



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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Classification: Public

Prosecution response to THAÇI Defence request relating to reserve witnesses

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Request¹ should be rejected. It is hypothetical and premature, based on misrepresentations and contradictions, and unsubstantiated. Despite the Request's alarmist tone, the THAÇI Defence has the information it needs to prepare for the relevant reserve witnesses and has failed to demonstrate any prejudice.

II. SUBMISSIONS

2. The Conduct of Proceedings Order already regulates scheduling matters, including in relation to (reserve) witnesses and the 'tentative' witness order that the Specialist Prosecutor's Office ('SPO') must provide.² The SPO has abided – and will continue to abide – by these regulations and provision of a 'definitive' witness order, as requested by the THAÇI Defence, is neither possible, nor necessary. The Defence does not demonstrate that any reconsideration or modification of the Conduct of Proceedings Order is justified.³

A. THE DEFENCE FAILED TO ENGAGE IN APPROPRIATE *INTER PARTES* CONSULTATIONS

3. The Request was made one working day after the Defence was notified of the provisional order of reserve witnesses for the July 2023 evidentiary block.⁴ Before filing this Request and despite its obligations otherwise,⁵ the THAÇI Defence did not

¹ URGENT Thaçi Defence Request for a definitive order of appearance of the SPO reserve witnesses, KSC-BC-2020-06/F01634, 3 July 2023 ('Request').

² Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order'), Section XV(C), *in particular*, paras 73-74, 77-78, 80-81. *See also* Oral Order, 19 June 2023, p.5068 (ordering that the list of 'backup witnesses' be in the '*projected* order of appearance') (emphasis added).

³ *See, similarly*, Decision on Selimi Request for Safeguards in Relation to Preparation of Identification Witnesses, KSC-BC-2020-06/F01456, 14 April 2023, para.12 (considering that the Defence had ample opportunities to raise concerns about issues addressed in the Conduct of Proceedings Order before it was issued, should have exhausted reasonable *inter partes* consultations, and raised hypothetical and premature concerns that could be addressed if and when they arose in relation to specific witnesses).

⁴ Request, KSC-BC-2020-06/F01634, para.8.

⁵ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 43 (indicating that issues should be raised with the Panel only after 'it proves impossible for the Parties and participants to resolve issues between themselves'), 84 ('Parties and participants are instructed to seek agreement, where possible, regarding the order in which witnesses are to be called in the following week').

attempt to engage in reasonable *inter partes* consultations.⁶ If it had, the SPO could have explained further the circumstances that impede its ability to fully predict the order of reserve witnesses. For example, the SPO has not yet received the Defence's and Victims' Counsel's cross-examination estimates.⁷ After receiving such information⁸ and based on the progress of the scheduled witnesses for this block, the SPO will be able to provide, as part of its weekly notification,⁹ further confirmation of the specific reserve witness(es) on standby the week of 17 July 2023. The SPO is available to engage in further *inter partes* consultations once the necessary information is obtained.¹⁰

B. THE REQUEST IGNORES THE NATURE AND PURPOSE OF RESERVE WITNESSES

4. At the end of an evidentiary block, the SPO notices the witnesses it intends to call during the next block; such decisions account for, *inter alia*, available sitting hours and reasonably foreseeable reductions in examination times.¹¹ In this context, the Request ignores the very purpose of reserve witnesses, whom the SPO does not *intend* to call during a given block, but has identified because they are, *inter alia*, expected to be available on short notice to exceptionally fill unanticipated gaps in the sitting schedule.¹² In turn, while the SPO has indicated the projected order of appearance of reserve witnesses, this order may change if the need arises.

5. The Request itself acknowledges that 'unpredictable events' may require changes in the order of (reserve) witnesses.¹³ Such events may include not only illness,

⁶ The THAÇI Defence has also failed to engage *inter partes* on other occasions. *See, for example*, Decision on Thaçi Defence Request to Vary the Contact Decision for W04147, KSC-BC-2020-06/F01467, 17 April 2023, Confidential, para.28.

⁷ Oral Order, 19 June 2023, p.5068 (requiring the Defence and Victims' Counsel to provide the information required by paragraph 76 of the Conduct of Proceedings Order by 7 July 2023 at 16.00).

⁸ Such information is important for realistic scheduling decisions. *See, for example*, Oral Order, 19 June 2023, pp.4983-4985.

⁹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.78.

¹⁰ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.84.

¹¹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 77, 81.

¹² Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.81.

¹³ Request, KSC-BC-2020-06/F01634, para.12.

as cited in the Request, but also other unexpected changes in a witness's circumstances and drastic reductions in cross-examination times.¹⁴ Further, while the Defence now claims it is not opposed to witness testimony 'being split over a court break',¹⁵ it previously proposed scheduling changes to avoid such breaks.¹⁶ A break in testimony between evidentiary blocks, including during the three-week judicial recess following the July 2023 evidentiary block, should be avoided when possible to safeguard the integrity of the proceedings and witness security, and prevent unnecessary use of court time and resources, including to arrange witness travel and accommodation.¹⁷

6. Witness well-being requires that witness scheduling avoids not only unnecessary breaks and repetitive travel, but also 'unpredictable waiting times and the constant pressure of being ready to give testimony'.¹⁸ Witnesses have professional and personal commitments, and witness testimony, as well as related travel and logistics, can be stressful. Further, for protection reasons, the time a witness spends away from his/her location of residence should be limited to what is strictly necessary.¹⁹ Consideration of and due respect for such circumstances are required by the Law and essential for the proper administration of justice.²⁰

¹⁴ See also Prosecution submission of list of the next 12 witnesses, reserve witnesses and associated information, KSC-BC-2020-06/F01630, 28 June 2023 ('Witness Information Submission'), paras 2-3.

¹⁵ Request, KSC-BC-2020-06/F01634, para.12

¹⁶ Email from THAÇI Defence Counsel to SPO dated 21 April 2023 at 23.22 ('we would like to schedule witnesses over the next several months in a manner that will avoid witnesses having breaks in their testimony for significant periods of time').

¹⁷ The same considerations apply to the Defence's suggestion that flights could be booked in advance for reserve witnesses. See Request, KSC-BC-2020-06/F01634, para.12.

¹⁸ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-656-AnxA, Annex A to the Decision on the protocol on witness familiarisation: Protocol on the practices to be used to familiarise witnesses for giving testimony at trial, 17 June 2015 ('ICC Protocol'), paras 14, 16.

¹⁹ ICC Protocol, para.17

²⁰ Article 23 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). See, similarly, ICC Protocol, para.17.

C. THE DEFENCE HAS THE NECESSARY INFORMATION TO PREPARE

7. The Defence is on notice of the witnesses who may be called as reserve witnesses, and has been on notice since 10 May 2023.²¹ Thereafter, and at the earliest opportunity, the SPO noticed specific reserve witnesses for the July 2023 evidentiary block beyond those anticipated to be necessary, to facilitate Defence preparations and considering the timing of related filings.²² If there is any change, timely notice of the appearance of, *inter alia*, reserve witnesses will be given at the earliest opportunity and when necessary to avoid delays.²³

8. The reserve witnesses for the July 2023 block were selected not only because of their availability, but also due to the limited scope of related materials and anticipated testimony. The Defence has long had access to the disclosures relating to the reserve witnesses and has received the information required by paragraph 74 of the Conduct of Proceedings Order.²⁴ In such circumstances, the Request's generalised recitation of preparatory steps for cross-examination fails to demonstrate that any prejudice arises from the calling of the noticed reserve witnesses when the need arises and as appropriate in the circumstances. If and when changes in the order of (reserve) witnesses are made, the Defence, following exhaustion of reasonable *inter partes* consultations, may seek appropriate relief from the Panel based on the concrete circumstances at that time.

²¹ Email from SPO to Panel, Parties, and Participants dated 10 May 2023 at 16.08. The SPO previously notified W04644 as among the group of initial 40 witnesses.

²² Prosecution motion for admission of evidence of Witnesses W03832, W03880, W04769, W03724, W00072, W01504, W02153, W04368, W04566, and W04586 pursuant to Rule 154, KSC-BC-2020-06/F01625, 23 June 2023, Confidential; Witness Information Submission, KSC-BC-2020-06/F01630.

²³ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 74 ('The SPO shall list the witnesses in the tentative order in which they are to be called [...]. The SPO shall, thereafter, notify the Trial Panel and the Parties and participants in a timely fashion of any change in the proposed order of presentation of witnesses'), 80 ('It is the duty of the presenting Party to notify the Trial Panel, the other Parties and participants, and the Registry as soon as possible of any changes to the order of witnesses [...]), 81 (providing that alternative witnesses shall be among those notified in accordance with paragraph 77 of the Conduct of the Proceedings Order or with approval of the Panel).

²⁴ KSC-BC-2020-06/F01630/A02. *See also* KSC-BC-2020-06/F01630/A01 (for W04644).

III. RELIEF REQUESTED

9. For the foregoing reasons, the Trial Panel should reject the Request.

Word count: 1504



Alex Whiting

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Wednesday, 5 July 2023

At The Hague, the Netherlands.