

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: 5 December 2022

Language: English

Classification: Public

**Public Redacted Version of Thaçi Defence Reply to Prosecution response to
Addendum to Defence Motion Justifying Request for Unique Investigative
Opportunities**

Specialist Prosecutor's Office

Alex Whiting

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION AND APPLICABLE LAW

1. On 11 November 2022, the Defence for Hashim Thaçi (“Defence”) filed an addendum¹ to its motion² justifying the need for unique investigative opportunities seeking to add one witness, [REDACTED], pursuant to Rule 99 of the Rules,³ and in the alternative, for a deposition pursuant to Rule 100. The measures requested were set out in a Defence Notice filed on 7 October.⁴ On 18 November, the SPO filed its response.⁵ The Defence hereby replies to the SPO Response to Addendum, pursuant to Rule 76.

2. The Defence maintains its Notice and Addendum in full. This reply focuses, as stipulated by Rule 76, on “new issues arising from the response”.

3. The absence of comment on any aspect of the SPO Response to Addendum is not a concession as to its validity; rather, it is an indication that the Defence has nothing additional to say which it has not already covered in its Notice, or Addendum.

¹ KSC-BC-2020-06/F01099, Addendum to Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities with confidential Annex 1, 11 November 2022 (“Addendum”). The Defence has noted a typographical error in its Addendum, paragraph 16 should read (amendments in red): “As detailed in the Notice, and in the Motion ~~with regards to the other 8 witnesses~~, the Defence requests that “the measures” under Rule 99; or in the alternative depositions under Rule 100 for this witness, be carried out in ~~closed open~~-session, **and as with the other 8 witnesses** in the courtroom of the KSC, in The Hague, if they are well enough to travel for the reasons contained in paragraph 31 of the Motion. “

² KSC-BC-2020-06/F01068, Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 October 2022 (“Motion”).

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

⁴ KSC-BC-2020-06/F01018, Thaçi Defence Notice of Unique Investigative Opportunities, 7 October 2022 (“Notice”).

⁵ KSC-BC-2020-06/F01112, Prosecution Response to Thaçi addendum to its motion for unique investigative opportunities, 18 November 2022 (“Response to Addendum”).

4. The Defence is filing this Reply as confidential as it refers to the identity and personal information of a proposed witness.⁶ It will file a public redacted version shortly.

II. SUBMISSIONS

A. ADDENDUM IS NOT OUT OF TIME

5. Contrary to the SPO's assertion,⁷ the Addendum was not filed out of time. In its Motion, the Defence stated that, at the date of filing, for reasons beyond its control, it was unable to seek unique investigative opportunities for one of the nine witnesses that it had indicated that it would be seeking unique investigative opportunities for in its Notice.⁸ The Court and the SPO were thus on notice within the deadline prescribed by the Pre-Trial Judge ("PTJ") that there would be a forthcoming request in relation to a ninth witness. As soon as the Defence [REDACTED], it filed the Addendum.⁹

6. Moreover, the Defence does not understand the PTJ's order at the 14th Status Conference to be that the Defence cannot file any subsequent applications for unique investigative opportunities after 28 October 2022.¹⁰ Indeed, in its Motion, the Defence reserved its position to make subsequent applications as it reviews the forthcoming new SPO evidence to be disclosed before trial.¹¹ The Defence recalls that the SPO has been granted significant leeway to add witnesses to its witness list on a rolling basis and assumes that fairness and equality of arms dictates the same treatment of the Defence by the PTJ and the Court. Specifically, at the Eighth Status Conference on 29

⁶ See Rule 82.

⁷ Response to Addendum, para. 2.

⁸ Motion, para. 9.

⁹ Addendum, para. 2.

¹⁰ KSC-BC-2020-06, Transcript of Fourteenth Status Conference, 8 September 2022, Oral Order 1 - p. 1582 line 21 to p. 1583 line 6.

¹¹ Motion, para. 10.

October 2021, the SPO advised that it would be able to file its pre-trial brief, witness list and exhibit list on 17 December 2021, seven months later than its own initial estimates.¹² The PTJ confirmed this deadline by an oral order issued the same day.¹³ On 17 December 2021, the SPO filed a strictly confidential and *ex parte* version of its Pre-Trial Brief, Exhibit List and Witness List; before filing a confidential redacted version of these documents on 21 December 2021.¹⁴ In July and September 2022, up to nine months after the filing of their Witness List, the SPO filed two additional requests to add witnesses.¹⁵ Both requests were granted by the PTJ on 27 October 2022, resulting in the addition of four new witnesses to the SPO's Witness List. These decisions included findings by the Pre-Trial Judge that the requests were made in a timely manner.¹⁶

B. THE RELIEF SOUGHT DOES NOT EXCEED THE POWERS VESTED IN THE PTJ

7. Contrary to the SPO's submission,¹⁷ the primary relief sought - that the witnesses' evidence is heard by a member(s) of the trial panel - does not exceed the powers of the PTJ. To substantiate this argument, the SPO cross refers to paragraph 2 of its Response to Defence Motion. As stated in the Reply to Motion,¹⁸ the ability of the President (at the invitation of the PTJ) to appoint a judge for this purpose is

¹² KSC-BC-2020-06, Transcript of Eighth Status Conference, 29 October 2021 ("Transcript of Eighth Status Conference"), pp. 725-726.

¹³ Transcript of Eighth Status Conference, Oral Order 2 - p. 752 line 20 to p. 753 line 5.

¹⁴ KSC-BC-2020-06/F00631/RED/A01/CONF/RED, Annex 1 - Confidential Redacted Pre-Trial Brief; KSC-BC-202006/F00631RED/A02/CONF/RED, Annex 2 - Confidential Redacted List of Witnesses; KSC-BC-202006/F00631/RED/A03/CONF/RED, Annex 3 - Confidential Redacted List of Exhibits.

¹⁵ KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022; KSC-BC-2020-06/F00947/CONF/RED, Prosecution request to add two witnesses and associated materials, 2 September 2022.

¹⁶ KSC-BC-2020-06/F01057/CONF/RED, Pre-Trial Judge, Confidential Redacted Version of Decision on Prosecution Rule 102(2) Submission and Related Requests, 27 October 2022, paras. 23-26, 32-35; KSC-BC-2020-06/F01058/CONF/RED, Pre-Trial Judge, Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, 27 October 2022, paras. 25, 29.

¹⁷ Response to Addendum, para. 3.

¹⁸ KSC-BC-2020-06/F01102, Thaçi Defence Reply to Prosecution response to Defence Motion Justifying Request for Unique Investigative Opportunities, 15 November 2022 ("Reply to Motion").

expressly provided for in Rule 99(3)(a). As argued in the Notice, the examples of ‘measures’ provided for in Rule 99(3)(a) are non-exhaustive. Consequently, it is open to the President to appoint more than one judge to hear the unique investigative opportunities. Further, nothing in Rule 99 prevents one or more members of the future trial panel being appointed to oversee the unique investigative opportunities, and the Defence suggests these judges are the most suitable to hear the evidence proposed.¹⁹

C. MISUNDERSTANDING OF LEGAL TEST: AGE AND ESTIMATED LENGTH OF PROSECUTION CASE TOGETHER CAN BE A REASON THAT EVIDENCE MAY BECOME UNAVAILABLE

8. The SPO is correct that the Defence has relied on the age of the witness but also (and not recognised by the SPO) on the estimated length of the SPO’s case to justify its application. It is these two factors combined that establish that the evidence of [REDACTED] may not be available subsequently at trial. The test in Rules 99 and 100 is whether the evidence may be *unavailable* at trial. No further guidance is given about what constitutes ‘unavailable’, however, it is submitted the death of a witness or their incapacity will suffice, as argued in full in the Reply to Motion and incorporated herein.²⁰

9. As set out in the Reply to Motion, average life expectancy depends on many complex factors, including sex; lifestyle; date of birth; country of origin and residence; and access to health care, an assessment of which is beyond the expertise of this court. As stated in the Motion and not contested by the SPO in its Response, realistically, the Defence case will not begin before early 2025 when [REDACTED] will be [REDACTED].²¹ The World Bank indicates that the average male life expectancy at

¹⁹ Notice, paras. 10-12.

²⁰ Reply to Motion, paras. 6-7.

²¹ The Defence notes that there was a typo in the Addendum at paragraph 9, as [REDACTED].

birth for [REDACTED].²² Data from UNICEF is similar, indicating the average life expectancy for [REDACTED]. Therefore, it is undeniable that, statistically, the evidence of [REDACTED] may become 'unavailable' due to death or incapacity from advanced age by the time he can be expected to testify and thus must be sufficient justification.

D. IMPORTANCE OF [REDACTED]'S EVIDENCE IS CLEAR

10. Contrary to the SPO's submissions,²³ the importance of [REDACTED]'s evidence is clear, as set out in Annex 1, he was the [REDACTED] at the relevant time and liaised with [REDACTED] and the KLA including Mr Thaci on matters central to the charges in the indictment.

III. RELIEF SOUGHT

11. The Defence reiterates the relief sought in its Addendum and Notice.²⁴

Word count: 1,473 words

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 5 December 2022

At London, United Kingdom

²² World Bank, 'life expectancy at birth, total (years)', 2020: https://data.worldbank.org/indicator/SP.DYN.LE00.IN?end=2020&most_recent_year_desc=false&start=2020&view=map.

²³ Response to Addendum, para. 4.

²⁴ Addendum paras. 21-22; Notice, paras. 16-17.