

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

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi  
and Jakup Krasniqi**

**Before:** Trial Panel II

Judge Charles L. Smith III, Presiding Judge  
Judge Christoph Barthe,  
Judge Guénaél 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:** 20 October 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of Joint Defence Response to Prosecution request to  
amend the Exhibit List (F01844)**

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**Specialist Prosecutor**

Kimberly P. West

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Gregory Kehoe

**Counsel for Victims**

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## I. INTRODUCTION

1. The Defence for Messrs Thaçi, Veseli, Selimi, and Krasniqi (collectively, “the Defence”) hereby file their response to the Prosecution request to amend the Exhibit List<sup>1</sup> (“SPO Request”).
2. The SPO seeks leave to add, *inter alia*, (1) the testimony transcript of one expert witness in [REDACTED], [REDACTED], that the SPO does not intend to call to testify in this case, but whose reports were relied upon by [REDACTED];<sup>2</sup> (2) an official note of meeting with [REDACTED];<sup>3</sup> and (3) data [REDACTED].<sup>4</sup> Pursuant to Rule 118(2) and Rule 149 of the Rules of Procedure and Evidence (“Rules”), the Defence submits that the SPO has failed to show good cause for the addition of these items to its Exhibit List.

## II. PROCEDURAL BACKGROUND

3. On 22 October 2021, the SPO filed its preliminary witness list, including three experts, W04875, [REDACTED], W04874, [REDACTED], and W04826, [REDACTED].<sup>5</sup>
4. On 24 November 2021, the Defence was disclosed three expert reports from W04874, W04875, and W04826, pursuant to Rule 102(1)(b) of the Rules of Procedure and Evidence (“Rules”).<sup>6</sup>

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<sup>1</sup> KSC-BC-2020-06/F01844, Prosecution request to amend the Exhibit List with confidential Annexes 1-5, 6 October 2023.

<sup>2</sup> SPO Request, para. 8, with reference to KSC-BC-2020-06/F01844/A01, [REDACTED] (“[REDACTED]”).

<sup>3</sup> SPO Request, paras 25-26, with reference to KSC-BC-2020-06/F01844/Annex 4, [REDACTED] (“[REDACTED]’s Note”).

<sup>4</sup> SPO Request, paras 27-29, with reference to KSC-BC-2020-06/F01844/Annex 5, [REDACTED] (“[REDACTED]’s Data”).

<sup>5</sup> KSC-BC-2020-06/F00542, Prosecution submission of preliminary witness list with strictly confidential and ex parte Annex 1 and confidential redacted Annex 2.

<sup>6</sup> Disclosure package n° 117.

5. On 1 December 2021, the Defence notified its position regarding these expert witnesses and/or reserved its right to do so pursuant to Rule 149.<sup>7</sup>
6. On 17 December 2021, the SPO filed its Pre-Trial Brief, with witness and exhibit lists.<sup>8</sup>
7. On 30 August 2022, the Pre-Trial Judge asked the SPO to clarify “whether, in relation to expert witnesses, the SPO can indicate: (i) if the reports disclosed in relation to experts presently on the Witness List are final; and (ii) if it has any intention of adding additional experts to the Witness List and if so, when the material relating to these experts can be finalised”.<sup>9</sup>
8. On 5 September 2022, the SPO replied that “[t]he expert reports disclosed for experts on the witness list are final, to the extent that no further information is sought from these experts at present. The SPO is mindful that it must seize the Pre-Trial Judge should it seek to call any additional experts.”<sup>10</sup>
9. On 29 March 2023, the SPO applied to add five items related to W04875 to its Exhibit List.<sup>11</sup> The SPO noted, *inter alia*, that it did not intend to call [REDACTED]

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<sup>7</sup> KSC-BC-2020-06/F00585, Selimi Defence Expert Notice pursuant to Rule 149(2); KSC-BC-2020-06/F00587, Krasniqi Defence Notice Pursuant to Rule 149(2); KSC-BC-2020-06/F00589, Thaçi Defence Notice Pursuant to Rule 149; KSC-BC-2020-06/F00592, Veseli Defence Notice on Expert Witness Reports.

<sup>8</sup> KSC-BC-2020-06/F00631, Submission of Pre-Trial Brief, with witness and exhibit lists with strictly confidential and ex parte Annexes 1-3, notified on 20 December 2021.

<sup>9</sup> KSC-BC-2020-06/F00940, Order Setting the Date for a Fourteenth Status Conference and for Submissions, para. 24(I)(e).

<sup>10</sup> KSC-BC-2020-06/F00952, Prosecution submissions for fourteenth status conference, para. 10.

<sup>11</sup> KSC-BC-2020-06/F01405, Prosecution request to add five items relating to expert witness to the Exhibit List with confidential Annexes 1-5, 29 March 2023.

as witness,<sup>12</sup> [REDACTED],<sup>13</sup> [REDACTED],<sup>14</sup> [REDACTED].<sup>15</sup> The amendment of the SPO Exhibit List was authorised by the Trial Panel on 23 May 2023.<sup>16</sup>

10. [REDACTED].<sup>17</sup>

### III. APPLICABLE LAW

11. Rule 149 of the Rules defines the regime applicable to the evidence of expert witnesses:

(1) The final report of any expert witness to be called by a Party shall be disclosed to the opposing Party and, where applicable, to Victims' Counsel within the time limit set by the Pre-Trial Judge or the Panel pursuant to Rule 102(1)(b).

(2) Within seven (7) days of disclosure of the report of an expert witness, or as directed by the Panel, the opposing Party shall file a notice indicating whether:

(a) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the expert witness report and, if so, which parts;

(b) it accepts the expert witness report or parts thereof; or

(c) it wishes to cross-examine the expert witness.

(3) If the opposing Party accepts the expert witness report or parts thereof, the latter may be admitted into evidence by the Panel without calling the expert witness to testify in person.

(4) If a Party exercised its rights under paragraph (2)(b) or (c), the Panel shall decide on the admissibility of the expert witness report following the testimony and questioning of the expert.

(5) Before testifying, every expert witness shall take the following solemn declaration: "Conscious of the significance of my testimony and my legal responsibility, I solemnly declare that I will perform my expert analysis conscientiously and to the best of my knowledge and that I will state my findings and opinion accurately and completely."

(6) If necessary, a Panel may authorise an expert witness who has not yet given his or her expert opinion to attend a hearing when another expert witness gives testimony on the same matter.

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<sup>12</sup> KSC-BC-2020-06/F01405, [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

<sup>15</sup> SPO Request, [REDACTED].

<sup>16</sup> KSC-BC-2020-06/F01544, Decision on Prosecution Request to Add Five Items Relating to Expert Witness to the Exhibit List, authorising the SPO to amend its Exhibit List, 23 May 2023, para. 16.

<sup>17</sup> KSC-BC-2020-06/F01844/A01, [REDACTED].

12. The Defence incorporates by reference its prior submissions on the admissibility of expert reports contained in its Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table.<sup>18</sup>
13. Rules 153 to 155 of the Rules define the conditions of admission of written statements of witnesses.
14. Concerning the amendment of the Exhibit List, the Panel has clarified that “[a]s regards good cause, the Panel notes that leave to amend the Exhibit List should not be granted with respect to items that are obviously irrelevant and would, therefore, ultimately be denied admission into evidence. Such an evaluation does not call for an assessment of the admissibility of the proposed material, but of a *prima facie* evaluation only.”<sup>19</sup>

#### IV. DISCUSSION

15. The SPO seeks to add to its Exhibit List the testimony transcript of [REDACTED], expert witness in [REDACTED], while he is not on the latest SPO Witness List<sup>20</sup> and the SPO has constantly stated that it does not intend to call him to testify in this case. The Defence therefore objects to the addition of this item and related material<sup>21</sup> to the SPO Exhibit List.
16. The Defence stresses that Rule 149(3) allows the Panel to admit an expert report into evidence without calling the expert to testify in person *only* if the report is explicitly accepted by the opposing party; whenever, on the contrary, the opposing Party has notified its intention to cross examine the expert, “the Panel

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<sup>18</sup> KSC-BC-2020-06/F01387, Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table, paras 78-81.

<sup>19</sup> KSC-BC-2020-06/F01544, para. 11.

<sup>20</sup> KSC-BC-2020-06/F01594, Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief with strictly confidential and ex parte Annex 1 and confidential Annexes 2-3, 9 June 2023.

<sup>21</sup> [REDACTED]’s Note and Data.

shall decide on the admissibility of the expert witness report following the testimony and questioning of the expert”.<sup>22</sup> The Defence reiterates that if the SPO intends to rely on the evidence of experts, such as [REDACTED], it should apply to add these proposed experts to its witness list and follow the procedure mandated by Rule 149.<sup>23</sup> The Defence objects to the SPO reliance on expert evidence without adding the expert to its witness list.

17. In the instant case, since the SPO does not intend to apply to add [REDACTED] to its witness list, the addition of [REDACTED]’s testimony to its Exhibit List is not justified. [REDACTED]’s testimony transcript from [REDACTED] would not be admissible pursuant to Rule 149 or Rules 153 to 155. The SPO has failed to show good cause for the addition of this item to its Exhibit List. For the same reasons, the Defence objects to the addition of [REDACTED]’s Note and Data to the SPO Exhibit List.
18. [REDACTED]’s Testimony, Note and Data should be disclosed pursuant to Rule 102(3), as material for the Defence preparation.

## V. CONFIDENTIALITY

19. The present response is filed confidentially pursuant to Rule 82(4) as it responds to confidential submissions filed by the SPO. The Defence undertakes to submit a public redacted version of the present filing in due course.

## VI. CONCLUSION

20. In light of the above, the Defence respectfully requests the Trial Panel to:

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<sup>22</sup> KSC-BC-2020-06/F01387, para. 79.

<sup>23</sup> KSC-BC-2020-06/F01387, para. 80.

- REJECT the SPO Request to add [REDACTED]'s Testimony, Note and Data to its Exhibit List.

Word count: 1.530

Respectfully submitted on 20 October 2023,



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