



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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 25 May 2023

Language: English

Classification: Public

Public Redacted Version of 'Prosecution response to "Thaçi Defence Motion regarding the testimony of W02652"'

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 Alagenda

I. INTRODUCTION

1. The Request¹ to strike from the record, and preclude reliance upon, the portions of W02652's testimony concerning THAÇI's alleged involvement in the arrest and mistreatment of [REDACTED] ('Testimony') should be rejected. The Request is untimely and - to the extent it alleges a lack of notice, prejudice or a 'shift' in the case of the Specialist Prosecutor's Office ('SPO') – unfounded. The Request is simply a belated attempt to suppress clearly relevant, adverse, evidence.

II. SUBMISSIONS

A. THE REQUEST IS UNTIMELY

2. The Request is untimely and, as such, should be rejected *in limine*. This matter could and should have been raised at an earlier stage. W02652's prior statements, clearly implicating THAÇI in the relevant incident, have been available to the Defence since 30 January 2023.² The issues, facts and circumstances in relation to which W02652 will be examined, which referred to 'W02652's knowledge of the arrest and detention of [REDACTED]', were provided to the Defence on 1 February 2023.³

3. The THAÇI Defence could have raised an objection following their review of W02652's prior statements. They could have done so following the SPO's notification that W02652 would address the relevant incident. They could have raised their objection immediately prior to the start of W02652's testimony. They could have promptly objected in court when the SPO began to elicit the Testimony.

4. However, inexplicably, the THAÇI Defence failed to raise the issue at any of these opportunities,⁴ electing instead to wait until after W02652's direct examination had concluded to raise the issue for the first time,⁵ and then extensively cross-

¹ Thaçi Defence Motion regarding the testimony of W02652, KSC-BC-2020-06/F01471, Confidential, 19 April 2023 ('Request').

² See 051954-TR-ET Part 11, pp.21-24, disclosed on 30 January 2023 (Disclosure package 656).

³ Annex 1 to Prosecution submission of list of first 12 witnesses and associated information, KSC-BC-2020-06/F01243/A01, 1 February 2023, Confidential, p.4/33.

⁴ See Transcript, 18 April 2023, pp.3063-3067 where the SPO elicited the Testimony with no objections from the Defence.

⁵ See Transcript, 18 April 2023, pp.3075-3077.

examining W02652 on the matter.⁶ The THAÇI Defence, having ended its cross-examination, was also authorised to re-open it in order to put further questions to W02652 concerning the relevant incident.⁷

5. The Panel should not reward this strategy by granting the Request and precluding reliance upon relevant evidence which was tested at length by the THAÇI Defence.⁸

B. ADEQUATE NOTICE WAS PROVIDED

6. W02652 testified about the arrest, mistreatment, and release of [REDACTED],⁹ [REDACTED].¹⁰

7. As outlined below, timely notice that the SPO would elicit the Testimony was provided to the Defence in multiple forms, including through the Indictment, the SPO Pre-Trial Brief, the summaries of expected testimony for [REDACTED] and W02652, and disclosed prior statements, including W02652's.

8. The arrest, transfer, detention and mistreatment of [REDACTED] is clearly charged in the Indictment¹¹ and addressed in the SPO Pre-Trial Brief.¹²

9. [REDACTED],¹³ [REDACTED].¹⁴ Further, as acknowledged by the Defence,¹⁵ in respect of the specific arrest of [REDACTED], the Pre-Trial Brief expressly alleges the involvement of [REDACTED].¹⁶ The Pre-Trial Brief further notes that that

⁶ See Transcript, 18 April 2023, pp.3083-3086; Transcript, 19 April 2023, pp.3140-3142.

⁷ Transcript, 19 April 2023, pp.3146-3147.

⁸ See ICTR, *Prosecutor v Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Nzuwonemeye's Motion to Exclude Acts not Pleaded in the Indictment, 4 July 2008 ('Ndindiliyimana Decision'), paras 19-20.

⁹ Transcript, 18 April 2023, pp.3057-3067.

¹⁰ Transcript, 18 April 2023, pp.3062-3067.

¹¹ Indictment, KSC-BC-2020-06/F00999, paras [REDACTED].

¹² Annex 1 to Prosecution submissions pursuant to Decision F01229, Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief' KSC-BC-2020-06/F01296/A01, 15 February 2023 ('SPO Pre-Trial Brief'), Confidential, paras [REDACTED].

¹³ Indictment, KSC-BC-2020-06/F00999, para.[REDACTED].

¹⁴ SPO Pre-Trial Brief, KSC-BC-2020-06/F01296/A01, paras [REDACTED].

¹⁵ Request, KSC-BC-2020-06/F01471, para.4.

¹⁶ SPO Pre-Trial Brief, KSC-BC-2020-06/F01296/A01, para.[REDACTED].

[REDACTED].¹⁷ As such, THAÇI's awareness of, involvement in, and responsibility for, the arrests and detentions at [REDACTED] is clearly alleged.

10. In addition, contrary to the Defence's unfounded theory that the SPO shifted its case,¹⁸ the SPO crystallised and noticed its intention to elicit evidence on the involvement of THAÇI in the arrest and detention of [REDACTED] as early as 22 October 2021 when the SPO first filed the summary of the facts on which [REDACTED] was expected to testify under Rule 95(4)(b). This summary provided: '[REDACTED]'.¹⁹ The summary for [REDACTED], first provided to the Defence without redaction on 15 February 2023, provides: '[REDACTED]'.²⁰

11. On 30 January 2023, the SPO disclosed lesser redacted versions of W02652's prior statements, with no relevant redactions to his account concerning THAÇI's involvement in the [REDACTED] incident. These prior statements mirror the substance of the Testimony, clearly referring to the involvement of the 'Snake' in the arrest and maltreatment of [REDACTED].²¹ That W02652's prior statements implicated THAÇI in the incident was certainly known to the THAÇI Defence- the very first questions put by them to the witness during cross-examination were based on excerpts thereof, which were read out to the witness.²²

¹⁷ SPO Pre-Trial Brief, KSC-BC-2020-06/F01296/A01, para.[REDACTED].

¹⁸ Request, KSC-BC-2020-06/F01471, para.9.

¹⁹ See ANNEX 2 to Prosecution submission of preliminary witness list, KSC-BC-2020-06/F00542/A02, 22 October 2021, p.67/400. While this filing is now classified as Strictly Confidential and *Ex Parte*, it was classified as Confidential until 15 June 2022, see Corrected Version of ANNEX 2 to Prosecution submission of preliminary witness list, KSC-BC-2020-06/F00542/A02/COR, 22 October 2021, p.67/400 and Confidential Redacted Version of 'Prosecution notification concerning filings F00542/A02 and F00631RED/A02/CONF/RED' [...], KSC-BC-2020-06/F00813/CONF/RED, Confidential, 16 June 2022; Annex 2 to Prosecution submissions pursuant to Decision F01229, Lesser Redacted List of Witnesses, KSC-BC-2020-06/F01296/A02, 15 February 2023, Confidential, p.108/553.

²⁰ Annex 2 to Prosecution submissions pursuant to Decision F01229, Lesser Redacted List of Witnesses, KSC-BC-2020-06/F01296/A02, 15 February 2023, Confidential, p.174/553.

²¹ See 051954-TR-ET Part 3, pp.2-3; 051954-TR-ET Part 11, pp.21-24 ([REDACTED]); See also 051934-051946-ET, p.051937, disclosed on 6 February 2023 ([REDACTED]).

²² Transcript, 18 April 2023, pp.3083-3086.

12. On 1 February 2023, the Defence was provided with the issues, facts and circumstances in relation to which W02652 will be examined, which referred to 'W02652's knowledge of the arrest and detention of [REDACTED]'.²³

13. On 12 April 2023, the SPO disclosed W02652's preparation note, again containing clear references to W02652 implicating THAÇI in the [REDACTED] incident.²⁴

14. Accordingly, the THAÇI Defence could not have been unaware of, or surprised by, the Testimony. Due notice thereof was provided.

C. THE THAÇI DEFENCE FAILS TO ESTABLISH ANY PREJUDICE

15. The THAÇI Defence fails to articulate the basis of, let alone substantiate, any alleged prejudice suffered.²⁵

16. That the THAÇI Defence was fully prepared to cross-examine W02652 in relation to the Testimony is evident from its presentation queue,²⁶ and the fact that it was the first topic of cross-examination it addressed, with THAÇI's Counsel even using W02652's prior statement to challenge W02652's account.²⁷

17. [REDACTED]. [REDACTED].

18. Accordingly, the Defence has not demonstrated how the alleged lack of notice materially prejudiced the Accused's right to a fair trial by hindering the preparation of a proper defence.

19. Further, the Defence fails to establish why striking the Testimony from the record of the case is warranted in the circumstances. Even if, *arguendo*, the Defence would have demonstrated lack of notice and material prejudice – which it did not, the

²³ Annex 1 to Prosecution submission of list of first 12 witnesses and associated information, KSC-BC-2020-06/F01243/A01, 1 February 2023, Confidential, p.4/33.

²⁴ 112738-112746, paras 9 ('052688-052689-AT, p.052688 (052688-052689, p.052689): W02652 clarified that [REDACTED], 13 [REDACTED].

²⁵ See *Ndindiliyimana* Decision, paras 19-20.

²⁶ The content of the THAÇI Defence presentation queue released for the purpose of W02652's cross-examination demonstrates a keen interest in, and familiarity with, the [REDACTED] incident, and its relevance to W02652's account - 64 out of the 86 items included therein were [REDACTED] prior statements or associated exhibits.

²⁷ Transcript, 18 April 2023, pp.3084-3086.

Defence does not demonstrate that other remedies such as granting an adjournment to allow the Defence additional time to prepare for the cross-examination of the witness or allowing the Defence to recall the witness for cross examination after the Defence has completed further preparation would not have been appropriate in the present case.

20. The THAÇI Defence's choices, including the moment when the issue was first raised and its extensive cross-examination, indicate that the sole aim of the Request is to suppress adverse evidence incriminating THAÇI.

D. THE TESTIMONY IS RELEVANT AND SHOULD BE CONSIDERED

21. THAÇI's involvement in this incident is relevant to multiple aspects of the Indictment,²⁸ including THAÇI's *mens rea* for all charged crimes, the common criminal purpose, the joint criminal enterprise, and the aiding and abetting of, and/or superior responsibility for, the crimes committed in [REDACTED]. Indeed, the THAÇI Defence does not even attempt to argue the Testimony is not relevant to the proceedings.

22. The THAÇI Defence fails to provide valid reason why the Panel, composed of professional judges, having heard the Testimony, should disregard it. The Panel should consider the Testimony and assess its weight at the end of trial in light of the entirety of the record, including the evidence of [REDACTED].

III. CONFIDENTIALITY

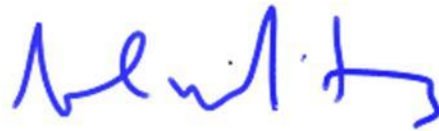
23. This filing is classified as confidential pursuant to Rule 82(4).

IV. CONCLUSION

24. For the reasons above, the Trial Panel should dismiss the Request.

²⁸ See ICTR, *Prosecutor v Ntahobali and Nyiramasuhuko*, ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, paras 14-15; ICTR, *Prosecutor v Ndirabatswe*, ICTR-99-54-T, Decision on Defence Motion to Exclude Evidence of Material Facts not Charged in the Indictment and/or in The Prosecution's Pre-Trial Brief, 14 February 2011, paras 18-19; ICTR, *Prosecuto v Kanyarukiga*, ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010, paras 8-11.

Word count: 1605



Alex Whiting

Acting Specialist Prosecutor

Thursday, 25 May 2023

At The Hague, the Netherlands.