

**In:** KSC-BC-2020-06  
**The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** **Trial Panel II**  
Judge Charles L. Smith, III, Presiding  
Judge Christoph Barthe  
Judge Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi  
Specialist Counsel for Rexhep Selimi  
Specialist Counsel for Jakup Krasniqi

**Date:** 14 September 2023

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**Thaçi, Selimi & Krasniqi Defence Response to ‘Prosecution request concerning post-testimony witness contacts’ (F01765)**

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## I. INTRODUCTION

1. Witnesses are not the property of any party. The Protocol governing witness contact<sup>1</sup> effectively prevents the Accused from properly investigating the case against him by prohibiting Defence counsel from contacting even unprotected witnesses outside the SPO's presence, unless this contact is video-recorded and provided to the Trial Panel, who can then admit the interviews as evidence *proprio motu* and rely on them to make adverse findings against the Accused. No diligent counsel would permit their investigative questions of Prosecution witnesses to be video-recorded and potentially used against their client.

2. The Protocol therefore prioritises the SPO's interest in presenting its witness testimony without any possible influence resulting from Defence investigative interviews. As a practical matter, the Accused must choose between exercising his right to investigate the Prosecution's case, or his right not to create evidence that could then be used against him.

3. Once the trial testimony of an SPO witness has been completed, the balance of interests between the SPO's rights and the rights of the Accused, must necessarily shift in favour of the Accused's right to investigate and obtain new leads to assist in his own case-in-chief. The Trial Panel cannot continue to sacrifice the rights of the Accused based on the SPO's speculative and unsubstantiated claim that it may need to recall witnesses in the future.

4. The issue of contact with the opposing party's witnesses was litigated, at

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<sup>1</sup> KSC-BC-2020-06/F00854, Pre-Trial Judge: Decision on Framework for the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022 ("Contact Decision"), and see pages 85-91 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' ("Protocol"),

extraordinary length, during the pre-trial phase of this case. Hundreds of pages of submissions were filed before the Pre-Trial Judge by the SPO, the four Defence teams, Victims' Counsel, and the Registry.<sup>2</sup> The Pre-Trial Judge's decision was then the subject of a separate appeal from each of the four Defence teams,<sup>3</sup> which resulted in a

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<sup>2</sup> KSC-BC-2020-06/F00594, Prosecution submissions on confidential information and contacts with witnesses, 3 December 2021; KSC-BC-2020-06/F00605, Victims' Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 10 December 2021; KSC-BC-2020-06/F00625, Thaçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021; KSC-BC-2020-06/F00626, Selimi Defence response to "Prosecution submissions on confidential information and contacts with witnesses", 15 December 2021; KSC-BC-2020-06/F00627, Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021; KSC-BC-2020-06/F00628, Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021; KSC-BC-2020-06/F00650, Order to the Registrar for Submissions, 21 January 2022; KSC-BC-2020-06/F00679, Registrar's Submissions on Proposed Protocol for Interviews with Witnesses', 16 February 2022; KSC-BC-2020-06/F00693, Prosecution response to 'Registrar's Submissions on Proposed Protocol for Interviews with Witnesses', 14 February 2022; KSC-BC-2020-06/F00690, Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations, 14 February 2022; KSC-BC-2020-06/F00691, Selimi Defence Response to "Registrar's Submissions on Proposed Protocol for Interviews with Witnesses", 14 February 2022; KSC-BC-2020-06/F00692, Thaçi Defence Response to the Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022; KSC-BC-2020-06/F00694, Veseli Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022; KSC-BC-2020-06/F00695, Krasniqi Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022; KSC-BC-2020-06/F00697, Thaçi Defence Reply to Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations, 15 February 2022; KSC-BC-2020-06/F00705, Thaçi Defence Reply to Prosecution Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 21 February 2022; KSC-BC-2020-06/F00741, Thaçi Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 21 March 2022; KSC-BC-2020-06/F00754, Prosecution response to 'Thaçi Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses', 28 March 2022; KSC-BC-2020-06/F00758, Thaçi Defence Reply in Support of Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 1 April 2022.

<sup>3</sup> KSC-BC-2020-06/IA024/F00002, Thaçi Appeal Against the "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant", 8 September 2022 ("Thaçi Contact Decision Appeal"); KSC-BC-2020-06/IA024/F00004, Veseli Defence Appeal against Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant (F00854), 8 September 2022; KSC-BC-2020-06/IA024/F00003, Selimi Defence Appeal against "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant", 8 September 2022; KSC-BC-2020-06/IA024/F00005, Krasniqi Defence Appeal against Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 8 September 2022.

55 page Court of Appeals ruling.<sup>4</sup>

5. This litigation resulted in the imposition of the most wide-ranging and restrictive regime for witness contact in the history of international criminal justice.

6. At no point during this litigation was any suggestion made by the SPO or anyone else that the limitations on witness contact should extend to the period **after** a witnesses' testimony. Nevertheless, that is exactly what the SPO seeks to do here. The Protocol is explicit: it applies to contacts with witnesses "prior to testimony".<sup>5</sup> The SPO never raised the "lacuna" which it now claims exists, or criticised its own proposal on the basis that the Protocol's "on again off again" application would enable a party to "strategically avoid" the Protocol.<sup>6</sup> The SPO concerns are misplaced, for the reasons set out in the present response.

## II. PROCEDURAL HISTORY

7. On 24 June 2022, the Pre-Trial Judge issued a decision<sup>7</sup> setting out the Protocol, which was explicitly limited in application to contacts with witnesses "prior to testimony".<sup>8</sup>

8. On 8 September 2022, all four defence teams appealed issues arising from the Contact Decision,<sup>9</sup> having been granted certification to do so.<sup>10</sup> On 27 December 2022,

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<sup>4</sup> KSC-2020-06/IA024/F00019, Decision on Defence Appeals against "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant", 27 December 2022 ("Appeal Decision").

<sup>5</sup> Protocol, para. II(a).

<sup>6</sup> KSC-BC-2020-06/F01765, Prosecution request concerning post-testimony witness contacts, 4 September 2023 ("SPO Request"), para. 5.

<sup>7</sup> Contact Decision.

<sup>8</sup> Protocol, para. II(a).

<sup>9</sup> See fn. 3 above.

<sup>10</sup> KSC-BC-2020-06/F00939, Pre-Trial Judge: Decision on Defence Requests for Leave to Appeal Decision F00854, 26 August 2022..

the Court of Appeals Panel dismissed appeals from all four defence teams in their entirety, upholding the Protocol.<sup>11</sup>

9. On 25 January 2023, the Trial Panel issued an Order on the Conduct of Proceedings.<sup>12</sup> Most relevantly, paragraph 71 set the following guidelines:

71. With respect to the procedure and safeguards applicable to contacts with the opposite Party's or participant's witnesses, Parties and participants shall abide by the Court of Appeals Panel's Decision of 27 December 2022. Where a Party or participant considers that **circumstances have changed in a material way** since the Court of Appeals Panel's Decision so as to affect the basis on which that decision was taken, the Party or participant may seek appropriate relief from the Panel. [emphasis added]

10. The parties have abided by the Protocol's terms since its implementation. The Taçi Defence has sought to vary or clarify the application of the Protocol in relation to two witnesses.<sup>13</sup> While neither witness is subject to any protective measures, both requests were denied as failing to demonstrate a material change of circumstances.<sup>14</sup>

### III. SUBMISSIONS

11. The Order on the Conduct of the Proceedings sets out the procedure for revision of the Protocol, and requires a party to demonstrate that "the circumstances have changed in a material way since the Court of Appeals Panel's Decision so as to affect the basis on which the decision was taken".<sup>15</sup> The SPO argues it should not be

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<sup>11</sup> Appeal Decision, para. 106.

<sup>12</sup> KSC-BC-2020-06/F01226, Trial Panel II, Order on the Conduct of Proceedings, 25 January 2023; KSC-BC-2020-06/F01226/A01, Annex 1- Order on the Conduct of Proceedings, 25 January 2023 ("Order on the Conduct of Proceedings"), para. 71.

<sup>13</sup> KSC-BC-2020-06/F01345, Taçi Defence Request to Vary the Contact Decision 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, 6 March 2023; KSC-BC-2020-06/F01639, Taçi Defence Request as regards contact with W04290, 4 July 2023.

<sup>14</sup> KSC-BC-2020-06/F01467, Trial Panel II: Decision on Taçi Defence Request to Vary the Contact Decision for W04147, 17 April 2023; KSC-BC-2020-06/F01719, Trial Panel II: Decision on Taçi Defence Request Concerning Contact with W04290, 16 August 2023.

<sup>15</sup> Order on the Conduct of the Proceedings, para. 71.

bound to the revision requirements, because the Protocol did not expressly concern post-testimony contacts, and thus “this request does not seek reconsideration”.<sup>16</sup>

12. Clearly, the SPO’s reluctance to be bound by this established standard stems from the fact that there are no changed circumstances, and points to no circumstances which would justify the proposed extension. In attempting to meet this standard, the SPO asserts the following:<sup>17</sup>

Nevertheless, even if considered against a [material] changed circumstances or reconsideration standard (Rule 79), the request should still be granted because, since the Appeal Decision, the hearing of witnesses in this case commenced and in light of the interests at stake, which demonstrate that the relief requested is necessary to avoid injustice.

13. The interests of SPO witnesses are being protected by a comprehensive Protocol, and an expansive statutory regime for protective measures, with every SPO request for protective measures having been granted. If the extension of the Protocol was indeed rendered necessary to “avoid injustice” by “the hearing of witnesses in this case”, this request would have been made in advance of the April 2023 start of proceedings. That was not done. The SPO has made no attempt to show why it suddenly became necessary in September 2023. In fact, there are no changed circumstances, and the SPO Request should be summarily dismissed on this basis.

14. In fact, the interests enumerated by the SPO that the proposed extension of the Protocol would arguably protect<sup>18</sup> have already been addressed by the Pre-Trial Judge in his decision. This fact is readily evidenced by the SPO’s reference in its Request to the corresponding paragraphs in the Protocol where those precise interests are acknowledged.<sup>19</sup> Should the SPO have deemed that the measures imposed by the Pre-

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<sup>16</sup> SPO Request, fn. 3.

<sup>17</sup> SPO Request, fn. 3.

<sup>18</sup> SPO Request, para. 3.

<sup>19</sup> For example, SPO Request, fns. 12, 13, 16-23.

Trial Judge to safeguard those interest are inadequate, it would have been incumbent upon it to file an appeal at the time the decision was issued, rather than put forward a request for reconsideration on the basis of circumstances already considered by the Pre-Trial Judge.

15. Regardless, at the centre of the SPO Request is the groundless allegation that the witness contact regime as applied, contains a “lacuna”, that enables a party (presumably the Defence) to strategically avoid the application of the Protocol, and gives rise to an “on again, off again” application of its terms.<sup>20</sup> There is no lacuna.<sup>21</sup> These concerns are unwarranted.

16. First, the SPO Request makes no reference to Rules 80 and 81,<sup>22</sup> the comprehensive regime for the protection of witnesses, which provides that protective measures continue even after the completion of testimony, and in any future proceedings. Accordingly, protected witnesses remain protected before, during, and after their testimony. The SPO has confirmed that they had no information that an SPO witness was approached and intimidated after their testimony.<sup>23</sup>

17. Notably, to justify its request to extend the application of the Protocol, the SPO relies on the “the risk of re-traumatisation, the likelihood of renewed anxiety and stress” that could arise from the Defence contacting witnesses after their testimony.<sup>24</sup> This submission is entirely reasonable for protected witnesses. It is, however, an irrelevant consideration for individuals without protective measures, such as international witnesses with no security concerns, who have neither sought nor been

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<sup>20</sup> SPO Request, para. 5.

<sup>21</sup> SPO Request, para. 5.

<sup>22</sup> KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

<sup>23</sup> KSC-BC-2020-06, Transcript of Hearing, 20 June 2023, pp. 5233-5234.

<sup>24</sup> SPO Request, para. 5.

granted protective measures. Many of these witnesses were in willing contact with Defence teams before the imposition of the Protocol. There is no reason to think that these, non-protected witnesses, would be re-traumatised or stressed or experience anxiety by meeting with a Defence team. Many may welcome it.

18. Importantly, any measures to restrict contact with witnesses for reasons of protection and privacy, must be balanced against the statutory rights of the accused, including the right “to have adequate time and facilities for the preparation of his or her defence”.<sup>25</sup> In fact, where a tension arises between the rights of the Defence and the need to protect witnesses, “in principle, the rights of the Defence shall take precedence, but the protection of all witnesses will at all times claim its right, loud and clear”.<sup>26</sup>

19. Article 40(1) of the KSC Law requires a Trial Panel to ensure that proceedings are conducted “with **full respect** for the rights of the accused” but “**due regard** for the protection of victims and witnesses”,<sup>27</sup> mirroring the wording of the ICTY and ICTR

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<sup>25</sup> Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”), Article 21(4)(c).

<sup>26</sup> ICTY, *Prosecutor v. Blaskić*, [IT-95-14-T](#), Trial Chamber: Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 November 1996 (“*Blaskić* Protective Measures Decision”), paras. 38-39. See also, ICTY, *Prosecutor v. Karadžić*, [IT-95-5/18-PT](#), Trial Chamber: Decision on Protective Measures for Witnesses, 30 October 2008 (“*Karadžić* Protective Measures Decision”), para. 20: “when weighing the relative interests at stake, [a Trial Chamber] must be cognisant of the fact that under Art [19(1)] of the Statute, ‘the balance dictates clearly in favour of an accused’s right to the identity of witnesses which the Prosecution intends to rely upon.’”. See also ICTY, *Prosecutor v. Milošević*, [IT-02-54](#), Trial Chamber: Decision on prosecution motion for provisional protective measures pursuant to Rule 69, 19 February 2002, para. 23: “[t]he 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.”

<sup>26</sup> SPO Request, para. 6.

<sup>27</sup> KSC Law, Article 40(2).



Statutes.<sup>28</sup> While “due regard” must also be given to protection of victims and witnesses, “this is a secondary consideration”.<sup>29</sup> Rule 80(1) of the KSC Rules permits a Trial Panel to “order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses... provided that the measures are consistent with the rights of the Accused.”

20. There is also a difference in approach to witness protection and contact among the pre-trial, trial, and post-trial stages. Neither the ICC Protocol, nor the Protocol, contain language which would extend their application to post-testimonial contact. While the SPO states that the ICC Protocol “applies to all contact with Opposing Party Witnesses”,<sup>30</sup> it then states in the footnote that, “the ICC Protocol does not include **any** language limiting its application *vis-à-vis* the Opposing Party Witness’s date of testimony”.<sup>31</sup> As such, the SPO’s blanket claim that the ICC Protocol “applies to all contacts with Opposing Party Witnesses”<sup>32</sup> is demonstrably incorrect.

21. This is reinforced by the two ICC cases cited by the Prosecution,<sup>33</sup> which do not support a general practice of post-testimonial restrictions. Rather, any such limitation is an exception to the general rule that restrictions cease at the end of a witness’ testimony. In *Bemba*, the Defence sought to restrict the Prosecution’s post-testimonial contact with Defence witnesses. The Trial Chamber recalled that its prior decisions on witness contact were limited to “prior contact” with another party’s witness, and that the ICC Protocol “is silent as to the possible post-testimony contact between a party

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<sup>28</sup> ICTY Statute, Article 20(1); ICTR Statute, Article 19(1). *See also*, Rome Statute, Article 68(1): Witness protective measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

<sup>29</sup> *Karadžić* Protective Measures Decision, para. 20.

<sup>30</sup> SPO Request, para. 6.

<sup>31</sup> SPO Request, fn. 29 (emphasis added).

<sup>32</sup> SPO Request, para. 6.

<sup>33</sup> SPO Request, fn. 30.

and the witness.”<sup>34</sup> However, given the specific circumstances of the *Bemba* case, where Defence witnesses were returning to a “particular security situation in the places of residence of the witnesses”, some limited restrictions were maintained.<sup>35</sup> Similarly, in *Katanga*, the witnesses were returning to an equivalent situation in Ituri, with an added obstacle of an ongoing armed conflict, when the Trial Chamber decided to extend the contact restrictions until the end of the case hearings.<sup>36</sup>

22. This approach is also reflected in the practice of the Tribunals, which drew a distinction between pre-testimonial contact and trial. At the ICTY, for example, while pre-trial protection was stricter to protect the witness, the balance was then found to shift in favour of the rights of the accused after the trial had begun, meaning that some protective measures were varied or lifted, even against the backdrop of witnesses coming to The Hague and returning to an ongoing conflict.<sup>37</sup> ICTY Chambers were required to apply the least restrictive protective measures required,<sup>38</sup> and protective measures ceased to apply when no longer needed.<sup>39</sup> Of course, at the centre of the protective measures regimes at the Tribunals, was the consent of the witness.

23. With this in mind, and to find a workable solution, the Defence submits that the Trial Panel could grant the SPO request, in part, and extend the application of the

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<sup>34</sup> ICC, *Prosecutor v. Bemba*, [ICC-01/05-01/08-3070](#), Trial Chamber III: Decision on the ‘Defence Motion on Prosecution contact with its witnesses’, 22 May 2014, para. 14.

<sup>35</sup> *Ibid*, para. 16.

<sup>36</sup> ICC, *Prosecutor v. Katanga and Ngudjolo*, [ICC-01/04-01/07-2711-Red-tENG](#), Trial Chamber II: Public redacted version of the Decision on the Office of the Prosecutor’s request to communicate with Witness P.250, 10 March 2011, para. 11.

<sup>37</sup> *Blaskić* Protective Measures Decision, para. 24.

<sup>38</sup> IRMCT, *Prosecutor v. Kamuhanda*, [MICT-13-33](#), Appeals Chamber: Decision on an Appeal of a Decision Rendered by a Single Judge, 6 October 2017, para. 14: “The Appeals Chamber recalls the generally accepted principle that the interpretation and implementation of protective measures should be the least restrictive necessary to provide for the protection of victims or witnesses.”; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Appeals Chamber: Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 19.

<sup>39</sup> ICTY, *Prosecutor v. Tadić*, [IT-94-1-T](#), Trial Chamber: Decision on Prosecution Motion to Withdraw Protective Measures for Witness “L”, 5 December 1996, para. 6.

Protocol to select witnesses with protective measures. The Defence has consistently expressed the position that it “does not oppose regulation of contact with other parties’ witnesses, where objective security concerns can be established”.<sup>40</sup>

24. Alternatively, any contact with non-protected witnesses would be governed by the witnesses themselves, who are entitled to accept or refuse an invitation to speak.

25. The Defence is entitled to pursue new investigative leads arising from the SPO witness’ testimony. If the SPO witness is willing to meet with the Defence, there should be no reasonable obstacle to this contact occurring. With these matters in mind, post-testimonial contact should not be prohibited.

26. Lastly, the SPO has sought to rely on the hypothetical scenario of potential recall of an SPO witness as requiring a blanket post-testimony application of the Protocol. In its appeal on the Protocol, the Defence raised its concern that, if it were required to take and disclose interviews with SPO witnesses, who were subsequently dropped by the SPO and called by the Defence, this would then amount to the imposition of Defence disclosure obligations that would not otherwise exist. In dismissing this concern, the Court of Appeals Panel acknowledged that this was “a scenario that could hypothetically arise”, but that the situation remained speculative, concluding that “should the circumstances warrant it, the Defence retains the possibility to apply for an appropriate remedy.”<sup>41</sup>

27. The same reasoning should apply here. The possibility of recall could hypothetically arise, but is speculative, and the SPO is not barred from seeking an appropriate remedy in the eventuality that the need for recall of an SPO witness arose. The hypothetical future recall of a small number of SPO witnesses cannot justify the

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<sup>40</sup> Thaçi Contact Decision Appeal, para. 8.

<sup>41</sup> Appeal Decision, para. 98.

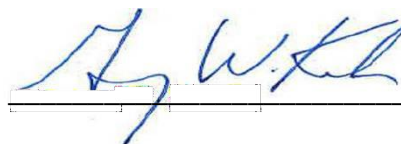
blanket restrictions on Defence investigations now being sought, mid-trial, by the SPO.

#### IV. CONCLUSION & RELIEF SOUGHT

28. The SPO has not established, or even sought to establish, the material change in circumstances required to justify the Trial Panel's consideration of its request. Should the Trial Panel nonetheless feel that the regime needs to be extended, mid-trial, to selectively limit post-testimonial contact, a reasonable balance is to limit this extension to those selected witnesses who have sought, and been granted, protective measures. As for any other witnesses, no protections are warranted as any interviews should be subject solely to the consent of the witnesses.

[Word count: 3,595 words]

Respectfully submitted on 14 September 2023,



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