

In: KSC-BC-2023-12
Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

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Joint Defence Preliminary Motion Pursuant to Rule 97 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers

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I. INTRODUCTION

1. The Defence for Messrs Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi (respectively “Defence” and “Accused”) jointly file this preliminary motion pursuant to Rule 97 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), and the determination of the Pre-Trial Judge (“PTJ”) that any preliminary motions be filed by 8 May 2025.¹

2. The only issue jointly raised by the Defence in this preliminary motion relates to severance of the amended confirmed indictment (“Indictment”)² as between the Accused and Hashim Thaçi.

3. The Defence fully support the application made by Mr Thaçi for an adjournment of proceedings in the instant case (“Case 12”) until Trial Panel II declares his joint case KSC-BC-2023-06 (“Case 6”) closed in order that his and his Case 6 co-Accused’s fair trial rights might be protected.³ However, in order that the Accused’s countervailing right to be tried without undue delay is not violated, the Defence submit that there should be severance of the Indictment such that their trial might continue expeditiously without Mr Thaçi.

II. PROCEDURAL HISTORY

4. The Defence incorporate by reference the procedural history set out in paragraphs 4-14 of the Thaçi Preliminary Motion.

¹ Decision Amending the “Decision on the Confirmation of the Indictment” and Setting a Date for the Submission of Preliminary Motions, KSC-BC-2023-12/F00260, 14 April 2025, para. 30

² Annex 1 to Submission of Amended Confirmed Indictment with confidential Annex 1 and public Annex 2, KSC-BC-2023-12/F00264, 16 April 2025

³ Thaçi Defence Preliminary Motion Requesting Severance of the Indictment and Adjournment of Proceedings concerning Mr Thaçi With Public Annex 1, KSC-BC-2023-12/F00285, 7 May 2025 (“Thaçi Preliminary Motion”)

III. APPLICABLE LAW

5. Article 6(1) of the European Convention on Human Rights (“ECHR”) provides that everyone facing any criminal charge is *inter alia* “entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law.”⁴

6. Article 21(4)(d) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) provides that:

[i]n the determination of any charge against the accused pursuant to this Law, the accused shall be entitled to the following minimum guarantees, in full equality:

d. to be tried within a reasonable time.

7. Article 39 of the Law provides, in relevant part, that:

1. [t]he Pre-Trial Judge shall have the power to [...] rule on any preliminary motions, including challenges to the indictment and jurisdiction, and make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

[...]

9. [u]pon application from [...] the parties, the Pre-Trial Judge [...] may direct that there be joinder or severance in respect of charges against more than one accused.

8. Rule 89(2)(b) provides that:

[a]t any stage of the proceedings, a Panel, after hearing the Parties, may order [...] that persons charged jointly be tried separately, *in the interests of a fair and expeditious trial* or to avoid a conflict of interests that may cause serious prejudice to an Accused.⁵

⁴ Emphasis added. Pursuant to Article 22 of the Kosovo Constitution, human rights and fundamental freedoms guaranteed by international agreements and instruments, including the ECHR, are directly applicable in the Republic of Kosovo. In the case of conflict, these instruments have priority over provisions of laws and other acts of public institutions.

⁵ Emphasis added

9. Rule 97(1)(b) provides, in relevant part, that:

The Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which [...] seek the severance of indictments pursuant to Rule 89(2).

IV. SUBMISSIONS

10. For the reasons compellingly advanced in the Thaçi Preliminary Motion, Mr Thaçi's fair trial rights demand that he be tried on the Case 12 Indictment only after the conclusion of the trial in Case 6.

11. As is recognised in paragraphs 76-82 of the Thaçi Preliminary Motion, if the Case 12 trial were adjourned to late 2025 or early 2026 in respect of all five defendants, the Accused would experience a significant delay. It is submitted that this would amount to an undue and prejudicial delay – not least because Messrs Smakaj, Kilaj and Fazliu remain in pre-trial detention – and a violation of their right to be tried within a reasonable time within the meaning of Article 21(4)(d) of the Law.

12. In the exercise of the Pre-Trial Judge's discretion to sever a case, she is bound to "strike a fair balance between the need to ensure the proper administration of justice and respecting the rights of the accused to a fair and expeditious trial."⁶ It will readily be accepted that in other pre-trial management situations, including where one co-Accused seeks an adjournment of a joint trial, the same obligation on the part of the Pre-Trial Judge to safeguard the fair trial rights of the other co-Accused will also apply. Indeed, the Thaçi Defence rightly cited to the Pre-Trial Judge's underscoring of the importance of "the fact that the present case involves multiple Accused who are equally entitled to fair and expeditious proceedings."⁷

⁶ *Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala*, Decision on Application for Severance, KSC-BC-2023-10/F00452, 27 August 2024 ("*Januzi et al.* Decision"), para. 40

⁷ Decision on Thaçi Defence Request for Variation of the Time Limit for Preliminary Motions, KSC-BC-2023-12/F00135, 24 January 2025, para. 19

13. The Defence agree with the Thaçi Defence that only by severing the Indictment as between Mr Thaçi and the Accused will the fair trial rights of all five (as well as the rights of the other Case 6 defendants) be fully respected.⁸

14. In assessing whether any delay in the start of proceedings in Case 12 for the Accused, were Mr Thaçi's adjournment application to be granted, would amount to an unreasonable delay, the Pre-Trial Judge must have regard to: (i) the complexity of the case; (ii) the Accused's conduct and that of the relevant administrative and judicial authorities; and (iii) what is at stake for the Accused in the dispute.⁹

(i) *Complexity of the case*

15. It is submitted that the instant case is relatively complex. It involves at present five defendants jointly charged on a 19-count Indictment. Mr Thaçi and the Accused are charged with offences of attempted obstruction of official persons in performing official duties contrary to Article 401 of the Kosovo Criminal Code ("KCC"), violating the secrecy of proceedings contrary to Article 392 of the KCC, and contempt of court contrary to Article 393 of the KCC. They are charged under various modes of liability, and, in respect of each of the obstruction charges, face maximum sentences of five years' imprisonment. The evidence in the case will include live testimony from "at least three" witnesses,¹⁰ documentary evidence (including expert reports), a large volume of the Accused's electronic communications, forensically extracted from mobile telephones, as well as material forensically extracted from external hard drives and laptop computers belonging to certain of the Accused. All this material must be carefully assessed by the Defence, which adds to the complexity of the case.

⁸ Thaçi Preliminary Motion, para. 77

⁹ Januzi *et al.* Decision, para. 41

¹⁰ Public redacted version of 'Prosecution submissions for First Status Conference', KSC-BC-2023-12/F00079/RED, 16 December 2024 (confidential original filed on 12 December 2024), para. 11

16. The same conclusion was reached by the Pre-Trial Judge, for similar reasons, in the *Januzi et al.* case.¹¹

(ii) *Conduct of the relevant authorities*

17. For the strict purposes of this preliminary motion, the Defence take no issue with the conduct of the SPO in terms of the length of time of the investigation and pre-trial proceedings. What is relevant is the necessity of Mr Thaçi to request an adjournment of the start of Case 12 until the conclusion of Case 6, and the reasons for that request. The grounds for the adjournment are fully set out in the Thaçi Preliminary Motion and need not be repeated here. As noted at paragraph 3 above, the Accused have great sympathy for Mr Thaçi's position and fully support his request. It is worth highlighting, however, that the decision to indict Mr Thaçi and seek to try him concurrently with proceedings in Case 6 is the SPO's alone. Mr Thaçi did not ask to be tried in two parallel trials. Crucially, neither did the Accused ask to be jointly tried with Mr Thaçi.

(iii) *Conduct of the Accused*

18. The Pre-Trial Judge has already held that proceedings in Case 12 "continue to move forward expeditiously."¹² The Defence agree with the Thaçi Defence that the trial in Case 12 could well be scheduled to start shortly after the summer recess.¹³

19. The Thaçi Defence estimates that the trial in Case 6 will not conclude until late 2025 or early 2026.¹⁴ If Mr Thaçi's adjournment motion is granted, the delay to the start of the Case 12 trial would be significant, and clearly a matter over which the Accused themselves have no control. It would not a circumstance of their making. Such a delay would self-evidently be unreasonable.

¹¹ *Januzi et al.* Decision, para. 42

¹² Second Decision on Review of Detention of Isni Kilaj, KSC-BC-2023-12/F00248, 7 April 2025, para. 42

¹³ Thaçi Preliminary Motion, para. 26

¹⁴ Thaçi Preliminary Motion, paras 24 and 54

(iv) *What is at stake for the Accused*

20. Messrs Smakaj, Kilaj and Fazliu, all middle-aged men of good character, all with established home and family lives in Kosovo, and all benefitting from the presumption of innocence, continue to be detained in the Specialist Chambers Detention Facility in The Hague. Mr Kuçi enjoys provisional release in Kosovo, albeit subject to onerous conditions that significantly impact on his liberty. The Accused want their trial to start as soon as possible, subject of course to full respect for their fair trial right to have adequate time and facilities to prepare their cases for trial.

21. An adjournment of the start of the trial in this case to late 2025 or early 2026 would mean the Accused lingering for an unduly lengthy period of time in detention, or subject to restrictive release conditions, awaiting their fate. Irrespective of whether the delay is caused by a lack of prosecutorial diligence or the need to protect Mr Thaci's fair trial rights, the Accused would be waiting for the start of a delayed trial during a protracted period of inactivity.¹⁵

V. CONCLUSION AND REMEDY

22. In conclusion, it is submitted that an holistic consideration of the aforementioned factors must lead inevitably to the finding that an adjournment of the start of proceedings in Case 12 until the close of Case 6 would result in an unreasonable delay. This would consequently amount to a violation of the Accused's right under Article 21(4)(d) of the Law to be tried within a reasonable time.

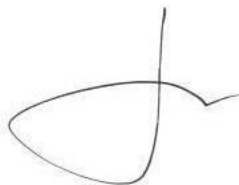
23. The only way to avoid this violation is severance of the Indictment as between the Accused and Hashim Thaçi.

¹⁵ *Januzi et al.* Decision, para. 54, citing European Court of Human Rights, *Abdoella v. Netherlands*, no. 12728/87, Judgment, 25 November 1992, para. 24

Respectfully submitted.

A handwritten signature in blue ink, appearing to read 'I. Edwards'.

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7 May 2025

Abidjan, Côte d'Ivoire

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