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In: **KSC-BC-2020-06**

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Pre-Trial Judge**

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: **15 December 2021**

Language: English

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Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses

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I. INTRODUCTION

1. Pursuant to Rule 76 of the Rules, the Defence for Mr Kadri Veseli ("Defence") hereby responds to the SPO request for framework on confidential information and contacts with witnesses ("Request").[1]

2. The Defence submits that the proposed protocol is not supported by precedent or the applicable legal texts of the KSC; it would significantly and unduly prolong the proceedings; and it would gravely encroach upon the rights of the Accused. In particular, the proposed conditions relating to contacts with the witnesses of other parties or participants would improperly and unfairly prevent the Accused from investigating the case against him.

3. It is axiomatic to the principles of a fair trial that any proposal which infringes upon the fundamental rights of a defendant must be tailored as narrowly as possible to advance a legitimate interest while protecting the fundamental rights of the individual.[2] Here, the SPO's proposed protocol is unworkably broad and it would severely encumber the proceedings without necessarily advancing its stated aim.

4. The Defence does not oppose the imposition of a protocol that is both reasonable and necessary. It notes, however, that the proposed protocol - which the Defence finds to be egregiously cumbersome and disproportionate - has been placed before the Pre-Trial Judge prior to any attempt by the SPO to develop a workable solution on an *inter partes* basis. It submits that the protocol should be rejected by the Pre-Trial Judge and the parties should be directed to

[1] F00594, Prosecution submissions on confidential information and contacts with witnesses, 3 December 2021, ("Request").
[2] ECtHR, *Krestovskiy v. Russia (Application no. 14040/03)*, Judgement, para. 29 (regarding security measures and the principle of publicity).

develop a protocol *inter partes* to identify common ground and develop a feasible protocol before any further motions are made concerning this issue.

II. SUBMISSIONS

A. The Proposed Protocol is not Supported by Precedent or the Law

5. Neither the *Gucati* Order on which the protocol is modelled[3], nor the legal texts of the KSC are capable of supporting the SPO's proposed protocol. The *Gucati* Order was rendered at a much later point in the proceedings, in a case that was very different from the instant case, both in terms of subject matter and scale. The legal texts – the Law, Rules, and Code of Conduct – do not contemplate a protocol such as has been proposed by the SPO and in some instances, are in conflict with it.

i. The Gucati Order Does not Constitute Applicable Precedent

6. The *Gucati* Order is inapposite to this case. The SPO submits that the proposed measures are *"largely consistent"* with those adopted in the *Gucati & Haradinaj* case.[4] Indeed, it appears to draw heavily on the Order from that case. However, this is where the "consistency" begins and ends.

7. The circumstances surrounding the *Gucati* Order are significantly different to those at hand. First, in *Gucati & Haradinaj,* the protocol was issued by a Trial Panel (as opposed to the Pre-Trial Judge) pursuant to Rule 116(3) on the conduct of the proceedings. It was only issued in that case **after** the defence had completed its investigations and had submitted a list of its own prospective

[3] KSC-BC-2020-07/F00314/A01, *Prosecutor v. Gucati & Haradinaj*, Annex to Order on the Conduct of Proceedings, 17 September 2021.
[4] Request, para. 6, referring to KSC-BC-2020-07/F00314/A01, Annex to Order on the Conduct of Proceedings ("Gucati Order"), fn 15.

witnesses annexed to its Pre-Trial Brief.[5] As a consequence, the Defence was able to conduct its investigation free from the oppressive measures that the SPO now seeks in this case.

8. Rule 116(3), the provision pursuant to which the *Gucati* Order was made, is not available to the Pre-Trial Judge. Indeed, there is no explicit basis for such a protocol at the current stage of the proceedings and, tellingly, there is no precedent for such an order being issued during the Pre-Trial phase in any of the other three indicted cases before the KSC. It is recalled, however, that each of those cases was overseen by the same Pre-Trial Judge who was specifically appointed to oversee all the cases at the Court in the pre-trial phase for reasons of consistency and predictability.[6]

9. Second, the *Gucati case* would be a poor point of comparison regardless of the timing of the proposed conditions. The entirety of the *Gucati* case revolves around accusations of crimes against the administration of justice. In that case, a robust protocol to deal with witness contact and confidential information directly relates to the underlying accusations.

10. Third, the scale of *Thaci et al.* compared with *Gucati* makes any attempt to apply the conditions vastly more complex and burdensome. The number of SPO witnesses in *Gucati* was just 4, whereas the number of SPO witnesses in this case exceeds 300. Additionally, whereas the *Gucati* case has two Accused, this case has four. Even if the conditions in the *Gucati* Order had been imposed at an earlier phase, it would at least have been manageable exercise. While the

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[5] *See* KSC-BC-2020-07/F00267, Order for Submissions and Scheduling the Trial Preparation Conference, 21 July 2021, para. 12.

[6] *See* KSC President Briefing to EU Heads of Missions, 11 February 2021, reproduced in https://www.euronews.com/2021/02/15/kosovo-could-try-to-move-war-crimes-court-to-pristina-judge-warns ("I assigned one Pre-Trial Judge, Judge Nicolas Guillou, to deal simultaneously with all three cases at the pre-trial phase. This will ensure consistency in the jurisprudence and predictability of practices before the KSC").

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Defence does not, of course, anticipate a need to interview all SPO witnesses, even interviewing a fifth of those witnesses would place significant strain on the time and resources of parties and the Registry. As developed further below, the proposed protocol is simply not feasible as applied to this case.

11. Of all of the cases currently before the KSC, the *Gucati* case is the least similar to this one. Yet, in the *Mustafa* and *Shala* cases, which involve allegations and witnesses common to the present case, no witness protocols have been applied during the Pre-Trial phase. Indeed, the *Mustafa* trial is well underway,[7] and the Trial Panel still has not issued any such "framework" regulating the interview of witnesses by opposing party.[8] This raises the obvious question of whether a witness protocol is truly necessary at all.

12. In sum, the Defence submits that the *Gucati* Order does not constitute applicable precedent, particularly as applied to the pre-trial phase of the proceedings.[9]

ii. There is no Basis for the Proposed Protocols in the Law

13. The legal framework does not provide adequate authority for the Pre-Trial Judge to implement such a protocol. The SPO relies upon a series of generic provisions[10] and the need for a "*framework for (i) contacts with witnesses; and (ii) handling of confidential information during investigations*."[11] But none of the provisions it cites support its Request at this stage of the proceedings.

[7] KSC-BC-2020-05/F00170, Decision on the conduct of the proceedings, 26 August 2021.
[8] KSC-BC-2020-05/F00130, Prosecution Submissions pursuant to KSC-BC-2020-05/F00123 with Strictly Confidential and ex parte Annexes 1-2, 2 June 2021.
[9] Should the SPO Request be granted, this would constitute a unique case where Mr Veseli would be discriminated towards other i) Serbian and SFRY nationals tried in courts of successor states to SFRY; ii) accused tried in other Kosovo courts; and iii) accused tried before the KSC.
[10] Request, para. 1.
[11] Request, para. 1.

14. Article 21(4) enshrines the minimum guarantees accorded to the Accused, which, according to the principle of legality may only be limited by law.[12] It may thus be reasonably expected that such an oppressive protocol would have been foreseen in the applicable texts, as are other significant limitations on the rights of the accused, such as the possibility of anonymous witnesses.[13] Yet, no such provision exists.

15. As regards the other provisions cited by the SPO:

- Article 23 relates, in general, to measures for the protection of victims and witnesses. Yet, while such procedures are clearly regulated in the Rules,[14] they i) relate to a different subject matter; and ii) clearly do not justify the relief sought by the SPO at this stage of the proceedings.

- Rule 80 implements Article 23(1) of the Law. The Defence notes that the SPO places special emphasis on this rule, particularly the power of the Pre-Trial Judge to order "*appropriate measures*" for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, provided that the measures are consistent with the rights of the Accused. However, as the rule makes clear, the Pre-Trial Judge's authority under Rule 80 is to be exercised in respect of witnesses on an individual basis, taking into account their specific circumstances. It does not permit the Pre-Trial Judge to issue a blanket protocol that must be initiated in respect of all witnesses, irrespective of their specific circumstances. The SPO has not indicated any risk specific to any of its witnesses that would justify the imposition of these additional protective measures; nor does it explain why

[12] Constitution, Article 56(1).
[13] Rule 147.
[14] Rules 80 and 81.

the current protective measures (all of which were granted by the Pre-Trial Judge) are inadequate.

- Article 35 sets out the competences of the SPO. To the extent that Article 35(2)(f) relates to the protection of information and may be ostensibly relevant here,[15] the Defence notes that any measures taken or requested by the SPO under this provision must comply with the law, and the proposed protocol does not.

- Article 38 regulates pre-Indictment activities. It does not, therefore, pertain to the present stage of the proceedings.

- Article 39(1) prescribes the power of the Pre-Trial Judge to "*make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial*."[16] This does not obviate the requirement that any order or decision that infringes on fundamental defence rights must be both necessary and proportionate. Moreover, the Defence points out that the proposed protocol would significantly delay rather than expedite the pre-trial proceedings. The proposed protocol thus cannot be justified as relating to the expeditious and proper preparation of the case for trial, as required for Article 39(1).

- Rule 95(2): It is unclear whether the SPO intended to rely on Rule 95(2)(e),[17] which is not clearly relevant to the present issue. To the extent that the SPO meant to cite Rule 95(2)(h), the Defence reiterates the above considerations. In particular, it opposes any attempt to equate the proposed "*regulatory*

[15] The SPO does not invoke a specific provision of the article.
[16] Despite claiming that the purported aim of the Request is to protect the confidentiality of witnesses, the SPO fails to refer to Article 39(11) of the Law.
[17] Rule 95(2)(e): set time limits for motions, until the transmission of the case file to the Trial Panel, including objections from the Parties to the admissibility of evidentiary material disclosed pursuant to Rule 102.

framework"[18] with a "*motion for protective measures*" which, as stated above, are required to be justified in respect of the individual circumstances of each witness.

- Articles 6, 12, 14 and 17 of the Code of Conduct: None of the cited provisions support, even implicitly, the SPO's Request. Indeed, the opposite seems to be the case. For instance, while Article 16 explicitly prohibits communications with client except through or with the permission of Counsel, Article 17 implicitly accepts that communications with unrepresented persons may occur without any prior notice or permission, by imposing standards of conduct for such occasions. Moreover, Article 15 of the Code of Conduct specifically provides for communications and meetings with unrepresented persons.[19]

iii. The Existing Legal Framework Affords Adequate Protection and Render the Protocol Unnecessary

16. The existing legal framework effectively accomplishes the very protection that the SPO claims to seek with respect to protected witnesses and victims subject and the handling of confidential information during defence investigations.

17. For example, Counsel is already under an obligation to protect and not to disclose confidential information to the public. It is already under an obligation not to disclose the names of protected witnesses or to harass or intimidate them. And, it is already under an obligation to "*avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity and physical and psychological well-being.*"[20]

[18] Request, para. 7.
[19] While the term 'unrepresented person' may be broader in nature to include, inter alia, potential clients, suspects, or co-accused, it does not preclude unrepresented persons who have been summoned as witnesses during the SPO investigation phase.
[20] Article 17 Code of Conduct. See also, Rule 143(4)(c).

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18. The proposed witness protocol is not supported by precedent at the Special Court, or the legal framework at this phase of the proceedings. Moreover, the current framework already accomplishes the purported objectives of the proposed protocol. For these reasons the Pre-Trial Judge should reject the SPO's Request.

B. The Proposed Protocol Violates Mr Veseli's Fundamental Rights

19. The proposed SPO Request would directly infringe on the fundamental rights of the Accused.

i. Equality of Arms

20. The proposed protocol infringes upon the fundamental rights of the accused because it violates the principle of equality of arms. The Defence recalls that the SPO has had more than ten years to investigate the allegations against Mr Veseli. During this time, the SPO has contacted and interviewed thousands of potential witnesses. The SPO has enjoyed freedom in choosing the methodology of contacting and interviewing witnesses which included informal and non-recorded meetings.

21. In order to accomplish those interviews, the SPO relied on a variety of methods including travelling to Kosovo to conduct interviews at a specialised facility proximate to the witnesses, as well as issuing summonses, and in some cases subpoenas to appear in The Hague. The Defence does not have the same tools available to it. Instead, the Defence relies primarily upon travelling to the witness and meeting with them on their terms. In order to secure evidence for its case, the Defence is required to be extremely flexible with its time, as meetings are often only confirmed by the witness on extremely short notice and during "*off hours*" when the witness is not working. The proposed protocols

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take these important Defence methods off the table and, in so doing, place the Defence at an unfair disadvantage to the Prosecution.

22. Even assuming that "SPO witnesses" would accept to be interviewed pursuant to the terms of the proposed protocols, and no chilling effect would occur, the breadth of these protocols would still provide the SPO with an unfair tactical advantage. The Defence would necessarily need to access witnesses it deemed strategically relevant through the SPO. The SPO would therefore be privy to each Defence investigative step; it would learn which witnesses the Defence prioritised; and it would be granted insight to the Defence's assessment of the witnesses' credibility and likely lines of cross-examination well in advance of trial. This would be patently unfair to the Defence and would provide the SPO with a distinct advantage.

ii. The Right to Prepare its Case

23. The ability of the Defence to adequately prepare its case is fundamental to any fair trial and it includes the right to investigate the charges against it and to interview relevant individuals including those who may have provided evidence to the SPO. This is a fundamental right which is specifically envisaged by the Law and the European Court of Human Rights.[21]

24. There is no question that the proposed Protocol makes it more difficult for the Defence to access witnesses and prepare its case. The SPO acknowledged as much in arguing that a similar protocol should not apply to SPO interviews of opposing party witnesses when the interview concerns "unrelated cases". The SPO submitted, "*Inviting the calling party to sit in on a witness interview with no relation to its case, for instance, would plainly compromise the efficacy of SPO*

[21] 14(3) ICCPR, 6(3) ECHR, see also *Huseyn and Others v. Azerbaijan*, 26 July 2011, para 175; *OAO Neftyanaya Kompaniya Yukos v. Russia*, 20 September 2011, para 538.

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investigations on entirely independent matters."[22] The Defence agrees with the SPO on that point: having another party sit in on a witness interview would compromise the efficacy of that interview. The proposed protocol would have a direct and negative impact on the fundament rights of the Accused.

25. The Defence notes therefore that the SPO's proposed protocol is not supported by precedent at the Special Court or the Law and the protocol would clearly infringe on the rights of the accused. The critical question then is whether the request has been properly tailored by necessity and proportionality, so as to allow for such a protocol at any phase of the proceedings.

C. The Proposed Protocol is Overbroad

26. The Defence submits that the proposed protocol in its current form is overbroad. It exceeds the SPO's stated purpose and causes unjustifiable collateral damage to the defendant's right to a fair trial.

27. The SPO's proposed protocol is not narrowly tailored to advance the SPO's stated purposed. The SPO's stated purpose for this protocol is to, "*avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being*."[23] Notably, the protocol does not distinguish at all between witnesses who have expressed fear, or a desire not to be contacted by the Defence and those who would readily volunteer to speak to any party to the proceedings. The protocol fails to distinguish between protected witnesses and those who intend to testify publicly. It further fails to distinguish between protected witnesses and individuals the SPO compelled to appear and to give evidence as suspects. This broad-brush approach maximally impedes on the rights of Mr Veseli while failing to advance the SPO's interests.

[22] KSC-BC-2020-07/F00284, Prosecution submissions on the conduct of proceedings, 27 August 2021, paras 12-13.
[23] Witness Protocol Para. 6.

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28. Of the 300 plus witnesses the SPO has identified, there are many for whom the stated purpose of this protocol simply does not apply. For example, there are dozens of witnesses that the SPO intends to call which (i) will testify publicly, (ii) have expressed no fear of testifying and (iii) who were initially interviewed as suspects. There is no reason to believe that such witnesses would be "retraumatised" if approached by the Defence. The SPO's protocol does not advance its stated purpose with respect to these witnesses. It does, however, significantly encumber the proceedings and infringe on the rights of the defendants. As such, the protocol as proposed is overbroad.

D. The Proposed Protocol Would Significantly Encumber the Proceedings

29. Leaving the breadth of the proposed protocol to one side, the Defence observed that, should the proposed protocol be adopted, it would pose significant logistical challenges and result in substantial delays to the proceedings.

30. As observed above, the proposed protocol was at least more practicable in the context of the proceedings for which it was designed, *i.e.*, the *Gucati* case.

31. In *Gucati*, the SPO proposed to call three (3) witnesses (two of whom were SPO employees). Even with only three witnesses, the Registry stressed the considerable logistical preparations which are required to implement such a protocol. It noted that such preparations would take "*no less than ten days*" for an interview to be arranged.[24] The different Registry Units would need to receive (i) the witnesses' agreement to be interviewed; (ii) information about protective measures; (iii) travel arrangements; and depending on the witness

[24] KSC-BC-2020-07/F00286, Registry Submissions for Trial Preparation Conferences and on the Draft Order
on the Conduct of Proceedings (F00267/A01) with one confidential Annex, 27 August 2021, para. 32 ("Considering the logistical preparations required, it is recommended that the interview takes place no earlier than ten days from the date the witness's agreement to be interviewed by the Opposing Party is notified to CMU").

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(iv) presence of the WPSO or (v) legal assistance would be required. Moreover, a risk assessment would need to be prepared in order to determine the location of the interview (which in principle would take place at the KSC premises in the Hague).[25]

32. Given those challenges, the Defence submits that there would be insurmountable logistical difficulties if such a protocol were implemented in this case. For example, if each defence team sought to interview even 20% of the SPO's witnesses it would amount to sixty (60) requests from four (4) separate Defence teams which may or may not overlap. The proposed ten-day period required by the Registry to organise each witness would on its own extend the Pre-Trial period – potentially -- by years.

33. The Defence additionally registers its concern that the proposed protocol is unreasonably burdensome to witnesses. Requesting that a witness fly to The Hague (apparently at their own expense) and to sit for a formal interview with the Defence *after* having already been interviewed by the SPO, is a significant barrier, even for a witness who would otherwise freely speak to the Defence. This would have a significant chilling effect which would constructively deny the Defence the opportunity to access a witness that otherwise would freely speak to the Defence. Such a scenario does not advance the SPO's stated purpose for the proposed protocol. It merely compromises the Defence's ability to prepare its case.

III. CONCLUSION

34. The Defence opposes the SPO's Request not because it opposes setting reasonable conditions on contacts with SPO witnesses. Rather, the concern

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[25] KSC-BC-2020-07/F00286, Registry Submissions for Trial Preparation Conferences and on the Draft Order on the Conduct of Proceedings (F00267/A01) with one confidential Annex, 27 August 2021, paras 31-40.

arises from the fact that the proposed protocol has been lifted from a separate case with far fewer witnesses and unilaterally put forward during the Pre-Trial Phase without any *inter partes* consultation. In so doing the SPO has lost sight of any balance between the interests it wishes to advance and the serious infringement on the rights of the accused.

35. For all of the reasons above, the Defence for Mr Veseli respectfully requests the Pre-Trial Judge to reject the SPO's Request and instruct the parties to engage in discussions regarding a protocol that is appropriate for this case.

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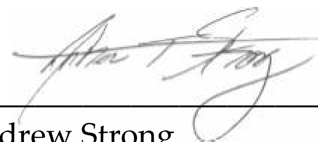

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