



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-06  
**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** Trial Panel II  
Judge Charles L. Smith, III, Presiding Judge  
Judge Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Acting Specialist Prosecutor

**Date:** 14 July 2023

**Language:** English

**Classification:** Confidential

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**Prosecution response to THAÇI request concerning contact with W04290**

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## I. INTRODUCTION

1. The Trial Panel should reject the THAÇI Defence's Request<sup>1</sup> to be relieved of its obligations under the Witness Contact Protocol<sup>2</sup> in relation to W04290. There has been no material change in circumstances since the Appeal Decision,<sup>3</sup> as required by the Conduct of Proceedings Order.<sup>4</sup> Accordingly, the Witness Contact Protocol continues to regulate contacts with W04290.

2. The Request is also premature, as THAÇI has not made any request to contact W04290 through the procedures established in the Witness Contact Protocol and has not exhausted reasonable *inter partes* consultations.

## II. SUBMISSIONS

### A. THAÇI FAILS TO DEMONSTRATE A MATERIAL CHANGE IN CIRCUMSTANCES

3. The SPO is under an obligation to promptly notify the Trial Panel, Parties, and participants of any changes to the order of witnesses.<sup>5</sup> Since W04290 was part of the first group of 12 witnesses and the last witness of that group in the projected order of appearance,<sup>6</sup> the SPO gave timely notice that it would not call W04290 *at this stage*, and would keep the necessity of his evidence under review as the case develops.<sup>7</sup> The SPO still intends to call this witness,<sup>8</sup> while being mindful of the Trial Panel's instructions

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<sup>1</sup> Thaçi Defence Request as regards contact with W04290, KSC-BC-2020-06/F01639, 4 July 2023, Confidential ('Request').

<sup>2</sup> See Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, KSC-BC-2020-06/F00854, 24 June 2022, para.212 ('Witness Contact Protocol').

<sup>3</sup> Decision on Defence Appeals against "Decision on Framework for the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, KSC-BC-2020-06/IA024/F00019, 27 December 2022 ('Appeal Decision').

<sup>4</sup> Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order'), para.71.

<sup>5</sup> Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.80.

<sup>6</sup> Annex 1 to Prosecution order of first 12 witnesses, KSC-BC-2020-06/F01361/A01, Confidential, 10 March 2023.

<sup>7</sup> Annex 1 to the Request, KSC-BC-2020-06/F01639/A01.

<sup>8</sup> *Contra* Request, KSC-BC-2020-06/F01639, paras 8 (the SPO 'has now indicated the opposite'), 11 ('[...] W04290 which it no longer intends to call'), 16 ('the changed intention of the SPO').

to, *inter alia*, reduce examination time estimates.<sup>9</sup> Accordingly, there has been no change in circumstances in a material way since the issuance of the Appeal Decision<sup>10</sup> that affects the basis on which that decision was taken. In this respect, THAÇI acknowledges that the Witness Contact Protocol applies to all witnesses the SPO intends to call.<sup>11</sup>

4. The order in which witnesses are called has no bearing upon the application of the Witness Contact Protocol.<sup>12</sup> As noted above, the SPO delayed calling W04290 to preserve potential efficiency measures, including a potential reduction in its examination time estimate. The SPO is mindful of the need to be efficient, keeping its case under review, and adjusting in light of developments in the proceedings.<sup>13</sup> In that regard and consistent with its obligations under the Conduct of Proceedings Order, the SPO has provided timely notice of witnesses it no longer intends to call, changed the proposed modes of testimony for a number of witnesses, and reduced direct examination estimates.<sup>14</sup> The SPO also continues to consider the impact of Decisions

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<sup>9</sup> Prosecution submission of list of the next 12 witnesses, reserve witnesses and associated information with confidential Annexes 1 and 2 and strictly confidential and *ex parte* Annex 3, KSC-BC-2020-06/F01630, 28 June 2023 ('List of next 12 witnesses'), footnote 13: 'For example, with respect to W04290, the SPO has decided not to call the witness at this stage and to keep that evidence under review as the case develops. While the SPO still intends to call this witness (whose direct examination time estimate is currently 9 hours), the SPO is mindful of the Panel's instructions to, *inter alia*, reduce examination time estimates'.

<sup>10</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019.

<sup>11</sup> Request, KSC-BC-2020-06/F01639, para.15.

<sup>12</sup> As indicated in the SPO's response to the THAÇI email. See Annex 2 to the Request, KSC-BC-2020-06/F01639/A02.

<sup>13</sup> THAÇI's reference to the Trial Panel's concerns about the current pace of the SPO's case ignores the fact that the target date for the termination of the SPO's case is not the only consideration. Other considerations include reasonable limits on cross-examination and the obligation on the Defence to provide coordinated and realistic time estimates for cross-examination in order to allow efficient scheduling of witnesses. See Request, KSC-BC-2020-06/F01639, para.11. See also Oral Order concerning Defence cross-examination time estimates, Transcript, 19 June 2023, pp.4983-4985; Decision on Joint Defence Request for a Variation of the Time Limit to Provide Information About the Examination of SPO Witnesses, KSC-BC-2020-06/F01650, 7 July 2023, para.14.

<sup>14</sup> See, for example, List of next 12 witnesses, KSC-BC-2020-06/F01630, para.5; Prosecution motion for admission of evidence of Witnesses W03832, W03880, W04769, W03724, W00072, W01504, W02153, W04368, W04566, and W04586 pursuant to Rule 154, KSC-BC-2020-06/F01625, 23 June 2023, Confidential, paras 11-22; Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04673 and W04362 pursuant to Rule 153, KSC-BC-2020-06/F01658, 7 July 2023,

F01534<sup>15</sup> and F01536,<sup>16</sup> and has engaged in related, *inter partes* consultations with the Defence.<sup>17</sup> The SPO anticipates deciding on further changes to its witness list (including decisions not to call witnesses and/or changes to modes of testimony and examination times) over the coming months, on the basis of decisions received, evidence admitted, and Defence positions communicated in and out of court. The SPO will continue to promptly notify the Panel, Parties, and participants when such decisions are made.

5. Beyond his failure to demonstrate any change in circumstances, THAÇI also impermissibly raises arguments that were rejected previously. THAÇI's claim that the Witness Contact Protocol impedes Defence investigations and its ability to collect evidence was raised before the Appeals Panel,<sup>18</sup> as were the arguments relating to the requirement to audio-video record interviews, and their subsequent disclosure and

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Confidential ('Rule 153 Motion'), footnote 55 and paras 42, 53; Prosecution Submission in advance of Specialist Prosecutor's preparation conference, KSC-BC-2020-06/F01291, 14 February 2023.

<sup>15</sup> Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex 1 (Confidential) and Annex 2 (Public), KSC-BC-2020-06/F01534, 17 May 2023.

<sup>16</sup> Decision on Defence Motion for Judicial Notice of Adjudicated Facts with Annex 1 (Public), KSC-BC-2020-06/F01536, 18 May 2023.

<sup>17</sup> Email from SPO to all Defence teams dated 22 June 2023, 15.10: 'Following Decision F01614 and the discussion in court on 20 June 2023, we kindly ask you to indicate before 7 July 2023 which judicially noticed adjudicated facts (see F01534/A01) you will not seek to rebut. Since adjudicated facts amount to rebuttable presumptions, that information is necessary to adequately and efficiently consider the impact of Decision F01534 and F01536. Relatedly, we invite you to notify us at any time of witnesses on our witness list you do not intend to cross-examine, regardless of their currently anticipated mode of testimony and anticipated appearance date.' See also Rule 153 Motion, KSC-BC-2020-06/F01658, fn.55 and paras 42, 53.

<sup>18</sup> Request, KSC-BC-2020-06/F01639, para.15. See also Thaçi Appeal Against the "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant", KSC-BC-2020-06/IA024/F00002, 8 September 2022 ('Thaçi Appeal of the Witness Contact Protocol'), paras 24, 32-37.

potential admission into evidence.<sup>19</sup> These arguments were considered and expressly rejected by the Appeals Panel, which found, *inter alia*, as follows:<sup>20</sup>

[...] there is no unlimited right to interview witnesses from the opposing party, and [...] it is well-established that conditions can be imposed in order to regulate such contacts. In the Appeals Panel's view, the Framework, subject to necessary and proportionate safeguards, in fact provides an *additional* opportunity for the Defence to retrieve information relevant to its preparations for trial, alongside other investigative avenues afforded to the Defence [...]<sup>21</sup>

Consequently, the Appeals Panel is not persuaded that the conditions imposed under the Framework impede the Defence's ability to investigate and to collect evidence favourable to the Accused.<sup>22</sup>

Finally, the Panel dismisses the Defence's argument that the admission into evidence of the interview records disclosed under the framework would violate the existing admissibility safeguards as it ignores the fact that the normal requirements governing admissibility of evidence under the Specialist Chambers' legal framework would still apply and it is only "where [these] conditions are met" that the Panel may, *proprio motu*, or upon the application of a Party, decide to admit evidence, as confirmed by the terms expressly used in the Framework. ... [The Panel] finds no error in the way the Pre-Trial Judge exercised his discretion to endorse this measure.<sup>23</sup>

6. In sum, there has been no change in circumstances and the Witness Contact Protocol continues to apply to W04290.

B. THE REQUEST IS PREMATURE

7. THAÇI seeks to interview W04290 'outside the presence of the SPO'.<sup>24</sup> Pursuant to the Witness Contact Protocol, the Defence can request to interview an SPO witness, following which the SPO shall ascertain in good faith if the witness consents to the interview and inform the witness of the possibility of having a representative of the

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<sup>19</sup> Request, KSC-BC-2020-06/F01639, para.12. These arguments were part of the first and eighth issue ('whether the recording and disclosure of witness interviews represents an erroneous invasion of attorney-client privilege and compromises the right of the accused to investigate the case against him', and 'whether the requirement on the Defence to disclose the audio-video records of its interviews is consistent with the regime set out in Rules 104-111 of the Rules') appealed by THAÇI. *See* Thaçi Appeal of the Witness Contact Protocol, KSC-BC-2020-06/IA024/F00002, paras 7, 9, 24, 37, 46-53.

<sup>20</sup> *See also* Appeal Decision, KSC-BC-2020-06/IA024/F00019, paras 71-72, 77-83, 85-86, 88-101.

<sup>21</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.81.

<sup>22</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.83.

<sup>23</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.85.

<sup>24</sup> Annex 2 to the Request, KSC-BC-2020-06/F01639/A02. This is stressed a second time in THAÇI's email, asking whether the SPO objects to an interview 'in the absence of the SPO'.

SPO or other identified representatives present during the interview.<sup>25</sup> As the Trial Panel articulated previously, it is then for the witness to decide about the presence of any of these representative during the interview, subject to exceptional relief where required in the circumstances.<sup>26</sup> Accordingly, as THAÇI has not attempted to make enquiries pursuant to the Witness Contact Protocol, whether W04290 would consent to being interviewed by the THAÇI Defence – with or without the SPO’s presence – remains hypothetical.

8. Likewise, THAÇI’s ‘considerations of efficiency’ fail since the Witness Contact Protocol provides for the possibility to interview SPO witnesses under the conditions laid out therein, and thus already facilitates the possibility to ‘interview and learn more about a witness’s knowledge and potential evidence’.<sup>27</sup> THAÇI has made a strategic decision not to seek to interview witnesses pursuant to the Witness Contact Protocol.<sup>28</sup> As indicated by the Appeals Panel, this decision is entirely for the Defence and if it decides not to avail itself of this opportunity, other investigative options remain available.<sup>29</sup>

9. Finally, THAÇI has not attempted to exhaust reasonable *inter partes* consultations. The Trial Panel has repeatedly emphasised the expectation that Parties and participants try to resolve issues arising between them before seeking judicial intervention.<sup>30</sup> In the present case, THAÇI merely requested the SPO to agree to waive the Witness Contact Protocol and did not consult further before filing the Request.

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<sup>25</sup> Witness Contact Protocol, KSC-BC-2020-06/F00854, Section II.b.

<sup>26</sup> Decision on Thaçi Defence Request to Vary the Contact Decision for W04147, KSC-BC-2020-06/F01467, 17 April 2023, Confidential (‘Decision on Thaçi Request concerning W04147’), para.26.

<sup>27</sup> Request, KSC-BC-2020-06/F01639, para.16.

<sup>28</sup> THAÇI states that no Defence team has sought to interview SPO witnesses since the Witness Contact Protocol is in place, because of the risk to elicit inculpatory evidence which would be entered into the trial record and could be used against an accused. *See* Request, KSC-BC-2020-06/F01639, para.12.

<sup>29</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.43.

<sup>30</sup> Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.43. *See also* Decision on Thaçi Request concerning W04147, KSC-BC-2020-06/F01467, para.28.

### III. CLASSIFICATION

10. In light of the Request's classification, this response is confidential pursuant to Rule 82(4) of the Rules.<sup>31</sup> However, the SPO does not object to its reclassification as public.

### IV. RELIEF REQUESTED

11. For the foregoing reasons, the Trial Panel should deny the Request.

**Word count: 2,022**



**Alex Whiting**

**Acting Specialist Prosecutor**

Friday, 14 July 2023

At The Hague, the Netherlands.

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<sup>31</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').