



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: 14 June 2024

Language: English

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**Public Redacted Version of Decision on Joint Defence Motion for Appointment of
Amicus Curiae Investigator or Alternative Relief**

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 40(2) and 40(6)(e) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 116 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 10-11 and 18 October 2023, W04577 attended court to testify.¹
2. On 31 October 2023, following a request from duty counsel for W04577 (“Duty Counsel”),² the Panel adjourned W04577’s testimony until further notice.³
3. On 4 December 2023, the Specialist Prosecutor’s Office (“SPO”) requested authorisation to apply one non-standard redaction to a message received by the SPO on “11/8/2023” which is said to relate to W04577’s credibility (“Letter”).⁴
4. On 18 December 2023, the Panel authorised one non-standard redaction to the Letter to redact the name of the author of the letter (“Decision”).⁵ The SPO subsequently disclosed the Letter, subject to that redaction, to the Defence.
5. On 23 February 2024, the Defences for Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (“Accused” and “Defence”) jointly filed a motion for

¹ Transcript of Hearing, 10 October 2023, confidential, pp. 8663-8669, 8674-8676; Transcript of Hearing, 11 October 2023, confidential, pp. 8678-8685, 8700-8702; Transcript of Hearing, 18 October 2023, confidential, pp. 9097-9106.

² Transcript of Hearing, 18 October 2023, p. 9098, line 4 to p. 9099, line 7.

³ F01896, Panel, *Decision on Duty Counsel’s Request for Adjournment of W04577’s Testimony* (“Decision on Request for Adjournment of W04577’s Testimony”), 31 October 2023, strictly confidential, paras 13, 15, 28(a) (a public redacted version was issued on 22 November 2023, F01896/RED).

⁴ F01979, Specialist Prosecutor, *Prosecution Request for Protective Measures for One Item Containing Rule 103 Information*, 4 December 2023, confidential, with one Annex, strictly confidential and *ex parte* (a public redacted version was filed the same day, F01979/RED).

⁵ F02020, Panel, *Decision on the Eighth Prosecution Request for Protective Measures for One Item Containing Rule 103 Information*, 18 December 2023, confidential, paras 7-8 (a public redacted version was filed on the same day, F02020/RED).

appointment of an *amicus curiae* investigator, or alternative relief (“Request”).⁶

6. On 7 March 2024, the SPO responded to the Request (“Response”).⁷

II. SUBMISSIONS

7. The Defence requests that the Panel appoints an *amicus curiae* investigator to investigate allegations contained in the Letter as they directly affect the credibility of W04577.⁸ The Defence argues that the identity of the author of the Letter is indispensable to investigating the Letter and, as the Panel authorised non-standard redactions to the author’s identity, the Defence is prevented from investigating the allegations and from challenging W04577’s credibility.⁹ The Defence contends that the SPO cannot undertake this investigation as it would give rise to a conflict of interest, and therefore requests the appointment of an *amicus curiae* investigator.¹⁰ In the alternative, the Defence requests that the Panel order the SPO to investigate the allegations in the Letter.¹¹ Lastly, the Defence requests that the Panel adjourn the continuation of W04577’s testimony until the present litigation has been resolved.¹²

8. The SPO responds that the Panel should reject the Request as: (i) the Defence fails to establish any basis for reconsideration of the Decision;¹³ (ii) under the Law and the Rules the SPO is the only entity authorised to investigate and prosecute

⁶ F02150, Specialist Counsel, *Joint Defence Motion for Appointment of Amicus Curiae Investigator or for Alternative Relief*, 23 February 2024, strictly confidential, with one Annex, strictly confidential (a public redacted version was filed on 27 February 2024, F02150/RED).

⁷ F02169, Specialist Prosecutor, *Prosecution Response to Joint Defence Motion for Appointment of Amicus Curiae Investigator or for Alternative Relief*, 7 March 2024, strictly confidential (a public redacted version was filed on the same day, F02169/RED).

⁸ Request, paras 1, 8-20, 32.

⁹ Request, paras 1-2, 8-9.

¹⁰ Request, paras 2, 15, 18-21.

¹¹ Request, paras 3, 22-29, 32.

¹² Request, paras 4, 30, 32.

¹³ Response, paras 1, 9-15, 18.

offences within the Specialist Chamber, including those related to SPO witnesses;¹⁴ and (iii) the appointment of an *amicus curiae* investigator has no basis in the Law or the Rules.¹⁵ The SPO adds that it remains cognisant of its disclosure obligations,¹⁶ and willing to investigate the allegations in the Letter as there is no conflict of interest.¹⁷ Lastly, the SPO maintains that, as W04577's testimony has been adjourned until further notice, no further adjournment is necessary at this stage.¹⁸

III. APPLICABLE LAW

9. Pursuant to Article 40(2), the Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused.

10. Pursuant to Article 40(6)(e), the Panel may, as necessary, order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.

11. Pursuant to Rule 48(2), the Panel may upon request by a Party or *proprio motu*, issue such arrest warrants, summonses, decisions or orders as may be necessary for the purposes of the investigation or for the preparation and conduct of the proceedings.

12. Pursuant to Rule 116, the Panel shall, on an ongoing basis, take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings.

¹⁴ Response, para. 1-3, 18.

¹⁵ Response, paras 1, 4, 18.

¹⁶ Response, paras 1, 5.

¹⁷ Response, paras 1, 6-8.

¹⁸ Response, paras 1, 16, 18.

IV. DISCUSSION

A. REQUEST FOR RECONSIDERATION

13. In respect of the SPO's argument that the Defence has failed to establish the requirements for a request for reconsideration,¹⁹ the Panel considers that the Request does not constitute a request for reconsideration.

14. The Decision concerned the authorisation, pursuant to Rule 108, of one non-standard redaction to the Letter, which contained Rule 103 information.²⁰ Neither Party is requesting the Panel to lift this redaction.²¹ Rather the Defence seeks a remedy, in particular, the appointment of an *amicus curiae* investigator, to investigate matters described in the Letter. This is a remedy which was not and could not have been requested earlier as the Decision was litigated and rendered with the Letter *ex parte* to the Defence. The Panel, therefore, finds that the Request does not amount to a request for reconsideration of the Decision and will address the merits of the Request.

B. REPORTS CONCERNING [REDACTED]

15. The Panel recalls that it previously ordered [REDACTED] the Witness Protection and Support Office ("WPSO" and "[REDACTED]") to liaise with [REDACTED] and report back to the Panel every two months on [REDACTED].²² Since then, WPSO has submitted three reports to the Panel ("Reports").²³ The Reports are not available to the Parties or participants. The Panel considers that there is information in the Reports which should be made available to the Parties, Victims' Counsel and Duty Counsel. The Panel, therefore, orders the Registrar to

¹⁹ Response, paras 1, 9-15.

²⁰ Decision, paras 7-8.

²¹ See Request; Response.

²² Decision on Request for Adjournment of W04577's Testimony, paras 13, 15, 28(a).

²³ [REDACTED]; [REDACTED]; [REDACTED].

file strictly confidential redacted versions of the Reports.

16. In light of the information contained in the Reports, the Panel invites the SPO to consider [REDACTED].

C. REQUEST FOR APPOINTMENT OF *AMICUS CURIAE* INVESTIGATOR

17. The Panel recalls that, in the Decision, it authorised the redaction of the name of the author of the Letter.²⁴ The Defence argues that this redaction prevents it from effectively investigating the allegations in the Letter and, therefore, requests the appointment of an *amicus curiae* investigator.²⁵ The SPO argues that there is no provision in the Rules that would enable the Panel to appoint an *amicus curiae* investigator.²⁶

18. The Panel accepts that the Letter appears to be potentially relevant to the credibility of W04577, as argued by the Defence.²⁷ The Panel further accepts that, as the Defence is not aware of the identity of the author of the Letter, the Defence is hampered in its efforts to further investigate the allegations contained in the Letter. The Panel also notes that the Defence is not authorised to contact W04577 at this time as the witness has begun and has not yet finished his testimony.

19. As for the legal basis to appoint an *amicus curiae* investigator, the Panel observes that the Law and the Rules, read as a whole, neither expressly require nor prohibit the appointment of an *amicus curiae* to assist the Panel in investigating a particular matter. Rule 67 gives the Panel broad discretion to appoint *amicus curiae* to submit observations on any issue that the Panel deems appropriate and which would assist in the proper determination of the case. Articles 40(2), 40(6)(e) and Rule 48(2) give the Panel broad discretion to issue such orders as are necessary

²⁴ Decision, paras 7-8.

²⁵ Request, paras 1-2, 8-9.

²⁶ Response, para 3-4.

²⁷ Request, paras 1, 8-9.

for the purposes of investigation or for the preparation and conduct of the proceedings. Rule 116 requires the Panel, on an ongoing basis, to take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings.

20. In the present circumstances, the Panel considers that it is not necessary to decide whether it has the power to appoint an *amicus curiae* investigator as the SPO has indicated that, “should the Panel consider it appropriate for the witness to be contacted at this time, and authorises such contact for the limited purpose of further investigating the contents of the Letter, the SPO stands ready to do so”.²⁸

21. The Panel will authorise the SPO to make such contact for the limited purpose outlined above, if it still wishes to proceed [REDACTED]. The Panel is not persuaded by the Defence argument that the SPO cannot investigate the allegations in the Letter as this would give rise to a conflict of interest.²⁹ As the SPO notes,³⁰ there is always a possibility that prosecutors obtain information which adversely impacts the credibility of a prosecution witness. Rule 103 expressly foresees that information will come within the SPO’s possession “which may reasonably affect the credibility of reliability of the Specialist Prosecutor’s evidence”. Accordingly, the Panel considers that the fact that the Letter may contain information which affects the credibility of a prosecution witness does not give rise to an actual or potential conflict of interest. Accordingly, and in light of the SPO volunteering to investigate the matter, it is not necessary to appoint an *amicus curiae* investigator assuming that the Panel would have the authority to do so.

22. If the SPO wishes to proceed with [REDACTED], the Panel accepts the Defence’s argument that the SPO should also consider interviewing the author of

²⁸ Response, para. 8.

²⁹ Request, paras 2, 15, 18-21.

³⁰ Response, para. 6.

the Letter, who may be able to further explain the content of the Letter.³¹

23. Accordingly, the Panel authorises the SPO, if it intends to proceed with [REDACTED], to contact W04577 and urges it to consider interviewing the author of the Letter to further investigate the content of the Letter and to notify the Panel, the Defence, Duty Counsel and the Victims' Counsel of its findings.

24. The Panel is satisfied that there is no undue prejudice caused to the Defence by authorising the SPO to carry out these inquiries. If the SPO decides to pursue the [REDACTED], the Defence will be able to put the content of the Letter to W04577 during cross-examination, as well as any further information disclosed to it by the SPO as a result of SPO inquiries, and may make such arguments as it wishes in relation to the witness's credibility in its closing arguments.

25. Mindful of its obligations to protect the safety, physical and psychological well-being of witnesses,³² the Panel directs that any contact by the SPO with W04577 shall be done in coordination with the [REDACTED] and Duty Counsel. In this respect, given the [REDACTED],³³ the SPO may contact W04577 and the author of Letter about the Letter at a time it deems appropriate, following discussions with WPSO, provided that all necessary investigative steps and any related disclosures are completed sufficiently in advance of the continuation of W04577's testimony to allow the Defence to review any newly disclosed material.

26. Finally, the Panel emphasises that "the Parties and participants are expected to try to resolve issues arising between them before seeking the assistance of the Trial Panel".³⁴ In this respect, the Panel considers that the SPO's initial response to the Defence that "[t]here is no obligation for the SPO to inform the Defence about investigative steps, if any",³⁵ was unhelpful in the present circumstances. In the

³¹ Request, para. 29.

³² Article 23(1); Rule 80(1).

³³ See *supra*, fn. 23.

³⁴ F01226/A01, Panel, *Annex 1 to the Order on the Conduct of Proceedings*, 25 January 2023, para. 43.

³⁵ Annex 1 to the Request, p. 1.

future, the Panel encourages the SPO to respond more constructively to Defence inquiries, as it did in the Response.³⁶

D. REQUEST FOR FURTHER ADJOURNMENT OF W04577'S TESTIMONY

27. As W04577's testimony is adjourned until further notice and until such time as the Panel is satisfied of his fitness to testify,³⁷ and as the Panel has instructed the SPO to investigate the allegations in the Letter before W04577 continues to testify,³⁸ the request for further adjournment is moot.

V. DISPOSITION

28. For these reasons, the Panel hereby:

- a) **ORDERS** the Registrar to file strictly confidential redacted versions of the Reports, to be made available to the Parties, Victims' Counsel and Duty Counsel;
- b) **INVITES** the SPO consider whether [REDACTED];
- c) **REJECTS** the request to appoint an *amicus curiae* investigator;
- d) **AUTHORISES** the SPO, if it considers it necessary to further proceed with the [REDACTED], to contact W04577 in accordance with paragraph 25, and **URGES** the SPO to contact the author of the Letter, to investigate the allegations in the Letter and to notify the Panel, Defence, Duty Counsel and Victims' Counsel of its findings promptly thereafter; and
- e) **DECLARES** moot the request to further adjourn W04577's testimony.

³⁶ Response, para. 8.

³⁷ Decision on Request for Adjournment of W04577's Testimony, paras 13, 15, 28(a).

³⁸ See *supra*, para. 25.



Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 14 June 2024

At The Hague, the Netherlands.