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

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I. INTRODUCTION

1. The Selimi Defence files this response to the submissions of the Specialist Prosecutor's Office (SPO) requesting the imposition of a "framework for (i) contacts with witnesses; and (ii) handling of confidential information during investigations".[1]

2. First, the SPO Submissions, and the Proposed Framework contained therein,[2] raise a number of significant legal concerns regarding the fundamental rights of the accused and his ability to prepare an effective defence by imposing blanket protective measures on individuals for whom no protection has previously been granted and for whom no objectively justifiable risk has been identified which would necessitate such protections.

3. Second, the SPO Submissions propose a number of measures which are already covered sufficiently by the Code of Conduct,[3] thus rendering them unnecessary for an order by the Pre-Trial Judge.

4. Regarding the "contacts with witnesses of other Parties and Participants", the Defence opposes, for the most part, the measures, as they are bureaucratically overbearing, violate the fundamental rights of the accused and include measures beneficial mostly to the SPO.

5. Should the Pre-Trial Judge be minded to accept any provisions of the Proposed Framework, these must be strictly limited only to witnesses found to be at risk and modified in order to ensure that the fundamental rights of the accused to a fair trial are guaranteed.

II. SUBMISSIONS

A. Legal Concerns affecting the Fundamental Rights of the Accused

1. <u>The rights of the accused must take precedence in the assessing the effect of protective measures</u>

6. It is necessary at the outset to clarify the relationship between the rights of the accused and those of the victims and witnesses. Article 40(2) of the Law[4] is absent from the SPO

[1] F00594, Prosecution Submissions on Confidential Information and Contacts with Witnesses ("SPO Submissions"), 3 December 2021, para. 1.
[2] "Proposed Framework" refers to paragraphs 5, 6 and their related subparagraphs.
[3] KSC-BD-07-Rev1, Registry Practice Direction on the Code of Professional Conduct for Counsel and Prosecutors before the Kosovo Specialist Chamber, 28 April 2021.
[4] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

Submissions, despite its reference to other provisions from the Law.[5] Article 40(2) relates to the Powers and Functions of the Trial Panel, but nevertheless is applicable during the Pre-Trial stage, as it establishes that the guarantee of a "fair and expeditious" trial under the law provides 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".[6]

7. The Defence notes that the Proposed Framework, although not quite phrased as being "pursuant to" Rule 80, is nevertheless submitted under the auspices of that Rule.[7] The use of Rule 80 in the present circumstances is addressed further below.[8] In determining protective measures, the Panel therefore must consider on one hand the rights of the accused to a fair and public trial, and to cross-examine witnesses against him and on the other hand, the rights of victims to protection and privacy.[9]

8. The different language employed by Article 40(2) in describing each set of rights relative to one another is no accident. The Statute of the ICTY[10] contains, at Article 20(1), provisions identical to those in the first sentence of Article 40(2) of the Law. As noted at the ICTY, the wording of these Articles establishes that in balancing the rights of the accused and the protection of witnesses, those of the accused are favoured, and are given precedence.[11] Stated plainly; that while "due regard" must be had for the protection of victims and witnesses, this is a secondary consideration for "full respect" of the rights of the accused.[12] This hierarchy is further confirmed by the wording of Rule 80(1), which allows protective measures to be ordered "provided that [they] are consistent with the rights of the accused".[13]

9. With the above in mind, in deciding on the SPO Submissions, the Pre-Trial Judge must weigh the Proposed Framework by giving preference to the fair trial guarantees provided

[5] SPO Submissions, para. 1.
[6] Article 40(2) of the Law [emphasis added].
[7] *See*, SPO Submissions, paras. 1, 2, 4, 5, 6
[8] See below, Section II.A.3.
[9] *Prosecutor v. Slobodan Milošević*, No. IT-02-54-T, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Croatia) ("Milošević Decision"), 30 July 2002, para. 4.
[10] Updated Statute of the International Criminal Tribunal for the former Yugoslavia, September 2009.
[11] *Prosecutor v Karadžić*, No. IT-95-5/18-PT, Decision on Prosecution's Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532, and variation of protective measures for KDZ489 ("Karadžić Delayed Disclosure Decision"), 5 June 2009, para. 12; *Prosecutor v Haradinaj et al*, No. 04-84-PT, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements (22 November 2006) at para. 3; Milošević Decision, para. 4.
[12] Karadžić Delayed Disclosure Decision, para. 12.
[13] Milošević Decision, para. 4.

in the Rules, the Law and with international human rights law, which sets criminal justice standards,[14] and any point where those fundamental rights are encroached upon by the suggested measures, must rule against the implementation of those measures. As set out further below, where the Proposed Framework is not already otherwise rendered unnecessary by virtue of the provisions of the Code of Conduct, in many cases it directly violates those fair trial rights and thus, must be rejected, or at the very least, carefully modified to preserve the balance of the respective rights, as outlined above.

2. The Proposed Framework is directed almost exclusively at the Defence

10. The Defence notes that the wording of the Proposed Framework as submitted by the SPO is ostensibly Party neutral, as it does not single out any one Party to proceedings and employ terms such as "opposing Party", "calling Party" and "interviewing Party".[15] However, the Pre-Trial Judge should not overlook the current stage of proceedings, the relative positions of the Parties and the actual effect that the Proposed Framework would in practice have, if imposed.

11. First, The SPO has already enjoyed many years with which to conduct its investigations. It should now be safe to assume at this point of proceedings, with the disclosure of the SPO Pre-Trial Brief on the horizon, and the promises that the Defence will be obtaining the Rule 95(4) witness and exhibit lists later this month in addition to the relatively recent disclosure of the "vast majority of the SPO's Rule 102(1)(b) materials",[16] that their investigations have all but been completed. During those years, the Prosecution has been free to carry out its investigations with no involvement of Defence counsel and to disclose confidential information to potential witnesses or any other person during this process as it saw fit (within the bounds of its professional and ethical obligations).

12. Second, it is necessary in light of the above to view the Proposed Framework with regard to the principle of equality of arms. This principle requires that "each Party be given a reasonable opportunity to present its case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent".[17] As noted at the ICTY;

> "The principle of equality of arms "goes to the heart of the fair trial guarantee."[18] While equality of arms does not mean that the Appellant

[14] Article 3(2).e of the Law.
[15] SPO Submissions, paras. 4, 6.b, c, d.
[16] SPO Submissions, para. 3.
[17] ECHR, *Kress v. France* [GC], no. 39594/98, 7 June 200 I, para. 72.
[18] *Prosecutor v. Tadić*, No. IT-94-1-A, Judgement, 15 July 1999, para. 44.

> is necessarily entitled to the same means and resources available to the Prosecution, it does require a judicial body to ensure that neither party is put at a disadvantage when presenting its case, particularly in terms of procedural equity. In assessing an equality of arms challenge by an accused, a judicial body must ask two basic questions: (1) was the Defence put at a disadvantage vis-à-vis the Prosecution, taking into account the "principle of basic proportionality"[19] and (2) was the accused permitted a fair opportunity to present his case."[20]

13. Furthermore, as noted by the ECHR; "counsel has to be able to secure without restriction the fundamental aspects of that person's defence: organisation of the defence, collection of evidence favourable to the accused"[21] so that the accused has the benefit of a defence that is "practical and effective".[22]

14. Third, as the SPO is well aware, the burden of proof rests on the Prosecution alone to prove each and every element of the offences beyond a reasonable doubt.[23] Furthermore, nothing in the Rules or the Law obliges the Defence to call witnesses, or to present a case following the conclusion of the SPO's case. Common practice before international tribunals has shown that, even where the Defence chooses to call a case, it will typically be of much smaller scale and therefore include only a fraction of the number of witnesses called by the Prosecution.

15. Accordingly, in contrast to the abundance of time and freedom the SPO has enjoyed during its investigations to date, the Defence has, relatively speaking, only recently been disclosed sufficient material with which to begin, in earnest, its own investigations. This may, and almost certainly will, involve the interviewing of witnesses who are on the SPO's witness list, as well as others not on that list. While the commencement of the trial might be possible towards the end of 2022, there is considerably little time within which to carry out the necessary defence investigations and thus prepare an effective defence for what will be a long and complex trial. Therefore, any unnecessary layer of bureaucracy imposed on the Defence in carrying out this work, particularly where no objective risk to specific witnesses has been identified, is an infringement on the accused's right to have adequate time and facilities to prepare his defence.

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[19] *Id.*
[20] *Prosecutor v Stakić*, No. IT-97-24-A, Judgement, 22 March 2006, para. 149.
[21] ECHR, *Dayanan v. Turkey*, no. 7377/03, 13 October 2009, para. 32.
[22] ECHR, *Goddi v. Italy*, no. 8966/80, 9 Apri11984, para. 27.
[23] Article 21(3) of the Law; *See e.g. Prosecutor v. Delić*, No. IT-04-83-T, Judgement (15 September 2008) at para. 23.

16. The overall focus of the SPO's Proposed Framework, insofar as it relates to contact with the witnesses of the opposing Party, is directed almost entirely, if not entirely, at the Defence and will have a disproportionately negative impact on the Mr. Selimi's resulting right to a fair trial.

3. Rule 80 should not be used in the manner proposed by the SPO

17. The SPO characterises the Proposed Framework as being necessary for "ensur[ing] witnesses' safety, physical and psychological well-being, dignity and privacy", noting that Rule 80(1) empowers the Pre-Trial Judge to order appropriate measures for the protection of the witnesses, provided they are compatible with the rights of the Accused.[24]

18. Besides implying that these risks are posed to its entire witness list, the SPO has not identified which of its witnesses, outside of those already subject to protective measures, are at risk, why the Proposed Framework is necessary for each witness on its list, and what specific risks to every one of these witnesses the measures are intended to alleviate. The Proposed Framework is thus an inappropriate blanket measure with no specificity and one which by its very nature should be rejected by the Pre-Trial Judge, at least insofar as the protective measures have not been justified.

19. It is recalled that in seeking protective measures, the burden rests on the seeking Party to justify, in each case, why those measures should be granted.[25] This allows the Pre-Trial Judge to make an assessment, on a case-by-case basis, why protective measures should be applied to particular witnesses, taking into account whether an objectively justifiable risk necessitates the imposition of those protective measures.[26] This is but one limb of the test which has previously been applied to other more restrictive measures in this case[27] and there is no cogent reason advanced as to why that test should be loosened so that a party seeking to use Rule 80 is no longer required to justify which witnesses are at risk.

20. The SPO's submissions, as they presently stand, would apply to every witness on its list, regardless of whether it has identified an objective risk or not. This would lead to an

[24] SPO Submissions, paras. 4, 6.
[25] *See e.g. Prosecutor v Gotovina*, No. IT-01-45-PT, Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68, 14 July 2006, pg. 6.
[26] *See also*, *Prosecutor v Lukić & Lukić*, No. IT-98-32/1-T, Order on Milan Lukić's Request for Protective Measures, 23 July 2008, pp. 3-4; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005, paras. 19-20; Decision on Nyiramasuhuko's Strictly Confidential *Ex Parte* Under Seal Motion for Additional Protective Measures for Defence Witness BK, 15 June 2005, para. 15.
[27] KSC-BC-2020-06/F00159, Framework Decision on Victims' Applications, para. 47. *See e.g.* KSC-BC-2020-06/F00257, First Decision on Victims Participation, para. 68.

absurd situation whereby, for example, an expert not in any way connected with the country of Kosovo beyond their professional duties, or a former diplomat residing far from the location of the alleged crimes would be provided with these extra protective measures on the same basis as a victim, or a crime-base witness.

21. The Defence notes that the ICC has previously rejected a blanket application of protective measures through an investigation protocol to cover those who are not already protected individuals.[28] Furthermore, authority cited in the SPO Submissions similarly viewed certain protective measures similar to those proposed by the Prosecution as being unjustified where no specific risk to the witnesses in question had been identified,[29] or issued certain measures where the Prosecution had at least attempted to justify them (and which the defence had reviewed and agreed with).[30]

4. Relevance of an order from a different KSC Panel

22. The SPO proposes extensive measures relating to the contacts with witnesses of other Parties and Participants.[31] It has provided no justification for these provisions, particularly as they relate to witnesses who are not subject to protective measures, merely noting that they are "largely consistent with those adopted by another Panel before this court".[32]

23. Irrespective of the fact that this decision has no legally binding effect on the Pre-Trial Judge, two matters arise from its inclusion as authority supposedly in support of the SPO Submissions. The measures introduced in *Gucati and Haradinaj* were issued approximately three weeks prior to the commencement of trial proceedings, after the case file had already been transmitted to the Trial Panel, in a case which does not approach the level of complexity or breadth as the present one. Furthermore, that case specifically alleged separate counts of Obstruction, Intimidation, Retaliation and Violation of Secrecy[33] in relation to witnesses who provided information to the SPO. As such, the measures imposed in that case, while excessive, were tailored to its unique factual circumstances, were not imposed on the Parties or Participants during the pre-trial stage

[28] *The Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-2047, Decision on the "Protocol on investigations in relation to witnesses benefitting from protective measures", para. 15.
[29] SPO Submissions, para. 4, *citing Prosecutor v Ayyash et al*., STL-11-01/PT/PTJ/F0269, Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012 ("Ayyash Decision"), 25 May 2012 *see* paras. 34, 35.
[30] SPO Submissions, para. 4, *citing Prosecutor v. Nzirorera*, ICTR-98-44-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000, para. 10.
[31] SPO Submissions, para. 6 and associated sub-sections.
[32] SPO Submissions, para. 6, citing KSC-BC-2020-07/F00314/A01, Annex to Order on the Conduct of Proceedings, Section VI(B).
[33] KSC-BC-2020-07/F00251, Lesser Redacted Indictment, 4 October 2021, para. 48. Counts 1-6.

and would not have had the same prejudicial effect that applying such conditions in the present circumstances would have.

5. Definition of Witnesses

24. The Defence objects to the SPO's expansive definition of "Witness" where it includes persons "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 is known or apparent to the opposing Party".[34] Either a witness is notified to the other Party or it is not. The Defence does not intend to engage in a guessing exercise to ascertain the intent of the SPO for potential future witnesses, particularly where the disclosure of witness lists is already governed by the Rules.

25. As such, once the final witness list has been filed by the SPO, this must be treated as being the final notification as to those intended to be called to testify, or for their statements to be relied upon. As soon as the SPO decides it no longer wishes to rely upon a witness, that information must be immediately communicated to the Defence.

B. The Code of Conduct renders much of the Proposed Framework unnecessary[35]

26. The Proposed Framework, particularly where it relates to the handling of confidential information, includes provisions that are already covered by the Code of Conduct.[36] The Code of Conduct sets out the rules by which Counsel and Prosecutors must abide in order to uphold their professional and ethical obligations as officers of the court appearing before the KSC. These obligations are not mere window-dressing, as the Code also includes a comprehensive disciplinary regime,[37] with severe sanctions,[38] to be applied to those who knowingly breach its terms.[39] Furthermore, such disciplinary sanctions are without prejudice to potential offences against the administration of justice pursuant to Article 15(2) of the Law.[40]

27. The SPO, despite referring to specific Articles from the Code of Conduct[41] has not advanced any argument which suggests that it is not fit for purpose and needs to be

[34] SPO Submissions, para. 5.b [disputed text underlined]. Note, the variation on this wording at para. 6.a, which states that this intention must be "…otherwise clearly apparent" does not sufficiently clarify the matter.
[35] *Id.*, paras 5.a – g, 6.d, 6.i.
[36] *Id.*, paras 5.a – g.
[37] Code of Conduct, Chapter V.
[38] *Id.*, Article 43.
[39] *Id.*, Article 33.
[40] *See* KSC-BD-04-Rev1, Directive on Counsel, Section 10.
[41] SPO Submissions, paras. 1, 5 fn. 11.

supplemented or augmented by an order of the Pre-Trial Judge (or indeed any Panel). The provisions of the Proposed Framework that are already covered by the Code of Conduct should therefore be dismissed as unnecessary. This approach is endorsed by jurisprudence cited in the SPO Submissions.[42]

28. First, in light of the above, Articles 6, 12 and 15 of the Code of Conduct require Prosecutors and Counsel *inter alia* to exercise their duties honourably and independently;[43] to respect professional secrecy and confidentiality,[44] taking all necessary care to protect the confidentiality of information;[45] maintain the highest standards or professional conduct in the preparation and presentation of a case[46] and to not reveal any information classified as confidential or strictly confidential pursuant to Rule 82 of the Rules, including the identity of protected victims and witnesses or any confidential information that may reveal their identity and whereabouts, unless he or she has been specifically authorised to do so by a Panel.[47]

29. As such, the Proposed Framework as it relates to the handling of confidential information in paragraphs 5.a – g is already covered by the Code of Conduct and an order of the Pre-Trial Judge setting out these provisions is unnecessary.

30. Second, the Defence is perplexed by the provisions of the Proposed Framework relating to the conduct of interviews with witnesses of the calling Party.[48] These provisions carry with them an astounding implication of unprofessionalism towards the interviewing Party, which as noted above,[49] is likely to be almost exclusively the Defence.

31. Nevertheless, the provisions are entirely unnecessary as they are covered by the Code of Conduct. In particular, Counsel and Prosecutors are bound to exercise their duties

[42] *Id.*, para. 4, *citing inter alia* Ayyash Decision, paras 27, 28, 32, 38. Note, with regard "*In the case against Akhbar and Al Amin*, STL-14-06/PT/CJ/F0030, Decision on the Amicus Curiae Prosecutor's Application for Protective Measures and Non-Disclosure ("Akhbar Decision"), 3 July 2014" also cited by the SPO, the Contempt Judge in that case specifically noted that the Decision was issued without the Defence having been heard, see para. 3. In addition, the measures imposed in that Decision were far more limited in scope than those presently proposed by the SPO, in particular regarding the notice to be provided to the *Amicus* prior to contacting witnesses, which applied only to those witnesses at risk identified by the *Amicus*, see p. 2.
[43] Code of Conduct, Article 6.1.a.
[44] *Id.,* Article 6.1.b.
[45] *Id.,* 12.1.
[46] *Id.,* 6.1.g.
[47] *Id.,* 12.2.
[48] SPO Submissions, para. 6.d. Note, the underlying basis of para. 6.d.iii is addressed separately below in paras. 47 – 49 as it concerns the video-recording of interviews.
[49] *See above*, Section II.A.2

honourably and independently;[50] maintain the highest standards of professional conduct in the preparation and presentation of a case;[51] act with diligence, dignity and integrity in relation to the performance of their duties;[52] take all reasonable steps to ensure that their actions are not prejudicial to, and do not bring proceedings before the Specialist Chambers into disrepute;[53] and to not intimidate or harass witnesses or victims, or subject them to pressure in a manner that is not reasonably justified by the effective performance of Counsel or Prosecutor's responsibilities.[54]

32. This also applies to the warnings proposed to be provided by the Registry to the interviewing witness.[55]

33. Accordingly, through the Code of Conduct; Counsel and Prosecutors have already bound themselves to act according to the highest standards of professional and ethical conduct, rendering the above provisions unnecessary.

C. The Proposed Framework on "Contacts with Witnesses of Other Parties and Participants" violates the fundamental rights of the Accused and is excessive

34. The Defence opposes the following provisions of the Proposed Framework, or in the alternative, requests that they are significantly modified in order to protect the rights of the accused. The Defence further contends that any measures imposed by the Pre-Trial Judge be strictly limited solely to those witnesses where an objective risk to being "re-traumatis[ed]"[56] or to their "privacy, dignity and physical and psychological well-being"[57] has been clearly identified by the SPO in each case.

1. <u>The involvement of the calling Party in the interview process should be limited only to ensure the protection of witnesses who face an objectively justified risk[58]</u>

35. First, in similar fashion to other international tribunals, both the Law and the RPE of the KSC are silent on the issue of whether one Party in a case can interview the witnesses intended to be called, or relied upon by the other Party, prior to their appearance in court. However, it has previously been recognised in international criminal law that "witnesses

[50] Code of Conduct, Article 6.1.a.
[51] *Id.,* Article 6.1.g.
[52] *Id.,* Article 6.1.c.
[53] *Id.,* Article 6.1.f.
[54] *Id.,* Article 17.1.
[55] SPO Submissions, para. 6.i.
[56] *Id.,* para. 6.
[57] *Id.,* para. 6.
[58] *Id.,* para. 6.b, c, f.

to a crime are the property of neither the Prosecution nor the Defence" and that therefore "both sides have an equal right to interview them".[59] Thus, the description of witnesses in the Proposed Framework as "witnesses of another Party or Participant"[60] is inappropriate and prejudicial – witnesses are simply witnesses.

36. As such, in principle at least, the Parties and Participants should be free to contact any witness for the purpose of diligently carrying out their investigations, whether or not that witness will be called, or relied on by the opposing Party (including where the opposing Party has clearly communicated its intent to call that witness). This is the principle that should be applied in the present case.

37. Nevertheless, recognising that there may be conditions in specific cases which necessitate a higher level of care for the protection of witnesses, if a requirement to notify the calling Party is ordered by the Pre-Trial Judge, this should be limited solely to those witnesses facing an objectively justified risk that have been clearly identified as such by the calling Party. This approach is consistent with the jurisprudence of other international courts.[61] In the absence of any such identified risk, an obligation on the interviewing Party to notify the calling Party is excessive and serves no purpose.

38. Second, while recognising that every witness is free to consent to, or refuse to be interviewed, the Defence objects to the involvement of the calling Party in seeking that consent.[62] Such a measure is excessive and raises concerns of undue pressure, not necessarily intentional, being exerted on the witness to refuse such an interview. Put plainly, such a question posed by a Party to a witness they propose to call carries with it the implication that speaking to the "other side" is somehow frowned upon, or otherwise not advisable.

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[59] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Interview of Defence Witnesses by the Prosecution, 8 November 2012, para. 10 *See also Prosecutor v. Mrksić*, Case No. IT -95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposing Party, 30 July 2003, para. 15; *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, Decision on the Prosecution's Motion to Interview Defence Witnesses, 1 September 2006, para. 3; *Prosecutor v. Popović et al*., Case No. IT-05-88-T, Decision on Nikolić Request for Certification to Appeal Oral Decision on PW-165 and Request for Variation of the Time-Limits, 12 July 2007, p. 1.

[60] SPO Submissions, para. 6.a, b, c.

[61] *See e.g.* Ayyash Decision, para. 34 "Lastly, with regard to the obligation on the Defence to give prior written notice to the Prosecution of its intention to contact a witness identified by the Prosecution and to obtain authorisation from that witness through the VWU, the Pre-Trial Judge considers that it is only justified with regard to witnesses facing a specific risk". *See also* Akhbar Decision, p. 2; *Prosecutor v. Mićo Stanišić*, IT -04-79-PT, Decision on Prosecution's Motions for Protective Measures for Victims and Witnesses, 6 June 2005, para. 17.

[62] SPO Submissions, para. 6.b.

39. Again, recognising that there is a need to treat with care those witnesses facing an identified risk of re-traumatisation, or threat to their privacy, dignity and physical and psychological well-being, there is no reason advanced why such consent cannot be sought by WPSO, which has no interest in the outcome of the proceedings outside of the well-being of the witnesses concerned.

40. Third, the Defence strongly objects to the provision which would allow any witness to request that "a representative of the calling Party"[63] be present at the interview, particularly when it is proposed that the same calling Party seek the consent of the witness. There have been no arguments advanced by the SPO as to why "a legal representative of the witness and/or a WPSO representative", also available to the individual, would not be able to sufficiently safeguard that person's privacy, dignity and physical and psychological well-being and protect them from re-traumatisation.

41. The interviewing of witnesses may necessarily entail the revealing of *inter alia* details of defence lines of investigation and/or strategy, future cross-examination and/or persons not on the calling Party's witness list who may potentially provide exculpatory/beneficial evidence to the interviewing Party. Furthermore, the presence of a representative of the calling Party during the interview has the obvious potential of reinforcing in the witness' mind that even if they have consented to the interview, they nevertheless should not be helping the "other side", particularly when the interview may touch on topics of an exculpatory nature. This has the potential to amount to a clear violation of the rights of the accused to have adequate facilities to prepare an effective defence.

42. This is of further concern to the Defence where the SPO seeks to have the right for the calling Party to override the "witness's expressed preferences"[64] as to its presence at the interview and seek leave of the Panel to be present. While this is presented as being for "the safety and security" of the witness (notwithstanding the fact that it is not clear why the calling Party is seeking to safeguard this and who is at risk, as noted above)[65], it also includes the vague basis of some "other legitimate reason". The Proposed Framework has been submitted, apparently, out of concern for witness safety and security, and should not therefore be widened to include such an undefined consideration, which is ripe for abuse, to allow the calling Party to override the expressed preference of the witness. As above,[66]

[63] SPO Submissions, para. 6.b, f.v.
[64] SPO Submissions, para. 6.b.
[65] *See above,* Section II.A.3.
[66] *See above*, para. 40.

there is no reason advanced by the SPO as to why the safety and security of the witness cannot be sufficiently protected by the witness' own legal representative and/or the WPSO.

43. Fourth, the provisions relating to the inadvertent contact with opposing Party or participant witnesses[67] should be restricted only to witnesses at risk, as outlined above.

44. If the Pre-Trial Judge is minded to grant the above framework in any Part, he must bear in mind the hierarchy of rights as noted above and apply those measures in a manner which has the least impact on the rights of the accused. Accordingly, the calling Party should be should be excluded from the interview process entirely, or if included, only to the extent that their inclusion can alleviate an objectively justified risk to a witness that cannot be addressed by either the witness' legal representative, or the WPSO.[68]

2. <u>The involvement of the Registry in the interview process should be restricted to cases only where such involvement is strictly necessary</u>[69]

45. First, the prospective trial date may leave limited time for the Defence to conduct its required investigations prior to a lengthy and complex process. In light of the need to guarantee full respect for the rights of the accused[70] in the preparation of his defence, the involvement of the Registry, through CMU, should be limited solely to cases where there is an objectively justified risk to a witness and where their presence and involvement is necessary to alleviate that risk.

46. Requiring Counsel to submit to this onerous level of bureaucracy in seeking and carrying out the necessary preparation of its defence is antithetical to the fundamental rights of the accused by limiting the scope of its investigations through the unnecessary involvement of a third party in the interview process. The Defence must be free to arrange and to carry out its own investigations without fear of tying the process up in a burdensome bureaucratic process which will undoubtedly cause excessive delay and thus violate the principle of equality of arms.[71]

[67] SPO Submissions, para. 6.c.
[68] SPO Submissions, para. 6.f should likewise be modified to reflect the exceptional nature of such measures.
[69] SPO Submissions, para. 6.e – l.
[70] *See above*, Section II.A.1.
[71] *See above*, Section II.A.2.

3. The Pre-Trial Judge must reject the mandatory recording of each interview by the Registry and its provision to all Parties and the Panel[72]

47. The proposal for the recordings of every interview to be audio-video recorded by the Registry and for all of these recordings to potentially be entered into evidence by the Panel, or by the SPO, is inherently prejudicial to the rights of the accused and must not be entertained.

48. The Pre-Trial Judge must bear in mind that the ostensible reason the Proposed Framework was put forth by the SPO was out of a "necessity to protect the physical and psychological well-being of victims, witnesses, and their families".[73] With this as the basis, there is absolutely no purpose served by allowing a calling Party, or a Panel, to have automatic access to a recording of an investigative interview carried out by the opposing side and even less for that recording to potentially be used against the interviewing Party, most likely to be the Defence in almost all cases, in trial proceedings. Stated simply; this measure bears absolutely no relationship to the protection of witnesses, and even if it did, its prejudicial effect on the accused would necessitate its exclusion from any framework for the conduct of investigations.

49. In addition to the clear risks to the integrity of the accused's right to prepare an effective defence outlined above,[74] potentially allowing the use of such audio-video recordings as evidentiary material in the manner proposed by the SPO would effectively force the defence, simply through the process of carrying out its own investigations: to call witnesses on behalf of the accused when it is under no obligation to do so; potentially violate the protection from self-incrimination and make it an extension of the SPO's own investigation. The Defence must be free to carry out its own investigations with full discretion regarding the evidence it presents in response to the Prosecution's case, and without fear that potentially incriminating answers given by a witness during those investigations will automatically be disclosed to the SPO, who may then present it as evidence against the accused. This discretion must not be prejudicially fettered or divided amongst the Parties and the Panel.

[72] SPO Submissions, paras. 6.h.i, j.iv, n.ii, o.
[73] SPO Submissions, para. 2.
[74] *See above*, para. 41.

III. REQUESTED RELIEF

50. The Proposed Framework is nothing more than a thinly veiled attempt to unduly interfere with and disrupt Defence preparations. Having delayed providing its pre-trial brief until the last working day of the year, the SPO now seeks to prevent the Defence from properly investigating these allegations and the evidence which purports to support them.

51. There is simply no reason why the Defence, bound by the specific provisions of the Code of Conduct, should be additionally required to jump through further bureaucratic hoops in order to conduct its investigations and interview witnesses who are willing to be interviewed.

52. For the reasons set out herein, the Defence therefore requests the Pre-Trial Judge to:

(i) DENY the SPO submissions in their entirety; or, in the alternative,

(ii) APPLY only those provisions of the Proposed Framework for witnesses who are on the SPO witness list, have been proven to be at risk by the SPO and specifically request such measures.

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Respectfully submitted on 15 December 2021,

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