



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: Specialist Prosecutor's Office

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Public Redacted Version of 'Prosecution response to "Thaçi Defence Request Related to W03170"'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Trial Panel should reject the THAÇI Request for orders to the Specialist Prosecutor's Office ('SPO') not to ask W03170 about the alleged direct involvement of Hashim THAÇI in the arrest and/or mistreatment of [REDACTED] ('Anticipated Testimony'), and to redact references to such alleged involvement from any material the SPO seeks to tender into evidence through W03170.¹

2. The THAÇI Request is untimely, misrepresents the Panel's decision concerning the admissibility of evidence analogous to the Anticipated Testimony,² and seeks reconsideration of the Panel's decision³ on the admissibility of W03170's prior statements pursuant to Rule 154 of the Rules⁴ without even addressing the standard for reconsideration. The Anticipated Testimony is admissible under Rules 137-138 and should not be excluded.

II. SUBMISSIONS

3. While, in responding to the SPO's Rule 154 request in relation to W03170, the Defence 'did not make any submissions about the admissibility *per se*' of the Anticipated Testimony,⁵ nothing precluded the Defence from doing so. Indeed, that would have been the appropriate time to make any such submissions. The Defence instead elected to engage in lengthy submissions concerning the credibility and reliability of the Anticipated Testimony, which it specifically acknowledged 'goes

¹ Thaçi Defence Request Related to W03170, KSC-BC-2020-06/F02274, Confidential, 30 April 2024 ('THAÇI Request').

² Decision on Thaçi Defence's Motion to Strike Part of the Record of Testimony of W02652, KSC-BC-2020-06/F01623, Confidential, 23 June 2023 ('W02652 Decision').

³ 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), KSC-BC-2020-06/F01901, Confidential, 2 November 2023 ('W03170 Rule 154 Decision'), paras 9-22, 90.

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁵ THAÇI Request, KSC-BC-2020-06/F02274, para.7.

directly to the acts and conduct of Mr Thaçi as charged in the Indictment'.⁶ That choice was the Defence's own, having clearly been put on notice of the SPO's intention to admit or elicit the Anticipated Testimony.⁷ Accordingly, the THAÇI Request is untimely⁸ and should be rejected on that basis alone.

4. In its Rule 154 decision concerning W03170, the Panel explicitly noted SPO submissions⁹ and Defence challenges¹⁰ related to the Anticipated Testimony, finding that admission of W03170's Statements under Rule 154 would not cause unfair prejudice to the Defence given that the Defence will have an opportunity to cross-examine W03170, that the *prima facie* probative value of W03170's prior statements is not outweighed by any prejudicial effect, and that W03170's prior statements are suitable for admission pursuant to Rule 154.¹¹ The THAÇI Request fails to even address the requirements for reconsideration of this decision and the arguments in the request do not demonstrate any error of reasoning or that reconsideration is necessary to avoid injustice.

5. While, as the THAÇI Defence asserts,¹² the Panel has held that it will disregard evidence analogous to the Anticipated Testimony as proof of the un-pleaded allegation that THAÇI took a personal part in the arrest and/or mistreatment of [REDACTED],¹³ the Panel went on to find, in the same decision, that such evidence could still be relevant to, and relied upon in support of, other pleaded allegations in

⁶ See Joint Defence Response to Prosecution Motion for Admission of Evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Requests (F01830), KSC-BC-2020-06/F01857, Confidential, 13 October 2023, paras 7-12, 14.

⁷ Prosecution motion for admission of evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 pursuant to Rule 154 and related request with confidential Annexes 1-7, KSC-BC-2020-06/F01830, Confidential, 3 October 2023, paras 6, 8; ANNEX 1 to Prosecution submission of list of witnesses for 30 October to 13 December 2023, KSC-BC-2020-06/F01828/A01, Confidential, 2 October 2023, p.5/39, no.10.

⁸ *Contra* THAÇI Request, KSC-BC-2020-06/F02274, para.13.

⁹ W03170 Rule 154 Decision, KSC-BC-2020-06/F01901, para.11.

¹⁰ W03170 Rule 154 Decision, KSC-BC-2020-06/F01901, paras 10, 13-14.

¹¹ W03170 Rule 154 Decision, KSC-BC-2020-06/F01901, paras 14, 22, 90.

¹² THAÇI Request, KSC-BC-2020-06/F02274, para.6.

¹³ W02652 Decision, KSC-BC-2020-06/F01623, para.29.

the Indictment and further specified in the SPO's Pre-Trial Brief.¹⁴ The Panel thus rejected the request, also submitted by the THAÇI Defence, to strike evidence analogous to the Anticipated Testimony and/or refrain from relying upon it. Just as the THAÇI Request ignores the reconsideration standard, it entirely ignores this unequivocal decision by the Panel, which is consistent with other decisions in which the Panel found that evidence of un-pleaded allegations against the Accused was admissible as proof of, for example, the Accused's knowledge, intent, and contributions to the pleaded joint criminal enterprise.¹⁵

6. Consistent with this Panel's prior decisions, the Anticipated Testimony – while not admissible as proof of any un-pleaded allegation – is relevant to multiple, pleaded allegations in the Indictment, including THAÇI's *mens rea*, the common criminal purpose, the joint criminal enterprise, and the aiding and abetting of, and/or superior responsibility for, *inter alia*, the crimes committed in [REDACTED].

7. Moreover, the probative value of the Anticipated Testimony is not outweighed by its prejudicial effect because: (i) the Defence had clear and consistent notice of the SPO's intention to tender and/or elicit the Anticipated Testimony;¹⁶ and (ii) the Defence will have the opportunity to cross-examine W03170, including on the Anticipated Testimony.¹⁷

8. As it is relevant and has probative value, which is not outweighed by any prejudice, the Anticipated Testimony is admissible and the THAÇI Request for its exclusion should be denied.

¹⁴ W02652 Decision, KSC-BC-2020-06/F01623, paras 22, 30-39, 41.

¹⁵ Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154, KSC-BC-2020-06/F01595/COR, Confidential, 9 June 2023, para.47; Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154, KSC-BC-2020-06/F01700, Confidential, 24 July 2023, paras 26-27, 40, 43.

¹⁶ See also para.3, fn.7 above.

¹⁷ See, similarly, W02652 Decision, KSC-BC-2020-06/F01623, paras 36-38.

III. CONFIDENTIALITY

9. This request is confidential in accordance with Rule 82(4).

IV. RELIEF REQUESTED

10. For the aforementioned reasons, the Panel should reject the THAÇI Request.

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Kimberly P. West

Specialist Prosecutor

Wednesday, 8 May 2024

At The Hague, the Netherlands.