

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 Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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**Public Redacted Version of Joint Defence Reply to Prosecution response to
F02150**

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I. INTRODUCTION

1. The Defence hereby files its reply to the Prosecution response to Joint Defence Motion for Appointment of Amicus Curiae Investigator or for Alternative Relief (“Response”).¹ The Response both mischaracterizes and fails to engage with the substance of the Defence submissions, and should therefore be dismissed.
2. The present submissions reply to four issues arising from the Response, namely (i) the SPO’s contention that relief requested by the Defence is unsupported by the KSC legal framework; (ii) its assertion that it is cognizant of its obligations and therefore no subsequent order is required; (iii) the claim that the Defence can still investigate the allegations contained in the W04577 Letter² through other avenues, and (iv) the characterization of the Defence Motion³ as a reconsideration request of the Trial Panel’s Decision.⁴

II. SUBMISSIONS

A. Requested relief falls within the KSC legal framework

3. The SPO argues that the KSC legal framework “clearly confers sole investigative and prosecutorial powers in relation to crimes within the KSC’s jurisdiction on the Specialist Prosecutor.”⁵ However, as the Defence has emphasized in the Motion, it does not seek the appointment of an *amicus* investigator with a view to initiate proceedings against W04577 for possible offences against the administration of justice, but to preserve the Accused’s right of confrontation and to ensure that the Trial Panel has before it all evidence relevant to an

¹ KSC-BC-2020-06/F02169, Prosecution response to Joint Defence Motion for Appointment of Amicus Curiae Investigator or for Alternative Relief, 7 March 2024.

² 116952-116955 RED (“W04577 Letter”).

³ KSC-BC-2020-06/F02150, Joint Defence Motion for Appointment of Amicus Curiae Investigator or for Alternative Relief with Strictly Confidential Annex 1, 23 February 2024 (“Motion”).

⁴ KSC-BC-2020-06/F02020, Decision on the Eighth Prosecution Request for Protective Measures for One Item Containing Rule 103 Information, 18 December 2023 (“Decision”).

⁵ Response, para. 2.

assessment of W04577's credibility.⁶ If the SPO intends to initiate proceedings against W04577, then doing so is its prerogative – yet the Accused's right to confront the evidence against them in the present proceedings cannot depend on the SPO's discretionary choice to do so. The SPO's references to the provisions establishing its competence in relation to the investigation and prosecution of offences falling within the jurisdiction of the KSC are therefore inapposite.

4. The SPO claims that “[t]here is no provision in the KSC legal framework that would enable the Trial Panel to appoint an amicus investigator” and that the absence of such a provision demonstrates the drafters' intent to exclude such relief.⁷ This overly narrow reading of the Rules constitutes an attempt to restrict the Trial Panel's discretionary power to ensure the fairness of proceedings where the circumstances so warrant.⁸
5. Concerning the SPO's argument that the references in the Rules to the role of *amicus curiae* in specific circumstances further militate against the relief sought, the Defence reiterates that such reasoning is contrary to international jurisprudence where *amicus curiae* have been granted extensive competences based on the equivalent provisions to those found in the KSC Rules when the overriding interests of justice and the rights of the Accused so required.⁹ The present circumstances are indeed those where the same interests require the requested relief to be granted; for if the SPO's position on the matter was followed to its logical conclusion, the Rules would allow for the Accused to be notified of exculpatory information, but ultimately denied the ability to give any meaningful effect to those leads, to the detriment of his own case.

⁶ Motion, para. 16.

⁷ Response, para. 4.

⁸ Motion, paras. 11-12.

⁹ Motion, para. 14.

B. The SPO's actions undermine its professed awareness of its obligations

6. Concerning the SPO's assertion that it remains cognizant of its obligations, and that on that basis "no order is necessary to the SPO's fulfilment of its functions", the Defence recalls that in *inter-partes* communication and in its Response, the SPO has neither indicated that it has carried out any investigative steps in relation to the allegations set out in the W04577 Letter, nor that it intends to do so in the future.¹⁰ To date, no other evidence relating to the allegations contained in the W04577 Letter has been disclosed.
7. Furthermore, the SPO claims that it is a "common reality" that "[i]n conducting investigations and prosecutions, there is always a possibility that information adversely impacting the credibility of SPO witnesses is obtained", and that such possibility will not ensue in a conflict of interest on the part of the SPO.¹¹ However, a distinction must be made between (i) situations where exculpatory information arrives in the SPO's possession in the ordinary course of investigations requiring no further action but disclosure, and (ii) that of the present case, where the material at issue requires further investigation in order to give effect to its exculpatory quality; thus potentially requiring the SPO to actively pursue an investigative lead against the interests of its own case.
8. It is precisely to address situations as those arising in the present case that the mechanisms laid down in Rules 77 and 91 of the ICTY/R Rules have been implemented. In this situation, it would be unreasonable for the Defence to rely exclusively on the SPO's mere recitations of its prosecutorial duties, especially when the Defence is being actively excluded from knowing if any steps have

¹⁰ Motion, Annex 1.

¹¹ Response, para. 6.

been, or will be, taken¹² to allow it to properly exercise its right of confrontation in relation to W04577.

9. Additionally, the appointment of an *amicus* investigator would further relieve the concerns expressed by the SPO in paragraphs 7 and 8 of the Motion and allow for a fully independent and impartial investigation, unburdened by the [REDACTED]. In particular, albeit not being required to confront W04577 with the newly acquired information, an independent investigator would likewise not be bound by the obligation not to contact W04577 on account of him having taken the oath, since that investigator would not be a party to the present proceedings.

C. The SPO may not circumscribe Defence investigations

10. Concerning the SPO's argument that the Defence may challenge the allegations contained in the W04577 Letter through other evidence,¹³ the SPO is attempting to decide the Defence's case strategy on its behalf, and to unilaterally limit the evidence essential to the preparation of the Defence. Even on a *prima facie* assessment of the letter, it is conspicuous that its author possesses evidence that may either provide context, corroboration or further details as to the circumstances described in the already disclosed material, or which constitute entirely novel circumstances. By way of example, the [REDACTED] allegations contained in the W04577 Letter are unique to that document and are not replicated in any other material that the Defence could otherwise use as a basis for further investigations. In that respect alone, there is no basis for why the Defence, and indeed the Trial Panel, should be deprived of the means to procure additional evidence critical to W04577's credibility.

¹² Motion, Annex 1.

¹³ Response, paras. 12-15.

D. The Motion is not a reconsideration request

11. The SPO mischaracterizes the Motion as a reconsideration request.¹⁴ The prime consideration justifying the heightened standard for any request for reconsideration pursuant to Rule 79 is the principle of finality.¹⁵ That principle operates in order to prevent the parties from endlessly re-litigating the same issues.¹⁶ However, that principle finds no application in the present circumstances as the Defence has had no meaningful opportunity to participate in the previous litigation owing to its lack of access to the W04577 Letter at the time it was expected to make submissions, as it was filed as a strictly confidential and *ex parte* annex.
12. In that respect, the Defence was in no position to appreciate the nature of the evidence concerned and its importance to W04577's credibility, as it was solely on notice that the material in question falls under Rule 103 and is possibly related to W04577. With such limited information available, the Defence could make neither reasoned nor specific submissions on the request itself or any appropriate counterbalancing measures. As such, it would be manifestly unjust for the Defence to be deprived of the right to be heard at the time it was ordinarily expected to make submissions, and for its only available avenue to make submissions to be against the much stricter reconsideration standard.
13. It is precisely for these reasons that other Chambers have allowed the Defence to file subsequent submissions after it has had a chance to assess the usefulness and

¹⁴ Response, paras. 9-10.

¹⁵ ICTR, *Prosecutor v. Kamuhanda*, Case No. MICT- I3-33-AR90/108.1, Decision on Kamuhanda's Appeal of Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness GEK, 8 December 2015, para. 16.

¹⁶ ICTR, *Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeal Judgment, 14 December 2015, para. 127.

relevance of the redacted documents.¹⁷ Following such submissions, the Chambers in questions determined that they “will assess, in the light of the Defence’s arguments, the practical impact of the redactions required and may thus request the Prosecutor to approach the source with a view to agreeing other solutions that might allow the redactions to be reconsidered or modified or, where necessary, to propose counterbalancing measures.”¹⁸

14. Even assuming *arguendo* that the relief requested was to form the basis of a reconsideration requests, first, the very fact described above that the Defence has had no opportunity to make submissions on potential counterbalancing measures constitutes an injustice that the Defence seeks to rectify by virtue of the Motion.
15. Second, the arguments in the SPO’s Response, and its representations made during the course of *inter partes* communications, constitute new facts not available when the Decision was issued. The SPO’s indications that (i) the Defence overstates the importance of the W04577 Letter; (ii) the Defence is in a position to challenge the credibility of W04577 in the absence of any further information pertaining to the allegations set out therein; and that (iii) it is under no obligation to apprise the Defence of any investigative steps it has taken, demonstrate that the SPO does not intend to pursue further investigations on the matter. The Panel was not made aware of the SPO’s intentions at the time it issued the Decision.
16. Thus, if, due to the SPO’s apathy, the Defence is required to satisfy itself with the W04577 Letter in redacted form as the only material pertaining to the allegations contained therein, then the Defence’s right and concomitant responsibility to

¹⁷ ICC, *Prosecutor v. Katanga and Chui*, Case No. ICC-01/04-01/07, Second decision on documents obtained pursuant to article 54(3)(e) and already disclosed to the Defence in redacted form, 21 December 2009, para. 17.

¹⁸ *Id.*

investigate and challenge the SPO's evidence are infringed. That is so because the effect of the Decision, coupled with the SPO's lack of interest in pursuing further investigation, is such that the Defence is deprived both of the only information that would allow it to conduct any investigations in relation to the allegations contained in the W04577 Letter, namely, the identity of its author, and of any further materials that would allow it to effectively challenge W04577's credibility absent that information.

17. While the Accused must "be given effective means of investigating the contents" of documents subject to protective measures,¹⁹ in the present situation, the Defence is bereft of any such means. Therefore, the appointment of an *amicus* investigator will thus ensure that the Accused's right to challenge the evidence against them is safeguarded. As such, reconsideration is required to obviate the twofold injustice occasioned by the Decision.

III. CLASSIFICATION

18. These submissions are filed strictly confidentially in accordance with Rule 82(4) of the Rules. A public redacted version will be filed in due course.

IV. CONCLUSION

19. Considering the foregoing, the Trial Panel should reject the arguments contained in the Response and grant the Motion.

Word count: 2000

Respectfully submitted on 15 March 2024,

¹⁹ KSC-BC-2020-07/F00136, Public Redacted Version of Decision on Non-Disclosure of Certain Witness Contacts, 22 February 2021, para. 27.



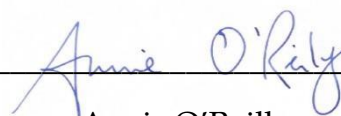
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