CA-2022-01, F00103, Decision on Gucati Application for Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.

<sup>20</sup> Namely, Appeal (IA029/F00002); SPO Response (IA029/F00003); Reply (IA029/F00004).

<sup>21</sup> The Panel notes that the SPO does not object to the reclassification of its response as public. See SPO Response, para. 19.

item seized”, is overly broad and constitutes an error of law warranting reversal of the Impugned Decision.<sup>22</sup> In particular, the Defence asserts that the Trial Panel’s broad interpretation of these terms is: (i) contrary to the “plain and binding meaning” of the text;<sup>23</sup> and (ii) an error depriving the Accused of procedural safeguards intended to protect their fundamental rights under Article 31 of the Kosovo Constitution, Article 21(2) of the Law, and Articles 6 and 8 of the European Convention on Human Rights (“ECHR”).<sup>24</sup> The Defence further submits that the Trial Panel “failed to explain its conclusion” and to provide “any compelling reasons” justifying its overly broad interpretation of Rule 39(4) of the Rules, and as a result, the Impugned Decision renders its procedural safeguards “theoretical and illusory”.<sup>25</sup>

11. With respect to the Trial Panel’s interpretation of a “detailed description”, the Defence submits that the Trial Panel erred in finding that the use of “rudimentary” descriptions or “labels”, such as “documents”, “binder”, “documents in binders” or “photos”, satisfies the level of specificity required under Rule 39(4) of the Rules.<sup>26</sup> In support, the Defence asserts that the “plain and ordinary meaning” of Rule 39(4) of the Rules unambiguously requires a description that “minutely” describes or provides “specifics as to the nature of an item”.<sup>27</sup>

12. With respect to the Trial Panel’s interpretation of “each item”, the Defence submits that the Trial Panel erred in finding that: (i) a “generic reference” to “collections” of documents whenever found as a bundle or collection of documents satisfies the itemisation requirement under Rule 39(4) of the Rules;<sup>28</sup> and (ii) the requirement is to be interpreted taking into account the nature, quantity, state and

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<sup>22</sup> Appeal, paras 5, 24, 33, 44.

<sup>23</sup> Appeal, paras 5, 24, 29, 33.

<sup>24</sup> Appeal, paras 5, 33, 40.

<sup>25</sup> Appeal, paras 5, 32, 44.

<sup>26</sup> Appeal, paras 20, 22, 31.

<sup>27</sup> Appeal, paras 29-30.

<sup>28</sup> Appeal, para. 23.

condition of the items seized in a particular case.<sup>29</sup> In support, the Defence asserts that the “ordinary meaning” of the words in Rule 39(4) of the Rules requires a description that “catalogue[s] individual documents” and provides information concerning “‘all (or every one)’ of the items in a set”.<sup>30</sup>

13. The Defence also submits that by substantially departing from the ordinary meaning of Rule 39(4) of the Rules, the Impugned Decision lowers the requisite standard for lawful searches and seizures.<sup>31</sup> Further, the Defence asserts that the Trial Panel’s “highly malleable interpretation” of Rule 39(4) of the Rules “improperly revises the requirements of the inventory process” and allows the SPO to “relax otherwise stringent requirements” that are intended to protect the rights of the Accused and the integrity of the proceedings.<sup>32</sup>

14. Finally, the Defence submits that the procedural safeguards of Rule 39(4) of the Rules engage a fundamental right and must therefore be subject to a “strict and narrow interpretation”, consistent with the holding of the Constitutional Court and the jurisprudence of the European Court of Human Rights (“ECtHR”).<sup>33</sup> In particular, the Defence asserts that the procedural requirement for a “detailed and itemised inventory” is essential to: (i) ensure the Defence’s ability to verify and contest the provenance of items tendered for admission; (ii) protect the right to privacy of persons concerned by the search and seizure; and (iii) prevent abuse by the investigative authority, and preserve the integrity of the proceedings by shielding against the admission of evidence obtained in violation of fundamental rights.<sup>34</sup>

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<sup>29</sup> Appeal, para. 30.

<sup>30</sup> Appeal, paras 29, 31.

<sup>31</sup> Appeal, para. 31.

<sup>32</sup> Appeal, para. 30.

<sup>33</sup> Appeal, paras 35-36, 40-43.

<sup>34</sup> Appeal, paras 37-39.

15. In light of these alleged errors, the Defence submits that the Impugned Decision erroneously concluded that the procedural requirements of Rule 39(4) of the Rules were satisfied, and as a result did not consider whether the seized evidence should be excluded pursuant to Rule 138(2) of the Rules.<sup>35</sup> Accordingly, the Defence requests that the Appeals Panel reverse the Impugned Decision, and remand the matter to the Trial Panel for a new determination on the admissibility of the evidence implicated by the search and seizure.<sup>36</sup>

16. The SPO responds that the Appeal fails to demonstrate any error in the Trial Panel's interpretation of the inventory requirement, let alone one that could invalidate the Impugned Decision.<sup>37</sup> In support, the SPO asserts that the Trial Panel correctly found that the requirements of Rule 39(4) of the Rules "should be interpreted and applied in the concrete circumstances of the case"<sup>38</sup> and that the Trial Panel's interpretation is consistent with the plain language, object and purpose of the Rule.<sup>39</sup> In this regard, the SPO first argues that "practical limitations arising from the scope or nature of the seized materials" are relevant considerations when assessing the application of safeguards to a search and seizure and, as a result, general descriptions of seized materials as "collections" of documents may accurately describe the materials under the circumstances and achieve the object and purpose of the inventory requirement to safeguard the privacy rights of the person concerned by the search and seizure, and the integrity of the seized evidence.<sup>40</sup> Regardless, the SPO asserts that the inventory supplied to the Defence also identified the location of each item when

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<sup>35</sup> Appeal, para. 46.

<sup>36</sup> Appeal, paras 6, 32, 47-48.

<sup>37</sup> SPO Response, para. 1.

<sup>38</sup> SPO Response, para. 2.

<sup>39</sup> SPO Response, paras 4-5.

<sup>40</sup> SPO Response, paras 4-5.



seized, and assigned each item an identification number linked to an evidence bag, enabling the Defence to confirm what items were seized from a given location.<sup>41</sup>

17. The SPO further submits that the application of Rule 39(4) of the Rules must be evaluated based on the individual circumstances of each case and in light of other safeguards available during a search and seizure.<sup>42</sup> Specifically, the SPO asserts that the absence of an inventory does not render a search and seizure unlawful, particularly where there are other adequate safeguards serving the same or similar purpose, such as the presence of a suspect or counsel during the search, the sealing of the evidence, the production of search reports, and an opportunity for review.<sup>43</sup> Accordingly, the SPO asserts that an inventory describing items “in light of what is being seized in a given case”, consistent with the Trial Panel’s interpretation of Rule 39(4) of the Rules, is an “effective means of ensuring the lawfulness of the search and the integrity of the evidence”.<sup>44</sup>

18. Finally, the SPO submits that the Appeal fails to establish how the alleged error invalidates the Impugned Decision.<sup>45</sup> In particular, the SPO asserts that the Defence does not: (i) link its challenge to the use of generic descriptive terms in the inventory with any of the items that were the subject of the Impugned Decision;<sup>46</sup> and (ii) substantiate its general assertion that a new determination pursuant to Rule 138(2)

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<sup>41</sup> SPO Response, paras 4, 13. The SPO further asserts in this regard that the Defence misrepresents the Pre-Trial Judge’s decision in support of its argument that the lack of an itemized description for each document seized impedes its ability to verify whether items later tendered into admission were in fact retrieved during the search. Rather, the SPO argues that the Pre-Trial Judge ordered the SPO to submit a more detailed inventory of the seized documents, considering the fact that the documents had not yet been disclosed at the time, which impeded the Defence’s ability to confirm that the search did not exceed the scope of the warrant and object accordingly. See SPO Response, para. 14.

<sup>42</sup> SPO Response, para. 6.

<sup>43</sup> SPO Response, paras 6-8.

<sup>44</sup> SPO Response, para. 9.

<sup>45</sup> SPO Response, paras 10-12.

<sup>46</sup> SPO Response, para. 12. The SPO further notes that the Defence neither disputes that the documents tendered for admission were seized from the Accused’s residences nor claims that the searches exceeded the scope of the search order.

of the Rules is required, as it fails to establish how it would change the outcome of the Impugned Decision.<sup>47</sup> In this regard, the SPO argues that, in light of existing jurisprudence establishing that the absence of an inventory is in itself insufficient to exclude seized evidence, the Defence's suggested interpretation of Rule 39(4) of the Rules would not impact an eventual assessment pursuant to Rule 138(2) of the Rules.<sup>48</sup>

19. The Defence replies that the SPO disregards the "clearly worded" requirement of Rule 39(4) of the Rules, which is not to be "selectively and arbitrarily disapplied at the SPO's discretion".<sup>49</sup> In this regard, the Defence asserts that the plain meaning of the text is the "primary and binding source of interpretation" and that the object and purpose of a provision is a relevant consideration "only where the text is unclear or ambiguous, which is clearly not the case of Rule 39(4)" of the Rules.<sup>50</sup>

20. Regardless, the Defence submits that the SPO "overlooks the actual objects and purposes of Rule 39(4)" of the Rules, which it asserts includes "to guarantee transparency as to the origin of the evidentiary material".<sup>51</sup> In this regard, the Defence argues that even with the location and an assigned evidence tag number, the description does not allow the Accused to confirm where "the individual document included in the bar table motion was found, or whether it was effectively retrieved during the search".<sup>52</sup>

21. The Defence further submits that "[t]he procedure set out in Rule 39(4) is not a mere suggestion, nor is the respect for its safeguards discretionary".<sup>53</sup> Accordingly, it asserts that any deficiencies in the SPO's Rule 39(4) inventory cannot be "compensated" by other safeguards serving the same or similar purposes, but that

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<sup>47</sup> SPO Response, paras 10-11.

<sup>48</sup> SPO Response, paras 15-17.

<sup>49</sup> Reply, paras 2, 6.

<sup>50</sup> Reply, para. 3.

<sup>51</sup> Reply, para. 4.

<sup>52</sup> Reply, para. 5.

<sup>53</sup> Reply, para. 6.

every “procedural step” must be implemented.<sup>54</sup> Finally, the Defence submits with respect to establishing the material impact of the alleged error on the Impugned Decision that the Defence is not required to address the criteria of Rule 138(2) of the Rules, as the Trial Panel did not make such a determination, and it therefore lies outside the scope of the Appeal.<sup>55</sup>

## 2. Assessment of the Court of Appeals Panel

22. At the outset, the Appeals Panel observes that the Defence challenges the Impugned Decision with regard to three specific findings: (i) the Trial Panel’s finding that the Defence “has argued in favour of a level of specificity of the inventory not required by the Rules” when it submitted that the use of generic terms, such as “photos”, “binder” or “documents” is inadequate to meet the requirement of a “detailed description” under Rule 39(4) of the Rules (“First Finding”);<sup>56</sup> (ii) the Trial Panel’s finding that “[d]ocuments are to be recorded in the inventory as they are found at the location of the search” and “[i]f they are found as a bundle or collection of documents, their description as such would meet the requirement of itemization foreseen by Rule 39(4)” of the Rules (“Second Finding”);<sup>57</sup> and (iii) the Trial Panel’s interpretation of the itemisation requirement of Rule 39(4) of the Rules on a case-by-case basis, “in light of what is being seized in a given case, the quantity, state and condition of the material when seized” (“Third Finding”).<sup>58</sup>

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<sup>54</sup> Reply, para. 6.

<sup>55</sup> Reply, paras 7-8. In this regard, the Defence further submits that, nevertheless, it has demonstrated how the alleged violation cast substantial doubt on the reliability of the evidence and how its admission would be antithetical to or damage the integrity of the proceedings. See Reply, para. 9, referring to Defence Response to Bar Table Motion, paras 33, 42, 46-48.

<sup>56</sup> Impugned Decision, para. 110; Appeal, para. 22.

<sup>57</sup> Impugned Decision, para. 113; Appeal, para. 23.

<sup>58</sup> Impugned Decision, para. 113; Appeal, para. 30. The Panel notes that the Defence’s challenges to the Second Finding and Third Finding both relate to the itemisation requirement of Rule 39(4) of the Rules. Accordingly, these findings will be addressed together in the Panel’s assessment.

23. The Appeals Panel further observes that two inventories of the items seized from Krasniqi and Selimi's residences have been provided to the Defence: (i) an inventory made at the time of the searches ("Contemporaneous Inventory");<sup>59</sup> and (ii) a more detailed inventory ("Updated Inventory")<sup>60</sup> provided following the Pre-Trial Judge's order.<sup>61</sup> The Panel notes in this regard that the Trial Panel's findings in the Impugned Decision were based on the "records of searches" as a whole, including both the Contemporaneous Inventory and the Updated Inventory.<sup>62</sup> The Panel further notes that the Defence only appended the Contemporaneous Inventory to its Appeal,<sup>63</sup> while its arguments are based on the contents of and the Trial Panel's evaluation of both inventories.<sup>64</sup>

24. Before turning to the substance of the Defence's arguments, the Appeals Panel emphasises that, in accordance with the scope of its review under the Certified Issue, the Appeals Panel will assess the Trial Panel's interpretation of the inventory requirements under Rule 39(4) of the Rules, and will not make findings regarding the

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<sup>59</sup> F00125/A02, Annex 2 to Request for reclassifications (redacted versions of annexes 2, 3 and 4 to Prosecution report on search and seizure pursuant to KSC-BC-2020-06/F00030, 8 December 2020 (confidential and *ex parte*). See F00125/A03, Annex 3 to Request for reclassifications (redacted versions of annexes 2 and 4 to Prosecution report on search and seizure pursuant to KSC-BC-2020-06/F00031/COR), 8 December 2020 (confidential and *ex parte*) (collectively, "Contemporaneous Inventory").

<sup>60</sup> F00366/A01, Annex 1 to Prosecution submission of seized item indexes, 23 June 2023 (confidential and *ex parte*); F00366/A02, Annex 2 to Prosecution submission of seized item indexes, 23 June 2023 (confidential and *ex parte*) (collectively, "Updated Inventory").

<sup>61</sup> F00251, Decision on the Request of the Veseli Defence Regarding Documents Seized During the Search, 16 April 2021 (confidential), paras 16, 18. In this regard, the Appeals Panel emphasises that, while the Pre-Trial Judge's order for a more detailed inventory related to a request made by the Veseli Defence concerning items seized during a search of his residence, the SPO also provided an inventory with respect to the searches of the Krasniqi and Selimi residences. Moreover, while the order specifically concerned the documents seized during the search, the updated inventories covered all items seized.

<sup>62</sup> Certification Decision, para. 22; Impugned Decision, para. 110, noting the Trial Panel's finding was based on the "records of the searches".

<sup>63</sup> See IA029/F00002/A01, Annex 1 to Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor's Bar Table Motion, 27 July 2023 (confidential and *ex parte*).

<sup>64</sup> See Impugned Decision, para. 108, referring to Defence Response to Bar Table Motion, paras 36 (where the Defence challenges the use of "generic" terms in the Contemporaneous Inventory), 38 (where the Defence challenges the use of the term "collections" in the Updated Inventory).

inventories' actual compliance with those requirements.<sup>65</sup> However, the Appeals Panel notes that the Trial Panel's interpretation of Rule 39(4) of the Rules cannot be assessed in the abstract, and must be evaluated within the context of the information before the Trial Chamber when it made its findings. Accordingly, the Appeals Panel will refer to the inventories supplied by the SPO as illustrative in its assessment.

25. The Appeals Panel recalls that Rule 39(4) of the Rules requires the SPO to prepare an inventory with a detailed description of and information regarding each item seized.

26. The Appeals Panel observes that "detailed description" and "each item" are not defined terms under the Law or Rules. Accordingly, the Panel agrees with the Defence that a panel can be guided in its interpretation of Rule 39(4) of the Rules by considering the ordinary meaning of these terms, in accordance with general principles of interpretation.<sup>66</sup> However, the Appeals Panel stresses that Rule 39(4) of the Rules is not to be construed in isolation, but is to be interpreted in the context of other relevant provisions of the Rules and Law, and taking into consideration the object and purpose of Rule 39 of the Rules as a whole.<sup>67</sup>

27. In this regard, the Panel first notes that Rule 39 of the Rules regulates the execution of a search and seizure by laying out procedures that are intended to safeguard against any abuse during a search, in order to protect the right to privacy of the person subject to the search and seizure. In this context, the inventory

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<sup>65</sup> The Appeals Panel notes that the Trial Panel considered this issue for certification, but ultimately rejected the Defence's request for certification. See Certification Decision, paras 23-26.

<sup>66</sup> See KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017 ("Constitutional Court Judgment"), para. 13 (according to which the Constitutional Court's review of the Rules was guided by the "actual language of the text", unless "manifestly contrary to the tenor of the Constitution"). See also UN, Vienna Convention on the Law of Treaties, 23 May 1969, Treaty Series, Vol. 1155, Article 31(1).

<sup>67</sup> Constitutional Court Judgment, para. 14; IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021, para. 139.

requirement, as provided in Rule 39(4) of the Rules, serves to ensure, *inter alia*, that: (i) the concerned person can reasonably identify the seized items, with a view to confirming that the seizure falls within the scope of the search order, and to otherwise object to the lawfulness of the search;<sup>68</sup> and (ii) preserve the integrity of the seized evidence in the event of a challenge to its admissibility, if produced as evidence at trial.<sup>69</sup>

28. Within this context, the Appeals Panel now turns to the interpretation of the terms “detailed description” and “each item”, as applied in Rule 39(4) of the Rules.<sup>70</sup> According to the plain and ordinary meaning of the terms, the Panel understands (i) a “detailed description” to be one that provides specific information regarding the nature of an item, including any characteristics or distinguishing features;<sup>71</sup> and (ii) “each item” to mean that the description or information provided must be specific to the individual objects or things recorded on the list.

29. The Appeals Panel will first examine the Defence’s challenge with respect to the requirement of a “detailed description” (First Finding). The Defence argues that

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<sup>68</sup> See ECtHR, *Van Rossem v. Belgium*, no. 41872/98, Judgment, 9 December 2004 (“*Van Rossem Judgment*”), paras 47, 50, noting that, in the absence of an inventory and other procedural safeguards during the search, the person concerned was unable to reasonably identify each item seized and ensure the proper scope of the search.

<sup>69</sup> KSC-BC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022, para. 327. See also ICTR, *Prosecutor v. Kabiligi*, ICTR-97-34-I, Decision on the Defence Motion for the Restitution of Items and Documents Seized, 5 October 1998, p. 3, noting that “it is the practice in international criminal jurisdiction for an inventory to be made which will guarantee the integrity of the property seized and guarantee the rights of the accused”. The Appeals Panel notes that, in the Appeal, the Defence neither claims that the search exceeded the scope of the warrant, nor does it dispute the origin or chain of custody of the seized materials tendered for admission, but rather claims that the alleged deficiencies in the inventories do not allow the Defence to confirm that all materials seized during the searches were processed in Legal WorkFlow, or which materials may contain exonerating evidence. See Appeal, para. 29; Certification Decision, para. 24; SPO Response, para. 12.

<sup>70</sup> The Panel notes the absence of comparable rules at the *ad hoc* tribunals and international courts regulating the execution of a search and seizure, which could provide guidance on the interpretation of Rule 39(4) of the Rules. While the ICTR amended its Rules to include Rule 41(B), which requires drawing up an inventory of an accused’s seized property, the rule makes no provision regarding the requisite specificity of the inventory nor does it require that it be drawn up at the time of the search.

<sup>71</sup> See Black’s Law Dictionary (11<sup>th</sup> ed., 2019), p. 559.

an inventory using descriptions, which it describes as “rudimentary” or “generic” does not meet the definition of a “detailed description”, which must instead “minutely” describe or provide “specifics as to the nature of an item”.<sup>72</sup> While the Panel agrees that a detailed description must provide “specifics as to the nature of an item”, to require that an inventory “minutely” describe the item seized would, in the Panel’s view, exceed the description requirement of Rule 39(4) of the Rules. Rather, an inventory must describe a seized item with sufficient particularity to allow the concerned person to reasonably identify it.<sup>73</sup> Consequently, a description that merely records an item by a general reference to the nature of the object (for example, “document” or “photo”), without noting any further details, would generally not constitute a “detailed description” as required under Rule 39(4) of the Rules.<sup>74</sup>

30. In the Panel’s view, this interpretation is consistent with the object and purpose of Rule 39 of the Rules, as outlined above, as well as the plain and ordinary meaning of “detailed description” and the relevant jurisprudence of the ECtHR, on which the provisions of Rule 39 of the Rules are based.<sup>75</sup> The Panel notes, however, that whether a description is indeed sufficiently specific to meet the requirement of Rule 39(4) of the Rules and fulfil the object and purpose of the inventory requirement is to be assessed in light of the nature and scope of the seized items, and therefore depends on the circumstances of each case.

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<sup>72</sup> Appeal, paras 22-23, 29, 31.

<sup>73</sup> See *Van Rossem* Judgment, para. 50. The Appeals Panel notes in this regard that the person concerned by the search ordinarily has personal knowledge of the items inside the residence, including the state of any objects and the contents of any files.

<sup>74</sup> However, the Panel notes in this regard that the Contemporaneous Inventory also identifies the location where each item was found. Furthermore, as previously noted in paragraph 23 above, the Trial Panel’s findings were based on the search records as a whole, including the Updated Inventory, which in the Appeals Panel’s view, contains more detailed descriptions than merely a “generic label”.

<sup>75</sup> KSC-CC-PR-2017-03/F00001/A01, Annex 1 to Referral of Revised Rules of the Rules of Procedure and Evidence to the Specialist Chambers of the Constitutional Court, 31 May 2017, p. 13, noting that “Rule 39 also draws upon relevant case-law of the European Court of Human Rights as regards execution of search and seizure.”

31. In this regard, the Appeals Panel is further guided by the jurisprudence of the ECtHR, which has assessed alleged violations of Article 8 of the ECHR based on the particular circumstances of the relevant case,<sup>76</sup> and in light of other safeguards available during a search and seizure. In particular, the ECtHR has declined to find a violation of Article 8 of the ECHR in circumstances where a contemporaneous inventory was found to be wholly absent, lacking in specificity, or provided at a later time, finding that other procedural safeguards available during or following the search provided adequate safeguards against abuse and arbitrariness.<sup>77</sup> In the Panel's view, the adequacy of an inventory of seized items must therefore be evaluated within the context of all available procedural safeguards, and not merely on its own in an isolated fashion. Consequently, and contrary to the Defence's assertion, the absence of or deficiency in the inventory does not render the safeguard "ineffective" or "illusory", or a search unlawful.<sup>78</sup>

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<sup>76</sup> See e.g. ECtHR, *Erduran et al. v. Turkey*, nos 25707/05 and 28614/06, Judgment, 20 November 2018 ("*Erduran Judgment*"), para. 100; ECtHR, *Modestou v. Greece*, no. 51693/13, Judgment, 16 March 2017, para. 42; ECtHR, *Smirnov v. Russia*, no. 71362/01, Judgment, 7 June 2007, para. 44.

<sup>77</sup> See e.g. ECtHR, *Man and Others v. Romania*, no. 39273/07, Decision, 19 November 2019, paras 55, 74, 94-97 (finding adequate safeguards against abuse and arbitrariness during a search where the inventory was alleged to be improperly itemised, but the search was carried out in the presence of the applicant, attesting witnesses and defence counsel; the seized items were placed in sealed envelopes; search reports were drafted; no objections were made to the search; and judicial review was available); ECtHR, *Bagiyeva v. Ukraine*, no. 41085/05, Judgment, 28 April 2016, para. 54 (taking into account the absence of the applicant and other witnesses during the search as a factor in determining whether sufficient safeguards were present enabling the accurate identification of seized items and that their seizure fell within the scope of the search warrant); *Erduran Judgment*, paras 94, 101 (finding that drafting an inventory after unsealing of the evidence bags rather than at the time of the search did not render a search unlawful where the search was carried out in the presence of the applicant and witnesses, and the applicant had the opportunity to attend the unsealing procedure); ECtHR, *Chappell v. UK*, no. 10461/83, Judgment, 30 March 1989, paras 39, 53, 62 (finding that the absence of an inventory is of insufficient weight to find a search unlawful). *Compare with Van Rossem Judgment*, para. 50 (finding a violation of Article 8 where, in the absence of an inventory and the concerned person's presence during the search, the procedural safeguards were inadequate to allow the concerned person to reasonably identify the seized objects).

<sup>78</sup> The Appeals Panel observes in this regard that, as noted by the SPO, other procedural safeguards were available during the searches of Krasniqi and Selimi's residences. In particular, the searches were carried out in the presence of the Accused, a representative designed by the Accused, or their elected counsel; the seized evidence was placed in sealed bags with an assigned identification number; reports of the searches were made and any objections were recorded therein. See SPO Response, para. 7. See



32. In light of the above, the Appeals Panel agrees with the Defence that a “detailed description” under Rule 39(4) of the Rules is one that provides specifics as to the nature of an item beyond a general “label”. The Panel also acknowledges that the Trial Panel’s reasoning could have been more clearly set out. However, considering the fact that the Trial Panel’s findings were based on an evaluation of the search records as a whole, the Appeals Panel finds that the Defence has failed to demonstrate an error invalidating the Impugned Decision. Accordingly, the Appeals Panel denies the Appeal with respect to the Trial Panel’s First Finding concerning the description requirement of Rule 39(4) of the Rules.

33. The Appeals Panel now turns to the Defence’s challenges with respect to the itemisation requirement of Rule 39(4) of the Rules (Second Finding and Third Finding). The Defence argues that a “generic reference” to “collections” of documents whenever found as a bundle or collection of documents does not meet the itemisation requirement of Rule 39(4) of the Rules, irrespective of the quantity, state and condition of the items seized in a particular case.<sup>79</sup>

34. First, the Appeals Panel is not persuaded by the Defence’s argument that the itemisation of “each item” extends the requirement of a “detailed description” to the *contents* of each item, by requiring that all documents in a “set” or “collection” be individually listed and described in detail.<sup>80</sup> In the Panel’s view, such an interpretation would require a detailed review and analysis of the seized items, which would not serve the purpose of the inventory requirement. The Panel also notes that such

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also F00095, Prosecution report on search and seizure pursuant to KSC-BC-2020-06/F00031/COR, 19 November 2020 (strictly confidential and *ex parte*, reclassified as confidential and *ex parte* on 8 December 2020, reclassified as confidential on 22 June 2023) paras 6, 8-9, 16, 20, 22; F00100, Prosecution report on search and seizure pursuant to KSC-BC-2020-06/F00030, 23 November 2020 (strictly confidential and *ex parte*, reclassified as confidential and *ex parte* on 8 December 2020, reclassified as confidential on 22 June 2023), paras 4, 6, 8. Furthermore, both Accused had possible recourse to judicial review of the search of their respective residences pursuant to Rule 42(3) of the Rules.

<sup>79</sup> Appeal, paras 23, 30.

<sup>80</sup> See Appeal, paras 29, 31.

procedure would be time-consuming and impractical to perform at the time of a search, particularly given the requirement of Rule 39(4) of the Rules that “the person concerned and his or her counsel, if present, shall sign the inventory”. Accordingly, in the Panel’s view, where documents are found in a collection or otherwise bound together by their owner for storage or safekeeping, their description as a set or “collection” would be sufficient to meet the itemisation requirement of Rule 39(4) of the Rules. Nevertheless, the Panel emphasises that the description must still meet the requirement of a “detailed description”, as outlined above.<sup>81</sup>

35. Furthermore, contrary to the Defence’s assertion, the Appeals Panel finds that the Trial Panel’s interpretation does not “relax” or revise the requirements for the inventory process, or altogether “remove the itemisation requirement” of Rule 39(4) of the Rules.<sup>82</sup> Rather, the Appeals Panel agrees that the itemisation of seized items will necessarily depend on the nature of the item and its condition when found.<sup>83</sup> In the Appeals Panel’s view, such an interpretation is consistent, and in fact necessary, to give effect to the purpose of the inventory requirement, which is to enable the accurate identification of the seized evidence and to preserve its integrity. A more rigid interpretation, as suggested by the Defence, requiring individual documents that are bound together by their owner to be separately itemised and described would not serve this purpose, and may in fact frustrate it.

36. In light of the above, the Appeals Panel finds that the Trial Panel’s interpretation does not depart from the plain and ordinary meaning of the term “each item” and is consistent with the object and purpose of Rule 39 of the Rules.

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<sup>81</sup> See above, para. 29. In this regard, the Appeals Panel notes that the Updated Inventory contains several entries identifying items as a “collection”, and that these entries generally contain additional information regarding the nature, source, and/or dates of the items.

<sup>82</sup> See Appeal, paras 5, 30, 44.

<sup>83</sup> The Appeals Panel notes, as an example, that many of the [REDACTED] were [REDACTED], including [REDACTED]. Under these circumstances, preserving the condition in which the items are found [REDACTED] is the most effective means to facilitate their proper identification.

Accordingly, the Appeals Panel denies the Appeal with respect to the Trial Panel's Second Finding and Third Finding concerning the itemisation requirement of Rule 39(4) of the Rules.

37. Having found no error in the Trial Panel's findings, the Appeals Panel considers the Defence's requested remedy moot.<sup>84</sup>

#### IV. DISPOSITION

38. For these reasons, the Court of Appeals Panel:

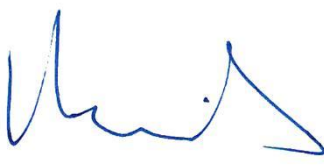
**DENIES** the Appeal;

**ORDERS** the Defence and the SPO to submit public redacted versions of their appellate filings referenced in paragraph 9 or indicate, through a filing, whether these filings can be reclassified as public, within ten days of receiving notification of the present Decision; and

**INSTRUCTS** the Registry to execute the reclassification of the filings referenced in paragraph 9 upon indication by the Defence and the SPO, if any, that they can be reclassified.

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<sup>84</sup> Appeal, para. 46. See also Certification Decision, para. 16.



**Judge Michèle Picard,  
Presiding Judge**

Dated this Wednesday, 23 August 2023

At The Hague, the Netherlands