

In: KSC-BC-2020-06
The 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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 14 October 2024

Language: English

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**Public Redacted Version of Thaçi Defence Reply to SPO Response to Motion to
Compel the Specialist Prosecutor to Call Witnesses [REDACTED]**

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Hashim Thaçi

Luka Misetic

Counsel for Kadri Veseli

Rodney Dixon KC

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. SUBMISSIONS IN REPLY

A. The SPO is not being forced to call witnesses for the Defence

1. Nowhere in the SPO Response¹ does the SPO ever state in plain terms that [REDACTED]'s evidence will not contribute to the establishment of the truth by the Specialist Chambers. For the reasons set out in the Motion,² it would not be possible for the SPO to make such a statement. As such, it is not attempted.

2. Rather, the SPO Response starts from the position that the Defence for Mr Hashim Thaçi ("the Defence") is attempting to "force the SPO to call witnesses on Mr. Thaci's behalf".³ This is incorrect. Rather, the issue being raised is whether the SPO is permitted to drop *its own witnesses* even if doing so would impede the Trial Panel's search for the truth, especially in light of the SPO's obligation under Rule 62 of the Rules⁴ to "contribute to the establishment of the truth by the Specialist Chambers".

3. Significantly, the SPO does not challenge the first Defence request for relief: that the Trial Panel enter a finding that hearing from [REDACTED] would assist in the search for the truth.⁵ It is self-evident that, even assuming *arguendo* that the Trial Panel cannot compel the SPO to call [REDACTED], the Trial Panel undoubtedly has the power to make this finding. It would then be left to the Specialist Prosecutor to determine whether she could reject that finding in light of the SPO's obligation under Rules 62 of the Rules to "contribute to the establishment of the truth by the Specialist

¹ KSC-BC-2020-06/F02629, Prosecution Response to Thaçi Defence Motion to Compel the Specialist Prosecutor to Call Two Witnesses, 9 October 2024, Confidential ("Response"). A public redacted version was notified on the same day.

² KSC-BC-2020-06/F02602-CONF, Thaçi Defence Motion to Compel the Specialist Prosecutor to Call Witnesses [REDACTED], 26 September 2024, Confidential ("Motion"), paras 4, 27, 37.

³ Response, para. 1.

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁵ Motion, paras 4, 27, 37.

Chambers”, and her own obligations under Article 30(2)(b)⁶ of the KSC Code of Professional Conduct.⁷

4. Instead, the SPO Response focuses on asserting that the SPO cannot be compelled not to drop witnesses from its list. The SPO argument is bold: despite the fact that Rule 62 stands in a section of the Rules titled “General Provisions,” the SPO argues that no Panel of the Specialist Chambers has jurisdiction to enforce this rule of procedure.⁸ The SPO cites no authority for this proposition. It must be the case that the Panels of the Specialist Chambers have the power to compel the Specialist Prosecutor to comply with her *procedural obligation* to assist the Specialist Chambers in their search for the truth.

5. The Rules cited in the Motion are indeed general provisions.⁹ They do, however, give the Panel the power to deny the SPO the right to drop witnesses that would impede the Panel’s search for the truth. The SPO cites to the *Ayyash et al* case before the Special Tribunal for Lebanon (“STL”),¹⁰ but acknowledges that the STL Trial Chamber only deferred its decision on the need to compel the Prosecutor to call witnesses under the STL equivalent of Rule 62, and admits that the Trial Chamber in question ruled that it had the ability to “ask” the STL Prosecution to call witnesses to testify.¹¹ Thus, even under the authority cited by the SPO, this Trial Panel has the ability to enter a finding that its search for the truth would be facilitated by the SPO calling [REDACTED], and the ability to ask the SPO to do so. Contrary to the SPO’s

⁶ Pursuant to which “Prosecutors shall, in the investigation and prosecution of crimes within the jurisdiction of the Specialist Chambers: (...) b. fully respect and ensure the suspect’s and accused’s fair trial rights.”

⁷ KSC-BD-07-Rev1, Registry Practice Direction, Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, 28 April 2021.

⁸ Response, paras 5-6.

⁹ Response, paras 3-6 referring to Article 40(2) and Rule 116, Rule 143(4), Rule 62.

¹⁰ Response, para. 5.

¹¹ Response, footnote 12.

suggestion, the STL Trial Chamber in *Ayyash et al* did not rule on whether it could ultimately compel the STL Prosecution to do so were it to refuse the court's request.

6. Again, the SPO then returns to the argument that its obligations under Rule 62 “do not extend to obligating it to call witnesses for the Defence.”¹² However, Rule 62 does obligate the SPO not to pursue victory at all costs, at the expense of the truth, by dropping its own witnesses because their evidence refutes the prosecution case.

B. The SPO relied on [REDACTED] as witnesses of the truth

7. Importantly, the SPO maintains its position that its only basis for not calling [REDACTED], is that it assists in the “streamlining” of the SPO case.¹³ The SPO makes no plausible argument that the evidence of [REDACTED] is not highly relevant and probative beyond asserting, without any basis, that the evidence of these two witnesses is “contradicted” by “credible” witnesses.¹⁴ Yet, witnesses already called by the SPO do not “contradict” many of the key elements of the evidence of [REDACTED], but instead have claimed ignorance of many of the facts known to [REDACTED], including that [REDACTED].¹⁵ Importantly, these are facts which concern one of the very few allegations of direct conduct levelled by the SPO against Mr Thaçi.

8. Moreover, the purported “credibility” of the SPO witnesses who have already testified is directly impacted by [REDACTED]'s proposed evidence. It is for the Trial Panel, and not the SPO, to decide whether these contradictions impact [REDACTED]'s

¹² Response, para. 5.

¹³ KSC-BC-2020-06/F02576, *Prosecution notice of witness changes*, Confidential, para. 1. A public redacted version was filed on the same day.

¹⁴ Response, para. 7.

¹⁵ KSC-BC-2020-06, Transcript of Hearing [REDACTED]; KSC-BC-2020-06, Transcript of Hearing [REDACTED]; KSC-BC-2020-06, Transcript of Hearing [REDACTED].

credibility, or the credibility of the witnesses who have gone before. The Trial Panel should not be deprived of this opportunity because the SPO has assessed that the prior witnesses are more useful in supporting its case. Dropping these witnesses now would amount to concealment of the truth rather than search for the truth.

9. In addition, only [REDACTED] is capable of knowing whether [REDACTED] told him that Hashim Thaçi [REDACTED]. Only [REDACTED] is capable of knowing whether [REDACTED] told him that Hashim Thaçi [REDACTED],¹⁶ as alleged by [REDACTED]. No “credible” SPO witness can “contradict”¹⁷ [REDACTED]’s evidence on these questions because none have claimed to have personal knowledge of any conversations between [REDACTED].

10. The SPO now states, without further explanation, that it does “not consider the set of factual proposition in the Motion to be ‘true’.”¹⁸ Yet, the SPO submitted the statements of [REDACTED] to the Trial Panel as the statements of witnesses of truth.¹⁹ Both [REDACTED] were included in the SPO preliminary witness list notified in October 2021.²⁰ [REDACTED] was relied upon by the SPO as a witness of truth to confirm the Indictment.²¹ The Defence has not sought to alter or add anything to their evidence. The SPO has not given any reasoning or pointed to any changed circumstances that have led it to now consider that the evidence of [REDACTED] is, in fact, no longer true and incapable of being considered by the Panel as truthful evidence. The SPO Response stays completely silent.

¹⁶ Motion, para. 22.

¹⁷ Response, para. 7.

¹⁸ Response, para. 7, referring to Motion, para. 34.

¹⁹ They were both included in the SPO preliminary witness list and their statements disclosed under Rule 102(1)(a) or (b) – See Motion, para. 5.

²⁰ See Motion, para. 5, footnote 7.

²¹ See Motion, para. 5, footnote 8.

11. Nor is it sufficient for the SPO to attempt to shift the burden to the Defence²² or the Trial Panel²³ to call the witnesses it has discarded, particularly having never asserted that in plain terms [REDACTED]'s evidence will not contribute to the establishment of the truth. Asserting that the Defence can "strategically decide to call whoever it wishes" does not relieve the SPO of its burden under Rule 62 and ignores the Thaci Defence submissions on 1 October 2024 that "we haven't decided whether we're going to put on a Defence case".²⁴

12. With the regards to the potential breach to the Witness Contact Protocol,²⁵ the question is not whether the Defence is able to respect its obligations of confidentiality. Rather, should the Defence contact [REDACTED], the witness may disclose information about the current whereabouts of [REDACTED]. Until now, the SPO's position has been that the Defence cannot be trusted with such information. If the SPO's position has changed, and it accepts that the Thaci Defence is indeed able to respect its obligations to protect the confidentiality of information, then this should be expressly stated.

C. The future drawing of adverse interferences is an appropriate remedy

13. The Defence is not making submissions about the merits of the proposed adverse inferences at this stage.²⁶ As is clear, the Defence has requested only that the Panel take note of the argument,²⁷ precluding the SPO from making future submissions that it had no notice that such an argument would be advanced. The SPO

²² Response, para. 8.

²³ Response, para. 9.

²⁴ Response, para. 8, footnote 19. *Contra*, see Transcript of Hearing, 1 October 2024, p. 20558, l. 3-4, p. 20562, l. 5-7.

²⁵ Response, para. 8.

²⁶ Response, paras 11-12.

²⁷ Response, paras 28, 34, 37.

is now on notice and has time to change course. If the SPO chooses not to do so, this will be an additional point raised by the Defence in closing submissions.

[Word count: 1715 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Luka Misetic', is centered below the text 'Respectfully submitted,'.

Luka Misetic

Counsel for Hashim Thaçi

Monday, 14 October 2024

At New York, United States