

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

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

**Registrar:** Dr. Fidelma Donlon

**Filing Participant:** Counsel for Hashim Thaçi  
Counsel for Kadri Veseli  
Counsel for Rexhep Selimi  
Counsel for Jakup Krasniqi

**Date:** 31 July 2023

**Language:** English

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**Public Redacted Version of**

**Joint Defence Response to Prosecution Request to Amend the Exhibit List**

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## I. INTRODUCTION

1. The Defence for Messrs. Thaçi, Veseli, Selimi, and Krasniqi (“Defence”) hereby responds to the Specialist Prosecutor’s Office (“SPO”) Request to Amend the Exhibit List.<sup>1</sup>

2. The Defence requests the Trial Panel to dismiss the SPO’s request to amend the exhibit list, which is the third such request made by the SPO since the start of the trial proceedings.<sup>2</sup> Yet again, the SPO has failed to provide timely notice or good cause. The large majority of the requested amendments have arisen due to oversights attributable to the SPO. Moreover, the addition of new material to the list of exhibits at this stage of the trial proceedings, when 15 witnesses have already testified and a new block is due to start soon, is prejudicial to the Defence and should also be rejected for that reason.

3. Pursuant to Rule 82(4) of the Rules,<sup>3</sup> this filing is classified as confidential as it responds to a document with the same classification.

## II. PROCEDURAL HISTORY

4. On 30 November 2022, the President of the Kosovo Specialist Chambers (“KSC”) constituted Trial Panel II (“Trial Panel”).<sup>4</sup>

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<sup>1</sup> KSC-BC-2020-06, F01689, Specialist Prosecutor, *Prosecution Request to Amend the Exhibit List* (“SPO Request”), 20 July 2023, confidential, with Annexes 1-12, confidential, and Annexes 13-15, public.

<sup>2</sup> See *infra* paras 8, 18.

<sup>3</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

<sup>4</sup> KSC-BC-2020-06, F01132, President of the Specialist Chambers, *Decision Assigning Trial Panel II*, 30 November 2022, public.

5. On 15 December 2022, the Pre-Trial Judge transmitted the case file to the Trial Panel pursuant to Rule 98 of the Rules.<sup>5</sup>
6. On 25 January 2023, the Trial Panel issued the Order on the Conduct of Proceedings, instructing the Parties to submit any request to amend the witness and exhibit list “at the earliest possible opportunity and, but for exceptional circumstances, sufficiently in advance of the commencement of the Party’s case”.<sup>6</sup>
7. On 3 April 2023, the trial proceedings started.<sup>7</sup>
8. In the nearly four months that followed the opening of the SPO’s case, the SPO has requested to amend the list of exhibits on two separate occasions,<sup>8</sup> and has filed, upon authorisation from the Trial Panel,<sup>9</sup> three amended versions of its exhibit list.<sup>10</sup>
9. On 23 June 2023, the SPO provided notice of its intention to file a further request to amend the list of exhibits,<sup>11</sup> which the SPO submitted on 20 July 2023.

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<sup>5</sup> KSC-BC-2020-06, F01166, Pre-Trial Judge, *Decision Transmitting the Case File to Trial Panel II*, 15 December 2022, public, with Annexes 1, 3, confidential, and Annexes 2, 4, strictly confidential and *ex parte*.

<sup>6</sup> KSC-BC-2020-06, F01226/A01, Trial Panel II, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, public, para. 48.

<sup>7</sup> KSC-BC-2020-06, Transcript of Hearing, 3 April 2023, public.

<sup>8</sup> KSC-BC-2020-06, F01622, Specialist Prosecutor, *Prosecution Request to Add Intercepted Communications to the Exhibit List* (“Intercepts Request”), 23 June 2023, confidential; Transcript of Hearing (“Transcript of Hearing 12 July”), 12 July 2023, confidential, pp. 5508-5509.

<sup>9</sup> 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 2023 Decision”), 23 May 2023, public; F01656, Trial Panel II, *Decision on Prosecution Request to Add Intercepted Communications to the Exhibit List* (“Intercepts Decision”), 7 July 2023, confidential; In Court – Oral Order, *Order on SPO’s Application to Amend its List of Exhibits* (“Exhibits Order”), 12 July 2023, public.

<sup>10</sup> KSC-BC-2020-06, F01562, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 30 May 2023, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential; F01662, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 10 July 2023, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential; F01669, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 12 July 2023, public, with Annex 1, strictly confidential and *ex parte* and Annex 2, confidential.

<sup>11</sup> Intercepts Request, fn. 7.

### III. APPLICABLE LAW

10. 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 (“ECHR”). 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 ECHR; 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 ECHR.

11. Rule 102(1)(b)(iii) 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.

12. 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).”

13. 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.<sup>12</sup> However, subject to timely notice and good cause, amendments to witness and exhibit lists may be permitted.<sup>13</sup>

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<sup>12</sup> KSC-BC-2020-06, F01352, Trial Panel II, *Decision on Prosecution Request to Amend the Exhibit List and Related Matters* (“8 March 2023 Decision”), 8 March 2023, confidential, para. 28; Intercepts Decision, para. 11.

<sup>13</sup> 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.

14. 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.<sup>14</sup> The jurisprudence of the International Criminal Court (“ICC”) has further clarified that “[i]nadvertence is not a reason outside of the Prosecution’s control, but lies plainly within it”,<sup>15</sup> finding that the Prosecution’s appreciation of the importance of certain documents upon a later review of its evidence collection did not constitute good cause for the addition of those documents to its list of evidence once the deadline had passed.<sup>16</sup> Further, ‘exceptional circumstances’ causing amendments to witness or exhibit lists 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 adversely affect his ability to prepare for trial.<sup>17</sup> Throughout this balancing exercise, the rights of the Accused remain the primary concern.<sup>18</sup>

15. 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

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<sup>14</sup> 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 P0551*, 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 (“Bemba Decision”)*, 27 August 2015, para. 9.

<sup>15</sup> *Bemba Decision*, para. 10.

<sup>16</sup> ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1120, Trial Chamber I, *Decision on the Prosecutor’s Request for an Extension of Time Pursuant to Regulation 35 of the Regulations of the Court and Application to Submit Six Documents under Paragraph 43 of the Directions on the Conduct of the Proceedings*, dated 21 December 2017, 2 February 2018, paras 10-12.

<sup>17</sup> 8 March 2023 Decision, para. 31; 23 May 2023 Decision, para. 11; *Intercepts Decision*, para. 16. *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 (“Karadžić Decision”)*, 19 October 2011, para. 9.

<sup>18</sup> KSC-BC-2020-06, IA019/F00006, Court of Appeals Panel, *Decision on Thaçi Appeal against Decision on Specialist Prosecutor Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 12 July 2022, public, para. 21.

would, therefore, ultimately be denied admission into evidence.<sup>19</sup> 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 material.<sup>20</sup>

16. Timely notice, in turn, requires that any amendment does not adversely affect an accused's ability to prepare for trial.<sup>21</sup> 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.<sup>22</sup>

#### IV. SUBMISSIONS

17. The SPO Request fails to meet the threshold criteria established by Rule 118(2). There is no good cause for any of the requested amendments of the SPO's exhibit list and timely notice has not been provided to the Defence.

18. Requests to amend the list of exhibits should be exceptional at this stage of proceedings, particularly when the SPO has been in possession of the items in question for a long time.<sup>23</sup> The present request constitutes the third such application made by the SPO since the start of trial in April 2023,<sup>24</sup> and the twelfth application

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<sup>19</sup> 8 March 2023 Decision, para. 31; 23 May 2023 Decision, para. 11; Intercepts Decision, para. 16. *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.

<sup>20</sup> 8 March 2023 Decision, para. 31; 23 May 2023 Decision, para. 11; Intercepts Decision, para. 16. *See also* *Karadžić* Decision, para. 9.

<sup>21</sup> 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.

<sup>22</sup> 23 May 2023 Decision, para. 10.

<sup>23</sup> *Karadžić* Decision, para. 13.

<sup>24</sup> *See* Intercepts Request, Transcript of Hearing 12 July, pp. 5508-5509.

made since the SPO filed its first Witness and Exhibit List on 17 December 2021.<sup>25</sup> Despite continuous Defence objections, all requests made by the SPO have been granted without exception by the Pre-Trial Judge<sup>26</sup> or the Trial Panel.<sup>27</sup>

19. The Defence continues to emphasise that the evaluation of the requested amendments should be contextualised in the ongoing pattern of SPO amendments. The Pre-Trial Judge, already in February 2022, 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 crystallise the Prosecution case to allow for Defence preparations.<sup>28</sup> Likewise, the Trial Panel, in January 2023, sought and received confirmation from the SPO that there would be no additional requests for amendments of the Exhibit List,<sup>29</sup> and it has expressed discontent with the SPO's untimely requests.<sup>30</sup>

20. Nevertheless, and despite multiple warnings, the SPO continues to seek amendment of its list of exhibits with no indication of when it will become final. To the contrary, the SPO has provided notice of yet another request to add materials generated in the course of the proceedings in the Shala case;<sup>31</sup> and a request to add a video footage [REDACTED], which the SPO intends to use with a witness scheduled to testify in late August.<sup>32</sup> If amendments continue being permitted with no

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<sup>25</sup> See KSC-BC-2020-06, Thaçi, Selimi and Krasniqi Defence, *Thaçi, Selimi and Krasniqi Defence Response to 'Prosecution Request to Add Intercepted Communications to the Exhibit List'* ("Intercepts Response"), 3 July 2023, confidential, fn. 26; Intercepts Request; Transcript of Hearing 12 July, pp. 5508-5509.

<sup>26</sup> See Intercepts Response, fn. 27.

<sup>27</sup> See Intercepts Response, fn. 28; 23 May 2023 Decision, para. 16; Intercepts Decision, para. 25; Exhibits Order.

<sup>28</sup> KSC-BC-2020-06, Transcript of Hearing, 4 February 2022, public, p. 928.

<sup>29</sup> KSC-BC-2020-06, Transcript of Hearing ("Transcript of Hearing 15 February"), 15 February 2023, public, pp. 2015-2018.

<sup>30</sup> See e.g., 8 March 2023 Decision, para. 30; Transcript of Hearing 12 July, p. 5552.

<sup>31</sup> SPO Request, fn. 5.

<sup>32</sup> SPO e-mail dated 26 July 2023; 113189-02; 113189-02-TR; 113189-02-TR-ET.

consequences and ignoring the fact that all time limits have elapsed months ago, the Defence will be condemned to face a never-ending cycle of amendments and the rights of the Accused to a fair trial will inevitably be compromised.

21. As regards the timeliness of the SPO Request, the SPO has failed to justify why, in the exercise of its due diligence, it did not seek leave to amend its exhibit list at an earlier point in time. Whilst late requests have previously been granted on the basis that, despite not being made as early as they could and should have been, they were within the scope of what the Rules and the Panel permit,<sup>33</sup> the present request is non-compliant with the Rules or the time limit set by the Pre-Trial Judge and does not include any compelling reason justifying the late addition.

22. The Trial Panel has, in assessing the issue of timeliness of previous requests, considered whether the requested amendments consisted of items that were recently created or received by the SPO.<sup>34</sup> The Defence notes that the majority of the items subject to the present request were neither recently created nor recently received by the SPO. Of the 16 items the SPO seeks to add to its list of exhibits, only one was recently obtained by the SPO and/or cleared for disclosure by the relevant authorities.<sup>35</sup> The remaining items have been in the SPO's possession for a considerable period, some of them for months or years, and/or were publicly available.<sup>36</sup> Indeed, the SPO has conceded that some of the requested amendments "could have been added to the Exhibit List sooner".<sup>37</sup>

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<sup>33</sup> 8 March 2023 Decision, para. 30.

<sup>34</sup> 23 May 2023 Decision, para. 9.

<sup>35</sup> [REDACTED].

<sup>36</sup> [REDACTED]; [REDACTED]; SPOE00116730-00116733; SITF00429643-00429647; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; 072508-01; [REDACTED]; SPOE00331224-00331233; 114010-114011; SPOE00332260-00332263.

<sup>37</sup> SPO Request, para. 4.



23. Moreover, the SPO should not be permitted to add documents to its list of exhibits that relate or are relevant to witnesses that have already come to testify – particularly those documents that could have been added to its exhibit list at a much earlier date.<sup>38</sup> Doing so would deny the Defence the right to cross-examine the witnesses in relation to these documents.

24. The SPO Request fails to show good cause justifying the late addition of the requested amendments. The SPO submits that the requested amendments include items whose importance has been recently determined or “reassessed”.<sup>39</sup> Further review or reassessment of the proposed evidence cannot constitute good reason for their late addition to the exhibit list. The SPO had ample opportunity to review the material in its possession. The requested amendments were known to the SPO and, if relevant to its case, should have been identified as such in the diligent exercise of its responsibilities.<sup>40</sup> Five items relate to the next 12 witnesses which were also included in the list of first 40 witnesses, filed by the SPO in November 2022.<sup>41</sup> Moreover, the SPO fails to explain why the requested amendments were not included in the application made by in January 2023, which was compiled in the context of trial preparations. As the Defence has previously noted,<sup>42</sup> granting the requested amendments simply because the SPO has reassessed their importance would open the door to unlimited future requests for amendments to the exhibit list.

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<sup>38</sup> E.g., W04746 would have been in a position to comment on [REDACTED] and W02153 on [REDACTED] and SPOE00116730-00116733.

<sup>39</sup> SPO Request, paras 4, 37.

<sup>40</sup> See 8 March 2023 Decision, para. 30.

<sup>41</sup> KSC-BC-2020-06, F01117/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Provisional List of First 40 Witnesses to be Called at Trial*, 18 November 2022, confidential.

<sup>42</sup> KSC-BC-2020-06, F01278, Krasniqi Defence, *Krasniqi Defence Response to Prosecution Request to Amend the Exhibit List and Related Matters*, 10 February 2023, confidential, para. 22.

25. In addition, the SPO submits that no prejudice arises because some of the requested amendments were previously disclosed under Rules 102(3) and/or 103.<sup>43</sup> The Defence recalls that during the September 2021 Status Conference, the Defence raised concerns about the SPO's repeated failure to identify Rule 103 material on the Rule 102(3) list. In light of these concerns, the Defence asked for and received explicit confirmation from the SPO that all items on that list had actually been reviewed by a human being. Despite raising its concerns repeatedly, and despite the SPO's repeated assurances that any errors had been rectified, mistakes continued to be surfaced throughout the remainder of pre-trial.<sup>44</sup> At this stage of the proceedings, when the pre-trial phase is long past and trial is well underway, it is simply not fair to require the Defence to continue to bear the burden of the SPO's failure to carry out its own evidence review to a satisfactory standard.<sup>45</sup>

26. The Defence further notes that the Trial Panel has accepted that Rule 102(3) or Rule 103 disclosure "does not put the Defence on notice of the fact that the SPO

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<sup>43</sup> SPO Request, para. 5.

<sup>44</sup> See for example, KSC-BC-2020-06, F00699/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Request for Protective Measures for Certain Information Requested by the Krasniqi Defence Pursuant to Rule 102(3)'*, KSC-BC-2020-06/F00699, Dated 16 February 2022, 18 February 2022, confidential, para. 16, fn. 51; F00986/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Request for Protective Measures for certain Information Requested by the Defence pursuant to Rule 102(3) with Strictly Confidential and Ex Parte Annexes 1-26'*, KSC-BC-2020-06/F00986, Dated 23 September 2022, 27 September 2022, confidential, paras 12-13; F00995/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Request for Protective Measures for Certain Information Requested by the Defence pursuant to Rule 102(3) with Strictly Confidential and Ex Parte Annexes 1-30'*, KSC-BC-2020-06/F00995, Dated 29 September 2022, 5 October 2022, confidential, para. 27; F01003/CONF/RED2, Specialist Prosecutor, *Confidential Lesser Redacted Version of 'Prosecution Request for Protective Measures for Certain Information Requested by the Defence pursuant to Rule 102(3) with Strictly Confidential and Ex Parte Annexes 1-24'*, KSC-BC-2020-06/F01003, Dated 30 September 2022, 13 January 2023, confidential, paras 12-13. See also, F00861/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Third Prosecution Request for Protective Measures for Items Containing Rule 103 Information'*, KSC-BC-2020-06/F00861, Dated 30 June 2022, 1 July 2022, confidential, para. 6; F00941/COR/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Corrected Version of Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information with Strictly Confidential and Ex Parte Annexes 1-44'*, 1 September 2022, confidential, paras 6, 33-35; F01019, Specialist Prosecutor, *Prosecution Disclosure Report*, 7 October 2022, public, para. 11; F01061, Krasniqi Defence, *Krasniqi Defence Response to Prosecution Challenge to Disclosure of Items in Rule 102(3) Notice*, 27 October 2022, confidential, para. 16, fn 22.

<sup>45</sup> KSC-BC-2020-06, Transcript of Hearing, 14 September 2021, public, pp. 586-589.

intends to use such material as evidence in the proceedings”.<sup>46</sup> While, as noted by the SPO,<sup>47</sup> the Trial Panel in that decision also found that prior disclosure did indicate that the material was not unknown to the Defence, “in that limited sense,” this is quite distinct from finding that no prejudice could ever arise from the late inclusion of a Rule 102(3) item on the exhibit list.

27. 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. The Pre-Trial Judge had already found that “the late addition of items to the Exhibit List could be prejudicial to the Defence in certain circumstances” and ordered counterbalancing measures for certain items that “could have an impact on the Accused’s ability to prepare for trial”.<sup>48</sup> The latest version of the Exhibit List comprises 19,630 items.<sup>49</sup> More than 3,300 items have been added over the course of the SPO requests made since the list of exhibits was first filed in December 2021.<sup>50</sup> Moreover, the SPO Request has to be understood in conjunction with the substantial evidence the SPO is seeking to admit, in particular in writing through Rules 153-155, and the overall prejudicial effect thereof.

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<sup>46</sup> 8 March 2023 Decision, para. 33. While the Trial Panel also found that prior disclosure did, “in that limited sense,” mean that the material was not unknown to the Defence, this is quite distinct from finding that the Defence would have had any reason to examine or investigate such documents. In a case of this size, where it is literally impossible to read all of the disclosure, the Defence must have notice of the issues and evidence that the SPO considers to support its case if it is to have a meaningful opportunity to test that evidence.

<sup>47</sup> SPO Request, para. 5, fn. 18.

<sup>48</sup> KSC-BC-2020-06, 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 Decision”), 8 July 2022, confidential, paras 32, 43.

<sup>49</sup> KSC-BC-2020-06, F01669/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Amended Exhibit List*, 12 July 2023, confidential.

<sup>50</sup> See 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 2021, confidential.

28. Finally, the SPO's attempt to downplay the 'limited nature and scope' of the application is without merit. The Defence notes that the 'limited' nature of the requested amendments is among the factors the Trial Panel has considered when assessing the impact on the Accused's preparation for trial.<sup>51</sup> The SPO seeks admission of 16 documents amounting to 142 pages. The requested amendments, albeit not voluminous *per se*, need to be considered in the light of the more than 400 pages of evidence that the SPO has sought to add to its list of exhibits since the start of the trial proceedings and since the SPO offered confirmation that the list was final,<sup>52</sup> and the more than 1,100 pages of requested amendments that the Trial Panel has already granted. It is the cumulative effect of the numerous applications as well as the uncertainty that this situation creates which causes prejudice to the Defence, which is forced to adapt its case strategy and evidence analysis on the basis of a 'moving target'.

### Annex 1

29. The SPO seeks to add an [REDACTED] from W02161 to [REDACTED] which was "inadvertently omitted from the Exhibit List".<sup>53</sup> Inadvertence does not constitute good cause for the late addition to the Exhibit List of an item that was in the SPO's possession since at least November 2022.<sup>54</sup>

30. W02161 was included in the list of first 12 witnesses that the SPO filed in February 2023.<sup>55</sup> As such, W02161 was scheduled to testify in June 2023 and her testimony had to be postponed due to [REDACTED],<sup>56</sup> which implies that: (i) the SPO

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<sup>51</sup> 23 May 2023 Decision, para. 13; Transcript of Hearing 12 July, p. 5553.

<sup>52</sup> Transcript of Hearing 15 February, pp. 2015-2018.

<sup>53</sup> SPO Request, para. 7.

<sup>54</sup> Disclosure 596.

<sup>55</sup> KSC-BC-2020-06, F01243, Specialist Prosecutor, *Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, public, with Annex 1, confidential.

<sup>56</sup> KSC-BC-2020-06, F01575, Specialist Prosecutor, *Urgent Prosecution Updates and Related Requests Concerning Witnesses in the Next Evidentiary Block*, 2 June 2023, confidential, with Annexes 1-3, confidential.

could and should have sought to add the [REDACTED] to the list of exhibits earlier, namely when the SPO filed the request to amend the list of exhibits in January 2023, which included additional material relating to W02161;<sup>57</sup> and (ii) the importance of the document to justify its late addition is questionable if its relevance only became apparent to the SPO after numerous reviews.

### Annexes 2-3

31. The SPO seeks to add two KVM reports from January 1999 relating to W03724.<sup>58</sup> The SPO has failed to show good cause for the late addition of these items. Both documents have plainly been in the SPO's possession for years, as they were included in the first Rule 102(3) Notice which the SPO filed in July 2021<sup>59</sup> and were disclosed to three Defence teams.<sup>60</sup> It follows that the SPO was, or should have been, aware of the existence of these documents when it filed the request to amend the list of exhibits in January 2023, which included material relating to W03724.<sup>61</sup> Therefore, these items could, as the SPO acknowledges,<sup>62</sup> and should have been requested to be added earlier to the list of exhibits.

32. Furthermore, and in contrast with other documents,<sup>63</sup> the SPO did not provide notice of its intention to add the two KVM reports to the list of exhibits in the list of the next 12 witnesses,<sup>64</sup> which suggests that review of material that has been for long

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<sup>57</sup> KSC-BC-2020-06, F01238, Specialist Prosecutor, *Prosecution Request to Amend the Exhibit List and Related Matters with ("30 January 2023 Request")*, 30 January 2023, confidential, with Annexes 1-47, confidential, paras 9-11.

<sup>58</sup> SPO Request, paras 8-9.

<sup>59</sup> KSC-BC-2020-06, F00421, Specialist Prosecutor, *Prosecution Rule 102(3) Notice*, 30 July 2021, public with Annex 1, confidential, and Annex 2, confidential and *ex parte*.

<sup>60</sup> SPO Request, para. 9.

<sup>61</sup> 30 January 2023 Request, paras 27-28.

<sup>62</sup> SPO Request, para. 9.

<sup>63</sup> [REDACTED]; SITF00429643-00429647.

<sup>64</sup> SPO Request, paras 7, 11, fns 28, 38.

in the SPO's possession continues to be an ongoing task and further requests to amend the list of exhibits are expected to come along with each new set of witnesses.

#### Annex 4

33. The SPO seeks to add four pictures that were used by UNMIK investigators during interactions with W04018 in 2003.<sup>65</sup> This item, again, could and should have been added to the exhibit list sooner.<sup>66</sup> It was in the SPO's possession for a long time as it was disclosed to the Defence pursuant to the First Decision on Specialist Prosecutor's Request for Protective Measures, which dates back to 2020,<sup>67</sup> and other photographs of locations where W04018 was allegedly detained in Bob and that are part of the same case were tendered and admitted as associated exhibits to W04018's statements.<sup>68</sup> W04018 is among the first 40 witnesses and review of the witness' material for the purpose of trial preparations could and should have been done earlier. Oversight cannot constitute good cause for the late addition of the photographs, even more so after several reviews of W04018's material have taken place.<sup>69</sup> Moreover, the SPO intends to call W04018 after the summer recess.<sup>70</sup> Adding documents related to this witness at such short notice is unacceptable.

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<sup>65</sup> SPO Request, para. 10.

<sup>66</sup> *Idem*, para. 11.

<sup>67</sup> SPO e-mail dated 31 January 2023; KSC-BC-2020-06, F00133/COR/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures*, 10 December 2020, confidential.

<sup>68</sup> KSC-BC-2020-06, F01595, Trial Panel II, *Decision on Second Prosecution Motion Pursuant to Rule 154*, 9 June 2023, confidential, paras 63, 65.

<sup>69</sup> This item was disclosed to the Defence on 30 January 2023 and W04018 was part of the Rule 154 application submitted in March 2023. See KSC-BC-2020-06, F01374, Specialist Prosecutor, *Prosecution Motion for admission of evidence of Witnesses W03827, W04408, W04577, W04644, W04781, W04018, W04255, W01493, and W04448 pursuant to Rule 154*, 15 March 2023, confidential, paras 56-67.

<sup>70</sup> SPO e-mail dated 21 July 2023.

Annex 5

34. The SPO seeks to add a document containing a [REDACTED] which was seized from Rexhep Selimi.<sup>71</sup> Timely notice has not been provided. Given that the search of Mr. Selimi's residence was carried out in November 2020, the requested item has been in the SPO's possession for a long time and thus could and should have been added to the exhibit list sooner.<sup>72</sup> Re-evaluation of the evidence for the purpose of preparation for W04769's testimony<sup>73</sup> does not constitute good cause justifying the late addition. W04769 is among the first 40 witnesses, therefore, review of the witness' materials could and should have been done earlier in time. In addition, the legality of the seizure remains under dispute.

Annex 6

35. The SPO seeks to add an ICTY statement of a deceased witness dated [REDACTED].<sup>74</sup> The SPO submits that the request of this item is timely, as "as the unredacted statement was only recently received".<sup>75</sup> However, the SPO fails to account for (i) when the item was initially received in redacted form; (ii) when the SPO requested the unredacted version of the statement; and (iii) why the SPO waited almost two months after the unredacted version was received to request its addition to the list of exhibits.

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<sup>71</sup> SPO Request, para. 12.

<sup>72</sup> SPO Request, para. 13.

<sup>73</sup> *Ibidem*.

<sup>74</sup> *Idem*, para. 14.

<sup>75</sup> *Idem*, para. 15.

Annexes 7-10

36. The SPO seeks to add a series of documents amounting to 87 pages that were only identified as relevant in the course of preparations for [REDACTED] testimony.<sup>76</sup> The fact that [REDACTED] is not among the next 12, first 40, or identified reserves does not good constitute good cause and does not alleviate the prejudice that the late addition of these items will cause to the Defence. To the contrary, since [REDACTED] is not scheduled to testify in the imminent future, the Defence has no guarantee that further requests to amend the list of exhibits will not arise upon further reviews of [REDACTED] material closer to the witness' testimony.

37. [REDACTED] is an SPO Official Note dated [REDACTED] containing [REDACTED]. The requested item was part of the initial Rule 102(3) and was disclosed to all Defence teams.<sup>77</sup> As the SPO recognises, this item could<sup>78</sup> and should have been added earlier to the list of exhibits.

38. [REDACTED] is an interview with [REDACTED] dated [REDACTED]. Given the relatively limited nature of this item, its admission to the list of exhibits could and should have been sought earlier.

39. [REDACTED] is an UNMIK report on the [REDACTED]. Timely notice has not been provided. This item was part of the initial Rule 102(3) Notice and was disclosed to three Defence teams.<sup>79</sup> Moreover, as the SPO acknowledges, [REDACTED] was shown and commented on the list in [REDACTED].<sup>80</sup> The requested item could and should have been added earlier to the list of exhibits.

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<sup>76</sup> SPO Request, paras 18-28.

<sup>77</sup> SPO Request, para. 20; Disclosures 374, 390, 404, 427.

<sup>78</sup> SPO Request, para. 20.

<sup>79</sup> SPO Request, para. 25; Disclosures 266, 267, 385.

<sup>80</sup> [REDACTED].



40. [REDACTED]. It was included in the initial Rule 102(3) Notice and disclosed to the Defence in September 2022. Therefore, the SPO could and should have requested to add this item earlier. Furthermore, the SPO has failed to demonstrate that the requested item is *prima facie* relevant. The [REDACTED] dates and addresses issues outside of the Indictment period. Passing and decontextualized references to the '[REDACTED]' or '[REDACTED]' do not justify the late addition to the list of exhibits.

[REDACTED]

41. The SPO seeks to add a video taken in [REDACTED].<sup>81</sup> The requested item was part of the initial Rule 102(3) and was disclosed to all Defence teams.<sup>82</sup> The SPO appears simply to have failed to include a video used in a witness interview in the list of exhibits. Oversight cannot constitute good cause for the late addition of this item which was shown to and discussed with W04691 during the SPO interview.<sup>83</sup> Therefore, the SPO could and should have added the requested item to its list of exhibits earlier.

Annex 11

42. The SPO seeks to add a video-clip from a [REDACTED] which was "inadvertently omitted from the Exhibit List until closer review in preparation for the testimony of [W02540 and W04734]".<sup>84</sup> Inadvertence does not constitute good cause for the late addition to the list of exhibits of an item that was in the SPO's possession since at least July 2021, as the requested item was included in the initial Rule 102(3)

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<sup>81</sup> SPO Request, para. 29.

<sup>82</sup> SPO Request, para. 30; Disclosures 141, 244, 255, 382.

<sup>83</sup> [REDACTED].

<sup>84</sup> SPO Request, paras 32, 34.

Notice and was disclosed to all Defence teams.<sup>85</sup> Furthermore, the fact that W02540 and W04734 are not among the next 12, first 40, or identified reserve witnesses does not mitigate the prejudice that the addition of the requested item will cause to the Defence, nor does it constitute a safeguard against future requests.

43. Furthermore, the requested video has little probative value. A number of videos depicting the same events and showing virtually the same contents are already in the SPO list of exhibits.<sup>86</sup> The fact that W02540 and W04734 were able to provide evidence in relation to [REDACTED]<sup>87</sup> renders the requested amendment unnecessary.

#### Annexes 12-13

44. The SPO seeks to add two [REDACTED] from Mr. Krasniqi's seized mobile phone and a Facebook post about Mr. Hashim Thaçi published in Mr. Krasniqi's profile.<sup>88</sup> Mr. Krasniqi's phone was seized in November 2020,<sup>89</sup> the [REDACTED] were disclosed to the Defence in February 2023, and the Facebook post dates back to 2014. Re-assessment of the evidence as relevant does not constitute good cause justifying its late addition.

45. Furthermore, the SPO has failed to show the *prima facie* relevance of the requested amendments. The SPO has not proposed any witness who could testify about the content of the requested items and mere 'observations' of a co-Accused regarding Mr. Thaçi's role fall short of an explanation for the late addition of the requested items at this stage of the proceedings. Granting admission of the requested

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<sup>85</sup> SPO Request, para. 34; Disclosures 141, 147, 150, 382.

<sup>86</sup> SPO Request, para. 33.

<sup>87</sup> *Ibidem*.

<sup>88</sup> *Idem*, para. 35.

<sup>89</sup> KSC-BC-2020-06, F00125/A03, Specialist Prosecutor, *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*.

items would only further the SPO's practice of bloating the case file with evidence of limited probative value. In addition, the legality of the seizure remains under dispute.

#### Annex 14

46. The SPO seeks to add a statement given by the US Secretary of State Madeleine K. Albright at the Contact Group Ministerial on Kosovo on 9 March 1998.<sup>90</sup> The SPO came across the requested item while assessing parts of the Thaçi Defence's opening statement, which took place on 4 April 2023,<sup>91</sup> and it is publicly available.<sup>92</sup> Therefore, the SPO could and should have sought addition of this item earlier.

47. The SPO fails to show *prima facie* relevance of the requested item by merely suggesting that the requested item is relevant to 'noticed aspects' of the SPO's case.<sup>93</sup> In addition, it mischaracterises Mrs. Albright's statement, which expresses concerns about the Kosovo situation, condemns Milošević's actions, and states that "responsibility for the violence lies squarely with Belgrade", by cherry-picking one single excerpt which in fact criticises Serbia's response to a 'terrorist threat'.

#### Annex 15

48. The SPO seeks to add CIA report dated 3 January 2000.<sup>94</sup> The SPO submits that a passage from the requested item was cited by the Thaçi Defence during its opening speech in April 2023 and it is publicly available.<sup>95</sup> The SPO could and should have sought addition of the requested item earlier.

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<sup>90</sup> SPO Request, para. 38.

<sup>91</sup> KSC-BC-2020-06, Transcript of Hearing, 4 April 2023, public.

<sup>92</sup> SPO Request, para. 40.

<sup>93</sup> *Ibidem*.

<sup>94</sup> SPO Request, para. 41.

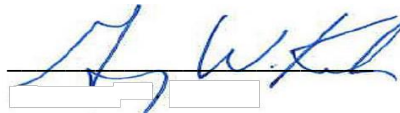
<sup>95</sup> *Idem*, para. 43.

**V. CONCLUSION**

49. For the foregoing reasons, the Defence requests that the SPO application to amend the list of exhibits be rejected.

**Word count: 5,986**

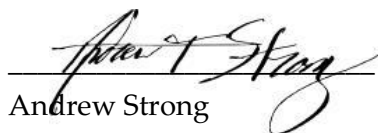
Respectfully submitted on 31 July 2023



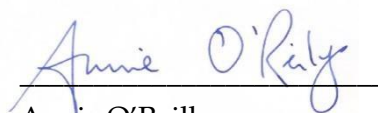
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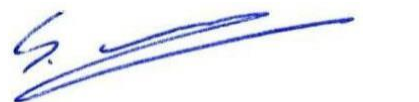
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