



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**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  
Judge Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 23 June 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Thaçi Defence's Motion to Strike Part of  
the Record of Testimony of W02652**

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**TRIAL PANEL II** (“Panel”), pursuant to Articles 19(2)-(3) and 21(4)(a) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 79, 95(4)(a), 137, 138 and 143 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 18 April 2023, in the hearing of W02652’s testimony, the witness gave evidence about the alleged involvement of Mr Hashim Thaçi (“Mr Thaçi”) in the arrest and detention of [REDACTED].<sup>1</sup> After this evidence was given, Counsel for Mr Thaçi indicated that the Defence (“Thaçi Defence”) would file a motion to strike this part of the record.<sup>2</sup>
2. On 19 April 2023, the Thaçi Defence filed a motion requesting the Panel to (i) strike the testimony of W02652 as it relates to Mr Thaçi’s involvement in the alleged arrest and mistreatment of [REDACTED]; and (ii) find that the SPO is precluded from relying on this evidence (“Request”).<sup>3</sup>
3. On 26 April 2023, the SPO filed a response to the Request (“Response”).<sup>4</sup>
4. On 28 April 2023, the Thaçi Defence filed a reply to the Response (“Reply”).<sup>5</sup>

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<sup>1</sup> Transcript of Hearing, 18 April 2023, pp. 3057-3066.

<sup>2</sup> Transcript of Hearing, 18 April 2023, pp. 3075-3077.

<sup>3</sup> F01471, Specialist Counsel, *Thaçi Defence Motion Regarding the Testimony of W02652*, 19 April 2023.

<sup>4</sup> F01481, Specialist Prosecutor, *Prosecution Response to ‘Thaçi Defence Motion Regarding the Testimony of W02652’*, 26 April 2023.

<sup>5</sup> F01485, *Thaçi Defence Reply to ‘Prosecution Response to ‘Thaçi Defence Motion Regarding the Testimony of W02652’’*, 28 April 2023.

## II. SUBMISSIONS

5. The Thaçi Defence submits that the charges do not contain an allegation that Mr Thaçi took a direct and personal part in the arrest and/or mistreatment of [REDACTED].<sup>6</sup> Pointing to the Indictment, the SPO Pre-Trial Brief, and the two summaries prepared by the SPO for W02652's expected testimony, the Defence further submits that these did not put the Thaçi Defence on notice that W02652 would testify about the alleged involvement of Mr Thaçi in the arrest and mistreatment of these individuals.<sup>7</sup> The Thaçi Defence characterises this as a "significant shift in the SPO's case which departs from the Indictment and Pre-Trial Brief, and concerns the acts and conduct of the accused and his alleged direct involvement in a pleaded incident".<sup>8</sup>

6. The Thaçi Defence also submits that the SPO has misinterpreted the scope of the Panel's ruling on Rule 154 witnesses in an attempt to broaden its applicability to all witnesses.<sup>9</sup> Finally, the Thaçi Defence submits that it was entitled to rely on the Indictment, Pre-Trial Brief, and witness summaries as being representative of the SPO's case regarding this incident.<sup>10</sup>

7. In response, the SPO submits that the Thaçi Defence could have raised a timely objection either before or during the impugned testimony, but failed to do so.<sup>11</sup> Moreover, the SPO avers that it provided adequate notice of the nature of the charges in respect of this incident, referring to the Pre-Trial Brief, the Indictment, the summaries of W02652 and others, and the prior statements of W02652.<sup>12</sup> Finally, the SPO adds that the Thaçi Defence failed to demonstrate that other

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<sup>6</sup> Request, in particular, paras 2-5.

<sup>7</sup> Request, paras 1-8.

<sup>8</sup> Request, para. 9.

<sup>9</sup> Request, paras 11-13.

<sup>10</sup> Request, para. 15.

<sup>11</sup> Response, paras 2-5.

<sup>12</sup> Response, paras 6-14.

remedies such as granting an adjournment to allow additional time to prepare or allowing the Thaçi Defence to recall the witness would not have been appropriate in the circumstances.<sup>13</sup>

8. In the Reply, the Thaçi Defence reiterates that it did not properly have notice of the allegations concerning the involvement of Mr Thaçi in the arrest and mistreatment of [REDACTED].<sup>14</sup> It relies, in particular, on the jurisprudence of the Appeals Chamber of International Criminal Tribunal for Rwanda (“ICTR”) for the assertion that the Prosecution cannot raise new allegations without properly putting the Defence on notice of its case.<sup>15</sup> It further argues that, where evidence has been led of direct allegations against an accused, in the absence of adequate notice, the appropriate remedy is the exclusion of this evidence.<sup>16</sup> Finally, the Thaçi Defence submits that the Request is not untimely because it was entitled to rely on the SPO case as charged.<sup>17</sup>

### III. APPLICABLE LAW

9. In the determination of any charge against the Accused pursuant to the Law, the Accused shall be informed promptly and in detail of the nature and cause of the charge against him.<sup>18</sup>

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<sup>13</sup> Response, para. 19.

<sup>14</sup> Reply, paras 6-7 and 12.

<sup>15</sup> Reply, para. 8, referring to ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana & Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004, para. 58.

<sup>16</sup> Reply, para. 10, referring to ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Evidence Tendered Through Witness K82, 3 October 2006, para. 12; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment, 11 May 2007; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 10.

<sup>17</sup> Reply, para. 5.

<sup>18</sup> Article 21(4)(a).

10. The Indictment must contain a concise statement of the facts and the crimes with which the Accused is charged, in particular the alleged modes of liability in relation to the crimes charged pursuant to Article 16.<sup>19</sup> The Indictment must be filed together with evidence supporting the material facts.<sup>20</sup>

11. According to Rule 95(4)(a), the SPO's Pre-Trial Brief must include, for each charge, a summary of the evidence that the SPO intends to present regarding the commission of the alleged crimes and the alleged modes of liability.

12. Rules 137 and 138 regulate the general conditions of admissibility of evidence.

#### IV. DISCUSSION

##### A. TIMELY OBJECTION TO ADMISSIBILITY OF EVIDENCE

13. According to the Order on the Conduct of Proceedings, any Party wishing to object to a question during the testimony of a witness shall stand and concisely state its objection.<sup>21</sup> This clearly contemplates that an objection regarding the admissibility of *viva voce* evidence be made in principle before or at the time that the witness gives evidence.<sup>22</sup> This was done, for instance, by the Defence of Mr Selimi in respect of the proposed evidence of W02652.<sup>23</sup>

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<sup>19</sup> Article 38(4); Rule 86(3).

<sup>20</sup> Rule 86(3)(a).

<sup>21</sup> F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, para. 115.

<sup>22</sup> See also ICTR, Appeals Chamber, *Prosecutor v. Niyitegeka*, ICTR-96-14-0532/1, Judgment ("*Niyitegeka* Appeal Judgment"), 9 July 2004, para. 199; ICTR, Trial Chamber, *Prosecutor v. Bagosora et al*, ICTR-98-41, Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005, para. 6; ICTR, Trial Chamber II, *Prosecutor v Bizimungu*, ICTR-99-50-0748, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004, paras 17-18; ICTY, Appeals Chamber, *Prosecutor v. Kupreškić et al.*, IT-95-16, Judgment ("*Kupreškić et al.* Appeal Judgment"), 23 October 2001, para. 123.

<sup>23</sup> Oral Order, 17 April 2023, Transcript ("*Oral Order of 17 April 2023*"), p. 2863, line 13 to p. 2866, line 8.

14. The Panel recalls that in the hearing of 18 April 2023, the SPO questioned W02652 at length regarding his knowledge of the arrest and detention of [REDACTED] and the individual Kosovo Liberation Army (“KLA”) members involved, as well as [REDACTED]. In compliance with the Panel’s Order on the Conduct of Proceedings, the Defence should have raised an objection at the time when the witness began giving the evidence to which objection is now taken. This would have enabled the Panel to contemporaneously rule on the relevance and admissibility of that evidence. The relevance of this failure is discussed below.<sup>24</sup>

15. At the end of W02652’s evidence-in-chief, the Defence indicated, however, that it would file a motion challenging the admissibility of the evidence of W02652 regarding the alleged involvement of Mr Thaçi in the arrest and mistreatment of [REDACTED]. It was instructed by the Panel to file its written submissions within five days.<sup>25</sup>

#### B. THE PANEL’S POWER TO STRIKE OUT EVIDENCE AND TO DISREGARD EVIDENCE

16. The Panel has already ruled that neither the Law nor the Rules expressly provide for the Panel’s authority to strike a part of the testimonial record of a witness.<sup>26</sup> The Panel does not, therefore, possess the legal authority to grant the primary relief sought by the Thaçi Defence.

17. The Thaçi Defence is also asking the Panel to find that the SPO is precluded from relying on this evidence.<sup>27</sup> Having failed to raise a timely objection, the Defence is in effect asking the Panel to reconsider its decision to allow the unopposed evidence of this witness.

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<sup>24</sup> See, *infra*, para. 19.

<sup>25</sup> Transcript of Hearing, 18 April 2023, pp. 3075-3077.

<sup>26</sup> Transcript of Hearing, 10 May 2023, p. 3396.

<sup>27</sup> Request, para. 16.

18. The Panel has the power to reconsider its decisions, including in respect of the admission of evidence.<sup>28</sup> In this particular case, absent a timely objection by the Defence, the Panel did not, however, explicitly rule on the admissibility of the impugned evidence. However, the combined effect of Rules 137(2) and 138(1) could be read as suggesting that evidence admitted on the record has presumptively been found to be admissible. Considering that the belated objection of the Thaçi Defence raises an issue of fundamental fairness and that it preserved its right to object by means of a written Request, the Panel is prepared in these exceptional circumstances to revisit the question of admissibility of the evidence now being objected to.

19. The failure of the Thaçi Defence to raise a timely objection to the admission of that evidence is relevant, however, to the question of the onus of establishing the conditions of admissibility of that evidence.<sup>29</sup> In *Prosecutor v. Niyitegeka*, the Appeals Chamber of the ICTR noted that “[i]n the case of objections based on lack of notice [of the charges], the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced”.<sup>30</sup> Where a timely objection has been raised, it is for the Prosecution to establish that the Defence was not materially impaired by the alleged defects in the Indictment.<sup>31</sup> Where, in contrast, an accused person

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<sup>28</sup> See, generally, Rule 79. See also: ICTY, Trial Chamber, *Prosecutor v. Milutinovic et al*, IT-05-87-T, Decision on Prosecution Motion Requesting Reconsideration of Trial Chamber “Decision on Evidence Tendered Through Witness K-82” Issued 3 October 2006 and Leave to Recall Witness K-82, 13 March 2007; ICTR, Trial Chamber II, *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Muvunyi’s Motion to Exclude Prosecution Exhibit No. 33, 13 June 2006, para. 17.

<sup>29</sup> ICTR, Appeals Chamber, *Prosecutor v. Gacumbitsi*, ICTR-01-64, Judgment, 7 July 2006, para. 51. See also ICTR, Appeals Chamber, *Prosecutor v. Ntagerura et al*, ICTR-99-46, Judgment (“*Ntagerura et al*. Appeal Judgment”), 7 July 2006, paras 31, 138.

<sup>30</sup> *Niyitegeka* Appeal Judgment, para. 199.

<sup>31</sup> See, e.g., *Niyitegeka* Appeal Judgment, para. 200. See also ICTR, Trial Chamber II, *Prosecutor v. Muvunyi*, ICTR-00-55A-0096, Decision on Prosecutor’s Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber, 24 June 2005, para. 8; ICTR, Appeals Chamber, *Prosecutor v. Muvunyi*, ICTR-00-55A-0487/1, Judgment (“*Muvunyi* Appeal Judgment”), 29 August 2008, para. 27.



fails to object in a timely fashion to the admission of evidence, it bears the burden of establishing that lack of adequate notice of the charges was prejudicial.<sup>32</sup>

### C. FAIR NOTICE OF THE CHARGES AND ADMISSIBILITY OF IMPUGNED EVIDENCE

#### Relevant legal considerations

20. To be admissible, evidence must be ‘relevant’.<sup>33</sup> For evidence to be relevant, it must relate to matters that are properly to be considered by the Panel in its evaluation of the charges, as validly pleaded in the Indictment.<sup>34</sup> The Panel has the power to exclude as irrelevant evidence of allegations that are not adequately pleaded in the indictment.<sup>35</sup> When it determines, *post facto*, that evidence should not have been admitted or not admitted for a particular purpose, the Trial Panel would have the authority to disregard that evidence or to disregard it in respect of an issue that does not form a valid part of the charges.<sup>36</sup>

21. Where objection is taken to the admission of evidence on the basis of lack of adequate notice of the charges, the adequacy of the notice given and the relevance of the proposed evidence to those charges is to be assessed to determine its

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<sup>32</sup> See, generally, *Niyitigeka* Appeals Judgement, para. 200; ICTY, Appeals Chamber, *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Judgement (“*Kvočka et al.* Appeal Judgment”), 28 February 2005, para. 35; *Ntagerura et al.* Appeal Judgment, para. 31; ICTR, Trial Chamber, *Prosecutor v. Bagosora et al*, ICTR-98-41, Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005, para. 6.

<sup>33</sup> Rule 138(1).

<sup>34</sup> See, generally, ICC, Trial Chamber I, *Prosecutor v Lubanga*, ICC-01/04-01-01/06-1399, Decision on the admissibility of four documents, 13 June 2008, para. 27.

<sup>35</sup> See Oral Order of 17 April 2023. See also, e.g., ICTR, Appeals Chamber, *Prosecutor v Bizimungu*, Decision on Prosecution’s Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004, para. 18. See also *Kupreškić* Appeal Judgment, para. 92; *Muvunyi* Appeal Judgment, para. 18; *Ntagerura et al.* Appeal Judgment, para. 27; *Kvočka et al.* Appeal Judgment, paras 30-31; *Niyitegeka* Appeal Judgement, para. 194; ICTR, Appeals Chamber, *Prosecutor v Bagosora et al*, ICTR-98-41, Decision Prosecutor’s Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 22. See also ICTY, Trial Chamber, *Prosecutor v. Boškoski*, Transcript of Hearing, 27 February 2008, pp. 10163-10165.

<sup>36</sup> See also ICTR, Appeals Chamber, *Prosecutor v. Setako*, ICTR-04-81, Judgment, 28 September 2011, para. 48; ICTY, Appeals Chamber, *Prosecutor v. Limaj et al.*, IT-03-66, Judgment, 27 September 2007, para. 86.



admissibility.<sup>37</sup> The Panel will also assess what prejudice would be caused to the Accused should the evidence be admitted.<sup>38</sup> To make that determination, the Panel will in turn have to consider what notice the Accused was validly given of the incident to which the proposed evidence relates.<sup>39</sup> In this regard, the Panel notes that the Indictment is the sole accusatory instrument so that it should give adequate notice of any allegation material to the Prosecution case, while other instruments (including the Pre-Trial Brief) could provide further specification of what is pleaded in the Indictment if clear and consistent.<sup>40</sup> In no case could those instruments result in the addition of material allegations or the amendment of the charges.<sup>41</sup>

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<sup>37</sup> See, again, Oral Order. See also ICTR, Trial Chamber, *Prosecutor v. Bagosora et al.*, ICTR-98-41, Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005, para. 5; *Niyitegeka* Appeal Judgment, para. 196; ICTR, Appeals Chamber, *Prosecutor v. Bizimungu*, Decision on Prosecution's Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004.

<sup>38</sup> See, generally, Rule 138(1). See also ICTY, Trial Chamber II, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-T, Decision on Motion of the Accused Hadzihasanovic Regarding the Prosecution's Examination of Witnesses on Alleged Violations not Covered by the Indictment, 16 March 2004, p. 5.

<sup>39</sup> *Ibid.* See also Oral Order of 17 April 2023.

<sup>40</sup> See, generally, *Muvunyi* Appeal Judgment, paras 28 and 32; ICTR, Appeals Chamber, *Prosecutor v. Muhimana*, ICTR-95-1B-0230/1, Judgment, 21 May 2007, para. 224; ICTR, Appeals Chamber, *Prosecutor v. Muvunyi*, ICTR-00-55, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 22; ICTR, Trial Chamber III, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgment and Sentence, 25 February 2004, para. 29; ICTR, Trial Chamber II, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-1295, Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB, and GAP, 6 October 2004, para. 16; ICTR, Trial Chamber II, *Prosecutor v. Nindliyiimana et al.*, ICTR-00-56, Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimony of Witness AOF, 2 December 2005, para. 21; ICTR, Trial Chamber, *Prosecutor v. Bagosora et al.*, ICTR-98-41, Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005, para. 5; ICTR, Trial Chamber, *Prosecutor v. Bagosora et al.*, ICTR-98-41, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, paras 3-4; *Kupreškić et al.* Appeal Judgment, para. 114; *Prosecutor v. Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 13.

<sup>41</sup> *Ibid.* See also ICTY, Appeals Chamber, *Prosecutor v. Naletilic et al.*, IT-98-34, Judgment, 3 May 2006, para. 26; *Kvočka et al.* Appeal Judgment, paras 33 and 67 (and references cited); ICTR, Appeals Chamber, *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 17; *Ntagerura et al.* Appeal Judgment, paras 32, 60-62 and 114; ICTR, Appeals Chamber, *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 29; ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana*, ICTR-96-17, Judgment, 13

22. Evidence cannot be admitted in relation to material facts not pleaded in the Indictment or in relation to an allegation of which insufficient notice was given.<sup>42</sup> Evidence that is inadmissible in relation to an un-pleaded fact or circumstance could still be admitted if relevant to another fact or circumstance that *is* validly pleaded in the Indictment.<sup>43</sup>

23. The Panel recalls that the purpose of the Indictment is to provide adequate notice to the Accused of the case against him.<sup>44</sup> The right to adequate notice of the charges requires that the Prosecution should lay out in detail the material facts underpinning the charges, but not the evidence by which such facts are said to be proved. Most important to the ability of the Defence to prepare are detailed particulars of the conduct which, the Prosecution claims, would render the Accused liable for the crimes charged. Because of the central importance of such facts to the Defence's ability to prepare and the fairness of proceedings, material

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December 2004, para. 125; ICTY, Trial Chamber I, Section A, *Prosecutor v Halilović*, IT-01-48-T, Decision on Defence Motion for Striking out of Paragraphs in Prosecution Pre-Trial Brief, 7 Feb 2005, pp 3-4.

<sup>42</sup> See, e.g., ICTR, Appeals Chamber, *Prosecutor v Bagosora et al*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 30; *Muvunyi* Appeal Judgment, para. 20; ICTR, *Prosecutor v Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 2006, in particular, para. 62.

<sup>43</sup> See, e.g., SCSL, Trial Chamber I, *Prosecutor v Sesay et al.*, SCSL-2004-15, Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment, 26 June 2008, para. 16. See also ICTR, *Prosecutor v Bizumungu et al.*, Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witness GTA and DCH Inadmissible, 24 November 2004; ICTR, *Prosecutor v Nyiramasuhuko et al.*, Decision on Defence's Urgent Motion to Declare Parts of Testimony of Witnesses RV and QBZ Inadmissible, 16 February 2004, para. 25; ICTR, *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment, 18 March 2008, para. 7; ICTR, *Prosecutor v Nyiramasuhuko et al.*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible, 2 July 2004, para. 12

<sup>44</sup> Law, art. 21(4)(a). See also: *Kupreškić et al.* Appeal Judgment, paras 88 *et seq*, and 122; ICTY, Appeals Chamber, *Prosecutor v. Simić et al.*, IT-95-9, Judgment, 28 November 2006, para. 74; Trial Chamber II, *Prosecutor v. Brdanin & Talić*, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 12; ICTY, Appeals Chamber, *Prosecutor v. Krnojelac*, IT-97-25, Judgment, 17 September 2003, para. 139; *Ntagerura et al.* Appeal Judgment, para. 22; ICTR, Appeals Chamber, *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgment, 9 July 2004, para. 194; ICTR, Appeals Chamber, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, 26 May 2003, para. 303. See also ECtHR, *Sipavicius v Lithuania*, case no 49093/99, Judgment, 21 February 2002, para. 28.

facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. As the ICTY Appeals Chamber noted in *Prosecutor v. Kupreškić*,

[...] in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.<sup>45</sup>

24. The Prosecution's Pre-Trial Brief (and summaries of proposed witnesses' evidence)<sup>46</sup> cannot add new charges or material allegations not contained in the Indictment, but can further specify those.<sup>47</sup>

### Notice of impugned incident

25. The Panel observes that the Indictment contains no allegation that Mr Taçi took a personal part in the arrest and/or mistreatment of [REDACTED]. Nor does the Pre-Trial Brief.

26. In his SPO interview of 26 June 2018, W02652 suggested that Mr Taçi might have taken part in the arrest of [REDACTED].<sup>48</sup> The Rule 95 witness summary of

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<sup>45</sup> *Kupreškić et al.* Appeal Judgment, para. 88.

<sup>46</sup> See e.g., ICTY, Trial Chamber I, *Prosecutor v. Martić*, IT-95-11, Judgment ("Martić Trial Judgment"), 12 June 2007, para. 17; ICTY, Appeals Chamber, *Prosecutor v. Naletilić*, IT-98-34, Judgment ("Naletilić Appeal Judgment"), para. 27; *Ntagerura et al.* Appeal Judgment, paras 74, 81-82, 96, 101-102, 154, 156.

<sup>47</sup> See, *supra*, references in footnotes 39-40. See also, e.g., ICTY, *Kupreškić* Appeals Judgment, paras 117-118; Appeals Chamber, *Prosecutor v. Blaškić*, IT-95-14, Judgment, 29 July 2004, para. 242; *Martić* Trial Judgment, para. 17; *Simić et al.* Appeal Judgment, para. 24; Appeals Chamber, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Judgment, 17 December 2004, para. 169; *Naletilić* Appeal Judgment, para. 27; ICTR, *Ntagerura et al.* Appeal Judgment, paras 35, 41-42, 130, 156; ICTR, Appeals Chamber, *Prosecutor v. Nahimana et al.*, ICTR-99-52, Judgment, 28 November 2007, paras 325, 367; ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana et al.*, ICTR-96-17, Judgment, 13 December 2004, para. 34; *Niyitegeka* Appeal Judgment, para. 219.

<sup>48</sup> 051954-TR-ET, Part 2, RED2, p 6.

W02652 contains no indication that the SPO intended to rely upon this part of the witness's evidence.<sup>49</sup> In the Preparation Note of W02652 of 11 April 2023, the following is recorded in respect of the content of the witness's SPO interview:

[REDACTED]

27. It is apparent from the above that an allegation that Mr Thaçi personally participated in the arrest and/or mistreatment of [REDACTED] does not form part of the charges as pleaded in the Indictment. It is also apparent from the above that the SPO did not provide clear and consistent notice of such an allegation being part of its case.

28. Although the SPO refers to passages from its pleadings and claims that notice was provided that Mr Thaçi was personally involved in the "questioning of [REDACTED] detainees" at the relevant crime site,<sup>50</sup> those [REDACTED] detainees are not the [REDACTED] detainees concerned here, namely [REDACTED]. The Panel finds that the SPO could have expressly stated in the Indictment that Mr Thaçi's personal involvement in the arrest and mistreatment of [REDACTED] insofar as it was considered material to its case against Mr Thaçi. It chose not to do so.

29. The Panel concludes from the above that an allegation that Mr Thaçi took a personal part in the arrest and/or mistreatment of [REDACTED] does not form part of the Prosecution case. The admission of evidence in support of such an unpleaded allegation would, therefore, be highly prejudicial to the Defence. The Panel will, therefore, disregard the impugned evidence of W02652 as it relates to

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<sup>49</sup> F01243/A01, *Annex 1 to Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, confidential, p. 4, para. 6; F01296/A02, *Annex 2 to Prosecution Submissions Pursuant to Decision F01229*, 15 February 2023, pp. 162-163. See also F00999/A01, *Annex 1 to Submission of Confirmed Indictment ("Indictment")*, 9 September 2022, confidential, para. 113; F01296/A01, *Annex 1 to Prosecution Submissions Pursuant to Decision F01229*, 15 February 2023, paras 474-477.

<sup>50</sup> Response, para. 9.

the un-pleaded suggestion that Mr Thaçi took a personal part in the arrest and/or mistreatment of [REDACTED].

30. The fact, however, that the impugned evidence cannot be relied upon to establish an un-pleaded allegation does not mean that it cannot be used as evidence of other facts which *are* pled in the Indictment.<sup>51</sup>

31. The Panel observes that the SPO alleges in paragraph 32 of the Indictment that the Accused and other members of a joint criminal enterprise shared a common purpose to gain and exercise control over all of Kosovo by, among other things, committing violence against opponents.<sup>52</sup> The Panel also notes that paragraph 59 of the Indictment explains that the acts enumerated in the indictment are demonstrative of a wider campaign of attacks against opponents implemented throughout Kosovo before, during, and after the indictment period.<sup>53</sup>

32. The Panel notes, furthermore, that the Indictment alleges that: “Hashim THAÇI, Kadri VESELI, Rexhep SELIMI, and Jakup KRASNIQI personally participated in the treatment of Opponents on the ground by participating in the intimidation, interrogation, mistreatment, and detention of Opponents, as discussed below”.<sup>54</sup> Nevertheless, the Prosecution is not limited to, nor primarily focused on, the alleged personal or direct involvement of any of the Accused in the commission of the crimes charged in the Indictment.<sup>55</sup> Instead, as is apparent from, *inter alia*, paragraphs 37-39 and 50-54 of the Indictment, the Accused are also charged with participating in a joint criminal enterprise and sharing its culpable intent based on a variety of allegations that do not rely on any claim of personal participation into the commission of the charged offences. The Panel notes, in

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<sup>51</sup> See, *supra*, footnote 43.

<sup>52</sup> See Oral Order of 17 April 2023.

<sup>53</sup> *Ibid.*

<sup>54</sup> Indictment, para. 40.

<sup>55</sup> In respect of these, *see* Indictment, paras 40-49.

particular, paragraph 50(a) and (d) of the Indictment, which allege that Mr Thaçi significantly contributed to achieving the common purpose by:

a. Formulating and/or participating in the development, approval, promotion, dissemination, and implementation of plans, policies, and practices in furtherance of the common purpose, including in the form of communiques, public statements, internal rules and regulations, structures, and information-gathering and reporting mechanisms;

[...]

d. Disseminating and/or facilitating the dissemination of information intended to promote the common purpose and engender fear, distrust, and hatred of Opponents, including through communiques, public statements, and other media;

33. The Panel also notes paragraph 11 of the SPO Pre-Trial Brief, which echoes the above paragraphs of the Indictment, as well as paragraphs [REDACTED] of that Brief, which provide further particularisation of some of the incidents which the SPO claims are relevant to establishing the Accused's contribution to the alleged JCE by means of public statements and communiques:

[REDACTED]

34. Furthermore, at paragraphs [REDACTED] *et seq* of the SPO Pre-Trial Brief, the SPO further specifies crimes alleged in the Indictment in relation to [REDACTED].<sup>56</sup> Among those, the SPO Pre-Trial Brief makes it clear that the arrest, detention, and interrogation of [REDACTED] forms part of the charges.<sup>57</sup>

35. The Indictment and SPO Pre-Trial Brief, therefore, put Mr Thaçi on clear notice that he is alleged to have interviewed [REDACTED] of the detainees (though [REDACTED]),<sup>58</sup> that he was told about [REDACTED] arrest and detention,<sup>59</sup> and that contrary to Mr Thaçi and the General Staff's claim, these

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<sup>56</sup> See Indictment, paras [REDACTED] and Schedule A, [REDACTED].

<sup>57</sup> SPO Pre-Trial Brief, paras [REDACTED].

<sup>58</sup> SPO Pre-Trial Brief, para. [REDACTED].

<sup>59</sup> *Ibid*, para. [REDACTED].



individuals were not subject to a genuine investigation/judicial procedure.<sup>60</sup> Insofar as these allegations form a validly pleaded part of the SPO case, the evidence of W02652 could be relied upon as evidence relevant to establishing one or more of those allegations.

36. Regarding the suggestion that the probative value of the impugned evidence is outweighed by its prejudicial effect, the Panel finds as follows. First, the fact that evidence is or might be incriminating does not render it prejudicial for the purpose of this exclusionary rule. For such a rule to apply, there must arise an unfairness unconnected to the evidential value of the evidence, such as an inability to challenge it fairly and effectively.<sup>61</sup>

37. In the present case, no such prejudice arises. First, as noted above, the facts in relation to which the evidence of W02652 might be relevant were clearly pleaded and notice in relation to them was clear and consistent. The Defence was able to and did in fact question W02652 in relation to this aspect of his evidence. Furthermore, several more witnesses are scheduled to testify about this incident, including [REDACTED] and [REDACTED], who are best placed to answer any question which the Defence might have in relation to these events.

38. The Panel, therefore, finds that the probative value of the impugned evidence is not outweighed by its prejudicial effect.

## Conclusions

39. Based on the above, the Panel finds that while the SPO will not be permitted to rely upon the impugned evidence of W02652 to seek to establish Mr Thaçi's

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<sup>60</sup> *Ibid*, para. [REDACTED].

<sup>61</sup> See, e.g., F01409, Panel, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, confidential, para. 13; F01596, Panel, *Second Decision on Specialist Prosecutor's Bar Table Motion*, 9 June 2023, confidential and *Ex Parte*, para. 84.



claimed personal involvement in the arrest and/or mistreatment of [REDACTED], this evidence could still be relevant to some of the material allegations made in the Indictment and further specified in the SPO Pre-Trial Brief as outlined above.

## V. CLASSIFICATION

40. The Panel notes that the Request, the Response, and the Reply are filed as “confidential” pursuant to Rule 82(4). In the interest of the publicity of the proceedings, the Panel orders the Parties to file public redacted versions of their filings by Friday, 30 June 2023, and the Panel will issue a public version of this decision shortly thereafter.

## VI. DISPOSITION

41. For these reasons, the Panel:

- a) **REJECTS** the Request insofar as it asks the Panel to strike the impugned evidence and/or refrain from relying upon it;
- b) **CLARIFIES** the relevance of W02652’s impugned evidence to these proceedings; and
- c) **ORDERS** the Parties to file public redacted versions of their submissions as indicated in paragraph 40 above, by Friday, 30 June 2023.



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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated Friday, 23 June 2023

At The Hague, The Netherlands.