

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 August 2023

Language: English

Classification: Public

Public Redacted Version of

Joint Defence Response to Prosecution Request to Amend the Exhibit List (F01747)

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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.¹ The Defence requests that the Trial Panel dismiss the SPO’s request to amend the Exhibit List to include an interview with W03880 published in [REDACTED].

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

3. At the outset, the Defence reiterates its concerns regarding the number of similar requests the SPO has made, in particular, since the start of the trial proceedings,³ which have been all authorised by the Trial Panel. The Defence also notes that SPO requests to amend the list of exhibits, made orally or in writing, have become more regular, with no less than four requests submitted in the last two months, including the present one.⁴ Whilst the addition of exhibits has been treated with flexibility during the pre-trial stage, leave to amend the exhibit list should not be granted lightly during the trial phase, when 19 witnesses have already testified.⁵ Two further factors militate against any justification advanced by the SPO for the late addition of the requested item: (i) the SPO’s reassurance that the list of exhibits had become final in February 2023,⁶ and (ii) the uncertainty created by a situation where requests to amend

¹ KSC-BC-2020-06, F01747, Specialist Prosecutor, *Prosecution Request to Amend the Exhibit List* (“SPO Request”), 29 August 2023, confidential, with Annex 1, confidential.

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

³ KSC-BC-2020-06, F01712, Joint Defence, *Joint Defence Response to Prosecution Request to Amend the Exhibit List* (“Joint Defence Response”), 31 July 2023, confidential, paras 2, 8, 18.

⁴ KSC-BC-2020-06, Transcript of Hearing, 12 July 2023, confidential, pp. 5508-5509; F01689, Specialist Prosecutor, *Prosecution Request to Amend the Exhibit List* (“July 2023 Request”), 20 July 2023, confidential, with Annexes 1-12, confidential, and Annexes 13-15, public; F01728, Specialist Prosecutor, *Prosecution Request to Amend the Exhibit List*, 22 August 2023, confidential, with Annex 1, confidential. In the July 2023 Request, the SPO provided notice of another request to add materials generated in the course of the proceedings in the Shala case, which has not yet been notified to the Defence (*see* July 2023 Request, fn. 5).

⁵ KSC-BC-2020-06, IA019/F00006, Court of Appeals Panel, *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, public, para. 21.

⁶ KSC-BC-2020-06, Transcript of Hearing, 15 February 2023, public, pp. 2015-2018.

the list of exhibits continue to proliferate with no indication of when it will come to an end.

4. The SPO has failed to provide timely notice or good cause justifying the late addition of the requested amendment. The SPO seeks to add an interview with W03880 published in [REDACTED] that purportedly discusses his detention in October 1998.⁷ The requested item was discussed in the SPO's own interview with W03880, which took place as long ago as 2019:

Q: [REDACTED]?

A: [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].⁸

5. In addition, as the SPO concedes, the interview was [REDACTED].⁹ Yet, the SPO submits that it was only during preparations for W03880's testimony that it 'noted' the witness' reference to an interview he had given to [REDACTED].¹⁰ Since W03880 had told the SPO about the requested item in December 2019, there is no excuse for the SPO's failure to include it on the original Exhibit List and to disclose it to the Defence within the time limits set during pre-trial proceedings. The SPO also missed a further opportunity to identify and disclose the requested item during its review of W03880's material for the purpose of the Rule 154 application, which was submitted in June 2023.¹¹

⁷ SPO Request, para. 1.

⁸ 070725-TR-ET Part 1 RED2, p. 14.

⁹ SPO Request, para. 8. *See also infra*, para. 9.

¹⁰ *Idem*, para. 7.

¹¹ KSC-BC-2020-06, F01625, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W03832, W03880, W04769, W03724, W00072, W01504, W02153, W04368, W04566, and W04586 pursuant to Rule 154*, 23 June 2023, confidential, with Annexes 1-10, confidential.

6. Moreover, further review or reassessment of the proposed evidence in preparation of the witness' testimony cannot constitute good cause for its late addition to the Exhibit List. The SPO has had ample opportunity to review the material in its possession. The requested item was known to the SPO and, if relevant to its case, should have been identified as such in the diligent exercise of its responsibilities.¹² Finally, the SPO cannot establish good cause for adding documents to its Exhibit List by making conclusory assertions such as, "the interview partially corroborates and complements the witness's account, giving important context to it."¹³ The Defence submits that there is little corroborative value in an interview given twenty years after the events described.

7. The Defence takes note of the SPO's acceptance that the requested amendment could have been identified earlier.¹⁴ However, this has also been the case for the large majority of the amendments in recent requests.¹⁵ The Defence reiterates its previous submissions that oversights or inadvertence attributable to the SPO cannot constitute good cause justifying the late addition of items to the list of exhibits.¹⁶ The Defence also notes that the timing and nature of this request only reinforces the concerns recently raised by the Defence for Mr. Thaçi, regarding addition of items that could reasonably have been identified by the SPO earlier, in the course of proper investigations. The SPO should not be permitted to continue adding such documents to its Exhibit List without limitation.¹⁷

¹² See 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. 30.

¹³ SPO Request, para. 5.

¹⁴ *Idem*, para. 6.

¹⁵ See e.g., Joint Defence Response, paras 2, 22.

¹⁶ Joint Defence Response, para. 2.

¹⁷ KSC-BC-2020-06, F01738, Thaçi Defence, *Thaçi Defence Response to 'Prosecution Request to Amend the Exhibit list' (F01728)*, 23 August 2023, confidential, paras 3-5.

8. Finally, the requested amendment does cause undue prejudice to the Defence.¹⁸ First, as the SPO submits, W03880 is expected to testify during the week of 11 September 2023.¹⁹ Less than two weeks is not enough notice. Second, whilst the requested amendment is of limited nature,²⁰ this request needs to be considered in light of the cumulative effect of the numerous recent applications and the prejudice it causes to the Defence, which is constantly forced to adapt its case strategy and evidence analysis on the basis of a 'moving target'.²¹

9. The SPO's submission that no undue prejudice would arise from adding the requested amendment to the Exhibit List because the Defence has been aware of W03880's interview since December 2020 and it was [REDACTED] is likewise without merit. Indeed, this is the very reason why the requested item should have been identified, disclosed, and added to the Exhibit List in the first place. The Defence recalls 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.²² The fact that a witness refers to a previous document, [REDACTED], does not constitute adequate notice. The SPO's attempt to reverse the burden of reviewing and scrutinising the materials relevant to its case should be rejected, even more so considering the size of the disclosure record.

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

¹⁸ *Contra* SPO Request, para. 8.

¹⁹ SPO Request, paras 1, 8.

²⁰ *Idem*, para. 3.

²¹ Joint Defence Response, para. 28.

²² 8 March 2023 Decision, para. 28; KSC-BC-2020-06, F01656, Trial Panel II, *Decision on Prosecution Request to Add Intercepted Communications to the Exhibit List*, 7 July 2023, confidential, para. 11.

Word count: 1,379

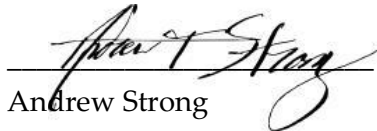
Respectfully submitted on 31 August 2023



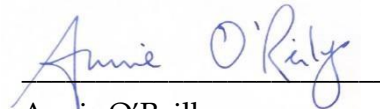
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