



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 12 May 2025

Language: English

Classification: Confidential

Consolidated Prosecution reply to responses to obstruction bar table motion

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I. INTRODUCTION

1. The Responses¹ to the Obstruction BTM² mischaracterise the relevance of the Proposed Exhibits, dramatically overstate any prejudice caused by their admission, and seek relief beyond the powers of the Trial Panel.

II. SUBMISSIONS

A. THE PROPOSED EXHIBITS ARE RELEVANT

2. The Proposed Exhibits tendered by the SPO are discrete,³ presented with sufficient context, and relevant to the requisite *prima facie* standard.

3. The Obstruction BTM identified three independent bases for the relevance of the items tendered.⁴ None depend on witnesses testifying differently at trial because of confidential information or instructions provided in the Detention Centre Transcripts.⁵ It is the conduct of the Accused which grounds the relevance of the Proposed Exhibits, and the Trial Panel can consider what consequences did or did not follow from this conduct when assessing weight. Contrary to assertions in the Responses that this material was tendered in order to show ‘bad character’ or

¹ Thaçi Defence Response to SPO Request for Admission of Proposed Exhibits (F03120) and Second Request for Exclusion of Materials *in limine*, KSC-BC-2020-06/F03156, 2 May 2025, Confidential (with annex) (‘THAÇI Response’); Veseli Defence Response to ‘Prosecution motion for admission of obstruction related materials with confidential Annexes 1-3’, KSC-BC-2020-06/F03162, 2 May 2025, Confidential (notified 5 May 2025) (‘VESELI Response’); Selimi Defence Response to Prosecution motion for admission of obstruction related materials with confidential Annexes 1-3, KSC-BC-2020-06/F03159, 2 May 2025, Confidential (notified 5 May 2025) (‘SELIMI Response’); Krasniqi Defence Response to ‘Prosecution Motion for Admission of Obstruction Related Materials’ (F03120), KSC-BC-2020-06/F03161, 2 May 2025, Confidential (notified 5 May 2025) (‘KRASNIQI Response’) (collectively, ‘Responses’).

² Prosecution motion for admission of obstruction related materials, KSC-BC-2020-06/F03120, 15 April 2025 (with annexes) (‘Obstruction BTM’).

³ The 2,700 tendered pages statistic at paragraph 63 of the THAÇI Response is grossly inflated, as this number can only be reached by including translated versions and untendered pages of the Proposed Exhibits.

⁴ Obstruction BTM, KSC-BC-2020-06/F03120, paras 4-6.

⁵ *Contra* THAÇI Response, KSC-BC-2020-06/F03156, paras 2, 14-15.

‘propensity,’⁶ the SPO linked this conduct directly to the criminal responsibility and sentencing considerations for the crimes charged.

4. The Trial Panel never ‘expressly rejected’ any of the current bases for tendering the Proposed Exhibits.⁷ The Exhibit List Decision⁸ merely identified and found sufficient one of the reasons why the SPO considered these items potentially relevant for inclusion on the Exhibit List,⁹ which was all that was requested and required at the time. Considering the SPO’s current relevance arguments does not require reconsideration of anything previously decided.

5. In the Obstruction BTM, the SPO did present relevant authorities of obstructive conduct being considered as aggravating circumstances in (main case) sentencing.¹⁰ In *Čelebići* in particular, the ICTY Appeals Chamber upheld considering - as an aggravating circumstance at sentencing - that Zdravko MUCIĆ was passing notes from the detention unit about fabricating evidence.¹¹ The *Šešelj* Appeals Judgment cited by the THAČI Defence¹² does not support a contrary position, as the IRMCT Appeals Chamber gave every indication that it did consider the accused’s obstructive

⁶ *Contra* SELIMI Response, KSC-BC-2020-06/F03159, paras 50, 53.

⁷ *Contra* THAČI Response, KSC-BC-2020-06/F03156, para.8.

⁸ Public Redacted Version of Decision on Prosecution Request to Amend the Exhibit List (F02279) and on Thaçi Defence Motion for Exclusion of Materials in Limine, KSC-BC-2020-06/F02501/RED, 22 August 2024 (redacted version notified 20 December 2024) (‘Exhibit List Decision’).

⁹ Exhibit List Decision, KSC-BC-2020-06/F02501/RED, paras 29, 42. The THAČI Defence overreads this decision to argue that the Panel determined that the Proposed Exhibits are not relevant ‘to the Indictment charges directly’ (THAČI Response, KSC-BC-2020-06/F03156, para.16). The quoted sentence in paragraph 42 of the Exhibit List Decision cross-references - *inter alia* - to paragraph 29, which only considered one basis of relevance advanced by the SPO (i.e. witness credibility) and made no contrary findings.

¹⁰ Obstruction BTM, KSC-BC-2020-06/F03120, para.4 (fns 12, 14), *contra* THAČI Response, KSC-BC-2020-06/F03156, para.13; SELIMI Response, KSC-BC-2020-06/F03159, paras 43-46, 51-52.

¹¹ ICTY, *Prosecutor v. Delalić et al.* (‘*Čelebići*’), Judgement, IT-96-21-A, 20 February 2001, paras 789-90. There is also no indication that the ICTY Trial Chamber limited consideration of these notes only to certain witnesses. ICTY, *Prosecutor v. Delalić et al.* (‘*Čelebići*’), Judgement, IT-96-21-T, 16 November 1998, paras 37-38, 1244; *contra* SELIMI Response, KSC-BC-2020-06/F03159, para.45.

¹² THAČI Response, KSC-BC-2020-06/F03156, para.13.

behaviour when deliberating its sentence.¹³

6. Violating court orders and the secrecy of proceedings constitutes conduct which - when prosecuted in Kosovo or before the KSC – falls under the chapter in the KCC governing ‘Criminal Offenses Against the Administration of Justice and Public Administration’.¹⁴ The insistence that the Proposed Exhibits do not show interference or obstruction¹⁵ is premised on an unduly narrow interpretation of these words which mis-appreciates the relevance and gravity of the conduct demonstrated.

B. THERE IS NO UNDUE PREJUDICE

7. The special investigative measures (‘SIMs’) requested exclusively concerned non-privileged communications.¹⁶ The SELIMI Defence is unable to explain why the prospect of potentially privileged communications is implicated.¹⁷

8. The Detention Centre Transcripts are also not ‘statements’ under the Rules, nor was there any requirement to seek some sort of voluntary consent prior to recording.¹⁸ This would be plainly unreasonable, and make effective interception of communications impossible.

9. The Defence have been disclosed all Proposed Exhibits under Rule 103 in some

¹³ IRMCT, *Prosecutor v. Šešelj*, Judgement, MICT-16-99-A, 11 April 2018, paras 179-80.

¹⁴ *Egs* Articles 392 and 393 of the 2019 Kosovo Criminal Code (in Chapter XXXI) (‘KCC’), read in conjunction with its 2012 version and Article 15(2) of the Law. In Case 12, Hashim THAÇI is also charged with an offence falling under Chapter XXXII of the KCC, namely the (attempted) obstruction of an official person performing official duties.

¹⁵ THAÇI Response, KSC-BC-2020-06/F03156, paras 3, 9; SELIMI Response, KSC-BC-2020-06/F03159, paras 26, 55; VESELI Response, KSC-BC-2020-06/F03162, paras 2, 4, 11, 13, 18 (noting also the first sentence of paragraph 9 in the VESELI Response, which contains more identifying information than what is acknowledged by the VESELI Defence).

¹⁶ Transcript of Hearing, 26 August 2024, T.18879-80; Decision on Defence Request for Measures to Ensure Counsel-Client Privilege, KSC-BC-2018-01/RAC001/F00011, Confidential and *Ex Parte*, para.15.

¹⁷ *Contra* SELIMI Response, KSC-BC-2020-06/F03159, paras 10-13, 23-27. In particular, non-privileged visits with a SELIMI Defence team member cannot reasonably be considered as privileged communications. *Contra* SELIMI Response, KSC-BC-2020-06/F03159, para.24.

¹⁸ *Contra* SELIMI Response, KSC-BC-2020-06/F03159, paras 18-20.

form by April 2024 at the latest. They have therefore had a long opportunity to investigate their contents and put them to witnesses as each team saw fit. It is an artificial constraint to suggest that the evidence could not be confronted until it was tendered.¹⁹ The Defence have long been on notice that the SPO may tender such items,²⁰ and could have used them for 'consciousness of innocence'²¹ or any other relevant point.

10. The potential impact of Accused not being able to cross-examine other accused about the Proposed Exhibits is not a bar to their admissibility,²² as has been considered in other contexts previously.²³ This matter goes to the fair use of the evidence, which is an issue of weight.

11. Finally, the proceedings in Case 12 are entirely irrelevant to the resolution of the Obstruction BTM, and had no impact on its timing.²⁴ Admitting the Proposed Exhibits in this case has no bearing on the evidence or criminal responsibility in that case.²⁵ This includes any question of double punishment,²⁶ which cannot even arise in advance of a conviction in either Case 6 or Case 12.²⁷

¹⁹ *Contra* THAÇI Response, KSC-BC-2020-06/F03156, para.64; KRASNIQI Response, KSC-BC-2020-06/F03161, paras 10-12.

²⁰ *See* Obstruction BTM, KSC-BC-2020-06/F03120, para.12 (n.24).

²¹ THAÇI Response, KSC-BC-2020-06/F03156, para.17.

²² SELIMI Response, KSC-BC-2020-06/F03159, paras 56-58.

²³ Decision on Prosecution Motion for Admission of Accused's Statements, KSC-BC-2020-06/F01917, 9 November 2023 (*upheld in* KSC-BC-2020-06/IA030/F00009), paras 215-19. These statements were not admitted with limitations that they could only be used against the Accused concerned. *Contra* KRASNIQI Response, KSC-BC-2020-06/F03161, para.8.

²⁴ *Contra* THAÇI Response, KSC-BC-2020-06/F03156, paras 4-5. The cited Appeals Panel decision paragraphs in footnote 5 of the THAÇI Response only concern: (i) one count under Article 401(2) of the KCC for Hashim THAÇI and Hajredin KUCI, where three other counts for this same offence remain confirmed for Mr THAÇI and the underlying evidence still supports other counts; and (ii) the extent to which non-parties can be responsible for contempt of court, which has no meaningful effect on Hashim THAÇI's Case 12 responsibility given that he is a party in Case 6.

²⁵ *Contra* THAÇI Response, KSC-BC-2020-06/F03156, paras 11-12, 66.

²⁶ THAÇI Defence Response, KSC-BC-2020-06/F03156, paras 13, 69.

²⁷ Under Article 17, non-bis-in-idem only attaches before the KSC for when a person has 'been tried' by a court of Kosovo or the ICTY. The cited ECtHR case of *Gradinger v. Austria* (THAÇI Response, KSC-BC-2020-06/F03156, para.13, n.22) found a violation of Article 4 of Protocol 7 of the ECHR. This protocol

C. ULTRA VIRES RULINGS ARE REQUESTED

12. The THAÇI Defence's extensive arguments concerning the alleged illegality of the Single Judge who granted the SIMs raise matters that fall outside the mandate of a Trial Panel.²⁸ The Trial Panel is not competent to rule on the assignment of judges by the President, or to sit in appellate review of decisions taken by a Single Judge.²⁹ Even if considered, there is no reason why a Trial Panel would have exclusive jurisdiction over obstruction related investigations when, as the THAÇI Defence acknowledges, the Trial Panel would be ineligible to hear any case arising from that investigation.³⁰

13. It falls for the THAÇI and SELIMI Defence to challenge the legality of Single Judge decisions through proper review mechanisms.³¹ They in fact did attempt such challenges, losing before the Appeals Panel and Constitutional Court on many of the same arguments they attempt to revive in the Responses.³²

14. The Rule 138(2)(b) criteria need not be reached in the absence of a violation of the Law, Rules, or standards of international human rights. The only violations alleged require either an *ultra vires* ruling or claims of prejudice which cannot be substantiated.³³ There is no procedural barrier to admitting the Proposed Exhibits, and

similarly provides that (emphasis added) '[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted [...]']'.

²⁸ THAÇI Response, KSC-BC-2020-06/F03156, paras 1, 20-50, 71.

²⁹ See similarly ICC, *Prosecutor v. Bemba et al.*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, 11 November 2024, para.10 (rendered by a Pre-Trial Chamber, two judges of which now sit on the KSC Supreme Court: '[t]he Chamber is of the view that it cannot review previous decisions issued by the Single Judge or by other organs of the Court'). *Contra* THAÇI Response, KSC-BC-2020-06/F03156, paras 28-30, 51-60; SELIMI Response, KSC-BC-2020-06/F03159, paras 14-17, 28-29. The THAÇI Defence is incorrect in its understanding of the ICC at para.28, n.52 – ICC Trial Chambers do have investigative powers, including under Article 57 of the ICC Statute. Article 64(6)(a) of the ICC Statute cross-references Article 61(11), which allows ICC Trial Chambers to exercise, *inter alia*, any Pre-Trial Chamber function under Article 57.

³⁰ THAÇI Response, KSC-BC-2020-06/F03156, para.30 (referencing Article 33(5)).

³¹ E.g. Article 45(2); Rule 77.

³² Public Redacted Version of Decision on the Referral to the Constitutional Court Panel on the violation of Mr Hashim Thaçi's fundamental rights, KSC-CC-2024-25/F00006/RED, 15 November 2024.

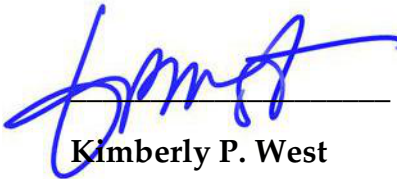
³³ *Contra* THAÇI Response, KSC-BC-2020-06/F03156, paras 65, 67-68.

it would be antithetical to the integrity of the proceedings to not consider the obstructive conduct of the Accused in this case.

III. CONCLUSION

15. The Proposed Exhibits should be admitted, and the corresponding relief sought by the Defence³⁴ rejected.³⁵

Word Count: 1991



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Monday, 12 May 2025

At The Hague, the Netherlands.

³⁴ In this regard, there is no reason to change the Legal Workflow description of the Detention Centre Transcripts. SPO naming convention includes all detainees and visitors on the recordings, regardless of their role across the transcript. There is nothing incorrect about how Kadri VESELI is identified in these descriptions, which in any event have no impact on the admissibility of the items. *Contra* VESELI Response, KSC-BC-2020-06/F03162, paras 5-6, 28.

³⁵ This submission is confidential pursuant to Rule 82(4). The SPO has no objection to reclassifying this filing as 'public'.