

**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:** 4 April 2022

**Language:** English

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**Thaçi Defence Reply to Prosecution response to Thaçi Defence request for  
certification to appeal Decision F00727**

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## I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) replies to the ‘Prosecution response to Thaçi Defence request for certification to appeal Decision F00727’.<sup>1</sup>

## II. SUBMISSIONS

2. The SPO has used its Response as a *de facto* response to an appeal on the merits. By criticizing the Request<sup>2</sup> for not providing fuller arguments or “concrete examples” in support of the issues raised,<sup>3</sup> and then responding to what it presumes these fuller arguments would be, the SPO distorts the proper procedure for the certification process.

3. Again, the SPO’s repeated claim that a party is prohibited from **collectively** addressing whether issues meet the relevant prongs is wrong, unsupported by the citation relied on,<sup>4</sup> and irreconcilable with the Pre-Trial Judge’s own practice.<sup>5</sup>

### A. ISSUE 1

4. The Pre-Trial judge concluded that “no prejudice to the Defence arises”. The error identified is that he reached this conclusion without considering or giving adequate weight to the prejudice raised by the Defence. The SPO attacks this Issue on the basis that the Defence “only specifically identifies one factor not addressed”.<sup>6</sup> The

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<sup>1</sup> KSC-BC-2020-06/F00752, Prosecution response to Thaçi Defence request for certification to appeal Decision F00727, 25 March 2022 (“Response”).

<sup>2</sup> KSC-BC-2020-06/F00733, Thaçi Defence Request for Certification to Appeal the “Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures”, 15 March 2022 (“Request”).

<sup>3</sup> Response, paras. 2, 5, 11.

<sup>4</sup> Response, para. 3, fn. 11.

<sup>5</sup> See, e.g. KSC-BC-2020-07/F00169, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021.

<sup>6</sup> Response, para. 5.

others are set out in the original filing, cited in the Request.<sup>7</sup> There is no requirement that they be cut and pasted therein.

5. The SPO then argues that the time it would take for the Defence to re-review and re-analyse material “is at best minimal”. This misses the point. The error is that the Pre-Trial Judge did not even make this assessment. Instead, he simply concluded there was “no prejudice” in the face of Defence submissions to the contrary, which feature nowhere in his reasoning. The SPO’s position that the additional waste of Defence resources caused by the SPO delay is “minimal” is irrelevant to the error identified.

6. The SPO then accuses the Defence of misrepresenting the Impugned Decision by claiming that the Pre-Trial Judge found a “disclosure breach”.<sup>8</sup> As is clear, the Defence was addressing in general terms the impact of deciding disclosure issues without considering the practical consequences of violations.<sup>9</sup> Obviously, the Pre-Trial Judge authorised the SPO’s inability to meet the deadlines set, despite acknowledging the documents “**should have been included in the Exhibit List filed on 17 December 2021**”.<sup>10</sup> The question is whether he committed the identified errors in doing so.

## B. ISSUE 2

7. Again, the SPO wrongly accuses the Defence of “misreading” the Impugned Decision, and premising its arguments on “the existence of a disclosure breach”.<sup>11</sup> As recognised by the Pre-Trial Judge, the documents in question “should have been

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<sup>7</sup> Request, para. 11, fn. 12, citing KSC-BC-2020-06/F00688, Thaçi Defence Response to Prosecution notice of Rule 102(1)(b) disclosure and related requests, 11 February 2022, paras. 17-18.

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

<sup>9</sup> Request, para. 16.

<sup>10</sup> KSC-BC-2020-06/F00727/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022 (“Impugned Decision”), para. 25.

<sup>11</sup> Response, para. 10.

included in the Exhibit List filed on 17 December 2021”.<sup>12</sup> The Defence rightly characterised this as the SPO “fail[ing] to meet its obligations”.<sup>13</sup> The Defence then legitimately argued that “[i]f the solution to **ongoing** disclosure violations is to be that ‘the Defence can just re-investigate’ then the SPO’s own **untimely disclosure and undue delays** will simply be passed on to the Defence to correct”.<sup>14</sup>

8. In playing with words to create a dispute which does not exist, the SPO fails to respond to the actual question raised; whether the Pre-Trial Judge erred in shifting the burden of the SPO’s failures back to the Defence.

### C. ISSUE 3

9. In its outrage at the “extravagant and inflated numbers” and the “hyperbolic picture” representing “the Defence’s infinite efforts to distract from the seriousness of the charges”, the SPO misrepresents the numbers.<sup>15</sup>

10. 132 is the number of documents included by the SPO in Disclosure Package 157, which the SPO then sought to add to the Exhibit List, outside the deadline set by the Pre-Trial Judge.<sup>16</sup> It is correct that the SPO, in its original filing, sought to minimise the number of documents it was seeking to add, referencing “60 items” in a footnote, failing to mention that Disclosure Package 157 contained 132 items, of all which it was seeking to add.<sup>17</sup> What matters, is that none of the 132 items had been disclosed previously by the SPO pursuant to Rule 102(1)(a) or (b), in breach of the SPO’s obligations, meaning that the Defence was required to process 132 items, and not 60.

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<sup>12</sup> Impugned Decision, para. 25.

<sup>13</sup> Request, para. 17.

<sup>14</sup> Response, para. 17 (emphasis added).

<sup>15</sup> Response, para. 15.

<sup>16</sup> Impugned Decision, para. 7.

<sup>17</sup> KSC-BC-2020-06/F00670/CONF/RED, Confidential Redacted Version of ‘Prosecution notice of Rule 102(1)(b) disclosure and related requests’, 31 January 2022, para. 1, fn. 8.

11. Regardless, the dispute as to the relative size of the SPO's failure does not assist in resolving the issue raised: whether the Pre-Trial Judge erred in assessing the prejudice arising from the late disclosure to the overall size of the case. The Defence never submitted that this was the only factor relied on by the Pre-Trial Judge, as is wrongly suggested.<sup>18</sup> But it was indeed relied on, which the Defence maintains was an error.

### III. RELIEF SOUGHT

12. For the above reasons, and those set out in the Request, the Defence respectfully requests that the Pre-Trial Judge grant leave to appeal the Issues.

[Word count: 963 words]

Respectfully submitted,



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Monday, 4 April 2022

At Tampa, United States

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<sup>18</sup> Response, para. 17.