

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 Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Counsel for Hashim Thaçi
Counsel for Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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Public Redacted Version of

**Joint Defence Response to Urgent Prosecution Updates and Related Requests
Concerning Witnesses in the Next Evidentiary Block, KSC-BC-2020-06/F01585,
dated 7 June 2023**

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I. INTRODUCTION

1. The Defence for Messrs. Thaçi, Veseli, Selimi, and Krasniqi (“Defence”) hereby responds to the Urgent Prosecution Updates and Related Requests Concerning Witnesses in the next Evidentiary Block.¹

2. The Prosecution Request: –

- a. Proposes to call W01602, W03540 and W03811 in the June evidentiary block in place of W02161;
- b. Requests the Panel to admit the statements and associated exhibits of W03540 and W03811 through Rule 154;² and
- c. Requests the Panel to permit W03811 to give evidence by video-link.

3. The Specialist Prosecutor’s Office’s (“SPO’s”) inefficiency has substantially inconvenienced the Defence. In particular, the SPO had at least four months since the Trial Panel issued the Order on the Conduct of Proceedings³ to notify the Defence of suitable alternative witnesses. Yet none of the three proposed substitute witnesses had been notified to the Defence until 2 June 2023. The Prosecution Request now places the Defence in an impossible position. Having needlessly spent time preparing for the cross-examination of W02161, the effect of the Prosecution Request will be that the time available to the Defence to prepare to cross-examine W01602, W03540 and

¹ KSC-BC-2020-06, F01575, Specialist Prosecutor, *Urgent Prosecution Updates and Related Requests Concerning Witnesses in the Next Evidentiary Block* (“Prosecution Request”), 2 June 2023, confidential, with Annexes 1-3, confidential.

² Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

³ KSC-BC-2020-06, F01226/A01, Trial Panel II, *Annex 1 to Order on the Conduct of Proceedings* (“Order on the Conduct of Proceedings”), 25 January 2023, public.

W03811 is much reduced. Nonetheless, the Accused have been in detention since November 2020. The Defence does not wish to delay the trial or waste court-time that has been allocated to this case. Plainly, W02161 cannot testify in the June evidentiary block [REDACTED] advanced in the Prosecution Request.⁴ Accordingly, despite the obvious and substantial impact of late substitutions on defence preparations, the Defence does not oppose the Prosecution Request to substitute W01602, W03540 and W03811 for W02161 in the June evidentiary block.

4. Regarding the request for W03811 to testify via video-link, the Defence recalls that the Panel has expressed a preference for testimony to be given in person.⁵ The SPO notified the Defence that W03811 was amongst its first 40 witnesses as long ago as 21 November 2022.⁶ It has therefore had more than six months to consider and make the appropriate travel arrangements for these witnesses. Its failure to do so timeously should not be used as a reason to force the Panel to permit testimony via video-link. W03811's [REDACTED] or expressed preference to testify from Kosovo would not ordinarily be sufficient to overcome the preference for testimony to be given in person. The Thaçi Defence therefore opposes W03811 being permitted to testify by video-link. The Veseli, Selimi and Krasniqi Defence, whilst agreeing with the force of these objections, do not formally oppose this aspect of the application in the specific circumstances which have arisen.

5. Pursuant to Rule 82(4) of the Rules, this filing is submitted confidentially because it responds to a filing with the same classification.

⁴ Prosecution Request, para. 5.

⁵ KSC-BC-2020-06, F01558/CONF/RED, Trial Panel II, *Confidential Redacted Version of Decision on Prosecution Request for Video-Conference Testimony and Special Measure for W04337* ("Video-Conference Decision"), 26 May 2023, confidential, para. 16; KSC-BC-2020-07, *Transcript of Hearing*, 14 January 2022, public, p. 3034, lines 2-5.

⁶ KSC-BC-2020-06, F01117/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Provisional List of First 40 Witnesses to be Called at Trial* ("SPO List of First 40 Witnesses"), 18 November 2022, confidential, with Annex 1, strictly confidential *and ex parte*, and Annex 2, confidential. The Defence was notified of the SPO List of First 40 Witnesses on 21 November 2022.

II. PROCEDURAL HISTORY

6. On 21 November 2022, the Defence received notification of the list of the first 40 witnesses that the SPO intended to call at trial.⁷

7. On 25 January 2023, the Trial Panel issued the Order on the Conduct of Proceedings, which makes provisions regarding the notification of forthcoming witnesses.⁸ In particular, it provides that at the end of every three week block of hearings, the party calling witnesses shall notify the Trial Panel and the other parties and participants of the witnesses it intends to call in the next evidentiary block.⁹ It further provides that any changes to the order of witnesses should be notified to the Trial Panel and the other parties and participants “as soon as possible”¹⁰ and that only witnesses notified in this way may be called as alternative witnesses “unless prior approval of the Panel is obtained”.¹¹

8. On 1 February 2023, the SPO submitted its list of the first 12 witnesses that it intended to call at trial.¹²

9. On 10 May 2023, the SPO notified the Trial Panel, the parties and participants by email that it had identified six suitable alternative witnesses.¹³ The SPO stated that “[i]f in the future it turns out to be necessary to request approval of the Trial Panel to call an alternative witness not notified pursuant to para. 77 CoP in order to avoid delay

⁷ SPO List of First 40 Witnesses.

⁸ Order on the Conduct of Proceedings, paras 72-84.

⁹ *Idem*, para. 77.

¹⁰ *Idem*, para. 80.

¹¹ *Idem*, para. 81.

¹² KSC-BC-2020-06, F01243, Specialist Prosecutor, *Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, public, with Annex 1, confidential.

¹³ W00072, W02153, W04368, W04371, W04566 and W04586.

in the proceedings, we will aim to call one of these six witnesses.” None of W01602, W03540 and W03811 appear on this list of suitable alternative witnesses.

10. On 24 May 2023, the SPO notified the Trial Panel, the parties and the participants by email that it intended to call W04323 and W02161 during the June evidentiary block.

11. On 2 June 2023, the SPO notified the Trial Panel, the parties and the participants by email that it had been notified that W02161’s [REDACTED]. The SPO proposed to call W01602, W03540 and W03811 (in that order) instead of W02161.

12. On 2 June 2023, the SPO submitted the Prosecution Request.

III. SUBMISSIONS

A. THE PROPOSED CHANGES TO THE ORDER OF WITNESSES

13. At the outset, the Defence notes that since none of W01602, W03540 and W03811 had been identified to the Defence as alternative witnesses, pursuant to paragraph 81 of the Order on the Conduct of Proceedings, the SPO requires the prior approval of the Panel in order to substitute these witnesses for W02161. The Defence further observes that the present circumstances could have been alleviated, or perhaps even avoided altogether, had the SPO determined a list of alternative witnesses shortly after the Order on the Conduct of Proceedings was issued by the Trial Panel, or at the latest, at the notification of the first 12 witnesses to be called in SPO’s case.

14. The Trial Panel will appreciate that the late substitution of witnesses, who had not previously been notified to the Defence as alternative witnesses, has had a profound impact on the time and facilities available to the Defence to prepare for

evidentiary blocks. Although the SPO notified the Defence of six suitable alternative witnesses as recently as 10 May 2023, the SPO did not include W01602, W03540 and W03811 on this list and, accordingly, the Defence had not allocated resources to preparing for those witnesses. Instead, from 24 May 2023 to 2 June 2023, Defence resources had been allocated to preparing to cross-examine W02161. The replacement of W02161 with three different witnesses, who had not previously been identified as potential alternatives, and two of which concern an entirely new location – [REDACTED] – which has not previously been addressed in evidence, plainly disadvantages the Defence, requiring the Defence to compress its preparations for these three witnesses into the available remaining time.

15. The Defence also notes that the SPO was required to notify the Panel, the Parties and participants of any changes in the order of witnesses “as soon as possible.”¹⁴ Whilst the Defence is mindful of the specific circumstances of the Prosecution Request, the Request appears to indicate that the SPO was aware on 31 May 2023 that W02161 [REDACTED].¹⁵ Had the SPO immediately notified the Panel, the Parties and the participants that W02161 was unlikely to be able to testify in June, less preparation time would have been wasted.

16. Nonetheless, the Defence has no wish to delay proceedings or to see available court time go unused. The Defence further takes note that the proposed witnesses [REDACTED]. Accordingly, the Defence has carefully reviewed the evidence of W01602, W03540 and W03811 and respectfully advises the Panel that on this specific occasion, considering the [REDACTED], which the Defence appreciates is outside the control of the SPO, the Defence does not object to the SPO amending its order of witnesses and calling W01602, W03540 and W03811 in the June evidentiary block.

¹⁴ Order on the Conduct of Proceedings, para. 80.

¹⁵ Prosecution Request, para. 5.

17. The Defence further requests that the SPO does not alter the schedule of witnesses for July, the Defence having already made the necessary arrangements to cross-examine W04337 and W04746 during the July session.

B. RULE 154 REQUEST REGARDING W03540 AND W03811

18. The Panel may admit evidence pursuant to Rule 154 where certain formal conditions are satisfied:

- a. The witness is present in court;
- b. The witness is available for cross-examination and any questioning by the panel; and
- c. The witness attests that the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined.¹⁶

19. Further, the Panel retains discretion not to admit evidence pursuant to Rule 154, which might be exercised, for instance, where the credibility of a witness constitutes a central element of the Defence case or where the length and nature of the written evidence militates against it.¹⁷

20. With respect to associated exhibits, the item(s) must fulfil the following requirements:

¹⁶ KSC-BC-2020-62, F01380, Trial Panel II, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* ("First Rule 154 Decision"), 16 March 2023, confidential, para. 11.

¹⁷ *Idem*, para. 20.

- a. The exhibit must form part of a written statement of a witness taken in the context of a criminal investigation or proceedings or a transcript of evidence given by a witness in proceedings before the Specialist Chambers. Statements and transcripts from a variety of sources could be tendered in evidence before this jurisdiction;
- b. The evidence satisfies the general requirements of relevance, authenticity, probative value, and the probative value is not outweighed by its prejudicial effect; and
- c. The express conditions set out in Rule 154 are met.¹⁸

21. The Defence has no objection to the SPO decision to elicit W01602's evidence *viva voce* and thus the SPO will not be tendering prior statements pursuant to Rule 154. However, the Defence puts the Parties and the Trial Panel on notice that it objects to the admissibility of a polygraph examination conducted with W01602.¹⁹ First, the Defence notes that the report discusses the results of the polygraph but does not contain specifics on the data used to establish those results. It is of note that even the administer of the polygraph stated that the charts contain [REDACTED].²⁰ Second, other international organisations have rejected the use of polygraph reports, in circumstances where they provide insufficient probative value "to assist the Chamber in determining any matter before it."²¹

22. The Defence notes that the SPO seeks to tender W03811's SPO interview and [REDACTED] via Rule 154 and to spend one additional hour eliciting oral testimony.

¹⁸ First Rule 154 Decision, para. 12

¹⁹ [REDACTED]

²⁰ [REDACTED]

²¹ ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Trial Chamber I, *Decision on the Admissibility of a Polygraph Report*, 19 January 2016, para. 8.

Provided that the formal conditions are satisfied, the Defence does not object to W03811's SPO interview and [REDACTED] being admitted pursuant to Rule 154. Nevertheless, the Defence underscores that during his SPO interview, W03811 (i) failed to properly authenticate his signature on the tendered [REDACTED] that he has purportedly offered²², (ii) explicitly disavowed parts of said statement,²³ and (iii) further provided information that is in contradiction with that offered in said statement.²⁴ Therefore, whether the [REDACTED] in question fulfils the requirement of authenticity and whether the witness' attestation as to the accuracy of said statement was genuine, ought to be addressed in determining the admissibility of [REDACTED].

23. The Defence further observes that the SPO seeks to tender W03540's SPO Interview and prior trial testimony as Rule 154 statements and to admit as associated exhibits a [REDACTED]²⁵ and [REDACTED].²⁶ As a starting point, the Defence notes that the SPO seeks to admit four separate prior testimonies of W03540, including three transcripts from his testimony in [REDACTED].²⁷ This testimony is largely repetitive and overlaps substantially, including events being described in almost identical ways across each transcript.²⁸ The SPO fails to justify why it would be necessary to admit these three testimonies in their entirety, in addition to W03540's SPO interview of 2019. As previously recognised by the Trial Panel, admission of all three testimonies risks a bloated and unmanageable trial record.²⁹ The SPO should therefore be required to specify which testimony is the most relevant.

²² [REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ *See, for example*, [REDACTED].

²⁹ First Rule 154 Decision, para. 29.

24. In the alternative, the SPO must at least be required to specify the portions of each testimony that are pertinent and/or on which it intends to rely.³⁰ The Defence also requests that only the pages containing W03540's testimony³¹ be tendered, to preserve the Defence's right to cross-examine the witness on the information therein and to prevent the admission of extraneous information from other witnesses onto the case record. As the Trial Panel itself has noted, the SPO has a burden "to clearly outline those parts of a statement/record of evidence on which it relies. The Defence should know what parts of a witness's testimony are potentially relevant to the case which it must meet, so that it can prepare to address them."³² In this respect, a streamlined assessment of W03540's evidence would reduce evidential debris and allow for easier submissions by the Parties as the trial progresses.

25. Finally, whilst the Defence does not oppose the admission of the SPO's interview with W03540, the Defence emphasises that the weight which should be given to this interview is substantially reduced [REDACTED] the Serbian State. The Defence has previously highlighted³³ that the Serbian State, as the opponent of the KLA, has a long history of fabricating evidence to falsely implicate the KLA in the commission of crimes.³⁴ [REDACTED] of the Serbian State in obtaining this evidence may have influenced the answers given by the witness. Subject to the above points and satisfaction of the formal requirements, the Defence does not oppose the admission of W03540's prior statements, testimony and associated exhibits through Rule 154.

C. REQUEST FOR W03811 TO TESTIFY BY VIDEO-LINK

³⁰ See, for instance, KSC-BC-2020-06, Transcript of Hearing, 23 May 2023, confidential, p. 4601, line 11 to p. 4602, line 3, where the Presiding Judge requested that the Defence provide the Court with "a comprehensive and accurate list" of the portions of a witness' transcript upon which it sought to rely.

³¹ See [REDACTED]

³² First Rule 154 Decision, para. 29.

³³ KSC-BC-2020-06, F01051/RED, Krasniqi Defence, *Pre-Trial Brief of Jakup Krasniqi*, 8 May 2023, public, paras 27-29.

³⁴ KSC-BC-2020-06, F00877, Joint Defence, *Joint Defence Motion for Disclosure Pursuant to Rule 103*, 12 July 2022, confidential, para. 40.

26. The Panel has previously underlined its preference for witnesses to attend the courtroom in person, rather than by video-link. As the Panel correctly identified, attendance in person affords the Panel the best opportunity to assess the demeanour of a witness and ensures that the right of the accused to confront the witness is not compromised.³⁵ Consistent with these findings, the Defence maintains that the importance of the right to confront witnesses renders it vital that SPO witnesses attend the courtroom in person.

27. The Thaçi Defence objects to the request for W03811 to testify via video-link, as it is prejudicial for the Defence. In addition to the general points raised above, the Thaçi Defence notes that the SPO has not provided any compelling reason justifying this measure, particularly in light of the impact this measure would have on the rights of the Accused, and in circumstances where the presence in the courtroom of a witness during testimony remains the preferred option.

28. First, as noted above, W03811 appeared in the SPO's provisional list of its first 40 witnesses,³⁶ and thus it was always highly likely that the witness would be attending trial in The Hague during the first year of the case. The failure by the SPO to make necessary arrangements for a witness to travel to The Hague sufficiently in advance cannot be to the detriment of the rights of the Accused. In any event, the Kosovo Ministry of Internal Affairs has the ability to issue a passport within 72 hours, following an expedited procedure.³⁷ Alternatively, the Kosovo Specialist Chambers ("KSC") Registry, in cooperation with the Kosovo authorities, may be able to issue relevant *sui generis* travel documents for the purpose of these proceedings,

³⁵ Video-Conference Decision, para. 16.

³⁶ SPO List of First 40 Witnesses, entry 14, p. 3.

³⁷ See, Administrative Instruction (MIA) Nr. 13/2016 on Equipping with ID Card, Passport and Driving License with Accelerated Procedure, Article 5(1).

[REDACTED]. Second, the Thaçi Defence notes that neither [REDACTED] are a bar to travel. Third, the fact that the witness, who benefits from extensive protective measures, has expressed a preference to testify from Kosovo, does not constitute a sufficient reason to depart from the general rule prioritising in-person testimony.³⁸ Last, the Thaçi Defence stresses that the significance of the expected testimony of W03811, in particular regarding the [REDACTED], further justifies his testimony in-person, in the courtroom.

29. Whilst the Veseli, Selimi and Krasniqi Defence fully support these submissions in principle, noting that at this late stage video-link may be the only way to hear this witness and hence avoid under-utilising the days of court time within the June evidentiary block,³⁹ they do not oppose the application on this specific occasion. No broader concession is intended and the Defence reserves the right to fully contest any future applications for video-link testimony.

D. TIME ESTIMATES

30. The Defence provides their time estimates for the cross-examination of W01602, W03540 and W03811 in the attached annex.

IV. CONCLUSION

31. In light of the above, the Defence: (1) does not oppose the SPO proposal to call W01602, W03540 and W03811 in lieu of W02161 in the June evidentiary block; (2) has no objection to the SPO decision to elicit W01602's evidence *viva voce* and the admission of W03811 and W03540's proposed evidence through Rule 154, provided

³⁸ Video-Conference Decision, para. 20.

³⁹ Prosecution Request, para. 35.

that the formal requirements are met; and (3) the Thaçi Defence opposes the SPO request for W03811 to testify via video-link.

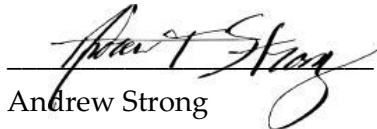
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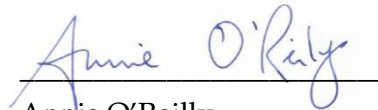
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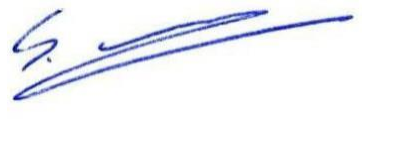
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