



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: Trial Panel II

Judge Charles L. Smith III

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 1 March 2023

Language: English

Classification: Public

**Decision on Prosecution Request for Compliance with Third Oral Order
Regarding Proposed Duration of Cross-Examination and Related Matters**

Acting Specialist Prosecutor
Alex Whiting

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

TRIAL PANEL II (“Panel”), pursuant to Article 40(2) and (6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 116(1) and (3)-(4), 127(3), 143(3) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 16 December 2022, the Panel ordered: (i) the Specialist Prosecutor’s Office (“SPO”) to provide certain information regarding the first twelve witnesses, by 1 February 2023; and (ii) the four Defence teams (collectively, “Defence”) to provide, *inter alia*, an estimate of the proposed duration of cross-examination for each of the twelve witnesses by 3 February 2023 (“Third Oral Order”).¹

2. On 13 January 2023, the Defence filed a joint request for an extension of time to comply with the Third Oral Order.²

3. On 18 January 2023, the Panel granted an extension of time until 13 February 2023 for the Defence to comply with the Third Oral Order.³

4. On 1 February 2023, the SPO filed its submissions in compliance with the Third Oral Order (“SPO Submissions on First Twelve Witnesses”).⁴

5. On 13 February 2023, the Defence filed a joint response to the SPO Submissions on First Twelve Witnesses (“Defence Response to SPO Submissions on First Twelve Witnesses”).⁵

¹ Transcript of Hearing, 16 December 2022, pp. 1773-1775.

² F01204, Specialist Counsel, *Joint Defence Request for a Variation of the Time Limit to Provide Information About the Examination of SPO Witnesses*, 13 January 2023, confidential (a public redacted version was filed on 16 January 2023, F01204/RED).

³ Transcript of Hearing, 18 January 2023, p. 1904, lines 11-16.

⁴ F01243, Specialist Prosecutor, *Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, with Annex 1, confidential.

⁵ F01286, Specialist Counsel, *Joint Defence Response to Prosecution Submission of List of First 12 Witnesses and Associated Information (F01243)*, 13 February 2023, confidential, with Annexes 1-12, confidential.

6. On 21 February 2023, the SPO filed a request for compliance with the Third Oral Order and related matters (“Request”).⁶

7. On 22 February 2023, the Panel informed the Parties that any responses to the Request should be filed by noon on Friday, 24 February 2023.⁷

8. On 24 February 2023, the Defence for Mr Selimi (“Selimi Defence”), the Defence for Mr Thaçi (“Thaçi Defence”), and the Defence for Mr Krasniqi (“Krasniqi Defence”) responded to the Request (“Selimi Response”, “Thaçi Response”, and “Krasniqi Response” respectively; collectively, “Responses”).⁸ The Defence for Mr Veseli did not respond to the Request.

II. SUBMISSIONS

9. The SPO submits that, in the Defence Response to SPO Submissions on First Twelve Witnesses, the Thaçi Defence, Selimi Defence and Krasniqi Defence only partially complied with the Third Oral Order, as they indicated that they wish to cross-examine certain witnesses, but did not provide an estimate of the proposed duration of cross-examination.⁹ The SPO also challenges: (i) the Defence’s request for a table of exhibits and presentation queue per witness as well as for a scrutiny as to the necessity for in-court protective measures (“Defence’s Requested Relief”);¹⁰ and (ii) the Defence’s submissions on a number of procedural and

⁶ F01310, Specialist Prosecutor, *Prosecution Request for Compliance with Third Oral Order Regarding Proposed Duration of Cross-Examination and Related Matters*, 21 February 2023, with Annex 1, confidential.

⁷ CRSPD 181, *Email from Trial Panel II to CMU re Response to F01310*, 22 February 2023.

⁸ F01317, Specialist Counsel, *Selimi Defence Response to KSC-BC-2020-06/F01310*, dated 21 February 2023, 24 February 2023; F01318, Specialist Counsel, *Thaçi Defence Response to ‘Prosecution Request for Compliance with Third Oral Order Regarding Proposed Duration of Cross-examination and Related Matters’ (F01310)*, 24 February 2023, confidential; F01319, Specialist Counsel, *Krasniqi Defence Response to Prosecution Request for Compliance with Third Oral Order (F01310)*, 24 February 2023, confidential, with Annexes 1-2, confidential (a public redacted version was filed on the same day, F01319/RED).

⁹ Request, paras 6, 10-15. *See also* Request, paras 7-8, *referring to* Transcript of Hearing, 15 February 2023, p. 2038; Annex 1 to the Request.

¹⁰ Request, paras 6, 16-17, *referring to* Defence Response to SPO Submissions on First Twelve Witnesses, paras 4-8, 31.

admissibility issues, including in relation to Rule 154 statements, communiqués, seized materials, and statements of the Accused.¹¹ The SPO therefore requests that the Panel: (i) direct the Thaçi Defence, Selimi Defence and Krasniqi Defence to fully comply with the Third Oral Order by immediately providing the relevant information regarding estimated duration of cross-examination; and (ii) reject the Defence's Requested Relief.¹²

10. The Selimi Defence responds that, contrary to the SPO's submissions, the Defence signalled their clear and unequivocal intention to provide cross-examination estimates *inter partes* as soon as practicable, and provided two further proposed times regarding witnesses for whom analysis has been completed and with clear indication that it would provide the additional estimates.¹³ The Selimi Defence also provides cross-examination estimates for the three remaining witnesses.¹⁴

11. The Thaçi Defence responds that the SPO has commenced unnecessary litigation concerning the need for information about the proposed duration of its cross-examination, particularly in light of the delay to the start date for these proceedings having been pushed back to 3 April 2023.¹⁵ The Thaçi Defence submits that the SPO has been provided with the cross-examination information for all but four of the first twelve witnesses, which the Defence had already agreed to provide on a rolling basis and as soon as it was known.¹⁶ The Thaçi Defence also provides cross-examination estimates for the four remaining witnesses.¹⁷ The Thaçi Defence

¹¹ Request, paras 6, 18, *referring to* Defence Response to SPO Submissions on First Twelve Witnesses, paras 9, 12-31.

¹² Request, paras 1-2, 19, *referring to* Defence Response to SPO Submissions on First Twelve Witnesses, para. 31.

¹³ Selimi Response, para. 2.

¹⁴ Selimi Response, para. 7.

¹⁵ Thaçi Response, para. 2, *referring to* Transcript of Hearing, 15 February 2023, pp. 2038-2039.

¹⁶ Thaçi Response, para. 2, *referring to* Annex 1 to the Request.

¹⁷ Thaçi Response, para. 12.

maintains the Defence's Requested Relief as well as the preliminary objections set out in the Defence Response to SPO Submissions on First Twelve Witnesses.¹⁸

12. The Krasniqi Defence responds that, given the volume of disclosure recently received in relation to the very witnesses for whom the Defence was to estimate the duration of cross-examination, the Defence was simply not able to provide reliable estimates for the cross-examination of the newly disclosed witnesses, and proposed to the SPO that it would provide these estimates "on a rolling basis" and "as quickly as we can".¹⁹ The Krasniqi Defence submits that the original timetable provided for the SPO to receive the time estimates only 15 days before the start of trial, and it is therefore difficult to understand why the SPO now asserts that it needs the time estimates immediately, when trial is some 37 days away.²⁰ The Krasniqi Defence also provides cross-examination estimates for the first twelve witnesses,²¹ and requests the Panel to: (i) dismiss the Request as moot; and (ii) remind the SPO to exhaust *inter partes* discussions in good faith before seizing the Panel with any issue.²²

III. DISCUSSION

A. COMPLIANCE WITH THIRD ORAL ORDER REGARDING PROPOSED DURATION OF CROSS-EXAMINATION

13. The SPO notes that, notwithstanding the revised trial date, the Third Oral Order has not been modified by the Panel and remains binding.²³ It submits that, considering the sitting schedule and the logistics of travel, witness preparation,

¹⁸ Thaçi Response, para. 14, *referring to* Defence Response to SPO Submissions on First Twelve Witnesses, paras 4-9, 31.

¹⁹ Krasniqi Response, para. 2, *referring to* Defence Response to SPO Submissions on First Twelve Witnesses, para. 2; Annex 2 to the Krasniqi Response.

²⁰ Krasniqi Response, para. 3.

²¹ Krasniqi Response, paras 3, 24, *referring to* Annex 1 to the Krasniqi Response.

²² Krasniqi Response, para. 27.

²³ Request, para. 10.

and court familiarisation, witness scheduling fundamentally depends on timely and realistic cross-examination estimates.²⁴

14. The Defence responds that there can be no prejudice to the SPO in the Defence having not yet provided the proposed duration of cross-examination for four of the first twelve witnesses, when the parties are still 37 days away from the new date for opening statements, and 45 days away from the start of the presentation of the SPO's evidence.²⁵ The Defence submits that: (i) the SPO misrepresents the nature and level of *inter partes* engagement;²⁶ and (ii) due to the volume of the recently disclosed material and to competing deadlines, the Defence has not yet had the time to complete the detailed review of the materials required to provide an accurate estimate of the proposed duration of cross-examination.²⁷

15. As a preliminary matter, the Panel makes it clear that a Party cannot seek to evade the effect of an order by seeking to rely on what it says are inadequacies attributable to the other side.

16. The Panel observes that, pursuant to the Third Oral Order, the Defence was ordered to notify the Panel and other Parties and participants of: (i) its intention to cross-examine the first twelve SPO witnesses and the proposed duration of the cross-examination; (ii) its objections, if any, to the admission of a witness's statement pursuant to Rule 154, if offered by the SPO under the rule; and (iii) its objections, if any, to the admission of any documents which the SPO proposes to use with the first twelve witnesses.²⁸ The Panel notes that, while the Thaçi Defence, Selimi Defence and Krasniqi Defence provided their time estimates for the cross-examination of seven witnesses,²⁹ they did not provide any time estimates for the

²⁴ Request, paras 11-15.

²⁵ Selimi Response, para. 5; Thaçi Response, para. 9; Krasniqi Response, para. 22.

²⁶ Selimi Response, para. 2; Thaçi Response, para. 10; Krasniqi Response, para. 23.

²⁷ Selimi Response, para. 3; Thaçi Response, para. 11; Krasniqi Response, paras 20-21.

²⁸ Transcript of Hearing, 16 December 2022, p. 1774, lines 2-12.

²⁹ See page 2 of Annexes 4, 6-7, 9-12 to the Defence Response to SPO Submissions on First Twelve Witnesses.

cross-examination of the remaining five witnesses in the Defence Response to SPO Submissions on First Twelve Witnesses.³⁰ None of the Defence teams sought an extension of time to comply with the Third Oral Order in respect of the remaining five witnesses. The Panel also notes that, following *inter partes* communications, the Thaçi Defence, Selimi Defence and Krasniqi Defence: (i) signalled their intention to provide cross-examination estimates *inter partes* as soon as practicable, taking into account the volume of the recently disclosed material that the Defence must analyse;³¹ and (ii) eventually provided their cross-examination estimates for the remaining witnesses.³² However, the Panel notes that, notwithstanding the recent disclosures, the revised trial date and *inter partes* communications, the Third Oral Order has not been modified nor has any request to that effect been submitted. The three Defence teams were therefore expected to comply with the Panel's Order by the set date and to provide consolidated estimates for the cross-examination of each of the first twelve witnesses *to the Panel and other Parties and participants* by 13 February 2023.

17. For these reasons, the Panel finds that the Thaçi Defence, Selimi Defence and Krasniqi Defence failed to fully comply in timely fashion with the Third Oral Order. However, the Panel notes that the Thaçi Defence, Selimi Defence and Krasniqi Defence have now provided their estimates for the cross-examination of each of the first twelve witnesses.³³ The Panel accordingly finds the SPO's request to direct the Defence to comply with the Third Oral Order to be moot, and orders the SPO to provide a final indication of the order in which it will call the first twelve witnesses by no later than Friday, 10 March 2023.

³⁰ See page 2 of Annexes 1-3, 5, 8 to the Defence Response to SPO Submissions on First Twelve Witnesses.

³¹ See Annex 1 to the Request, pp. 3-5; Selimi Response, para. 2; Thaçi Response, paras 2, 10; Krasniqi Response, para. XX.

³² Annex 1 to the Request, pp. 3-5; Selimi Response, para. 6; Thaçi Response, para. 12; Annex 1 to the Krasniqi Response.

³³ Annex 1 to the Request, pp. 3-4; Selimi Response, para. 6; Thaçi Response, para. 12; Annex 1 to the Krasniqi Response.

B. RELATED MATTERS

18. The SPO submits that the relief requested in the Defence Response to SPO Submissions on First Twelve Witnesses amount to an unwarranted attempt to modify the terms of the Third Oral Order and of the Order on the Conduct of Proceedings.³⁴ It adds the following: (i) the metadata requested in addition to the list(s) to be provided by the SPO pursuant to paragraphs 73-74 of the Order on the Conduct of Proceedings is already available on Legal WorkFlow; and (ii) uploading presentation queues along with such list(s) would be premature and ultimately could result in unnecessary use of resources.³⁵ The SPO also challenges the Defence's request for the Trial Panel to scrutinize the justification of in-court protective measures and submits that the Order on the Conduct of Proceedings establishes a procedure consistent with the framework and standards set out in Rules 80 and 81.³⁶ Lastly, the SPO submits that the Defence preliminary submissions on a number of procedural and admissibility issues, including in relation to Rule 154 statements, communiqués, seized materials, and statements of the Accused, relate to motions that have already been or will be made by the SPO and, as appropriate, the Parties and the Panel will have the opportunity to address such matters in that context, namely, when the SPO seeks their admission into evidence.³⁷

19. The Thaçi Defence maintains its position expressed in the Defence Response to SPO Submissions on First Twelve Witnesses, and reiterates that the measures

³⁴ F01226, Trial Panel II, *Order on the Conduct of Proceedings*, 25 January 2023, with Annex 1 ("Order on the Conduct of Proceedings").

³⁵ Request, para. 16, *referring to* Order on the Conduct of Proceedings, paras 73-74, 79.

³⁶ Request, para. 17, *referring to* Order on the Conduct of Proceedings, paras 63-70, 75-76.

³⁷ Request, para. 18.

proposed therein were for the sake of the efficiency of the proceedings and for the benefit of all parties.³⁸

20. The Panel notes that the Order on the Conduct of Proceedings regulates: (i) the presentation queue to be uploaded by the calling Party no later than 24 hours before a witness is due to testify;³⁹ and (ii) a protective measure regime consistent with the framework and standards set out in Rules 80 and 81.⁴⁰ The Panel is of the view that requesting the SPO to provide a presentation queue per witness at the time the list pursuant to paragraphs 73-74 of the Order on the Conduct of the Proceedings is to be provided would be premature and is therefore unnecessary. Turning to the information requested by the Defence in addition to the list pursuant to paragraphs 73-74 of the Order on the Conduct of the Proceedings, the Panel agrees with the Defence that the lack of key information such as dates and descriptions of the documents which the SPO proposes to use with or tender through the witnesses reduces the utility of the list. The Panel therefore orders the SPO to provide, for any upcoming lists pursuant to paragraphs 73-74 of the Order on the Conduct of the Proceedings, the complete ERN (including the ERN of the English translation of any document not in English) as well as the date, description and claimed relevance of each document that the SPO intends to use with or tender through its witnesses.

21. Turning to the Defence's request for a scrutiny of the justification for in-court protective measures, the Panel observes that, pursuant to the Order on the Conduct of Proceedings, within five days of receiving the list(s) pursuant to paragraphs 73-74 of the Order on the Conduct of the Proceedings, the Defence and Victims' Counsel shall set out clear and concrete reasons in support of an

³⁸ Thaçi Response, para. 14, *referring to* Defence Response to SPO Submissions on First Twelve Witnesses, paras 4-9, 31.

³⁹ Order on the Conduct of Proceedings, para. 79.

⁴⁰ Order on the Conduct of Proceedings, paras 63-70, 75-76.

application for their variation.⁴¹ In the Panel's view, the Defence did not provide individualised arguments as to why existing in-court protective measures should be varied for the relevant witnesses at this point in time. Protective measures as currently in place will stand until cogent reasons have been advanced for their variation. The Panel therefore finds that the Defence has failed to set out clear and concrete reasons in support of its request for a scrutiny of the justification for in-court protective measures.

22. Turning to the Defence's submissions in relation to Rule 154 statements, communiqués, seized materials, and statements of the Accused ("Defence's Preliminary Objections"), the Panel considers that these submissions were made in accordance with the Third Oral Order, which, *inter alia*, required the Defence to state its objections to the admission of witness statements pursuant to Rule 154, if any, as well as any documents which the SPO proposes to use with the first twelve witnesses. The Panel will address any objections validly raised to the admission of proposed evidence when deciding on the relevant applications put forward by the SPO.

23. For these reasons, the Panel takes notice of the Defence's Preliminary Objections and rejects the remainder of the Defence's Requested Relief.

IV. CLASSIFICATION

24. The Panel notes that the Defence Response to SPO Submissions on First Twelve Witnesses and the Thaçi Response were filed confidentially and orders: (i) the Defence to submit a public redacted version of the Defence Response to SPO Submissions on First Twelve Witnesses by no later than Friday, 17 March 2023; and (ii) the Thaçi Defence to submit a public redacted version of the Thaçi Response by no later than Friday, 17 March 2023.

⁴¹ Order on the Conduct of Proceedings, para. 76.

V. DISPOSITION

25. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS**, in part, the Request;
- b) **DECLARES** the SPO's request to direct the Defence to comply with the Third Oral Order to be moot;
- c) **ORDERS** the SPO to provide a final indication of the order in which it will call the first twelve witnesses by no later than **Friday, 10 March 2023**;
- d) **TAKES NOTICE** of the Defence's Preliminary Objections and **ORDERS** the SPO to provide, for any upcoming lists pursuant to paragraphs 73-74 of the Order on the Conduct of the Proceedings, the complete ERN (including the ERN of the English translation of any document not in English) as well as the date, description and claimed relevance of each document that the SPO intends to use with or tender through its witnesses;
- e) **REJECTS** the remainder of the Defence's Requested Relief; and
- f) **ORDERS**: (i) the Defence to submit a public redacted version of the Defence Response to SPO Submissions on First Twelve Witnesses by no later than **Friday, 17 March 2023**; and (ii) the Thaçi Defence to submit a public redacted version of the Thaçi Response by no later than **Friday, 17 March 2023**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Wednesday, 1 March 2023

At The Hague, the Netherlands.