



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA 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: 7 March 2024

Language: English

Classification: Public

Decision on Prosecution Request for Non-Disclosure (F02136) and Related Matters

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 39(3) and 40(6)(a) and (d) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 103 and 108 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 16 October 2023, the Specialist Prosecutor’s Office (“SPO”) filed a request wherein it, *inter alia*, sought authorisation to temporarily withhold a judicially authorised covert recording of a non-privileged visit to Hashim Thaçi in the Specialist Chamber’s detention centre (“16 October Request” and “Recording”).¹
2. On 24 October 2023, the Panel deferred its decision in respect of the Recording until such time when the Panel has been provided with a full transcript thereof.²
3. On 17 November 2023, the SPO disclosed a copy of the Recording, together with a transcript thereof, to the Defence and Victims’ Counsel.³
4. On 19 February 2024, the SPO filed a request seeking authorisation to withhold a document containing information pertaining to W04501 (“19 February Request” and “Document”).⁴

¹ F01860, Specialist Prosecutor, *Prosecution Supplement to Non-Disclosure Request F01839*, 16 October 2023, strictly confidential and *ex parte*, e.g. paras 1-2 (a confidential redacted version was filed on 7 December 2023, F01860/CONF/RED).

² F01884, Panel, *Decision on Prosecution Request for Temporary Non-Disclosure (F01839)*, 24 October 2023, strictly confidential and *ex parte*, paras 5, 13(e) (a confidential redacted version was issued on 6 February 2024, F01884/CONF/RED).

³ See F01933, Specialist Prosecutor, *Prosecution Urgent Request for Modification of Detention Conditions*, 17 November 2023, fn. 9, with Annexes 1-5, confidential (a public redacted version was filed on 22 November 2023, F01933/RED); F01933/A04, Specialist Prosecutor, *Annex 4 to Prosecution Urgent Request for Modification of Detention Conditions*, 17 November 2023, confidential, pp. 247-415 (116083-TR-AT Part 1-ET). See also Disclosure Packages 1061, 1086 and 1113.

⁴ F02136, Specialist Prosecutor, *Prosecution Request for Non-Disclosure*, 19 February 2024, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential (a confidential redacted version, F02136/CONF/RED, and a public redacted version, F02136/RED, were filed on the same day). The Document is contained in Annex 1 to the 19 February Request.

5. No responses were filed to the 19 February Request.

II. SUBMISSIONS

6. The SPO requests that the Panel authorise non-disclosure of the Document.⁵ It submits that while the Document contains (limited) Rule 103 information pertaining to W04501, full disclosure of the Document would be contrary to the rights of third parties.⁶ The SPO further submits that: (i) the summary in Annex 2 contains all information relevant to W04501; and (ii) providing the summary allows the Defence to properly prepare for, and cross-examine, W04501 and suffices as a counterbalancing measure.⁷

III. APPLICABLE LAW

7. Pursuant to Rule 108, where information in the custody, control or actual knowledge of the SPO is subject to disclosure under Rule 102 or Rule 103, but such disclosure may: (a) prejudice ongoing or future investigations; (b) cause grave risk to the security of a witness or members of his or her family; or (c) be contrary to any other reason to the public interest or the rights of third parties, the Specialist Prosecutor may apply confidentially and *ex parte* to the Panel to withhold the information in whole or in part.⁸ The Panel shall consider whether the information in question is subject to disclosure pursuant to the Rules. Where the Panel is satisfied that this is the case, it shall consider the Specialist Prosecutor's

⁵ 19 February Request, paras 1, 6.

⁶ 19 February Request, para. 1. *See also* 19 February Request, paras 3-5.

⁷ 19 February Request, paras 1, 4.

⁸ *See also e.g.* F01863, Panel, *Decision on Prosecution Report and Request for Temporary Non-Disclosure (F01778)*, 17 October 2023, strictly confidential and *ex parte*, para. 6 (a confidential redacted version was issued on 6 February 2024, F01863/CONF/RED); F01797, Panel, *Decision on Prosecution Request to Delay Disclosure (F01745)*, 15 September 2023, strictly confidential and *ex parte*, para. 5 (a confidential redacted version was issued on 6 February 2024, F01797/CONF/RED); F01727, Panel, *Decision on Prosecution Request for Authorisation to Delay Disclosure and Apply Redactions (F01710)*, 21 August 2023, strictly confidential and *ex parte*, para. 7 (a confidential redacted version was issued on 30 August 2023, F01727/CONF/RED); F01695, Panel, *Decision on Prosecution Request to Delay Disclosure (F01619)*, 24 July 2023, confidential, para. 4.

application and reasons for non-disclosure together with any proposed counterbalancing measures.⁹

IV. DISCUSSION

A. 16 OCTOBER REQUEST

8. Considering that the SPO has, in the meantime, disclosed the Recording to the Defence and Victims' Counsel,¹⁰ the Panel finds that the 16 October Request is now moot to the extent it relates to the Recording.

B. 19 FEBRUARY REQUEST

9. The Panel observes that, as acknowledged by the SPO,¹¹ the Document contains Rule 103 information relating to W04501,¹² and is therefore subject to disclosure pursuant to that provision. Accordingly, the Panel will assess the request to withhold the Document pursuant to Rule 108(1)(a)-(c).

10. As regards the necessity of the measure sought, the Panel notes the SPO's submission that full disclosure of the Document would be contrary to the rights of third parties and would cause a high security risk for an individual other than W04501 mentioned in the Document ("Person 1").¹³ These submissions have not been disputed by the Defence. The Panel further considers that disclosure of the Document would be contrary to the rights of, in particular, Person 1, who is not a witness or victim in this case but a third party within the meaning of Rule 108(1)(c).¹⁴ In this regard, the Panel observes that, as related information is

⁹ *Ibid.*

¹⁰ See above, para. 3 and fn. 3.

¹¹ 19 February Request, para. 1.

¹² See Document, pp. 18, 24.

¹³ 19 February Request, paras 1, 3.

¹⁴ See e.g. F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, para. 95(b) and fn. 108; F01151, Pre-Trial Judge, *Decision on the Specialist Prosecutor's Request for Protective Measures for Certain Information Requested by the Defence Pursuant to Rule 102(3)*, 12 December 2022, strictly confidential and *ex parte*, paras 78, 106 (a confidential redacted version was

publicly available,¹⁵ Person 1 could be identified if the Document were to be disclosed. The Panel considers that, in this particular instance, the Document cannot be meaningfully redacted without jeopardising the rights and interests of, in particular, Person 1.

11. The Panel therefore finds that withholding the Document is necessary at this point in time.

12. With respect to proportionality, the Panel considers that the above-mentioned reasons underpinning the necessity to withhold the Document apply, by the same token, to the question of the proportionality of the measure. In this regard, the Panel recalls that disclosing the Document would be contrary to the rights of, in particular, Person 1 and that it cannot be meaningfully redacted without jeopardising these rights. Furthermore, the Panel observes that: (i) the Rule 103 information contained in the Document is limited¹⁶ and has already been made available to the Defence through the summary contained in Annex 2 to the 19 February Request (“Summary”); and (ii) the remaining information in the Document is not related to the charges in this case and does not fall under Rule 102(3).

13. The Panel therefore finds that withholding the Document is proportionate at this point in time.

14. As regards counterbalancing measures, the Panel recalls that the Defence is already privy to the Summary containing the Rule 103 information relating to W04501. The Panel considers this to be an appropriate and sufficient

issued on the same day, F01151/CONF/RED). *See also* ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-475, Appeals Chamber, [Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”](#), 13 May 2008, e.g. paras 40, 46, 54, 57-58 (with further references, e.g. to ECtHR, *Rowe and Davis v. United Kingdom* [GC], no. 28901/95, [Judgment](#), 16 February 2000, para. 61).

¹⁵ *See e.g.* 19 February Request, fns 5-7.

¹⁶ *See* Document, pp. 18, 24.

counterbalancing measure.

15. In light of the above, the Panel authorises the withholding of the Document at this point in time. If, however, W04501 is called by the SPO to give evidence, the Document shall be disclosed to the Defence no later than **10 days** before commencement of testimony. Should the SPO seek to vary this order, it shall seize the Panel of a further application for withholding no later than **20 days** before the testimony of W04501 is due to start.

V. DISPOSITION

16. In light of the above, the Panel hereby:

- a) **DECLARES MOOT** the 16 October Request to the extent it relates to the Recording;
- b) **GRANTS** the 19 February Request; and
- c) **FINDS** that withholding the Document is both necessary and proportionate at this point in time and, accordingly, **AUTHORISES** the SPO to withhold it, subject to the conditions set out above in paragraph 15.



Judge Charles L. Smith, III
Presiding Judge

Dated this Thursday, 7 March 2024

At The Hague, the Netherlands.