

ANNEX 5 to

“Joint Submission on the Adoption of a Framework for the Handling of Confidential Information during Investigations between a Party or Participant and Witnesses of the Opposing Party or of a Participant”

PUBLIC

Defence's Proposed Modifications to the "Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant ('Framework')" in case KSC-BC-2020-06

I. Handling of Confidential Information during Investigations

- a. Parties and participants are under a general obligation not to disclose to third parties¹ any confidential documents or information.² This Framework sets out the conditions and procedures in which the disclosure of confidential documents or information to third parties as part of investigative activities by a Party or participant is exceptionally permissible.
- b. Throughout the investigation and proceedings, Parties and participants shall undertake to minimise the risk of exposing confidential documents or information to the greatest extent possible.
- c. Confidential documents or information which have been made available to a Party or participant may only 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 its 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.
- d. When a confidential document or confidential information is revealed to a third party under the conditions stated in 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 Trial Panel, the third party shall not retain a copy of any confidential document shown to it.
- e. A Party or participant may make specific enquiries addressed to third parties concerning a witness³ only if enquiries are required for the preparation and presentation of its case. If a Party or participant is aware that the witness has been

¹ 'Third party' shall include any person except a Party or participant in these proceedings, or a Judge or staff member of the Court authorized to have access to the information in question.

² 'Confidential document' shall mean any document classified as 'confidential' or 'strictly confidential' under Rule 82(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"). 'Confidential information' shall mean any information contained in a confidential document which has not otherwise been made public and any information ordered not to be disclosed to third parties by any Panel.

³ 'Witness' shall mean a person included in a Witness List formally disclosed in case KSC-BC-2020-04 and identified as a person whom a Party or participant intends to call to testify or a person on whose statement a Party or participant intends to rely pursuant to Rules 153–155 of the Rules, insofar as the intention of the Party or participant has been notified to the opposing Party or participant.

relocated with the assistance of the Kosovo Specialist Chambers (“KSC”)/Specialist Prosecutor’s Office (“SPO”), the Party or participant shall inform the Witness Protection and Support Office (“WPSO”) in advance of the details of the place, time and, to the extent possible, the types of organizations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the WPSO as to any specific measures that may be necessary. If the witness is otherwise protected by the WPSO, the Party or participant shall inform the WPSO of the disclosure of the witness’s identity as soon as possible, but in any event before disclosure.

- f. Notwithstanding the previous subparagraph, Parties and participants shall not reveal to third parties that any protected witness is involved with the activities of the KSC/SPO or the nature of such involvement.
- g. Visual 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 witness 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 witness depicted in the activities of the KSC/SPO. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorized by the Chamber, the third party shall not retain copies of the visual material subject to this provision.
- h. If 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.
- i. A Party or participant shall bring to the attention of the WPSO as soon as possible any reasonable suspicion that a protected witness may have been placed at risk for any reason, including reasonable suspicion that a witness’s involvement with the KSC/SPO or protected location has become known to third parties.
- j. If a Party or participant has wrongly revealed confidential information, or has become aware of any other breach of the confidentiality of documents or information, or discovers that a third party has become aware of confidential information, it shall inform the recipient of the confidential nature of such information and instruct him or her not to disclose it any further. In addition, the Party or participant shall immediately inform the WPSO.

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

- a. Except under the conditions specified herein, prior to testimony, Parties and participants⁴ shall not contact or interview a witness of another Party or participant if the intention to call the witness to testify or to rely on his or her statement has been notified to the opposing Party or participant.
- b. If an opposing Party or participant wishes to interview a witness of another Party or participant, it shall notify the calling Party, the Court Management Unit (“CMU”) and, in relation to dual status witnesses, Victims’ Counsel at least ten days prior to the intended interview. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party. The calling Party or participant shall not attempt to influence the witness’s decision whether to agree to be interviewed by the Party or participant seeking to interview him/her. The calling Party shall inform the opposing Party whether the witness consents.
- c. If a Party or participant contacts a witness of an opposing Party or participant inadvertently or during WPSO-organized courtesy meetings, the Party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness’s consent to be interviewed directly. A witness’s consent to be interviewed may be obtained only through the procedure set out in the previous subparagraph.
- d. The opposing Party conducting the interview (“interviewing Party”) shall:
 - i. ensure that the interview is conducted effectively and expeditiously;
 - ii. prepare copies of all documents to be shown to the witness in a language which he or she understands together with an English translation to be provided to the calling Party;
 - iii. refrain from talking to the witness outside the timeframe of the interview and the video-recording, so that all statements and utterances made are duly recorded;
 - iv. refrain from any action that could be regarded as threatening or provocative; and
 - v. otherwise comply with any order made by the Trial Panel.
- e. The interviewing Party shall facilitate the preparation and conduct of any interview under this section. Communications between the calling Party and the interviewing Party shall be filed as correspondence in the case file in accordance with the Practice Direction on Files and Filings. The calling Party shall bear the costs associated with its attendance at the interview. In consultation with the Parties and/or participants, the Registry may, based on the information provided pursuant to Section II, paragraphs (e)-(g) of the Framework and if feasible, facilitate the process. Further, as set out in

⁴ For purposes of this paragraph, this includes counsel, their clients, and their teams as defined in Article 2 of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers but does not apply to contact between the Victims’ Counsel and the team assisting Victims’ Counsel and dual status witnesses-victims.

Section II, paragraph (h) of this Framework, when considered necessary, the Registry shall ensure that a WPSO representative is on site or otherwise available.

- f. Once a witness has agreed to be interviewed, the calling Party shall, in consultation with WPSO where applicable, provide, as appropriate and applicable, the interviewing Party with the following information:
 - i. the preferred dates for, and an estimate of the duration of, the interview;
 - ii. whether protective measures have been ordered, requested or will be requested under Rule 80 of the Rules in relation to the witness and whether the witness has any special needs as defined in Rule 146 of the Rules or requires special measures as listed in Rule 80(4)(c) of the Rules;
 - iii. an updated Witness Information Form for the witness;
 - iv. the language which the witness is expected to use during the interview;
 - v. any information as to the persons expected to be present at the interview, including any indication of whether the witness may require the presence of a representative of the calling Party, a WPSO representative, the Registry, Victims' Counsel, or any other legal representative; and
 - vi. any other information that may facilitate the preparation for the interview, as required by the interviewing Party.
- g. The interviewing Party may seek additional information, if required, to facilitate the preparation for the interview. The Panel shall be seized in relation to any unresolved dispute between the Parties, participants, and/or WPSO/CMU regarding measures recommended by the Parties, participants, and/or by WPSO/CMU.
- h. The interviewing Party shall facilitate the process by:
 - i. providing a venue for the interview and audio-video recording equipment; and
 - ii. providing interpretation, where necessary.

Furthermore, where considered necessary, the Registry shall ensure that a Court Officer or another designated representative of the Registry is present during the interview, and that a witness-support representative is on site.

- i. Prior to the commencement of the interview, the interviewing Party shall advise the witness that he or she:
 - i. is not required to participate in the interview and can decide to stop being interviewed at any time;
 - ii. can refuse to answer questions, in particular if they are thought to be potentially self-incriminating;
 - iii. can ask for a recess at any time; and

- iv. can ask to meet with a WPSO representative at any time during the interview.
- j. During the interview, the interviewing Party shall:
 - i. ensure the presence of only the authorized individuals;
 - ii. verify the identity of the witness;
 - iii. ensure that all individuals present identify themselves on the record;
 - iv. ensure that the interview is audio-video-recorded;
 - v. ensure the safety and well-being of the witness; and
 - vi. ensure that the procedural elements of the interview are conducted in accordance with the Law, the Rules, and any subsequent order, decision, observations, or recommendations of the Panel.
- k. In the event that a Registry representative is present during the interview in accordance with this section of the Framework, the Parties shall respect the Registry's neutrality and shall refrain from seeking to involve its representative in the proceedings. Should the witness need to consult with a legal representative during the interview, the interview shall be suspended so that this can be arranged. The interviewing Party shall inform the Defence Office, so that the necessary arrangements to assign Counsel to the witness may be made.
- l. If the interviewing Party intends to show confidential or strictly confidential records to the witness other than the witness's own statements, it shall proceed, *mutatis mutandis*, in accordance with section I, paragraphs (c) and (d) of this Framework.
- m. Following the completion of the interview, the interviewing Party shall prepare:
 - i. a memorandum recording the process (indicating time, place, attendees, classification – i.e., public, confidential or strictly confidential – and any other relevant circumstance); and
 - ii. the audio-video recording of the session.

Disclosure of the aforesaid memorandum and audio-video recording shall be subject to Rules 102–104 of the Rules.

- n. Neither the record of the interview nor any materials used during the interview shall become part of the record in the case unless admitted in evidence by the Trial Panel *proprio motu* or upon an application by a Party, where the conditions for its admission under the Rules are met. Where admission of such a video recording is sought, the interviewing Party shall also produce the transcript of the interview.
- o. Where the Parties and participants agree that the interests of justice so require, they can agree to depart from the Framework with respect to the modalities of an interview (for instance, for the purposes of conducting an interview when visiting sites or places

of interest) and related contact with witnesses. In the event of such an agreement, the Parties shall inform the Trial Panel accordingly. In the event of a disagreement between the Parties and participants as to the disapplication of the Framework, the Party or participant requesting departure from the Framework may seize the Trial Panel to decide upon such a request.