



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: Acting Specialist Prosecutor

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Corrected Version of 'Prosecution response to THAÇI request regarding preservation of Defence evidence', KSC-BC-2020-06/F01221, dated 20 January 2023

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I. INTRODUCTION

1. The Request¹ should be denied because it fails to demonstrate – as required under the Law and Rules² – that it is necessary and in the interests of justice to either (i) upend the sequence of the trial set in the Rules and hear the Witnesses³ before the Prosecution case begins; or (ii) take depositions of the Witnesses.

2. As the Defence has acknowledged,⁴ the substance of the Request is the same as its previous request for unique investigative opportunities and the taking of depositions in relation to the same nine Witnesses.⁵ On 28 November 2022, the Pre-Trial Judge rejected this request as unsubstantiated. He found that neither the age of the Witnesses, nor the anticipated length of time before the Defence case demonstrated that the evidence of the Witnesses may subsequently become unavailable.⁶ Since there is no apparent change in circumstances pertaining to any of the Witnesses and the Request repeats the same submissions already considered and rejected,⁷ there is no reason to depart from the Pre-Trial Judge's ruling that the justifications put forward by the Defence are inadequate.

¹ *Thaçi Defence Motion Regarding the Preservation of Defence Evidence*, KSC-BC-2020-06/F01191, 9 January 2023, Confidential ('Request').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'), Article 40(2); Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), Rules 116 and 127. All references to 'Article' or 'Articles' and 'Rule' or 'Rules' herein refer, respectively, to the Law and Rules, unless otherwise specified.

³ The nine witnesses identified in the Request are referred to herein as the 'Witnesses'.

⁴ Request, KSC-BC-2020-06/F01191, para.5.

⁵ *Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities*, KSC-BC-2020-06/F01068, 28 October 2022, Confidential ('First Request'); *Thaçi Defence Notice of Unique Investigative Opportunities*, KSC-BC-2020-06/F01018, 7 October 2022 ('Notice'); *Addendum to Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities with confidential Annex 1*, KSC-BC-2020-06/F01099, 11 November 2022.

⁶ *Decision on Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities*, KSC-BC-2020-06/F01125, 28 November 2022 ('Decision'), paras 28, 33-34.

⁷ *Compare First Request*, KSC-BC-2020-06/F01068, paras 9-11, 15-26, 30, 35-36 *with Request*, KSC-BC-2020-06/F01191, paras 10-12, 17-19, 21-31, 37-38. Annexes 1-6 have the same content as Annexes 1-6 to the First Request, Annex 7 corresponds to Annex 1 to the Addendum, and Annexes 8-9 match Annexes 7-8 to the First Request.

II. SUBMISSIONS

A. THE DEFENCE FAILS TO DEMONSTRATE THAT A VARIATION OF THE SEQUENCING OF THE TRIAL IS EXCEPTIONALLY WARRANTED

3. The THAČI Defence requests the Trial Panel to radically reverse the default order of the presentation of the evidence and open the present trial with Witnesses called by the Defence – contrary to the core features of an adversarial procedure and the Rules – solely on the basis of the Witnesses’ age and the potential length of the Prosecution case.⁸ The Defence fails to cite any relevant jurisprudence, despite similar provisions being in effect at other international tribunals.⁹ To the contrary, international courts with similar frameworks have emphasised that the presentation of evidence should follow the logical order: the Prosecution first presents and closes its case, and the Defence is then given an opportunity to answer that case.¹⁰ This is the same trial sequence set out in Rule 127(2) and the foundation upon which Chapter 9 of the Rules, concerning the trial proceedings, is based.¹¹

4. Contrary to the Defence’s contention,¹² the right to obtain the attendance and examination of witnesses on behalf of the Accused is ‘for obvious reasons, subject to conditions, including a *requirement* that the evidence should be called at the proper time’,¹³ and so, in accordance with the prescribed order of evidence presentation. Any variation in the sequencing of the presentation of evidence should therefore be exceptional and only ordered where it has been demonstrated that it is necessary and

⁸ Request, KSC-BC-2020-06/F01191, paras 2, 18-30, 42.

⁹ See e.g. ICTY RPE, Rule 85(A); ICTR RPE, Rule 85(A) and IRMCT RPE, Rule 102(A).

¹⁰ See e.g. ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004 (‘Kordić Appeal Judgment’), para.216; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the prosecution in cross-examination of Defence witnesses, 26 February 2009 (‘Prlić Decision’), para.23. While these decisions do not specifically concern a Defence request to preserve evidence, they underline the general principle, which is equally applicable in the context of the present Request.

¹¹ See, *inter alia*, Rules 117-119, 124, 126, 129, and 131.

¹² Request, KSC-BC-2020-06/F01191, para.29.

¹³ ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para.75 (emphasis added).

in the interests of justice.¹⁴ In this respect, as it does not concretely demonstrate that the evidence of the Witnesses may be unavailable at the time of the Defence case,¹⁵ the Request fails to meet this standard.

5. Despite the Defence's baseless assertion that its proposal would benefit the Specialist Prosecutor's Office ('SPO'),¹⁶ the request relief would cause irreparable prejudice and would run against the interests of justice. As previously noted, the advanced age of certain witnesses is inherent in the KSC's mandate, which concerns crimes committed between 1998 and 2000.¹⁷ In this regard, the SPO intends to call a number of elderly witnesses, as well as witnesses in precarious security situations. The necessary and proportionate protective measures granted certain witnesses in this case, including delayed disclosure of their identities, would be undermined if the Defence was permitted to delay the presentation of the SPO's evidence.¹⁸ Hearing the Witnesses out of order would therefore unnecessarily and unjustifiably delay and impact the ability of Prosecution witnesses to testify, threatening the mandate of both the SPO and KSC.

6. In relation to W04147, and as previously submitted, the SPO intends to call W04147 in the first 40 witnesses. While the Defence notes this fact,¹⁹ it does not engage

¹⁴ Rule 127(2) should be read in light of Article 40(2) (providing that the Panel may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of the proceedings) and Rule 116(1). *See also Prlić* Decision, para.23.

¹⁵ At this stage and for the reasons herein, variation of the trial sequence, particularly in the terms requested by the Defence, requires a higher standard than is required at the pre-trial stage for unique investigative opportunities and depositions. However, as the Request fails to meet the standard under Rules 99-100, it necessarily fails at this stage.

¹⁶ Request, KSC-BC-2020-06/F01191, para.20.

¹⁷ Prosecution response to THACI request for unique investigative opportunities, KSC-BC-2020-06/F01096, 10 November 2022, paras 6-7 ('First Response'); Prosecution response to THACI addendum to its motion for unique investigative opportunities, KSC-BC-2020-06/F01112, 18 November 2022, para.5 ('Response to the addendum').

¹⁸ Such protective measures and related disclosure timelines (including the anticipated 30 January 2023 disclosure pertaining to witnesses with delayed disclosure of 30 days before trial and, in certain cases, 30 days before testimony) were reached on the basis of the default evidence presentation sequence. In this respect, this Panel recently invited the SPO to consider calling certain witnesses with delayed disclosure earlier in its witness order. *See* Transcript, 16 December 2022, p.1709. Such timelines may require further consideration in the event of any change in the evidence presentation order.

¹⁹ Request, KSC-BC-2020-06/F01191, para.31.

with it or concretely explain why it still would be necessary to call him – or any of the other Witnesses – before the Prosecution’s case.

7. Accordingly, the Request entirely fails to substantiate the Defence’s request for the Trial Panel to reverse the order of the presentation of the evidence to hear the Witnesses first. For the same reasons and as set out below, the relief sought in the alternative should also be dismissed.

B. THE DEFENCE FAILS TO DEMONSTRATE THAT THE WITNESSES’ EVIDENCE MAY BE UNAVAILABLE AT TRIAL

8. As previously stated, the SPO does not object to the use of Rule 100 measures when justified.²⁰ However, the Defence does not explain how this pre-trial procedure, which permits the Pre-Trial Judge to take depositions in limited circumstances, applies at this stage of proceedings and, in any event, fails to concretely demonstrate that the evidence of the Witnesses may become unavailable before the Defence case.²¹

9. Like the First Request and Addendum, the present Request is defective on its face. Contrary to the Defence’s assertion that the Pre-Trial Judge ruled ‘without prejudice’ on the Defence’s request for depositions of the nine Witnesses,²² the Pre-Trial Judge rejected the motion on the basis that there was no reason to believe that the evidence of the Witness may become unavailable²³ and limited the ‘without prejudice’ caveat to submissions ‘with respect to the modalities, timing and chronology of the testimony of the Witnesses.’²⁴ There is no change in circumstances that would warrant reconsideration²⁵ of the Pre-Trial Judge’s Decision that depositions of the Witnesses are not justified.

²⁰ First Response, KSC-BC-2020-06/F01096, paras 6-7; Response to the addendum, KSC-BC-2020-06/F01112, para.5.

²¹ Rule 100(1).

²² Request, KSC-BC-2020-06/F01191, para.4.

²³ Decision, KSC-BC-2020-06/F01125, paras 33-34.

²⁴ Decision, KSC-BC-2020-06/F01125, para.31.

²⁵ See Decision on SPO Request for Reconsideration and/or Leave to Appeal of F01149, Suspensive Effect and Request for Time Extension, KSC-BC-2020-06/F01206, 13 January 2023, Confidential, para.33 (the Trial Panel has not decided whether it has the power to reconsider a decision of the Pre-Trial Judge).

10. As found by the Pre-Trial Judge – consistent with the jurisprudence of other tribunals – age alone is insufficient to trigger Rule 100 measures.²⁶ The Defence has itself acknowledged this jurisprudence now twice.²⁷ Infirmary and poor health – not age alone – may be sufficient, in certain circumstances, to show that evidence may be unavailable subsequently.²⁸ The present Request once more relies solely on the Witnesses’ age and the potential length of the Prosecution case, conceding that ‘ill health [...] is not currently a factor in play in this case’.²⁹

11. While in the First Request, the Defence generally mentioned in passing the ‘varying degrees of health’ of the Witnesses,³⁰ it has never provided any specific or concrete information concerning any health concerns. In the First Response, the SPO noted that at least two of the Witnesses were professionally active.³¹ The Defence has now removed from the Request any mention of health concerns, except for Prosecution witness W04147.³²

12. Even if the Defence demonstrated that the Witnesses’ evidence may become unavailable at trial (which it did not), the Request fails to adequately explain why taking their depositions is necessary.³³ The importance of the evidence the Defence seeks to preserve is a key factor going to necessity. Notably, the Defence does not argue anymore that the evidence of the Witnesses is ‘indispensable for Mr Thiagi’s

²⁶ Decision, KSC-BC-2020-06/F01125, paras 28, 33-34.

²⁷ Request, KSC-BC-2020-06/F01191, para.30; First Request, KSC-BC-2020-06/F01068, para.26 referring to ICTY, *Prosecutor v. Krajišnik and al.*, IT-00-39 & 40-PT, Decision to proceed by way of deposition pursuant to Rule 71, 16 November 2001; and ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Callixte Nzabonimana’s motion for protection measures and deposition of Witness RW-42, 27 October 2009. In these cases, the Chambers noted, *inter alia*, the poor health condition or infirmity of the relevant witnesses and that the Defence had provided supporting medical evidence.

²⁸ See also ICTR, *Prosecutor v. Bagasora and al.*, ICTR-98-41-I, Decision on Prosecutor’s motion for deposition of Witness OW, 5 December 2001, para.12.

²⁹ Request, KSC-BC-2020-06/F01191, para.30.

³⁰ Notice, KSC-BC-2020-06/F01018, para.6; Request, KSC-BC-2020-06/F01068, para.16.

³¹ First Response, KSC-BC-2020-06/F01096, para.5.

³² Request, KSC-BC-2020-06/F01191, para.30; Annex 2 refers to the ‘risk of age and fragile health’ of W04147, no specific information is provided.

³³ Article 40(2) (providing that the Trial Panel may adopt procedures and modalities as are necessary); Rules 116(1) (‘the Panel shall, on an ongoing basis, take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings), 100(1)-(2).

defence',³⁴ but, instead, that the Witnesses would testify to 'matters that are central to the case against Mr Thaçi'.³⁵ However, none of these Witnesses made it to any Rule 95(5)(c) witness list.³⁶

13. Further, the importance of the Witnesses' evidence is unclear due to the lack of tangible information provided in the Annexes. As previously noted, the assertion that Witnesses had personal contact with Mr. THAÇI is vague.³⁷ In this respect, the general summary of the Witnesses' anticipated testimony in the Request³⁸ does not always correspond to the information provided in the annexes and, even taken at its best, the anticipated evidence of some Witnesses is marginally relevant.³⁹ The Defence also inflates the nature and frequency of the direct contacts between certain Witnesses and THAÇI. For example, based on the information provided in the Annexes, DURKEE only interacted with THAÇI on one occasion⁴⁰ and BENNETT on an unspecified 'number of occasions'.⁴¹

14. Lastly, the Defence fails to demonstrate that the Trial Panel's intervention is necessary and that it has exhausted available measures. The Defence's assessment of alternative options is unconvincing,⁴² since alternative options to interview the Witnesses itself and at the appropriate time, call the Witnesses or admit their evidence under Rules 153-155 are still open, even if not preferred by the Defence.

³⁴ Request, KSC-BC-2020-06/F01068, para.24.

³⁵ Request, KSC-BC-2020-06/F01191, para.17.

³⁶ Pre-Trial Brief of Mr Hashim Thaçi, KSC-BC-2020-06/F01050, 21 October 2022, Confidential, para.17 (indicating that the Defence was not in a position to provide a list of potential witnesses).

³⁷ Request, KSC-BC-2020-06/F01191, para.38.

³⁸ Request, KSC-BC-2020-06/F01191, paras 37-38.

³⁹ For example, the assertion that the Witnesses will testify on 'persons holding themselves out as KLA, but were in no way related to the KLA' has no corresponding basis in any of the Annexes. In relation to BENNETT, the information provided at paragraphs 7 and 8 of Annex 1 do not fall within any of the themes listed at paragraph 35. The source of the witness's knowledge referred to in Annex 7 - including whether firsthand or hearsay - is not clearly specified.

⁴⁰ Annex 5, para.5.

⁴¹ Annex 1, para.7. Also, in relation to the witness referred to in Annex 7, information on the nature and frequency of the witness's interactions with THAÇI and other KLA members, the topics of meetings he arranged, and whether he attended them - is lacking.

⁴² Request, KSC-BC-2020-06/F01191, paras 39-41.

15. Lastly, as also noted above, the Defence does not concretely engage with the fact that it can seek to interview W04147,⁴³ who is an SPO witness and will be called live⁴⁴ among the first 40 witnesses, under the conditions of the Contact Decision.⁴⁵ The Contact Decision provides for many of the same procedures that feature in Rule 100.⁴⁶ The Defence has not made any request to interview any witness under the Contact Decision, let alone W04147, and its request for any variation⁴⁷ is therefore premature and unsubstantiated.

III. CLASSIFICATION

16. This response is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

IV. RELIEF REQUESTED

17. For the foregoing reasons, the Trial Panel should reject the Request in its entirety.

Word count: 2,516



Alex Whiting

Acting Specialist Prosecutor

Monday, 23 January 2023

At The Hague, the Netherlands.

⁴³ Request, KSC-BC-2020-06/F01191, para.31.

⁴⁴ Witness List, KSC-BC-2020-06/F01078/A04, 2 November 2022, Confidential, p.222.

⁴⁵ The Contact Decision applies to W04147. *See* Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, KSC-BC-2020-06/F00854, 24 June 2022 ('Contact Decision').

⁴⁶ *See* Contact Decision, KSC-BC-2020-06/F00854, para.212 (II)(d)-(j), (n) and (o).

⁴⁷ Request, KSC-BC-2020-06/F01191, para.31. *See also* First Request, KSC-BC-2020-06/F01068, para.30; Transcript, 4 November 2022, pp.1645-1646.

Explanatory note: Corrections were made to the title and name of the Filing Participant on the cover page.