

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

Date: 3 July 2023

Language: English

Classification: Public

**URGENT Thaçi Defence Request for a definitive order of appearance of the SPO
reserve witnesses**

With Confidential Annex 1

Specialist Prosecutor's Office

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Counsel for Hashim Thaçi

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Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) requests the Trial Panel to (i) order the SPO to provide a *definitive* order of appearance for the four reserve witnesses identified for the month of July 2023, by 5 July 2023; and (ii) clarify that at the end of any three-week block of hearings, the Party calling witnesses shall notify the Trial Panel and the other Parties and participants of the *reserve* witnesses which it intends to call during the following three-week block of hearings in their *definitive* order of appearance.¹

2. This information is necessary for Defence preparation for cross-examination of these witnesses, in accordance with Article 4(c) and (f) of the Law.

II. PROCEDURAL AND FACTUAL BACKGROUND

3. On 25 January 2023, the Trial Panel issued the Order on the Conduct of Proceedings,² pursuant to which:

74. The SPO shall list the witnesses in the tentative order in which they are to be called, identifying them if necessary by groupings. The SPO shall, thereafter, notify the Trial Panel and the Parties and participants in a timely fashion of any change in the proposed order of presentation of witnesses. [...]

[...]

77. At the end of any three-week block of hearings, the Party calling witnesses shall notify the Trial Panel and the other Parties and participants of the witnesses which it intends to call during the following three-week block of hearings.

78. On Thursday, at 16:00 hours, in any week preceding a week in which witnesses are to be heard, the Party calling witnesses shall notify the Trial Panel and the other Parties and participants of the witnesses which it intends to call during the following week.

[...]

80. It is the duty of the presenting Party to notify the Trial Panel, the other Parties and participants, and the Registry as soon as possible of any changes to the order of witnesses and/or any amendment to the list of (proposed) exhibits that it intends to

¹ See KSC-BC-2020-06/F01226/A01, Order on the Conduct of Proceedings, para. 77.

² KSC-BC-2020-06/F01226/A01.

use with a witness.

81. It is the presenting Party's responsibility to ensure that, at the conclusion of the evidence of a witness, there is another witness ready to begin to testify. If one of the proposed witnesses is not able to testify at the scheduled time or if there is no cross-examination of a witness, or if cross-examination proceeds faster than expected, the presenting Party shall ensure that an alternative witness can be called so as to avoid any delay in the proceedings. Only those witnesses notified pursuant to paragraph 77 may be called as alternative witnesses, unless prior approval of the panel is obtained.

[...]

84. Parties and participants are instructed to seek agreement, where possible, regarding the order in which witnesses are to be called in the following week. The Trial Panel reserves its right to order the Parties and participants to amend the order in which they propose to call witnesses.

4. On 19 June 2023, the Presiding Judge issued an oral order on the upcoming witness schedule:³

PRESIDING JUDGE SMITH:

I direct that the SPO provide to the Panel, the parties, and the participants, a list of the next 12 witnesses from the list of the first 40 witnesses and to file that by Friday, June 30, 2023, at 4.00 p.m. In addition to the list of 12 scheduled witnesses, the SPO will also provide a list of five backup witnesses in projected order appearance also out of the list of 40. The list should be in full compliance with paragraph 74 of the Order on Conduct of Proceedings. By Friday, 7 July 2023, at 4.00 p.m., the Defence and Victims' Counsel will provide information required by paragraph 76 of the Order on Conduct of Proceedings. This concludes my oral order.

5. On 21 June 2023, the SPO confirmed that it intended to call W04337 and W04647 in July 2023 and notified that it had identified W02153, W04644, W04586 as alternative witnesses with availability in July 2023.⁴

6. On 28 June 2023, the Defence asked the SPO to advise the predicted order of appearance of the three alternative witnesses for July 2023.⁵

³ KSC-BC-2020-06, Transcript of hearing of 19 June 2023, Public, Page 5068 Line 10 to Page 5068 Line 21.

⁴ Annex 1, Email from the SPO dated 21 June 2023.

⁵ Annex 1, Email from the Defence dated 28 June 2023.

7. On 30 June 2023, the Defence was notified of the 'Prosecution submission of list of the next 12 witnesses, reserve witnesses and associated information', with their projected order of appearance.⁶ The first four reserve witnesses were listed as W04586, W02153, W0072, and W04566.⁷ The SPO clarified that W04644 remained "a reserve for the July evidentiary block and if not called earlier as a reserve, will be called among the next group of 12 witnesses."⁸ The SPO further specified that:

The indicated appearance order for the reserve witnesses is provisional, and is dependent on several factors, including the witnesses' and courtroom availability, the time effectively used for the witnesses' examination, and the time needed to make logistical arrangements with the involved authorities. To achieve maximum scheduling flexibility, including to efficiently deal with the last-minute changes, the SPO, taking into account the factors identified below, has selected the proposed witnesses both from, and outside, the list of the initial 40 witnesses. All of these witnesses were previously notified as among the initial 40 witnesses or were notified by *inter partes* email. The identified reserves include five witnesses among the initial witnesses, as well as five other suitable reserve witnesses. [...]

8. On the same day, the SPO indicated by email that it had identified another witness with availability in July, W0072, and that:

The provisional order of the identified reserves for the July 2023 evidentiary block is:

- W02153
- W00072
- W04586
- W04644

However, for reserve witnesses, the order is difficult to predict, as the most appropriate reserve witness to be selected depends on multiple factors, including the number of courtroom hours available, the time estimates for the reserve witnesses, and related logistical arrangements, including the notice required by relevant domestic and other authorities. Accordingly, if it is necessary to call one or more reserve witnesses during the upcoming evidentiary block, it may not be possible to do so in the order given above.

We repeat our request to be promptly advised, with the maximum notice possible, of any further potential reductions in cross-examination estimates in order for the necessary logistical arrangements for alternative witnesses to be made.

⁶ KSC-BC-2020-06/F01630, Public, with confidential Annexes 1 and 2 and strictly confidential and ex parte Annex 3, dated 28 June 2023, notified on 30 June 2023.

⁷ KSC-BC-2020-06/F01630/A02, Reserve Witnesses, Confidential.

⁸ KSC-BC-2020-06/F01630, footnote 8.

III. SUBMISSION

9. The Defence requests the Trial Panel to order the SPO to provide a *definitive* order of appearance for the four reserve witnesses identified for the month of July 2023, by 5 July 2023, and for the reserve witnesses identified for each court block, at the end of any three-week block of hearings. The SPO has already amended the number and projected order of appearance of the reserve witnesses of July 2023 within 48 hours, *i.e.* between the SPO filing F01630 dated 28 June 2023 and its email of 30 June 2023,⁹ which renders the requested order even more necessary.

10. The order of witnesses is central to Defence preparation. The Defence is entitled to advance notice of the order of appearance of not only the next 12 witnesses but also, at a minimum, the reserve witnesses identified for each court block, in order to allow it to organise the significant work required for the cross-examination of any witness, *i.e.*, to review their statements and associated exhibits (in their subsequent less redacted and unredacted versions), to anticipate admissibility issues, to review the material of related witnesses or crime sites, to identify investigation leads and interview potential witnesses on the witness' allegations, to define the line of questioning and documents to be put to the witness. This preparation cannot be effectively completed at the last minute. Rather, in light of the size of the SPO case and of the number of SPO witnesses, Defence preparation hinges on prioritising the witnesses pursuant to their order of appearance.

11. The late notice or amendment of the order of appearance is extremely prejudicial for the Defence. It requires the Defence to reorganise the various tasks allocated to its members at the last minute and jeopardise a meaningful preparation of the cross-examination of witnesses.

⁹ Annex 1, SPO Email dated 30 June 2023.

12. The SPO submissions pursuant to which the order of reserve witnesses “is difficult to predict” since it involves “multiple factors”, and therefore may not be followed,¹⁰ is unconvincing and unsatisfactory. It is the SPO’s duty to adopt the requested measures to ensure that its proposed order of appearance is followed. Of course, unpredictable events, such as illness, may justify the postponement of a particular witness’s testimony. Yet, at the end of any three-week block of hearings, the SPO should be in a position to define with certainty the order of appearance of the reserve witnesses of the next court block, like it does for each batch of 12 witnesses. Visas and plane tickets with cancellation option can be arranged ahead of any court block. For clarity, the Defence has no objection to a witness’ testimony being split over a court break; this happens regularly before other international criminal Courts.

13. The Trial Panel’s invitation to resort to alternative witnesses to avoid lost of court time and delay is entirely understandable, particularly given the current protracted rate of these proceedings. It should not, however, be implemented in a way prejudicial for the Defence. The SPO should not be authorised to confirm or amend the order of appearance of a reserve witness only a few days before his/her testimony. Any court time saved is entirely outweighed by the prejudice to the Defence.

IV. CONCLUSION

14. For the above reasons, the Defence respectfully requests the Trial Panel to:

ORDER the SPO to provide a *definitive* order of appearance for the four reserve witnesses identified for the month of July 2023, by 5 July 2023; and

¹⁰ Annex 1, Email of the SPO dated 30 June 2023.

CLARIFY that at the end of any three-week block of hearings, the Party calling witnesses shall notify the Trial Panel and the other Parties and participants of the *reserve* witnesses which it intends to call during the following three-week block of hearings in their *definitive* order of appearance.

[Word count: 1763 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 3 July 2023

At The Hague, The Netherlands