



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
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: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 7 March 2024

Language: English

Classification: Public

Public Redacted Version of 'Prosecution response to Joint Defence Motion for Appointment of *Amicus Curiae* Investigator or for Alternative Relief'

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Mišetić

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Panel should reject the Motion.¹ Under the legal framework and jurisdiction of the Kosovo Specialist Chambers ('KSC'), the Specialist Prosecutor's Office ('SPO') is the sole entity authorised to investigate and prosecute, including as concerns Prosecution witnesses. The Defence fails to establish any conflict of interest, and the appointment of an *amicus* investigator has no basis in the Law² or the Rules.³ Further, the Panel has already decided that the non-standard redactions it authorised to the Letter⁴ are necessary and proportionate.⁵ The Defence fails to establish any basis for reconsideration, both overstating the Letter's importance to W04577's credibility and ignoring disclosed material and other available investigative avenues. Finally, considering that W04577's testimony has already been adjourned until further notice,⁶ no further adjournment is necessary at this stage.

II. SUBMISSIONS

A. THE SPO IS THE SOLE ENTITY AUTHORISED TO INVESTIGATE AND PROSECUTE

2. The Law clearly confers sole investigative and prosecutorial powers in relation to crimes within the KSC's jurisdiction on the Specialist Prosecutor.⁷
3. The drafters of the Law and Rules, mindful of the regimes employed at other courts for the investigation and prosecution of contempt and false-testimony, opted to provide the SPO with the sole authority to investigate and prosecute offences within

¹ Joint Defence Motion for Appointment of *Amicus Curiae* Investigator or for Alternative Relief with Strictly Confidential Annex 1, KSC-BC-2020-06/F02150, Strictly Confidential, 23 February 2024 (notified 26 February 2024; 'Motion').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to the Law, unless otherwise specified.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ 116952-116955 RED ('Letter').

⁵ Decision on the Eighth Prosecution Request for Protective Measures for One Item Containing Rule 103 Information, KSC-BC-2020-06/F02020, Confidential, 18 December 2023 ('Protective Measures Decision'), paras 5-8.

⁶ Decision on Duty Counsel's Request for Adjournment of W04577's Testimony, KSC-BC-2020-06/F01896, Strictly Confidential, 31 October 2023 ('Adjournment Decision'), para.28(d).

⁷ Article 35(1).

the jurisdiction of the KSC, including those relating to Prosecution witnesses⁸ and/or potential attempts to interfere with witness testimony.⁹ There is no provision in the KSC legal framework that would enable the Trial Panel to appoint an *amicus* investigator.¹⁰

4. Contrary to the Defence assertion,¹¹ the very fact that the Rules do make provision for *amicus curiae* in specific circumstances further demonstrates that, had the intention been to include the possibility of appointing *amicus* investigators in circumstances such as those referred to in the Motion, the Rules would have explicitly catered therefor.

5. Moreover, the SPO remains cognisant of its obligations, including to contribute to the establishment of the truth,¹² to disclose potentially exculpatory material, and to not knowingly permit the giving of false evidence and rely upon it.¹³ It is precisely in view of such obligations that the SPO discloses items such as the Letter, and will continue to disclose any further information obtained which falls within its disclosure obligations. No order is necessary to the SPO's fulfilment of its functions, either investigative or in making appropriate disclosures.

6. The Motion fails to establish any actual or potential conflict of interest on the part of the SPO.¹⁴ In conducting investigations and prosecutions, there is always a possibility that information adversely impacting the credibility of SPO witnesses is obtained. The Defence suggestion that this common reality is somehow impermissible, or that the SPO is incapable of fulfilling its obligations to the court in good faith in such circumstances, is unfounded.

⁸ In this respect, while the Defence seeks an investigation into matters potentially impacting credibility at this stage, it reserves the right, based on the outcome of that investigation, to apply for initiation of an investigation into obstruction offences, *see* Motion, KSC-BC-2020-06/F02150, para.16.

⁹ Article 15(2). *See* Letter, p.116954 ([REDACTED]).

¹⁰ *Contra* Motion, KSC-BC-2020-06/F02150, paras 10-20.

¹¹ Motion, KSC-BC-2020-06/F02150, para.13.

¹² Rule 62.

¹³ Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07-Rev1, 28 April 2021, Article 14.

¹⁴ *Contra* Motion, KSC-BC-2020-06/F02150, paras 2, 18-20.

7. The SPO is also fully aware of its obligations towards witnesses. Since W04577's testimony has been indefinitely adjourned, and considering the reasons for such adjournment,¹⁵ it would have been both improper and unwise for the SPO to contact him in relation to the Letter - a necessary step in any meaningful investigation thereof. Given prior findings regarding the witness's wellbeing, and the absence of any indication of changed circumstances at this stage, the SPO must necessarily act with appropriate caution regarding the witness, and those who may be in potential contact with him, such as the Letter's author.

8. Equally, as the witness had taken the solemn declaration, and commenced his testimony, steps taken must be weighed against the impact they may have on the ability of any of the Parties, or indeed the Panel, to further examine the witness in a manner conducive to establishment of the truth. However, 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. Any further information relevant to the Letter otherwise obtained by the SPO will be disclosed in accordance with relevant obligations.

B. THE MOTION FAILS TO ESTABLISH ANY BASIS FOR RECONSIDERATION

9. The Panel decided that the non-standard redactions it authorised in relation to the Letter were necessary and proportionate, and that 'no counter-balancing measures are necessary, in the present circumstances, to uphold the Accused's rights.'¹⁶ The Panel reached this decision having considered the unredacted version of the Letter.¹⁷ This decision is also in line with the Adjournment Decision, both decisions ensuring due regard for the protection of W04577's [REDACTED] wellbeing given the circumstances and events relevant to this witness.

¹⁵ See Adjournment Decision, KSC-BC-2020-06/F01896.

¹⁶ Protective Measures Decision, KSC-BC-2020-06/F02020, paras 5-8.

¹⁷ Annex 1 to Prosecution request for protective measures for one item containing Rule 103 Information with strictly confidential and *ex parte* Annex 1, KSC-BC-2020/06/F01979/A01, Strictly Confidential and *Ex Parte*, 4 December 2023.

10. The Motion fails to establish, in relation to the Protective Measures Decision, any exceptional circumstances and to demonstrate a clear error of reasoning or to establish reconsideration is necessary to avoid injustice. Since the requirements of Rule 79 of the Rules have not been met, the Panel should reject the Motion.

11. Assuming the Letter does concern W04577,¹⁸ in seeking reconsideration and additional relief, the Motion grossly overstates the centrality of the Letter,¹⁹ in particular in view of other disclosed information addressing the primary allegations in the Letter, and the Defence's ability to investigate, and cross-examine on any matters relating to W04577's credibility it elects to.

12. First, in arguing that the Letter [REDACTED],²⁰ the Defence ignores several relevant factors and investigative avenues open to it. In particular, the Witness Protection and Support Office ('WPSO') compiled a detailed report in relation to W04577's fitness to testify, which is available to the Defence.²¹ A further WPSO report and related documentation relevant to [REDACTED] W04577 are also available to the Defence.²² It is on the basis of such information that the Panel ordered an adjournment of W04577's testimony.²³ Further, the Panel's order to WPSO²⁴ ensures that the Parties and Participants will obtain any further relevant and disclosable information concerning W04577's [REDACTED].²⁵

¹⁸ See Prosecution request for protective measures for one item containing Rule 103 Information with strictly confidential and *ex parte* Annex 1, KSC-BC-2020/06/F01979, Confidential, 4 December 2023, para.2.

¹⁹ See Motion, KSC-BC-2020-06/F02150, paras 1, 7-9, 29; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-03-A, Decision on Appeals against the Decision by Trial Chamber I rejecting the Defence Motions to direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses 'E' and 'CC', 8 June 1998, para.28.

²⁰ Motion, KSC-BC-2020-06/F02150, para.8.

²¹ Annex 1 to WPSO Observations Regarding Assessment of Fitness to Testify for W04577 with one strictly confidential Annex, KSC-BC-2020/06/F01866/A01, Strictly Confidential, 18 October 2023.

²² WPSO Report Regarding W04577, KSC-BC-2020-06/F01872, Strictly Confidential, 19 October 2023; Email from CMU dated 18 October 2023 at 09:36 a.m. attaching an [REDACTED] report.

²³ Adjournment Decision, KSC-BC-2020-06/F01896.

²⁴ Adjournment Decision, KSC-BC-2020-06/F01896, paras 18-21.

²⁵ See also Adjournment Decision, KSC-BC-2020-06/F01896, paras 22-24.

13. Second, the Letter alleges the individual at issue [REDACTED]²⁶ and the Defence argues the Letter allegedly proves evidence of W04577 having [REDACTED].²⁷ Even if, *arguendo*, W04577 [REDACTED], W04577 and the SPO would be best placed to provide relevant information in this regard, not the author of the Letter. The SPO has disclosed a number of items relevant to this subject based on its interactions with W04577²⁸ as well as from another source whose identity is known the Defence.²⁹ The Defence's ability to investigate W04577's credibility on the basis of the latter information is unhindered. As to [REDACTED]; as such, there is no reasonable prospect of reliable information being provided in that regard.

14. Further, the Defence is fully capable of investigating any issues with W04577's credibility through individuals other than the Letter's author, may cross-examine W04577 or present evidence on any of the claims included in the Letter and, at the end of the trial, may make submissions on W04577's credibility.

15. Accordingly, contrary to the Defence assertion,³⁰ the Defence has numerous investigative avenues it could pursue in order to be able to challenge W04577's credibility, including concerning allegations set out in the Letter.

C. NO NEED FOR AN ADJOURNMENT

16. In its decision on Duty Counsel's request for an adjournment of W04577's testimony, the Panel granted such an adjournment until further notice.³¹ Accordingly, at this stage, there is no need to order any further adjournment.³²

²⁶ Letter, p.116954.

²⁷ Motion, KSC-BC-2020-06/F02150, para.8.

²⁸ *See, e.g.*, 116049-116056 RED, paras 5-17; 111242-111242 RED; 110981-110981 RED.

²⁹ 076044-076044 RED3.

³⁰ Motion, KSC-BC-2020-06/F02150, paras 1, 9, 29.

³¹ Adjournment Decision, KSC-BC-2020-06/F01896, para.28(d).

³² *Contra* Motion, KSC-BC-2020-06/F02150, paras 4, 30, 32.

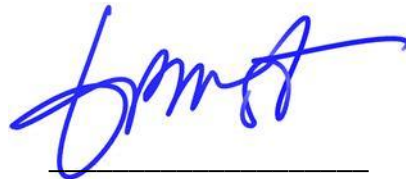
III. CONFIDENTIALITY

17. This request is strictly confidential in accordance with Rule 82(4) of the Rules. A public redacted version will be filed simultaneously.

IV. RELIEF REQUESTED

18. For the aforementioned reasons, the Panel should reject the relief sought in the Motion.

Word count: 1789



Kimberly P. West
Specialist Prosecutor

Thursday, 7 March 2024

At The Hague, the Netherlands.