

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
Specialist Counsel for Rexhep Selimi

Date: 21 September 2023

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Public Redacted Version of Thaçi and Selimi Defence Request to postpone the testimony of W00208, W04753 and W04491

With Confidential Annexes 1 and 2

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I. INTRODUCTION

1. On 15 September 2023, the SPO notified its intention to call W00208, W04753 and W04491 (the “Witnesses”) as reserve witnesses for the evidentiary block running between 9 and 19 October 2023.¹ The Witnesses were not included in the SPO list of first 40 witnesses,² nor in any subsequent lists of witnesses or reserve witnesses. The SPO had applied one day prior, on 14 September 2023, to tender their statements and associated exhibits through Rule 154.³

2. On 19 September 2023, the Defence for Messrs Thaçi, Selimi and Krasniqi asked the SPO *inter partes* to postpone the testimony of the Witnesses, in light of the SPO’s failure to provide a timely notice of the forthcoming appearance of these Witnesses, prejudicial for the Defence preparation. The SPO dismissed this request on 21 September 2023.⁴

3. Yet, the SPO’s late notice of the imminent testimony of the Witnesses is prejudicial. It infringes on the Accused’s right to have adequate time to prepare to examine them. The Defence for Messrs Thaçi and Selimi (“the Defence”) has made all efforts to accommodate the SPO’s changing schedule, and has not previously objected where it has been able to adjust and adequately prepare to address the SPO’s changing list of witnesses. The objection is raised now, after the SPO has sought to call new witnesses, but has not drawn from its list of reserves, or indeed even from witnesses who were scheduled to testify in this calendar year. No justification or explanation has been offered by the SPO as to why these new witnesses have been moved up the list. At a certain point, and despite the best efforts of the Defence to remain flexible

¹ Annex 1, SPO mail dated 15 September 2023, 15h21.

² KSC-BC-2020-06/F01117, Prosecution submission of provisional list of first 40 witnesses to be called at trial, 18 November 2022.

³ KSC-BC-2020-06/F01788, Prosecution motion for admission of evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 pursuant to Rule 154, with confidential Annexes 1-7.

⁴ Annex 2.

and accommodating, preparation becomes impossible. That point has now been reached. The Defence accordingly requests the Trial Panel to order the SPO to postpone the testimony of the Witnesses until the evidentiary block of November 2023, at the earliest.

II. APPLICABLE LAW

4. Article 6(3)(b) of the European Convention on Human Rights (“ECHR”) and Article 21(4)(c) of the KSC Law guarantee the Accused’s right to have adequate time and facilities for the preparation of his defence. Article 6(3)(d) of the ECHR and Article 21(4)(f) of the KSC Law protect the right of the Accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.⁵

5. In January 2023, the Trial Panel issued its Order on the Conduct of Proceedings (“Order”). The Order set out the procedure for the presentation of SPO witnesses, as follows:⁶

73. The Trial Panel notes that the SPO submitted a provisional list of the first forty witnesses to be called at trial.⁷ The Trial Panel further requires that, one month prior to the completion of the testimony of these witnesses, the SPO shall provide to the Panel and the other Parties and participants a list of the witnesses it intends to call in the ensuing three-month period and to continue this practice every three months thereafter or until a further order from the Trial Panel.

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. The list shall include:

[...]

iv. The issues, facts and circumstances in relation to which the witness will be examined;

v. Time estimate for direct examination;

⁵ See also Article 31(4) of the Kosovo Constitution.

⁶ KSC-BC-2020-06/F01226/A01, 25 January 2023.

⁷ See KSC-BC-2020-06, Oral order, 9 September 2022, Page 1584 Line 9 to Page 1584 Line 12.

vi. Documents and exhibits which the SPO proposes to use with this witness, and the exhibit or MFI number of any of those already admitted or marked for identification; and

[...]

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.

[...]

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 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.

III. SUBMISSIONS

6. The SPO witness list contains 303 witnesses.⁸ The SPO gave notice of its intention to rely on three new Witnesses on 15 September 2023, approximately three weeks before their eventual testimony. The SPO had given no prior notice of any intention to call the Witnesses in the near future, or even this year. This does not constitute a timely notice, in violation of the SPO's duty to "notify the Trial Panel and the Parties and participants in a timely fashion of any change in the proposed order of presentation of witnesses".⁹

7. The SPO had many opportunities to put the Defence on notice of the fact that the Witnesses would be forthcoming: in the initial SPO list of the first forty witnesses

⁸ KSC-BC-2020-06/F01594/A02, Amended List of Witnesses; SPO email dated 4 September 2023.

⁹ Order, para. 74.

filed in November 2022;¹⁰ in the subsequent lists of witnesses filed on 1 February 2023¹¹ and 28 June 2023,¹² or in emails exchanged with the Panel, Parties and Participants on the upcoming order of appearance of witnesses since April 2023.

8. Late notice hampers the Defence preparation for trial in general and for the cross-examination of witnesses in particular. The prejudice is aggravated by several factors. First, the SPO is required by the Order to provide notice of “the issues, facts and circumstances in relation to which the witness will be examined” and the “documents and exhibits which the SPO proposes to use with this witness, and the exhibit or MFI number of any of those already admitted or marked for identification”.¹³ The SPO has failed to submit such information,¹⁴ while it is central to Defence preparation. In its absence, Defence preparation can only ever be partial, and will necessarily be compromised. At the Defence request, the SPO has indicated *inter partes* that it will provide the required information by 22 September 2023,¹⁵ *i.e.* only two weeks before the Witnesses’ eventual appearance. This late notice is necessarily prejudicial for the Defence since it involves, *inter alia*, last minute review of the proposed Exhibits to be used with the Witnesses and does not provide adequate time for the preparation of their cross-examination. For the SPO to simply include previously un-announced witnesses by email at the end of a three-week hearing, is insufficient to fulfil its duty to provide a timely notice to the Defence.

¹⁰ KSC-BC-2020-06/F01117, Prosecution submission of provisional list of first 40 witnesses to be called at trial, 18 November 2022.

¹¹ KSC-BC-2020-06/F01243, Prosecution submission of list of first 12 witnesses and associated information, 1 February 2023.

¹² KSC-BC-2020-06/F01630, Prosecution submission of list of the next 12 witnesses, reserve witnesses and associated information, 28 June 2023.

¹³ Order, paras. 74(iv) and (vi).

¹⁴ The Witnesses’ prior statements, the Rule 95 information provided by the SPO in its witness list (KSC-BC-2020-06/F01594/A02), the SPO list of proposed Rule 154 material (KSC-BC-2020-06/F01788) are insufficient for these purposes.

¹⁵ Annex 2.

9. Second, the SPO applied only on 14 September 2023 to have the Witnesses' statements and associated exhibits admitted as evidence pursuant to Rule 154. The SPO Rule 154 application concerns a significant number of documents for these Witnesses.¹⁶ The Defence is entitled to respond within 10 days, *i.e.* by 25 September 2023, and the SPO to reply within 5 days, *i.e.* by 2 October 2023, which would leave only a short time for the Panel to consider the merits on the SPO application and to issue its ruling. At best, the Defence will only be given notice a few days before the Witnesses' testimony of the list of documents considered admissible, if any, pursuant to Rule 154, necessarily impacting Defence preparation for cross-examination.

10. Third, the SPO has been required to produce reserve lists of witnesses, precisely to avoid these kinds of last minute obstacles and the prejudice which arises. It is the SPO's duty to maintain a list of *available* reserve witnesses and to notify the Defence in a *timely* fashion. While the Defence appreciates that the SPO has taken into account the Defence submissions pursuant to which W01493 and W04448 were not suitable as reserve witnesses, the SPO has not specified the "new information" which would justify that [REDACTED]'s availability and appropriate testimony mode remain under consideration.¹⁷ The efforts taken by the Trial Panel to put in place a procedure of lists and reserve lists to ensure that everyone has sufficient notice, cannot simply be overridden.

11. Last, further complicating the Defence's last-minute preparation for the Witnesses is the complete lack of overlap in their evidence. W00208 is a former [REDACTED] who will purportedly testify about the alleged abduction and

¹⁶ KSC-BC-2020-06/A01 lists, for W00208, a 6 parts [REDACTED] interview, and [REDACTED] statement[REDACTED]. KSC-BC-2020-06/A07 lists, for W04753, an 8 parts SPO interview and 9 associated exhibits. KSC-BC-2020-06/A06 lists, for W04491, a 2 parts SPO interview and 5 associated exhibits.

¹⁷ Annex 2.

disappearance [REDACTED].¹⁸ W04753 is a former [REDACTED], who is being presented to testify about [REDACTED].¹⁹ W04491, allegedly [REDACTED], will purportedly testify about [REDACTED].²⁰ These entirely different incidents will involve an even greater volume of last-minute preparation, than if the SPO had produced three witnesses who were in some way related, and would testify about the same incident.

12. As the Trial Panel is aware, the Defence resources during the trial phase are directed towards cross-examination preparation, but also to ongoing litigation, defence investigations, and review of the voluminous material disclosed by the SPO on a weekly, and often daily basis. Two²¹ to three weeks of preparation for three new Witnesses, in a complex case involving four Accused, ten counts, 303 witnesses, more than forty crime sites in two countries with hundreds of alleged victims, over a temporal scope of one year and a half, are plainly insufficient. The late notice of the expected appearance of the three Witnesses is undoubtedly prejudicial. The Defence, and the accused, are acutely aware of the need to ensure a steady flow of witnesses and evidence. This desire to keep the trial moving, however, cannot be without limits, particularly when it circumvents the procedures put in place by the Trial Panel to ensure adequate notice and to avoid this precise obstacle; last minute changes by the SPO which make it impossible for Defence counsel to diligently perform their professional obligations to the Court and to their client.

13. In this context, the only adequate remedy is to postpone the testimony of the Witnesses to a later evidentiary block. This will provide the Defence with appropriate notice of the issues and documents that the SPO intends to raise during their direct

¹⁸ KSC-BC-2020-06/F01594/A02, SPO Amended List of Witnesses.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ The SPO having indicated that it will provide the information required by para. 74 of the Order by 22 September 2023 only.

examination, and provide the Defence with adequate time for the preparation of their cross-examination.

14. Pursuant to Rule 9(5)(a) of the Rules, the Defence invites the Trial Panel to reduce the time limit prescribed by Rule 76 of the Rules for the SPO's response to the present submissions, in order that a decision be issued shortly, before the start of the October evidentiary block.

IV. CONCLUSION

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

REDUCE the time limit prescribed by Rule 76 of the Rules for the SPO's response to the present submissions;

ORDER the SPO to postpone the testimony of W00208, W04753 and W04491 until the evidentiary block of November 2023, at the earliest.

[Word count: 2.200 words]

Respectfully submitted on Thursday 21 September 2023



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