

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Hashim Thaçi
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

Date: 23 October 2023

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Public Redacted Version of Joint Defence Observations on W04577

With Strictly Confidential Annex 1

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I. INTRODUCTION

1. The Defence for Mr Thaçi, Mr Selimi and Mr Krasniqi (“Defence”) hereby requests the Trial Panel to:

(1) Adjourn W04577’s testimony until it deems appropriate;

(2) Order a full [REDACTED] assessment of W04577 to be notified to the Panel, Parties and Victims’ Counsel prior to any resumption of W04577’s testimony;

(3) Order the full disclosure of all W04577 [REDACTED], past, present and future, until he testifies.

II. PROCEDURAL BACKGROUND

2. On 5 October 2023, the WPSO recommended the attendance of a WPSO psychologist in the courtroom during W04577’s testimony.¹

3. On 10 October 2023, W04577 appeared before the Trial Panel to testify as prosecution witness. After a few preliminary questions, his testimony was interrupted following his request for a “short pause” because he did “not feel very well” and he wanted to consult a lawyer to assist him with the procedure.² W04577 was able to meet a WPSO lawyer during a short break;³ W04577 was not concerned by the issue of self-incrimination but did not want to answer questions from one particular representative of the SPO.⁴ The hearing was adjourned in order to allow W04577 to speak with a Duty Counsel overnight.⁵

¹ KSC-BC-2020-06/F01836, Recommendations of WPSO Psychologist for special measures for witness W04577.

² KSC-BC-2020-06, Transcript of 10 October 2023, pp. 8668-8669.

³ *Ibid.*, p. 8671.

⁴ *Ibid.*

⁵ *Ibid.*, pp. 8674- 8675.

4. On 11 October 2023, the hearing resumed to hear W04577's testimony, in presence of his Duty Counsel, Mr De Bree.⁶ Despite a change among the SPO staff, W04577 stated that "[REDACTED]."⁷ The SPO reminded the witness of his duty to answer truthfully to the questions before the Court and asked him to comment his prior 2004 [REDACTED] statement; W04577 denied having signed it.⁸ This led his Duty Counsel to solicit a 30 minutes adjournment, having found in the morning a "very distressed person who is not willing to give testimony, is even willing to go to jail".⁹ Following a short break, W04577's Duty Counsel applied for an adjournment of one month, noting that he had seen, in his view, a [REDACTED].¹⁰
5. The Panel decided to adjourn the witness' testimony until 16 October 2023 and advised Duty Counsel to explain to his client the possibility of sanctions under 141(6) of the KSC Rules and Article 42 paragraphs 7 and 8 of the KSC Law.¹¹
6. On 18 October 2023, W04577's Duty Counsel notified the Court that [REDACTED], mentioning [REDACTED]. Noting that W04577 was [REDACTED], W04577's Duty Counsel reiterated his request for an adjournment of one month.¹² W04577 confirmed that he was not willing to testify because [REDACTED] ¹³ The Panel ordered the disclosure of the [REDACTED] to the parties¹⁴ and asked the WPSO to [REDACTED].¹⁵

⁶ KSC-BC-2020-06, Transcript of 11 October 2023, p. 8678.

⁷ *Ibid.*, p. 8681 ; see also p. 8682.

⁸ *Ibid.*, p. 8684.

⁹ *Ibid.*, pp. 8684-8685.

¹⁰ *Ibid.*, pp. 8691-8692.

¹¹ *Ibid.*, pp. 8700- 8701.

¹² KSC-BC-2020-06, Transcript of 18 October 2023, pp. 9098-9099.

¹³ *Ibid.*, p. 9102.

¹⁴ *Ibid.*, p. 9102.

¹⁵ *Ibid.*, p. 9103.

7. On the same day, the WPSO notified its Observations Regarding Assessment of Fitness to Testify for W04577, pursuant to which:¹⁶
 - a. [REDACTED].
 - b. [REDACTED].
 - c. [REDACTED].
 - d. [REDACTED].
 - e. Therefore, a not-fit to testify conclusion is made [REDACTED].
8. By email dated 18 October 2023, the Panel invited the Parties and Victims' Counsel to file submissions, if any, on Duty Counsel's request for an adjournment of W04577's testimony by no later than Monday, 23 October 2023, at 5:00 p.m.
9. On 19 October 2023, the WPSO notified an additional Report Regarding W04577, summarising its contacts with the witness between 15 and 18 October 2023.¹⁷

III. APPLICABLE LAW

10. Rule 27 of the Rules of Procedure and Evidence defines the responsibilities of the Registrar for Witness Protection and Support:

(2) The Witness Protection and Support Office shall, in particular, exercise the following functions:

[...]

(c) assist witnesses and victims participating in the proceedings in obtaining medical, psychological and other appropriate support necessary for them to testify before the Specialist Chambers;

[...]

¹⁶ KSC-BC-2020-06/F01866, WPSO Observations Regarding Assessment of Fitness to Testify for W04577 with one strictly confidential Annex, 18 October 2023.

¹⁷ KSC-BC-2020-06/F01872, WPSO Report Regarding W04577, 19 October 2023.

(3) The Witness Protection and Support Office may, on order of a Panel or proprio motu, conduct a medical and/or psychological assessment through a qualified professional, prior to and/or during a court appearance, on a person's vulnerability, or fitness in relation to his or her appearance and on any necessary protective measures.

[...]

11. Rules 143 and 153 to 155 of the Rules govern the examination of witnesses and define the conditions of admission of written statements of witnesses.

IV. DISCUSSION

12. The Defence takes note of the WPSO's conclusion that the witness is "not-fit to testify".¹⁸
13. In light of such finding and of the repeated concerns expressed by W04577's Duty Counsel regarding [REDACTED], mentioned above, the Defence would not object if the Panel were to defer W04577's testimony until the witness receives adequate [REDACTED]. The witness has told the WPSO that he has [REDACTED].¹⁹
14. The Panel set the target date for the closing of the Specialist Prosecutor's case to be April 1, 2025.²⁰ Therefore, there is another 1,5 years left to see whether W04577 will be able to testify at a later date. Accordingly, this witness's testimony should not be admitted in writing without full and effective Defence cross-examination. To do so would be in breach of Article 21 of the KSC Law and Article 6 of the European Convention of Human Rights; this is particularly so in light of the ICTY Appeals Chamber judgment in *Haradinaj* where an acquittal was overturned on the basis that two witnesses were not given sufficient opportunity

¹⁸ KSC-BC-2020-06/F01866, WPSO Observations Regarding Assessment of Fitness to Testify for W04577 with one strictly confidential Annex, 18 October 2023.

¹⁹ KSC-BC-2020-06/F01866/A01, p. 3.

²⁰ KSC-BC-2020-06, Transcript of Hearing, 15 February 2023, Page 2039 Line 12 to Page 2039 Line 16.

to reconsider their positions and adjourn.²¹ The Defence wants to hear the witness' testimony orally, which goes to the acts and conduct of the Accused.²²

15. In *Haradinaj*, the ICTY Appeals Chamber held that a trial court has an obligation to ensure a fair trial, which includes an obligation to "provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."²³ It further held that, "[f]or the Tribunal to function effectively, Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*."²⁴ Similarly, the Trial Panel here has an obligation to ensure a fair trial for the Accused, including the rights of the Accused to examine the witnesses against them. The Trial Panel must counter attempts by witnesses to obstruct these proceedings and the rights of the Accused by "taking all measures that are reasonably open to them" to compel witnesses to answer questions from both the SPO and the Defence.
16. Where the Trial Panel admits the prior testimony of witnesses who are refusing to testify and to submit to cross-examination by the Accused, without the Trial Panel first having "taken all measure reasonably open to it" to compel the witnesses to testify, the Trial Panel violates the fair trial rights of the Accused and commits an error.
17. In addition, it would be disruptive for the Defence if W04577 were to be recalled shortly and maintain his refusal to testify, the Defence having once again to move suddenly onto another witness. Thus, the Defence has no objection to the postponement of W04577's testimony, which will give him further time to

²¹ KSC-BC-2020-06, Transcript of Hearing, 11 October 2023, pp. 8693-8694.

²² See KSC-BC-2020-06/F01594/A02, Amended List of Witnesses, p. 379; KSC-BC-2020-06/F01630/A01, List of Next 12 witnesses, p. 62, para. 11.

²³ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Appeals Chamber, Judgment, 19 July 2010, para. 35.

²⁴ *Id.*

reconsider his position, provided that the Defence is given a proper opportunity to cross-examine him at a later stage.

18. The Defence further requests the Trial Panel to order a full [REDACTED] assessment of W04577 and the full disclosure of all W04577's [REDACTED] records, past, present and future, until he testifies.
19. The witness has previously told the SPO that several years ago his family [REDACTED] but that he lost the corresponding papers.²⁵ He has further taken some appointments in view of an [REDACTED].²⁶ In this context, the Defence submits that the WPSO [REDACTED] must be supplemented by a complete [REDACTED] in light of the eventual impact of [REDACTED] on the credibility and/or reliability of his testimony.²⁷
20. The assessment conducted [REDACTED] on 18 October 2023 is insufficient in so far as such evaluation is limited to the witness' fitness to testify at the time it was conducted.²⁸ Given that the SPO seeks to admit W04577's prior statements and associated exhibits pursuant to Rule 154, any [REDACTED] ought to consider the witness' [REDACTED] at the time he provided the statements.
21. The SPO should have sought a full [REDACTED] of W04577 earlier. Article 14(3)(a) and (4) of the Code of Professional Conduct provides that the Prosecution shall not submit evidence for the truth of its content, which it knows to be false and shall not knowingly permit the giving of false evidence and rely upon it.²⁹ Similarly, the Order on Conduct of Proceedings, in accordance with

²⁵ [REDACTED], pp. 1-5. See also submissions from Lead Counsel for Mr Veseli, KSC-BC-2020-06, Transcript of Hearing, 18 October 2023, p. 9107.

²⁶ KSC-BC-2020-06/F01866/A01, p. 3.

²⁷ KSC-BC-2020-06, Transcript of Hearing, 18 October 2023, pp. 9107-9109.

²⁸ KSC-BC-2020-06, F01866, Registrar, *Annex 1 to WPSO Observations Regarding Assessment of Fitness to Testify for W04577*, 18 October 2023, strictly confidential.

²⁹ Code of Professional Conduct - for Counsel and Prosecutors before the Kosovo Specialist Chambers, 28 April 2021.

the Rules, provides that a “Party shall not seek to tender or present evidence that it knows or suspects to be false”.³⁰

22. On 29 May 2013, over the course of his testimony in [REDACTED], W04577 stated that he had [REDACTED] even though such documents were not in the Prosecution’s possession.³¹ In [REDACTED] 2020, [REDACTED] before the first interview with the SPO, the SPO was put on notice of W04577’s [REDACTED].³² During the interview with the SPO in [REDACTED] 2020, W04577 informed the SPO, in relation to his [REDACTED].³³ The SPO, despite all this information in its possession, failed to investigate W04577’s [REDACTED] and to take the necessary steps to ensure that W04577 was [REDACTED] to provide evidence when he was interviewed in [REDACTED] 2020 and [REDACTED] 2022.
23. In September 2023, the Defence inquired with the SPO via e-mail whether the SPO, or WPSO to the knowledge of the SPO, had carried out any [REDACTED] of W04577 and requested disclosure of any [REDACTED] records in the SPO’s possession relating to the witness’ [REDACTED].³⁴ The SPO denied having carried out any such evaluation and/or any knowledge of WPSO having done so. The SPO further confirmed it is not in possession of any relevant undisclosed [REDACTED] concerning W04577.³⁵
24. After the Trial Hearing of 18 October 2023, the CMU, pursuant to the Trial Panel’s instruction,³⁶ distributed a [REDACTED].³⁷ [REDACTED] indicates that

³⁰ KSC-BC-2020-06, F01226/A01, Trial Panel II, *Annex 1 to Order on the Conduct of Proceedings* (“Order on Conduct of Proceedings”), 25 January 2023, public, para. 46; Rule 138(1).

³¹ [REDACTED].

³² See [REDACTED]. Any reference to [REDACTED] should not be understood as a Defence’s concession on the credibility or reliability of the information provided by [REDACTED], but to point out the SPO’s failure to conduct further investigations despite the information in their possession.

³³ [REDACTED], pp. 1-5.

³⁴ Defence e-mail sent on 18 September 2023 at 10:52.

³⁵ SPO email received on 20 September 2023 at 12:08.

³⁶ Transcript of 18 October 2023, pp. 9106-9107.

³⁷ CMU e-mail received on 18 October 2023 at 09:36.

W04577 [REDACTED].³⁸ Accordingly, all [REDACTED] relevant to the witness' [REDACTED], inasmuch as it may have an impact on the credibility and reliability of the witness, should be made available to the Defence.

25. The Defence hereby provides notice of its objection to any application to admit W04577's evidence pursuant to Rule 155. The Defence reserves the right to make additional submissions, orally or in writing, in the event any such application is made.
26. Admitting W04577's evidence pursuant to Rule 155 would prejudice the overall fairness of the proceedings and the fair trial rights of the Accused. Rule 155 provides for the possibility to admit, subject to certain conditions, "[e]vidence in the form of a written statement, any other record written or otherwise expressed of what a person has said or transcript of a statement by a person who [...] is by reason of physical or mental impairment or other compelling reason unable to testify orally". Notwithstanding that Rule 155 does not preclude the admission of evidence that goes to proof of the acts and conduct of the Accused as charged in the indictment, this may be a factor militating against the admission of such evidence, in whole or in part. W04577's evidence goes to proof acts and conduct of the Accused; hence caution is required on the part of the Panel in admitting such evidence.
27. The Defence has repeatedly expressed its concerns as to the amount of untested evidence that has been admitted Rule 155 and Bar Table Motions, and the resulting impact on the rights of the Accused.³⁹ Statements of a witness who has repeatedly lied, and even admitted having done so;⁴⁰ sought and continues to seek to manipulate court proceedings to his advantage; and who has proved to

³⁸ [REDACTED] report, p. 3.

³⁹ KSC-BC-2020-06, F01865, Specialist Counsel, *Joint Defence Response to Prosecution Third Motion for Admission of Evidence Pursuant to Rule 155 (F01804)*, 17 October 2023, confidential, para. 5.

⁴⁰ See e.g., [REDACTED], pp. 7-8.

be [REDACTED], both at the time of his interviews with the SPO and during his testimony in previous cases should not be admitted, in the interests of justice, without full and effective Defence cross-examination.

V. CONFIDENTIALITY

28. The present response is filed as strictly confidential pursuant to Rule 82(4) as it responds to strictly confidential submissions filed by the WPSO.

VI. CONCLUSION

29. In light of the above, the Defence respectfully requests the Trial Panel to grant the relief sought in paragraph 1.

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Respectfully submitted on 23 October 2023,



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