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In:	**KSC-BC-2020-06** **The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Trial Panel II** Judge Charles L. Smith, III, Presiding Judge Christoph Barthe Judge Guénaël Mettraux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
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Thaçi Defence Request for Leave to Reply to Prosecution Response to Thaçi Notice of Defence

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi ("Defence") hereby requests leave to Reply to the Prosecution "Response"[1] to Mr. Thaçi's Notice of Defence of 20 February 2023.[2] Because the Prosecution had no legal basis to file the Response, the Defence will move to strike the filing if leave to Reply is granted, unless the Trial Panel has already stricken the Prosecution Response *proprio motu.*

II. PROCEDURAL HISTORY

2. In the '*Order on the Conduct of Proceedings*', the Trial Panel ordered the Defence to provide notice of any defence not expressly provided for in Rule 95(5) of the Rules,[3] where that defence had not already been outlined in the Pre-Trial Brief, by 20 February 2023.[4]

3. On 20 February 2023, the Defence filed its Notice of Defence, providing notice of its intention to raise the defence of self-defence under customary international law, as reflected in Article 31(1)(c) of the Statute of the International Criminal Court and confirmed by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the *Kordic and Cerkez* Trial Judgement.[5]

4. On 2 March 2023, the Specialist Prosecutor's Office ("SPO") filed a "Response" to Mr. Thaçi's Notice of Defence of 20 February 2023, in which it argues that Mr. Thaçi's defence is "irrelevant to the charges" and therefore "evidence advanced on this basis should not be permitted."[6]

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[1] KSC-BC-2020-06/F01338, Prosecution response to Thaçi notice of defence (F01306), 2 March 2023, Public ("SPO Response").
[2] KSC-BC-2020-06/F01306, Thaçi Notice of Defence, 20 February 2023, Public ("Notice of Defence").
[3] KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").
[4] KSC-BC-2020-06/F01226/A01, Annex 1 – Order on the Conduct of Proceedings, 25 January 2023, Public ("Conduct of Proceedings Order"), para. 45.
[5] ICTY, *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, paras. 450-451.
[6] SPO Response, para. 2.

III. SUBMISSIONS

5. The SPO had no legal basis to file a "Response" to the Notice of Defence filed by the Defence on 20 February 2023. The SPO invokes two sources of authority for the filing of the Response: (1) Rule 95(5) of the Rules, and (2) paragraphs 45 and 104 of the Conduct of Proceedings Order.[7] However, nothing in either document authorized the filing of a Response by the SPO.

6. The relevant provision of Rule 95(5) of the Rules states, "*In addition, within a time limit set by the Pre-Trial Judge, the Defence shall notify the Specialist Prosecutor of its intent to offer a defence of alibi or any other grounds excluding criminal responsibility, including that of diminished or lack of mental capacity, intoxication, necessity, duress, and mistake of fact or law*." The Defence complied with this provision on 20 February 2023. Nothing in the Rule authorizes a subsequent Response by the SPO.

7. Paragraph 45 of the Conduct of Proceedings Order ordered the Defence to file any Notice of Defence by 20 February 2023. It made no mention of any right of response by the SPO.

8. Paragraph 104 of the Conduct of Proceedings Order states:

> Parties and participants shall refrain from asking questions, or tendering exhibits, intended to advance a *tu quoque* defence or any other defence that has been ruled by the Trial Panel to be invalid. Similarly, questions regarding the justness or legitimacy of the war are not matters relevant to these proceedings and will not be permitted, **unless it is clearly established to be pertinent to a fact relevant to the case**. [Emphasis added].

9. Nothing in paragraph 104 of the Conduct of Proceedings Order authorizes the SPO to file a response to a notice of defence. Moreover, the language of paragraph 104 emphasized above ("**unless it is clearly established to be pertinent to a fact relevant to the case**") was added by the Trial Panel to the Conduct of Proceedings Order

[7] SPO Response, para. 1.

pursuant to a specific request from the Defence so that the Defence could lead evidence of self-defence at trial:

> The Defence is concerned that the current wording of this paragraph may prevent questions potentially relevant to the motivation of KLA members, direct perpetrators, or even the Accused. The reasons for certain political and/or military activities, plans, operations, incidents and events occurring at certain locations are relevant as they tend to disprove the allegation pleaded by the SPO in the Amended Indictment that they were launched to further, or formed part of, an alleged common criminal purpose. **The current wording could also preclude the Defence from raising valid defences, such as the lack of effective control or self-defence. Self-defence (whether of the Accused personally or in defence of others) is a ground for excluding criminal responsibility under customary international law, enshrined in Article 31(c) and (d) of the ICC Rome Statute**.[8]

10. Accordingly, the SPO's reliance on the language of paragraph 104 of the Conduct of Proceedings Order ignores the drafting history of that paragraph, which was amended precisely as a result of the Defence requesting an amendment to the original language proposed by the Trial Panel so as not to preclude the Defence from leading evidence of "fact[s] relevant to the case," including specifically those facts relevant to the defence of self-defence.

11. The SPO in its Response does not challenge the Defence's assertion that an Accused person has a right under customary international law to assert self-defence. The Defence vigorously disputes the SPO's claim that self-defence is allegedly "irrelevant to the charges" in this case. But the appropriate time to argue about the relevance of this defence is at the conclusion of the trial, after the Trial Panel has heard the evidence.

12. The SPO cites no authority whatsoever for the proposition it advances in its Response: that the Trial Panel has the authority before the trial has even begun to prevent an Accused person from exercising his right under customary international law to assert self-defence, and before it has heard any evidence. Indeed, every single authority from an international criminal tribunal (which are distinguishable from the

[8] KSC-BC-2020-06/F01203, Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01), 13 January 2023, Public, para. 44.

facts of this case) cited by the SPO in its Response is from a *Judgement.* The Trial and Appeals Chambers thus had heard the evidence in all of those cases before deciding on the relevance of the defence in the factual circumstances of those cases. The Trial Panel here should similarly hear the evidence at trial before hearing argument from the Parties about the applicability of the defence to the charges in this case.

IV. RELIEF REQUESTED

13. For all of the foregoing reasons, the Defence respectfully requests the Trial Panel grant it leave to file a Reply in which it will seek to strike the Response filed by the SPO, unless the Trial Panel has already done so *proprio motu.*

[Word count: 1,135 words]

Respectfully submitted,

Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 6 March 2023

At The Hague, The Netherlands