In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
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Thaçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses

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I. INTRODUCTION

1. On 3 December 2021, the SPO filed its Prosecution submissions on confidential information and contacts with witnesses, pursuant to which it proposes a framework for (i) contacts with witnesses; and (ii) handling of confidential information during investigations ("SPO Submissions").[1]

2. The Defence for Mr Hashim Thaçi ("Defence") hereby responds to these submissions and objects to the framework proposed, which violates the fundamental rights of Mr Thaçi guaranteed by Articles 30, 31, and 53 of Kosovo Constitution, Articles 21 the Law N° 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Article 6 of the European Convention on Human Rights ("ECHR"). The SPO's proposed framework also violates Rules 104, 106 and 111 of the Rules of Procedure and Evidence ("Rules"), which guarantee that Defence work product (including its investigations and investigative theories and areas of interest) are privileged work product and not subject to disclosure to the SPO.

3. The SPO's sole rationale for its draconian scheme is that it is "*necessary to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being*."[2] It thus amounts to an improper, overly broad and untimely application for provisional measures under Rule 80, which authorizes appropriate measures "*for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses* […]," but only "*provided that the measures are consistent with the rights of the Accused*." As noted above and further below, the proposed measures violate the rights of the Accused and therefore cannot be granted by the plain terms of Rule 80. They are overbroad because they are requested for every witness in the case, regardless of whether the witness needs them or whether the witness consents to the

[1] KSC-BC-2020-06/F00594.
[2] SPO Submissions, para. 6.

proposed measures (witness consent must be sought pursuant to Rule 80(2)). And the proposed measures are untimely because the PTJ's deadline for the SPO to seek protective measures has passed.

4. Given the importance of the matter and the novelty of the issue before the KSC, the Defence further requests that a hearing be held to address the merits of the SPO Submissions.

II. APPLICABLE LAW

5. The right to a fair trial is an essential component of any democratic society, enshrined in Article 31 of the Kosovo Constitution, Articles 1(2) and 21(2) of the Law and Article 6(1) of the ECHR.

6. The Kosovo Constitutional Court has recalled that *"[e]quality of arms and the right to an adversarial hearing are inherent features of a fair trial guaranteed under Article 31 of the Constitution. Equality of arms requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis- à-vis the opposing party."*[3] Such principles are also regularly confirmed by the European Court of Human Rights ("ECtHR").[4]

7. To ensure the fairness of the proceedings, any accused is entitled to the following fundamental rights, in full equality:

[3] KSC, KSC-CC-PR-2017-01/F00004, ConJudgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017.
[4] ECtHR, *Ankerl v. Switzerland*, Judgment, 17748/91, 23 October 1996, para. 38; ECtHR, *Faig Mammadov v. Azerbaijan*, Judgment, 60802/09, 26 January 2017, para. 19; ECtHR, *De Haes and Gijsels v. Belgium*, Judgment, 19983/92, 24 February 1997, para. 53.

- To have adequate time and facilities for the preparation of his defence, as per Article 30(3) of Kosovo's Constitution, Article 21(4)(c) of the Law and Article 6(3)(b) of the ECHR.
- To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf <u>under the same conditions</u> as witnesses against him or her, protected by Article 31(4) of the Kosovo Constitution, Article 21(4)(f) of the Law, and Article 6(3)(d) of the ECHR.[5]
- Not be forced to testify against oneself or admit one's guilt, guaranteed by Article 30(6) of the Kosovo Constitution and Article 21(4)(h) of the Law.[6]

8. Article 39(13) of the Law provides that *"[t]he Pre-Trial Judge may, where necessary, at the request of a party or Victims Counsel or on his or her own motion, issue any other order as may be necessary for the preparation of a fair and expeditious trial."*

9. Article 40(2) of the Law contain a similar provision for the Trial panel, requiring it to ensure that:

> *"proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Trial Panel, having heard the parties, may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings. It may give directions for the conduct of fair and impartial proceedings and in accordance with the Rules of Procedure and Evidence."*

[5] See ECtHR, *Bönisch v. Austria*, Judgement, 8658/79, 6 May 1985, para. 11, pursuant to which Article 6 ECHR includes *"the right to the attendance and examination of witnesses and experts for the defence <u>under the same conditions as those for the prosecution</u>."*

[6] See KSC, KSC-CC-2019-05/F00012, Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018, 20 February 2019, para. 27: *"the right to silence and the right to not incriminate oneself are generally recognised international standards in criminal proceedings and lie at the heart of the notion of a fair procedure under Article 6 of the [ECHR]".*

III. SUBMISSIONS

A. TERMINOLOGIES

10. The Defence contends that the definition of witness shall be limited to a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely, insofar as the intention of the party or participant to call the witness or to use his or her statement has been clearly communicated to the opposing party.[7] It is not sufficient that such intention be 'apparent'.

11. The Defence further submits that there should be a distinction between *"confidential document"* and *"confidential information."*[8]

B. CONTACTS WITH WITNESSES OF OTHER PARTIES AND PARTICIPANTS

12. Witnesses do not belong to the SPO. The ICTY regularly recalls *"[w]itnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them."*[9] The *"principle that there is no property in a witness"* further dictates that "*the Prosecution may not withhold contact information unless it can establish that there are grounds, pursuant to the provisions of the Statute or the Rules, which would allow it to do so. Any other interpretation would, as the Defence argues, allow property in witnesses."*[10] Thus, *"once the Prosecution decides to call witnesses at trial, it may not*

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[7] See, for instance, ICC, *Prosecutor v. Al Hassan*, ICC-01/14-01/18-677-Anx5, 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, 8 October 2020 ("*Al Hassan* Protocol"), para. 4(f).
[8] *Al Hassan* Protocol, para. 4(d) and (e).
[9] ICTY, *Prosecutor v. Mrkšić*, Case No. IT-95-13/l-AR73, Decision on defence interlocutory appeal on communication with potential witnesses of the opposing party", 30 Jul 2003, para. 15. See also ICTY, *Prosecutor v. Lukic and Lukic*, Case No. IT-98-3211-T, Decision on Milan Lukic's Motion to Compel Disclosure of Contact Information and on the Prosecution's Urgent Motion to Compel Production of Contact Information, 30 March 2009, para. 54.
[10] ICTY, *Prosecutor v. Lukic and Lukic*, Case No. IT-98-3211-T, Decision on Milan Lukic's Motion to Compel Disclosure of Contact Information and on the Prosecution's Urgent Motion to Compel Production of Contact Information, 30 March 2009, para. 25.

unilaterally take protective measures. This, the Chamber stressed, was "solely a matter for determination by the Trial Chamber."[11]

13. As noted above, what the SPO is really seeking is protective measures pursuant to Rule 80. However, Rule 80 makes clear that protective measures may only be granted "*provided that the measures are consistent with the rights of the Accused*." For the reasons set forth below, the Prosecution's proposed protective measures are inconsistent with the rights of the Accused.

14. While the PTJ needs to strike a balance between the right of the accused to a fair and public trial and the protection of victims and witnesses, the right of the accused should be given primary consideration, as required by Rule 80, and as explained by ICTY case law:

> *"23. The Prosecution asserts that the duty to provide for the protection and privacy of the witnesses is an affirmative one. The measures which are appropriate should be determined after balancing the right of the accused to a fair and public trial and the protection of victims and witnesses. These propositions are uncontroversial. What is clear from the Statute and Rules of the Tribunal is that the rights of the accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one. Article 20.1 of the Statute states that Trial Chambers shall ensure that trials are conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The case law of the Tribunal bears out this proposition. It is noted, however, that whilst the rights of the accused are elevated above the protection of victims and witnesses, the latter are still given greater protective status than in national systems of criminal law. The reasoning for this may, in part, be explained by the complexities of the Tribunal's jurisdiction, the particular dangers that attach to those who give evidence in proceedings before the Tribunal and lack of a comprehensive witness protection programme at the Tribunal's disposal. The provisions of the Tribunal's Statute and Rules, as well as its jurisprudence, show that the Tribunal takes seriously the striking of an appropriate balance between the sometimes competing interests of the accused and victims and witnesses. It should not be forgotten that the Rules of the Tribunal are created and interpreted in light of its Statute and the Trial Chamber will consider the specific provisions in this light."*[12]

[11] *Ibid.*, para. 26.

[12] ICTY, *Prosecutor v. Milosevic*, Decision on prosecution motion for provisional protective measures pursuant to rule 69, 19 February 2002.

15. The SPO suggests extremely cumbersome modalities of contacts with witnesses of other parties and participants, which have never been applied before any other courts, be it at the national or international level, in inquisitorial or adversarial systems, on the ground that they would be "*necessary to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being*."[13] The SPO requires that a party wishing to interview another party or participant's witness notify the calling party and CMU ten days in advance, that the calling party then ascertains whether the witness consents to being interviewed by the opposite party, and if so the interview should be systematically organised and video-recorded by CMU, in the presence of a court officer, who could terminate the interview at any time if he/she considered that the opposing party had not complied with its obligations. The SPO further submits that the witness should be assisted by a representative of the calling Party, a legal representative of the witness and/or WPSO representative during the interview if he/she wants to. The SPO adds that the opposing party should refrain from talking to the witness outside the videorecording, which would then be submitted to the parties and the panel.

16. The Defence submits that the proposed framework is extremely prejudicial to Mr Thaçi and would violate his fundamental rights to a fair trial, to equality of arms, to have adequate time and facilities for the preparation of his defence, to examine, or have examined, the witnesses against him, and not to be compelled to testify against himself, guaranteed by Articles 30 and 31 of Kosovo's Constitution, Article 21 of the Law and article 6 of the ECHR.

17. The systematic requirements that the interview be video-recorded and the possibility that the SPO be present during the witness' interview infringes the accused' right to equality, enshrined in Article 21(1) of the Law, and more generally the

[13] SPO Submissions, para. 6.

principle of equality of arms. Witnesses do not belong to the SPO. Many of the witnesses the SPO intends to call also may provide testimony exculpatory for Mr. Thaçi. The SPO was able to interview these witnesses and conduct its investigation without the presence of the Defence and in most cases without videorecording its interviews. It is now asking for participation in the Defence's interviews of these same witnesses when the Accused was not afforded that right, in breach of the principle of equality of arms. Moreover, by preparing an overbroad list of over 300 witnesses it claims it will call (but may not), the SPO through its proposed scheme is able to classify likely Defence witnesses as potential SPO witnesses in order to ensure that it will be present for Defence interviews with exculpatory witnesses. The ECtHR regularly stresses that:

> *"the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies also to litigation in which private interests are opposed; in such instances "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence -under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent […]. A difference of treatment in respect of the hearing of the parties' witnesses may therefore be such as to infringe the principle in question."*[14]

The SPO proposed framework would clearly put the Defence at a substantial disadvantage vis-à-vis the prosecution in the conduct of its investigations and interview of witnesses.

18. What is more, pre-trial questioning of witnesses by the Defence is privileged from disclosure under Rule 111(1) and Rule 111(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"). Such questioning involves communications made in the context of the professional relationship between an Accused and his or her Specialist Counsel. Indeed, Mr Thaçi may give information to his Specialist Counsel to use to question a witness in advance of trial; that information is privileged and should not be disclosed unless the witness discloses it pursuant to

[14] ECtHR, *Ankerl v. Switzerland*, Judgment, Appl. n° 17748/91, 23 October 1996, para. 38. See also ECtHR, *De Haes and Gijsels v. Belgium*, Judgment, 24 February 1997, 19983/92, para. 53.

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Rule 111(1)(b). The Defence may further interview a SPO witness on subjects which were not addressed by the SPO; to disclose the result of such interview would require the Defence to reveal investigatory avenue and thus to assist the SPO in its prosecution against the Accused.

19. The ICTY Appeals Chamber has stressed the importance for the Defence to be able to interview a purported prosecution witness before his/her testimony in Court, noting that the witness may have information of value not exploited by the calling party:

> *12. Where a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not necessarily follow that this witness will have no information of value to the opposing party on other issues related to the case. The opposing party may have a legitimate expectation of interviewing such witness in order to obtain this information and thereby better prepare a case for its client. To deprive this expecting party of such ability would hand an unfair advantage to the opposing party, which would be able to block its opponent's ability to interview crucial witnesses simply by placing them on its witness list. 13. Moreover, the party which placed the witness in question on its list of witnesses may then decide not to call the witness at all. While the other party, such as the Defence in this case, could subsequently petition the Trial Chamber for a subpoena to obtain information from the witness, that party would have lost valuable time in procuring this information and may therefore end up at an unfair disadvantage with respect to the preparation of its case.*
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> *14. The Trial Chamber also seems to have overlooked the fact that during cross-examination, the party conducting cross-examination can elicit from the witness evidence exceeding the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness, provided that "the witness is able to give evidence relevant to the case for the cross-examining party. Given that during cross examination the Defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case.*
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> *15. In these circumstances, the Trial Chamber erred in rejecting the Defence request for subpoenas of three Prosecution witnesses solely on the basis of the fact that the Defence will have the opportunity to cross-examine these witnesses. The Trial Chamber should have examined whether the Defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective cross-examination. As this assessment requires a factual determination which is properly left to the Trial Chamber, [...].*[15]

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[15] ICTY, *Prosecutor v. Halilović*, Case No. IT-0l-48-AR73, Decision on the issuance of subpoenas, 21 June 2004, paras 12-15.

20. Rule 106 of the Rules provides that "*reports, memoranda or other internal documents prepared by a Party […] in connection with the investigation or preparation of a case are not subject to disclosure or notification under these Rules*," and Rule 104 of the Rules defines the disclosure obligations of the Defence only with regard to the witnesses it intends to call and the exhibits it intends to use or tender at trial. In contrast with the SPO's obligations with respect to witnesses, these Rules do not require that the Defence takes any notes or record the interview of witnesses, nor that it discloses such work product – unless it intends to tender it as evidence during trial.[16]

21. Failure to protect the confidentiality of the Defence's investigations will significantly infringe on the Accused's rights either under Article 21(4)(h) (right not to testify against himself) or Article 21(4)(c) (right to prepare his defence). This is for the simple reason that if the Accused is required to have the Prosecution present and record his interviews of SPO witnesses, and there is a risk that the additional questioning may produce additional incriminating testimony against the Accused or reveal new investigative avenues, then the Accused is put in the position of either giving up his right to thoroughly prepare his defence (for fear of creating more incriminating evidence for the SPO to use or providing SPO with new investigative avenues) or to go ahead and take the risk of asking questions and producing more incriminating evidence against himself for use by the SPO (in violation of his right against self-incrimination).

22. The modalities of interview suggested by the SPO would contravene the purpose of the right to silence and of the privilege against self-incrimination, which "*is to protect an accused person against improper compulsion by the authorities and thereby to avoid a*

[16] See, for instance, ICTR, *Prosecutor v Karemera et al*, No. ICTR-98-44-T, Decision on Joseph Nzirorera's 24th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures (6 May 2009), para. 12, pursuant to which the Defence must disclose witness statements in its possession which it intends to use as evidence at trial, but not notes taken during interviews.

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miscarriage of justice and to secure the aims of Article 6 of the Convention. It is the existence of the element of compulsion that raises an issue as to whether the privilege against self-incrimination has been respected. A violation of Article 6 will occur where the degree of compulsion involved destroys the very essence of the privilege against self-incrimination."[17]

23. Thus, at the ICC, Trial Chamber VII dismissed a prosecution request to be disclosed prior statements of purported defence witnesses which may incriminate the accused, such an order being in breach of the accused's rights not to be compelled to testify against himself:

> *"14. The Prosecution argues that the production of the Requested Material is warranted in order to test the viability of the Kilolo Defence's contention that Mr Kilolo did not corruptly influence witnesses. This allegation of improper witness interference is the very matter to be determined in this case. Therefore, the Prosecution seeks, in essence, that the Chamber orders the accused to produce evidence that could be potentially incriminating in a prosecution against the accused. The Prosecution has not satisfied the Chamber that such an order would not violate the rights of the accused '[n]ot to be compelled to testify or to confess to guilt and to remain silent' (Article 67(l)(g) of the Statute) and his right '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal' (Article 67(l)(i) of the Statute)."*[18]

24. What the SPO is effectively asking for is additional protective measures for all the witnesses mentioned on its list, and the time for seeking protective measures has passed.

25. Moreover, the SPO is seeking protective measures now for all witnesses, without any legal basis for such a broad grant of protective measures. The SPO argues only that a similar protocol was adopted "*by another Panel before this court*" and that "*these measures are necessary to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being*", pursuant to Rule 80(1) of the

[17] KSC, KSC-CC-2019-05/F00012, Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018, 20 February 2019, para. 33.
[18] ICC, *Prosecutor v. Bemba et al.*, Decision on Prosecution Request for Production of Evidence in Possession of the Defence, ICC-01/05-01/13-907, 15 April 2015, para. 14.

Rules.[19] The SPO does not quote any case law from any other courts, because such a burdensome process had never been applied before any other jurisdictions, since it would violates the accused's fundamental rights.

26. The *Haradinaj* Protocol cannot be applied *mutatis mutandis* in the present case because the cases are markedly different. The *Gucati & Haradinaj* case relates to alleged offences against the administration of justice which would have been committed one year ago by the Accused,[20] while the present case relates to alleged war crimes and crimes against humanity which would have been perpetrated 22 years ago. Because the *Gucati & Haradinaj* case involves allegations of breach of witness protection orders, there may be a special sensitivity and care in the contacts and interviews of SPO witnesses by the Defence in the *Gucati & Haradinaj* case; this is not justified in the current case.

27. In addition, the *Haradinaj* Protocol was submitted *proprio motu* by Trial Panel II, five days after it was assigned to the case, without reliance on any specific legal basis or precedent and without prior debate between the parties;[21] its provisions on contacts and interviews with witnesses were slightly amended thereafter after minor observations were filed by the parties, none of which objected to its content. Therefore, it does not constitute a reliable precedent.

28. Moreover, in the *Mustafa* case, in which the Accused is charged with similar crimes to those for which Mr Thaçi is prosecuted, Trial Panel I did not find necessary

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[19] SPO Submissions, para. 6, with reference to KSC, *Specialist Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00314/A01, Annex to Order on the Conduct of Proceedings, Section VI(B) ("*Haradinaj* Protocol").

[20] Mr Gucati and Mr Haradinaj are charged with two counts of criminal offences against public order and four counts of criminal offences against the administration of justice and public administration, *i.e.* obstructing official persons in performing official duties, intimidation, retaliation, and violating secrecy of proceedings, allegedly committed in September 2020.

[21] KSC, *Specialist Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00267, Order for Submissions and Scheduling the Trial Preparation Conference, 21 July 2021, and KSC-BC-2020-07/F00267/A01, Draft Order on the Conduct of Proceedings.

to issue specific instructions on the issue of contacts and interviews of an opposite party's purported witnesses. The *Mustafa* Decision on the conduct of the proceedings does not contain any such provision,[22] which demonstrates that the protocol proposed by the SPO in the current case is excessive and unwarranted. In this regard, it is interesting to note that both the ICTY and ICTR have never imposed strict guidelines for contacts and interviews of the opposite party's purported witnesses. When the ICTY did issue some guidance, it did so at the request of the parties and simply endorsed their proposal that the Victim and Witness Section ("VWS") be used as an intermediary to confirm the witness' consent to be interviewed; it did not require the VWS's presence nor that the interview be recorded.[23] At the ICTR, it was limited to requiring the Defence to notify the Prosecution in writing if it wished to contact any <u>protected</u> witness and/or his or her family; if the person concerned consented, the Prosecution had to facilitate such contact together with the WVSS; again, the presence of the WVSS was not required, nor was a videorecording of the interview.[24]

29. Contrary to the SPO Submissions, the vast majority of the 327 witnesses mentioned in its preliminary witness list do not need or require any special measure *"to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being."* At the very most, it is possible that some victim-witnesses may require special treatment when being contacted, and eventually, interviewed by the Defence, but this number should be limited after the SPO has made a specific showing that such measures are required for each specific witness it identifies, such as vulnerable and sensitive victims of crime, who have been granted protective measures by the PTJ. Any limitations to the Defence's investigations must be exceptional and justified by on a case-by-case basis.

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[22] KSC-BC-2020-05/F00170, 26 August 2021.
[23] See, for instance, ICTY, *Prosecutor v. Karadzic*, Decision on motion for reconsideration of decision on motion for Order for Contact with Prosecution Witnesses, 15 July 2009, paras 7-8.
[24] See, *inter alia*, 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.

30. The SPO does not explain why the proposed protocol would be necessary for high-profile figures such as former members of governments or international governmental organisations. International witnesses & public officials certainly have no need *"to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being,"* which is the only justification offered by the SPO for its draconian scheme.

31. In reality, this process is designed by the SPO specifically for the Defence interviews of prosecution witnesses, with the strong, erroneous, underlying presumption that the Defence is a serious threat to the safety and welfare of every SPO witness in the case, thus questioning the Defence's professionalism, experience and integrity. Indeed, it is not reasonable to believe the SPO considers all these protections would be needed for SPO interviews of Defence witnesses. The Defence recalls that it is bound by rules and codes in place. First, the hiring practice requires experienced, qualified professionals, with unblemished backgrounds; second, the Code of Professional Conduct requires specific ethical behaviour. Therefore, there is no need to resort to the draconian measures suggested by the SPO.

32. It would be unfair to the Defence to impose such strict and burdensome measures to contact and interview SPO witnesses while the SPO had years to investigate without any constraints. It is materially unworkable, and it provides the SPO with a prejudicial head start on the identification of "its" purported witnesses (in this case abusively so with the number exceeding 300), who then fall within its prejudicial scheme. The Defence team and witnesses are based worldwide. Witnesses are unlikely to travel to The Hague to attend interviews organised by the CMU. The SPO's scheme would thus seriously impede defence preparations, in violation of Mr Thaçi's constitutional rights to have adequate time and facilities to prepare for trial. It would be similarly ridiculous to require the KSC to pay a court officer to travel

worldwide to organise and attend Defence interviews of SPO purported witnesses. This would be a waste of time and money.

33. The conditions of interviews suggested by the SPO are even more stringent than those applied to a witness' appearance in Court, and will impose intolerable pressure on any witness interviewed in such circumstances. They require enormous logistical efforts by the registry institutions and amount to a mini trial, which would be more complex than the actual trial, with the presence of: a registry person acting as referee – overseen by the Trial Panel for any problems – who can stop the interview at any time if someone allegedly misbehaved; a prosecution representative; a defence counsel; a victim/witness lawyer; a witness support counsellor - even if the witness does not want one; interpreters; all being video and audio recorded. Such a crowd of people in a contested atmosphere would be extremely hard on a witness, and even more onerous than in a courtroom because there would be no judge present. This process makes it virtually impossible for the Defence to interview witnesses without expending enormous time and resources required in no other proceeding, as the SPO may intend. Given the number of witnesses on the SPO preliminary list, the Defence at best could interview very few of them pursuant to the SPO's proposed procedure. In comparison, a normal defence interview would involve only one investigator and eventually one Defence lawyer, one interpreter, and if required by the witness an attorney or other support person for the witness; it would be done in a calm atmosphere, quickly and efficiently.

34. Even the ICC Chambers Protocol does not contain any provision requiring that the interview of an SPO witness by the Defence be organised and videorecorded by a court officer in his/her presence. The SPO has offered no explanation justifying the KSC (which is trying a case about events that occurred 22 years ago) imposing a scheme different from that used by the ICTR, ICTY or ICC.

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35. The Defence further strongly opposes the SPO's request that "*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*." The ICC Chambers Protocol does not contain any similar provision. While such a unilateral determination by one party would never be acceptable, to put it bluntly, in this case the SPO has not earned the right to arrogate to itself the right to determine that it knows – better than the witnesses themselves – what is good for them. It should be summarily dismissed.

C. HANDLING OF CONFIDENTIAL INFORMATION IN THE FRAMEWORK OF INVESTIGATIVE ACTIVITIES

36. The Defence submits that it is unnecessary for the PTJ to issue a protocol on the handling of confidential information during investigations. Counsel and the members of their teams, and in particular investigators, are professionals bound by codes of ethics[25] and/or have signed confidentiality agreements with the KSC. There is no need to remind them of their obligations.

37. Nevertheless, in the event the PTJ considers that a protocol on such an issue would be warranted over the Defence's most strenuous objection, the Defence makes the following observations.

38. The SPO submits that the parties and participants are under a general obligation not to disclose to third parties any "confidential information" (para. 5(a)) and defines strict conditions pursuant to which a party or participant may exceptionally disclose the identity of a witness to a third party.

[25] KSC-BD-07/Rev1/2021, Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, 28 April 2021.

39. The Defence notes that approximately 22 000 documents have been disclosed to it as purportedly incriminating, exculpatory or material for the defence preparation. They have all been classified as confidential by the SPO in Legal Workflow. However, many of these documents emanate from public sources, are published online, do not relate to any SPO witnesses, and/or do not contain any confidential information, such as a map of a city for instance, a picture of a building, *etc*. In such circumstances, the Defence should be authorised to use such documents to conduct investigations, *i.e.* to show them to third parties, provided that the documents in question do not reveal the identity of a protected witness. A general ban on the use of all the document disclosed by the SPO would unduly limit the Defence investigations and would contravene the purpose of Rule 103 and Rule 102(3) of the Rules. The general ground advanced by the SPO, *i.e.* to ensure the SPO witnesses' safety, physical and psychological well-being, dignity and privacy,[26] is not valid for most of the 22 000 documents disclosed.

40. A provision similar to the following one could be adopted:

> *"Confidential documents or information which have been made available to a party of participant may be revealed by that party or participant to a third party where such disclosure is directly and specifically necessary for the preparation and presentation of their case. A party or participant shall only disclose to third parties those portions of a confidential document of which the disclosure is directly and specifically necessary for the preparation and presentation of its case.*
>
> *When a confidential document or confidential information is revealed to a third party under the preceding paragraph, the party or participant shall explain to the third party the confidential nature of the document or information and warn the third party that the document or information shall not be reproduced or disclosed to anyone else in whole or in part. Unless specifically authorised by the Chamber, the third party shall not retain a copy of any confidential document shown to them."*[27]

41. The Defence further submits that any restrictions on the disclosure of a witness' identity to a third party should not be so strict as to make it impossible in practice. It

[26] SPO Submissions, para. 5.
[27] 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 ("ICC Chambers Protocol"), 2019, paras 8-9.

should not apply to international figures, such as former staff from foreign governments, international governmental organisations. More generally, it should not apply to witnesses who have not been allocated any protective measures by the PTJ in the current case, since such restrictions would be unwarranted.

42. Finally, and importantly, the Defence requests that the Pre-Trial Judge conveys a hearing to hear the parties and participants' submissions on the issue raised by the SPO in its Submissions, i.e. contacts with witnesses and handling of confidential information during investigations. These are crucial matters for defence investigations which should not dealt with through limited written submissions, especially since any measure imposed by the Pre-Trial Judge will likely remain applicable during trial. They deserve – indeed require—a full debate.

IV. CONCLUSIONS

43. For these reasons, the Defence asks the PTJ to:

- Convey a hearing to hear the parties and participants' submissions on contacts with witnesses and handling of confidential information during investigations;
- Dismiss the SPO Request.

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Respectfully submitted,

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Gregory W. Kehoe

Counsel for Hashim Thaçi

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At Tampa, United States