



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

**Date:** 19 April 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of 'Prosecution response to Thaçi request to waive  
Witness Contact Protocol for W04147', KSC-BC-2020-06/F01381, dated  
16 March 2023**

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## I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to Thaçi's Request<sup>1</sup> to waive the Witness Contact Protocol<sup>2</sup> for W04147. The Request should be denied because Thaçi fails to meet the requirement that the Trial Panel imposed in the Order on the Conduct of Proceedings ('Conduct of Proceedings Order')<sup>3</sup> that a party must show that 'circumstances have changed in a material way'<sup>4</sup> since the Appeals Panel's decision upholding the Witness Contact Protocol<sup>5</sup> ('Appeal Decision'). In this respect, there has been no material change in circumstances since the Appeal Decision, nor has there been any material change since this Panel rejected a prior Thaçi request to vary the Witness Contact Protocol in relation to W04147.

2. The Request is also premature, as Thaçi has not made any request to contact W04147 through the procedures established in the Witness Contact Protocol.

## II. PROCEDURAL HISTORY

3. On 24 June 2022, the Pre-Trial Judge issued the Witness Contact Decision,<sup>6</sup> which contained the Witness Contact Protocol.

4. On 27 December 2022, the Appeals Panel upheld the Witness Contact Protocol in the Appeal Decision.<sup>7</sup>

5. On 25 January 2023, the Trial Panel issued the Conduct of Proceedings Order.

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<sup>1</sup> Thaçi Defence Request to vary the Contact Decision 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/F01345, 6 March 2023 ('Request').

<sup>2</sup> 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, para.212 (as relating specifically to the content of para.212, 'Witness Contact Protocol').

<sup>3</sup> Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023.

<sup>4</sup> Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.71.

<sup>5</sup> Decision on Defence Appeals against '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/IA024/F00019, 27 December 2022.

<sup>6</sup> 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.

<sup>7</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019.

6. On 2 February 2023, the Trial Panel denied a Thaçi Request to preserve evidence pursuant to Rule 127, which included a request to waive the Witness Contact Protocol for W04147 ('Preservation of Evidence Decision').<sup>8</sup>

7. On 6 March 2023, Thaçi filed the Request.

### III. SUBMISSIONS

#### A. THAÇI FAILS TO JUSTIFY HIS REQUEST TO WAIVE THE WITNESS CONTACT PROTOCOL

8. At the outset, in the context of seeking a waiver of the Witness Contact Protocol and under the plain language of the Conduct of Proceedings Order, it is not sufficient, as Thaçi claims in the Request, to merely raise issues that 'were not litigated by the Defence at the time'.<sup>9</sup> Rather, as the Trial Panel stated, the moving party must show that 'circumstances have changed in a material way since the Court of Appeals Panel's Decision so as to affect the basis on which that decision was taken.'<sup>10</sup> All of the issues that Thaçi raises here pre-date the Appeal Decision, and so do not satisfy the requisite standard. Because these circumstances were known to Thaçi before—and in most cases well before—the Appeal Decision, he could have raised them.

9. Moreover, as set out in more detail below, Thaçi did previously raise most of the issues contained in the Request prior to the issuance of the Appeal Decision. He also previously raised these issues to the Trial Panel before it denied Thaçi's earlier request for a waiver of the Witness Contact Protocol for W04147.

10. Therefore, the Request should be dismissed outright. In any event, Thaçi fails to explain why contacting W04147 through the Witness Contact Protocol is not sufficient, and he has not attempted to use the procedures of the Witness Contact Protocol.<sup>11</sup>

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<sup>8</sup> Decision on Thaçi Defence Motion Regarding the Preservation of Evidence, KSC-BC-2020-06/F01250, 2 February 2023.

<sup>9</sup> Request, KSC-BC-2020-06/F01345, para.10.

<sup>10</sup> Conduct of Proceedings Order, KSC-BC-2020-06/F01226, para.71 (emphasis added).

<sup>11</sup> Thaçi claims that he 'did not have the opportunity to confirm' with W04147 whether he would agree to appear as a witness for Thaçi because the Witness Contact Protocol came into effect 'preventing the Defence from any further contact with him.' Request, KSC-BC-2020-06/F01345, para.11. As Thaçi

i. *Thaçi's Purported Prior Contact with W04147 Does Not Justify Reconsideration*

11. Thaçi claims that prior to the application of the Witness Contact Protocol 'the Defence had been in substantial and significant contact with Witness W04147 who had indicated that he would be very happy to continue speaking to them.'<sup>12</sup> Thaçi provides no support for either his prior contacts with W04147, nor for his characterisation of W04147's statements or views.

12. Thaçi's prior contact with W04147 does not constitute a change in circumstances since the Appeal Decision, as the prior contact all occurred before the imposition of the Witness Contact Protocol in June 2022. Thaçi's prior contact with W04147 also does not constitute a change in circumstances since the Appeal Decision because Thaçi raised his prior contact with witnesses before the Appeals Panel in litigating the Witness Contact Protocol. For instance, Thaçi argued to the Appeals Panel that he had been in contact with 'people who now appear on the SPO Witness List, who had consented to being interviewed'<sup>13</sup> and that '[n]o security or privacy concerns have been raised by witnesses interviewed by the Defence, who were in many cases eager and willing to share information.'<sup>14</sup> The Appeals Panel nevertheless upheld the Witness Contact Protocol.

13. Thaçi has also raised his prior contact with W04147 before this Trial Panel, in advance of the Preservation of Evidence Decision that rejected a variation of the Witness Contact Protocol for W04147. At the first Status Conference before the Trial Panel, Thaçi's Counsel was asked a question regarding the impact of the Witness

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knows, however, the Witness Contact Protocol does not prevent Thaçi from contacting W04147, it merely requires that he follows the appropriate procedures to do so, something which he has not yet sought to do.

<sup>12</sup> Request, KSC-BC-2020-06/F01345, para.11.

<sup>13</sup> Thaçi Appeal Against the '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/IA024/F00002, 8 September 2022, para.33 ('Thaçi Appeal').

<sup>14</sup> Thaçi Appeal, KSC-BC-2020-06/IA024/F00002, para.33; *see also* Thaçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses, KSC-BC-2020-06/F00625, 15 December 2021, para.30 (arguing that 'high-profile figures such as former members of governments or international governmental organisations' should not be subject to any witness contact protocol).

Contact Protocol on his ability to prepare for the SPO's first 40 witnesses. In clear reference to W04147, Counsel responded:<sup>15</sup>

Yes, the protocol does affect several of the first 40 witnesses. In case in point, the international witnesses, I can tell you specifically, without mentioning the particular witness's name. It is a witness that is on the SPO's witness list, but he is also one of the witnesses that we advanced to the Pre-Trial Judge to take his deposition or statement out of order before the Chamber.

So that is not the only one, but it is one of the most immediate concerned. He is, again, one of those witnesses that I spoke to as an officer of the court. I spoke to him preliminarily. But as [for] any follow-up, Judge Mettraux, I was precluded from doing so because of the protocol.

14. Despite not having had further contact with W04147 since that time, what Thaçi's Counsel then described as speaking to W04147 'preliminarily' without the possibility for 'any follow-up', has now metastasised into 'substantial and significant contact with Witness W04147'<sup>16</sup> and a claim that W04147 has 'spoken extensively to the Defence.'<sup>17</sup>

15. Thaçi also raised his prior contact with W04147 in the litigation leading to the Preservation of Evidence Decision.<sup>18</sup> Indeed, the Trial Panel noted this prior contact in its decision, but nevertheless declined to waive the Witness Contact Protocol for W04147:<sup>19</sup>

The Panel understands that the Defence was in contact with W04147 prior to the issuance of the Contact Decision. The Panel notes nonetheless that, should the Defence wish to interview W04147 further, the Defence could ask to do so under the conditions set out in the Contact Decision.

16. Similarly, Thaçi's prior contact with the W04147 does not merit re-visiting the Pre-Trial Judge's decision, upheld by the Appeals Panel, that the Witness Contact Protocol should apply to all witnesses.<sup>20</sup> Thaçi argues that because W04147 did not express any fear in his prior communications, the Witness Contact Protocol should be

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<sup>15</sup> Transcript (Status Conference), 16 December 2022, p.1720, lines 14-25 (Private Session).

<sup>16</sup> Request, KSC-BC-2020-06/F01345, para.11.

<sup>17</sup> Request, KSC-BC-2020-06/F01345, para.12.

<sup>18</sup> Thaçi Defence Motion Regarding the Preservation of Defence Evidence, KSC-BC-2020-06/F01191, 9 January 2023, para.31

<sup>19</sup> Preservation of Evidence Decision, KSC-BC-2020-06/F01250, para.40.

<sup>20</sup> *Contra* Request, KSC-BC-2020-06/F01345, para.12.

waived. But the very portion of the Witness Contact Decision that Thaçi quotes in the Request demonstrates that the Pre-Trial Judge rejected such reasoning when he held: ‘the mere fact that a witness has not expressed any fear so far or that he or she has an international profile and/or occupied a high-ranking position does not, as such, establish that he or she should not be allowed to request the protection under the terms of the [Witness Contact Protocol] in light of the aforementioned considerations.’<sup>21</sup> The Appeals Panel likewise held that:<sup>22</sup>

The Panel ... finds no error in the fact that the [Witness Contact Protocol] equally applies to high-ranking and/or international witnesses. The Panel is not persuaded by the Defence arguments that this category of witnesses should be excluded from the [Witness Contact Protocol] unless they are subject to Rule 80 protective measures and/or have expressed fears. Given that the [Witness Contact Protocol] is not contingent upon any actual need for protection and is of a preventative nature, it will apply to all notified witnesses regardless of whether they have expressed security concerns. It is therefore irrelevant whether the high-ranking and/or international witnesses complained about any impropriety or whether they fall outside of the geographic scope of interference.

17. That both the Pre-Trial Judge and the Appeals Panel fully addressed the arguments that Thaçi now raises again shows that these arguments are not ‘circumstances that have changed in a material way’ since the Appeal Decision. Moreover, Thaçi’s claim that on the basis of prior contacts ‘there is no need for preventive protection from witness intimidation and/or pressure that the [Witness] Contact Decision is intended to guard against’<sup>23</sup> wholly ignores the privacy, evidence preservation, and expeditious conduct of proceedings objectives that also underpin the Witness Contact Protocol.<sup>24</sup>

*ii. The Involvement of the [REDACTED] Does Not Justify Reconsideration*

18. Thaçi also fails to justify waiver of the Witness Contact Protocol on the basis of the [REDACTED] involvement in interviews with W04147. As with Thaçi’s argument

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<sup>21</sup> See Request, KSC-BC-2020-06/F01345, para.12, *quoting* Witness Contact Decision, KSC-BC-2020-06/F00854, para.120.

<sup>22</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.45.

<sup>23</sup> Request, KSC-BC-2020-06/F01345, para.12.

<sup>24</sup> See Witness Contact Decision, KSC-BC-2020-06/F00854 paras 121-125.



based on his prior contact with W04147, the information Thaçi provides concerning his communications with [REDACTED] are not ‘circumstances [that] have changed in a material way since’ the Appeal Decision, but rather pre-date that decision. Indeed, the basis for Thaçi’s representations concerning the views of [REDACTED] is a letter from July 2022.<sup>25</sup>

19. The crux of Thaçi’s argument in this regard seems to be that because the [REDACTED] will place certain requirements on any interview with W04147, the Witness Contact Protocol should not apply. But this argument cannot withstand scrutiny.

20. As an initial matter, whatever the requirements that obtain during an interview, by Thaçi’s own admission he has had contact with W04147 outside of the constraints that the [REDACTED] imposes for formal interviews and would likely continue to do so if the Witness Contact Protocol was waived for W04147. Any reliance on the modalities pertaining to a formal interview would therefore fail to fully account for the totality of possible interactions.

21. The presence of [REDACTED] at any formal interview with W04147 also does not obviate the need for the Witness Contact Protocol. The Witness Contact Protocol advances multiple objectives in addition to the ‘need for protection’<sup>26</sup> that Thaçi claims is ameliorated by the presence of [REDACTED] at an interview.<sup>27</sup> In addition to witness protection and as also noted above, the Witness Contact Protocol also protects objectives of insuring witnesses’ privacy, preserving evidence, and promoting the expeditious conduct of proceedings.<sup>28</sup> As a more general matter, the involvement of [REDACTED] in order to protect that [REDACTED] own interests does not necessarily

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<sup>25</sup> Annex 1 to Request, KSC-BC-2020-06/F01345/A01.

<sup>26</sup> Request, KSC-BC-2020-06/F01345, para.13.

<sup>27</sup> The SPO notes that Thaçi continues to dispute that there exists a climate of witness intimidation and interference. *See* Request, KSC-BC-2020-06/F01345, para.13. The SPO submits that such a view is material to the consideration of any requests to waive the Witness Contact Protocol.

<sup>28</sup> *See* Witness Contact Protocol, KSC-BC-2020-06/F00854, paras 116-125.

protect the interests of the witness, the SPO (as the calling party) or the Kosovo Specialist Chambers.

22. Thaçi also claims that complying with the Witness Contact Protocol would place him in breach of undertakings to the [REDACTED]. Specifically, Thaçi claims that members of his defence team have signed non-disclosure agreements ('NDA') and agreed not to share information from any interview they may be allowed to conduct with W04174 outside of those who have signed the NDA.<sup>29</sup>

23. The SPO notes preliminarily that according to the letter annexed to the Request, the [REDACTED] has not yet even agreed to Thaçi's request to interview W04147. The letter clearly states '[REDACTED]'.<sup>30</sup>

24. Regardless, the requirements that [REDACTED] conveyed would be applicable to any interview it might eventually authorise were premised on the substance of the request that Thaçi sent, and the [REDACTED] understanding of the applicable KSC Rules and requirements at the time.<sup>31</sup> Although Thaçi does not provide the letter that he sent requesting the interview, since it was sent on 6 June 2022,<sup>32</sup> it could not have included reference to the requirements of the Witness Contact Protocol. There is no reason at present to think that the [REDACTED] would not be willing to accommodate the requirements of the Witness Contact Protocol, particularly as the letter it sent to Thaçi notes that '[REDACTED]'.<sup>33</sup>

#### B. THE SPO IS NOT PREVENTED FROM CONTACTING W04147

25. Thaçi erroneously asserts that 'neither party can talk to [W04147] without consulting the other' because the Defence indicated an intent to call W04147 as a witness after the SPO had notified its intention to call W04147.<sup>34</sup> The Witness Contact

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<sup>29</sup> Request, KSC-BC-2020-06/F01345, para.14.

<sup>30</sup> Annex 1 to Request, KSC-BC-2020-06/F01345/A01, p.1.

<sup>31</sup> See, e.g., Annex 1 to Request, KSC-BC-2020-06/F01345/A01, p.1 (referencing the applicability of Rule 107).

<sup>32</sup> See Annex 1 to Request, KSC-BC-2020-06/F01345/A01, p.1 (referencing 'letter dated June 6, 2022').

<sup>33</sup> Annex 1 to Request, KSC-BC-2020-06/F01345/A01, p.2.

<sup>34</sup> Request, KSC-BC-2020-06/F01345, para.11.



Protocol does not allow a defence party to inhibit the SPO's contact with its witnesses—or vice-versa—simply by subsequently claiming a desire to call those same witnesses. There is an understood first-in-time rule that underlies the functionality of the Witness Contact Protocol, which is why the Pre-Trial Judge in the Witness Contact Protocol, the Appeals Panel in upholding the Witness Contact Protocol, and the Trial Panel in the Conduct of Proceedings Order felt no need to address a purported stalemate that Thaçi suggests occurs when an opposing party announces an intention to call a witness that the calling party has already notified.

26. Notably, even when Thaçi submitted the list of witnesses he sought to question prior to the start of trial, which included W04147, he did not claim at that time that doing so prevented the SPO from being in contact with W04147.<sup>35</sup> Nor did the Trial Panel, in rejecting Thaçi's request, hold that as a result of W04147 being on Thaçi's list, the SPO could not contact him any longer. Indeed, after receiving Thaçi's list of witnesses, including W04147, the Trial Panel instructed Thaçi that 'should the Defence wish to interview W04147 further, the Defence could ask to do so under the conditions set out in the [Witness] Contact Decision',<sup>36</sup> implicitly acknowledging that W04147 continued to be the SPO's witness for purposes of the Witness Contact Protocol and Thaçi could contact him through the SPO.

27. Allowing a circumstance where a party could block the initial calling party from contacting its witnesses would not only be non-sensical, but it would also be harmful to the objectives underlying the Witness Contact Protocol. Rather than being protective of witnesses and their privacy, and preserving evidence and expediting proceedings, these goals would be hampered.

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<sup>35</sup> See Thaçi Defence Motion Regarding the Preservation of Defence Evidence, KSC-BC-2020-06/F01191, 9 January 2023, para.31 (noting that W04147 is an SPO witness but making no claim that Thaçi's request to interview him prohibits the SPO from contacting him); *see also* Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 October 2022, KSC-BC-2020-06/F01068, 28 October 2022, para.30 (same).

<sup>36</sup> Preservation of Evidence Decision, KSC-BC-2020-06/F01250, para.40.

#### IV. CLASSIFICATION

28. This filing is filed as confidential as it pertains to confidential witness information. A public redacted version will be filed.

#### V. CONCLUSION AND RELIEF REQUESTED

29. Thaçi fails to demonstrate that he has met the requirements for a deviation from the Witness Contact Protocol. In addition, because Thaçi has not sought to inquire into W04147's willingness to be interviewed by using the procedures of the Witness Contact Protocol, the Request is premature.

30. For the foregoing reasons, the SPO requests that the Trial Panel deny the Request.

**Word Count: 2917**



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**Alex Whiting**

**Acting Specialist Prosecutor**

Wednesday, 19 April 2023

At The Hague, the Netherlands.