



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:** Specialist Prosecutor's Office

**Date:** 4 September 2023

**Language:** English

**Classification:** Public

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**Prosecution request concerning post-testimony witness contacts**

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## I. INTRODUCTION

1. Pursuant to Articles 35 and 39-40 of the Law<sup>1</sup> and Rule 116 of the Rules,<sup>2</sup> the Specialist Prosecutor's Office ('SPO') requests that the Trial Panel order that the Contact Protocol<sup>3</sup> applies to all – including, but not limited to,<sup>4</sup> post-testimony – contacts with witnesses of the opposing Party or participant ('Opposing Party Witnesses').<sup>5</sup> While the terms of the Contact Protocol are currently limited to pre-testimony contacts,<sup>6</sup> extension of the Contact Protocol to all contacts with Opposing Party Witnesses is necessary for the same reasons enumerated by the Pre-Trial Judge and affirmed by the Court of Appeals, namely, protection, privacy, evidence preservation, and expeditiousness.

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to the Law, unless otherwise specified.

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>3</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 ('Contact Decision'), para.212(II) ('Contact Protocol'). *See also* 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 ('Appeal Decision'); Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order'), para.71. While the Conduct of Proceedings Order provides a changed circumstances standard for further relief in relation to the Contact Protocol, the Contact Decision and Appeal Decision did not expressly concern post-testimony contacts (*see* fn.6 below concerning the relevant language in the existing Contact Protocol), and therefore, this request does not seek reconsideration. Nevertheless, even if considered against a changed circumstances or reconsideration standard (Rule 79), the request should still be granted because, since the Appeal Decision, the hearing of witnesses in this case commenced and in light of the interests at stake, which demonstrate that the relief requested is necessary to avoid injustice.

<sup>4</sup> In this respect, limiting the Contact Protocol by reference to 'testimony' does not account for Rule 153 witnesses and Rule 155 witnesses, who are not deceased.

<sup>5</sup> This filing follows an *inter partes* query by the KRASNIQI Defence concerning the applicability of the Contact Protocol to post-testimony contacts. *See* Email from KRASNIQI Defence to SPO dated 20 July 2023 at 21:06.

<sup>6</sup> *See* Contact Decision, KSC-BC-2020-06/F00854, para.212(II)(a) ('prior to testimony').

## II. SUBMISSIONS

2. There is no ‘unlimited, automatic right’ to interview Opposing Party Witnesses.<sup>7</sup> Indeed, the Defence’s right to examine witnesses does not mean it is entitled to question an Opposing Party Witness on multiple occasions, namely, pre-testimony (subject to the terms of the Contact Protocol), during cross-examination, and post-testimony (currently, without regulation). Considering that requests to interview Opposing Party Witnesses generally take place before testimony,<sup>8</sup> in the exceptional circumstances where there is a legitimate forensic purpose for post-testimony contacts, such contacts should be regulated by the Contact Protocol, which has been found to be compliant with – and in furtherance of – a fair and expeditious trial.<sup>9</sup>

3. The Specialist Chambers and SPO are obliged to take measures to ensure fair and expeditious proceedings,<sup>10</sup> and provide for the protection of victims and witnesses before, during, and after their testimony.<sup>11</sup> This trial – in which many witnesses benefit from strictly necessary and proportionate protective measures in light of concrete, objective risks to their safety and security<sup>12</sup> – is being conducted in the context of a persistent climate of witness intimidation and interference,<sup>13</sup> which is ongoing and frequently aggravated, as reflected by recent SC cases concerning obstruction and witness

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<sup>7</sup> Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.79.

<sup>8</sup> 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 (*‘Ndindiliyimana Decision’*), para.3.

<sup>9</sup> Contact Decision, KSC-BC-2020-06/F00854, paras 137-177; Appeal Decision, KSC-BC-2020-06/IA024/F00019, paras 50-101.

<sup>10</sup> *See, inter alia*, Articles 1-2, 21, 35, 39-40.

<sup>11</sup> Articles 35(2)(f), 39(1), 39(11), 40(2), 40(6)(a), 40(6)(f). *See also* Article 23. Article 23(3) specifically refers to measures ‘before, during and after testimony’.

<sup>12</sup> Contact Decision, KSC-BC-2020-06/F00854, para.118; Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.46.

<sup>13</sup> Contact Decision, KSC-BC-2020-06/F00854, para.118; Appeal Decision, KSC-BC-2020-06/IA024/F00019, paras 34, 46. Whether any issue of interference or intimidation has materialised is irrelevant since the Contact Protocol is meant as a preventive measure. *See* Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.34.

intimidation.<sup>14</sup> These circumstances challenge the SC's ability to adequately protect witnesses and the integrity of the proceedings. Accordingly, extension of the Contact Protocol to post-testimony contacts<sup>15</sup> is necessary to, *inter alia*: (i) protect witnesses,<sup>16</sup> (ii) respect their reasonable expectation of privacy,<sup>17</sup> (iii) safeguard witness consent and enable witnesses to seek assistance regarding contacts,<sup>18</sup> (iv) establish a transparent and accessible record of post-testimony contacts,<sup>19</sup> (v) facilitate the assessment of any interference allegations,<sup>20</sup> and (vi) concretise the obligations of the Parties and participants through a predictable and consistent procedure that applies to *all* contacts with Opposing Party Witnesses.<sup>21</sup>

4. Importantly, the Defence is not sufficiently familiar with the current situation of witnesses to appropriately tailor otherwise unregulated contacts in a manner that – despite good faith efforts – avoids potential security risks and, considering the significant influence exercised by the Accused and climate of interference,<sup>22</sup> feelings of coercion and intimidation.<sup>23</sup>

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<sup>14</sup> See, *similarly*, Prosecution submissions pertaining to periodic detention review of Jakup Krasniqi, KSC-BC-2020-06/F01741, 25 August 2023, para.13 (and the sources cited therein).

<sup>15</sup> The reasoning behind the Contact Protocol does not distinguish between pre-testimony and post-testimony. Indeed, nothing in the Contact Decision, Appeal Decision, or related submissions indicates that any of the reasons underpinning the Contact Protocol apply only pre-testimony.

<sup>16</sup> Contact Decision, KSC-BC-2020-06/F00854, paras 116-120.

<sup>17</sup> Contact Decision, KSC-BC-2020-06/F00854, paras 121-123.

<sup>18</sup> Contact Decision, KSC-BC-2020-06/F00854, paras 116, 119.

<sup>19</sup> Contact Decision, KSC-BC-2020-06/F00854, para.124.

<sup>20</sup> Contact Decision, KSC-BC-2020-06/F00854, para.124. See also *Ndindiliyimana* Decision, para.5 (ordering the prosecution's presence to curtail possible allegations of witness tampering).

<sup>21</sup> Contact Decision, KSC-BC-2020-06/F00854, para.125.

<sup>22</sup> Contact Decision, KSC-BC-2020-06/F00854, para.118.

<sup>23</sup> Contact Decision, KSC-BC-2020-06/F00854, para.198 (considering that there is a concrete possibility that witnesses feel pressured on account of the climate of witness intimidation). See, *similarly*, ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, para.16 (considering that particular caution is needed where a witness declines to be interviewed by the opposing party, since in such a case, the witness may feel coerced or intimidated). Chambers at other tribunals have imposed contact restrictions post-testimony, including after the close of the presentation of evidence, to ensure continued cooperation and avoid potential recantation. See, for example, ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on

5. Further, following testimony, witnesses are entitled to some degree of finality and contact regulation, including in light of the risk of retraumatisation, the likelihood of renewed anxiety and stress,<sup>24</sup> and the ability of the Parties to both seek to interview witnesses under the terms of the Contact Protocol and elicit relevant information during (cross)examination.<sup>25</sup> There should be no lacuna – like the one that currently exists – that either enables a Party to strategically avoid the Contact Protocol<sup>26</sup> or results in ‘on again, off again’ application of its terms. For example, if a request or decision was made to recall a witness, the existing Contact Protocol would apply to related contacts, and thus, logically should also apply to any interim contacts, including that could ultimately lead to (requests for) recall.<sup>27</sup>

6. Notably, the ICC Protocol, which appropriately provides guidance in light of similar statutory provisions,<sup>28</sup> applies to all contacts with Opposing Party Witnesses, not just those made pre-testimony.<sup>29</sup> Indeed, when ambiguity in witness contact procedures

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Reconsideration of Protective Measures Orders, 15 October 2009, paras 6-15. *See also* fns 8, 20, 27, 30 (and the sources cited therein).

<sup>24</sup> *See, similarly*, IRMCT, *Prosecutor v. Gatete*, MICT-13-42, Decision in Respect of the Application for Variation of Protective Measures, 15 May 2014, para.8.

<sup>25</sup> Rule 143(3) (providing, *inter alia*, that where the witness is able to give evidence relevant to the case of the cross-examining Party, he or she may be examined on the subject matter of that case, provided that the cross-examining Party puts to the witness the nature of that case).

<sup>26</sup> The Defence has thus far chosen not to seek interviews with SPO witnesses under the terms of the Contact Protocol. *See* Thaçi Defence Request as regards contact with W04290, KSC-BC-2020-06/F01639, 4 July 2023, para.12 (noting that, so far, given the risk of eliciting inculpatory evidence which is then entered directly into the trial record and can be relied upon to make adverse findings against an accused, no Defence team has sought to interview any SPO witness since the Contact Protocol was put in place).

<sup>27</sup> ICTR, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision Jérôme-Clément Bicamumpaka’s Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA, 21 April 2008, paras 15-16 (finding that restrictions on post-testimony contacts before recall are necessary to ensure there is no interference with the course of justice). *See also* ICTR, *Prosecutor v. Ndirabatware*, ICTR-99-54-T, Decision on Defence Motion for Leave to Meet with the Husband of Witness ANAE and for Postponement of Her Testimony, 28 October 2009, para.22.

<sup>28</sup> Contact Decision, KSC-BC-2020-06/F00854, paras 126-127; Appeal Decision, KSC-BC-2020-06/IA024/F00019, paras 30, 47.

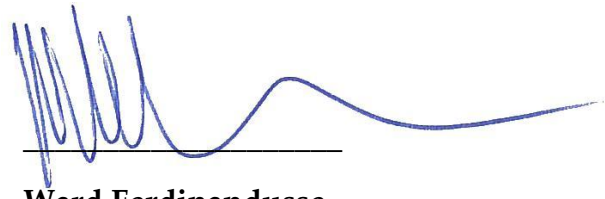
<sup>29</sup> ICC, Chambers Practice Manual, July 2023, Annex: Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of

pre-dating the ICC Protocol arose, the relevant ICC Chambers imposed restrictions on post-testimony contacts with Opposing Party Witnesses, including after the presentation of evidence had concluded.<sup>30</sup>

### III. RELIEF REQUESTED

7. For the foregoing reasons, the Trial Panel should order that the Contact Protocol applies to all contacts with Opposing Party Witnesses.

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Monday, 4 September 2023

At The Hague, the Netherlands

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a participant, paras 28-45 ('ICC Protocol'). The ICC Protocol does not include any language limiting its application *vis-à-vis* the Opposing Party Witness's date of testimony.

<sup>30</sup> See, for example, ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the 'Defence Motion on Prosecution contact with its witnesses', 22 May 2014, para.16. See also ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Public redacted version of the Decision on the Office of the Prosecutor's request to communicate with Witness P.250, 10 March 2011, para.11.