



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2023-10
Specialist Prosecutor v. Sabit JANUZI and Ismet BAHTJARI

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 16 October 2023

Language: English

Classification: Public

Public Redacted Version of 'Prosecution request for the adoption of protocols governing the handling of confidential information and witness contacts'

Specialist Prosecutor's Office

Ward Ferdinandusse

Duty Counsel for Sabit Januzi

Thomas Gillis

Duty Counsel for Ismet Bahtjari

Hendrik Sytema

I. INTRODUCTION

1. Pursuant to the Pre-Trial Judge's Oral Order,¹ and with reference to Articles 21(4), 23, 35, and 39(1) and (11) of the Law² and Rules 80 and 95(2) of the Rules,³ as well as Articles 6, 12, 14, and 17 of the Code of Conduct,⁴ the Specialist Prosecutor's Office ('SPO') hereby proposes certain measures and prohibitions related to (i) the handling of confidential information and (ii) contacts with opposing Party witnesses and their relatives, including any contacts by relatives, friends and/or associates of Sabit JANUZI and Ismet BAHTJARI ('Accused').

II. SUBMISSIONS

2. The SPO requests that the Pre-Trial Judge adopt, with certain modifications detailed below, the 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 ('Framework') from *Thaçi et al.* ('Case 06')⁵ for the same reasons presented and accepted in Case 06.⁶ The Framework will ensure the protection and privacy of witnesses, enable the preservation of evidence, and

¹ Transcript, 12 October 2023, p.71 ('Oral Order').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

³ 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.

⁴ Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07, 1 March 2019 ('Code of Conduct').

⁵ See *Specialist Prosecutor v. Thaçi et al.*, 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 ('Framework Decision'), para.212. This is consistent with the frameworks adopted in *Shala* (see *Specialist Prosecutor v. Shala*, KSC-BC-2020-04/F00537/A01, Annex 1 to 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, 8 June 2023, Section II) and *Gucati and Haradinaj* (see *Specialist Prosecutor v. Guçati & Haradinaj*, Annex to Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, 17 September 2021, Section VI(B)).

⁶ Framework Decision, KSC-BC-2020-06/F00854, paras 114-212. This reasoning was affirmed by the Court of Appeals (see *Specialist Prosecutor v. Thaçi et al.*, 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')).

contribute to the expeditious conduct of proceedings without compromising the rights of the Accused.⁷

3. The SPO requests two modifications to Section II of the Framework. Each modification addresses contacts between a Party or participant and witnesses of the opposing Party or of a participant ('Contact Protocol').⁸ First, the SPO requests that the Contact Protocol be extended to all—including, but not limited to, post-testimony—contacts with witnesses of the opposing Party or participant.⁹ Second, the SPO requests that the Contact Protocol clearly prohibit not just Parties and participants but also relatives, friends, or associates of Parties and participants from contacting opposing Party witnesses or their relatives.

4. The proposed modifications are necessary to avoid further interference with Witness 1, and any attempted obstruction of the trial proceedings generally, as well as to safeguard the privacy, dignity, and physical and psychological well-being of Witness 1 and any other witnesses. In this respect, Panels across cases before the KSC have recognised the pervasive climate of witness interference and intimidation in which these proceedings operate.¹⁰ The Court of Appeals has found that this climate exists and has existed more broadly in criminal proceedings against former KLA members in Kosovo, which is a relevant 'contextual consideration' for KSC

⁷ See Framework Decision, KSC-BC-2020-06/F00854, paras 116-125, 135-177.

⁸ See Framework Decision, KSC-BC-2020-06/F00854, para.212(II).

⁹ This proposed modification mirrors a pending request in Case 06 (see *Specialist Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F01765, Prosecution request concerning post-testimony witness contacts, 4 September 2023; *Specialist Prosecutor v. Thaçi et al.*, Prosecution reply relating to its request concerning post-testimony witness contacts, KSC-BC-2020-06/F01812, 22 September 2023).

¹⁰ See, e.g., Public Redacted Version of the Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2023-10/F00009/RED, 2 October 2023, para.21; *Specialist Prosecutor v. Shala*, Public Redacted Version of Decision on the Thirteenth Review of Detention of Pjetër Shala, KSC-BC-2020-04/F00663/RED, 20 September 2023, para.17; *Specialist Prosecutor v. Mustafa*, Further Redacted Version of Corrected Version of Public Redacted Version of Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, 16 December 2022, paras 49-57; *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Rexhep Selimi, KSC-BC-2020-06/F01794, 15 September 2023, paras 20, 33; *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of the Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022, paras 576-581.

proceedings.¹¹ Further, as set out in more detail below, the specific facts and charges alleged in the instant case, when considered in light of this climate of intimidation, underscore the need for the Contact Protocol, with the requested modifications to, *inter alia*: (i) protect witnesses,¹² (ii) respect their reasonable expectation of privacy,¹³ (iii) safeguard witness consent and enable witnesses to seek assistance regarding contacts,¹⁴ (iv) establish a transparent and accessible record of contacts,¹⁵ (v) facilitate the assessment of any interference allegations,¹⁶ and (vi) concretise the obligations of the Parties and participants through a predictable and consistent procedure that applies to all contacts with witnesses of the opposing Party.¹⁷

A. THE CONTACT PROTOCOL SHOULD APPLY TO ALL OPPOSING PARTY WITNESS CONTACTS

5. The ‘prior to testimony’¹⁸ limitation should be removed from the Contact Protocol so that it is clear it applies to all contacts with witnesses of the opposing Party. Such modification is necessary to: (i) resolve any ambiguity about the Framework’s application to witnesses the Parties do not intend to call live, for example, any Rule 153 witnesses and Rule 155 witnesses, who are not deceased; and (ii) give full effect to the purposes underpinning the Contact Protocol, namely, protection, privacy, evidence preservation, and expeditiousness.¹⁹ These rights and interests apply throughout the proceedings, not just pre-testimony.

¹¹ *Specialist Prosecutor v. Taçi et al.*, Public Redacted Version of Decision on Rexhep Selimi’s Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA015/F00005/RED, 25 March 2022, para.43; *Specialist Prosecutor v. Taçi et al.*, Public Redacted Version of Decision on Hashim Taçi’s Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA017/F00011/RED, 5 April 2022, paras 41-48; *Specialist Prosecutor v. Taçi et al.*, Public Redacted Version of Decision on Kadri Veseli’s Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014/F00008/RED, 31 March 2022, paras 46-53.

¹² Framework Decision, KSC-BC-2020-06/F00854, paras 116-120.

¹³ Framework Decision, KSC-BC-2020-06/F00854, paras 121-123.

¹⁴ Framework Decision, KSC-BC-2020-06/F00854, paras 116, 119.

¹⁵ Framework Decision, KSC-BC-2020-06/F00854, para.124.

¹⁶ Framework Decision, KSC-BC-2020-06/F00854, para.124.

¹⁷ Framework Decision, KSC-BC-2020-06/F00854, para.125.

¹⁸ Framework Decision, KSC-BC-2020-06/F00854, para.212(II)(a).

¹⁹ See also paras 2, 4 above.

6. There is no ‘unlimited, automatic right’ to interview witness of the opposing Party at any time.²⁰ Considering that requests to interview opposing Party witnesses generally take place before testimony,²¹ 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.²² Notably, the ICC Protocol, which appropriately provides guidance in light of similar statutory provisions,²³ applies throughout the proceedings to all contacts with opposing Party witnesses.²⁴

B. THE CONTACT PROTOCOL SHOULD GOVERN CONTACTS BY ASSOCIATES OF THE ACCUSED AND WITH RELATIVES OF OPPOSING PARTY WITNESSES

7. The Contact Protocol currently applies to contacts (i) with opposing Party witnesses²⁵ (ii) by counsel, clients and their teams as defined in Article 2 of the Code of Conduct.²⁶ However, as relatives, friends, and associates of the Accused could be used, including by the Accused, to make contact with opposing Party witnesses, as well as their relatives, the scope of the Contact Protocol should be adapted

²⁰ Appeal Decision, KSC-BC-2020-06/IA024/F00019, para.79.

²¹ 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.3.

²² Framework Decision, KSC-BC-2020-06/F00854, paras 137-177; Appeal Decision, KSC-BC-2020-06/IA024/F00019, paras 50-101.

²³ Framework Decision, KSC-BC-2020-06/F00854, paras 126-127; Appeal Decision, KSC-BC-2020-06/IA024/F00019, paras 30, 47.

²⁴ 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 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. *See also* 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’); ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1093, Decision 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 (expressly rejecting defence requests to exclude post-testimony contacts from the scope of the ICC Protocol).

²⁵ Framework Decision, KSC-BC-2020-06/F00854, fn.299.

²⁶ Framework Decision, KSC-BC-2020-06/F00854, fn.300. *See* Code of Conduct, Article 2 (defining ‘Team’ as persons engaged by counsel and working under his or her oversight).

accordingly. While the Contact Protocol is intended to govern any opposing Party witness contacts, both direct and indirect, this clarification is necessary to remove any ambiguity about and appropriately supplement its scope in the circumstance of this case.

8. The conduct at the core of the Indictment involves allegations that the Accused [REDACTED] coordinated with each other and Co-Perpetrator 1 to approach Witness 1 regarding his testimony before the KSC. Specifically, the Indictment alleges that the Accused visited Witness 1 at his home to confront him about his SPO testimony. Moreover, in order to arrange their meetings, the Accused exploited other of Witness 1's familial relationships: Ismet BAHTJARI spoke to [REDACTED] by phone to confirm his presence at his home before their meeting, and Sabit JANUZI contacted yet another of Witness 1's relatives in order to arrange his separate meeting with Witness 1.

9. Given the pervasive climate of fear and intimidation in Kosovo and the specific charges in this case, the requested measures are necessary to protect SPO witnesses, including specifically Witness 1, from further interference and intimidation and to safeguard the witnesses' privacy, dignity, and physical and psychological well-being. They are also required to forestall any further attempts to obstruct KSC proceedings, to preserve evidence to be presented at KSC proceedings, and to ensure the expeditious conduct of proceedings without compromising the rights of the Accused.

10. Finally, the implementation of restrictions on witness contacts by associates of the Accused and with the relatives of witnesses is consistent with the jurisprudence of past international criminal tribunals.²⁷

²⁷ ICTY, *Prosecutor v. Blagojevic et al.*, IT-02-60-PT, Order for Protective Measures and Non-Disclosure to the Public, 18 February 2003, p.4 (requiring Defence Counsel to notify the Prosecution in writing 10 days in advance and secure Prosecution consent prior to contact with prosecution witnesses, and providing that no contact with prosecution witnesses, potential witnesses or their relatives may be made by the families, friends or associates of the accused other than the members of the defence team). See also SCSL, *Prosecutor v. Norman*, SCSL-2003-08-PT, Annex to Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure: Orders for Immediate Protective Measures for Witnesses and Victims and for Non Public Disclosure, 23 May 2003,

III. CLASSIFICATION

11. This filing is submitted as confidential in accordance with Rule 82(4).

IV. RELIEF REQUESTED

12. For the reasons given above, the SPO requests the Pre-Trial Judge to adopt the Framework with the modifications outlined above.

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Ward Ferdinandusse

Acting Deputy Specialist Prosecutor

Monday, 16 October 2023

At The Hague, the Netherlands.

p.3 (requiring Defence Counsel to make a written request to the relevant judicial authority, with notice to the Prosecution, for permission to contact any protected witnesses or any relative of such person); ICTR, *Prosecutor v. Ngirabatware.*, ICTR-99-54-T, Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 6 May 2009, p.7 (requiring Defence Counsel and any representative acting on its behalf to notify the Prosecution in writing if it wishes to contact any protected witness and/or family member); ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-T, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel, 10 July 2001, p.12 (requiring counsel for the parties to make a written request to the relevant judicial authority, with notice to the opposing party, for permission to contact victims/witnesses or their close family members).