



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 16 August 2023

Language: English

Classification: Confidential

Decision on Thaçi Defence Request Concerning Contact with W04290

Acting Deputy Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21(2) and (4)(c), 40(2) and 40(6)(f) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 24 June 2022, the Pre-Trial Judge issued a decision (“Contact Decision”)¹ setting out a “Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant” (“Protocol”).²

2. On 27 December 2022, the Court of Appeals dismissed appeals from the Defence teams against the Contact Decision and upheld the Protocol (“Appeal Decision”).³

3. On 21 June 2023, the Specialist Prosecutor’s Office (“SPO”) informed the Panel, the Parties and the participants of its decision “not to call W04290 at this stage, and to keep the necessity of his evidence under review as [the Prosecution] case develops.”⁴

4. On 26 June 2023, the Defence for Hashim Thaçi (“Defence”) sought clarification from the SPO regarding the impact of this decision on the Defence’s contact with W04290. The Defence suggested that the application of the Protocol should be

¹ F00854, Pre-Trial Judge, *Decision on Framework for the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, 24 June 2022.

² Contact Decision, para. 212.

³ IA024/F00019, Court of Appeals Panel, *Decision on Defence Appeals against “Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant”*, 27 December 2022.

⁴ See Correspondence 271.

lifted as regards W04290 and that the Defence should be allowed to interview W04290 prior to W04746's testimony and outside the presence of the SPO.⁵

5. On 28 June 2023, the SPO responded to the Defence by stating that the order in which witnesses are called has no bearing upon the application of the Protocol.⁶

6. On 4 July 2023, the Defence filed a request concerning contact with W04290 ("Request").⁷

7. On 14 July 2023, the SPO responded to the Request ("Response").⁸

8. The Defence did not reply.

II. SUBMISSIONS

9. The Defence requests the Panel to clarify that the Defence is relieved of its obligations under the Protocol when speaking to W04290.⁹ It argues that the statement, by the SPO, that it no longer intends to call W04290 at this stage: (i) is a material change in circumstances;¹⁰ and (ii) cannot be due to scheduling or efficiency concerns, but rather, is a strategic decision on behalf of the SPO as this witness is able to present significant exculpatory evidence.¹¹ The Defence submits that, when the SPO identifies witnesses which it no longer intends to call, the ability of the Defence to contact such witnesses necessarily changes.¹² The Defence submits that a plain reading of the Protocol dictates that this is the only reasonable outcome in light of the SPO's notification that it will not call W04290 to testify at

⁵ See F01639/A02, Specialist Counsel, *Annex 2 to Taçi Defence Request as Regards Contact with W04290*, 4 July 2023, confidential.

⁶ See Annex 2 to the Request.

⁷ F01639, Specialist Counsel, *Taçi Defence Request as Regards Contact with W04290*, 4 July 2023, confidential, with Annexes 1 and 2, confidential.

⁸ F01677, Specialist Prosecutor, *Prosecution Response to Taçi Request Concerning Contact with W04290*, 14 July 2023, confidential.

⁹ Request, paras 13, 17.

¹⁰ Request, para. 1.

¹¹ Request, para. 10.

¹² Request, para. 10.

this stage.¹³ The Defence avers that the application of the Protocol should be strictly limited to witnesses which the SPO intends to call to testify as the Protocol impedes its ability to investigate and collect evidence by forcing the Defence to choose between its right to fully investigate and its right not to be compelled to produce evidence.¹⁴ The Defence further argues that an interview of W04290 by the Defence will contribute to the efficient conduct of the proceedings as it will ensure that the most relevant and probative evidence is presented to the Panel.¹⁵

10. The SPO responds that the Panel should deny the Request.¹⁶ First, the SPO argues that there has been no material change of circumstances since the Appeal Decision,¹⁷ so the Protocol continues to apply in relation to W04290.¹⁸ Second, the SPO submits that the Request is premature as the Defence has not requested to contact W04290 through the Protocol and has not exhausted reasonable *inter partes* discussions.¹⁹

III. APPLICABLE LAW

11. In the Contact Decision, the Pre-Trial Judge ordered the following procedure, which was upheld in the Appeal Decision:²⁰

II. Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant

- a. Except under the conditions specified herein, prior to testimony, Parties and participants shall not contact or interview a witness of another Party or participant if the intention to call the witness to testify or to rely on his or her statement has been notified to the opposing Party or participant.

¹³ Request, para. 14.

¹⁴ Request, para. 15.

¹⁵ Request, para. 16.

¹⁶ Response, paras 1, 11.

¹⁷ Response, paras 1, 3-5.

¹⁸ Response, paras 1, 6.

¹⁹ Response, paras 2, 7-9.

²⁰ Appeals Decision, para. 106.

- b. If an opposing Party or participant wishes to interview a witness of another Party or participant, it shall notify the calling Party, the Court Management Unit (“CMU”) and, in relation to dual status witnesses, Victims’ Counsel at least ten days prior to the intended interview. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party and shall also inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness, Victims’ Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview. In exceptional circumstances, a Party or participant may, after having consulted sufficiently in advance with the Registry, apply to the Panel to additionally require the presence of Registry representatives. The calling Party shall inform the opposing Party whether the witness consents. In addition, where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness, regardless of the witness’s expressed preferences. If the calling Party seizes the Panel or indicates to the opposing Party that it shall do so, the opposing Party shall refrain from interviewing the witness until the Panel has issued its decision. The procedure in this section shall not apply to an interview conducted by the SPO with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.
- c. If a Party or participant contacts an opposing Party or participant witness inadvertently or during WPSO-organized courtesy meetings, the Party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness’s consent to be interviewed directly. A witness’s consent to be interviewed may be obtained only through the procedure set out in the previous subparagraph.
- d. The opposing Party conducting the interview (“interviewing Party”) shall:
 - i. ensure that the interview is conducted effectively and expeditiously;
 - ii. prepare copies of all documents to be shown to the witness in a language which he or she understands together with an English translation to be provided to the calling Party;
 - iii. refrain from talking to the witness outside the timeframe of the interview and the video-recording, so that all statements and utterances made are duly recorded;
 - iv. refrain from any action that could be regarded as threatening or provocative; and
 - v. otherwise comply with any order made by the Trial Panel.

[...]

- h. [...] Furthermore, where applicable, the Registry shall ensure that a Court Officer or another designated representative of the Registry is present during

the interview, and that a witness-support representative is on site, where considered necessary by WPSO.

- i. Prior to the commencement of the interview, the interviewing Party shall advise the witness that he or she:
 - i. is not required to participate in the interview and can decide to stop being interviewed at any time;
 - ii. can refuse to answer questions, in particular if they are thought to be potentially self-incriminating;
 - iii. can ask for a recess at any time; and
 - iv. can ask to meet with a WPSO representative at any time during the interview.²¹

12. It was made clear by the Pre-Trial Judge and the Court of Appeals Panel that the Protocol was only ever intended to apply to those individuals whom a Party (in this case the SPO) intends to call as witness in its case.²² This is consistent with the view that witnesses are not the “property” of either Party,²³ but that certain measures might need to be adopted in respect of the witnesses of the opposing side in order to ensure the integrity of the evidential process.²⁴

IV. DISCUSSION

13. The SPO gave notice of its intention to call W04290 as a witness in its case by listing it as one of its proposed witnesses pursuant to Rule 95(4)(b) and disclosing its statements and records of interview in accordance with Rule 102(1)(b)(i).²⁵ That

²¹ Contact Decision, para. 212.

²² See e.g. Contact Decision, paras 183-185 (regarding the definition of witnesses and reference to “notified witnesses”), 212 (Protocol (II)(a)); F00939, Pre-Trial Judge, *Decision on Defence Requests for Leave to Appeal Decision F00854*, 26 August 2022, para. 94(a) (granting leave to appeal the Third Krasniqi Issue (i.e. issue (h)) making reference to “witnesses that a party intends to call”); Appeal Decision, paras 43 (“contacts between witnesses and the non-calling party”), 77 (references to the “calling party” and reference to “notified witnesses”).

²³ See e.g. ICTY, *Prosecutor v Mrkšić et al*, IT-95-13/1-AR73, Appeals Chamber, [*Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Other Party*](#), 30 July 2003, para. 15.

²⁴ See e.g. KSC-BC-2020-07, F00314/A01, Trial Panel II, *Annex 1 to Order on the Conduct of Proceedings*, 17 September 2021, paras 27-40.

²⁵ See F00631/RED/A02/COR/CONF/RED, Specialist Prosecutor, *Corrected Version of Annex 2 to Public Redacted Version of ‘Submission of Pre-Trial Brief, with Witness and Exhibit Lists’*, KSC-BC-2020-06/F00631, dated 17 December 2021 (“F00631/A02”), 23 May 2022, confidential, p. 9, no. 150, pp. 257-258. See also F01594/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Updated Witness List and*

intention was further reiterated when the SPO initially listed W04290 as one of the witnesses it intended to call in the first block of witnesses to be called in its case.²⁶ As such, W04290 was a “notified witness” for the purpose of the Protocol.

14. The Panel recalls that the Order on the Conduct of Proceedings, provides that:

With respect to the procedure and safeguards applicable to contacts with the opposite Party’s or participant’s witnesses, Parties and participants shall abide by the [Appeal Decision]. Where a Party or participant considers that **circumstances have changed in a material way since the [Appeal Decision] so as to affect the basis on which that decision was taken, the Party or participant may seek appropriate relief from the Panel.**²⁷ (emphasis added, footnote omitted)

15. The Panel will therefore assess whether the Defence has demonstrated that circumstances have changed in a material way in relation to W04290 since the issuance of the Appeal Decision, so as to materially affect in respect of this individual the basis on which that decision was taken.²⁸

16. At the outset, the Panel notes that the Defence asserts that “when the SPO identifies witnesses which it *no longer* intends to call, the ability of the Defence to contact such witnesses necessarily changes.”²⁹ The Panel observes, however, that this description does not accurately reflect the SPO’s present stance with respect to W04290. The Panel observes that the SPO indicated that it no longer intends to call W04290 “at this stage”, *i.e.* during the first block of SPO witnesses, but “it *still* intends to call [W04290].”³⁰ The SPO further indicated that it would keep the necessity of his evidence under review as the case develops.³¹ It is apparent from

Confidential Lesser Redacted Version of Pre-Trial Brief (“Updated Witness List”), 9 June 2023, confidential, p. 9, no. 146, pp. 249-250. See e.g. Disclosure Package 66.

²⁶ F01243/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, confidential, pp. 24-25.

²⁷ F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings (“Order on the Conduct of Proceedings”)*, 25 January 2023, para. 71.

²⁸ Order on the Conduct of Proceedings, para. 71.

²⁹ Request, para. 10.

³⁰ Response, para. 3.

³¹ Annex 1 to the Request.

this that the SPO still intends to call W04290 as a witness, though at a later point in the proceedings.

17. In the Panel's view, the notification that the SPO does not intend to call W04290 "at this stage" in the proceedings does not alter the situation that the SPO *notified* the Defence of its *intention* to call the witness to testify.³² That the witness will be called in a different order to the one initially foreseen by the SPO does not change the fact that the Defence was, and remains, on notice that the SPO intends to call W04290 to testify – an intention which the SPO reiterated.³³ The Panel is therefore not persuaded by the Defence's submission³⁴ that circumstances have materially changed in respect of this witness since the Appeal Decision such that the Defence would be relieved of its obligations under the Protocol when speaking with W04290.

18. Second, the Panel is also not persuaded by the Defence's submission³⁵ that, if there was no change in circumstances, the SPO would never have notified the Defence of its changed intention. The Panel recalls that it is the duty of the presenting Party to notify the Panel, the other Parties and participants, as soon as possible of any changes to *the order* in which witnesses are to be called.³⁶ It follows that, in this instance, the SPO was required to provide this information to the Defence. As already noted, a change in the order in which the SPO intends to call its witnesses cannot be regarded as an intention on its part not to call a particular witness.

19. Third, the Panel notes that some of the arguments raised by the Defence in support of the Request – namely that the application of the Protocol impedes its

³² See F00631/A02, p. 9, no. 150, pp. 257-258. See also Updated Witness List, p. 9, no. 146, pp. 249-250.

³³ Response, para. 3.

³⁴ Response, para. 14.

³⁵ Request, para. 13.

³⁶ Order on the Conduct of Proceedings, para. 80.

investigations and its ability to collect evidence³⁷ – were previously rejected by the Court of Appeals Panel.³⁸ These arguments have already been fully entertained and authoritatively decided and cannot constitute a material change of circumstances since the issuance of the Appeal Decision.

20. In addition, the Panel reiterates³⁹ that the Defence is free to seek to interview W04290 under the Protocol. Noting that the Defence wishes to interview W04290 “in the absence of the SPO”,⁴⁰ the Panel recalls that, save for exceptional circumstances, it is up to the witness to decide whether he wishes the calling party, or any of the other identified representatives, to be present at the interview.⁴¹ The Panel further recalls that the witness’s consent to be interviewed by the opposing party may be obtained only through the procedure set out in the Protocol.⁴² In the present case, the Defence would first have to notify the SPO of its wish to interview W04290; in turn, the SPO will have to: (i) ascertain whether W04290 consents to being interviewed by the Defence; (ii) inform W04290 of the possibility of having the SPO, a legal representative of the witness, and/or a WPSO representative present during the interview and ascertain whether W04290 wishes any of them to be present; (iii) inform the Defence whether W04290 consents to the interview and which, if any, of the identified representatives he wants to be present; and (iv) in exceptional circumstances the SPO may, after having consulted sufficiently in advance with the Registry, apply to the Panel to additionally require the presence of Registry representatives. The process set out above has yet to be put in motion by the Defence and the Panel will not prejudge any issue that depends on the Parties’ compliance therewith.

³⁷ Request, para. 15.

³⁸ Appeals Decision, para. 83.

³⁹ See F01467, Panel, *Decision on Thaçi Defence Request to Vary the Contact Decision for W04147* (“Decision on Request to Vary the Contact Decision”), 17 April 2023, confidential, para. 29. See also F01250, Panel, *Decision on Thaçi Defence Motion Regarding the Preservation of Evidence*, 2 February 2023, para. 40.

⁴⁰ See Request, para. 6. See also Annex 2 to the Request.

⁴¹ Decision on Request to Vary the Contact Decision, para. 26.

⁴² See similarly Decision on Request to Vary the Contact Decision, para. 27.

21. In relation to possible further changes to the SPO's witness list in the upcoming months,⁴³ the Panel notes that the order in which witnesses are to be called is primarily within the responsibility of the calling Party. Such order has no bearing upon the application of the Protocol, so long as the calling Party still intends to call an individual as a witness in its case. The Panel reiterates that the Protocol is only intended to apply in respect of witnesses whom the calling party (the SPO in this case) intends to call. Therefore, if and when the SPO takes the view that it will not call a particular witness who is included on its list, it is required to give prompt notice of that fact to the Defence. The SPO is not permitted to keep individuals subject to the Protocol if it has no more intention to call that person as a witness. This requires of the SPO to proactively review, on an ongoing basis, its list of proposed witnesses and to give the Defence prompt notice of any decision taken not to call a particular witness.

22. Therefore, should the SPO decide at any point not to call W04290 (or any other witness(es)), it must promptly notify the Panel, the Defence and Victims' Counsel of this fact.

23. In light of the above, the Panel finds that the Defence has failed to demonstrate that circumstances in relation to W04290 have changed in a manner that materially affects the basis on which the Appeal Decision was taken. Accordingly, the Panel denies the Request, clarifies that the Protocol continues to apply in relation to W04290, and reiterates that, should the Defence wish to interview this witness, it shall follow the procedure set out in the Contact Decision.

V. CLASSIFICATION

24. The Panel notes that both the Request (F01639) and the Response (F01677) were filed confidentially. The Panel also notes that the SPO has no objection to the

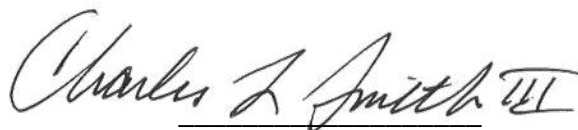
⁴³ Response, para. 4.

reclassification as public of the Response (F01677).⁴⁴ The Panel directs the Registry to reclassify the Response as public and orders the Defence to file a public redacted version of the Request, or to request its reclassification as public, by **Wednesday, 23 August 2023**.

VI. DISPOSITION

25. The Panel hereby:

- a) **DENIES** the Request;
- b) **DIRECTS** the Registry to reclassify as public the Response (F01677) by **Wednesday, 23 August 2023**; and
- c) **ORDERS** the Defence to file a public redacted version of the Request (F01639), or to request its reclassification as public, by **Wednesday, 23 August 2023**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Wednesday, 16 August 2023

At The Hague, the Netherlands.

⁴⁴ Response, para. 10.