



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 31 May 2024

Language: English

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Public Redacted Version of Decision on Thaçi Defence Request Related to W03170

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TRIAL PANEL II (“Panel”), pursuant to Articles 21(4)(a) and 38(4) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 86(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 2 November 2023, the Panel found that the proposed evidence of W03170 was appropriate for admission pursuant to Rule 154 (“Rule 154 Decision”).¹
2. On 22 March 2024, the Specialist Prosecutor’s Office (“SPO”) indicated its intent to call W03170 before the summer recess.²
3. On 30 April 2024, the Defence for Hashim Thaçi (respectively, “Mr Thaçi” and “Defence”) requested that the Panel prevent W03170 from testifying about Mr Thaçi’s alleged personal participation in the arrest and/or mistreatment of certain identifiable individuals in 1998 (“Allegation”). Specifically, the Defence requested the Panel to order the SPO to: (i) exclude questions about the Allegation; and (ii) redact references to the Allegation from any material that the SPO seeks to tender into evidence (“Request”).³
4. On 8 May 2024, the SPO responded to the Request (“Response”).⁴
5. On 14 May 2024, the Defence replied to the Response (“Reply”).⁵

¹ F01901, Panel, *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, confidential (a public redacted version was filed on the same day, F01901/RED).

² F02195/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submission of List of Witnesses [...]*, confidential.

³ F02274, Specialist Counsel, *Thaçi Defence Request Related to W03170*, 30 April 2024, confidential (a public redacted version was filed on the same day, F02274/RED).

⁴ F02298, Specialist Prosecutor, *Prosecution Response to ‘Thaçi Defence Request Related to W03170’*, 8 May 2024, confidential (a public redacted version was filed on the same day, F02298/RED).

⁵ F02309, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to ‘Thaçi Defence Request Related to W03170’ (“Reply”)*, 14 May 2024, confidential.

II. SUBMISSIONS

6. The Defence submits that the Allegation is not part of the SPO's case.⁶ The Defence invites the Panel to confirm the finding it made in the context of W02652's testimony that the Allegation does not form part of the SPO case and that admitting evidence in support of the Allegation would be prejudicial to the Defence ("Decision on Motion to Strike").⁷ The Defence argues that the Panel should apply this finding consistently to the SPO's case.⁸ The Defence argues that the Panel should preclude the SPO from leading any evidence regarding the Allegation as doing otherwise would be highly prejudicial.⁹ The Defence avers that no evidence regarding the Allegation should be elicited orally from W03170 and that, if any of W03170's statements are admitted pursuant to Rule 154, the relevant portions should be redacted.¹⁰ The Defence submits that it filed the Request in advance of W03170's testimony in order to prevent the admission of the Allegation onto the record, rather than *post-facto* inviting the Panel to disregard it.¹¹

7. The SPO responds that the Panel should reject the Request.¹² The SPO submits that the Request: (i) is untimely;¹³ (ii) misrepresents the Decision on Motion to Strike;¹⁴ and (iii) seeks reconsideration of the Rule 154 Decision without addressing the standard for reconsideration.¹⁵ The SPO avers that W03170's anticipated testimony is admissible and that the Allegation should not be excluded.¹⁶ The SPO reiterates that W03170's anticipated testimony – including the

⁶ Request, paras 1, 14-17.

⁷ Request, para. 2 referring to F01623, Panel, *Decision on Thaçi Defence's Motion to Strike Part of the Record of Testimony of W02652* ("Decision on Motion to Strike"), 23 June 2023, confidential, para. 29 (a public redacted version was filed on 24 July 2023, F01623/RED), para. 29. See also Request, para. 19.

⁸ Request, para. 20.

⁹ Request, para. 20. See also Reply, para. 6.

¹⁰ Request, paras 21-22. See also Reply, para. 9.

¹¹ Request, para. 3.

¹² Response, paras 1, 8, 10.

¹³ Response, paras 2-3.

¹⁴ Response, paras 2, 5.

¹⁵ Response, paras 2, 4.

¹⁶ Response, paras 2, 6.

Allegation – is relevant, and has probative value which is not outweighed by any prejudice.¹⁷

8. The Defence replies that the Request is timely.¹⁸ The Defence submits that it objected to the admission of the entirety of W03170's anticipated testimony through Rule 154, *including the Allegation*.¹⁹ The Defence argues that there is no admission decision to reconsider as W03170's proposed evidence has not been admitted yet, it has merely been found admissible.²⁰ Should the Panel consider the Request untimely, the Defence recalls that the Panel has the power to reconsider its decision.²¹ The Defence submits that reconsideration is warranted in the present case as an issue of fundamental fairness to the Accused arises.²² In relation to the SPO's submission that the Defence misrepresents the Decision on Motion to Strike,²³ the Defence replies that the circumstances in the instant case differ in that the witness relevant to the Decision on Motion to Strike had already testified.²⁴ The Defence submits that the Panel can direct the SPO to exclude or redact the Allegation from W03170's anticipated testimony as W03170 has not yet testified.²⁵

III. APPLICABLE LAW

9. In the determination of any charge against the Accused pursuant to the Law, the Accused shall be informed promptly and in detail of the nature and cause of the charge against him.²⁶

¹⁷ Response, paras 6-8.

¹⁸ Reply, para. 2.

¹⁹ Reply, para. 2.

²⁰ Reply, para. 2.

²¹ Reply, para. 3.

²² Reply, para. 3.

²³ Response, paras 2, 5.

²⁴ Reply, para. 6 *referring to* Decision on Motion to Strike, para. 16.

²⁵ Reply, para. 6.

²⁶ Article 21(4)(a).

10. 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 of the Law.²⁷ The indictment must be filed together with evidence supporting the material facts.²⁸

11. According to Rule 95(4)(a), the SPO's pre-trial brief must include, for each charge, a summary of the evidence that the SPO intends to present regarding the commission of the alleged crimes and the alleged modes of liability.

12. Conditions of admissibility of evidence are laid out, in particular, in Rules 137-138 and 154.

IV. DISCUSSION

A. TIMELINESS OF THE REQUEST

13. The Panel understands the Defence to be seeking to: (i) preclude the SPO from eliciting oral evidence about the Allegation during W03170's testimony; and (ii) redact references to the Allegation from the witness's written evidence.

14. The SPO argues that the appropriate time for the Defence to challenge the admissibility of the Allegation would have been in the response to the SPO's Rule 154 motion ("Rule 154 Motion").²⁹

²⁷ Article 38(4); Rule 86(3).

²⁸ Rule 86(3)(a).

²⁹ See Response, para. 3. See also F01830, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Request*, 3 October 2023 ("Rule 154 Motion"), confidential, with Annexes 1-7, confidential, paras 5-15 (a public redacted version was filed on 9 November 2023, F01830/RED).

15. The Panel notes that W03170's testimony is scheduled to start testifying shortly.³⁰ The Panel further notes that an objection regarding the admissibility of *viva voce* evidence is to be made in principle before or at the time that the witness gives evidence.³¹

16. As noted by the SPO, the objections raised in Request could and should have been brought to the attention of the Panel in response to the SPO's Rule 154 Motion as it pertains to an issue of (*prima facie*) relevance of the proposed evidence. This, however, does not render the Defence application untimely since the Panel's Rule 154 Decision only declares the relevant material to be appropriate for admission subject to the three requirements set out in this provision. A Party can still raise objections to admissibility at the time when the material is formally offered for admission after these requirements are met, where such objections could not reasonably be expected to have been made earlier.

17. The Panel further notes that it has already entertained an objection to the admission of the Allegation in the context of W02652's testimony in its Decision on the Motion to Strike. In that Decision, the Panel rejected the Defence's motion to strike the impugned evidence of W02652 in respect of the Allegation and/or to refrain from relying upon it. The Panel further clarified that while the SPO will not be permitted to rely upon the impugned evidence (of W02652 in that case) to seek to establish Mr Taçi's claimed personal involvement in the arrest and/or mistreatment of named individuals, this evidence could still be relevant to some of the material allegations made in the Indictment and further specified in the SPO Pre-Trial Brief.³²

³⁰ List of Witnesses.

³¹ See W02652 Decision, paras 13-14. See also F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, paras 115-118.

³² Decision on Motion to Strike, para. 22.

18. Based on the above, and with the caveat that it should have been raised in response to the Rule 154 Motion, the Panel is satisfied that the Request is still timely.

B. NATURE OF THE REQUEST

19. The SPO argues that the Request is, in essence, a request to reconsider the Rule 154 Decision.³³

20. The Panel recalls that: (i) in its Rule 154 Motion, the SPO identified the material it intends to tender into evidence through W03170 (“W03170’s Rule 154 Material”);³⁴ and (ii) in response, the Defence challenged the general admissibility of W03170’s Rule 154 Material (“Rule 154 Response”).³⁵

21. In finding that W03170’s Rule 154 Material was appropriate for admission pursuant to Rule 154,³⁶ the Panel gave due consideration to the challenges raised by the Defence in the Rule 154 Response. However, as acknowledged by the Defence itself,³⁷ the Defence did not specifically challenge the admissibility of the Allegation in the Rule 154 Response or request the Panel to exclude the Allegation from W03170’s evidence. Furthermore, the Panel in the Rule 154 Decision did not admit any of W03170’s Rule 154 Material as the requirements of Rule 154 can only be fulfilled once the witness appears in court to testify. It follows, as noted above, that the Panel has not rendered a decision admitting the impugned material. It has only found that material to be appropriate for admission under Rule 154. The Panel reiterates, however, that as the objection now taken also goes to the question

³³ Response, paras 2, 4-5.

³⁴ Rule 154 Motion, paras 5-15. *See in particular* Annex 1 to Rule 154 Motion. *See also* Rule 154 Decision, fn. 13. The Panel recalls that W03170’s Rule 154 Material consists of: (a) five statements [REDACTED]; and (b) eight associated exhibits [REDACTED].

³⁵ F01857, Specialist Counsel, *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)* (“Rule 154 Response”), 13 October 2023, confidential (a public redacted version was filed on 10 November 2023, F01857/RED), paras 4-14.

³⁶ Rule 154 Decision, para. 22.

³⁷ Request, para. 7. *See also* Reply, para. 2. *See also* Rule 154 Response, paras 4-14.

of relevance of the said evidence and as the Rule 154 Motion expressly referred to this Allegation,³⁸ an objection to its admission on grounds of relevance should have been raised in response to the SPO's Rule 154 Motion.

22. Accordingly, the Panel finds that the current Request does not amount to a request for reconsideration.

C. MERITS OF THE REQUEST

23. The Panel recalls its previous findings in the context of Decision on Motion to Strike that: (i) the Allegation, insofar as it pertains to Mr Taçi's personal involvement in the arrest and/or mistreatment of the named individuals, does not form part of the charges as pleaded in the Indictment and, in turn, does not form part of the Prosecution case;³⁹ and that (ii) admission of evidence in support of such an un-pleaded Allegation would therefore be highly prejudicial to the Defence.⁴⁰ For this reason, the Panel held that it will "disregard the impugned evidence [...] as it relates to the un-pleaded suggestion that Mr Taçi took a personal part in the arrest and/or mistreatment" of the named individuals.⁴¹

24. For the same reasons, the Panel reiterates that it will disregard the Allegation insofar as it pertains to Mr Taçi's alleged personal participation in the arrest and/or mistreatment of the relevant individuals.

25. However, the Panel also recalls that evidence that is inadmissible in relation to an un-pleaded material fact could still be admitted if relevant to another fact or circumstance that *is* validly pleaded in the Indictment.⁴² For instance, it has been

³⁸ See Rule 154 Motion, para. 8.

³⁹ Decision on Motion to Strike, paras 25, 27, 29 referring to F00999/A01, Annex 1 to Submission of Confirmed Indictment ("Indictment"), 9 September 2022, confidential.

⁴⁰ Decision on Motion to Strike, para. 29.

⁴¹ Decision on Motion to Strike, para. 29.

⁴² See Decision on Motion to Strike, paras 22, 30. See also SCSL, Trial Chamber I, *Prosecutor v Sesay et al.*, SCSL-2004-15, [Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment](#), 26 June 2008, para. 16; ICTR, *Prosecutor v Bizumungu et al.*, ICTR-99-50-T, [Decision on Bicamumpaka's](#)

held that evidence which may go to proving an un-pleaded allegation is admissible if relevant to the proof of other allegations in the indictment or to facts at issue in the proceedings; to the proof of the chapeau requirements for crimes against humanity or the existence of a consistent pattern of conduct relevant to serious violations of international humanitarian law; or where it provides the Panel with useful background or contextual information.⁴³ Similarly, it could serve as evidence of an Accused's whereabouts at relevant times, knowledge of facts relevant to the case, and/or authority, and/or control over others.

26. The Panel also recalls that the arrest and detention of the named individuals clearly forms part of the charges.⁴⁴

27. It follows that, while the SPO will not be permitted to rely upon the Allegation to seek to establish Mr Thaçi's *personal involvement* in the arrest and mistreatment of these individuals, the Allegation could still be relevant to certain allegations validly pleaded in the Indictment and further specified in the SPO Pre-Trial Brief.⁴⁵

28. In addition, the Panel recalls that it found W03170's Rule 154 Material to be relevant, *prima facie* authentic, and *prima facie* probative.⁴⁶ The Panel also found that the probative value of W03170's Rule 154 Material – including the references

[Urgent Motion to Declare Parts of the Testimony of Witness GTA and DCH Inadmissible](#), 24 November 2004, paras 20, 22, 28; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, [Decision on Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment](#), 18 March 2008, para. 7; Trial Chamber II, *Prosecutor v. Nindilyimana et al.*, ICTR-00-56-T, [Decision on Bizimungu's Motion to Exclude the Testimony of Witness AP](#), 28 October 2005, para. 32; Appeals Chamber, *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-AR7, [Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible"](#), 2 July 2004, para. 15.

⁴³ SCSL, Trial Chamber I, *Prosecutor v. Sesay et al.*, SCSL-2004-15, [Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment](#), 26 June 2008, para. 16.

⁴⁴ Decision on Motion to Strike, paras 34-35 referring to Indictment, paras [REDACTED] and SPO Pre-Trial Brief, paras [REDACTED].

⁴⁵ See also Decision on Motion to Strike, paras 31-35.

⁴⁶ Rule 154 Decision, para. 22.

to the Allegation – is not outweighed by any prejudicial effect.⁴⁷ Also, the Panel recalls that the fact that evidence is or might be incriminating does not render it prejudicial for the purpose of this exclusionary rule.⁴⁸ For such a rule to apply, there must arise an unfairness unconnected to the evidential value of the evidence, such as an inability to challenge it fairly and effectively.⁴⁹ The Defence will be able to cross-examine in at least one and possibly another of the individuals concerned, as well as other witnesses who have testified or will testify about this matter. The Panel, therefore, remains of the view that the probative value of the impugned evidence is not outweighed by its prejudicial effect.

29. For this reason, the Panel rejects the Request.

V. CLASSIFICATION

30. The Panel observes that the Defence did not file a public redacted version of the Reply (F02309). The Panel recalls that, unless there are compelling reasons not to do so which should then be explained in the classification section of the filing, Parties and participants shall file *simultaneously* a public redacted version of their confidential filing.⁵⁰ The Panel therefore directs the Defence to file a public redacted version of the Reply (F02309) by **Wednesday, 5 June 2024**.

⁴⁷ Rule 154 Decision, para. 22.

⁴⁸ Decision on Motion to Strike, para. 36.

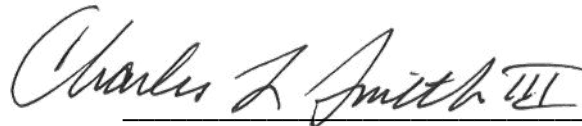
⁴⁹ See, e.g., F01409, Panel, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, confidential, para. 13; F01596, Panel, *Second Decision on Specialist Prosecutor's Bar Table Motion*, 9 June 2023, confidential and *Ex Parte*, para. 84.

⁵⁰ Transcript of Hearing, 7 November 2023, p. 9446, lines 13-20 (Oral Order on the Publicity of Proceedings).

VI. DISPOSITION

31. In light of the above, the Panel:

- a) **DENIES** the Request; and
- b) **ORDERS** the Defence to file a public redacted version of the Reply (F02309) by **Wednesday, 5 June 2024**.

A handwritten signature in black ink, reading "Charles L. Smith, III", written over a horizontal line.

Judge Charles L. Smith, III

Presiding Judge

Dated this Friday, 31 May 2024

At The Hague, the Netherlands.