



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:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 14 February 2022

**Language:** English

**Classification:** Confidential

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**Prosecution response to 'Registrar's Submissions on Proposed Protocol for Interviews with Witnesses'**

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1. Pursuant to the Order,<sup>1</sup> the Specialist Prosecutor's Office ('SPO') hereby responds to the Registry Submissions.<sup>2</sup>
2. At the outset, the SPO again emphasises the importance of a procedure governing contacts with witnesses of other parties and participants to, *inter alia*, avoid re-traumatisation of victim-witnesses and safeguard privacy, dignity, and physical and psychological well-being, as well as the integrity of the evidence.<sup>3</sup>
3. In the particular circumstances of the Specialist Chambers ('SC') and this case, any such procedure must take into account the well-established and persistent climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.<sup>4</sup> The reality is that SPO witnesses are, and will continue to be, under enormous pressure not to cooperate with the SC. Persons summonsed by the SPO during the investigation phase routinely felt compelled to 'go public' with their summons, lest they appear to be 'cooperating' with the SC. A significant number of witnesses have been granted protective measures because of clear risks to their safety and security. The Defence in this case have long sought to frame the prosecution in this case as hostile to the interests of Kosovo, including in the media, status conferences, and filings.<sup>5</sup> The

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<sup>1</sup> Order to the Registrar for Submissions, KSC-BC-2020-06/F00650, 21 January 2022 ('Order'), para.7(b).

<sup>2</sup> Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, KSC-BC-2020-06/F00679, 3 February 2022, Confidential ('Registry Submissions').

<sup>3</sup> Prosecution submissions on confidential information and contacts with witnesses, KSC-BC-2020-06/F00594, 3 December 2021 ('Prosecution Submissions'), paras 2-6.

<sup>4</sup> *See, for example*, Decision on Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F00624, 14 December 2021, Confidential, para.46 and the sources cited therein.

<sup>5</sup> *See, for example*, *Ekonomia Online*, 'Alarmon avocati i Thaçit: Në Hagë po tentohet të rishkruhet historia e Kosovës', 9 February 2022, available at: <https://ekonomiaonline.com/politike/alarmon-avokati-i-thacit-ne-hage-po-tentohet-te-rishkruhet-historia-e-kosoves/> (THAÇI Defence Counsel: 'It is a case more than against individuals. It is indeed a judgment against a country, a judgment against its people'); Transcript, 4 February 2022, p.907; Transcript, 29 October 2021, pp.653 (VESELI Defence Counsel: 'Why? Because they're prominent politicians. They'll do. They'll do for the purposes of symbolising the KLA, which is being accused'), 655 (VESELI Defence Counsel: '[...] the assumption underlying the Prosecution is no more than there is some sort of equivalence between the Serbs and KLA, and that since no KLA people got convicted at the ICTY it's justified to try and go again. And they made the decision to choose these defendants when they had no idea what the case against them was'); Public Redacted Version of Thaçi Defence Reply to

unmistakable effect is to cast prosecution witnesses as participants in the undermining of Kosovo, placing enormous and improper pressure on them to prove their patriotism by cooperating with the Accused and distancing themselves from the SPO. There should be absolutely no doubt that any request from the Defence to interview an SPO witness before trial will carry with it significant pressure. To be clear, witnesses, in particular, those living in or with close connections to Kosovo, will feel compelled to accede to any request from the Accused, whether made formally or through informal channels, including to submit to an interview and to do so without the presence of the SPO. To ignore these realities in devising this Protocol will create enormous risks to the integrity of the evidence in this case.<sup>6</sup>

4. While the SPO is not in a position to address the specific questions raised in the Registry Submissions,<sup>7</sup> as these are questions that must be principally addressed by the Defence at this juncture, the Registry's submissions do underline the potential strain of the Proposed Protocol<sup>8</sup> on Registry resources and the potential impact on the

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Prosecution response to Thaçi Defence Submissions on Second Detention Review, KSC-BC-2020-06/F00596/RED, 8 December 2021, paras 6 ('The SPO now advances more arguments that have roots in the anti-Albanian stereotypes that are the foundation of the Marty Report. [...] These attacks on the credibility of the KP play on stereotypes of Kosovo as a failed state, and its people as prone to corruption. But in light of how much Dick Marty and the SPO have been able to accomplish through the use of anti-Albanian innuendo [...]'), 46 ('The systematic incarceration of anyone charged before the KSC gives rise to the objective impression that this Court is hampered by a patent bias against any Accused from Kosovo'); Thaçi Defence Reply to 'Prosecution response to Thaçi Defence appeal against decision KSC-BC-2020-06/F00450', KSC-BC-2020-06/IA013/F00010, 16 December 2021, para.16 ('The SPO had the KSC relocated to The Netherlands based on the portrayal of Kosovo, and its political leadership, as a mafia-like organization. It now regularly resorts to the same Anti-Albanian stereotypes [...]'). The aforementioned statements of concern represent an intentional choice by counsel to inflame and operationalise the above climate to the advantage of the Accused.

<sup>6</sup> As also indicated below, corresponding changes are required to paragraph 6(b) of the Proposed Protocol, insofar as it provides for the possibility of an interview in the absence of the calling party; such possibility fails to adequately protect witnesses and integrity of the proceedings.

<sup>7</sup> Registry Submissions, KSC-BC-2020-06/F00679, para.11. The questions posed by the Registry depend on a number of unknown variables outside the control of the SPO.

<sup>8</sup> Prosecution Submissions, KSC-BC-2020-06/F00594, paras 5(a)-(g), 6(a)-(o) (collectively, 'Proposed Protocol').

expeditiousness of the proceedings. The Registry Submissions focus on the proposed, extensive involvement of the Registry in the organisation of, and presence at, interviews.<sup>9</sup> While these aspects of the Proposed Protocol could be beneficial to the quality and reliability of this aspect of the proceedings, they will not be strictly necessary to serve the underlying purposes of the Proposed Protocol, namely to protect the security of witnesses and the integrity of the evidence, assuming the calling party is in fact present. Indeed, save in exceptional cases, the parties should be able to organise interviews and the calling party's presence will be sufficient – with other requirements of the Proposed Protocol – to ensure the rights of the parties and well-being of witnesses and guard against allegations of witness interference or impropriety.<sup>10</sup>

5. Accordingly, in light of the Registry Submissions and the particular circumstances of this case, the following modifications to the Proposed Protocol are appropriate:<sup>11</sup>

- a. The Registry is not required to make the logistical arrangements for and a Registry representative is not required to be present at interviews. The calling

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<sup>9</sup> Registry Submissions, KSC-BC-2020-06/F00679, paras 10-11.

<sup>10</sup> In the circumstances set out above, such allegations may arise during interviews of opposing party witnesses despite the exercise of good faith by the interviewing party. Other courts have recognised that the calling party's presence is a safeguard against such risks to the integrity of the proceedings. *See, for example*, ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP, 26 October 2007, para.5 (deciding that, due to, *inter alia*, 'possible implications for the parties, and to curtail possible allegations of tampering with the witness, the Chamber will authorise the meeting in the presence of a representative of the Office of the Prosecution'). *See also* ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, para.11; ICC, *Prosecutor v. Bemba*, ICC-01/05-01-08, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", 4 September 2012, para.32; ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Trial Chamber I, Decision on Prosecutor's Request to Contact Defence Witnesses and their Family Members), 10 October 2002, para.17(vi).

<sup>11</sup> Except for those portions affected by the proposed modifications set out below, the remaining terms of the Proposed Protocol remain necessary and appropriate. *See also* Victims' Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, KSC-BC-2020-06/F00605, 10 December 2021, paras 9-10 (concerning an amendment to fn.17, which the SPO does not object to).

party, however, must be present. In light of the very real pressures felt by witnesses in respect of this case, this requirement is essential. In exceptional circumstances, a party or participant may apply to the Panel to additionally require the presence of Registry representative(s). However, ordinarily the witness's 'waiver' of the presence of the SPO will not be a sufficient basis for the interview to proceed without the SPO in light of the very real compulsion that witnesses will feel to accede to an interview without the SPO. Where a Registry representative will be present, the Panel shall, as necessary and appropriate, also order that the Registry or its representative(s) fulfil the obligations set out in paragraph 6(h)-6(k) and (n) of the Proposed Protocol.<sup>12</sup>

b. In the absence of a Registry representative and unless otherwise ordered by the Panel:

- i. The interviewing party shall make all necessary logistical arrangements in accordance with best practices.<sup>13</sup> The calling party shall bear the costs associated with its attendance at the interview.
- ii. In consultation with the parties, the Registry may, based on the information provided pursuant to paragraph 6(e)-(g) and if feasible, facilitate the process. Further, as set out in paragraph 6(h)(iv), when considered necessary by the Witness Protection and Support Office ('WPSO'), the Registry shall ensure that a WPSO representative is on site or otherwise available.
- iii. In the event the calling party objects to any part of the procedure followed or any particular line or manner of questioning during the

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<sup>12</sup> Corresponding amendments would be required to paragraph 6(b), (e), (h), (i)-(k) and (n) of the Proposed Protocol.

<sup>13</sup> These include obligations already imposed on the interviewing party, as set out in paragraph 6(d), (l), and (m), as well as certain responsibilities originally assigned to the Registry, as set out in paragraph 6(e), (h)(i)-(ii), (i)-(j), and (n).

interview, it shall raise the issue with the interviewing party outside the presence of the witness. Any disagreement shall be recorded and shall not impede or unduly disrupt the interview.

6. Accordingly, to protect witnesses and facilitate the fair and expeditious conduct of these proceedings, the Pre-Trial Judge should adopt the Proposed Protocol with the amendments set out above.

7. This filing is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

**Word count: 890**



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**Jack Smith**  
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Monday, 14 February 2022

At The Hague, the Netherlands.