



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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 17 April 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of  
Decision on Thaçi Defence Request to Vary the Contact Decision for W04147**

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**Counsel for Kadri Veseli**

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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”) and Rules 80(1) and 81 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 24 June 2022, the Pre-Trial Judge issued a decision 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 (“Contact Decision”).<sup>1</sup>
2. On 27 December 2022, following an appeal by the Defence,<sup>2</sup> the Court of Appeals Panel upheld the Contact Decision (“Court of Appeals Decision”).<sup>3</sup>
3. On 25 January 2023, the Panel ordered that the Parties and participants shall abide by the Court of Appeals Decision (“Order on the Conduct of Proceedings”).<sup>4</sup>
4. On 6 March 2023, the Defence for Mr Hashim Thaçi (“Defence”) filed a request for a variation to the Contact Decision in relation to W04147 (“Request”).<sup>5</sup>

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<sup>1</sup> 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.

<sup>2</sup> IA024/F00002, Specialist Counsel, *Thaçi Appeal Against the “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*, 8 September 2022.

<sup>3</sup> 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.

<sup>4</sup> F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, para. 71.

<sup>5</sup> F01345, Specialist Counsel, *Thaçi Defence Request to Vary the Contact Decision 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*, 6 March 2023, confidential, with Annex 1, confidential.

5. On 16 March 2023, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response").<sup>6</sup>

6. The Defence did not reply.

## II. SUBMISSIONS

7. The Defence requests a variation of the Contact Decision in relation to W04147 to enable it to interview the witness in advance of his testimony, in the absence of the SPO, and free of the constraints of the Contact Decision.<sup>7</sup> The Defence submits that circumstances have changed in a material way since the Court of Appeals Decision for several reasons.<sup>8</sup> The Defence argues that it would be preferable to waive the Contact Decision for W04147, to enable both the SPO and the Defence to speak freely with the witness to ascertain which party he will testify for.<sup>9</sup>

8. Second, the Defence submits that W04147 spoke extensively with the Defence, did not express any fear, and indicated that he would be happy to speak to the Defence again.<sup>10</sup> On this basis, the Defence argues that the Contact Decision's preventative protection from intimidation and/or pressure is unwarranted in respect of W04147.<sup>11</sup>

9. Third, the Defence submits that, in July 2022, [REDACTED] confirmed to the Defence that it was willing to authorise the Defence to interview W04147 under certain conditions ("[REDACTED] Letter").<sup>12</sup> The Defence avers that the

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<sup>6</sup> F01381, Specialist Prosecutor, *Prosecution Response to Thaçi Request to Waive Witness Contact Protocol for W04147*, 16 March 2023, confidential.

<sup>7</sup> Request, paras 2, 15.

<sup>8</sup> Request, paras 3, 10. *See also* Request, para. 9.

<sup>9</sup> Request, para. 11.

<sup>10</sup> Request, para. 12.

<sup>11</sup> Request, para. 12.

<sup>12</sup> Request, para. 13 *referring to* Annex 1 to the Request. The Defence explains that the conditions are: (i) any information gleaned from the interview would remain confidential and could not be disseminated outside the authorised members of the Defence team without written permission of the [REDACTED]; (ii) counsel present at any interview or who receive information gleaned from it to sign

conditions set by [REDACTED] ensure the level of safety which the Contact Decision intended to achieve, rendering the presence of the SPO at W04147's interview unnecessary.<sup>13</sup>

10. Finally, the Defence argues that, insofar as it agreed with [REDACTED] to share the information to be obtained in W04147's interview only with the members of the Defence team who signed a non-disclosure agreement, compliance with the Contact Decision will put the Defence in breach of its obligations towards [REDACTED].<sup>14</sup>

11. The SPO responds that the Request should be denied because the Defence has failed to demonstrate a material change of circumstances since the Court of Appeals Decision.<sup>15</sup> The SPO submits that neither the Defence's prior contacts with W04147,<sup>16</sup> nor the involvement of [REDACTED] in interviews of W04147,<sup>17</sup> justify the Request. The SPO rejects the Defence's contention that the Contact Decision would prevent the SPO from contacting W04147 on the basis that the Defence indicated its intention to call him as a Defence witness.<sup>18</sup> This interpretation, the SPO argues, would be harmful to the objectives underlying the Contact Decision.<sup>19</sup> The SPO avers that the Request is premature as the Defence made no request to contact W04147 through the procedures set out in the Contact Decision.<sup>20</sup>

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non-disclosure agreements; and (iii) representatives of the [REDACTED] are required to be present in any interview (collectively, "Conditions").

<sup>13</sup> Request, para. 13.

<sup>14</sup> Request, para. 14.

<sup>15</sup> Response, paras 1, 8-10, 29-30.

<sup>16</sup> Response, paras 11-17.

<sup>17</sup> Response, paras 18-24.

<sup>18</sup> Response, paras 25-27.

<sup>19</sup> Response, para. 27.

<sup>20</sup> Response, paras 2, 29.

### III. APPLICABLE LAW

12. In the Contact Decision, the Pre-Trial Judge ordered the following procedure, which was upheld in the Court of Appeals Decision:<sup>21</sup>

#### **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.
- 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.

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<sup>21</sup> Court of Appeals Decision, para. 106.

- 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.<sup>22</sup>

#### IV. DISCUSSION

13. In the Order on the Conduct of Proceedings, the Panel stated with respect to the procedure and safeguards applicable to contacts with the opposite Party’s or participant’s witnesses: “Where a Party or participant considers that circumstances have changed in a material way since the [Court of Appeals Decision] so as to affect the basis on which that decision was taken, the Party or

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<sup>22</sup> Contact Decision, para. 212.

participant may seek appropriate relief from the Panel”.<sup>23</sup> The Panel will first assess whether the Defence has demonstrated that circumstances have changed in a material way since the issuance of the Court of Appeals Decision, so as to materially affect the basis on which that decision was taken.<sup>24</sup>

14. The Defence argues that the assessment of the Court of Appeals – as to whether the Pre-Trial Judge erred in finding that the Contact Decision should apply equally to different categories of witnesses – was conducted *hypothetically*, not in relation to W04147 specifically. The Defence submits that certain issues related to W04147 were not litigated at the time, and should be regarded as “new facts which require consideration”,<sup>25</sup> in particular the Defence’s prior contacts with W04147 and its intent to call him as a witness for the Defence. The Defence argues that “neither party can talk to him without consulting the other and undertaking the arduous procedures for contact set out in” the Contact Decision.<sup>26</sup>

15. The Defence states that the contacts of the Defence with W04147 occurred “[p]rior to the imposition of” the Contact Decision and it was “on the basis of these conversations” that the Defence intended to call W04147 as a witness.<sup>27</sup>

16. It is apparent from the above that the prior contacts of the Defence with W04147, and in turn the Defence’s decision to call W04147 as a witness, pre-dated the Court of Appeals Decision. These factors do not constitute a new fact or circumstance arising after that decision.

17. Furthermore, the relevance of prior contacts with witnesses was already raised before and considered by the Court of Appeals Panel.<sup>28</sup> The Court of

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<sup>23</sup> Order on Conduct of Proceedings, para. 71.

<sup>24</sup> Order on Conduct of Proceedings, para. 71.

<sup>25</sup> Request, para. 10 *referring to* Court of Appeals Decision, paras 43-49.

<sup>26</sup> Request, para. 11.

<sup>27</sup> Request, para. 11.

<sup>28</sup> IA024-F00002, Specialist Counsel, *Thaçi Appeal Against the “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”* (“Thaçi Appeal of the Contact Decision”), 8 September 2022, paras 1, 51.

Appeals Panel nonetheless did not consider that such contacts would justify variation of the Contact Decision.<sup>29</sup>

18. The Defence also raised this same argument before this Panel when seeking to secure an exception to the Contact Decision in relation to W04147.<sup>30</sup> In its decision on that request, the Panel noted that it “understands that the Defence was in contact with W04147 prior to the issuance of the Contact Decision”, but held “nonetheless that, should the Defence wish to interview W04147 further, the Defence could ask to do so under the conditions set out in the Contact Decision”.<sup>31</sup> The Panel reiterates this finding for present purposes.

19. The Defence argues that “neither party can talk to [W04147] without consulting the other and undertaking the arduous procedures” set out in the Contact Decision on the premise that the Defence seeks to call him as a witness for the Defence.<sup>32</sup> The Panel is not persuaded by this argument. The SPO notified its intent to call W04147 in its [REDACTED].<sup>33</sup> As a result, W04147 became a prospective SPO witness, thus triggering the application of the Contact Decision. The SPO is the “calling Party” for the purposes of the Contact Decision. That the Defence contemplates calling W04147 as a Defence witness does not alter the fact that he is a prospective SPO witness in respect of whom contacts are regulated by the Contact Decision.

20. The Panel will now address the argument of the Defence that W04147 expressed no fear, spoke extensively to the Defence, and indicated he would be

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<sup>29</sup> See e.g. Court of Appeals Decision, para. 106.

<sup>30</sup> F01191, Specialist Counsel, *Thaçi Defence Motion Regarding the Preservation of Defence Evidence*, 9 January 2023, confidential, para. 31.

<sup>31</sup> See F01250, Panel, *Decision on Thaçi Defence Motion Regarding the Preservation of Evidence* (“Decision on Thaçi Defence Motion Regarding the Preservation of Evidence”), 2 February 2023, para. 40.

<sup>32</sup> Request, para. 11.

<sup>33</sup> [REDACTED].



happy to speak to the Defence again,<sup>34</sup> and that there is therefore “no need for preventative protection” for W04147.<sup>35</sup>

21. The Panel observes that the Thaçi Defence raised this point before the Court of Appeals Panel,<sup>36</sup> which expressly rejected it, finding that the Contact Decision “is not contingent upon any actual need for protection”, “is of a preventative nature”, and “will apply to all notified witnesses regardless of whether they have expressed security concerns”.<sup>37</sup> The Court of Appeals Panel held that it was “therefore irrelevant whether the high-ranking and/or international witnesses complained about any impropriety or whether they fall outside of the geographic scope of interference”.<sup>38</sup> The Panel agrees with this analysis and has no reason to revisit it.

22. The Panel now turns to the Defence’s contention that the conditions set by the [REDACTED] and the presence of [REDACTED] at interviews between W04147 and the Defence would: (i) ensure the safety of the witness envisaged by the Contact Decision; and (ii) render the presence of the SPO at the interview unnecessary.<sup>39</sup>

23. The Panel observes that the [REDACTED] Letter dates from July 2022. The Defence was thus not in a position to raise it before the Pre-Trial Judge prior to the Contact Decision. However, the Defence was in possession of the [REDACTED] Letter when it appealed the Contact Decision and could have raised it before the Court of Appeals Panel. The Defence has provided no reason for failing to do so and may therefore be regarded as having waived the possibility of doing so now. Furthermore, the [REDACTED] Letter does not constitute a

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<sup>34</sup> Request, para. 12.

<sup>35</sup> Request, para. 12.

<sup>36</sup> See e.g. Thaçi Appeal of the Contact Decision, paras 38, 40.

<sup>37</sup> Court of Appeals Decision, para. 45.

<sup>38</sup> Court of Appeals Decision, para. 45.

<sup>39</sup> Request, para. 13.

circumstance that could be said to have changed in a material way since the Court of Appeals Decision. The Specialist Chambers is not in a position to order, monitor or regulate the manner in which the [REDACTED] would participate in this process. The Contact Decision does not foresee that the responsibility to regulate this matter can be delegated to third parties. For these reasons, the Panel does not accept that the presence or participation of [REDACTED] representatives would provide a viable alternative to the framework set out by the Contact Decision.

24. With regard to the Defence's argument that compliance with the Contact Decision in relation to W04147 would put the Defence in breach of its obligations towards the [REDACTED],<sup>40</sup> the Panel observes that, in the [REDACTED] Letter, the [REDACTED] noted that it trusted that the Defence "will take any other additional steps as required by relevant decisions [...] and procedures of the [Specialist Chambers]" before commencing any interviews.<sup>41</sup> Accordingly, as pointed out by the SPO,<sup>42</sup> there is no reason to suggest that the [REDACTED] would not be willing to accommodate the requirements of the Contact Decision.

25. Having reviewed the specific issues relating to W04147 advanced by the Defence, the Panel is not satisfied that circumstances in relation to W04147 have changed in a material way since the issuance of the Court of Appeals Decision, so as to affect the basis on which that decision was taken.

26. Finally, the Panel notes that the Defence seeks to interview W04147 "without the presence of the SPO".<sup>43</sup> The Contact Decision provides that, following a request by the opposing party to the calling party to interview a witness, "[t]he 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'

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<sup>40</sup> See Request, para. 14.

<sup>41</sup> See Annex 1 to the Request.

<sup>42</sup> Response, para. 24.

<sup>43</sup> Request, paras 2, 15.

Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview.” Therefore, it is up to the witness to decide whether he or she wishes the calling party, or any of the other identified representatives, to be present at the interview.<sup>44</sup> It does not depend on the calling party’s preference. However, in exceptional circumstances, and irrespective of the witness’s expressed preference, the Contact Decision provides for a further safeguard: “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.” Even in these exceptional circumstances, the presence of the calling party at the interview is not mandatory unless the witness requests it.

27. The Panel further emphasises that the witness’s consent to be interviewed by the opposing party may be obtained *only* through the procedure set out in the Contact Decision.<sup>45</sup> In the present case, the Defence must first notify the SPO of its wish to interview W04147; in turn, the SPO will have to: (i) ascertain whether W04147 consents to being interviewed by the Defence; (ii) inform W04147 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 the witness wishes any of them to be present; (iii) inform the Defence whether W04147 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

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<sup>44</sup> Contact Decision, para. 212(b). *See also* Court of Appeals Decision, para. 30, fn. 77 (*noting that* the ICC, Chambers Practice Manual, Fifth Edition, 25 March 2022, Annex “also foresees: (i) a similar notification procedure, where the calling party has to ascertain the consent of the witness to be interviewed; (ii) that the witness can choose to have a representative of the calling party present during the interview; (iii) that the interviews are audio or video-recorded and a copy of the recordings should be provided to the calling party”) and para. 48, fn. 136 (*noting that* “some protections provided by the Framework – such as the presence of a representative of the calling Party – will only be triggered if invoked by the witness or subject to judicial overview”).

<sup>45</sup> Contact Decision, para. 212(c) *referring to* para. 212(b).

additionally require the presence of Registry representatives.<sup>46</sup> The Panel expects that such steps would be taken promptly and in good faith so as to enable the Defence to conduct such interviews where the witness agrees.

28. From the information set out in the Request, it is not yet clear whether: (i) W04147 consents to being interviewed by the Defence; (ii) W04147 wishes to have the SPO present during the interview; and (iii) the [REDACTED], who indicated its willingness to authorise the Defence to interview W04147 under certain conditions,<sup>47</sup> will agree to the interview of W04147 by the Defence. Furthermore, it appears that the Defence has not yet attempted to reach a solution with the SPO on the basis of *inter partes* discussions.<sup>48</sup> The Panel reiterates that Parties and participants are expected to conduct *inter partes* discussions with a view to find agreeable solutions to any issue that arises during trial and, only if this cannot happen, to seek the assistance of the Panel.<sup>49</sup>

29. Accordingly, the Panel denies the Request and reiterates that, should the Defence wish to interview W04147, it shall follow the procedure set out in the Contact Decision.<sup>50</sup>

## V. CLASSIFICATION

30. The Panel notes that both the Request (F01345) and the Response (F01381) were filed confidentially. The Panel directs the Parties to file a public redacted version of their respective filings by **Monday, 24 April 2023**.

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<sup>46</sup> Contact Decision, para. 212(b).

<sup>47</sup> Annex 1 to the Request - [REDACTED] Letter “[REDACTED].”

<sup>48</sup> Request, para. 11; Response, para. 29.

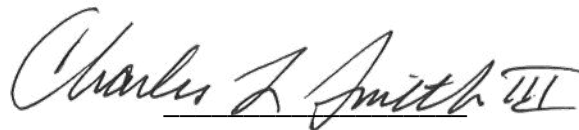
<sup>49</sup> See Order on Conduct of Proceedings, paras 7, 43.

<sup>50</sup> See Decision on Thaçi Defence Motion Regarding the Preservation of Evidence, para. 40.

VI. DISPOSITION

31. In light of the above, the Panel:

- a) **DENIES** the Request;
- b) **DIRECTS** the Defence, should it wish to interview W04147 further, to follow the procedure set out in the Contact Decision; and
- c) **DIRECTS** the Defence and the SPO to file a public redacted version of their respective filings, the Request (F01345) and the Response (F01381), by **Monday, 24 April 2023**.



**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Monday, 17 April 2023

At The Hague, the Netherlands.