



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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 27 September 2023

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Public Redacted Version of 'Prosecution response to THAÇI and SELIMI Defence request to postpone reserve witnesses'

Specialist Prosecutor's Office

Ward Ferdinandusse

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 Alagendra

I. INTRODUCTION

1. The premature and unfounded Request¹ for postponement of the Reserve Witnesses² should be denied. The Defence had sufficient notice and has adequate time and facilities to prepare. Beyond unsubstantiated assertions otherwise, the Defence does not demonstrate any concrete prejudice arising from the potential testimony of the Reserve Witnesses during the October Block.³ Consistent with its obligations under the Conduct of Proceedings Order, the Specialist Prosecutor's Office ('SPO') proposes to call the Reserve Witnesses if scheduled witnesses are unavailable to testify or if the cross-examinations of scheduled witnesses proceed faster than expected.⁴ Due to the nature of reserve witnesses, there must be a degree of flexibility.⁵

II. SUBMISSIONS

2. Notice of, *inter alia*, the Reserve Witnesses at this stage was required due to the number of previously noticed reserve witnesses called during evidentiary blocks in July, August, and September 2023. Of the previously noticed reserve witnesses, two have not yet been called or scheduled, and neither is a suitable reserve witness for the October Block.⁶ In this respect, the SPO took into account Defence scheduling preferences regarding W01493,⁷ and provided timely notice in July 2023 that [REDACTED]'s availability and testimony mode remain under consideration.⁸

¹ Thaçi and Selimi Defence Request to postpone the testimony of W00208, W04753 and W04491, KSC-BC-2020-06/F01807, 21 September 2023, Confidential ('Request'). The THAÇI and SELIMI Defence are referred to herein as the 'Defence', noting that the other two Defence teams did not join the Request.

² W02008, W04491, and W04753 ('Reserve Witnesses').

³ 9-19 October 2023 evidentiary block ('October Block').

⁴ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order'), para.81.

⁵ Oral Order, Transcript, 10 July 2023, pp.5259-5261.

⁶ KSC-BC-2020-06/F01630/A02.

⁷ Additional Joint Defence Response to Prosecution Submission of List of the Next 12 Witnesses, Reserve Witnesses and Associated Information, KSC-BC-2020-06/F01694, 21 July 2023, Confidential; Transcript, 30 August 2023, pp.6982-6983. The SPO also took into account Defence scheduling preferences regarding W04448, who is now scheduled to appear in the October Block.

⁸ Public Redacted Version of 'Prosecution request concerning items related to W03832 and Rule 154 application for [REDACTED]', KSC-BC-2020-06/F01673/RED, 17 July 2023, para.3; Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and

3. Inaccurate cross-examination estimates contributed to the number of previously noticed reserve witnesses called to date. As emphasised by the Panel, accurate cross-examination estimates are essential to facilitate scheduling decisions, are crucial for the SPO to provide timely notice of the witnesses it intends to call, and could avoid the need to regularly resort to reserve witnesses.⁹ When scheduling, the SPO already accounts for potential reductions in cross-examination times. However, drastic reductions are unforeseeable. For example, the combined Defence estimate for W04255 was 12.5 hours, which would amount to roughly three court days for cross-examination alone.¹⁰ W04255's actual cross-examination time by all Defence teams was less than five hours, thereby contributing to the need to call the notified reserve witness for that week, namely, W03724.

4. Identification and notice of the Reserve Witnesses was the result of a careful consideration of multiple, often competing, factors, including (i) publicity; (ii) witness availability, testimony modes, examination estimates, sitting schedules, and *inter partes* consultations; (iii) the scope, nature, and subject matter of the witness's anticipated testimony and related materials; (iv) the status of the presentation of evidence; (v) the witness's personal circumstances; (vi) security concerns; and (vii) the need to provide adequate notice.¹¹ Considering a history of inaccurate cross-examination estimates, as well as the possibility that scheduled witnesses become unavailable due to other unforeseen medical or logistical reasons, the SPO notices reserve witnesses that are not only available at short notice and have limited associated materials and evidentiary scope, but also witnesses that, when necessary, may be called to fill multiple sitting days.¹²

W04769 Pursuant to Rule 154, KSC-BC-2020-06/F01700, 24 July 2023, Confidential, para.18. The SPO will provide further information concerning this witness as soon as practicable.

⁹ Oral Order, Transcript, 10 July 2023, pp.5259-5261; Oral Order, Transcript, 19 July 2023, p.6089.

¹⁰ KSC-BC-2020-06/F01694/A08.

¹¹ Prosecution submission of list of reserve witnesses, KSC-BC-2020-06/F01811, 22 September 2023 ('Reserve List'), para.3.

¹² For example, in the Rule 154 Motion (*see* fn.14 below) and Reserve List, the SPO noticed W04147, as a reserve witness who may be available to fill multiple sitting days when the need arises. The Defence

5. After balancing the above factors and reaching its discretionary¹³ scheduling decisions, the SPO noticed the Reserve Witnesses on 14 September 2023, approximately one month in advance of the October Block.¹⁴ On 22 September 2023, as foreshadowed in the Rule 154 Motion,¹⁵ the SPO filed the information required by paragraph 74 of the Conduct of Proceedings Order. This filing is a compilation of information that significantly – and in some cases completely – overlaps with information already in the Defence’s possession.¹⁶

6. For example, in relation to the ‘issues, facts and circumstances in relation to which the witness will be examined’,¹⁷ similar (and more detailed) information concerning the anticipated subject matter of each Reserve Witness’s testimony had already been provided through, *inter alia*, the Rule 95 summaries and Rule 154 Motion. Further undermining Defence submissions claiming prejudice,¹⁸ there is only one document the SPO intends to use with the Reserve Witnesses that was not previously

has recently claimed he is not a suitable reserve witness due to the nature and scope of his evidence. See Joint Defence Response to the Prosecution motion for admission of evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 pursuant to Rule 154, KSC-BC-2020-06/F01818, Confidential, para.36 (objecting to W04147 being called as a reserve witness due to the nature and scope of the witness’s anticipated evidence, related materials, and pending litigation). The Defence’s submissions should be considered in light of not only past reductions in cross-examination times, but also previous requests to call this witness before or at the outset of the trial. See, for example, Thaçi Defence Motion Regarding the Preservation of Defence Evidence, KSC-BC-2020-06/F01191, 9 January 2023, Confidential, paras 34-35 (indicating that the Defence was prepared to proceed with the deposition of, *inter alia*, W04147 in February 2023 or his testimony in March 2023).

¹³ See, *inter alia*, Rules 118, 121, 127 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’); Conduct of Proceedings Order, KSC-BC-2020-06/F01226, Sections XII, XV(C); Transcript, 15 February 2023, pp.1911-1912. All references to ‘Rule’ or ‘Rules’ are to the Rules, unless otherwise indicated.

¹⁴ The Rule 154 Motion was filed 25 days before the start of the October Block. See Prosecution motion for admission of evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 pursuant to Rule 154, KSC-BC-2020-06/F01788, 14 September 2023, Confidential (‘Rule 154 Motion’). The SPO thereafter noticed the possibility of calling the Reserve Witnesses during the October Block on 15 September 2023. See Email from SPO to Panel, Parties, and participants dated 15 September 2023 at 15.21.

¹⁵ Rule 154 Motion, KSC-BC-2020-06/F01788, fn.5.

¹⁶ See also Reserve List, KSC-BC-2020-06/F01811, paras 4-5.

¹⁷ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.74(iv).

¹⁸ Request, KSC-BC-2020-06/F01807, para.8 (claiming prejudice from the allegedly late notice of documents the SPO intends to use with the Reserve Witnesses).

tendered as an associated exhibit in the Rule 154 Motion.¹⁹ The SPO does not intend to use any documents during the testimony of W00208.

7. Moreover, while the evidence of the Reserve Witnesses does not overlap, the evidence of W04491 and W04753 does relate to many of the same matters, including charged crime sites, addressed by other scheduled or completed witnesses.²⁰ While previous witnesses have not testified about the incident concerned by W00208's evidence, the scope of such evidence and related materials is limited. Accordingly, Defence submissions about 'the volume of last-minute preparation' arising from the subject matter of the Reserve Witnesses' potential testimonies are misleading and unsubstantiated. In the same vein, general claims of prejudice based on Defence preparations for other witnesses, ongoing litigation,²¹ investigations, and disclosure review²² are normal parts of the trial process and the Defence should be expected to organise its resources accordingly.

8. At this stage, whether it will be necessary to resort to the potential Reserve Witnesses remains hypothetical and, as set out above, depends on, *inter alia*, accurate cross-examination estimates.²³ Before each block and before each week of that block, the SPO notifies the witnesses, including potential reserve witnesses.²⁴ Throughout this process, the SPO is available to liaise *inter partes* about any issues that arise, in particular, in light of demonstrable and concrete prejudice. Only after exhausting such

¹⁹ KSC-BC-2020-06/F01811/A01. Certain of these associated exhibits or parts thereof were also previously admitted.

²⁰ For example, [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

²¹ In this respect, the Defence received an extension of time on 27 September 2023 – resulting in approximately a month total – for the response to the Third Rule 155 Motion. See Prosecution third motion for admission of evidence pursuant to Rule 155, KSC-BC-2020-06/F01804, 20 September 2023, Confidential ('Third Rule 155 Motion').

²² Request, KSC-BC-2020-06/F01807, para.12.

²³ As previously indicated and as is inherent in the process, the SPO is also confirming logistical arrangements for the witnesses noticed for the October Block. As appropriate, the SPO will provide updates as soon as possible, including any previously unanticipated impact on the witness order. See Email from SPO to Panel, Parties, and participants dated 15 September 2023 at 15.21.

²⁴ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 77-78.

inter partes consultations should the Defence seek any relief from the Panel.²⁵ Accordingly, the Request is premature and, in any event, unsubstantiated.

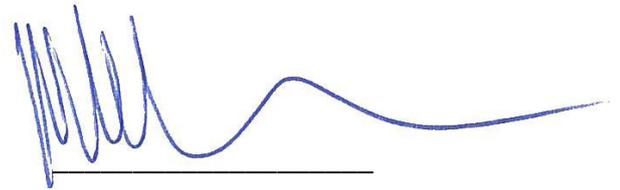
III. CLASSIFICATION

9. This response is confidential pursuant to Rule 82(4) and to give effect to existing protective measures. A public redacted version will be submitted.

IV. RELIEF REQUESTED

10. For the foregoing reasons, the Request should be denied.

Word count: 1653



Ward Ferdinandusse

Acting Deputy Specialist Prosecutor

Wednesday, 27 September 2023

At The Hague, the Netherlands.

²⁵ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.43.