



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: Acting Specialist Prosecutor

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Prosecution response to 'Thaçi Defence Request for Disclosure of Information related to the Relocation of Prosecution Witnesses'

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I. INTRODUCTION

1. The Request¹ should be rejected. The information requested by the Defence relates to the witness protection programme ('WPP') managed by the neutral and independent Registry and is not subject to disclosure. The Defence's unfounded allegations that relocation as part of the WPP necessarily impacts the credibility of the Witnesses² and is therefore subject to disclosure ignores the scope of Rules 102-103 of the Rules³ and the nature and purposes of the WPP.

II. SUBMISSIONS

2. The Request is premised on a fundamental mischaracterisation of relocation as part of the WPP. Contrary to Defence arguments,⁴ relocation is not properly characterised, in the abstract, as 'an economic and social opportunity' that incentivises cooperation. Rather, it is a last resort protective measure through which the Witnesses, as a matter of strict necessity, were relocated away from the source of grave threats to their safety and security. As emphasised by the ICC Appeals Chamber:⁵

relocation is a serious measure that can [...] have a "dramatic impact" and "serious effect" upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and re-settling that person into a new environment. It may well have long-term consequences for the individual who is relocated – including potentially placing an individual at increased risk by highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should be only provisional. Where relocation occurs, it is likely to involve careful and possibly long-term planning for the safety and well-being of the witness concerned.

¹ Thaçi Defence Request for Disclosure of Information related to the Relocation of Prosecution Witnesses with Confidential Annexes 1 and 2, KSC-BC-2020-06/F01404, 28 March 2021, Confidential ('Request').

² The 'Witnesses' are identified in paragraph 1 of the Request.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule' or 'Rules' are to the Rules.

⁴ Request, KSC-BC-2020-06/F01404, paras 23, 29.

⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07 OA 7, Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, 26 November 2008 ('*Katanga Appeal Decision*'), para.66.

3. Considered in the proper context, including the serious and grave risks leading to relocation and the impact on the Witnesses, the Request fails to demonstrate that the requested information is subject to disclosure on any basis. Even if *arguendo* it was, the Defence has not demonstrated a legitimate forensic purpose and is merely attempting to embark on an impermissible fishing expedition⁶ for information that is not only immaterial to its preparations, but, if disclosed, also poses serious and objective risks to the effective management of the WPP and the safety and security of the Witnesses.

A. THE REQUESTED DETAILS ARE NOT SUBJECT TO DISCLOSURE

4. The Registry – which is mandated under the Law⁷ and Rules⁸ to maintain confidentiality and act impartially at all times⁹ – is ‘not influenced, even unintentionally, when deciding upon whether relocation is appropriate to protect a particular witness, by the additional pressing interest of a party to the case of needing itself to secure the evidence of the witness concerned’.¹⁰ The WPP provides for equal treatment for all witnesses requiring relocation, whether ultimately appearing for the Specialist Prosecutor’s Office (‘SPO’), Defence, or otherwise.¹¹ Further, the Registry ensures that payments and assistance to witnesses in the context of the WPP are necessary and justifiable, and reflective of the actual costs incurred in the individual case.¹²

⁶ See, similarly, *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021, para.56.

⁷ Article 34 of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ are to the Law, unless otherwise specified.

⁸ Rule 27(4).

⁹ KSC-BC-2020-06/F01404/A02.

¹⁰ *Katanga* Appeal Decision, para.92. While the ICC legal framework includes provisions regulating witness protection that are not part of this Court’s framework, insofar as the Registry oversees the WPP and the Witnesses were relocated as part thereof, similar principles apply.

¹¹ See, similarly, *Katanga* Appeal Decision, para.92.

¹² KSC-BC-2020-06/F01404/A02.

5. In light of such safeguards, necessary assistance provided as part of the WPP does not impact witness credibility¹³ and respects equality of arms between the Parties, a key principle underlying the SPO's disclosure obligations.¹⁴ In turn, consistent with practice in Kosovo¹⁵ and before international courts,¹⁶ the specific details requested by the Defence – namely, the date of relocation, associated expenses, and number of family members involved – are not subject to disclosure.¹⁷ The rights of the Defence are safeguarded through its ability to question the Witnesses about

¹³ See, for example, ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-428-Corr, Corrigendum to Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, para.31; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005 ('Nzirorera 2005 Decision'), para.9 (finding that (i) the information sought concerning the amount of money expended by a state for a relocated witness was 'not necessary for a fair determination of the credibility of the Witness'; (ii) 'the protection [namely, relocation] does not necessarily compromise the credibility of the Witness', and (iii) '[t]here is no mathematical relation between the amount spent on witness protection and the degree of credibility'); ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, 21 January 2014 ('Ruto VWU Decision'), paras 1, 21 (the Chamber found that 'it does not afford a *prima facie* indicium of credibility that the VWU undertook those reasonable tasks of providing reasonable support and maintenance to a witness rather than the witness doing it themselves'). See also fn.16 below.

¹⁴ See ECtHR, *Rowe and Davis v. United Kingdom*, 28901/95, Judgment [GC], 16 February 2000, para.60.

¹⁵ Details of agreements with witnesses under the witness protection programme (pursuant to Law No.04/L05 on Witness Protection, which is also incorporated in Article 23 of the Law) are considered official secret and are in principle not subject to disclosure. See Basic Court of Mitrovicë/Mitrovica, [Case P938/13](#), Verdict, 27 May 2015 ('Basic Court of Mitrovicë Decision'), para.45.

¹⁶ See, for example, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Public Redacted Version of 'Decision on Defence requests seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness's cross-examination' [...], 5 October 2015 ('Ntaganda Decision'), paras 61-63 (finding that the VWU is a neutral and independent organ in charge of the Court's system for witness protection. In order to properly carry out its mandate, some of its working practices must remain confidential, for example those related to expenses made for protection, as the very information about such expenses could give away sensitive information related to the witnesses that are in the VWU's care. The VWU's mandate requires it to impartially evaluate and provide reasonable and necessary support to witnesses. In light of this mandate and the applicable disclosure framework, VWU does not have a general disclosure obligation with regard to expenses incurred for protecting witnesses); ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disclosure of Benefits to Prosecution Witness ZF, 21 October 2009 ('Nzirorera 2009 Decision'), paras 4-5 (in considering that certain expenses relating to relocation were not disclosable, the Chamber distinguished between relocated witnesses in the 'care' of the ICTR Registry and those 'who receive special arrangements from the Prosecution'). See also fn.13 above.

¹⁷ Disclosure is governed by Rules 102(3) and 103, which do not provide for disclosure by the Registry. See also Section II(B) below.

matters relating to credibility and motivation,¹⁸ albeit not about immaterial details – such as those sought in the Request – that could reveal the place of relocation¹⁹ or undermine protective measures and/or the integrity of the WPP.

6. Throughout the Request, the Defence selectively relies on inapplicable jurisprudence. It fails to acknowledge that cited decisions purportedly supporting the requested disclosures – for example, the *Ayyash* Decision,²⁰ the *Haradinaj* Decision,²¹ the *Karadžić* Decision,²² both *Karemera* Decisions,²³ and the *Ruto* Decision²⁴ – all concerned payments and ‘benefits’ provided directly and indirectly by the Prosecution to witnesses. None of these decisions concerned payments in the context of a witness protection programme akin to the WPP and managed by a neutral and independent entity, like the Registry. Indeed, the Request ignores that in the cited *Ruto* Decision, ‘VWU staff members’ were excluded from the scope of the decision; in turn, related witness contacts and expenses were not subject to disclosure.²⁵ Further, the

¹⁸ See, similarly, *Ntaganda* Decision, para.63; ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1604, Decision Joint Defence Applications for Leave to Appeal the Second Oral Decision on Disclosure of Information on VWU Assistance, 13 October 2014, para.24; Basic Court of Mitrovicë Decision, para.45.

¹⁹ See also Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, KSC-BC-2020-06/F00099/37, pp.35-36 (Category B.4).

²⁰ Request, KSC-BC-2020-06/F01404, para.24, fn.26 citing STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Prosecution Witness Expenses, 9 May 2014 (‘*Ayyash* Decision’).

²¹ Request, KSC-BC-2020-06/F01404, para.25, fn.28 citing ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis, 12 October 2022 (‘*Haradinaj* Decision’).

²² Request, KSC-BC-2020-06/F01404, para.25, fn.27 citing ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, 22 November 2011 (‘*Karadžić* Decision’).

²³ Request, KSC-BC-2020-06/F01404, paras 22, fn.22 citing ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, and para.23, fn.25 citing ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments Made for the Benefit of Witness G, 29 May 2008 (collectively, ‘*Karemera* Decisions’).

²⁴ Request, KSC-BC-2020-06/F01404, para.17, fn.19 citing ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-904-Red2, Public redacted version of Decision on Disclosure of Information Related to Prosecution Intermediaries, 11 December 2017 (‘*Ruto* Decision’).

²⁵ *Ruto* Decision, paras 35-37 (‘other than VWU staff’ members’ qualifies the scope of Prosecution ‘intermediaries’ concerned by the decision), p.26.

Defence fails to mention that in some of the same cases it references, other decisions specifically denied relief similar to that sought in the Request. For example, both the *Karemera* and *Ruto* Chambers, in decisions that are notably absent from the Request, unequivocally found that necessary assistance provided by the Registry and a third state – as distinguished from the Prosecution – to relocated witnesses did not impact credibility and was not subject to disclosure.²⁶

B. THE SPO HAS FULFILLED ITS DISCLOSURE OBLIGATIONS

7. The SPO is discharging its disclosure obligations, including in relation to any witness expenses or ‘benefits’ which may reasonably impact on witness credibility.²⁷ This includes information relating to witness relocation that has a bearing on witness credibility, for example, evidence that a witness abused or exploited the WPP.²⁸ The details sought in the Request do not fall into this category, do not *per se* impact on witness credibility, and are not subject to disclosure.²⁹ To facilitate fair and expeditious proceedings, the SPO already disclosed the fact of the Witnesses’ relocation,³⁰ as such information was requested by the Defence and in the SPO’s possession, could be disclosed without compromising the Witnesses’ security or the WPP, and facilitates compliance with the Contact Decision.³¹ The Request fails to demonstrate that any further disclosure is either permitted or justified under the Law and Rules.

²⁶ *Ruto* VWU Decision, paras 1, 21; *Nzirorera* 2009 Decision, paras 4-5; *Nzirorera* 2005 Decision, para.9.

²⁷ *See, similarly*, Prosecution consolidated response to F01100 and F01101, KSC-BC-2020-06/F01121, 24 November 2022, Confidential, para.48.

²⁸ *See, similarly*, *Ruto* VWU Decision, para.25.

²⁹ *See* para.5 above.

³⁰ *See* KSC-BC-2020-06/F01404/A01.

³¹ In this regard, if the Defence is unaware of the fact of relocation, then one of the safeguards in the Contact Decision intended to protect the Witnesses would be rendered meaningless. *See* Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, KSC-BC-2020-06/F00854, 24 June 2022 (‘Contact Decision’), para.212(I)(e) (requiring a Party to consult with the Witness Protection and Support Office before disclosing the identities of relocated witnesses to third parties).

8. While the Defence acknowledges that some information concerned by the Request 'may not be in the SPO's custody',³² it asserts that the SPO is 'certainly aware' of the date of relocation.³³ First, as outlined above, information pertaining to the Witnesses' date of relocation – which follows admission into the WPP – is not subject to disclosure. In the event the SPO may become aware of certain information concerning the Witnesses' relocation, any such information is not subject to disclosure for the same reasons given above, in particular, the absence of any impact on witness credibility, the neutrality of the Registry, the need to preserve the integrity of the WPP, and the safety and security of the Witnesses.³⁴

9. Moreover, the Defence's submissions as to the materiality of specific relocation dates are unsupported.³⁵ The Defence is already aware that the Witnesses were relocated before their anticipated testimony in this case and does not provide any legitimate reason why a specific date would assist in its preparations.³⁶

III. CLASSIFICATION

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

IV. RELIEF REQUESTED

11. For the foregoing reasons, the Panel should dismiss the Request.

Word count: 2357



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Thursday, 6 April 2023

At The Hague, the Netherlands.

³² Request, KSC-BC-2020-06/F01404, para.31.

³³ Request, KSC-BC-2020-06/F01404, para.27

³⁴ See, similarly, *Ntaganda* Decision, paras 61-62.

³⁵ See Request, KSC-BC-2020-06/F01404, para.27.

³⁶ The Defence also indicates that it is aware of more specific information concerning the timing of the relocation of one of the witnesses. See Request, KSC-BC-2020-06/F01404, para.30.