In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
Date:	21 February 2022
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Thaçi Defence Reply to Prosecution Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi ("Defence") hereby replies to the Prosecution's Response[1] to 'Registrar's Submissions on Proposed Protocol[2] for Interviews with Witnesses'.

2. If the Specialist Prosecutor truly believed that the Pre-Trial Judge's ("PTJ") refusal to adopt this Protocol "will create enormous risks to the integrity of the evidence in this case,"[3] then either: (1) he was derelict in his duties as Specialist Prosecutor in allowing the Defence to harm the "integrity of the evidence" by interviewing SPO witnesses for thirteen months between November 2020 and December 2021 before seeking the imposition of the Proposed Protocol; or (2) he does not believe Defence interviews pose a threat to the integrity of the proceedings. The truth is evidently the latter.

3. For all of the reasons set forth below, the PTJ should reject the request for the SPO Proposed Protocol in its entirety.

II. DISCUSSION

A. THE SPO'S APPLICATION FOR A PROTOCOL IS OUT OF TIME

4. The SPO Response again reiterates that its Proposed Protocol is motivated by an alleged need to "avoid re-traumatization of victim-witnesses and safeguard privacy, dignity, and physical and psychological well-being, as well as the integrity of the evidence."[4] This language mirrors the language of Rule 80(1), which authorizes

[1] KSC-BC-2020-06/F00605, 14 February 2022 ("SPO Response").
[2] KSC-BC-2020-06/F00594, Prosecution submissions on confidential information and contacts with witnesses, 3 December 2021 ("SPO Proposed Protocol").
[3] SPO Response, para. 3.
[4] *Ibid.*, para. 2.

protective measures. But the PTJ should take note that neither the Specialist Prosecutor nor Victims' Counsel expressly invoke Rule 80 in their submissions. This is not merely oversight by the SPO and Victims' Counsel. Both are well aware that the PTJ set a deadline of 3 September 2021 for the SPO to apply for protective measures for witnesses pursuant to Rule 80. The SPO did not file its application for the Proposed Protocol until three months after the PTJ's deadline had expired. Accordingly, the application is out of time and should be dismissed in its entirety on that basis alone.

5. Rule 80(2) requires a Panel to "seek to obtain the consent of the person in respect of whom the protective measures are sought." The SPO has identified 300 living witnesses it intends to call at trial. While both the Specialist Prosecutor and Victims' Counsel make sweeping assertions that *every one of the 300 witnesses for whom the Protocol would apply* might be "re-traumatized" or have their "privacy, dignity, and physical and psychological well-being" violated if they were to receive a communication from a Defence lawyer, remarkably absent from their submissions is *any* representation that *any* single-status witness has given their consent to the Proposed Protocol being applied to them.

6. The Specialist Prosecutor's application should be summarily dismissed for this additional reason.

7. Concerning the claim by Victims' Counsel that the Proposed Protocol is needed because "[s]ome of the dual-status witnesses, for example, fear that they will be killed for taking part in these proceedings,"[5] the existing legal framework ensures that there will be no direct contact between the Defence and dual-status witnesses. Article 16 of the Code of Professional Conduct prohibits Defence Counsel from contacting dual-

[5] KSC-BC-2020-06/F00690, Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations, 14 February 2022, para. 9.

status witnesses except through Victims' Counsel. Accordingly, no Protocol is needed for these witnesses.

B. THE SPO PROPOSED PROTOCOL VIOLATES THE RULES OF PROCEDURE AND EVIDENCE

8. Under the Rules, the Defence does not have disclosure obligations corresponding to those of the SPO. In the pre-trial phase, the SPO must disclose to the Defence "[t]he statements of all witnesses whom the Specialist Prosecutor intends to call to testify at trial" pursuant to Rule 102(1)(b), regardless of whether the SPO intends to use those witness statements at trial. Furthermore, Rule 102(2) requires the SPO to disclose to the Defence, "*any* statements" of its witnesses "which are deemed by the Defence to be material to its preparation".

9. In contrast, the Defence has no obligation to disclose witness statements to the SPO in the pre-trial phase. The Defence's obligations to disclose witness statements arise under Rule 104 only if the Defence decides to put on a Defence case. Even then, the Defence is only obliged to disclose the statements of its witnesses under Rule 104(5)(a), "which are intended for use by the Defence as evidence at trial," or under Rule 104(5)(b), all statements "which the Defence intends to present at trial." The Rules thus make clear that unlike the Prosecution's disclosure obligations, the Defence need not disclose <u>all</u> statements of its witnesses that are in the possession of the Defence, but only those statements which the Defence intends to submit as evidence at trial.

10. The reasons for this asymmetry in disclosure obligations between the Prosecution and the Defence are well-established in the Law and in international human rights treaties: the Prosecution bears the burden of proof beyond reasonable doubt, and the Accused is entitled to a right against self-incrimination. The Prosecution's burden of proof means it must disclose the evidence it relies on to prove its case, while the Accused need not prove anything and therefore need not disclose any evidence. Furthermore, the Rules are structured to ensure that the Accused is not

compelled at any stage of the proceeding to incriminate himself by producing witness statements that could be used against him.

11. The Proposed Protocol violates this disclosure architecture of the Rules by imposing an obligation upon the Accused to potentially incriminate himself by disclosing witness statements (including videotapes of witness interviews) to the SPO in the pre-trial phase. That the Proposed Protocol concerns disclosure of witness statements of SPO Witnesses is of no relevance, because the Rules quite clearly impose an obligation on the Accused to disclose only witness statements that the Defence intends to use at trial. For the PTJ to now add a requirement that the Defence must disclose all witness statements it takes from SPO Witnesses, including witness statements that the Defence would not use at trial and which might help the Prosecution case, would constitute a violation of the right against self-incrimination which the Rules were carefully crafted to prevent.

12. Indeed, although the 300 SPO witnesses are currently identified as witnesses to be called by the SPO, nothing prevents the SPO from ultimately deciding not to call some of them at trial. What if, as a result of a Protocol imposed by the PTJ, the Prosecution attends a Defence interview of an SPO Witness and decides not to call that witness as part of its case because of compelling exculpatory evidence disclosed during the Defence interview? The effect would be that the SPO Witness would have to be called by the Defence in the Defence case, and the SPO in violation of Rule 104 would have used the Proposed Protocol to obtain the benefit of seeing a Defence witness statement (the Defence interview recorded as mandated by the Proposed Protocol) prior to the Defence case.

13. The PTJ has no authority to require such disclosures of witness statements by the Defence.

C. THE PRESENCE OF THE SPO AT DEFENCE INTERVIEWS WILL HAVE A CHILLING EFFECT ON SOME SPO WITNESSES AND THREATEN THE INTEGRITY OF THE PROCEEDINGS

14. The Defence is not aware of any complaints from SPO Witnesses about their experiences during Defence interviews in the last fifteen months. As the Defence has no means to compel such interviews, they have been entirely voluntary and conducted in accordance with the Law, the Rules, and the Code of Professional Conduct.

15. In contrast, many SPO Witnesses were compelled by the SPO to appear for testimony. Some were identified by the SPO as suspects prior to their interviews, and were made to feel that they could face indictment by the SPO if they did not provide answers that would be satisfactory to the SPO.

16. Still other witnesses have told the Defence of questionable tactics used by the SPO in the preparation of their statements. Ambassador Daan Everts is a senior Dutch diplomat who in July 1999 was appointed Head of the OSCE Mission in Kosovo. In January and March 2018, Ambassador Everts was interviewed by the SPO, and gave a statement on 10 March 2018. When reviewing his SPO statement, Ambassador Everts said that: "[w]hile every single paragraph is accurate as written and can stand as it is, the totality of the statement seems to reflect a lesser interest in exculpatory than incriminating information."[6]

17. It is absolutely essential that witnesses such as Ambassador Everts feel free to convey any pressure or questionable tactics they may have felt from the SPO in the preparation of their SPO witness statements. The presence of the SPO at Defence interviews may discourage SPO Witnesses from being candid about their experiences.

D. THE SPO PROVIDES NO EVIDENCE OF ITS UNDERLYING ASSUMPTIONS

[6] Everts' Statement, para. 103.

18. The SPO provides no support for the assumptions underlying its application. The SPO, for example, claims that "SPO witnesses are, and will continue to be, under enormous pressure not to cooperate with the SC,"[7] "[p]ersons summoned by the SPO during the investigation phase routinely felt compelled to 'go public' with their summons, lest they appear to be 'cooperating' with the SC," and "witnesses, in particular, those living in or with close connections to Kosovo, will feel compelled to accede to any request from the Accused…including to submit to an interview and to do so without the presence of the SPO." But the SPO cites no evidence for any of this.

19. The Specialist Prosecutor makes the frivolous claim that comments by the Defence "in the media, status conferences and filings" have led to the "unmistakable effect" of casting "prosecution witnesses as participants in the undermining of Kosovo, placing enormous and improper pressure on them to prove their patriotism by cooperating with the Accused and distancing themselves from the SPO." This wild allegation is, of course, not supported by any evidence, an unfortunate *modus operandi* of this Specialist Prosecutor with tragic consequences for the Accused.

20. For the record: the Defence's comments "in the media, status conferences and filings" are true. The Specialist Prosecutor complains that the "Defence in this case have long sought to frame the prosecution in this case as hostile to the interests of Kosovo." No such "framing" was required. The Specialist Prosecutor has indicted leadership of the Kosovo Liberation Army as a Joint Criminal Enterprise which had a criminal purpose to commit war crimes and crimes against humanity. The Foreign Ministry of Russia, a permanent member of the Security Council, welcomed the Specialist Prosecutor's indictment of the Accused in this case and the harm that it causes to Kosovo: "*The impressive 'status' of the accused is remarkable. It turns out that for many years there have been people at the head of the Kosovo quasi-state, with respect to whom strong evidence has been gathered tying them to illegal activities in Kosovo … We hope that*

[7] SPO Response, para. 3.

the West will finally heed the warnings about the true nature of Kosovo's "statehood" and stop blindly supporting those who are determined to do anything for the sake of their self-serving political goals."[8]

21. Furthermore, the Accused have a fundamental right to a public trial in international human rights law precisely because, as United States Supreme Court Justice Louis Brandeis remarked in 1913, "[s]unlight is said to be the best of disinfectants." The Accused in this case will continue to make full use of their right to a public trial in order to ensure that sunlight shines brightly on the actions of the Specialist Prosecutor in this case.

III. CONCLUSION

22. For the foregoing reasons, the Defence respectfully requests the Pre-Trial Judge to dismiss the SPO Proposed Protocol in its entirety.

[Word count: 1997]

Respectfully submitted,

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Counsel for Hashim Thaçi

Monday, 21 February 2022

At Tampa, United States

[8] See, Ministry of Foreign Affairs of the Russian Federation, 'Comment by the Information and Press Department on the Kosovo Specialist Chambers activities', 9 November 2020, available at: https://archive.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4419121.