

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 Reply to Prosecution response to ‘Thaçi Defence Request Related to W03170’’

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby replies to the Prosecution response to ‘Thaçi Defence Request Related to W03170’.¹ The Defence submits that its Request is timely: the Trial Panel has not yet admitted W03170’s evidence and the Defence is always entitled to make objections before admission. No “reconsideration” of the Trial Panel’s Rule 154 Decision for W03170² is required, but even assuming *arguendo* that it were, the criteria for reconsideration are satisfied. In order to ensure the fairness of the trial, the Defence has rightly invited the Trial Panel to disregard W03170’s evidence concerning an unpleaded allegation in the Indictment.

II. DISCUSSION

2. Contrary to the SPO’s submissions,³ the Defence Request⁴ is timely. The Defence seeks to prevent the SPO from eliciting evidence orally about Mr Thaçi’s alleged personal participation in the arrest, detention or mistreatment of [REDACTED] (“Anticipated Testimony”), ahead of W03170’s live testimony. In this regard, the Defence has complied with the Trial Panel’s ruling pursuant to which an objection to the admissibility of *viva voce* evidence should be made in principle before or at the time that the witness gives evidence.⁵ Furthermore, the Defence did object previously⁶ to the admission through Rule 154 of W03170’s evidence in its entirety, which included his statements about the alleged direct involvement of Mr Thaçi in

¹ KSC-BC-2020-06/F02298, 8 May 2024 (“SPO Response”).

² KSC-BC-2020-06/F01901, 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 for W03170”).

³ SPO Response, paras 2-3.

⁴ KSC-BC-2020-06/F02274, Thaçi Defence Request Related to W03170, 30 April 2024 (“Defence Request”).

⁵ KSC-BC-2020-06/F01623, Decision on Thaçi Defence’s Motion to Strike Part of the Record of Testimony of W02652, 23 June 2023 (“W02652 Decision”), paras 13-14.

⁶ 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, paras 4-14.

[REDACTED] arrest or detention, and such material, while found admissible,⁷ has not been admitted yet, and thus there is no admission decision to reconsider.

3. Nevertheless, if the Trial Panel were to consider that the Defence objection is untimely, the Defence recalls that the Panel has the power to reconsider its decision, including in respect of the admission of evidence,⁸ in order to avoid injustice.⁹ Reconsideration is warranted in the instant case¹⁰ since the Defence objection raises an issue of fundamental fairness to the Accused,¹¹ *i.e.* the Prosecution's attempt to rely, without sufficient notice, on evidence related to material facts which concern the actions of Mr Thaçi personally *vis-à-vis* [REDACTED], not pleaded in the Indictment or Pre-Trial Brief.¹² The Trial Panel has already ruled as much. This issue was not addressed in the Rule 154 Decision for W03170¹³ – the Panel simply concluded that the admission of W03170's Statements under Rule 154 would not cause unfair prejudice to the Defence, given that it will have an opportunity to cross-examine him and another witness.¹⁴

4. However, evidence cannot be admitted in relation to material facts not pleaded in the Indictment or in relation to an allegation of which insufficient notice was given.¹⁵ The Defence stresses that the Indictment is the sole accusatory instrument, which should give notice of any allegation material to the Prosecution case; the SPO Rule 95 summary for W03170, or its Rule 154 motion, does not provide sufficient

⁷ KSC-BC-2020-06/F01901, 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) ("Rule 154 Decision for W03170"), para. 22.

⁸ W02652 Decision, para. 18.

⁹ Rule 79 of the KSC Rules of Procedure and Evidence.

¹⁰ See contra, SPO Response, paras 2, 4.

¹¹ W02652 Decision, para. 18.

¹² W02652 Decision, paras. 22, 23, 25.

¹³ See contra, SPO Response, para. 4.

¹⁴ W03170's Rule 154 Decision, para. 14.

¹⁵ W02652 Decision, para. 22.

notice¹⁶ and cannot result in the addition of material allegations or the amendment of the Indictment.¹⁷

5. The Panel has already concluded 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 and that the admission of evidence in support of such an unpleaded allegation would, therefore, be highly prejudicial to the Defence.¹⁸ In consequence, the Defence is right to ask the Panel to disregard the impugned evidence of W03170 as it relates to the unpleaded suggestion that Mr Thaçi personally took part in the arrest and/or mistreatment of [REDACTED].

6. The SPO submits that this does not preclude the Panel from relying on W03170's Anticipated Testimony in support of other, pleaded allegations in the Indictment. The SPO relies on W02652's Decision, where the Panel held that it will disregard W02652's evidence analogous to the Anticipated Testimony as proof of the unpleaded allegation that Mr Thaçi took a personal part in the arrest and/or mistreatment of [REDACTED], but found that W02652's evidence could still be relied upon in support of other pleaded allegations in the Indictment.¹⁹ The Defence submits that the circumstances between the two witnesses are different. In W02652's case, the witness had already testified and the Panel observed that it did not have the authority to strike a part of the testimonial record of a witness²⁰ - thus the Panel could not ignore what was already part of the record and considered that it may rely on it in support of other pleaded allegations. In W03170's case, he has not testified yet and his statements have not been admitted yet. His Anticipated Testimony is not part of the record yet. The SPO can thus be directed to exclude or redact certain evidence whose

¹⁶ See contra, SPO Response, para. 3, footnote 7, and para. 7, footnote .16

¹⁷ W02652 Decision, para. 21.

¹⁸ W02652 Decision, para. 29.

¹⁹ SPO Response, paras 5-6.

²⁰ W02652 Decision, para. 16.

prejudicial effect would outweigh its probative value.²¹ In the current case, the Defence submits that the lack of notice in the Indictment concerning Mr Thaçi's alleged direct involvement in the arrest, detention or mistreatment of [REDACTED], should prevent the SPO from eliciting or tendering such evidence through W03170, be it orally or pursuant to Rule 154, in order to ensure the fairness of the trial for the Accused. Its eventual probative value would be outweighed by its prejudicial effect, in the absence of sufficient notice, and in light of the fact that W03170 and [REDACTED]'s account on this issue are contradictory,²² and thus not reliable.

7. The Defence notes that the Trial Panel has already ruled, unequivocally, that it will “disregard the impugned evidence of W02652 as it relates to the un-pleaded suggestion that Mr Thaçi took a personal part in the arrest and/or mistreatment of [REDACTED].”²³ It also ruled, in the same paragraph, that the “*admission* of evidence in support of such an un-pleaded allegation would, therefore, be highly prejudicial to the Defence.”²⁴ With this Motion, the Defence does nothing more than request that the Panel enforce its prior ruling and deny *admission* of evidence which is “highly prejudicial to the Defence.” It further submits that the Trial Panel cannot for any purpose rely on evidence (specifically, that “Mr Thaçi took a personal part in the arrest and/or mistreatment of [REDACTED]”) which it has already ruled it will “disregard,” and the *admission* of which it has found to be “highly prejudicial to the Defence.”

III. CLASSIFICATION

8. These submissions are filed confidentially pursuant to Rule 82 of the Rules, as they respond to a filing with the same classification.

²¹ KSC-BC-2020-06, Oral ruling of 17 April 2023, p. 2865-2866.

²² See KSC-BC-2020-06/F01857, paras 8-12.

²³ W02652 Decision, para. 29

²⁴ *Ibid.* (Emphasis added).

IV. CONCLUSION

9. For the foregoing reasons, the Defence respectfully 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: 1357 words]

Respectfully submitted,



Luka Mišetić

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Tuesday, 14 May 2024

At The Hague, The Netherlands