

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

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Public Redacted Version of ‘Thaçi Defence Request Related to W03170’

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I. INTRODUCTION

1. On 22 March 2024, the SPO announced that it intends to call W03170 in the next batch of witnesses to be heard between 22 April and 18 July 2024.¹ Based on the tentative witness order provided by the SPO, the Defence for Mr Hashim Thaçi (“Defence”) understands that W03170 will now be heard during [REDACTED]. The Defence files this motion to seek confirmation from the Panel that the SPO will not be permitted to lead evidence either orally or via Rule 154 admissions from W03170 about Mr Thaçi’s alleged personal participation in the arrest, detention and mistreatment of [REDACTED]. This is because, as the Panel has previously held, this allegation is not part of the SPO’s case.

2. Specifically, the Defence invites the Panel to recall and confirm that it will reapply its finding made in the context of the testimony of W02652 to the forthcoming evidence of W03170. The relevant finding was:

that an allegation that Mr Thaçi took a personal part in the arrest and/or mistreatment of [REDACTED] does not form part of the Prosecution case. The admission of evidence in support of such an un-pleaded allegation would, therefore, be highly prejudicial to the Defence.²

3. Unlike the case of W02652, the Defence is filing this motion in advance of W03170’s testimony to prevent its admission onto the record in the first place, rather than, as in the case of W02652, inviting the Panel to disregard it after the event.

II. PROCEDURAL HISTORY

A. PREVIOUS FINDING BY THE PANEL REGARDING THE IMPUGNED INCIDENT

¹ KSC-BC-2020-06/F02195, SPO, *Prosecution submission of list of witnesses for 22 April to 18 July 2024 with confidential Annexes 1 and 2*, 22 March 2024 (“F02195”). See Annex 1, where W03170 appears as [REDACTED].

² KSC-BC-2020-06/F01623, Trial Panel II, *Decision on Thaçi Defence’s Motion to Strike Part of the Record of Testimony of W02652*, 23 June 2023 (“W02652 Decision”), para. 29.

4. On 18 April 2023, the SPO elicited evidence from its second witness, W02652, regarding the alleged personal involvement of Mr Thaçi in the arrest and detention of [REDACTED].³ At the time, the Defence raised an oral objection to the SPO's use of W02652's evidence in this manner, and was ordered to file a written objection.⁴

5. On 19 April 2023, the Defence filed a written objection requesting the Panel to strike W02652's testimony regarding Mr Thaçi's alleged involvement, and find the SPO was precluded from relying on this evidence.⁵ The SPO filed a response on 26 April 2023,⁶ and the Defence replied on 28 April 2023.⁷

6. On 23 June 2023, the Panel issued a decision confirming that the SPO was not permitted to rely upon the impugned evidence of W02652 to seek to establish Mr Thaçi's claimed personal involvement in the arrest and/or mistreatment of [REDACTED], because this incident was not part of the charges as pleaded in the indictment, and not part of its case as pleaded. As it had already heard this evidence, the Panel ruled that they would 'disregard' it as it related to this unpleaded allegation.⁸

B. W03170 – ADMISSION OF STATEMENTS UNDER RULE 154

7. On 3 October 2023, the SPO filed a motion seeking the admission of the evidence of various witnesses, including W03170, pursuant to Rule 154.⁹ On 13

³ KSC-BC-2020-06, Transcript of Hearing (W02652 Testimony), 18 April 2023, pp. 3057-3066.

⁴ *Ibid*, pp. 3075-3077.

⁵ KSC-BC-2020-06/F01471, *Thaçi Defence Motion regarding the testimony of W02652*, 19 April 2023 ("W02652 Motion").

⁶ KSC-BC-2020-06/F01481, SPO, *Prosecution Response to 'Thaçi Defence Motion Regarding the Testimony of W02652'*, 26 April 2023.

⁷ KSC-BC-2020-06/F01485, *Thaçi Defence Reply to 'Prosecution Response to "Thaçi Defence Motion Regarding the Testimony of W02652"'*, 28 April 2023.

⁸ W02652 Decision, paras. 27-29.

⁹ KSC-BC-2020-06/F01830, SPO, *Prosecution Motion for Admission of Evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Request*, 14

October 2023, the four defence teams filed a joint response to the Rule 154 Motion.¹⁰ In the response, the defence challenged the admissibility of W03170's evidence pursuant to Rule 154 as opposed to orally.¹¹ The Defence did not make any submissions about the admissibility *per se* of W03170's evidence that Mr Thaçi was personally involved in the arrest and/or mistreatment of [REDACTED], but rather focussed its submissions on the fact that Rule 154 was not an appropriate vehicle for his evidence which should be heard orally.

8. On 2 November 2023, the Panel issued a decision on the Rule 154 Motion, finding that the evidence of W03170 was "appropriate for admission" pursuant to Rule 154.¹²

9. On 22 March 2024, the SPO indicated that it intends to call W03170 in the period between 22 April and 18 July 2024.¹³ Based on current scheduling and projected time estimates, the Defence understands W03170 will be called in the evidentiary block starting on [REDACTED].

September 2023 ("Rule 154 Motion"), paras. 5-15, and Annex 1. The SPO had intended to call witness W03170 between October and December 2023, but this did not materialise, see: KSC-BC-2020-06/F01828, SPO, *Prosecution Submission of list of witnesses for 30 October to 13 December 2023*, 2 October 2023 ("F01828"), as well as its Annex 1; [REDACTED].

¹⁰ KSC-BC-2020-06/F01857, *Joint Defence Response to the Prosecution Motion for Admission of Evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Requests (F01830)*, 13 October 2023 ("Joint Defence Rule 154 Response").

¹¹ Joint Defence Rule 154 Response, paras. 8-12.

¹² KSC-BC-2020-06/F01901, Trial Panel II, *Decision on Prosecution Motion for Admission of Evidence of W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Request (F01830)*, 2 November 2023 ("Rule 154 Decision"), para. 22.

¹³ F02195, Annex 1.

III. APPLICABLE LAW

10. Article 21(4)(a) of the KSC Law¹⁴ requires that, in the determination of any charge against the accused pursuant to the Law, the accused be informed promptly and in detail of the nature and cause of the charge against him.

11. The indictment must contain a concise statement of the facts and the crimes with which the accused is charged, in particular the alleged modes of liability in relation to the crimes charged pursuant to Article 16.¹⁵

12. As previously held by this Panel:

21. [...] the Indictment is the sole accusatory instrument so that it should give adequate notice of any allegation material to the Prosecution case, while other instruments (including the Pre-Trial Brief) could provide further specification of what is pleaded in the Indictment if clear and consistent. In no case could those instruments result in the addition of material allegations or the amendment of the charges.¹⁶

[...]

23. [...] material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. As the ICTY Appeals Chamber noted in *Prosecutor v. Kupreskic*,

[...] in a case where the Prosecution allege that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed must be pleaded in detail.¹⁷

24. The Prosecution's Pre-Trial Brief (and summaries of proposed witnesses' evidence) cannot add new charges or material allegations not contained in the Indictment, but can further specify those.¹⁸

¹⁴ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

¹⁵ Article 38(4); Rule 86(3).

¹⁶ W02652 Decision, para. 21.

¹⁷ W02652 Decision, para. 23 citing "*Kupreskic et al.* Appeal Judgment, para. 88".

¹⁸ W02652 Decision, para. 24.

IV. SUBMISSIONS

A. TIMING OF REQUEST

13. The Defence is mindful of the Panel's previous rulings that any objection to the admission of evidence should be timely¹⁹ and that neither the KSC Law or Rules expressly provide for the Panel's authority to strike a part of the testimonial record of a witness once admitted.²⁰ While the Panel has found that W03170's material is appropriate for admission pursuant to Rule 154, and the SPO have confirmed that they intend to lead evidence on this point in addition to what is included in the Rule 154 material,²¹ none of this evidence is yet admitted into the record. The Defence objection to its admission is thus timely, as it is being made before the evidence is introduced.²²

B. ADMISSIBILITY OF EVIDENCE

14. The Indictment²³ sets out each of the alleged incidents pled to support each of the charged crimes, organised by location.²⁴ Where one or more of the four accused is implicated in events at a particular location, their names are noted in bold, and their alleged involvement is explicitly pleaded.

15. In relation to the incident in question, the Indictment reads as follows:²⁵

[REDACTED]

¹⁹ W02652 Decision, para. 13.

²⁰ W02652 Decision, para. 16; KSC-BC-2020-06, Transcript of Hearing, 10 May 2023, Oral Order, pp. 3396-3397.

²¹ See, for example, F01828/A01, p. 4, para. 10.

²² See, for example, ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-0532/1, Appeals Chamber, Judgment, 9 July 2004, para. 199, where the Appeals Chamber of the ICTR noted that "[in] the case of objections based on lack of notice [of charges], the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced."

²³ KSC-BC-2020-06/F00999/A01, Annex 1 - Amended Indictment, 30 September 2022, Confidential ("Indictment").

²⁴ Indictment, paras. 58-175.

²⁵ Indictment, paras. [REDACTED].

16. Mr Thaçi is not alleged to have been involved.

17. The SPO Pre-Trial Brief then provides further details as to the SPO's case on this incident, and explicitly names four alleged perpetrators none of whom is Mr Thaçi.²⁶

[REDACTED]

18. In fact, in its Pre-Trial Brief, the SPO expressly limits Mr Thaçi's role in these events to having been confronted about the detention of [REDACTED] *after* the event.²⁷

19. Having considered the above texts, this Panel has previously found that neither the Indictment nor the Pre-Trial Brief contain any allegation that Mr Thaçi took a personal part in the arrest and/or mistreatment of [REDACTED].²⁸ They further found, that any such allegation is not part of the prosecution case as pleaded in the Indictment and that the SPO did not provide clear and consistent notice that it was.²⁹ The Panel observed that the SPO had the option to expressly allege Mr Thaçi's personal involvement in the arrest and mistreatment of [REDACTED] in the Indictment, but chose not to. As a consequence, it was not part of the SPO's case and to admit evidence in support of an un-pleaded allegation would be "highly prejudicial to the Defence."³⁰

20. The Defence submits that this judicial finding must be applied consistently to the SPO's case; that is, whether Mr Thaçi faces an allegation that he took a personal

²⁶ KSC-BC-2020-06/F01594/A03, Annex 3 - Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief', 9 June 2023 ("SPO Pre-Trial Brief"), para. [REDACTED]. *See also*, paras. [REDACTED].

²⁷ SPO Pre-Trial Brief, para. [REDACTED].

²⁸ W02652 Decision, para. 25.

²⁹ W02652 Decision, para. 27.

³⁰ W02652 Decision, paras. 25, 29.

part in the arrest/detention of [REDACTED] cannot depend on whose evidence the Panel is considering. It is either an allegation he faces or not. The Panel has clearly already found that it is not part of the SPO's case and the Defence submits that this must therefore preclude the SPO leading any evidence in this case, including that of W03170, that Mr Thaçi had any personal involvement in the arrest and/or mistreatment of [REDACTED]. To do otherwise would be "highly prejudicial to the Defence."³¹

21. In practical terms, the Defence submits that this will mean that evidence cannot be elicited from W03170 orally or, if any of W03170's statements are admitted via Rule 154 on the day he testifies, the relevant portions should be redacted.

22. For the avoidance of doubt, the Defence does not seek to prevent the SPO eliciting evidence from this witness about the arrest, detention and interrogation of [REDACTED] as this forms part of the JCE charges, as previously found by the Panel.³² The matter in issue is Mr Thaçi's alleged direct personal participation in these events which the Panel has previously found is limited in the charging instruments to being told about [REDACTED] detention.³³

V. CLASSIFICATION

23. These submissions are filed confidentially pursuant to Rule 82, as they contain identifying information for a protected SPO witness, and confidential details regarding the trial schedule and upcoming witnesses. A public redacted version will be filed in accordance with the orders of the Trial Panel.

³¹ W02652 Decision, para. 29.

³² W02652 Decision, para. 34.

³³ W02652 Decision, para. 35.

VI. CONCLUSION AND RELIEF SOUGHT

24. The Defence hereby requests the Trial Panel to:
- (i) Order the SPO to exclude questions about the alleged direct involvement of Mr Taçi in the arrest and/or mistreatment of [REDACTED]; and
 - (ii) Redact references to such alleged involvement from any material the SPO seeks to tender into evidence.

[Word count: 2,425 words]

Respectfully submitted,



Luka Misetic

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Tuesday, 30 April 2024

At The Hague, The Netherlands