

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 24 February 2023

Language: English

Classification: Public

Public Redacted Version of 'Thaçi Defence Response to 'Prosecution request for compliance with Third Oral Order regarding proposed duration of cross-examination and related matters' (F01310)'

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“the Defence”) hereby responds to the ‘Prosecution request for compliance with Third Oral Order regarding proposed duration of cross-examination and related matters’, filed on 21 February 2023.¹

2. 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, pushed back to 3 April 2023.² The SPO has been provided with the cross-examination information for all but four of the first 12 witnesses, which the Defence had already agreed to provide on a rolling basis and as soon as it was known.³ The information had not been previously provided because the Defence was unable to submit accurate estimates of cross-examination time for five witnesses, given that disclosure of their complete, unredacted materials was only received on 30 January 2023 – along with the disclosure of unredacted or less redacted material for 69 other witnesses whose identity was disclosed on the same date.

II. PROCEDURAL HISTORY

3. On 16 December 2022, the Trial Panel issued an order setting the timeline for provision of information relating to the first 12 SPO witnesses.⁴ In particular, the SPO was ordered to provide its list of the first 12 witnesses, along with specific information about each, by 1 February 2023. By 3 February 2023, the Defence was ordered to notify

¹ KSC-BC-2020-06/F01310, Prosecution request for compliance with Third Oral Order regarding proposed duration of cross-examination and related matters with confidential Annex 1, 21 February 2023, Public (“SPO Request”).

² KSC-BC-2020-06, Transcript of SPO Preparation Conference, 15 February 2023, Public, Oral Order 1 – pp. 2038-2039 (“Scheduling Order”).

³ See the correspondence in Annex 1 to the SPO Request.

⁴ KSC-BC-2020-06, Transcript of Sixteenth Status Conference, 16 December 2022, Public (“Transcript of Sixteenth Status Conference”), Oral Order 3 – pp. 1773-1775.

the parties of various information, including whether intends to cross-examine the witness, and if so, the proposed duration of the cross-examination.⁵

4. On 13 January 2023, the defence teams jointly filed a 'Request for a Variation of the Time Limit to Provide Information about the examination of SPO Witnesses'.⁶ This request was not opposed by the SPO.⁷ During the trial preparation conference on 18 January 2023, the Trial Panel granted this request, and ordered the Defence to file submissions providing information on the SPO's first 12 witnesses by 13 February 2023.⁸ This was 15 days before the start date for the trial (namely, 1 March 2023), as it was then scheduled.

5. On 30 January 2023, the SPO disclosed four packages of material amounting to approximately 2,500 items and 56,000 pages, containing new, lesser redacted, or unredacted materials.⁹ Through these disclosures, the SPO also disclosed the identities of 74 witnesses who had previously benefited from delayed disclosure of their identities.

6. On 1 February 2023, the SPO filed its list of the first 12 witnesses, and associated information.¹⁰ Notably, five of the witnesses in this list (including four of the first five in the order) had been subject to the protective measure of delayed disclosure of their identity. The Defence had therefore only learned their identities through the

⁵ *Ibid.*

⁶ KSC-BC-2020-06/F01204/RED, Public Redacted Version of "Joint Defence Request for a Variation of the Time Limit to Provide Information about the examination of SPO Witnesses", 13 January 2022.

⁷ KSC-BC-2020-06, Transcript of Trial Preparation Conference, 18 January 2023, Public ("Transcript of Trial Preparation Conference"), p. 1827, lines 24-25.

⁸ Transcript of Trial Preparation Conference, Oral Order 9 – p. 1904.

⁹ Disclosure 656 (636 items, 16,702 pages), Disclosure 657 (1,358 items, 22,962 pages), Disclosure 658 (203 items, 5,368 pages), Disclosure 659 (361 items, 11,035 pages).

¹⁰ KSC-BC-2020-06/F01243, Prosecution submission of list of first 12 witnesses and associated information with confidential Annex 1, 1 February 2023, Public ("SPO Submission of First 12 Witnesses").

disclosures from the SPO on 30 January 2023 (collectively, the “Newly Disclosed Witnesses”).

7. On 13 February 2023, the defence teams jointly filed their response.¹¹ In the Joint Response, the Defence teams for Mr Thaçi, Mr Selimi and Mr Krasniqi indicated that they would cross-examine each of the Newly Disclosed Witnesses, but chose not to specify the proposed duration of the cross-examination, instead marking ‘N/A’.¹² The rationale for this approach was expressed in the body of the filing:¹³

the volume of material that the Defence must read, analyse and investigate in relation to just the first four witnesses exceeds 11,000 pages. Moreover, this material is not well-organised: as explained below, the Defence has faced a number of difficulties in identifying correctly the documents to which the SPO refers in its filings. In light of these circumstances, the Defence has not had the time to review each document in detail, to consider them in conjunction with other related documents to assess their reliability, or to carry out further investigations. Consequently, the Defence’s time-estimates for the cross-examination of witnesses, to the extent that it has been able to provide them, are necessarily provisional.

8. On 16 February 2023, the SPO requested the Defence to provide all outstanding cross-examination times by 20 February. The same day, the Defence advised that it was not able to provide such details but would attempt to do so on a rolling basis. It also confirmed the proposed duration of cross-examination for the first witness, [REDACTED], was seven hours.¹⁴ The SPO never responded or otherwise acknowledged this correspondence.

III. SUBMISSIONS

A. PROPOSED DURATION OF CROSS-EXAMINATION FOR NEWLY DISCLOSED WITNESSES

¹¹ KSC-BC-2020-06/F01286, Joint Defence Response to Prosecution Submission of List of First 12 Witnesses and Associated (F10243), With Confidential Annexes 1-12, 13 February 2023, Confidential (“Joint Response”).

¹² See Annexes 1, 2, 3, 5 and 8 to the Joint Response.

¹³ Joint Response, para. 2.

¹⁴ For both items of correspondence, see Annex 1 to the SPO Request.

9. During the SPO Preparation Conference held on 15 February 2023, the start date of the trial in these proceedings was delayed from 1 March 2023 to 3 April 2023.¹⁵ This month-long delay means that the urgency conveyed by the SPO in their Request does not exist. While scheduling witnesses can be complex, the SPO was previously willing to wait until 15 days prior to the start of trial to receive the cross-examination information for these same witnesses.¹⁶ There can be no prejudice to the SPO in the Defence having not yet provided the proposed duration of cross-examination for 4 of the first 12 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.¹⁷

10. The SPO also misrepresents the nature and level of *inter partes* engagement. When approached by the SPO to provide additional details of the cross-examination times for the outstanding witnesses, the Defence provided the figure for the first witness, and indicated further estimates would be provided on a rolling basis, stating that “[w]e will endeavour to provide information about the remaining witnesses as quickly as possible, once it is available to the Defence.”¹⁸ Notwithstanding, the SPO did not engage further with the Defence, abandoning *inter partes* communication in favour of litigation.

11. The simple fact is that 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. In particular, its ability to conduct the required review has been affected by the following factors:

¹⁵ See Scheduling Order.

¹⁶ The Defence request for an extension was not opposed by the SPO when it was initially made, see fn. 7.

¹⁷ Opening statements are scheduled to be held from 3 to 5 April 2023, while the start of the presentation of evidence is scheduled for 11 April 2023: see Scheduling Order.

¹⁸ See Annex 1 to the SPO Request (emphasis added).

- (i) The complete package of materials for the Newly Disclosed Witnesses was only received by the Defence on 30 January 2023. Prior to this date, a large portion of the materials had been withheld, or were so significantly redacted that the Defence was not able to adequately review them. Consequently, for the Defence, these are effectively completely new witnesses for whom a completely new review is required.
- (ii) The materials for the Newly Disclosed Witnesses amount to over 3,200 pages. This figure also does not account for the thousands of additional pages of material required to be reviewed for related witnesses and materials; an exercise that is necessary for the Defence to be fully prepared for cross-examination and provide an accurate estimate of cross-examination time.
- (iii) Since 30 January, the Defence has been subject to numerous other court-ordered deadlines, trial preparation activities and review of the remaining pages of recently de-redacted evidence, all of which must occur simultaneously.¹⁹

12. In these circumstances, any estimate of the duration of cross-examination for the Newly Disclosed Witnesses provided at this time would necessarily be speculative. However, in the interests of efficiency, the Defence confirms that it intends to cross-examine all of the Newly Disclosed Witnesses,²⁰ and provides the following estimates for the witnesses for whom cross-examination times remain outstanding:

- (i) [REDACTED] – 4 hours;
- (ii) [REDACTED] – 6 hours;

¹⁹ These competing deadlines have been set out at length in a prior filing, and will not be repeated herein, see: KSC-BC-2020-06/F01271, Joint Defence Request for Relief Pursuant to Article 21(4) of the Law and Rule 143 of the Rules, 9 February 2022, Confidential, paras. 2, 8.

²⁰ There appears to be some confusion within the SPO Request (compare paras. 6 and 8), but the Defence confirms the guidance previously provided in the annexes to the Joint Response.

- (iii) [REDACTED] - 6 hours; and
- (iv) [REDACTED] - 6 hours.

13. These are provisional figures, subject to change, following full review of all material for the Newly Disclosed Witnesses, and the completion of investigations.

B. RELATED MATTERS

14. The SPO Request challenges the basis for the other relief requested in the Joint Response.²¹ The Defence maintains its original position, and reiterates that the measures proposed were for the sake of the efficiency of the proceedings and for the benefit of all parties.²²

[Word count: 1,686 words]

Respectfully submitted,



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Friday, 24 February 2023

At The Hague, The Netherlands

²¹ SPO Request, paras. 16-18.

²² Joint Response, paras. 4-9, 31.