

In: KSC-BC-2023-12

Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj,
Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Isni Kilaj

Date: 22 April 2025

Language: English

Classification: Public

**Public redacted version of Kilaj response to “Prosecution
[REDACTED] and related submissions”**

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I. INTRODUCTION

1. The Defence for Mr Isn'i Kilaj ("Defence") files this response to the request of the Specialist Prosecutor's Office ("SPO", "Prosecution") for supplementation of the witness contact protocol ("Protocol").¹ The Defence makes no submissions in respect of the application for protective measures contained in paragraphs 2 and 6 of the Request.

2. The Defence submits that the proposed supplementation of the Protocol is neither necessary nor proportionate. However, notwithstanding the Defence's principal position, if the Pre-Trial Judge is minded to accede to the Request, the Defence proposes four changes to the wording of the supplements to the Protocol.

II. SUBMISSIONS

3. As foreshadowed in the Request, the Prosecution has [REDCATED].² The Prosecution has not explained, even in the most generalised terms, how this development amounts to a material change of circumstance requiring the Protocol to be supplemented as proposed. It is not clear why an augmentation of Defence restrictions on witness contact in the instant case is needed now whereas heretofore there was no necessity for Defence Counsel to notify the SPO and Witness Protection and Support Office ("WPSO") in advance of meeting a Prosecution witness.

4. If there were a need for amendment of the Protocol [REDACTED], one would expect any change to be in the direction of loosening contact restrictions, not making restrictions more onerous. The Prosecution's proposal is counterintuitive.

5. The Prosecution argues that "Defence Counsel are not familiar with the complex and continuously evolving security situation of these sensitive

¹ Confidential redacted version of 'Prosecution [REDACTED] and related submissions', KSC-BC-2023-12/F00252, 8 April 2025, confidential (original *ex parte* version filed on 7 April 2025) ("Request"), paras 7-9

² [REDACTED]. [REDACTED]

individuals...”³ But Defence Counsel are neither any more nor any less familiar with such matters now than [REDACTED]. If there were any truly cogent reason to require Defence Counsel to notify the SPO and WPSO before making contact with the Group B witnesses, these arguments would have been raised in the course of the litigation leading to the Pre-Trial Judge’s decision on the witness contact framework.⁴ However, the SPO stated in terms that it was not asking for the adoption of the second part (relating to contacts between witnesses and non-calling Parties) of the Framework for the Handling of Confidential Information During Investigations in Case 6.⁵ The SPO’s position as set out in the Request is inconsistent with the position it advanced in the Framework Litigation between December 2024 and January 2025. This inconsistency goes unexplained.

6. If there is indeed [REDACTED] requiring reconsideration of the Protocol, and this [REDACTED] extraneous circumstances, the Prosecution has not explained what those circumstances are and has provided no evidence thereof.

7. The Protocol aims to strike a balance between the preservation of the Defence’s ability to prepare its defence on the one hand, and the protection of witnesses on the other. But the Pre-Trial Judge must ensure that the Protocol does not disproportionately interfere with the Defence’s rights to investigate and prepare its defence. The Pre-Trial Judge’s assessment is fundamentally a fact-based one and cannot be conducted in a vacuum detached from an understand of the relevant circumstances. Yet this is precisely what the Pre-Trial Judge is being asked to do.

³ Request, para. 8

⁴ Decision on Framework for the Handling of Confidential Information and Witness Contacts, KSC-BC-2023-12/F00173, 11 February 2025, confidential (public redacted version filed on 11 March 2025) (“Framework Decision”)

⁵ Framework Decision, para. 22, citing Prosecution Consolidated Reply to Defence Responses to Protective Measures Request, KSC-BC-2023-12/F00128, 21 January 2025, confidential (public redacted version submitted on 22 January 2025), para. 10

8. The only concrete example of how Defence Counsel's lack of familiarity with the Group B witnesses' particular circumstances might be problematic is the asserted lack of familiarity with "how any contact by people associated with the KSC may be perceived within their community."⁶ This concern ignores the many years of experience of members of the Kilaj team in preparing defences and conducting investigations in trials before numerous international and internationalised courts and tribunals. The Defence has no intention of advertising its hopes of making contact with some of the Group B witnesses "within their community." The Defence will conduct its activities discreetly, fully conscious that witnesses may not want their contacts with people associated with the KSC to be known within their community. The Defence has experience of making contact with vulnerable witnesses and ensuring that any meetings are conducted in a low-profile and inconspicuous manner at a distance from their homes and workplaces. The risk of a witness's contacts with the Defence becoming known within their community is no higher than the risk of contacts with the SPO becoming known.

9. If, however, the Pre-Trial Judge is minded to supplement the Protocol with the wording proposed in paragraph 9 of the Request, the Defence proposes the following four modifications:

- (i) **(c):** the reference to a witness whom the SPO intends to call to testify or on whose statement it intends to rely should be modified to clarify that this only applies when the SPO has notified its intention to call or rely to the Defence;
- (ii) **(d):** the reference to the obligation of the SPO or WPSO to ascertain in good faith if the witness consents to being contacted and/or interviewed by Counsel should be supplemented by the clear injunction that the SPO or WPSO must not attempt to influence the witness's decision whether to

⁶ Request, para. 8

agree to being contacted and/or interviewed by Counsel. This would bring the provision in line with the ICC's Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant, annexed to the ICC's Chambers Practice Manual;⁷

- (iii) **(f):** The SPO shall notify the Defence at least ten days in advance if it wishes to contact and/or interview any Defence witness whose identity has been notified to the SPO in the present case, or a witness whom the Defence intends to call to testify or on whose statement it intends to rely, and such intention has been notified to the SPO.
- (iv) **(g):** The Defence shall ascertain in good faith if the witness consents to being contacted and/or interviewed by the SPO. The Defence must not attempt to influence the witness's decision whether to agree to being contacted and/or interviewed by the SPO. The Defence shall inform the SPO whether the witness consents. Once a witness has agreed to being contacted and/or interviewed, the Defence shall provide the SPO with any information concerning whether the witness has any special needs as defined in Rule 146 of the Rules or requires special measures as listed in Rule 80(4)(c) of the Rules.

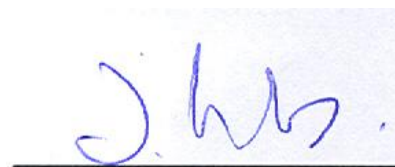
⁷ <https://www.icc-cpi.int/sites/default/files/2022-11/chamber-manual-eng-v.6.pdf>

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'I. Edwards'.

Iain Edwards

Counsel for Isn'i Kilaj

A handwritten signature in blue ink, appearing to read 'J. Holmes'.

Joe Holmes

Co-Counsel for Isn'i Kilaj

22 April 2025

Abidjan, Côte d'Ivoire

Word count: 1,182