

**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:** 1 April 2022

**Language:** English

**Classification:** Public

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**Thaçi Defence Reply in Support of Supplemental Submissions on the SPO's  
Proposed Framework for Contacts with Witnesses**

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## I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“the Defence”) hereby files its Reply to the SPO Response to the Thaçi Supplemental Submissions on the SPO’s Proposed Framework for Contacts with Witnesses.<sup>1</sup> The SPO’s filing entirely misses the point. The SPO cannot, on the one hand, claim to be seeking the imposition of a protocol on the Defence “to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being,”<sup>2</sup> while on the other hand the SPO has not asked these witnesses whether they want the SPO present for Defence interviews *and indeed has not even told these witnesses that they are on the SPO witness list.*

2. In its Response, the SPO essentially concedes that it has failed to meet the requirements of Rule 80 of the Rules<sup>3</sup> that must be satisfied in order for protective measures to be granted, in particular the requirement that “*the Panel shall seek to obtain the consent of the person in respect of whom the protective measures are sought.*” Instead, the SPO argues that the Pre-Trial Judge (“PTJ”) has power under Article 39(1) of the Law<sup>4</sup> to adopt procedures that facilitate the fair and expeditious conduct of proceedings, and therefore the PTJ can impose the proposed Protocol “independently of Rule 80 if the Pre-Trial Judge were so inclined.”<sup>5</sup> Respectfully, the SPO’s analysis is erroneous.

3. The PTJ’s power under Article 39(1) to “make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial” is *lex generalis*. The Law’s *lex specialis* on the question of witness protection measures is contained in Article 23, wherein the Law states, “[t]he Specialist Chambers’ Rules of Procedure and Evidence shall provide for the protection of victims and witnesses including their safety, physical and psychological well-being, dignity and privacy.” Accordingly,

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<sup>11</sup> KSC-BC-2020-06/F00754, 28 March 2022 (“SPO Response”).

<sup>2</sup> KSC-BC-2020-06/F00594, Prosecution submissions on confidential information and contacts with witnesses, 3 December 2021 (“SPO Submissions”), para. 6. See also para. 5.

<sup>3</sup> Rules of Procedure and Evidence Before the KSC, KSC-BD03/Rev3/2020, 2 June 2020 (“Rules”).

<sup>4</sup> Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

<sup>5</sup> SPO Response, para. 5.

Article 23 of the Law makes clear that the PTJ must look to the Rules (and specifically Rule 80), and not Article 39(1) of the Law, when determining whether the legal requirements for imposition of witness protection measures have been met.

4. Moreover, the PTJ's general powers under Article 39(1) of the Law to "*adopt procedures that facilitate the fair and expeditious conduct of proceedings*" have been incorporated into Rule 95(2), which states, "[t]he Pre-Trial Judge shall ensure that the proceedings are not unduly delayed and *shall take all necessary measures for the expeditious preparation of the case for trial.*" However, the SPO cannot seek to impose witness protection measures by invoking the general provisions of Rule 95(2) (or Article 39(2) of the Law) in an effort to evade the specific requirements of Rule 80 for the issuance of witness protection measures.

5. In *Galić*,<sup>6</sup> the Appeals Chamber of the ICTY rejected similar efforts to evade a rule which was *lex specialis* by invoking a *lex generalis* rule:

A party cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89(C) in order to avoid the stringency of Rule 92bis. The purpose of Rule 92bis is to restrict the admissibility of this very special type of hearsay to that which falls within its terms. **By analogy, Rule 92bis is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89(C)**, although the general propositions which are implicit in Rule 89(C) – that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92bis.

6. The ICTY Appeals Chamber's ruling in *Galić* is squarely on point here. Rule 80 is the *lex specialis* which takes witness protection measures out of the scope of the *lex generalis* of Rule 95(2) (and Article 39(2) of the Law). The SPO expressly argues that it is seeking the imposition of the proposed Protocol "[i]n order to ensure witnesses'

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<sup>6</sup> ICTY, *Prosecutor v. Galić*, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), Case No IT-98-29-AR73.2, 7 June 2002, para. 31 (hereinafter "*Galić*"). Emphasis added.

safety, physical and psychological well-being, dignity and privacy.”<sup>7</sup> This language tracks the language of Rule 80(1) almost verbatim: “a Panel may [...] order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses [...]”. It is therefore beyond dispute that the SPO is seeking witness protection measures that are covered by Rule 80, and the SPO must therefore comply with the requirements of Rule 80, including by “obtain[ing] the consent of the person in respect of whom the protective measures are sought.”

7. The SPO’s failure to obtain the consent of witnesses, as required by Rule 80(2), is fatal to its application, and the SPO cannot cure this defect by invoking the *lex generalis* of Rule 95(2) or Article 39(2) of the Law. Rule 80 requires that the PTJ reject the SPO’s application.

8. The SPO also claims that it has “received information from one international organization that it has serious concerns about the Defence directly contacting its current or former staff”.<sup>8</sup> The SPO does not identify the organization, thus denying the Defence the opportunity to respond substantively. The Defence reserves all rights to make submissions should the international organization seek any measures. However, the Defence notes that no international organizations have expressed any concerns to the Defence about contacts with its current or former staff.

9. Furthermore, the Defence submits that before an international organization is allowed to impose restrictions on Defence contacts with its current or former staff, the organization must establish that it imposed the same or similar restrictions on the SPO. Article 21(4)(f) of the Law and Article 6(3)(d) of the European Convention on Human Rights guarantee an Accused the right “to obtain the attendance and examination of witnesses on his or her behalf **under the same conditions as witnesses against him or**

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<sup>7</sup> SPO Submissions, para. 5; see also paras 2, 6.

<sup>8</sup> SPO Response, para 6.

*her.*<sup>9</sup> Accordingly, Mr. Thaçi is entitled to obtain access to current and former staff of the undisclosed international organization *under the same conditions* as those that were granted to the SPO in interviewing that organization's witnesses. The SPO has not disclosed the conditions under which it interviewed the undisclosed international organization's witnesses, or whether those conditions differ from the conditions that the undisclosed organization may seek to impose on the Defence.

10. If Mr. Thaçi is not given access to the witnesses of the undisclosed international organization *under the same conditions* as the SPO, the Defence reserves the right to move to exclude any witness testimony obtained by the SPO from that international organization.

**[Word count: 1199]**

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Friday, 1 April 2022

At Tampa, United States

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<sup>9</sup> Article 21(4)(f) of the Law, emphasis added. Article 6(3)(d) of the European Convention guarantees the Accused "the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."