



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

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Reply to Thaçi response to Prosecution "Request to caution Mr Dastid Pallaska"

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I. REPLY

1. The Prosecution hereby replies to the Thaçi Response,¹ on two issues. First, an appointed counsel with obligations of, *inter alia*, candour and diligence² cannot rely on ignorance to evade responsibility for his public statements. Thaçi simply asserts that the burden of showing that Mr Pallaska's statements were *intentionally or knowingly* false or misleading has not been met,³ without addressing the appropriate standard by which that should be measured. Second, articulating Defence positions in public does not absolve Counsel from abiding by Article 13(a) of the Code of Conduct, and the Order on the CoP.⁴

The standard of knowingly false or misleading conduct has been met

2. While making a contextual challenge to the interpretation of one quotation,⁵ Thaçi does not deny the textual accuracy of the statements attributed to Mr Pallaska. Instead, Thaçi claims, *inter alia*, that the Prosecution has 'failed to meet its burden' of establishing that Mr Pallaska's comments were intentionally or knowingly misleading.⁶ Yet, Thaçi

¹ Thaçi Defence Response to Prosecution "Request to caution Mr Dastid Pallaska", KSC-BC-2020-06/F01541, 22 May 2023 ('Response').

² Code of Professional Conduct for Counsel and Prosecutors before the Kosovo Specialist Chambers, KSC-BD-07/Rev1/2021, 28 April 2021 ('Code of Conduct'), Chapter II, Section 1, Article 6 ('Basic Professional Standards'), see especially 6(1)(c), 6(1)(h), and Section 2 ('Candour Towards the Specialist Chambers'), see especially Article 13; Annex to the Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Order on the CoP'), para.19;

³ Response, KSC-BC-2020-06/F01541, e.g. paras 2, 6-7, 33.

⁴ Order on the CoP, KSC-BC-2020-06/F01226/A01, paras 15-20.

⁵ Response, KSC-BC-2020-06/F01541, paras 1, 8-14. In its Request, the Prosecution cited to all of the relevant pages of Mr Pallaska's comments and provided a publicly accessible video-link to Mr Pallaska's full interview. See Request to caution Mr Pallaska, KSC-BC-2020-06/F01515, 10 May 2023 ('Request'), in particular fns.1 & 11. As such, the Defence claim that the Prosecution 'manufactured allegations' and 'manipulated evidence' is baseless. *Contra* Response, KSC-BC-2020-06/F01541, para.1. Moreover, even on its own terms, the 'contextualisation' by the Defence does not demonstrate that the statement was not misleading; it merely adds the further false allegation that the SPO has been manipulated by the Serbian government.

⁶ Response, KSC-BC-2020-06/F01541, para.24.

does not offer any relevant test in support of this assertion. He merely disagrees with the Prosecution's submissions.

3. The Prosecution submits that a fair-minded observer, acting in good faith and with sufficient knowledge of the relevant circumstances to make a reasonable judgement of whether or not statements were knowingly false or misleading, is an appropriate test to apply.⁷ Applying this standard to Mr Pallaska's comments cited in the Request, the Trial Panel is entitled to conclude that his comments were knowingly false and/or misleading, having regard to Counsel's 'obligations of candour, diligence, dignity and integrity'.⁸ Counsel should not be permitted to hide behind either ignorance, or assertions of his own subjective state of mind, to evade responsibility for inflammatory comments bound to mislead the public, defame the proceedings, and generate an additionally polarised and hostile environment for those called to testify.⁹

Adversarial arguments made publicly must still comply with the Panel's directions

4. Second, Thaçi claims Mr Pallaska was merely repeating 'well-established Defence positions on issues which form part of Mr Thaçi's Defence.'¹⁰ Contrary to the Defence submissions, at no point has the Prosecution requested 'a gag order' be placed on the Defence, or otherwise sought to restrain its ability to communicate with the public.¹¹

⁷ This test is derived from jurisprudence that considered alleged judicial bias, where, in the absence of a clear test by which to assess judicial conduct (including verbal remarks), a similarly-worded test based on a fair-minded and informed observer was utilised. *See e.g.* ICTY, Appeals Chamber, *Prosecutor v. Stanišić & Župljanin*, IT-08-91-A, Judgement, 30 June 2016, para.43; ICTR, Appeals Chamber, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007, paras.49-50; ICC, *Prosecutor v Al Hassan*, The Presidency, ICC-01/12-01/18-458-AnxI-Red, Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judges from Pre-Trial Chamber I, 12 September 2019, para.25. No precise criteria is elaborated in the Order on the CoP.

⁸ Order on the CoP, KSC-BC-2020-06/F01226/A01, para.19.

⁹ Request, KSC-BC-2020-06/F01515, para.9.

¹⁰ Response, KSC-BC-2020-06/F01541, paras 2, 19, 29.

¹¹ *Contra* Response, KSC-BC-2020-06/F01541, para.19.

Counsel is, however, legally bound to comply with the Code of Conduct and the Order on the CoP when engaging with the media and the public at large. As Specialist Counsel, when engaging with the media, Mr Pallaska is not entitled to raise an adversarial shield to avoid these important obligations.

5. Respecting the judicial process involves speaking about the proceedings in an accurate, informed and professional manner, and avoiding any comment about issues that are before the Panel to determine. For example, and contrary to the Defence submissions, the credibility of protected witnesses¹² and documents that form part of the Prosecution's Bar Table Motion¹³ are both 'live issues' that await the Panel's determination. Mr Pallaska's comments were prejudicial to the ongoing proceedings in the sense that they prejudice the public's understanding of the trial, which brings the KSC into disrepute.

6. The Prosecution does not make this request lightly. It does so to preserve the integrity of the proceedings, which are inevitably harmed when satellite litigation is conducted in the press through the use of false and misleading statements. This is especially the case when proceedings require certain *in camera* hearings to ensure the protection of witnesses, which increases the need for responsible and balanced comments in public interviews, an obligation that extends to all Parties.¹⁴

¹² Mr Pallaska stated that the credibility of protected witnesses – which is a matter for the Panel's final judgement – was 'irreparably' harmed. *See* Request, KSC-BC-2020-06/F01515, para.12. The Defence does not address this comment in its Response.

¹³ The Defence claims that, in his comments, Mr Pallaska was not referring to the Prosecution's Bar Table Motion. *See* Response, KSC-BC-2020-06/F0154, para.27. However, Mr Pallaska expressly commented on the evidential value of the KLA Communiques, which are part of the Prosecution's Bar Table Motion, which is live before the Panel. *See* Request, KSC-BC-2020-06/F01515, para.10. Similarly, the Defence does not address this comment in its Response.

¹⁴ ICC, Trial Chamber I, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2433, Decision on the press interview with Ms Le Fraper du Hellen, 12 May 2010 ('*Lubanga* Decision'), para.38.

7. Furthermore, Mr Pallaska's comments may heighten the 'general climate of witness interference and intimidation of witnesses that prevails in Kosovo, particularly in criminal proceedings against former KLA members' – a matter of judicial concern in this case¹⁵ and other proceedings before the KSC.¹⁶ Appropriate judicial intervention by way of a caution may serve to mitigate these heightened risks. The remarks of Trial Chamber I in the *Lubanga* case, which was similarly faced with false and misleading statements made by a party to the case, are particularly apposite to the present circumstances:

'[t]he public needs to be able to trust the published statements of those involved in the case, as reflecting, in a suitably balanced way, the evidence that has been heard and the decisions that have been made. It is important that in media statements there is a clear and accurate description as to whether issues that are reported to have been decided or are still unresolved. Most importantly, and as a matter of professional ethics a party to proceedings is expected not to misrepresent the evidence, to misdescribe the functions of the parties or the Chamber, or to suggest or imply without proper foundation that anyone in the case, including the accused, has misbehaved.'¹⁷

II. CONCLUSION

8. None of the reasons advanced by the Thaçi Defence alter the fact that Mr Pallaska made public statements that were, by any objective standard, knowingly false and/or misleading. In the circumstances, issuing a caution is an appropriate measure for the Panel to take.

¹⁵ Public Redacted Version of Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F01459/RED, 17 April 2023, para.21.

¹⁶ See e.g., *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-05/F00611/RED, Public Redacted Version of the Trial Judgement, 18 May 2022, para.577.

¹⁷ *Lubanga* Decision, para.39.

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Tuesday, 30 May 2023

At The Hague, the Netherlands.