



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

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Prosecution reply relating to its request concerning post-testimony witness contacts

Specialist Prosecutor's Office

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1. The Response¹ largely repeats submissions previously considered and rejected by the Pre-Trial Judge and Court of Appeals.² Like in its previous submissions, the Defence relies on misconceptions of relevant rights, and misrepresentations of the purposes and basis of the Contact Protocol³ and the Request that seeks its justifiable extension.
2. Notwithstanding unfounded procedural arguments raised in the Response,⁴ the Defence does not oppose the Request to the extent it applies to witnesses with protective measures.⁵ However, this limitation would undermine the very purposes of the Contact Protocol and its requested extension,⁶ namely, protection, privacy, evidence preservation, and expeditiousness.⁷ The Pre-Trial Judge and Court of Appeals have soundly rejected previous Defence submissions attempting to limit the Contact Protocol to only protected witnesses. Such submissions ignore that the Contact Protocol and its requested extension are commensurate to the established security risks in this case, are of a preventive nature, and should apply to all

¹ Thaçi, Selimi & Krasniqi Defence Response to ‘Prosecution request concerning post-testimony witness contacts’ (F01765), KSC-BC-2020-06/F01790, 14 September 2023 (‘Response’). *See also* Prosecution request concerning post-testimony witness contacts, KSC-BC-2020-06/F01765, 4 September 2023 (‘Request’); Victims’ Counsel’s Response to Prosecution request concerning post-testimony witness contacts, KSC-BC-2020-06/F01791, 14 September 2023 (‘VC Response’).

² *See* Request, KSC-BC-2020-06/F01765, paras 2-3. *See also* Response, KSC-BC-2020-06/F01790, para.4 and the sources cited therein.

³ *See* Request, KSC-BC-2020-06/F01765, fn.3 (defining the term ‘Contact Protocol’).

⁴ The interests at stake justify extension of the Contact Protocol to avoid injustice, regardless of whether the Request is treated as a motion for new relief or reconsideration. The Request seeks relief applicable at this stage of the proceedings to safeguard, *inter alia*, witness well-being and the integrity and expeditiousness of the proceedings, and follows a request by the Defence concerning post-testimony contacts. *See* Request, KSC-BC-2020-06/F01765, fn.3.

⁵ Response, KSC-BC-2020-06/F01790, paras 17 (noting that concerns about the ‘risk of retraumatisation, the likelihood of renewed anxiety and stress’ that could arise from post-testimony witness contacts are ‘entirely reasonable for protected witnesses’), 23 (reiterating the Defence’s consistent position that it ‘does not oppose regulation of contact with other parties’ witnesses, where objective security concerns can be established’), 28.

⁶ Moreover, Defence submissions do not take into account that many witnesses without Rule 80 protective measures are testifying subject to Rule 107 conditions or are dual status witnesses with certain contact restrictions already in place. *See also* VC Response, KSC-BC-2020-06/F01791, para.13.

⁷ Request, KSC-BC-2020-06/F01765, paras 1, 3 and the sources cited therein.

witnesses.⁸ In this respect, all witnesses in this case are testifying in the context of an ongoing and frequently aggravated climate of witness interference and intimidation,⁹ which impacts and affects both those with and those without protective measures.¹⁰ Feelings of intimidation, risks of retraumatisation, and the likelihood of renewed anxiety and stress could impact on *any* witness's well-being, security, and ability to genuinely consent to contacts by the opposing Party.

3. Alarmist and exaggerated Defence submissions that 'no diligent counsel' would conduct interviews under the terms of the Contact Protocol and that it constitutes the 'most wide-ranging and restrictive regime for witness contact in the history of international criminal justice' once again ignore that ICC Defence and Prosecution counsel, often by agreement, have been routinely bound by the terms of the ICC Protocol.¹¹

4. As submitted previously¹² and despite Defence mischaracterisations of its scope,¹³ the ICC Protocol is consistent with the Contact Protocol in this case, with one important exception: it applies to all witness contacts throughout the proceedings,¹⁴ including post-testimony.¹⁵ Thus, just as the Pre-Trial Judge and Court of Appeals

⁸ 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.120; 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, para.45.

⁹ Request, KSC-BC-2020-06/F01765, para.3.

¹⁰ *See, for example*, Prosecution notification of open source material falling under Rule 103, KSC-BC-2020-06/F01809, 22 September 2023, Confidential. *See also* Updated Submissions of the Witness Protection and Support Office Pursuant to Rule 81(6), KSC-BC-2020-06/F01777, 8 September 2023, Confidential, para.2.

¹¹ With variations to address the particular circumstances of each case. *See also* Request, KSC-BC-2020-06/F01765, fn.29 (defining the term 'ICC Protocol').

¹² Request, KSC-BC-2020-06/F01765, para.6.

¹³ Response, KSC-BC-2020-06/F01790, paras 20-21.

¹⁴ ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-451, Decision on the Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party, 18 February 2013, para.17 (noting that the protocol 'will apply throughout the proceedings').

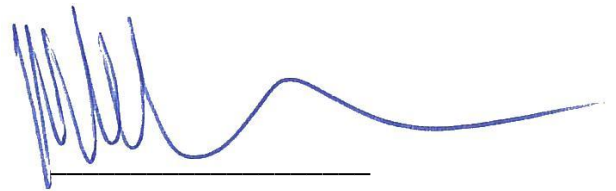
¹⁵ The *Bemba et al.* Chamber expressly rejected Defence requests to exclude post-testimony contacts from the scope of the ICC Protocol. *See* ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1093, Decision

found that the ICC Protocol provided appropriate guidance in connection with the existing Contact Protocol,¹⁶ it likewise supports its extension to all witness contacts.

5. Finally, the Pre-Trial Judge and Court of Appeals have already found that the Contact Protocol is consistent with – and in furtherance of – a fair and expeditious trial,¹⁷ appropriately balancing the rights and interests of the Parties, participants, witnesses, and victims.¹⁸ The same considerations apply to its extension, as sought in the Request.

6. For the reasons give above and in the Request, the Panel should extend the terms of the Contact Protocol to all witness contacts, including post-testimony.

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At The Hague, the Netherlands.

adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of Other Parties, 20 July 2015, para.16.

¹⁶ Request, KSC-BC-2020-06/F01765, para.6 and the sources cited therein.

¹⁷ Request, KSC-BC-2020-06/F01765, paras 2-3 and the sources cited therein.

¹⁸ *Contra* Response, KSC-BC-2020-06/F01790, paras 1-3, 18-19.