

In: KSC-BC-2020-06
The 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 Guénaël Mettreaux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Language: English

Classification: Public

**Thaçi Defence Motion to Narrow Charges in the Indictment Pursuant to
Rules 116, 117 and 118**

Acting Specialist Prosecutor

Alex Whiting

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. On 18 January 2023, the Trial Panel ordered the Parties to file any motions pursuant to Rule 117(2) by 1 February 2022.¹ Mr Hashim Thaçi now petitions the Trial Panel, pursuant to Article 40 of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (the "Law"), and Rules 116, 117(2) and 118(1)(b)² to invite the Specialist Prosecutor's Office ("SPO") to narrow the temporal scope of the Indictment. Specifically, the Accused's right to an expeditious trial requires a reduction in the temporal scope of the Indictment. Moreover, as set forth below, the Trial Panel already has enough information before it to conclude that the evidence offered by the SPO to support the allegation of the existence of armed conflict in Kosovo beyond 20 June 1999 will be insufficient to "support a conviction beyond reasonable doubt" (the standard in Rule 130(3) of the Rules) for war crimes beyond that date.

2. The Trial Panel should therefore use its authority under Rule 118(1)(b) to invite the SPO to narrow the temporal scope of the Indictment to events on or before 20 June 1999. If the SPO declines the Trial Panel's invitation, the Trial Panel should order the SPO to do so pursuant to the Trial Panel's powers under Article 40 of the Law and Rule 116 of the Rules.

3. The Indictment charges the Accused with four counts of war crimes and six counts of crimes against humanity.³ The Prosecution alleges that the armed conflict in

¹ KSC-BC-2020-06, Transcript of Trial Preparation Conference, 18 January 2023, Public ("Transcript of Trial Preparation Conference"), Oral Order 2, pp. 1901-1902.

² KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

³ The current version of the indictment is: KSC-BC-2020-06/F00999/A01, Annex 1 - Amended Indictment, 30 September 2022, Confidential ("Indictment"), pp. 55-56.

Kosovo extended into September 1999⁴ and therefore alleges that the Accused are responsible for war crimes committed in Kosovo after Serbian/FRY forces withdrew from Kosovo on 20 June 1999. The Defence for Mr. Thaçi (“Defence”) disputes this allegation and argues that the armed conflict in Kosovo ended no later than 20 June 1999,⁵ the date of the signature of the Undertaking of Demilitarization and Transformation by the UÇK.⁶ The Defence relies *inter alia* on the conclusions of several domestic and international courts, including the International Criminal Tribunal for the former Yugoslavia (“ICTY”), that the armed conflict in Kosovo ended no later than June 1999.⁷

4. In order to establish the existence of an armed conflict in Kosovo after 20 June 1999, the Prosecution in its Pre-Trial Brief identifies five witnesses in support of this allegation: Witnesses W02135, W02161, W02183, W04408 and W04856.⁸ For the remainder of its proof, SPO relies exclusively on documentary evidence. The SPO has failed to identify any witnesses or documentary evidence which were unavailable to the ICTY and other courts and tribunals when concluding that the armed conflict in Kosovo ended in June 1999. Accordingly, the SPO has offered no justification for why this Trial Panel should reconsider the conclusions of other courts and the international community.

5. The Trial Panel must ensure the fair and expeditious conduct of proceedings by inviting the SPO to reduce the temporal scope of the Indictment at the Specialist Prosecutor’s Preparation Conference. As set forth below, the Trial Panel has the

⁴ See Indictment, para. 16; KSC-BC-2020-06/F00709/A02, Annex 2 - Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief, 24 February 2022 (“Prosecution Pre-Trial Brief”), para. 699.

⁵ KSC-BC-2020-06/F01050, Pre-Trial Brief of Mr Hashim Thaçi, 21 October 2022 (“Thaçi Pre-Trial Brief”), paras. 76–78.

⁶ 005901-005907.

⁷ Thaçi Pre-Trial Brief, para. 77, and particularly footnotes 161-163.

⁸ Prosecution Pre-Trial Brief, paras. 698-699.

authority to order the SPO to reduce the temporal (and geographic) scope of the Indictment regardless of the merits of the allegations and evidence that would be excluded from the trial if such an order were to be issued. In either event, the insufficiency of the evidence the SPO relies upon to establish the existence of armed conflict in Kosovo beyond 20 June 1999 is a factor to be considered in deciding whether to reduce the temporal scope of the Indictment.

II. APPLICABLE LAW

6. Article 40(2) of the Law states, “The Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Trial Panel, having heard the parties, may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings.” (Emphasis added).

7. Rule 116(1) states, “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.” (Emphasis added). Rule 116(4) states, “After consultation with the other members of the Panel, the Presiding Judge may issue trial management orders and decisions pursuant to Rule 15(4). The Panel may issue orders or decisions on any matter as necessary to ensure a fair and expeditious trial.” (Emphasis added).

8. Rule 118(1)(b) states, “At the Specialist Prosecutor’s Preparation Conference, after having heard the Parties, the Panel may invite the Specialist Prosecutor to reduce or narrow the number of charges in the indictment, if applicable”.

9. Rule 130(3) states, “Having heard the Parties and, where applicable, Victims’ Counsel, the Panel may dismiss some or all charges therein by oral decision, if there

is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question. Having heard the Parties and, where applicable, Victims' Counsel, the Panel may dismiss some or all charges therein by oral decision, if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question." (Emphasis added).

10. The legal provisions cited above confirm that Trial Panels have been conferred broad trial management powers in order to fulfil their mandate and obligation to ensure that a trial is fair and expeditious. This finds further confirmation in the fact that the case law of the *ad hoc* tribunals has already found that the power to make orders such as the one suggested in the present motion falls within the parameters of the "the general power of the Trial Chamber to 'exercise control over the mode and order of interrogating witnesses and presenting evidence'".⁹

III. SUBMISSIONS

11. The Law obliges the Trial Panel to ensure that these proceedings are expeditious, and therefore gives it the power to "adopt such procedures and modalities as are necessary" to ensure an expeditious trial. Rule 116 empowers the Trial Panel to take "all measures" and issue orders or decisions on any matter as necessary to ensure a fair and expeditious trial. This includes the power to order the SPO to reduce the geographic and temporal scope of the Indictment, which other international tribunals have ordered the Prosecutor to do prior to trial. For example, in *Gotovina*, a Trial Chamber of the ICTY ordered the Prosecution to reduce the geographic and temporal scope of the indictment after the Prosecution had first rejected the Trial Chamber's "invitation" to do so.¹⁰ The *Gotovina* Trial Chamber

⁹ ICTY, *Prosecutor v. Sikirica, Dosen and Kolundzija*, IT-95-8-PT, Decision on Kolundzija Defence Motion for Severance of Counts And/Or Bifurcation of Trial, 2 August 2000.

¹⁰ ICTY, *Prosecutor v. Gotovina*, IT-06-90-PT, Order Pursuant to Rule 73 Bis (D) to Reduce the Indictment, 21 February 2007 ("*Gotovina* Order to Reduce the Indictment").

justified the order on the basis that the “proposed reduction is in accordance with the interest of a fair and expeditious trial.”¹¹

12. The Trial Panel likewise should order the SPO to reduce the temporal scope of the Indictment, to no later than 20 June 1999. As explained in Mr. Taçi’s Pre-Trial Brief,¹² and in his oral submissions to the Trial Panel on 18 January 2023,¹³ the SPO must prove the existence of an armed conflict *beyond reasonable doubt* in order to prove its four war crimes counts.¹⁴ In other words, the SPO has the burden of proving that “no reasonable trier of fact” could conclude that there was no nexus between the committed offense and an armed conflict. The conclusions of the ICTY – and in particular the conclusion of the Office of the Prosecutor of the ICTY (“OTP”) – that the armed conflict ended in Kosovo no later than 20 June 1999,¹⁵ amount to *per se* reasonable doubt about the existence of armed conflict as alleged by the SPO.

13. The OTP concluded that it had no jurisdiction under the ICTY Statute to investigate crimes committed in Kosovo after 20 June 1999 precisely because of its recognition that the armed conflict in Kosovo was over by that date.¹⁶ The SPO here is essentially asking the Trial Panel to conclude – implicitly – that no reasonable OTP of

¹¹ *Ibid.*, p. 3. Similarly, in the *Perišić* case, the Prosecution was again ordered to reduce the scope of its indictment, having first declined the Trial Chamber’s invitation to do so. In reducing the scope of the indictment, the Trial Chamber cited “the goal of ensuring a fair and expeditious trial”. See ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Application of Rule 73 bis and Amendment of Indictment, 15 May 2007, paras. 16-17, 20. See also *Prosecutor v. Milošević*, IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73 bis (D), 12 December 2006; *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Decision Pursuant to Rule 73 bis (D), 4 February 2008.

¹² Taçi Pre-Trial Brief, para. 75.

¹³ Transcript of Trial Preparation Conference, pp. 1845-1850.

¹⁴ ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeals Chamber Judgement, 26 May 2003, paras. 557 *et seq.*

¹⁵ Taçi Pre-Trial Brief, para. 77.

¹⁶ ICTY Press Release, ‘Address to the Security Council by Carla Del Ponte’, 24 November 2000, <https://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-internationalcriminaltribunals-former>. See also ICTY Press Release, Statement by Carla Del Ponte Prosecutor of the ICTY on the investigation and Prosecution of crimes committed in Kosovo, 29 September 1999, <https://www.icty.org/en/press/statement-carla-del-ponte-prosecutor-international-criminal-tribunalformer-yugoslavia>.

the ICTY could have concluded what the OTP concluded: that it had no jurisdiction to investigate crimes in Kosovo after 20 June 1999 because of the absence of a state of armed conflict. This is an exceptionally high burden for the SPO to meet.

14. The SPO's evidence of armed conflict after 20 June 1999¹⁷ cannot meet the standard set forth in Rule 130(3), namely that it will "support a conviction beyond reasonable doubt" by proving that criminal acts committed after 20 June 1999 had a nexus to an armed conflict.

15. If the Trial Panel is persuaded already that the SPO's evidence cannot prove the existence of armed conflict after 20 June 1999 beyond reasonable doubt, then there is no need for the SPO to call the post-20 June 1999 crime base evidence of war crimes it intended to call. The interest of an expeditious trial necessitates that the Trial Panel order the SPO to reduce the temporal scope of the Indictment.

16. To the extent that the SPO opposes this application on the basis that some of the post-20 June 1999 crime base evidence it seeks to introduce is related to the six counts of crimes against humanity which do not require a nexus to an armed conflict, the Defence notes that the Trial Panel has the power to order the SPO to reduce the temporal scope of the Indictment even if the SPO believes it has a meritorious case that crimes against humanity were committed in Kosovo after 20 June 1999, and even if the Pre-Trial Judge confirmed the charges.

17. Indeed, in *Gotovina*, the Trial Chamber ordered the Prosecution to reduce the temporal scope of the Indictment despite the Prosecution's objections that it had "already focused on the most important criminal charges and because the request [to reduce the temporal and geographic scope of the Indictment] infringes on the

¹⁷ Prosecution Pre-Trial Brief, paras. 698-699.

Prosecution's independence," and "any further reduction would inhibit the Prosecution's ability to bring the Accused's criminal responsibility to the attention of the Trial Chamber."¹⁸ The Trial Chamber concluded that the need to ensure an expeditious trial took precedence over the Prosecution's desire to prove all of the charges and crime base evidence that had been confirmed by the confirming Judge in the Indictment.

18. However, the Trial Panel is nevertheless entitled to consider the weight of the Prosecution's allegations of crimes against humanity in considering whether to reduce the temporal scope of the Indictment. In this regard, the Trial Panel should note that the ICTY in *Limaj* and *Haradinaj* rejected Prosecution allegations that the KLA had committed widespread or systematic attacks against a civilian population resulting in crimes against humanity;¹⁹ no other court has found otherwise. The Defence submits that these precedents cast doubt on the merits of the SPO's allegations in this case that the Accused are guilty of crimes against humanity.

19. The *Gotovina* precedent makes clear that, in the interests of protecting the Accused's right to an expeditious trial, the Trial Panel has the authority to reduce the temporal (and geographic) scope of the Indictment even if this might result in the exclusion from the trial of probative evidence that supports the Prosecution's charges as confirmed by the Pre-Trial Judge. Nevertheless, the dubious nature of the SPO's allegations of (1) the existence of armed conflict post 20 June 1999, and (2) in light of *Limaj* and *Haradinaj*, the very existence of a widespread or systematic attack by the KLA against a civilian population in Kosovo, provide additional justification for the Trial Panel to order the Prosecution to reduce the temporal scope of the Indictment to no later than 20 June 1999.

¹⁸ *Gotovina* Order to Reduce the Indictment, p. 2.

¹⁹ See, ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber Judgement, 30 November 2005, para. 228; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber Judgement, 3 April 2008, para. 122.

20. In addition to the reasons set forth in the present application, Mr. Taçi invites the Trial Panel to order the SPO to reduce the temporal and/or geographic scope of the Indictment as the Trial Panel deems necessary to protect his right to an expeditious trial.

IV. RELIEF SOUGHT

21. For the above reasons, Mr. Taçi requests that the Trial Panel issue an Order to the SPO to reduce the temporal scope of the Indictment to no later than 20 June 1999, and to order further reductions in the temporal and geographic scope of the Indictment as the Trial Panel deems necessary to protect his right to an expeditious trial.

[Word Count: 2,428 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Taçi

Wednesday, 1 February 2023

At Tampa, United States