

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

Date: 22 May 2023

Language: English

Classification: Public

Thaçi Defence Response to Prosecution “Request to caution Mr Dastid Pallaska”

with Public Annex 1

Specialist Prosecutor’s Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Specialist Prosecutor’s Office’s (“SPO”) “*Request to caution Mr Dastid Pallaska*” (“Request”).¹ The foundation of the Request rests on the SPO’s misrepresentations of Mr Pallaska’s comments.² Most notably, the SPO, through the use of ellipses, has manipulated Mr Pallaska’s remarks to manufacture an allegation that Mr Pallaska is “*publicly accus[ing] the Prosecution of propagating ‘untruths’, in order to label Kosovo a criminal state.*”³ But the transcript of Mr Pallaska’s televised remarks, which the SPO inexplicably filed confidentially to prevent the public from seeing them, makes clear that Mr Pallaska was referring to Serbia’s goal of criminalizing Kosovo as a state, not the SPO’s. This manipulation of evidence by the SPO in order to manufacture public allegations of wrongdoing against counsel should be appropriately addressed by the Trial Panel. For the reasons set forth below, Mr Pallaska should not suffer public reputational harm from the SPO’s manipulation of his remarks.

2. Mr Pallaska’s comments merely repeated the well-established Defence positions on issues which form part of Mr Thaçi’s defence. Accordingly, the Defence denies that Mr Pallaska’s remarks were false or misleading. Moreover, the standard which the SPO Request must satisfy is set forth in the Trial Panel’s Order on the Conduct of Proceedings, which makes clear that the SPO must prove that counsel made remarks which were “intentionally or knowingly misleading.”⁴ Here, the SPO’s Request makes no effort to justify the allegation that Mr Pallaska made misleading

¹ KSC-BC-2020-06/F01515, Request to caution Mr Dastid Pallaska, 10 May 2023.

² The Acting Specialist Prosecutor signed the Prosecution’s Request, and therefore bears personal responsibility for any intentional misrepresentations contained in the filing: see Article 10 of KSC-BD-07-Rev1, Code of Professional Conduct – for Counsel and Prosecutors before the Kosovo Specialist Chambers, 28 April 2021 (“Code of Conduct”).

³ Request, para. 9.

⁴ KSC-BC-2020-06/F01226/A01, Annex 1 – Order on the Conduct of Proceedings, 25 January 2023 (“Conduct Order”).

statements in his interview for *RTK Prime*, much less that Mr Pallaska's statements were intentionally or knowingly misleading.

3. Whether the scope of the SPO's Indictment potentially places the entire Kosovo Liberation Army ("KLA") in a Joint Criminal Enterprise ("JCE") is a matter still subject to multiple layers of appellate review. Aware of this, the SPO Request is an attempt to prevent public articulation of Mr Thaçi's criticisms and complaints about violations of his fundamental rights in this proceeding. The SPO's effort to silence legitimate criticism and to impose a chilling effect on free expression amounts to a violation of the right of Mr Thaçi to a "fair and public hearing," and to the rights of Mr Thaçi and his lawyers to free expression, in violation of the Kosovo Constitution, the European Convention on Human Rights, and the Law on the Specialist Chambers.

4. In a trial which has thus far been held in secret, the SPO's effort to impose even more secrecy by preventing Mr Thaçi and his lawyers from publicly articulating Mr Thaçi's arguments makes the Request even more damaging to the public perception of the KSC's commitment to the protection of fundamental rights to a fair and public hearing and to freedom of expression.

5. The Request should be rejected in its entirety.

II. SUBMISSIONS

6. Article 13(a) of the Code of Conduct provides that Counsel and Prosecutors shall not "**knowingly** make statements on social media, to the press or public, which are false or defamatory, or disclose confidential information, including about persons involved in the proceedings."⁵ In its Conduct Order, referring to the above provision,

⁵ Emphasis added.

the Trial Panel considered “false” or “defamatory” to include statements that are “intentionally or knowingly misleading.”⁶

7. Accordingly, the SPO bears the burden of proving that Mr Pallaska made statements which he knew, or intended to be, misleading. The Request fails to meet this standard of the Conduct Order.

A. MR PALLASKA DID NOT ACCUSE THE SPO OF PROPAGATING UNTRUTHS TO DECLARE KOSOVO A CRIMINAL STATE

8. The SPO alleges that Mr Pallaska “*publicly accuse[d] the Prosecution of propagating ‘untruths’, in order to label Kosovo a criminal state.*”⁷ This assertion misrepresents Mr Pallaska’s comments.

9. The SPO’s claim is premised on the two abridged, and disconnected, excerpts of Mr Pallaska’s interview with *RTK Prime*, which were misrepresented as being a single passage of a single statement and/or parts of the same statement and/or statements on the same topic. In the excerpt below, the bolded section concerning Serbia’s agenda against Kosovo was artificially merged with the first excerpt, resulting in a manipulation of the interview text:

Now, in this case, this is very important to explain, because the prosecution again for the umpteenth time, contrary to the content of the indictment, a document that they have itself drafted, says that this is not a trial of the KLA, that the whole KLA is not a member of the Joint Criminal Enterprise. With all due respect, I do not want to argue in a TV studio, but this is a big untruth. [quotes paragraph 35 of the Indictment which lists the JCE members] Because that prosecutor, Mr. Whiting, said that, “the claim that this is a trial of the KLA is false, inaccurate, not true.” If it is not true, then either this or that declaration stands - both of them cannot stand. And this, nobody can insult our intelligence and tell us that this does not say what is saying and what I read.’ [...] **if the whole KLA is declared joint criminal enterprise, according to the paragraph 35,**

⁶ Conduct Order, para. 17 (emphasis added).

⁷ Request, para. 9.

then what does the freedom of Kosovo mean? ... This is exactly the goal, to declare Kosovo a criminal state which cannot survive on its own.⁸

10. In the unbolded text, Mr Pallaska pointed to the inconsistencies that exist between paragraph 35 of the Indictment – including all members of the KLA within the definition of the members, instruments and tools of the charged JCE – and the SPO’s oral submissions that the KLA is not on trial in this case. Mr Pallaska simply said that if the argument that the KLA is on trial in this case is false, as the SPO noted in its opening statement, then paragraph 35 of the Indictment does not stand.

11. Next, Mr Pallaska did not state that the SPO’s goal is to declare Kosovo a criminal state. His comments on the goal to declare Kosovo a criminal state referred exclusively to Serbia.⁹ In this part of the interview, Mr Pallaska discussed **Serbia’s** attempt to rewrite Kosovo’s history, **and expressly stated that “[i]t might happen that this is not the goal of the prosecution”**.¹⁰ Inexplicably, the SPO failed to include these remarks in its public filing.

12. A review of the full interview shows that Mr Pallaska’s statement about Serbia’s agenda against Kosovo was made in response to the specific comments of James Rubin about the rewriting of Kosovo’s history, aired during the interview:

And what Mr. Rubin stated of history being rewritten, is also very important, because **this is exactly the goal of Serbia. It might happen that this is not the goal of the prosecution, but the prosecution should be aware and holds responsibility if it is misused by Serbia.** The final goal of Serbia is building a fake equivalent of responsibility alleging that crimes have been committed by both sides. We should not forget Serbia today physically cannot be present in Kosovo the way it was at that time. However, Serbia today is present in Kosovo through the hybrid war tools, starting from individuals who are contributing to this intentionally or not, and I would like to believe that most of them are not aware of their actions, but also the misuse of general political discourse, political fights, personal conflicts, serving to final goal which is very simple – if the KLA is declared joint criminal enterprise, according to the

⁸ Request, para. 9.

⁹ Annex 1, pp. 17-18.

¹⁰ Annex 1, p. 17 (Emphasis added).

paragraph 35 of the indictment then what the freedom of Kosovo is? What is the independence of Kosovo? It is a product of a criminal offence, the products of a criminal offence are confiscated or destroyed after confirmation of the criminal offence. This is exactly the goal, declaring Kosovo a criminal state which cannot survive on its own.¹¹

13. As the full excerpt reveals, Mr Pallaska was clearly arguing that Serbia's goal was to have Kosovo declared a criminal state. Mr Pallaska noted that, while this may not be the goal of the SPO, the latter must be mindful of Serbia's objective to undermine Kosovo's statehood. Again, the SPO removed all of this context through ellipses to manufacture the allegation that Mr Pallaska was accusing the SPO, not Serbia, of declaring Kosovo a criminal state.

14. The Defence has consistently expressed its concern about Serbia's attempts to use these proceedings to criminalize Kosovo, most recently when the Defence brought to the Court's attention the allegations by Switzerland that Serbia had launched an assassination plot against Dick Marty to blame Mr Thaçi.¹² Serbia's efforts in this regard are precisely the bases upon which the Defence has sought disclosure of any evidence emanating from Serbia's security apparatus.¹³

15. The SPO also complains about Mr Pallaska's statement that the plain reading of paragraph 35 suggests that the Indictment extends to all members of the KLA and, as such, is in contradiction with SPO's oral submissions that the KLA is not on trial. But this is the position that the Defence has articulated repeatedly in this case.¹⁴

¹¹ Annex 1, pp. 17-18 (emphasis added).

¹² KSC-BC-2020-06, Transcript of Twelfth Status Conference, 20 May 2022 ("Transcript of Twelfth Status Conference"), pp. 1230-1231; KSC-BC-2020-06/F00797/RED, Public Redacted Version of Thaçi Defence Reply to Prosecution response to Hashim Thaçi's Submissions on Third Detention Review, 2 June 2022, para. 12.

¹³ Transcript of Twelfth Status Conference, pp. 1231-1232.

¹⁴ See, *inter alia*, KSC-BC-2020-06, Transcript of Hearing on Procedural Matters, 22 February 2022, p. 1052; Transcript of Twelfth Status Conference, p. 1320; KSC-BC-2020-06, Transcript of Fifteenth Status Conference, 4 November 2022, p. 1667.

Indeed, due to its relevance for Mr Thaçi's overall defence, this argument is also prominently featured in Mr Thaçi's Pre-Trial Brief.¹⁵

16. Moreover, it should be noted that it was the SPO which placed emphasis in its Opening Statement on its argument that the "KLA is not on trial,"¹⁶ thus creating public and media interest in this issue. Mr Pallaska simply repeated the Defence position in response. It was thus the SPO, and not Mr Pallaska, which reignited the public debate on this question, but now the SPO moves to have the Defence "cautioned" for challenging the Prosecution's Opening Statement in public. As explained below, this amounts to a violation of the fundamental rights of Mr Thaçi and his lawyers.

17. While the Defence takes note of, and fully respects, the present view of the Trial Panel on this matter, the Defence has not waived its argument on this issue. On the contrary, it remains the good faith position of the Defence that the allegations in paragraph 35 of the Indictment, as well as allegations that the entire leadership of the KLA was a JCE, threaten to stigmatize the entire KLA.

18. This is evident from experience at the ICTY, where the ICTY Prosecutor used JCE allegations to stigmatize not just the specific accused before the Tribunal, but also to "criminalize" senior leaders who had not been tried by the Tribunal. Upon the issuance of the Appeals Judgement in the *Prlić* case, for example, the ICTY Prosecutor

¹⁵ KSC-BC-2020-06/F01050/RED, Public Redacted Version of Pre-Trial Brief of Mr Hashim Thaçi, 8 November 2022 ("Pre-Trial Brief"), para. 10. ("The crude framing of the charges in such wide terms demonstrates the weakness of the SPO's case. A prosecuting authority with credible evidence of an accused's guilt would never be required to cast the net so wide as to impute individual criminal responsibility to thousands of people, simply on the basis of their KLA membership, or involvement in the Provisional Government of Kosovo ('PGoK'). The SPO's repeated insistence that the KLA is not on trial cannot be reconciled with the framing of these charges as a collective indictment, with the KLA and the liberation war itself in the dock").

¹⁶ See, e.g., KSC-BC-2020-06, Transcript of Hearing (Opening Statements), 3 April 2023, p. 2162 lines 7-15, p. 2246 lines 16-21.

issued a press release emphasizing that “key members of Croatia’s then-leadership” were also found to be members of a JCE, even though they were not defendants in the case.¹⁷ The Defence thus has a good faith basis to argue, from prior ICTY experience, that the stigma of the JCE allegations in paragraph 35 of the Indictment will extend well beyond the four Accused in this case.

19. Since the issue has not been finally adjudicated, it cannot be argued that the “fact” the “KLA is not on trial” is so well-established that Mr Pallaska sought to “**knowingly or intentionally**” mislead the general public on this point. The SPO appears to be under the erroneous impression that the Defence is under a “gag order” not to express any positions in public that are different from, or critical of, the views of the SPO. No such order exists,¹⁸ and for the reasons explained below, any such order would violate the fundamental rights of Mr Thaçi and his lawyers.

20. In light of the above, the SPO’s Request for Mr Pallaska to be cautioned for identifying an inconsistency between the SPO’s written and oral submissions and, more importantly, for underlining an issue that is an ongoing part of the Defence case, should be dismissed.

¹⁷ ICTY Office of the Prosecutor, ‘Statement of the Office of the Prosecutor in relation to the judgement in the case *Prosecutor vs. Jadranko Prlić et al.*’, 29 November 2017, available at <https://www.icty.org/en/press/statement-of-the-office-of-the-prosecutor-in-relation-to-the-judgement-in-the-case-prosecutor>.

¹⁸ This is evidenced by the opening statement of the Defence for Rexhep Selimi, which – while addressing this particular issue – noted: “We’ve also heard the SPO repeatedly assure Your Honours, in both opening and in closing its speech yesterday, through Mr. Whiting and through Ms. Lawson, respectively, that this case is not a prosecution of the KLA. It does not accuse everyone in the KLA, and the KLA is not on trial. However, despite these fine words, it is the actions of the SPO which matter, and specifically the choice of the SPO to file an indictment against Mr Selimi and his co-accused on the basis of a JCE which, in our submission, allows for the potential inclusion of any KLA fighter as a possible JCE member or tool.” See KSC-BC-2020-06, Transcript of Hearing (Opening Statements), 4 April 2023, p. 2382, lines 7-16.

B. MR PALLASKA EXPRESSED THE DEFENCE'S ONGOING GOOD-FAITH CHALLENGES TO SUBJECT MATTER JURISDICTION

21. The Defence continues to dispute the Court's jurisdiction on the basis that the allegations in the Indictment are not sufficiently connected to the Marty Report. As set forth below, the Defence intends to raise this issue, if necessary, before the Constitutional Court Panel, after this trial and any appeals are exhausted.

22. Nevertheless, the SPO alleges that Mr Pallaska's criticism of the reasoning of the Pre-Trial Judge's decision on the Thaçi Defence Preliminary Motion Challenging the Jurisdiction of the KSC ("Pre-Trial Judge's Decision") is "*plainly misleading and does not comply with the requirements of candour and diligence.*"¹⁹ In support, the SPO offers the following excerpt of Mr Pallaska's statement:²⁰

More than 99% of the indictment has nothing to do with the report of Dick Marty. When we objected to this, with all these references, the pre-trial judge told us that, "Well, they are related to the report of Dick Marty, because in the introduction part of the report [...] Dick Marty said that this report is about the war in Kosovo." [...] He said, "the war is mentioned in the introduction and the fact that the war in Kosovo is mentioned suffices for everything to be included within that jurisdiction," which is really, with all due respect for the Specialist Chambers, a non-serious reasoning, and, as such, we will normally follow this until the end.

23. Mr Pallaska's criticism of the Pre-Trial Judge's Decision is based on, *inter alia*, the referral to the Constitutional Court Panel made by the Defence, which argued not only a violation of Mr Thaçi's fundamental right to an independent and impartial tribunal established by law, but also a violation of Mr Thaçi's constitutional right to a reasoned opinion.²¹

¹⁹ Request, para. 8.

²⁰ Request, para. 7, referring to Annex 1, p. 5.

²¹ KSC-CC-2022-15/F00001, Referral to the Constitutional Court Panel on the violation of Mr Thaçi's fundamental rights to an independent and impartial tribunal established by law, and to a reasoned opinion, 28 February 2022 ("Constitutional Referral"), paras. 6-7; 28-31; 60-62; 64.

24. Mr Pallaska's criticism is consistent with the Defence arguments and criticisms articulated in the Constitutional Referral. Mr Pallaska's choice of words that the reasoning was "unserious" should be read in the context of the fact that the Constitutional Referral raised lack of reasoned opinion as one of the violations of Mr Thaçi's constitutional rights. The SPO fails to meet its burden of establishing that Mr Pallaska's intention was to "**knowingly or intentionally**" mislead the public.

25. Finally, given that the Constitutional Referral was dismissed as premature,²² Mr Pallaska expressed the Defence's good faith intention to continue to pursue this issue and his comments cannot be deemed to be misleading, let alone "knowingly or intentionally" misleading.

C. MR PALLASKA DID NOT COMMENT ON LIVE LITIGATION BEFORE THE PANEL

26. The SPO also erroneously alleges that Mr Pallaska made references to live litigation before the Panel, when discussing the probative value of books and media articles. As the transcript clearly shows, Mr Pallaska did not refer to any live litigation, much less the SPO's bar table motion of 8 February 2023 ("Bar Table Motion").²³

27. Mr Pallaska's comments on the evidentiary value of books and media articles were made in response to a direct question by the journalist on the unsworn statement of Mr Thaçi, in which he said that certain books are exaggerated. In this respect, Mr Pallaska was asked whether an indictment can "refer to such books".²⁴ Mr Pallaska addressed this question in general, without referring to any live litigation, and posed a hypothetical example not applicable to this case. He gave the example of a murder

²² KSC-CC-2022-15/F00010, Decision on the Referral of Hashim Thaçi Concerning the Right to an Independent and Impartial Tribunal established by Law and to a Reasoned Opinion, 13 June 2022, paras. 65-66.

²³ KSC-BC-2020-06/F01268, Prosecution application for admission of material through the bar table, 8 February 2023.

²⁴ Annex 1, p. 13.

confession in a book, which cannot be taken as a lawful acceptance of guilt because such a confession was made without advising the suspect/defendant of his/her constitutional rights, including the right to not incriminate him/herself.²⁵ Contrary to the SPO's assertion, Mr Pallaska did not comment on the Bar Table Motion during his interview for *RTK Prime*.²⁶

28. In addition to the above, the SPO accuses Mr Pallaska of criticizing the protective measures' regime and decisions on Mr Thaçi's continued detention. Again, Mr Pallaska articulated the Defence's positions, repeatedly expressed in and outside of the courtroom, as well as in its Pre-Trial Brief.²⁷

29. The guaranteed right to a "fair and public hearing" is intended, *inter alia*, to allow an Accused to call public attention to his complaints about violations of his fundamental rights.²⁸ Mr Thaçi's complaints about the protective measures regime, including his pre-trial detention, along with Mr Pallaska's comments do not amount to "**knowingly or intentionally**" misleading the public. These are and have been well-established Defence positions. Indeed, the right to a "fair and public hearing" is eviscerated if the Trial Panel will only permit an Accused and his lawyers to express views in public that support the positions of the SPO and the Trial Panel.

30. Finally, the SPO seeks to establish "a concerning pattern of conduct" by Mr Pallaska by referring to his previous media statements concerning the SPO's failure generally to disclose exculpatory material, and specifically the unjustified

²⁵ *Ibid.*

²⁶ Annex 1, p. 14.

²⁷ Pre-Trial Brief, paras. 177, 179.

²⁸ The right to a "fair and public hearing" is guaranteed by Article 21(2) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office; Article 31(2) of the Kosovo Constitution; and Article 6 of the European Convention on Human Rights, which is applicable pursuant to Article 53 of the Kosovo Constitution.

withholding by the SPO of the witness statement of Ambassador Daan Everts, which was touched upon in Mr Pallaska's interview for Klan TV's Opinion on 17 March 2022.

31. Contrary to the SPO's efforts to downplay these disclosure violations, this was not only a serious violation of the SPO's Rule 103 disclosure obligations, but one that necessitated a request by the Defence for an independent and impartial review of exculpatory material.²⁹ More importantly, the SPO's failure to remedy this and other Rule 103 disclosure obligations recently resulted in a finding by this Trial Panel that the "SPO has failed to fully comply with its disclosure obligations under Rule 103 of the Rules with respect to [certain] categories of evidentiary material."³⁰ In this respect, the Trial Panel noted as follows:

[c]onsidering the pivotal role of timely disclosure in particular in respect of exculpatory material, the Panel is of the view that the disclosure failure on the part of the SPO meets the threshold of non-compliance, within the meaning of Rule 110 of the Rules, and thus warrants the adoption of "appropriate measures."³¹

32. Similarly, Mr Pallaska's statements for Klan Kosova's Rubikon on 28 July 2022 articulated the Defence's courtroom criticisms on the SPO's prolongation of investigations without any legal basis.³² The Pre-Trial Judge himself instructed the SPO to provide the estimated date of completion for outstanding investigations, emphasizing that "[g]eneral investigations should not continue throughout the trial."³³

33. Accordingly, Mr Pallaska's remarks were, once again, consistent with the Defence positions articulated within the court proceedings. Nothing in the SPO

²⁹ KSC-BC-2020-06/F00724/RED, Public Redacted Version of Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material, 29 March 2022.

³⁰ KSC-BC-2020-06/F01245, Decision on Thaçi Defence Request for a Finding of Disclosure Failure, 1 February 2023, para. 33(a).

³¹ *Ibid*, para. 26.

³² KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022, p. 929.

³³ *Ibid*, p. 928.

Request meets the legal standard to prove a violation: that Mr. Pallaska made his remarks while **knowing or intending** them to be misleading.

D. THE SPO HAS FAILED TO JUSTIFY ITS REQUEST TO CURTAIL THE FUNDAMENTAL RIGHTS OF MR THAÇI AND HIS LAWYERS

34. In summary, the SPO's Request is nothing more than an effort to curtail fundamental rights to free expression. The Defence submits that, pursuant to Article 40 of the Kosovo Constitution and Article 10 of the European Convention on Human Rights (applicable in this case through Article 53 of the Kosovo Constitution), the KSC cannot restrict the rights of the Accused and Defence Counsel to public expression, except as strictly necessary and proportional to defend another important public interest.

35. The Request falls far short of establishing any misrepresentations by Mr Pallaska, or that Mr Pallaska's statements were intentionally or knowingly misleading. In addition, the Request fails to identify any important public interest that would warrant the Trial Panel's curtailment of Mr Thaçi's constitutional rights to a fair and public hearing as well as to the fundamental right of free expression guaranteed under Article 40 of the Kosovo Constitution to Mr. Thaçi and his counsel.

III. RELIEF SOUGHT

36. Accordingly, the Defence respectfully requests that the Trial Panel reject the Request in its entirety.

[Word count: 3,942 words]

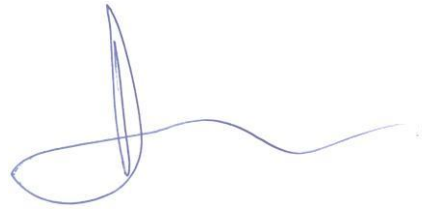
Respectfully submitted,

Handwritten signature of Gregory W. Kehoe in blue ink, with a white rectangular redaction box covering the bottom portion of the signature.

Gregory W. Kehoe
Counsel for Hashim Thaçi

Monday, 22 May 2023

At The Hague, The Netherlands

Handwritten signature of Dastid Pallaska in blue ink, consisting of a large loop followed by a horizontal stroke.

Dastid Pallaska
Co-Counsel for Hashim Thaçi

Monday, 22 May 2023

At Prishtina, Kosovo