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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:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, KSC-BC-2020-06/F00627, dated 15 December 2021

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi ("Defence") hereby submits its response to the Specialist Prosecutor's Office ("SPO") Submissions on Confidential Information and Contacts with Witnesses, in which the SPO proposes framework measures for (i) handling of confidential information during investigations; and (ii) contacts with witnesses.[1]

2. The Defence requests the Pre-Trial Judge to reject the SPO's Proposed Protocols because they are premature and no legal or practical justification or benefit for the establishment of these Protocols has been provided by the SPO. The Proposed Protocols are also excessively burdensome, prejudice the rights of the Defence, create potential for considerable delays in the context of already severely compromised Defence investigations and do not factor in the unique circumstances of the case. The Protocols would burden both the Defence and the Pre-Trial Judge with inefficient, unnecessary and impracticable measures to protect witnesses and confidential information.

3. If, however, the Pre-Trial Judge is considering ordering a protocol, the Defence considers that, at this stage of the proceedings, it would be most appropriate that he first invites the parties and participants to engage in *inter partes* discussions to attempt to develop a joint protocol.

II. SUBMISSIONS

The Request is Premature

[1] KSC-BC-2020-06, F00594, Specialist Prosecutor, *Prosecution Submissions on Confidential Information and Contacts with Witnesses* ("Prosecution's Proposed Protocols", "SPO Submissions" or "SPO Request"), 3 December 2021, public.

4. The Defence is disappointed that the SPO chose simply to file the Prosecution's Proposed Protocols without attempting to engage in any *inter partes* discussions. This is not merely discourteous. As the SPO has previously submitted, seeking premature and unwarranted judicial intervention is a misuse of the Panel's time.[2] The chronology is revealing. The SPO first disclosed confidential information to the Defence a year ago, as part of the disclosure process that is still ongoing.[3] Issues relating to contacting witnesses were identified by the Defence for Mr. Veseli in a Status Conference on 14 September 2021, whereupon the SPO reserved the right to make further submissions in writing but took no further step at that stage.[4] The preliminary witness list was disclosed well over one month ago on 22 October 2021.[5] Throughout this time, despite being well aware that the Defence could have contacted any witness, the SPO has made no effort to engage with the Defence in order to commence *inter partes* discussions regarding the development of a non-disclosure protocol. Nothing has changed to warrant the sudden introduction of a protocol now.

5. The SPO's approach effectively leaves the Defence with less than two weeks in advance of the filing's deadline to review and assess the draft protocols, conduct the necessary research and internal discussion among the four Defence teams (which are necessary because the issues affect all teams equally), and attempt to agree on a protocol dealing with important matters directly affecting the Defence investigations. If this process is to be meaningful, then even leaving aside the absence of any *inter partes* discussions, a period longer than twelve days is required. Nor is there any proof that the SPO engaged with the Registry, including the Witness Protection and Support

[2] KSC-BC-2020-06, F00229, Specialist Prosecutor, *Prosecution Response to 'Thaçi Defence Request for Orders related to Disclosure'*, 18 March 2021, public, with Annex 1, confidential and *ex parte*, para. 3.
[3] *See* SPO's Disclosure Package 7, dated 20 November 2020.
[4] KSC-BC-2020-06, Transcript of Hearing, 14 September 2021, public, p. 620, lines 8-11.
[5] KSC-BC-2020-06, F00542, Specialist Prosecutor, *Prosecution Submission of Preliminary Witness List*, 22 October 2021, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential.

Office ("WPSO") and the Court Management Unit ("CMU"), to seek its input in drafting these Proposed Protocols. This is further indication that the SPO's intent is simply to have the Proposed Protocols rubber-stamped, rather than genuinely engaging in *inter partes* discussion regarding the development of a joint non-disclosure protocol, contrary to the internal good practice adopted, for instance, at the International Criminal Court ("ICC").[6]

6. The SPO has not advanced any justification or purpose as to why at this stage of the proceedings a new regime dealing with the handling of confidential information is required or why the existent regime needs to be amended. Rather than bolstering its argument as to why the Proposed Protocols are necessary, the authorities cited in the SPO Submissions[7] do not specify any example of such protocols adopted in any other case before the Kosovo Specialist Chambers ("KSC") other than the Order on the Conduct of Proceedings adopted by Trial Panel II in *Gucati and Haradinaj*.[8] This in fact further confirms that the Proposed Protocols are not necessary or justified at this stage of the pre-trial proceedings.

7. The SPO Request is not only premature but also without any legal basis during the pre-trial phase. The SPO fails to assert any legal basis for its Request other than relying on general provisions regarding witnesses' safety and their dignity, physical and psychological well-being and privacy.[9] Nor is the Defence able to identify in the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") any legal basis for the Pre-Trial Judge to issue such protocols at this stage of the

[6] *See e.g.*, ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-2047-tENG, Trial Chamber II, *Decision on the "Protocol on Investigations in Relation to Witnesses Benefiting from Protective Measures"*, 26 April 2010, paras 2-7, 9; *Prosecutor v. Abakaer Nourain and Jerbo Jamus*, ICC-02/05-03/09-451, Trial Chamber IV, *Decision on the Protocol on the Handling of Confidential Information and Contact of Between a Party and Witnesses of the Opposing Party*, 18 February 2013, para. 11.
[7] SPO Submissions, fn. 10.
[8] KSC-BC-2020-07, F00314, Trial Panel II, *Order on the Conduct of Proceedings*, 17 September 2021, public, with Annex, public.
[9] SPO Submissions, paras 2, 5-6.

proceedings other than the general authority of the Pre-Trial Judge under Rule 116(4) to issue orders or decisions on any matter as necessary to ensure a fair and expeditious trial, which applies to trial proceedings and not to the pre-trial proceedings.

8. Against this context, if the Pre-Trial Judge is nevertheless minded to order a protocol, the Defence considers that, at this stage of the proceedings, it would be most appropriate that the parties and participants would be first invited to engage in *inter partes* discussions to attempt to develop a joint protocol.

The Request is Unwarranted

9. The most essential objection of the Defence to the Proposed Protocol is that it is unwarranted. In the first place, as regards the protection of confidential information, the Defence is, in the same way as the SPO, subject to strict professional obligations of confidentiality arising from the Code of Professional Conduct for Counsel and Prosecutors.[10] Counsel are also bound by the Codes of Conduct of their own national bar associations. The Defence has been strictly complying and will strictly comply with these obligations at all times. It is worth noting in this context that to the extent that the SPO's Proposed Protocol covers the same subject matter as the Code of Conduct, the latter always takes precedence.[11] Within this framework, the Defence has been in receipt of confidential information for more than a year and have begun conducting investigations. The Defence is not aware of any breaches; the comprehensive confidentiality obligations arising from the Code of Conduct have to date adequately and efficiently protected the handling of confidential information in the framework of investigative activities. In the event of any non-compliance, the Pre-

[10] KSC-BD-07-Rev1, *Code of Professional Conduct – for Counsel and Prosecutors Before the Kosovo Specialist Chambers* ("Code of Conduct"), 28 April 2021.
[11] Article 3(2) of the Code of Conduct.

Trial Judge, the SPO or the Registry are already well equipped to take steps to address any issues which arise.

10. The SPO also proposes a Protocol which governs contacts with witnesses of other parties and participants, which is similarly unwarranted at this stage of the proceedings. The Trial Panel to which the case-file will be transmitted will at the appropriate time issue an order on the conduct of proceedings,[12] pursuant to its powers under Rule 116(3) of the Rules as is the practice in other courts and tribunals. It is submitted that granting the SPO's requested relief in the terms sought will duplicate work, generate unnecessary procedures and inefficiency.

11. The SPO Submissions lack any factual and legal foundation and fail to provide clarifying details regarding the proposed regimes. Instead of a precise legal foundation, the SPO merely substitutes general and vague submissions regarding witnesses' safety, physical and psychological well-being, dignity and privacy.[13] None of the provisions cited by the SPO in the Law[14] or the Rules provides authority for the Pre-Trial Judge to order the Prosecution's Proposed Protocols.

12. Further, the SPO's reliance on the practice in *Gucati and Haradinaj* and the ICC, International Criminal Tribunal for the former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR") and Special Tribunal for Lebanon ("STL")[15] is clearly insufficient. More importantly, the Defence recalls in this context the well-established principle that witnesses are the property of neither the SPO nor the Defence and thus both parties have an equal right to interview them.[16] This is

[12] *Contra* SPO Submissions, para. 6.
[13] SPO Submissions, paras 4-6.
[14] Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").
[15] SPO Submissions, para. 5, fn. 10.
[16] ICTY, *Prosecutor v. Mrkšić*, 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.

particularly important in the specific context of this case where the pool of witnesses available to the Defence is already small. [REDACTED]. [REDACTED], [REDACTED].[17] Denying or restricting the Defence opportunity to interview such witnesses will severely limit the ability of the Defence to investigate the creation, functions and operations of that organ.

13. As stated above, adopting and implementing at this stage of the proceedings the Order on the Conduct of Proceedings issued by Trial Panel II in *Gucati and Haradinaj* would be premature and duplicative. In addition, other Trial Panel's decisions at the KSC do not, as matter of law, create a binding precedent on the other panels or the Pre-Trial Judge. At the same time, protocols must be developed and adjusted to the specific circumstances of each case at the appropriate time. Mr. Krasniqi cannot be bound by the concessions made by another Defence team or the case-specific considerations upon which a Panel relied in another case different in scope and complexity. The Order on the Conduct of Proceedings in *Gucati and Haradinaj* should not be therefore mechanically imported to the present case. In distinction to this case, *Gucati and Haradinaj* expressly concerns allegations of contempt of court and obstruction of the processes of the KSC which provides a specific justification for the need for a protocol in that case.[18] The Defence submits that in this specific case, no cause has been shown nor any good reason was offered for adopted the Proposed Protocols.

14. The Defence adds that the Proposed Protocols seem to make little distinction between protected victim witnesses and other witnesses. There can be no justification for imposing any restrictions on the ability of the Defence to contact witnesses who do not have objectively justifiable concerns for their safety. For instance, the safety,

[17] [REDACTED], [REDACTED], [REDACTED].
[18] KSC-BC-2020-07, F00251/A01/RED, Specialist Prosecutor, *Lesser Redacted Indictment*, 4 October 2021, public, paras 4-48.

dignity and privacy of international witnesses, [REDACTED], is surely not at risk from the Defence. The SPO submits that the proposed measures are necessary to avoid re-traumatisation of victim witnesses and to safeguard their privacy, dignity, and physical and psychological well-being.[19] Whilst the Defence understands the importance of safeguarding the rights of victim witnesses (subject, of course, to the rights of the Defence), these considerations simply do not apply to many other witnesses in the case [REDACTED].

The Prosecution's Proposed Protocols are Unduly Burdensome

15. Furthermore, multiple provisions of the Proposed Protocols are unduly onerous. The SPO suggests – at a stage of the proceedings when internal working procedures have been established and have proved effective to date – an excessively burdensome regime, but fails to discharge its burden of showing how the alleged benefit outweighs the burden imposed. Moreover, these new burdens will significantly affect Mr. Krasniqi's fair trial rights including the statutory right to be tried within a reasonable time[20] as the new unduly burdensome regime envisaged in the Proposed Protocols will inevitably slow down the Defence investigations and significantly delay the start of trial. Several provisions of the Proposed Protocol illustrate this point.

16. Paragraph 5(d) of the Proposed Protocol on Handling of Confidential Information in the Framework of Investigative Activities serves as the best illustration of the overly burdensome and unworkable nature of the regime proposed by the SPO. The SPO again does not explain why it singled out the visual and/or non-textual material, including photographs, and made it subject to a cumbersome disclosure regime. In the Defence's view, all confidential information should be subject to strict

[19] SPO Submissions, para. 6.
[20] Articles 21(4)(d) and 41(5) of the Law.

protection and should be treated with the appropriate caution as is the existent practice. This provision requires that:

> [v]isual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement of the person depicted or otherwise reflected in the activities of the KSC/SPO, a party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the KSC/SPO.

17. How are such onerous and ambiguous obligations to be discharged in practice? If the Defence was required to follow these requirements, the likelihood is that the Defence would be largely unable to show photographs, visual and/or non-textual material during the Defence's investigative activities or would be used on an exceptional basis. This will inevitably impede the investigation and often for no good reason.

18. Paragraph 5(e) of the Proposed Protocol on Handling of Confidential Information in the Framework of Investigative Activities requires that, "[i]f a party or participant is in doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected witness to third parties, it shall seek the advice of the WPSO". An obligation to seek, during its investigative missions, the advice of the WPSO each time the Defence is in doubt as to whether the identity of a protective witness may be disclosed to a third party must be rejected as being too onerous, inefficient and unworkable in practice. Defence investigations are spontaneous and unpredictable. While in the field, the Defence simply cannot endlessly seek the advice of the WPSO and wait for its response. Further, Defence investigations in the field are necessarily limited and meeting a specific person is often a one-time opportunity. Seeking on the advice of the WPSO each time the Defence is uncertain whether or not an investigative step may lead to the disclosure of the identity of a protected witness to third parties might very well result in losing a potential witness and/or source.

19. Paragraph 5(g), which *inter alia* requires that each time the Defence discovers that a third party has become aware of confidential information, it must immediately inform the WPSO can be criticised on the same basis as paragraph 5(e). In addition, an absolute obligation to inform the WPSO of all confidentiality breaches is not merited and unworkable in practice. Further, not all non-public information is witness related and may concern other sensitive matters such as governmental information or material originated from international organisations. Therefore, the obligation to inform the WPSO of all breaches of the Proposed Protocol is obviously inappropriate, irrelevant and impractical and should be rejected.

20. Paragraph 6(b) of the Proposed Protocol on Contacts with Witnesses of Other Parties and Participants states 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." Paragraph 6(m) of the same Proposed Protocol provides that, "[i]f the interviewing Party intends to show confidential or strictly confidential records to the witness other than the witness's own statements, it shall apply for leave of the Panel." These provisions are objectionable for number of reasons. First, the involvement of the Panel each time these two scenarios occur will unduly burden the judges, inevitably delay both the court proceedings and the Defence investigations, and potentially lead to additional expenses. Second, the SPO fails to provide any explanation as to why disclosure of confidential and strictly confidential records should be subjected to such treatment.

21. How the provision regarding the confidential records might work in practice is most instructive in this context. Confidential records are often shown to witnesses during a mission and the necessity of showing such records to a witness might not have been identified in advance, but arise during the course of an interview. If the

Defence was required to comply with this provision of the Proposed Protocol, it is very unlikely that the Defence would actually be able to show relevant records during the mission. Instead, the Defence would need to file an application before a Panel and await its authorisation to show the records to a witness. A decision may not be reached during the time frame of the mission. A situation might arise where all four Defence teams submit multiple applications. The inefficiency of and inability to make this provision workable in practice is obvious. Moreover, the SPO does not find it necessary to provide any explanation as to why they should be allowed to show confidential material to witnesses without being authorised by a Panel, while for such a basic investigative step the Defence must file an application and wait for a Panel's ruling. On the whole, these provisions add an unduly onerous, impractical and unnecessary layer of obligations, without the SPO providing any obvious benefits for such a regime for the Defence investigations or the conduct of court proceedings. In the Defence's view, the test for the Defence's use of confidential material should simply be based on necessity.

22. A number of other provisions of the Proposed Protocols are flawed and should be rejected. Both Protocols do not describe their proposed purpose and intended subject, and do not use consistent definitions throughout the text of the provisions. For instance, the material the Proposed Protocols are intended to cover, such as "visual and/or non-textual material" and "strictly confidential records", should be properly defined. Both Proposed Protocols lack clear definitions and consistent use of terms such as "party", "participant", "representative of the calling Party".

23. Moreover, the Proposed Protocols are prejudicial to the rights of the Accused. They prevent the Defence from interviewing witnesses on the same terms as the SPO has interviewed them. They risk requiring the Defence to reveal lines of enquiry and the content of investigations to the SPO. They limit the ability of the Defence to investigate and to prepare for trial.

III. CONCLUSION

24. For the above reasons, the Defence submits that the Pre-Trial Judge should reject the Protocols proposed by the SPO. In the alternative, the Defence submits that the appropriate order at this stage would be for the parties and participants to discuss the terms of the Proposed Protocols *inter partes*.

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