



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06
The 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: Fidelma Donlon

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Decision on Specialist Prosecutor's Request Concerning Post-Testimony Witness Contact

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21(2), 23(1), and 40(2) and 40(6)(f) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 80(1) and 116(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”) hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 24 June 2022, the Pre-Trial Judge issued a decision (“Contact Decision”)¹ setting out a “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” (“Contact Protocol”).²
2. On 27 December 2022, the Court of Appeals Panel dismissed appeals from the Defence teams against the Contact Decision and upheld the Contact Protocol (“Appeal Decision”).³
3. On 4 September 2023, the Specialist Prosecutor’s Office (“SPO”) filed a request concerning post-testimony witness contact (“Request”).⁴
4. On 14 September 2023, the Defence for Hashim Thaçi (“Thaçi Defence”), Rexhep Selimi (“Selimi Defence”) and Jakup Krasniqi (“Krasniqi Defence”) (jointly “Defence”) responded to the Request (“Defence Response”).⁵

¹ F00854, Pre-Trial Judge, *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*, 24 June 2022.

² Contact Decision, para. 212.

³ IA024/F00019, Court of Appeals Panel, *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”*, 27 December 2022.

⁴ F01765, Specialist Prosecutor, *Prosecution Request Concerning Post-Testimony Witness Contacts*, 4 September 2023.

⁵ F01790, Specialist Counsel, *Thaçi, Selimi & Krasniqi Defence Response to “Prosecution Request Concerning Post-Testimony Witness Contacts” (F01765)*, 14 September 2023.

5. Also, on 14 September 2023, Victims' Counsel responded to the Request ("Victims' Counsel Response").⁶

6. On 22 September 2023, the SPO replied to the Defence Response and Victims' Counsel Response ("Reply").⁷

II. SUBMISSIONS

7. The SPO requests that the Panel "order that the Contact Protocol applies to all contacts with" witnesses of the opposing Party or participant ("Opposing Party Witnesses"), consistent with similar protocols before the International Criminal Court ("ICC").⁸ The SPO submits that, while the Contact Protocol is presently limited to pre-testimony contact, extension of the Contact Protocol to all contact with Opposing Party Witnesses is necessary to: (i) protect witnesses; (ii) respect their reasonable expectation of privacy; (iii) safeguard witness consent and enable witnesses to seek assistance regarding contacts; (iv) establish a transparent and accessible record of post-testimony contacts; (v) facilitate the assessment of any interference allegations; 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.⁹ The SPO also argues that, following testimony, witnesses are entitled to some degree of finality.¹⁰

8. Victims' Counsel supports the Request and avers that there can be no dispute that the victims participating in the proceedings ("VPPs") have suffered either

⁶ F01791, Victims' Counsel, *Victims' Counsel's Response to Prosecution Request Concerning Post-Testimony Witness Contacts*, 14 September 2023.

⁷ F01812, Specialist Prosecutor, *Prosecution Reply Relating to its Request Concerning Post-Testimony Witness Contacts*, 22 September 2023.

⁸ Request, paras 1, 6 referring to ICC, [Chambers Practice Manual](#), 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, July 2023, pp. 37-47.

⁹ Request, paras 1, 3 referring to Contact Decision, paras 116-125.

¹⁰ Request, para. 5.

directly or indirectly at the hands of the Kosovo Liberation Army (“KLA”).¹¹ Victims’ Counsel argues that it takes little imagination to picture the likely effect on the VPPs of receiving direct contact on behalf of such senior KLA figures as the Accused.¹² Victims’ Counsel submits that the object and purpose of the Contact Protocol is to address such concerns, which do not dissipate upon completion of a witness’s testimony, and to avoid re-traumatisation of witnesses and victims.¹³ Victims’ Counsel argues that the Contact Protocol should be amended as the Defence has now raised the prospect of making post-testimony contact with witnesses.¹⁴

9. The Defence opposes the Request in part, suggesting that the Panel could extend the Protocol “to select witnesses with protective measures”.¹⁵ The Defence opposes the Request in respect of witnesses who have testified without protective measures, arguing that the Contact Protocol explicitly provides that it only applies to contacts with witnesses “prior to testimony”.¹⁶ The Defence submits that witnesses are not the property of any party,¹⁷ and that the Contact Protocol prioritises the SPO’s interest in presenting its witnesses without any influence from Defence investigative interviews.¹⁸ The Defence further argues that, when an SPO witness has testified at trial, the balance of interests must shift in favour of the Accused’s right to investigate.¹⁹ Lastly, the Defence submits that the SPO has failed to demonstrate a material change in circumstances since the Appeal Decision to justify the proposed extension of the Contact Protocol.²⁰

¹¹ Victims’ Counsel Response, paras 2, 8, 14.

¹² Victims’ Counsel Response, para. 8.

¹³ Victims’ Counsel’s Response, paras 9-10.

¹⁴ Victims’ Counsel’s Response, para. 11.

¹⁵ Defence Response, paras 23, 28.

¹⁶ Defence Response, paras 6, 16, 28.

¹⁷ Defence Response, para. 1.

¹⁸ Defence Response, para. 2.

¹⁹ Defence Response, para. 3.

²⁰ Defence Response, paras 12-13.

10. The SPO replies that limiting the extension of the Contact Protocol only to protected witnesses would undermine the purposes of the Contact Protocol and its requested extension, namely, protection, privacy, evidence preservation, and expeditiousness.²¹

III. APPLICABLE LAW

11. The Contact Protocol, which was upheld in the Appeal Decision,²² provides:

II. Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant

- a. Except under the conditions specified herein, **prior to testimony**, Parties and participants shall not contact or interview a witness of another Party or participant if the intention to call the witness to testify or to rely on his or her statement has been notified to the opposing Party or participant.
- b. If an opposing Party or participant wishes to interview a witness of another Party or participant, it shall notify the calling Party, the Court Management Unit (“CMU”) and, in relation to dual status witnesses, Victims’ Counsel at least ten days prior to the intended interview. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party and shall also inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness, Victims’ Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview. In exceptional circumstances, a Party or participant may, after having consulted sufficiently in advance with the Registry, apply to the Panel to additionally require the presence of Registry representatives. The calling Party shall inform the opposing Party whether the witness consents. In addition, where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness, regardless of the witness’s expressed preferences. If the calling Party seizes the Panel or indicates to the opposing Party that it shall do so, the opposing Party shall refrain from interviewing the witness until the Panel has issued its decision. The procedure in this section shall not apply to an interview conducted by the SPO with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.

²¹ Reply, para. 2.

²² Appeal Decision, para. 106.

- c. If a Party or participant contacts an opposing Party or participant witness inadvertently or during WPSO-organized courtesy meetings, the Party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness's consent to be interviewed directly. A witness's consent to be interviewed may be obtained only through the procedure set out in the previous subparagraph.
- d. The opposing Party conducting the interview ("interviewing Party") shall:
- i. ensure that the interview is conducted effectively and expeditiously;
 - ii. prepare copies of all documents to be shown to the witness in a language which he or she understands together with an English translation to be provided to the calling Party;
 - iii. refrain from talking to the witness outside the timeframe of the interview and the video-recording, so that all statements and utterances made are duly recorded;
 - iv. refrain from any action that could be regarded as threatening or provocative; and
 - v. otherwise comply with any order made by the Trial Panel.
- [...]
- h. [...] Furthermore, where applicable, the Registry shall ensure that a Court Officer or another designated representative of the Registry is present during the interview, and that a witness-support representative is on site, where considered necessary by WPSO.
- i. Prior to the commencement of the interview, the interviewing Party shall advise the witness that he or she:
- i. is not required to participate in the interview and can decide to stop being interviewed at any time;
 - ii. can refuse to answer questions, in particular if they are thought to be potentially self-incriminating;
 - iii. can ask for a recess at any time; and
 - iv. can ask to meet with a WPSO representative at any time during the interview.

[...]

o. Neither the record of the interview nor any materials used during the interview shall become part of the record in the case unless admitted in KSC-BC-2020-06/F00854/91 of 93 PUBLIC 24/06/2022 16:38:00 KSC-BC-2020-06 91 24 June 2022 evidence by the Trial Panel *proprio motu* or upon an application by a Party, where the conditions for its admission under the Rules are met. Where admission of such a video recording is sought, the interviewing Party shall also produce the transcript of the interview.²³

IV. DISCUSSION

12. The Panel will refrain from addressing generalised objections to the Contact Protocol raised by the Defence,²⁴ which have already been ruled upon.²⁵ The Panel will confine its decision to the question of whether the obligations set out in the Contact Protocol should be extended to cover the period after the witness has testified, or, where a witness's statement is admitted pursuant to Rules 153 or 155, after its admission.

13. The SPO requests, in essence, the Panel to modify, or amend, the Contact Protocol to remove the limitation "prior to testimony". The Panel recalls that paragraph 71 of the Order on the Conduct of Proceedings provides:

With respect to the procedure and safeguards applicable to contacts with the opposite Party's or participant's witnesses, Parties and participants shall abide by the [Appeal Decision]. Where a Party or participant considers that circumstances have changed in a material way since the [Appeal Decision] so as to affect the basis on which that decision was taken, the Party or participant may seek appropriate relief from the Panel.²⁶

14. In the Panel's view, the SPO has failed to establish a material change of circumstances as contemplated by paragraph 71 of the Order on the Conduct of Proceedings. Insofar as the SPO argues that the hearing of witnesses in this case

²³ Contact Decision, para. 212 (emphasis added).

²⁴ Defence Response, para. 1.

²⁵ F01467, Panel, *Decision on Thaçi Defence Request to Vary the Contact Decision for W04147* ("Decision to Vary Contact Decision for W04147"), 17 April 2023, confidential, paras 26-27 (a public redacted version was issued on 31 October 2023, F01467/RED); F01719, Panel, *Decision on Thaçi Defence Request Concerning Contact with W04290* ("Decision Concerning Contact with W04290"), 16 August 2023, paras 19-20.

²⁶ F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), 25 January 2023, para. 71.

constitutes a material change since the Appeal Decision,²⁷ justifying the Request, the Panel disagrees. Hearing witnesses is a core function of a criminal trial, and the fact that witness have started to testify since the Appeal Decision cannot be considered to be a material change in circumstances. In other words, the assumption that witnesses subject to the Contact Protocol would testify must perforce have formed part of the considerations leading up to the admission of said Protocol.

15. However, the Panel underlined when adopting the Order on the Conduct of the Proceedings that the order “remains subject to future variation by the Panel, where necessary, as the trial progresses.”²⁸ Furthermore, pursuant to Rule 116, the Panel is under an obligation, on an *ongoing basis*, to “take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings”. The Panel notes that the Order on the Conduct of the Proceedings does not address the question of whether a non-calling party may contact an Opposing Party Witness after the witness has testified, and considers that a variation of the Order on the Conduct of Proceedings, and by extension the Contact Protocol, is necessary to facilitate the fair and expeditious conduct of the proceedings in compliance with Articles 21, 23(1) and 40(2) and (6)(f) of the Law.

16. The Panel also recalls the Court of Appeals Panel’s finding, when upholding the Contact Protocol, that the Law does not set an exhaustive list of measures to be taken to achieve the objectives, *inter alia*, of protection and privacy of victims and witnesses.²⁹ The Panel considers that Rule 116 and Articles 21, 23(1) and 40(2) and (6)(f) of the Law provide an adequate legal basis to amend the Contact Protocol in respect of post-testimony contacts.

²⁷ Request, fn. 3.

²⁸ F01226, Panel, *Order on the Conduct of Proceedings*, 25 January 2023, para. 10.

²⁹ Appeal Decision, para. 26.

17. The Panel also notes that several ICC trial chambers have adopted contact protocols that apply post-testimony.³⁰ In addition, as the SPO notes,³¹ the model contact protocol attached to the July 2023 Chambers Practice Manual of the ICC, which regulates contact with a calling party's witness by a non-calling party, does not limit its application to the period until the witness testifies at trial.³²

18. Furthermore, the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), have regulated post-testimony contacts with an opposing party's witnesses.³³

19. In deciding how to regulate this issue, the Panel has factored in that these proceedings are taking place in a climate of witness interference and

³⁰ See for example, ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-412, Trial Chamber VI, [Decision on Adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant'](#), 12 December 2014, with Annex A (where there is no distinction between the application of the contact protocol pre or post-testimony); *Prosecutor v. Jean-Pierre Bemba et al.*, ICC-01/05-01/13-1093, Trial Chamber VII, [Decision Adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties](#), 20 July 2015, para. 16, with one Annex (where Trial Chamber VII rejected a request to exclude post-testimonial contact from the contact protocol, finding such an exclusion inappropriate and that it should not deviate from the *Ntaganda* Protocol); *Prosecutor v. Abdallah Banda Abakaer Nourain et al.*, ICC-02/05-03/09-451, Trial Chamber IV, [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, with one Annex (where Trial Chamber IV held that the contact protocol does not deviate from the standing practice and that it would apply throughout the proceedings).

³¹ Request, para. 6

³² See ICC, [Chambers Practice Manual](#), 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*, July 2023, pp. 37-47.

³³ See for example, ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Trial Chamber II, [Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP](#), 26 October 2007, para. 5 (where Trial Chamber II granted the defence a post-testimony meeting with the witness in the presence of a representative of the Prosecution); *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Trial Chamber II, [Decision on Jerome Clement Bicamupaka's Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA](#), 21 April 2008, paras 14-16 (where Trial Chamber II granted the defence a post-testimony meeting with the witness in the presence of a representative of both the Prosecution and WVSS before recalling the witness); *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Trial Chamber II, [Decision on Defence Motion for Leave to Meet with the Husband of Witness Ane and for Postponement of Her Testimony](#), 28 October 2009, paras 22-23 (where Trial Chamber II granted an interview with the husband of a Prosecution witness after the conclusion of her testimony in the presence of a representative of the Prosecution).

intimidation.³⁴ The Panel has also been mindful of its obligations to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses and to ensure the integrity, fairness and expeditiousness of the proceedings.³⁵

20. The Panel is conscious that, once a witness has testified, the risks associated with interference with the administration of justice may diminish somewhat. This means that measures adopted in respect of pre-testimony contacts might not be justified or required to the same extent in respect of post-testimony contacts. At the same time, the risk of interference cannot be entirely eliminated, even after the witness has testified. It is also the case that, while witnesses have a civic duty to testify in criminal cases,³⁶ they are entitled not to be constantly solicited to provide information in respect of an incident in relation to which they have testified.

21. The Panel notes that the Defence asserts that the Contact Protocol prevents the Accused from properly investigating the case against them as they are prevented from interviewing SPO witnesses outside the SPO's presence unless such contacts are video-recorded and provided to the Panel.³⁷ This, the Defence submits, could lead to a situation where records of interviews it conducted could be admitted *proprio motu* as evidence to the prejudice of the Accused who requested the interview.³⁸ These submissions misrepresent the tenor of the Contact

³⁴ See, for example, Contact Decision, para. 118; F01794, Panel, *Decision on Periodic Review of Detention of Rexhep Selimi*, 15 September 2023, para. 33; F01795, Panel, *Decision on Periodic Review of Detention of Jakup Krasniqi*, 15 September 2023, confidential, para. 33 (a public redacted version was issue on the same day, F01795/RED); F01861, Panel, *Decision on Periodic Review of Detention of Kadri Veseli*, 16 October 2023, para. 26; F01862, Panel, *Decision on Periodic Review of Detention of Hashim Thaçi*, 16 October 2023, para. 21.

³⁵ Articles 23(1) and 40(2); Rules 80(1) and 116.

³⁶ See, generally, European Court of Human Rights, *Voskuil v. the Netherlands* no. 4752/01, [Judgment](#), 22 November 2007, para. 86; Human Rights Review Panel, *W against EULEX*, no. 2011-07, [Decision](#), 10 April 2013, para. 47.

³⁷ Defence Response, para. 1.

³⁸ Defence Response, para. 1.

Protocol. First, as previously emphasised, save for exceptional circumstances, it is up to the *witness* to decide whether he, or she, wishes the calling party, or any of the other identified representatives, to be present at the interview.³⁹ The witness's consent to be interviewed by the opposing party must be obtained through the procedure set out in the Contact Protocol.⁴⁰ Second, the Contact Protocol specifically provides that “[n]either the record of the interview nor any materials used during the interview shall become part of the record in the case”,⁴¹ unless, of course, it is tendered in evidence and meets the requirements for admission.⁴² This is consistent with that witnesses are not the property of either Party⁴³ and that the admissibility of evidence they provided are subject to the same, general, conditions.

22. As noted, the Defence argues that the Contact Protocol should only apply to “select witnesses with protective measures”.⁴⁴ The Contact Protocol foresees no such limitation.⁴⁵ The Contact Protocol is intended to apply to all witnesses, regardless of such protective measures having been granted to a witness.⁴⁶ The Contact Protocol ensures that any concern that a witness might have about talking to an opposing Party or participant is duly accounted for and that the witness can decide whether or not to be interviewed by an opposing Party or participant.⁴⁷

23. As to the prejudice to the Accused, the Panel recalls that the Court of Appeals Panel determined that the Contact Protocol is consistent with the Accused's

³⁹ Contact Decision, para. 212 (Contact Protocol II(b)); Decision to Vary Contact Decision for W04147, paras 26-27; Decision Concerning Contact with W04290, para. 20.

⁴⁰ Decision to Vary Contact Decision for W04147, para. 27; Decision Concerning Contact with W04290, para. 20.

⁴¹ Contact Decision, para. 212 (Contact Protocol II(o)).

⁴² Contact Decision, para. 212 (Contact Protocol II(o)).

⁴³ Decision Concerning Contact with W04290, para. 12; *See also* ICTY, *Prosecutor v Mrkšić et al*, IT-95-13/1-AR73, Appeals Chamber, [Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party](#), 30 July 2003, p. 3.

⁴⁴ Defence Response, para. 23.

⁴⁵ Contact Decision, para. 120.

⁴⁶ Appeal Decision, para. 45.

⁴⁷ Contact Decision, paras 116, 212 (Contact Protocol II(b)).

rights.⁴⁸ In particular, it held that the Contact Protocol does not: (i) contain any direct or indirect elements of compulsion so as to contravene the privilege against self-incrimination; (ii) violate the principle of equality of arms and does not disproportionately burden the Defence, as the Contact Protocol is phrased in neutral terms and apply to both Parties; and (iii) violate the Accused's right to investigate the case against them as there is not an unlimited, automatic right to conduct interviews of witnesses of the opposing party.⁴⁹ These considerations are equally applicable to contacts with witnesses after they have testified or after their statement has been admitted pursuant to Rule 153 or 155.

24. The Panel also wishes to clarify that the Contact Protocol, as presently worded, also includes those witnesses the Parties do not intend to call live, such as witnesses whose evidence has been offered under Rules 153 and 155, if available to be contacted.⁵⁰

25. Lastly, the Panel reminds the Parties and participants that protective measures granted to witnesses towards the public remain in place. This includes witnesses who are interviewed, or witnesses whose evidence is put to persons, or witnesses, who are interviewed.

⁴⁸ Appeal Decision, paras 60, 70, 86.

⁴⁹ Appeal Decision, paras 57, 77, 79, 81.

⁵⁰ See Contact Decision, para. 212 (Contact Protocol II(a)) which reads "Parties and participants shall not contact or interview a witness of another Party or participant if the intention to call the witness to testify or to **rely on his or her statement** has been notified to the opposing Party or participant."

V. DISPOSITION

26. For these reasons, the Panel hereby:

- a) **GRANTS** the Request;
- b) **ORDERS** that the Contact Protocol shall apply throughout the present proceedings, including where an opposing Party or participant wishes to interview a witness of another Party or participant who has already testified in the present trial, or whose prior statement has been admitted pursuant to Rule 153 or 155;
- c) **ORDERS** the Parties and participants to comply with the Contact Protocol in relation to all contacts with Opposing Party Witnesses; and
- d) **REMINDS** the Parties and participants that protective measures remain in place and effective, including in respect of witnesses who are interviewed, or witnesses whose evidence is put to persons, or witnesses, who are interviewed.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 27 November 2023

At The Hague, the Netherlands.