

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence Counsel for Kadri Veseli  
Defence Counsel for Jakup Krasniqi

**Date:** 14 August 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of**  
**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”**

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## I. SUBMISSIONS

1. The Defence for Jakup Krasniqi and the Defence for Kadri Veseli (collectively “Defence”) hereby reply to the “Prosecution response to ‘Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor’s Bar Table Motion’” (“Response”).<sup>1</sup>

2. In the Response, the Specialist Prosecutor’s Office (“SPO”) fails to engage with the core of the appeal, *i.e.* that the Rule 39(4) requirement for a “detailed description of and information regarding each item seized” is a clearly worded safeguard, which was included by the drafters to protect a variety of rights and interests and, as such, poses no issue of interpretation. The SPO’s creative attempt to submit that this requirement can be selectively and arbitrarily disapplied at the SPO’s discretion,<sup>2</sup> is unpersuasive and must be disregarded.

3. The Defence reiterates that the plain text of the Rules remains the primary and binding source of interpretation.<sup>3</sup> Other sources of interpretation, such as the object and purpose of a provision as recalled by the SPO,<sup>4</sup> can be a relevant consideration only where the text is unclear or ambiguous, which is clearly not the case of Rule 39(4).

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<sup>1</sup> KSC-BC-2020-06, IA029-F00003, Specialist Prosecutor, *Prosecution response to ‘Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor’s Bar Table Motion’ with public Annex 1*, 8 August 2023, confidential.

<sup>2</sup> Response, paras 6-9.

<sup>3</sup> KSC-BC-2020-06, IA029-F00002, Veseli and Krasniqi Defence, *Veseli and Krasniqi Defence Appeal against the Second Decision on Specialist Prosecutor’s Bar Table Motion with confidential and ex parte Annex 1 and public Annex 2 (“Appeal”)*, 27 July 2023, paras 25-28; KSC-CC-PR-17-01, F00004, Constitutional Court Panel, Judgement 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 SC and SPO, 26 April 2017, public, paras 12-16.

<sup>4</sup> Response, paras 3-4.

4. In any case, the SPO overlooks the actual objects and purposes of Rule 39(4), which are listed in the Appeal.<sup>5</sup> The “detailed description [...] regarding each item seized” safeguard envisioned by Rule 39(4) is intended, *inter alia*, to guarantee transparency as to the origin of the evidentiary material that the SPO now intends to rely upon, thus protecting both the rights of the Accused and the integrity of the proceedings. Contrary to the SPO submissions,<sup>6</sup> the Trial Panel’s lax interpretation of Rule 39(4) effectively deprives the Accused of this safeguard and makes it impossible to ascertain whether the individual documents now tendered by the SPO were effectively retrieved during the search.

5. In this regard, the SPO’s submission that the inventory included also the “location where the items were found and a corresponding number assigned to each sealed evidence bag”<sup>7</sup> does not address the issue: the SPO is now seeking to admit into evidence, and rely upon, individual documents; however, the entries in the inventory only amount to, for example: “documents”, [REDACTED].<sup>8</sup> Nothing in this “description” allows the Accused to verify where the individual document included in the bar table motion was found, or whether it was effectively retrieved during the search. Nor can it be considered “detailed” or itemised in any way.

6. Moreover, the SPO effectively submits that any deficiencies in its Rule 39(4) inventory – or, taken to the extreme, even the absence of an inventory<sup>9</sup> – can be compensated by “other available safeguards, which serve the same or similar purposes”.<sup>10</sup> The procedure set out in Rule 39(4) is not a mere suggestion, nor is the respect for its safeguards discretionary and optional. The SPO cannot elect, at its own

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<sup>5</sup> Appeal, paras 36-39.

<sup>6</sup> Response, paras 4, 13-14.

<sup>7</sup> *Idem*, paras 4, 13.

<sup>8</sup> Annex 1 to the Appeal, entry n. 19.

<sup>9</sup> Response, paras 6-8.

<sup>10</sup> *Ibidem*.

discretion, to disapply the procedural safeguards of the Rule, or decide which safeguards to apply and which to ignore. Nor can the Trial Panel arbitrarily decide that certain safeguards, albeit specifically included by the drafters in the provision, can be safely overlooked by the SPO. Rule 39(4) sets out a list of procedural steps designed to protect a number of different rights and interests, and each step must be respected and implemented during search and seizure operations. All of these steps are necessary to ensure this protection, and all of them must be respected.

7. Finally, the SPO's assertion that the Appeal does not establish any material impact on the decision because it "fails to address" the criteria of Rule 138(2)<sup>11</sup> wholly misunderstands the purpose of the present Appeal. This has been clearly explained by the Trial Panel in the Decision Granting Certification:<sup>12</sup>

[T]he Panel considers that the interpretation of Rule 39(4) is relevant to determining whether the search and seizure operations conducted in this case complied with the Rules. While **non-compliance with the terms of Rule 39(4)** would not necessarily have led to the exclusion of the material seized during search operations, it **would have required the Panel to determine whether, despite the claimed violation of Rule 39(4), the material could and should in the circumstances be admitted. Having found that no such violation occurred, the Panel did not need to make that determination.** In those circumstances, the Panel is prepared to accept that the claimed error might raise an issue of fairness in the sense of Rule 77(2) and/or impact the outcome of proceedings.<sup>13</sup>

8. The Trial Panel did not make any determination on Rule 138(2), which is therefore outside the scope of the present appeal. That is why the relief sought requests the Appeals Panel to correct the erroneous interpretation of Rule 39(4) and remit the matter to the Trial Panel for it to consider whether the items purportedly

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<sup>11</sup> Response, para. 11.

<sup>12</sup> KSC-BC-2020-06, F01678, Trial Panel II, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion* ("Decision Granting Certification"), 17 July 2023, confidential, para. 16.

<sup>13</sup> *Ibidem*.

retrieved during search and seizure operations at Mr. Krasniqi's and Mr. Selimi's residences should be excluded pursuant to Rule 138(2).

9. Indeed, at the appropriate time the Defence objected to the admission of these items, and explained how the violation of Rule 39(4) casted substantial doubt on the reliability of the evidence and how its admission would be antithetical to or would seriously damage the integrity of the proceedings.<sup>14</sup> These submissions, and more in general whether the Rule 138(2) criteria for exclusion had been met, were not taken into consideration by the Trial Panel because of its previous finding on the lawfulness of the search and seizure, which was in turn based on an erroneous interpretation of Rule 39(4). Adopting the correct standard, the search and seizure must be considered to have been conducted in violation of the applicable rules and safeguards, and therefore the Trial Panel must now proceed with a new determination pursuant to Rule 138(2).

10. Pursuant to Rule 82(4) of the Rules, this document is filed confidentially because it replies to a document bearing the same classification.

## II. CONCLUSION

11. In light of the foregoing, the Defence requests that the relief sought in the Appeal be granted.

**Word count: 1200 words**

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<sup>14</sup> KSC-BC-2020-06, F01387, Joint Defence, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table*, 21 March 2023, confidential, paras 33, 42, 46-48.

Respectfully submitted on 14 August 2023,



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