

In: KSC-BC-2020-06
**The 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: Counsel for Hashim Thaçi

Date: 13 November 2023

Language: English

Classification: Public

**Thaçi Defence Reply to “Victims’ Counsel’s response to “Thaçi Defence
Notice of Objection to Victims’ Counsel Cross-examination of W03780 and
W04741”**

Specialist Prosecutor
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Simon Laws

Counsel for Hashim Thaçi
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Counsel for Kadri Veseli
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Counsel for Rexhep Selimi
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I. INTRODUCTION

1. On 10 October 2023, Victims' Counsel filed his 'Seventh Notification of Wish to Cross-Examine Witnesses', related to six additional witnesses from those notified as to be called by the Specialist Prosecutor's Office ("SPO") in filing F01828.¹
2. On 23 October 2023, the Defence provided notice that it would object to Victims' Counsel cross-examining W03780 and W04147, on the basis that cross-examination (i) is not sufficiently justified, and (ii) would be prejudicial to the Defence's preparation for its cross-examination.²
3. On 3 November, Victims' Counsel filed a response to the Defence notice.³
4. The Defence for Mr Thaçi hereby replies to the Victims' Response.⁴

II. DISCUSSION

5. At the outset, the Defence objects to the submission that its arguments are intended to have a 'chilling effect' on the participation of victims to the proceedings.⁵ The Defence is cognisant and respectful of the procedural rights afforded to participating victims by the legal framework of the KSC. Defence

¹ KSC-BC-2020-06/F01845, *Victims' Counsel's Seventh Notification of Wish to Cross-Examine Witnesses*, 10 October 2023.

² KSC-BC-2020-06/F01879, *Thaçi Defence Notice of Objection to Victims' Counsel Cross-examination of W03780 and W04741*, 23 October 2023. As noted by Victims' Counsel in footnote 1 of his Response, the original filing F01879 inadvertently referred to "W04741" instead of "W04147" in the title and other parts of the filing. A corrected version has been filed and notified on 10 November 2023 (F01879/COR).

³ KSC-BC-2020-06/F01907, *Victims' Counsel's response to "Thaçi Defence Notice of Objection to Victims' Counsel Cross-examination of W03780 and W04741"*, 3 November 2023 ("Response"). The Defence's original filing was confidential; a public redacted version has been filed on 10 November 2023 (F01879/COR/RED). As the present reply does not contain confidential information, it is filed publicly.

⁴ The Defence notes that it had intended its notice (F01879) to be a response to the Victims' Counsel's Notification (F01845). However, based on the classification and the timing of Victims' Counsel filing F01907, the Defence have understood Victims' Counsel's filing to be intended as a response, and have accordingly filed a reply.

⁵ See Response, para. 8.

submissions are exclusively made with a view to protecting the rights of the accused in every aspect of the proceedings.

6. In this regard, the Defence main concern is that the proposed cross-examination by Victims' Counsel is incompatible with the guarantees contained in Article 21(4) of the Law, with specific regard to the right to the adequate time and facilities for the preparation of his or her defence and to examine the witnesses against him or her.

7. The Defence is further guided by Article 40(2), which establishes that the Trial Panel has an obligation to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with "**full respect**" for the rights of the accused and "**due regard**" for the protection of victims and witnesses.⁶

8. The Defence arguments are also consistent with the application of the legal framework of the KSC as reflected in the Order of Conduct of Proceedings, which regulates the participation of victims with a view to "ensuring that Victims' Counsel makes a genuine contribution to the proceedings without duplicating or interfering with the responsibilities of the SPO or the Defence."⁷

9. Limitations on the nature of the questions that Victims' Counsel can put to witnesses, in paragraphs 34 and 35, were imposed by the Trial Panel⁸ in order to ensure that Victims' Counsel's participation is not prejudicial to or inconsistent with the rights of the Accused. The Defence is not attempting to re-draft the order on conduct of proceedings, but rather seeking its full practical application,

⁶ Article 40(2) of the Law; see also KSC-BC-2020-06/F01348, *Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses with strictly confidential and ex parte Annexes 1-3*, 6 March 2023, para. 12.

⁷ KSC-BC-2020-06/F01226/A01, *Order on Conduct of the proceedings*, para. 32.

⁸ KSC-BC-2020-06/F01359, *Decision Regarding Cross-Examination by Victims' Counsel*, 9 March 2023 para. 14.

particularly insofar as it requires Victims' Counsel to provide notice about the areas of evidence that he wishes to question each witness about.

10. With specific reference to the identity of each identified VPP *that Victims' Counsel wishes to question a witness about*, the Defence maintains that disclosure of this information is necessary for the Defence preparation; Victims' Counsel also agrees that the Defence would ordinarily be entitled to it.⁹ There is therefore no dispute that such disclosure should happen. The Defence submits that it is in the interest of efficiency of proceedings that this disclosure is made at the earliest opportunity rather than at the end of the SPO direct examination, as proposed by Victims' Counsel.¹⁰

11. Due regard to the rights of victims in these proceedings does not require that Victims' Counsel be allowed to ambush the accused by eliciting evidence that can be used to convict him without prior adequate notice, which may inevitably occur, when Victims' Counsel questions a witness in relation to a VPP without disclosing the identity of the VPP to the Defence sufficiently in advance of its cross-examination.

12. If the main obstacle to an earlier disclosure from Victims' Counsel's perspective is that a decision whether to question a witness can only be made at the end of the SPO direct examination, the Defence respectfully submits that this could be avoided, for example, by coordinating with the SPO in advance of the witness' testimony order to determine whether the relevant points will be covered in the SPO's direct examination. If they will not be addressed by the SPO, Victims' Counsel can then make a request pursuant to para. 35 of the Order on the Conduct of Proceedings, and consequently disclose the relevant

⁹ Response, para. 25.

¹⁰ Response, paras. 27-28.

information and make the necessary applications to lift protective measures as appropriate.

13. This solution would also allow the Panel to make an informed decision whether to allow Victims' Counsel questioning, and ensure that the participatory rights of Victims are given due regard, without interfering with the rights of the Accused and the responsibilities of the Defence.

14. The system proposed by Victims' Counsel (disclosure of the identity of a VPP only at the conclusion of the SPO's direct examination) will likely leave the Defence with no option but to request an adjournment of proceedings, or to recall witnesses at a later stage, in order to address any allegations that may arise in the course of Victims' Counsel questioning of a witness in an area of which it had no prior notice. This would be necessary in light of the Trial Panel's obligation to ensure full application of Article 21(4) of the Law, but would also necessarily cause delays in the proceedings, which in turn would also cause prejudice to the accused.

Word count: 1122

Respectfully submitted on 13 November 2023,

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