



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-06**

The 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: Fidelma Donlon

Date: 23 April 2024

Language: English

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Decision on Selimi Defence Request for Extension of Legal Privilege to Legal Consultant

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TRIAL PANEL II (“Panel”), pursuant to Articles 1(2), 21, and 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), Rules 2(1), 26(1) and 111(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), Sections 9, 12-13, and 18(3)(b)-(d) and (4) of the Directive on Counsel (“Directive”),¹ Articles 6(1)(b) and 26 of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers (“Code of Conduct”),² and Articles 4(2), 6(5) and 9(4) of the Practice Direction on Detainees: Counsel Visits and Communications (“Practice Direction on Counsel Visits and Communications”)³, hereby renders this decision.

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 1 December 2023, the Panel issued a decision on modification of detention conditions for three Accused (“Decision F01977”).⁴
2. On 20 February 2024, the Panel issued an oral order regarding Counsel’s responsibility arising out of the Directive and the Code of Conduct (“Oral Order”).⁵
3. On 15 March 2024, the Defence for Rexhep Selimi (respectively “Mr Selimi” and “Selimi Defence”) requested the Panel to extend client-counsel privilege currently enjoyed by Dr Rudina Jasini, Co-Counsel for Mr Selimi, to her as a Legal Consultant (“Selimi Defence Request”).⁶ The Selimi Defence asserts that this

¹ KSC-BD-04-Rev2, Registry Practice Direction, *Directive on Counsel*, 22 February 2024.

² KSC-BD-07/Rev1, *Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers*, 28 April 2021.

³ KSC-BD-10-Rev1, *Registry Practice Direction on Detainees: Counsel Visits and Communications*, 23 September 2020.

⁴ F01977, *Further Decision on the Prosecution’s Urgent Request for Modification of Detention Conditions for Hashim Thaçi, Kadri Veseli and Rexhep Selimi*, 1 December 2023.

⁵ Transcript of Hearing, 20 February 2024, p. 12506, line 15, to p. 12508, line 20.

⁶ F02185, Specialist Counsel, *Selimi Defence Request for Extension of Legal Privilege to Legal Consultant*, 15 March 2024, paras 1, 22.

would enable Dr Jasini to continue to have privileged communications and visits with Mr Selimi.⁷

4. On 20 March 2024, the Registry filed its submissions on the Request (“Registry Submissions”), contending that the Specialist Chambers (“SC”)’s legal framework, which does not extend the Counsel-client privilege to Legal Consultants, should be applied. The Registry also points out that Defence team members who are not entitled to privileged visits and communications when meeting Mr Selimi alone can nevertheless enjoy privileged visits and communications when accompanied by Counsel or Co-Counsel.⁸

5. The Specialist Prosecutor’s Office did not respond to the Request.

II. APPLICABLE LAW

6. Pursuant to Rule 26(1) and Section 12 of the Directive, the Registrar shall appoint or assign Counsel from the List of Specialist Counsel to a suspect or Accused.

7. Pursuant to Rule 111, communications made in the context of the professional relationship between a person and his or her Specialist Counsel shall be regarded as privileged.

8. Pursuant to Article 6(1)(b) of the Code of Conduct, Counsel and Prosecutors shall, within their respective roles in proceedings, respect professional secrecy and confidentiality.

9. Pursuant to Articles 4(2) and 6(5) of the Practice Direction on Counsel Visits and Communications, visits and communications between a Detainee and Counsel (and Co-Counsel) are privileged.

⁷ See Selimi Defence Request, paras 3, 13, 20.

⁸ F02190, Registry, *Registry Submissions on Selimi Defence Request for Extension of Legal Privilege to Legal Consultant*, 20 March 2024, with Annex 1, confidential.

10. Pursuant to Article 9(4) of the Practice Direction on Counsel Visits and Communications, members of Counsel's team may accompany Counsel when visiting a Detainee.

III. DISCUSSION

11. The SC's legal framework provides for a careful balance between certain privileges that are granted to Counsel for an Accused and a set of obligations borne by Counsel in the exercise of his or her responsibilities. The two are closely linked insofar as they seek to ensure, on the one hand, the effective representation of an Accused while, on the other, making sure that Counsel performs his or her duty to the expected level of care and ethical standards. In this context, the SC's legal framework provides that: (i) privileged communications are those made "in the context of a professional relationship between a person and his or her Specialist Counsel";⁹ and (ii) Specialist Counsel is a person on the List of Specialist Counsel assigned or appointed to a suspect or Accused as Counsel, or (eligible to be) chosen to act as Co-Counsel, in line with the Directive.¹⁰ Similar privileges do not extend to other members of a Defence team, who are also not bound by the same duties and obligations as are binding upon Counsel.

12. The Panel notes, in particular, that Counsel and Co-Counsel are bound by the Code of Conduct, which sets out basic professional standards that must be met by Counsel, Co-Counsel, and Prosecutors appearing before the SC, including the obligation to respect confidentiality and professional secrecy.¹¹ In this regard, the Code of Conduct ensures accountability for misconduct and sets out a disciplinary regime applicable to Counsel, Co-Counsel, and Prosecutors.¹² Under this

⁹ Rule 111(1).

¹⁰ Rules 2(1) and 26(1). *See also* Sections 12, 18(1) and (4) of the Directive.

¹¹ Code of Conduct, Articles 6(1)(b), 26.

¹² *See* Code of Conduct, Articles 3(2) and 33(1).

disciplinary regime, Defence team members other than Counsel or Co-Counsel, including Legal Consultants (“Defence Team Members”), are not directly liable under the Code of Conduct and the disciplinary standard and obligations foreseen therein can only be enforced in respect of Defence Team Members through supervisory Counsel or Co-Counsel.¹³

13. The Panel further observes that the Practice Direction on Counsel Visits and Communications provides that: (i) both Counsel and Co-Counsel are entitled to privileged visits and communications with the Detainee they represent;¹⁴ and (ii) Defence Team Members may accompany Counsel or Co-Counsel when visiting a Detainee, and these visits are treated as privileged to the same extent as other Counsel visits under the Practice Direction on Counsel Visits and Communications.¹⁵

14. Consistent with the above distinctions between Counsel and other members of a Defence team, Decision F01977 differentiated between privileged visits (where Counsel or Co-Counsel are present) and visits with an Accused by other Defence Team Members (without Counsel or Co-Counsel present), which are not privileged.¹⁶ In particular, the Panel required, *inter alia*, that any non-privileged visits and telephone calls require prior approval by the Registrar.¹⁷

15. The Panel is of the view that the Selimi Defence has not demonstrated that the advance scheduling that is now required for contact by the Accused with Defence Team Members after implementation of Decision F01977 has effectively limited communications only to Counsel. The Panel notes that, as submitted by the Registry and contrary to the Selimi Defence’s submissions,¹⁸ Mr Selimi

¹³ Code of Conduct, Article 34.

¹⁴ Practice Direction on Counsel Visits and Communications, Articles 4(2), 6(5).

¹⁵ Practice Direction on Counsel Visits and Communications, Article 9(4).

¹⁶ Decision F01977, paras 60-61.

¹⁷ Decision F01977, para. 60.

¹⁸ Registry Submissions, paras 17-18; Selimi Defence Request, paras 9-11.

continues to be able to: (i) have privileged visits with Counsel and Co-Counsel, accompanied by other Defence Team Members if they so wish; (ii) place privileged calls to Counsel and Co-Counsel; and (iii) have non-privileged visits and telephone calls with Defence Team Members unaccompanied by Counsel or Co-Counsel, with the caveat that prior approval by the Registrar is now required for these visits and calls. The Panel therefore holds that the applicable legal framework governing the scope of privileged communications, as set out above,¹⁹ has not been modified by Decision F01977, nor has the scope of Mr Selimi's legal privilege been altered as a consequence.

16. Furthermore, the Panel is not persuaded that the circumstances outlined by the Selimi Defence would warrant an extension of legal privileges in this instance. First, the current regime is fully compatible with the needs for preparation of the Selimi Defence and with the effective protection of the rights of the Accused. Secondly, the regime outlined above already provides for an adequate and necessary balance between the interests of the Accused and other public interests relevant to this matter, including the protection of confidential information. Thirdly, the Selimi Defence has failed to establish that the tasks and responsibilities that are to be assigned to Dr Jasini cannot be effectively performed within the existing framework. Lastly, the Panel notes and reiterates that it appears that Mr Selimi engaged in disclosure of confidential information to unauthorised third parties.²⁰ This, and the environment of witness interference in which this trial is being conducted, calls for a particularly careful approach to legal privileges. The Selimi Defence has failed to show that compelling enough reasons had been shown to depart from the existing regime in this case.

17. The Panel notes that the jurisprudence relied upon by the Selimi Defence does

¹⁹ See above paras 11-13.

²⁰ See e.g. F02182, Panel, *Decision on Periodic Review of Detention of Rexhep Selimi*, 15 March 2024, para. 22, referring to Decision F01977, paras 35-37.

not support the requested extension of the client-counsel privileges in this case.²¹ First, none of the authorities cited can be compared to the present one. Furthermore, these cases are different from the present one in material respects: (i) the extension of legal privilege to include the case manager of the Ngaiissona Defence team was granted by the ICC Pre-Trial Chamber because the team did not have a Co-Counsel, and the Pre-Trial Chamber withdrew that extension when the team was expanded to include team members who were entitled to privileged communications;²² and (ii) the extension of legal privilege in the referenced *Turinabo et al.* Order was issued in the exceptional context where lead counsel and the Accused were in different countries due to the global COVID-19 pandemic.²³ The Panel finds that no similar circumstances justifying an extension of the client-counsel privileges exist under the current circumstances.²⁴

18. The Panel is also of the view that the Selimi Defence's intention to change roles and responsibilities among team members to comply with the Oral Order and Decision F01977 does not constitute valid grounds to expand legal privileges to those not otherwise entitled to them under the SC's legal regime.²⁵ The Panel's Order was intended to ensure that all of those who act as Counsel for an Accused are able and willing to perform those obligations and responsibilities that attach to such a function. Where they are not, they must be given a different role. As outlined above, such roles come with different rights and responsibilities. The

²¹ Selimi Defence Request, paras 16-17, referring to ICC, *Prosecutor v. Yekatom and Ngaiissona*, ICC-01/14-01/18-176-Red2, Pre-Trial Chamber II, Public Redacted Version of "Decision Pursuant to Regulation 101 of the Regulations of the Court" ("[Yekatom and Ngaiissona First Decision](#)"), 8 February 2021 (date of original: 15 April 2019); IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Single Judge, Order on the Extension of Attorney-Client Privilege ("[Turinabo et al. Order](#)"), 25 September 2020.

²² [Yekatom and Ngaiissona First Decision](#), para. 34; ICC, *Prosecutor v. Yekatom and Ngaiissona*, ICC-01/14-01/18-712-Red, Trial Chamber V, Public Redacted Version of "Decision on the Ngaiissona Defence Request on the Scope of Privileged Communications" ("[Yekatom and Ngaiissona Second Decision](#)"), 16 February 2021 (date of original: 4 November 2020), para. 21.

²³ [Turinabo et al. Order](#), p. 2.

²⁴ See [Yekatom and Ngaiissona Second Decision](#), para. 21.

²⁵ See ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3080, Trial Chamber III, Decision on "Defence Motion on Privileged Communications" ("[Bemba Decision](#)"), 3 June 2014, para. 21.

Selimi Defence has failed to establish in this case that privileges attaching to one's role as Counsel should come without the responsibilities that attach thereto.

19. The Panel is therefore not satisfied that a wider application of legal privilege than that which is explicitly set out in the SC's legal framework is warranted at this stage.²⁶

20. For these reasons, the Panel refuses to extend the client-counsel privilege to Dr Jasini if she reverts to her former position as Legal Consultant. The Selimi Defence Request is therefore rejected.

IV. DISPOSITION

21. For the above-mentioned reasons, the Panel hereby:

REJECTS the Selimi Defence Request.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 23 April 2024

At The Hague, the Netherlands.

²⁶ [Bemba Decision](#), para. 22.