Tuesday, 22 February 2022

[Hearing]

[Open session]

[The accused entered the courtroom via videolink]

[The accused Veseli not present]

--- Upon commencing at 2.30 p.m.

JUDGE GUILLOU: Good afternoon and welcome everyone in and outside the courtroom.

Madam Court Officer, can you please call the case.

THE COURT OFFICER: Good afternoon, Your Honour. This is case KSC-BC-2020-06, The Specialist Prosecutor versus Hashim Thaci, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi.

JUDGE GUILLOU: Thank you, Madam Court Officer.

Now I would kindly ask the parties and participants to introduce themselves, starting with the Specialist Prosecutor's Office.

Mr. Prosecutor.

MR. FERDINANDUSSE: Good afternoon, Your Honour. Today the Specialist Prosecutor's Office is represented by Mr. Alan Tieger, Senior Prosecutor; Nathan Quick, Associate Team Leader; Nada Kiswanson, Associate Legal Officer; and I am Ward Ferdinandusse, Head of Prosecutions Investigations.

JUDGE GUILLOU: Thank you, Mr. Prosecutor.

Now let me turn to the Defence.

Mr. Kehoe, please.

MR. KEHOE: Good afternoon, Your Honour. Gregory Kehoe,

Peter McCloskey, Sophie Menegon, Bonnie Johnston, and in the back we have Chaira Loiero and Hanen Ghali on behalf of President Thaci. Thank you.

JUDGE GUILLOU: Thank you, Mr. Kehoe.

Mr. Emmerson, please.

MR. EMMERSON: [via videolink] Good afternoon, Your Honour. On behalf of Mr. Veseli, present in court today is Ms. Annie O'Reilly, co-counsel; Mr. Samir Sali, a legal assistant; Anouk Julien, our Case Manager, who is substituting for our Case Manager today; and appearing in court for the first time, Tomas Moreno Ocampo, one of our interns; appearing by videolink is obviously myself and co-counsel Mr. Andrew Strong who may be in a position to deal in more detail with some of the issues.

JUDGE GUILLOU: Thank you, Mr. Emmerson.

Mr. Roberts, please.

MR. ROBERTS: Good afternoon, Your Honour. I'm Geoffrey Roberts on behalf of Mr. Selimi in the courtroom together today with Mr. Eric Tully, our legal officer; Ms. Natalia Ryzhenko, our Case Manager; and Ms. Sara Isufi, our intern.

I would just also like to take the opportunity to seek leave for Mr. Tully to make submissions today on behalf of the Selimi Defence. Thank you.

JUDGE GUILLOU: This is noted.

Thank you, Mr. Roberts.

And now I turn to Ms. Alagendra, please.

MR. BAIESU: Thank you.

JUDGE GUILLOU: Sorry, Mr. Baiesu.

MR. BAIESU: Yes, thank you, Your Honour. Good afternoon to you and to everyone in the courtroom. I am Victor Baiesu for Mr. Jakup Krasniqi. By videolink, we have lead counsel Ms. Venkateswari Alagendra; co-counsel, Mr. Aidan Ellis; and Mr. Mentor Beqiri, legal assistant. And I am assisted today in the courtroom by Kalina Tzvetkova, our Case Manager, and Ms. Laura Abia, our support team member. Thank you.

JUDGE GUILLOU: [Overlapping speakers] ...

MR. KEHOE: If I may your honour. I neglected to identify three of my colleagues that are on the video. My co-counsel, Mr. Luka Misetic, Dastid Pallaska, and Jonathan Greenblatt. My apologies to the Court for omitting them.

JUDGE GUILLOU: Thank you, Mr. Kehoe. This is noted.

Let me turn to the counsel for victims, Mr. Laws, please.

MR. LAWS: [via videolink] Good afternoon to Your Honour and to everyone. Simon Laws, assigned counsel for victims in this case.

JUDGE GUILLOU: Thank you, Mr. Laws.

And finally let me turn to the Registry. Mr. Nilsson, please.

MR. NILSSON: Good afternoon. Good afternoon, Your Honour. And good afternoon to colleagues. Jonas Nilsson, representing Registry today.

JUDGE GUILLOU: Thank you, Mr. Nilsson.

And for the record, I note that Mr. Thaci, Mr. Selimi, and

Mr. Krasniqi have waived their right to attend the hearing in person but are attending via video-conference. And I also note that Mr. Veseli has waived his right to attend this hearing.

And I am Nicolas Guillou, Pre-Trial Judge for this case.

On 16 February 2022, at the request of the Thaci Defence, I scheduled this hearing to hear submissions on the issues raised by the SPO proposed protocol on handling confidential information and contacts with witnesses of the opposing party during investigations.

The purpose of the hearing today is to give an opportunity to the parties and participants to debate on the SPO initial and amended proposal.

I invite the parties not to repeat their written submissions but to focus on the specific questions that I included in the Scheduling Order to the extent that these questions apply to each party and participant individually.

I would especially like the parties and participants to focus on the following questions: What would be the legal basis for the SPO proposal; would such a protocol infringe on the accused's rights, noting that similar protocols have been adopted in other international tribunals; if the proposal would be considered, should it apply to all witnesses or only to a specific category of witnesses; and could the model developed at the ICC, regarding the matters under consideration, or another particular model developed at another international or internationalised court be applied at the Specialist Chambers?

Finally, I invite the parties to indicate if *inter partes* discussions could be useful to reach an agreement on certain aspects of the proposed protocol; and, if so, what issues in particular.

As indicated in the Scheduling Order, each party and participant will be afforded 15 minutes to provide its submissions, excluding the time required to answer any of my additional questions.

Before giving the floor to the parties and participants, I first note that the Defence for Mr. Thaci requests that the Victims' Counsel's response to the Registry's submissions be struck from the record. I will therefore give a brief opportunity to the Victims' Counsel to provide any submissions in relation to this request separate from the matters on the agenda for today's hearing. And I will also give the floor to the Defence for Mr. Thaci who may address any new matters raised by the Victims' Counsel without repeating any submissions already made in the request.

So, first, Mr. Laws, would you like to make any submissions in that regard? Really focusing on the request from the Thaci Defence, not on the merits of the discussion of today. Thank you.

MR. LAWS: Your Honour, yes, I would. Thank you for the invitation.

May I start in this way. We don't accept at all what's said in the Thaci filing. I'm happy to deal with it in any way that Your Honour sees fit. I am happy to deal with it extensively in oral argument today or to set out briefly headlines in response to it, and then if Your Honour so wishes, to file a written reply.

So we're in Your Honour's hands. I am conscious that it's not a particularly productive use of the Court's time for us to spend a great deal this afternoon on it because in a couple of hours time it's going to be, we suspect, somewhat moot, to put it mildly, because we're going to traverse all the ground that's in the filing that's objected to by the Thaci Defence. And if I deal with it orally, I'll adopt what's said in my written submissions and not take up the Court's time in that way.

But here we go. Perhaps if I just give Your Honours a headline --

JUDGE GUILLOU: Let's proceed like that. Just give the headlines as you proposed --

MR. LAWS: Thank you so much.

JUDGE GUILLOU: -- rather than the whole entirety of your submissions.

MR. LAWS: Thank you very much.

The argument put forward by the Thaci Defence depends on two submissions. They assert that it is a reply, the document that we filed. Therefore, the argument goes, the word limit has been exceeded, and also it's too late. What we say about that is that it's, with respect, not for the Thaci Defence to attach whatever label they wish to a filing. Your Honour's decision on 21 January was that responses should be filed. Not replies. Your Honour gave us ten days in which to do it, which is the time limit for responses, not for replies, and the Thaci Defence has treated other filings as

responses; notably, the SPO's.

So it was a response. Therefore, it's within the time limit. It's within the word limit.

Their second argument is that, in effect, we went beyond the scope of the invitation to provide written submissions. They don't address the very purpose of the filing that is set out at paragraph 1; namely, that Your Honour announced that you were to make a decision as to whether or not there should be an oral hearing.

Now, I confess that I'd rather assumed that there would be. But at the Status Conference on 4 February, Your Honour indicated that that was a decision you still had to make. Ordinarily, we submit, the parties are allowed to make submissions in respect of pending judicial decisions, particularly where they are as important as this, because, and this is the headline, no one had drawn attention to the ICC's own protocol.

And without repeating what I said in my filing, the position was that the SPO's proposed framework was being represented as some very burdensome, very novel, and very extreme regime that was going to be imposed on the parties in this case, and it's nothing of the kind. It reflects the ICC protocol quite closely.

And so by the time we got to the stage of 4 February, no one had drawn that to Your Honour's attention, and we submit that that was, potentially, at least, a very unfortunate gap in the material before the Court, because it may very well be that it was a protocol with which Your Honour was fully familiar and ready to make precisely the

points that we made in our filings. But it's dangerous to take such a -- to make such a conclusion without a proper basis.

So in those circumstances, we felt it was not only open to us to assist Your Honour with that additional information so that you're better placed to take a decision as to whether the hearing should be oral or further written submissions. Not only was it open to us, but it was our duty to do so. If the Court had reached a conclusion on the papers without considering the protocol from the ICC, that would have been a very unfortunate outcome indeed. As it is, we're pleased to see that it's on the agenda, and quite prominently today, as it should be.

So that's what we say in our reply, Your Honour. And as I say, I'm conscious that this is going to become academic in the course of the afternoon, but I'm at Your Honour's disposal as to how we deal with it further, if necessary to do so.

JUDGE GUILLOU: Thank you, Mr. Laws.

Mr. Kehoe, would you like to specifically address any new matters raised by the Victims' Counsel?

MR. KEHOE: Yes, Your Honour. I believe counsel misperceives what our filing was about.

Your Honour invited counsel, as well as the SPO, to comment on the Registrar's submission, and Your Honour did that in our last Status Conference on 4 February of 2022. Victims' Counsel elected not to do that. He elected to criticise our filing of 15 December. And any such filing answering that is well out of time, months out of

time, almost two months out of time. And they did not answer what the Registrar was putting before this Chamber.

So our criticism was that they went well beyond what Your Honour asked them to do, which was an answer to the Registrar's submission; and, number two, they failed to do in a timely fashion; and, number three, what they did is used it as an opportunity to criticise our submissions of December of 2021. And it was on that basis that we move to strike their submissions.

Thank you.

JUDGE GUILLOU: Thank you, Mr. Kehoe.

Let's now move back to our agenda. I will first give the floor to the SPO, followed by the representative for victims, and then followed by the Defence, and the Registry.

I remind the parties and participants to give prior notice should any submission require the disclosure of any confidential information so that appropriate measures may be taken, as usual.

Mr. Prosecutor, you have the floor for 15 minutes, please.

MR. FERDINANDUSSE: Thank you, Your Honour.

The SPO has submitted a proposal for a framework on the handling of confidential information and contacts with witnesses of the opposing party. And as Victims' Counsel has just said, nothing in this proposed framework is new or out of the ordinary.

The framework has been drafted on the basis of similar frameworks applied in another case before this court and in multiple cases before the ICC and other international tribunals. Every single

provision of the proposed framework has been enacted before, either in this court, or in the ICC, or in other international tribunals, and often in multiple.

And that background is important for many of the questions to be addressed today. We are not discussing novel ideas of the SPO here. Multiple judges from different courts have considered how to balance the interests at stake, and they have found rules such as these to be necessary and reasonable. At the same time, the challenges faced in this court, when it comes to safeguarding witness welfare and security, as well as the integrity of the evidence, are unique.

This Court exists to bring justice to victims in the context of a long-standing climate of intimidation that has too often stymied justice for more than 20 years. And every single day, many diligent staff, in all organs of this court, are working toward that goal. To, indeed, do justice to the victims, we have to learn from the past. And that past has shown that trials against defendants accused of crimes committed while they were KLA members, even those not from the upper echelons of power, were characterised by an extraordinary level of stress and fear in witnesses, and that many such witnesses either refused to testify or changed their accounts on the stand.

As we have outlined in earlier pleadings, this was not sporadic or random. It was consistent and predictable. And a consequent need to preserve the integrity of evidence applies here in this case, indeed with even greater force. We will once again see witnesses too afraid to testify, and we will see witnesses changing their accounts

out of either fear or loyalty to the defendants. There is and there will be enormous pressure on many witnesses in this case.

The proposed framework is necessary both to allow as many witnesses as possible to give their evidence without fear and to enable the court to determine where the truth lies when witness testify will depart from previous accounts, and the question arises how that change came about. Having an accessible record for pre-trial contacts and having two parties able to make submissions on those contacts in an informed manner will greatly increase the chance of establishing the truth and doing so efficiently.

Thus, to answer your first question, Your Honour, the proposed framework can be ordered pursuant to the following provisions of the law and rules: Article 23 and Rule 80 for the protection of victims and witnesses; Article 39(1), (3), (11) and (13) concerning the expeditiousness and fairness of the proceedings and the integrity of the evidence; and Rules 82 and 83 for the protection of confidential information. And, obviously, the application of Rule 80 is not time-barred in this case, only because previously a deadline was imposed in the specific context of disclosure.

Your second question, Your Honour, asks whether the framework should apply to all witnesses or can be differentiated. The framework does not solely concern the SPO's witnesses but is formulated to apply equally to all sides. It should apply to all witnesses, since it serves the different purposes I have just mentioned, and some of those, in particular, the need to protect the

integrity of the evidence and guard against allegations of interference that will otherwise taint this case, apply across the board to all categories of witnesses.

And it must be emphasised that there is not necessarily a correlation between protective measures and pressure on witnesses. Some witnesses without protective measures are likely to be severely pressured.

Your third question, Your Honour, concerns our reaction to the fair trial arguments of the Defence teams. And the SPO's reaction can be as brief as the arguments have been made. The Defence has brought forward only general assertions. They have not cited a single relevant case or other legal source to support their submissions. The arguments made by the Defence have been repeatedly raised and dismissed at the ICC, where protocols similar to the one proposed here have been adopted.

Internal work product protections or attorney-client privilege or the right against self-incrimination do not apply when the Defence is voluntarily disclosing information to a third party, such as a witness or a potential witness. Interviewing a witness in the presence of another party does not mean sharing your strategy. It means you make smart decisions, what to ask and how to do that. It is done by counsel every single working day all over the world.

The right to examine witnesses does not include a right to interview the opposing party's witnesses without oversight or regulation. Defendants have the right to examine witnesses of some

importance once in the courtroom and not twice, including an *ex parte* trial run. Effective preparation for examination in the courtroom can take many forms, certainly for witnesses who have given elaborate statements or been examined multiple times already, as many witnesses in this case have.

In the Halilovic case at the ICTY, the Pre-Trial Chamber declined to allow the Defence to summons Prosecution witnesses because the Defence would have an opportunity to question them at trial.

In the Ndindiliyimana and Nzirorera cases at the Rwanda Tribunal, that tribunal determined that pre-trial interviews were to take place in the presence of the calling party to curtail possible allegations of tampering with the witness and to protect the integrity of the case.

In the Lubanga and Bemba cases, the ICC ruled that the calling party would be allowed to attend pre-trial interviews by the opposing party unless an exception to that rule was ordered by the Chamber.

All of those decisions by all of those courts could not have been taken if the Defence had the unfettered right to *ex parte* pre-trial interviews with Prosecution witnesses that is being pursued here today, and I will be happy to give you more details such as date and paragraphs on all of those decisions, if that is helpful.

And the same is true for many national legal systems in which further witness interviews do not take place at all once witnesses have been identified for examination at trial, unless ordered by the

court. These national systems do not all violate the right to a fair trial on a massive scale.

The Judges in this Court, who have previously drafted and adopted an equivalent protocol are well aware what the right to a fair trial entails, and they did not violate it in their case. And while the logistical implications in this case are different due to the number of witnesses, the different rights to be balanced are the same.

While your fourth question about joint interviews is addressed to the Defence, the SPO submits that the Defence teams should be encouraged to conduct joint interviews, and in the case of victim witnesses, should be obliged to do so. For all witnesses, it is trying and inefficient to be interviewed more times than necessary. For victims, it is even more stressful and can be severely retraumatising.

Your fifth and sixth questions were not addressed at the SPO.

Your seventh question concerns the model at the ICC or a model from any other tribunal. The proposed protocol is similar, or even identical in many respects, to protocols adopted before the ICC. Based on the particular circumstances before this Court, and in this case, in particular the persistent pattern of recantations in cases involving KLA members, the climate of intimidation, and the unique pressure that witnesses will feel when contacted by the Defence in this case, certain amendments were necessary to ensure the integrity of the evidence and to protect witnesses and victims. The SPO's

position is, therefore, that while the models at other courts may provide guidance, the proposed protocol is necessary and tailored to the particular circumstances of this Court and this case.

The extraordinary pressure and risks in this case have been objectively found to exist. The Court has already authorised standard redactions for contact information of witnesses and identifying and contact information of individuals at risk of being associated with this court because they are extremely vulnerable. Such individuals cannot genuinely consent or refuse when asked whether they want to be interviewed or want others to be present when approached for a pre-trial interview. Certainly not when some of them will likely be approached by former superiors, such as the ex-minister of justice who has apparently joined the Veseli Defence team.

And without a robust contact protocol, the very rationale behind the redactions aimed to protect would be undermined.

Your eighth and final question concerns possible *inter partes* discussions. Within the framework of the proposed protocol, the process is primarily *inter partes*. The SPO considers that it's better that the framework is now adopted and the parties then consult as necessary and appropriate within that framework.

We know the Defence teams are already reaching out to Prosecution witnesses, and we, therefore, respectfully ask you to order the framework as proposed, to specify that the framework also applies to contacts that have already been initiated, to order the

Defence teams to report which Prosecution witnesses they have contacted and interviewed before the framework was ordered, and to disclose any available records and recordings of those contacts and interviews.

In the alternative, if you decide that *inter partes* discussions should be held, we ask you to order that contacts with witnesses of the opposing party can no longer take place until you have decided.

I come to my last points. Several Defence teams, including that of Mr. Thaci, have referred to the Code of Conduct to argue that the proposed protocol is unnecessary. That argument fails. We cannot turn a blind eye to the reality we see in this courtroom every single time we convene. The KSC Code of Conduct requires counsel to refrain from making false or defamatory statements, to act with dignity and integrity, with respect towards anyone with a standing in the proceedings, and in compliance with any decision or order of the Panel.

The record clearly shows that the Thaci and Veseli Defence teams fail to adhere to these standards on a continuing basis. Even when making their submissions on this very topic, the Thaci team continues its efforts to mislead. In paragraph 14 of yesterday's Thaci filing, lead counsel for Thaci submits that his team is not aware of complaints from SPO witnesses about their experiences during Defence interviews in the last 15 months.

15 months would bring us back to December 2020. Let that sink in and think back to all the Status Conferences we have had last

year.

On 16 February 2021, counsel for Thaci put to the Court:

"I haven't started investigations. I repeat that. I haven't started investigations. I can't see investigations starting much before April."

On 24 March 2021, Mr. Prosper told us in this courtroom that the Thaci team was not in a position to begin Defence investigations in April and elaborately explained why that was the case.

On 19 May 2021, Mr. Prosper informed the Court that the Thaci Defence team was unable to provide clarity on the status of the Defence investigation for the foreseeable future until they received more information from the Prosecution.

On 14 September 2021, Mr. Kehoe told you, Your Honour, and I will quote:

"I can't give Your Honour any estimate as to when any investigation is going to take place."

That was a little more than five months ago. So which one is it? It can't both be true.

The 15 months between December 2020 and today do include the months of February and March and May and September of 2021. And behind this looms a graver question: Are we honestly supposed to believe that such counsel will scrupulously adhere to the Code of Conduct in unrecorded contacts with witnesses while nobody else is there? That is not a serious proposition given their behaviour to date.

JUDGE GUILLOU: Please conclude, Mr. Prosecutor. We are nearly at 15 minutes, and I will have two questions for you after that.

MR. FERDINANDUSSE: I will come to a conclusion, Your Honour.

It needs to be stressed that our requests are extremely limited in their breadth. They apply solely to witnesses of the opposing party. The only professional standards and information requests to be imposed on the Defence concern their contacts with witnesses for the Prosecution. Everything else in the Defence investigations can remain the black box that it is.

There are many thousands of potential Defence witnesses that can be interviewed without the SPO being present or the Defence disclosing the records of those interviews if they do not call them at trial. All we ask here is a ray of sunlight on our own witnesses, offering to apply the exact same standards ourselves when we will learn who the Defence witnesses will be.

In the Haradinaj case, the Appeals Chamber of the ICTY not only expressed its concern over the unprecedented atmosphere of widespread and serious witness intimidation that surrounded that trial but also emphasised that for an international court to function effectively, its judicial organs must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*.

Multiple judges at the ICC and at other tribunals have deemed the standards proposed here to be reasonably open to them and so have other Judges in this Court. And we ask you to follow their example

and order this framework now before it is too late.

JUDGE GUILLOU: Thank you, Mr. Prosecutor.

I have two questions that relate to the difference between your proposal and let's call it the ICC protocol, the one that is attached to the Chambers manual of the ICC.

The first one is the question of the presence of a representative of the calling party, especially in the case where it is against the expressed wish of the witness. Your proposal here differs from the ICC standard protocol. What would be the justification?

MR. FERDINANDUSSE: Your Honour, we have looked at many different protocols, and we note that the ICC has applied different models. So when we look at different protocols, there is not one case where the proposal that is on the table here is deemed to be in violation of the right to a fair trial.

As we have said, we believe the justification for the model that is now on the table is in the particular circumstances of this Court and in the particular circumstances of this case, especially the enormous pressure that will be on the witnesses. We note that other protocols have a variety of factors to be considered, including the way the witness is contacted, the way the interview is recorded, and where -- the way the protocol deals with the presence of the calling party. There are models where that presence is given as right. There are models where that presence is based on witness consent. And there are numerous models where there is an exception possible to

be made by the Chamber. And we believe that, especially given the enormous pressure, as I have specified, the model on the table is the model that should be applied in this Court and certainly in this case.

JUDGE GUILLOU: A follow-up question here: Do you think this should be a decision of the SPO then or this should be a decision of the Panel?

MR. FERDINANDUSSE: The presence of the calling party?

JUDGE GUILLOU: When the witness doesn't request it or opposes it.

MR. FERDINANDUSSE: Our position is that the presence of the opposing party, like has been the case in other tribunals, is given as of right with only the possibility of the Chamber making an exception.

JUDGE GUILLOU: Thank you. This is noted.

And my second question relates to the distinction between confidential information and confidential document. Because as you have seen from the Defence submissions, the Defence argues that there should be a distinction between the two.

The ICC protocol stipulates that confidential information does not -- sorry, confidential information does not include information which has otherwise legitimately been made public even if contained in a confidential document. And here, again, there is a discrepancy between your proposal and the model of the ICC Chambers Manual.

Why have you proposed this different model here?

MR. FERDINANDUSSE: If you allow me, that would be an answer that I would like to quickly look into and give you after some consideration.

JUDGE GUILLOU: Absolutely. Thank you, Mr. Prosecutor.

Now let me turn to the Victims' Counsel. Mr. Laws, you have 15 minutes, maximum.

MR. LAWS: Your Honour, thank you. So far as question 1 is concerned, really a matter for the SPO. We make no submissions about it.

So far as question 2 is concerned, the answer that we give to the question should the proposals apply to all witnesses is yes.

Obviously we only represent those who are dual status. But as a general proposition, we would say, yes, the protocol should apply as it does elsewhere. A protocol of this kind promotes transparency in the proceedings. It promotes certainty as to what was said, and it avoids misunderstandings or even allegations being made in one direction or another, and it applies, as my friend for the SPO has just said, to both sides equally. So we answer the first part of question 2: Yes, all witnesses.

Are specific arrangements required for dual status witnesses is the second part of question 2. And again, we answer that yes, some special arrangements are required. We're going to point to two such special arrangements, if we may.

The giving of notice to the other side or to Victims' Counsel. The Thaci Defence say you don't need to have a provision governing

their contact with dual status witnesses, because the Code of Conduct prevents them doing so without informing Victims' Counsel. And that is correct. And so the response that we would give to that is if it's something that's already in place, what can the objection be to it being included in the framework? This is not an additional obligation on them. It's one that they must already abide by.

And a framework of this kind is going to be much more effective, isn't it, if it gathers together all the different ways that all of our conduct will be regulated rather than saying, well, we can omit this provision, because you can find it elsewhere in a different Code of Conduct. That -- with respect, that seems to us to defeat the purpose of a framework, which is that it provides you with a framework, not that it provides you with part of the framework and then you can look up the other bits elsewhere when you have time.

So we suggest that it's much more sensible for the framework to have, as it were, a comprehensive remit rather than to pick and choose.

And it's right to say that the ICC has a very similar provision governing contact with other people's clients in Article 28. It doesn't mean that the ICC has done away with the need for notice. So we suggest that the first amendment, so far as dual status witnesses are concerned, is that there should be, indeed, notice to Victims' Counsel and the SPO whose witnesses they are.

The second suggestion that we make is in our filing at paragraph 17. I'm not going to repeat it in detail, but just as a

headline, as it is an answer to the second question: If required by the witness, Victims' Counsel should be permitted to be present at the interview.

And we refer to the al-Hasan case at the ICC where it was said that dual witnesses were entitled to have their legal representatives attend interviews, should they so decide. And so we would say that that is an additional requirement for dual status witnesses. Bringing me to the end of what I want to say about question 2, part 2.

For question 3, I hope being loyal to Your Honour's direction in what I said earlier, I've set out already in writing my submissions in relation to whether or not the fair trial rights of the accused are jeopardised, and I'm not going to repeat them at all but I stand by them.

Question 4. May we adopt what's just been said by the SPO. It's not obviously a question directed at us. But do the Defence teams intend to organise joint interviews of witnesses, they must do so where they are planning to interview witnesses who are also victims in the proceedings or any other vulnerable category of witness. There simply can't arise a situation in which a witness gets interviewed four times by the Defence. It would need, we respectfully submit, some very exceptional circumstance to justify a second interview, and that's something which perhaps should oversight from the Panel.

So question 5 is directed to the Registry, and I shan't take up

any time in relation to it.

Question 6. What's the position of the Defence teams and of Victims' Counsel in relation to the adjusted SPO protocol? What we say about that is this: We don't object to the amendments that have been put forward by the SPO in response to the Registry. We can see the practical difficulties, of course, for the Registry in fulfilling the obligations as they were initially set out in the SPO's proposed framework.

We suggest that the protocol should, however, be flexible as to the presence of the Registry in exceptional circumstances. We would encourage Your Honour to leave an element of discretion there. It's sensible, perhaps, to say that the decision should be taken by the Panel when it's said that exceptional circumstances arise on either side.

JUDGE GUILLOU: Sorry to interrupt, but a follow-up question. What would be these exceptional circumstances? What are you thinking about? Just give one or two examples, if you don't mind.

MR. LAWS: Very difficult to predict is really what I'm saying about that. We've had some discussions about what sort of circumstances could arise. They could be, for example, a vulnerable witness whose interview doesn't proceed as planned and who requires some more oversight from the Registry, for example. So it isn't possible to predict all of the ways that this protocol could start to require some third party involvement, but that's just one example.

We suggest that it should -- if it's there and the circumstances

never arise, if the power is there to order it, then it may prove useful. That's all we'd say about it.

And finally on that topic, we endorse the SPO's proposal at 5(b)(ii) in their amended framework proposals, which is that WPSO should be involved when they consider it necessary. And that, as Your Honour has seen, mirrors the position at the ICC, and we would say that for good reason if WPSO's evaluation is that somebody really needs them there, then that should happen and that should be part of the protocol.

So question 7, do the parties and participants consider the ICC model or another international model could be applied here? We say it constitutes a good model, which has been adopted in cases of real complexity. And it would apply well here. So, broadly, we invite Your Honour to adopt it. We've got a couple of qualifications to it. The dual status amendments that we have proposed is one, and the involvement of WPSO is, as we've just suggested, also a valuable component.

8, final question: Should *inter partes* discussions be conducted? Your Honour, our position is that we are very happy to take part in discussions of that kind and to assist in promoting a final outcome that is more agreeable to all parties. We were very happy to do that.

So unless there are any other questions for me, Your Honour, those are my submissions.

JUDGE GUILLOU: Thank you, Mr. Laws.

Let me now turn to the Defence, starting with Mr. Kehoe. You have 15 minutes.

MR. KEHOE: Thank you, Your Honour.

If I may, Judge, I will talk briefly about the legality of the entire proceeding, but I would like to cede approximately five minutes to my colleague, Mr. Misetic, with Your Honour's permission, to talk about the ICC protocol.

JUDGE GUILLOU: Absolutely. As long as it's not more 15 minutes in total.

MR. KEHOE: Yes, sir. I understand.

At the outset, let me just say it's unfortunate that counsel has seen fit to engage in *ad hominem* attacks. I thought they may have learned their lesson from the last time about the failure to turn over exculpatory material and then to mislead the Court.

Let me remind Your Honour that the only witness --

JUDGE GUILLOU: Mr. Prosecutor, please.

And, Mr. Kehoe, focus on --

MR. KEHOE: I am.

JUDGE GUILLOU: -- what we're here today. Let's not waste time and let's continue on the protocol, please. Thank you.

MR. KEHOE: Addressing the issue as to the integrity of the system absent the presence of the SPO, which we will get into in more detail, let me remind the Court that it was Ambassador Everts interviewed by the Prosecution that said: While every single paragraph in his statement is accurate as written and can stand as it

is, the totality of the statement seems to reflect a lesser interest in exculpatory than incriminating information.

So contrary to statements that somehow the integrity of the system is going to be maligned if the SPO is not there, it seems, in fact, it was maligned because the Defence wasn't present. But as you can see from the protocol that the Prosecution has put on the table, this is basically one way that they want to be in the interviews that the Defence counsel has of witnesses; yet Defence counsel is never present during any of the interviews conducted by the SPO since November 2020. And there have been many, because we have gotten a significant number of witness statements just over the past year in 2021.

So, clearly -- and we will talk a bit about equality of arms. Your Honour can appreciate that there is no equality of arms except in the fashion that the SPO wants to dictate.

Unlike the ICTY and the ICC and the ICTR and the other tribunals, this is a Kosovo court and it is dictated by the provisions to follow the provisions of the European Court of Human Rights, which are very clear about what the right of the Defence is.

And I cite to Your Honour the case that we cited in our submissions, Dayanan v. Turkey, where the Court talked about the accused's investigative rights, and noted:

"The fairness of the proceedings that require that the Defence be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to

secure, without restriction, the fundamental aspects of that person's defence: Discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning."

"... has to be able to secure without restriction," that's what the court said; the European Court of Human Rights.

What the SPO wants to impose on this Court and on the Defence is with a tremendous amount of restriction. Let us start at the outset -- and it's interesting to review their pleadings, because they view the witnesses on their witness list as their witnesses. I don't want to repeat all the case law that we cited for Your Honour in our submissions, but the witnesses on the witness list are not the SPO's witnesses. They are witnesses, period, open to all sides to discuss, and it's not the SPO's witnesses.

But when we look at what the legality of what is transpiring here, this is just another layer of the illegality that the SPO is attempting to foist on this Court. We have 326 witnesses. Almost 50 per cent of those witnesses have protective measures under Rule 80 already. I believe it's 48.something. It is 157 out of 326 have protective measures. 103 are completely anonymous, with disclosure of those individuals coming at various times, 30 days prior to trial, and even during the course of the trial.

We have those protective measures for those witnesses at this point, 157 out of 326. Now - now - the SPO wants to broaden the umbrella and put this restriction, their protocol restriction on all

witnesses. International diplomats, international officials, government officials, non-government agency officials from around the world - Germany, France, the UK - military officers, retired generals in the United Kingdom's military are under the protective measures being advanced by the SPO. Witnesses protected by -- excuse me, represented by counsel.

I read an interview just yesterday with my colleague, Mr. McCloskey, of a witness who was represented by quite able counsel, had been a barrister in the UK -- or had been a solicitor and a barrister in the UK for well over 40 years and did quite well to protect the interests of his client. It is all of these people that the SPO is now attempting to preclude the Defence from interviewing.

And let's just go to the reason why. The reason why they put forth is to avoid retraumatisation of victims, witness, and safeguard privacy, dignity and physical and psychological well-being.

Is the SPO seriously arguing that a retired general in the British army needs to be protected from some type of psychological damage because he's subjected to the interview, you know, by Mr. McCloskey, for instance? Clearly not. Clearly not. What they're asking for is well out of line for what is the normal protocol in courts, international courts, and certainly a violation of the European Court of Human Rights.

I mean, putting aside these wild allegations advanced by the SPO concerning Prosecution's witnesses being undermined and placing

enormous pressure on them to prove their patriotism by cooperating with the accused and distancing themselves from the SPO, that's in paragraph 3 of their most recent response, they do so with no evidence whatsoever. They do so with the fact that there has been no indication of any witness being impugned, impacted, injured, psychologically, physically intimidated, whatsoever.

Have we begun to do interviews in Kosovo at this time, Judge? At the last Status Conference, I advised the Court that we had. Mr. McCloskey conducted quite a few interviews in Kosovo over the past month or so. And I trust there have not been any allegations leveled against Mr. McCloskey for the interviews that he conducted. So this whole argument that there is some spectre out of there of injury to their witnesses has got no validity in fact.

And, by the way, any of the allegations that we advanced against the SPO in the proceedings before Your Honour are all true. But putting that all aside, there has been no substantive evidence or evidence whatsoever brought before us, before Your Honour, before anyone else, that somehow witnesses since the indictment in 2020 have somehow been impacted, damaged, or dealt with in anything other than a forthright manner.

This is a spectre of: We want it both ways. We want control of the situation from the SPO. We want to have control of our witnesses when we want to talk to them, and we want to have control of the Defence witnesses when the Defence is talking to witnesses that are on the SPO list. And, by the way, 326, they've covered the landscape

of virtually everybody.

They say that this -- that this is to avoid the retraumatisation of witnesses. Well, that's under Rule 80, Judge. And the timeframe for bringing arguments before Your Honour on Rule 80, protective measures, was in September. Not in December, January, and February. That is completely time-barred.

And going yet further, Judge. With regard to witnesses to get protective measures, Rule 80(2) requires consent. Has there been any consent advanced by the SPO concerning any of these witnesses? Has any of these generals in the British army or any diplomats from the United States or France or from Belgium or from Germany, have they given their consent to any of this? I haven't seen anything, in any submission by the Prosecution or by the Victims' Counsel, which, of course, is required under Rule 80. I suspect that no consent was given whatsoever and none was ever asked.

In fact, I submit to Your Honour that no request was made of counsel who represented witnesses. Counsel who represented witnesses as to whether or not they consent to these protective measures. It hasn't been done. This is just an across-the-board-we-want-it-our-way position taken by the SPO.

Now with regard to the witnesses who happen to be represented by Mr. Laws. There is no problem there. We ethically are bound to contact Mr. Laws if, in fact, that witness wants to be contacted -- if we want to talk to that witness. That is the reason why we wanted the identity of dual witnesses brought before the Chamber, which is

something we filed yesterday. Because once we know who those witnesses are, and the SPO knows who those witnesses are, we have to go through Mr. Laws, as is proper, which we would have to do in any jurisdiction.

But that's not covered by the SPO's filing either. Without arguing everything we put forth in our submission, it violates the -- the protocol violates the right to a fair trial. What is happening here is: Rule by what the SPO wants to do. There is no equality of arms here. We were not entitled to participate in any of the interviews that the SPO has done or is continuing to do, because their investigation is, in fact, continuing.

They're interfering with the preparation of the Defence, and they're interfering with the right of the accused not to incriminate himself. And the fact of the matter is they sit there across the table. They are invading the Defence camp. All of which is in violation of the European Court of Human Rights that noted in Dayanan v. Turkey that we should be operating without restrictions. All they're doing is putting restrictions on, in fact, what we want to do.

JUDGE GUILLOU: You're practically at 15 minutes.

MR. KEHOE: I'm sorry, Judge.

JUDGE GUILLOU: If you want your co-counsel to speak, you have to give him the floor now, and he will only have three or four minutes.

MR. KEHOE: Yes, Your Honour. We would just say that having the

SPO there, having this taped is a violation. Certainly having it taped and having the SPO there is a violation of Rule 104(5) because we were giving a pre-trial statement before the Defence is going to be put on.

With regard to the legality of that, I will turn to Mr. Misetic.

JUDGE GUILLOU: Thank you, Mr. Kehoe.

MR. FERDINANDUSSE: Your Honour, I apologise, but I have a point of order to make.

The Thaci Defence has just made allegations against the SPO that are entirely false and that are defamatory, and the Thaci Defence has once again misrepresented the content of the statements of the Mr. Everts, just as they have done in the last Status Conference.

MR. KEHOE: I will stand by Mr. Everts' statements that have been submitted to the appellant --

MR. FERDINANDUSSE: [Overlapping speakers] ... Your Honour, I will be very happy if I can just finish what I have to say before Mr. Kehoe interrupts me.

JUDGE GUILLOU: So very briefly, Mr. Prosecutor. You have less than a minute.

MR. FERDINANDUSSE: Counsel has again failed to mention both the inculpatory parts of that statement, as well, and this is very important for what he just said, the fact that Mr. Everts was explicitly asked by the SPO at the end of his interview if he would like to provide any additional information or [indiscernible] in any other supplement or change his statement. Mr. Everts declined to do

so and what he had to say was inculpatory more than exculpatory, and to suggest that his statement has any special relevance, either for detention review as they did in the last Status Conference, or as evidence of any impropriety on the part of the SPO as he just did, is as dishonest as it is delusional.

MR. KEHOE: Just very -- 15 seconds, Judge.

We stand by what Everts had to say. The Prosecution didn't turn it over in violation of their obligation to send over exculpatory information. They knew it. They got caught doing it. And that's why they're complaining about it now, and that's why we had to bring it before the Court of Appeals.

MR. FERDINANDUSSE: And one last issue, if I may, Your Honour.

JUDGE GUILLOU: Briefly.

MR. FERDINANDUSSE: I would like to share with you that in since joining this Court less than a year now, I've heard more false allegations of impropriety on the part of the Defence than I've heard in all years before.

Today, for the first time, we have clear evidence of impropriety. We have the Thaci team's written submissions that cannot be reconciled with a range of submissions they have made last year. And the Thaci team would be well advised to speak about that and not try to walk it back in the very slippery and implicit way they have just tried to do, because obviously pursuing Defence investigations for 15 months is very different from doing it for one month. They are two different things. And Mr. Kehoe would be well

advised to address this issue and not make more false allegations as he just has.

MR. KEHOE: And the --

JUDGE GUILLOU: I will now give the floor to Mr. Misetic. We will not continue this feud. We are here to discuss about the protocol. I mentioned specific questions in my order. This is what I need to issue my decision.

So, Mr. Misetic, you have the floor. And forgive me if I make a mistake when I pronounce your name. And I think in a previous Status Conference, I made so many mistakes that I really need to apologise. So you have the floor.

MR. MISETIC: [via videolink] No apology is necessary, Your Honour. Thank you.

Let me start off by saying as follows. In November 2020, the SPO indicated they would be ready for trial in the summer of 2021. Obviously they then proceeded with disclosure of witness identities and witness statements thinking, at the time, that we were going to be in trial within seven months.

You were not asked to impose a protocol at any point in time while they were disclosing these witness statements, and so the underlying assumptions and presumptions of their submissions, which they made quite explicit this morning, is that we as Defence counsel somehow are suspicious and you should be suspicious of us and, I would say in their submissions, perhaps even likelihood that we will tamper with evidence.

I would remind the SPO, and obviously the Court, that in order to even be qualified as Defence counsel in this case, all of us had to go through a very rigorous procedure. And to the best of my knowledge, no counsel, no member of the investigative team has ever had an allegation, a substantiated allegation of witness tampering in our entire careers. And as a result of that, we were able to be qualified to represent people in these proceedings.

So to the extent that the allegation now, which underlies the entire protocol, is that you should be suspicious of Defence counsel, I think is contrary to what the established facts are thus far in terms of us being accredited.

Secondly, the fact of the matter is this case has now been pending for 15 months. And, again, we reiterate, and I'm frankly not even clear on what the allegation is by SPO counsel about our submissions. The point made by our submissions is that for 15 months the SPO has disclosed witness identities and witness statements to the Defence, and we have been free to interview those witnesses for 15 months.

To the best of our knowledge, there has been no allegation by an SPO witness of any improper conduct by any Defence team - not just the Thaci Defence team - with respect to witnesses. What we do know thus far is that the only issue with respect to witness security that has happened thus far is the disclosure from the SPO of witness statements that were made public and which are now part of other proceedings at the SPO. These are the simple facts.

Now, the underlying issue and what the SPO and Victims' Counsel rely on and what Mr. Kehoe alluded to is a comparison between these proceedings and the proceedings at the ICC. And we would again reiterate that the ICC proceedings are not comparable to the proceedings at the KSC, for one simple reason. The ICC is -- or the ICTY or the ICTR are not bound by the European Convention on Human Rights or the jurisprudence of the European Court of Human Rights. This Court is explicitly by both the law of the Specialist Chambers and the constitution of Kosovo, and as Mr. Kehoe pointed out in his remarks, the case of Dayanan v. Turkey clearly sets out that Defence counsel, in order to be able to do our jobs, must be able to do so "without restriction" in the collection of evidence favourable to the accused and preparation for questioning.

I know I'm running out of time. So the final point I wanted to make is there is also this assumption or this suggestion by the SPO and Victims' Counsel that the obligations under the protocol will treat both sides equally. The point here is that the rules were set up not to treat the parties equally and not to treat their disclosure obligations equally.

The SPO has a much higher burden of disclosure than does the defendant, the accused. The accused has no disclosure obligation for witness statements prior to the beginning of the Defence case, and the accused has no obligation to disclose all statements by a witness. Only those statements that the accused intends to use.

Now, the protocol that's being proposed here puts us in the

position as follows -- and it was actually expressly now indicated by the SPO. For example, the SPO this morning said -- or this afternoon, I should say, said they want you to order a disclosure of statements and notes that have already been taken of interviews of SPO witnesses. That's in clear violation of the rules.

There is no obligation for the accused to disclose statements to the Prosecutor that could be used against him in the proceedings. It's a clear violation of the right against self-incrimination. And as a result, what we're now being asked to do is impose a protocol that says: You, the Defence, must now take statements, which we otherwise wouldn't have to do. For example, we could interview an SPO witness, we don't like what the witness says, we don't even have to take a statement under the rules.

The protocol would now say you must create statements, and you must disclose them to the SPO, and the SPO can use them against you later. What you're being asked to do is to produce a protocol that will force the accused to potentially create evidence that could be used against him.

Again, and I would close with this, while that may be the case at the ICC, there is no decision at the ICC that has said this protocol we use at the ICC is consistent with the European Convention on Human Rights or has been found to be valid by the European Court of Human Rights. That's not the position that this Court is in, and this Court must follow the ECHR.

Thank you, Your Honour.

JUDGE GUILLOU: Thank you, Mr. Misetic.

A couple of questions either for Mr. Kehoe or Mr. Misetic. I'll let you choose who is going to respond.

You insisted on the fact that this protocol would be contrary to the ECHR. Can you let me know which article?

MR. KEHOE: [Microphone not activated]. I missed that last part.

JUDGE GUILLOU: Which article of the ECHR would it be contrary to?

MR. KEHOE: Well, I think if we read what the constitution has to say, it is -- we're talking about the KSC is obliged to follow Article 22 and 53 of the Kosovo Constitution and Article 3(2)(e) of the Law. And that requires the Kosovo courts to follow the jurisprudence of the European Court of Human Rights.

JUDGE GUILLOU: I know that. I'm asking you which article of the Convention. Are you talking about Article 6?

MR. MISETIC: [via videolink] Article 6, yes. Article 6 and the right to counsel and the right to a fair trial.

JUDGE GUILLOU: Right to counsel and right to a fair trial.

MR. MISETIC: [via videolink] Yes. And as Dayanan makes clear, it flows from the right to counsel.

JUDGE GUILLOU: Thank you. Would you consider that the ICC protocol, whether the one that is annexed to the Chamber's manual or any of the models adopted in different ICC cases, would be contrary to the ECHR?

MR. MISETIC: [via videolink] Well, the fact of the matter is, as far as we know, it hasn't been cited by the ECHR. And as far as we know, the ICC has not explicitly said it's consistent with the ECHR. But, yes, to the extent that the protocol requires an accused to create evidence that could be used against him, yes, we do think it would violate the ECHR.

JUDGE GUILLOU: And when you indicate that it is contrary to the ECHR, is it only the specific point that you just mentioned, or is it broader than that, as in the principle of the protocol, or is it in between the two? Is it the fact that there is an irregulation of the Defence investigations during the pre-trial and trial phase?

MR. MISETIC: [via videolink] Well, it's also in the collection of evidence. For example, if we're put in the position of choosing to either risk creating a record that could be used against the accused or not interviewing the witness at all in order to avoid the risk, that then implicates a different right under the Convention in terms of the right to investigate the case. That would be the right to counsel, basically, because the right to investigate flows from the right to be represented by counsel.

And so we would have to be trading off rights under the Convention, because we'd have to just say, well, it's too risky to interview this witness because we don't know what they'll say, and then the SPO can come into court later and say even on the Defence questions, even on the questions of the accused, the witness said X, Y, and Z. So we won't investigate it at all, which now hinders our

ability to conduct cross-examination, because we haven't even had an opportunity to meet with the witness, interview the witness, see what the witness will say.

It implicates other rights in the sense that the -- frankly, the SPO will be sitting in the room -- and I'll give you another hypothetical example. If we're in a witness interview and a witness says something that the SPO didn't know before that's going to be highly exculpatory for the accused, the SPO decides that, as a result, they're not going to call the witness, and this relates to a topic that was discussed at the last Status Conference about the potential for the SPO to be asked to reduce the number of witnesses they're going to call.

The SPO decides as a result of being present at a Defence interview we're not going to call these witnesses, and now the Defence has to call certain witnesses as part of the Defence case that were on the SPO list. Now you have a violation of Rule 104, because they now have a Defence statement, that they otherwise weren't entitled to have before the Defence case, that they now have as part of their case, and, as Mr. Kehoe used the language, they invaded the Defence camp and now have an opportunity to see what the evidence is that the Defence hopes to emphasise through certain witnesses.

So the other -- the main point of this is that the rules were structured in a way that is not symmetrical. And that is -- part of the submissions of Victims' Counsel and the SPO here is, well, the

protocol applies equally to both sides, everything is fair because it applies 50/50 to everyone. But that's not the way the rules are structured. The burden is on the Prosecution entirely at this phase of the case. They have all the disclosure obligations. The accused has none. And now 50/50 is actually a violation of the way the rules were set up.

And I would also add that there is a very specific reason why the rules don't say when the Defence cases starts the accused must produce all witness statements of the witness. They don't say that. They say the statements that the accused intends to rely on at trial. But if we were to have other statements of a witness that, for whatever reason, the accused decided not to submit, the Court has no right under the rules to force the accused to submit them.

Your protocol now would essentially require that. Because it would require the accused to start producing statements that he otherwise might not want to produce and that they could be used against him in the proceedings. We do submit that that would be a violation of the Convention.

JUDGE GUILLOU: But, Mr. Misetic, you know that in several systems in Europe, probably even the majority but I'm not sure of that, the Defence doesn't even have the right to question witnesses before the trial or at least before the investigation judge when you are in a model where you have an investigation judge.

So I struggle with your arguments that even the principle of such a protocol would be contrary to the ECHR when a lot of

jurisdictions within the ECHR do not even provide for the possibility for the Defence to conduct investigations.

MR. MISETIC: [via videolink] That may be the case, but you would have a situation then in a civil law system, for example, where the questioning is being done by the investigative judge and the accused has the right to ask the judge to interview certain witnesses as part of the investigation.

Here, that's not the way the Court is set up. So while we could make the argument that if we were in a civil law system, then the judge would be doing all the questioning and there would be no risk of the accused himself creating evidence that can be used against himself.

We're now in a model system where the SPO has a right to investigate its case and the accused has the right to go out and investigate his own case; right? And you're being asked now to say and what you produce can be used against you in the proceedings before the Court, which I don't think would be the case even in a civil law system. But whatever the case may be, where the accused would be required to produce or turn over evidence that has -- otherwise wouldn't have been created to be used against him.

So the point is if we have a system that is set up this way, then it must be set up in a way that the accused has the ability to conduct an investigation and isn't put in a position of conduct an investigation and risk creating evidence against you or don't conduct an investigation at all, which is the situation we're in now.

JUDGE GUILLOU: Thank you, Mr. Misetic.

MR. KEHOE: Just one last comment.

My counsel have referred to, Mr. Misetic referred to Rule 104, what we were talking about is Rule 104. And our obligation to turn over information is the Defence, should it choose to present a case. I'm talking about Rule 104(5):

"... should it choose to present a case shall, within the time limit set by the Panel, and no later than 15 days prior to the opening of the Defence case."

So under the protocol that is advanced by the SPO, they would have witness statements prior to the Defence ever making a decision about putting a case on in violation of Rule 104(5). That is the regime that was set up when these rules were set forth.

So going back to Mr. Misetic's example, we have an interview of a witness and a witness gives certain information that's exculpatory, the Prosecution decides not to put that witness on, the Defence is then in a position of having to put that witness on, they put it on with the SPO being in possession of that witness's statement from the conversation with Defence counsel in violation of Rule 104(5).

So just following the particular rules itself, putting aside the regime of the ICTY, the ICC, and the ICTR, these rules drive what we must do, and the protocol that they have set up clearly violates Rule 104(5) based on the scenario and hypothetical Mr. Misetic spoke about and I just alluded to.

JUDGE GUILLOU: Thank you, Mr. Kehoe.

Let me now turn to the Veseli Defence team. Is it Mr. Emmerson or is it Mr. Strong?

MR. EMMERSON: [via videolink] It will be me for the time being, I'm afraid.

Can I make two or three general points at the outset before, as quickly as I can, running through the list of questions.

JUDGE GUILLOU: Yes, but that will be within your 15 minutes then, Mr. Emmerson.

MR. EMMERSON: [via videolink] It will absolutely be within the 15 minutes. And I note that we're beginning at 1447, so I'll make sure that I'm finished within the timeframe. Okay. 1530.

So first of all - and I'm just making general points at this stage - I would invite you to consider how the position and arguments advanced by the Prosecution can be reconciled with the mandatory presumption of innocence. It doesn't seem to have affected or have been raised within the Prosecution's submissions, which are based on two fundamental propositions.

One is that the accused will wish to interfere with the course of justice through their counsel; and the second, and this is a direct allegation against Defence counsel, that -- which itself is in breach of the rules that Prosecution counsel has been objecting to, that, in light of some of the points that Defence counsel have made in these proceedings, in these open proceedings, they can't be trusted to comply with the Code of Conduct when dealing with witnesses and are likely to interfere with witnesses. That is, of

course, a hugely defamatory comment and entirely inconsistent with the rules and prosecutorial misconduct. But I'd like to deal with it, because it's an extremely serious proposition.

But before we turn to that, I want to invite Your Honour to look at the way the case is put with the presumption of innocence of the accused and, frankly, of counsel, in the way this has been put most recently, is fully respected all the way through the decisions that you have to make. I'm not going to say to you what exactly the implications of that are, but it's a rather shocking omission from this discussion.

Secondly, the key question here is proportionality of the scheme. And when the [indiscernible] it up, he said at the beginning of the conversation -- sorry, of his submission that he wasn't sure he really had standing to speak about those witnesses who were not victims. He's right, of course. He only has standing to make representations on behalf of victim witnesses, and he has no standing, as I thought he conceded, but then made submissions about, to address the question whether all [indiscernible] protocol.

A protocol -- we need to look at what the Prosecution says the protocol is for and ask ourselves whether the methodology established for it is reasonably tailored to meet the objective it says that it's seeking to pursue. Now, the objective, I'm quoting the Prosecution here, "is to avoid retraumatisation of victim witnesses and to safeguard privacy, dignity and physical and psychological well-being."

Well, with the greatest [indiscernible] there can be no question of [indiscernible] non-victim witnesses. So the first issue is: Why on earth are we including non-victim witnesses in this protocol? There can be no reason why, other than the allegation that the Defence are going to do something to corrupt the witness in one way or another. You know, I find that, of course, professionally a hugely offensive suggestion. And, indeed, the way counsel put it was it was laughable or can't seriously be -- can't be taken seriously that the opposite would be true. Which is an extraordinary example of the very worst of what the Prosecution is trying to say about the Defence submissions.

So the first question is: What does proportionately require in the context of a scheme designed to avoid --

THE INTERPRETER: The interpreters don't hear the counsel, sorry.

MR. EMMERSON: [via videolink] Sorry. Why would that be? Is that a problem at your end? Can the Court hear me?

JUDGE GUILLOU: I can hear you, but I think that we sometimes hear a sound over you. So I don't know if there is a microphone that is still on in any of the other Zoom participants. If it's the case, I invite all of you to put your microphone on mute and it should be fine. And maybe if it's from the last screen, maybe the AV can also mute the last screen on the big screen in the courtroom, if it's possible.

Mr. Emmerson, please proceed.

MR. EMMERSON: [via videolink] So proportionately is the first thing. Certain examples have been cited to you, such as the internationals who are giving entirely [indiscernible] ... and obviously it's self-evident that at that end of the spectrum this -- this system should not be applicable, and there's no justification whatever for applying it.

And it's -- with the greatest of respect, it seems to me, and I would make this submission, that at the very least you should exclude anybody who is not alleged to be a victim. And that, at least, will reduce the scale and scope.

We are dealing with 300 -- I'm sorry, I lost the number. It's either 320 or 360 witnesses. And so anything that can be done to keep this manageable and not to derail the trial needs to be done. Otherwise we'll end up with a two-year pre-trial delay whilst these witnesses are all put -- a significant number of them are put through this mincing bell.

And I am sure many of us, certainly I am, would be reluctant to be interviewing victim witnesses in advance. Very often they have little to say about the issues in the indictment but only about their personal experiences, so -- I can't say that would always be the case. There may well be cases where we do need to apply by the protocol. But realistically it's -- it is significant interference with the Defence in relation to witnesses who are not victims.

And so far as -- so far as the procedure adopted in the ICC is concerned, it is very important to remember the distinction between

adversarial and inquisitorial proceedings. Obviously an inquisitorial procedure is compatible with Article 6 of the Convention. That's self-evident. And so it can't be that an ordinary inquisitorial process, with all its own safeguards, is in violation of Article 6.

But at the same time, if you're in an adversarial process, you can't borrow in bits from an inquisitorial process and say, well, it works there, it can work here. An adversarial process is entirely different in the way that it's set up. It's set up so that each party presents the evidence to the Court, and the Court makes the decision. And obviously cross-examination is an important tool. But, above all, and this has been accepted by international tribunals when they're confronted with some issues about adversarial and inquisitorial proceedings, in any event confronting a witness in cross-examination with a piece of information that they perhaps are responding to for the first time -- I mean, this may not be the protocol issue but you may have information independently sourced that you put to a Prosecution witness, therein [indiscernible] at the first presentation of it is a critical tool for evaluating credibility and reliability.

And that pre-supposes an element of surprise. It's not trial by ambush in adversarial proceedings. It's a process where each side is trusted to present the evidence. And if a Prosecution is going to say, well, you can't trust the Defence to do anything because they're rule breakers, and it's a laughable proposition that they would

genuinely interview a witness and not seek to interfere -- illegally commit a crime with interfering with the course of justice, then I'm afraid the whole system has collapsed.

It's premised upon trust of counsel, and that disgraceful suggestion this morning ought to be withdrawn. It won't be withdrawn because the Prosecution continues with a brass neck all the way through these proceedings.

Now, I want to address one aspect, and then I'll rush as quickly as I can through the questions. I don't know whether I need to address you in detail on the ludicrous submissions of the Prosecution. The issues that have been raised in court, in open court, and the subject of argument about the Prosecution's conduct in these proceedings are in themselves a threat to witness cooperation. That has elevated at this hearing into being evidence that we, counsel, could not be trusted not to commit crimes because we are so evidently criminal people. That is what we're dealing with.

Now, I have to address that for obvious reasons. The reality, as you know, because you've sat in every pre-trial hearing, is that the issues that have been raised by the Defence against the Prosecution relate to misleading statements about how long it was going to take for the Prosecution to be ready, about misleading statements by the Prosecution that the Defence were elongating the realistic pre-trial period dishonestly in order to inflate their chances of provisional release, it relates to the fact that the Prosecution has repeatedly failed to meet its own deadlines, misled

the Court in numerous respects, and that the Prosecutor himself addressed a meeting of European ministers -- of European ambassadors and made astonishing statements about the accused, the first accused, being guilty of the crime with which Mr. Haradinaj and Gucati were charged even though he had no evidence, he acknowledged, to prove it.

And so we've had a terrible series of acts of prosecutorial misconduct, and it's true, and I accept the rebuke that my tone may have reflected my feelings, which is a deep sense of shock that the Prosecution has behaved in this way over a period of time and that they've been allowed to behave in that way. And so it is possible that I have a [indiscernible] ...

But to say on that basis that I am the sort of person who would commit a crime in the preparation of the Defence case is a disgraceful slur and is a good example of how the Prosecution has completely lost any sense of rationality or reasonableness. I mean, it's desperate stuff.

As far as the protocol is concerned, as I say, we can start from the proposition that it's clearly far too broad in terms of the witnesses that it covers. A simple way of cutting it down very significantly is to confine it to those witnesses that Victims' Counsel is legitimately able to make submissions on; namely, those who may be retraumatised by even thinking about it [indiscernible] I mean, retraumatisation is likely to happen to those who [indiscernible] retraumatised by the hearing, by the publicity surrounding their giving evidence, by the whole process.

And that, I'm afraid, is one of the consequences. It's inevitable. It's not to do with being interviewed by the Defence. It's to do with the entire process that they're going through. There is a risk that some people, particularly those suffering from post traumatic stress disorder from an event, will find themselves retraumatised, and, no doubt, the Court will give them full psychological and social support if they need it.

So that, in a sense, I can't take it any further than saying that we're obviously dealing with a situation where a Prosecution has lost focus [indiscernible] 326 witnesses on the witness list to be called which, as I've said last time, equates on past trial experience to something like a four to five-year trial. Whatever the Prosecution says about the fact that they're different from other tribunals. That's exactly what they said about how long it would be before they were ready for trial.

But the Prosecution says whatever it wants to deal with the short-term interest or the issue before them knowing, or at least being reckless as to whether there is any truth whatsoever in the predictions that they're making. We've seen it happen over and over again.

So, I mean, as far as that is concerned, we would suggest that the Prosecution is not seriously attempting to engage with the underlying issues of really genuinely looking at retraumatisation. Instead it's splashing slurs against Defence counsel, creating a protocol that covers 360 witnesses, including internationals and

police officers, and people of [indiscernible] of being intimidated. And it also includes people who have gone public about the fact -- have voluntarily gone public about the fact that they were interviewed by the SPO. Numerous people who were on the witness list were later, following their interviews, return to Kosovo and announce that they have been interviewed. These do not look like witnesses who would be intimidated by an interview professionally conducted by Defence counsel.

So I'm afraid you're being given a pile of what we used to call pants from the Prosecution. There's nothing in the suggestion that a protocol of this breadth is necessary in this case for this number of witnesses. That's, essentially -- yes, I'm taking it from that end rather than what I think it ought to be.

Your first question asked about specific legal basis and about other comparable tribunals. I mean, the borrowing of different protocols from the ICC and taking them at their highest -- in other words, as you say, the question that you asked the Prosecutor, not mirroring any one of them but combining them to create the most oppressive possible regime. That's one way of going down this route. But it doesn't lead to proportionality in a case like this.

I mean, when you look at the kinds of cases to which those kinds of protocols have been applied by the ICC, you know, in Gbagbo, Lubanga and so forth, you are looking at cases where the witness numbers were tiny by comparison to the case we're dealing with. And, I mean, I can give you the statistics, if I can find them. Sorry,

just second. Yes, I'll come back to that because -- yes, I think -- I know where I've got it. Hang on. Sorry, I've lost that statistic.

But we're talking about trials with sort of between 40 or 60 witnesses and, of course, they weren't subject to a protocol as absolute and extreme as the one that you're being presented with but which has been culled from the most extreme aspects of what the Prosecution is able to envisage. So the point you make about witnesses happy to be interviewed by the Defence in the absence of anybody is a very good one.

But there are others. But there is also an entirely different mindset adopted by the ICTY, which is a practice practiced at -- applies to the Balkans or was applied to the Balkans and Kosovo as well, and you'll find the sort of leading authority in Mrksic, which is -- and it's the principle. It's the same as the principle in all adversarial proceedings, which is that witnesses are the property of neither the Prosecution nor the Defence and, thus, both parties have an equal right to interview them. An equal right to interview them. Not the Prosecution has the right to do it [indiscernible] ... but the Defence must do it in the full glare of the Prosecution and others.

And it's a very common phrase used quite throughout the common law world on which the proceedings here are based, that [indiscernible] property in a witness. So the ICC approach is to say the calling party has a certain proprietary interest in the witness. But the ICTY approach, which is faithful to an adversarial procedure

and consistent with the process in Kosovo, this being a Kosovo criminal court, is that there is no property in a witness whatsoever.

And I'll read you the passage very briefly in the Mrksic decision. This is -- I'll provide the reference. It's 30 July 2003, paragraph 13, and it's a decision on the Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party. And the Trial Chamber rejected, in that case, the Defence application to establish rules governing communication with witnesses, because they didn't want the Prosecution coming and interviewing their witnesses in a manner that had no regulation in that case.

The Appeals Chamber upheld the decision that there should be generally no, as such, protocol, but went on to say:

"... where, however, a person for any reason declines to be interviewed, the Prosecution does not have the power to compel that person [indiscernible] ..."

And paragraphs 3 -- 18, 19 of the decision, say exactly as we have here. There is no rule in the KSC rules which justifies this process. I mean, it's all to be inferred from the objectives, and particularly Rule 80. We say, fundamentally, Rule 80 supplies a witness-by-witness decision. But obviously that would be unworkable in practice, so we're hoping to find categories.

Now, clearly, any witness who does not wish to be interviewed by the Defence is entitled to refuse. Any who only wishes to be interviewed with Victims' Counsel is entitled to Victims' Counsel. And so forth. And --

JUDGE GUILLOU: Mr. Emmerson, please conclude this. Now more than 19 minutes.

MR. EMMERSON: [via videolink] Your Honour, that's not right. I started at 1447. And so my time expires at 1517, and it's now 1506.

JUDGE GUILLOU: It's 15 minutes per counsel, Mr. Emmerson.

MR. EMMERSON: [via videolink] Yes, isn't that right? Have I not got that correct? 47 -- 15. Okay, well, I'm very nearly where I was, at the end.

So the only other issues that I need to touch on, that's the question of legality as far as the basis for the provision is concerned. The basis for the protocol is concerned. That is your first question.

And your second question also I think I've addressed, which is whether or not it should apply to all witnesses.

The third question is addressed to the Prosecution. You've heard our submissions in relation to that.

Do the Defence teams intend to organise joint interviews? That has not been the subject of agreement between the Defence, but it does seem to me there is force in the submission that that should happen whenever it's possible, and only in exceptional circumstances should witnesses need to be interviewed more than once.

And, yes, as to adjusted proposals. Well, I say in -- as I've already submitted, they are lacking in proportionality and precision and unworkable, in fact, given the size of the case and the number of witnesses involved. That's why we don't -- we suggest that the ICTY

is a more suitable approach in the context of an adversarial procedure.

But we entirely understand that if Your Honour does consider a witness protocol to be necessary in relation to categories, because otherwise every single one would have to come to you, then it's a very significantly narrower category than the category the Prosecution is relying on.

And I think that's everything I have to say.

JUDGE GUILLOU: Thank you, Mr. Emmerson.

Mr. Prosecutor, did you want to say something? Really, very brief, because then we have to break for the interpreters before the two remaining Defence teams.

MR. FERDINANDUSSE: Thank you, Your Honour.

I would just like to note that I would like to make two further points in response to what has just been said. And I promise that I will be briefer than the time that has now been ceded to the Thaci and Veseli Defence teams, but I'll be happy to do that after all counsel has addressed the Court.

Thank you.

THE INTERPRETER: The interpreters kindly ask all the other microphones to be switched off. We think Mr. Emmerson's is still on, and his sleeve is rubbing against the microphone. That's why we are having difficulties.

Thank you.

JUDGE GUILLOU: I think we have solved the problem of the sound

that we could hear from time to time.

It's now nine past 4.00. We're going to break for 21 minutes, until 4.30. And at 4.30, we'll reconvene with the Selimi Defence team.

The hearing is adjourned.

--- Recess taken at 4.09 p.m.

--- On resuming at 4.33 p.m.

JUDGE GUILLOU: I will now give the floor to Mr. Tully. You have the floor, please.

MR. TULLY: I thank you, Your Honour.

I will attempt to be as brief as possible. I know that counsel for Mr. Thaci and for Mr. Veseli have covered a lot of the points quite comprehensively. And just before I begin, I would like to say that we support all of the points they've made so far. I'll attempt to add to them as much as I can, and I'll try to avoid any overlap.

I'll deal with this question by question.

So on question 1 regarding the specific legal basis for the proposals set forth in the SPO's positions, our view is that the most important rule that has been cited here is Rule 80, Your Honour. We are aware of the fact that in the first written submissions and in the second written submissions of the Prosecution, there is no direct invocation of Rule 80. It was referred to but it was never directly invoked, and this is noted by counsel for Mr. Thaci on Monday.

And, nevertheless, Your Honour, the language of all of these applications, including the submissions of the Prosecutor in court

today, show that this is very much an application, this protocol, that is grounded in the bones of Rule 80. And along with Rule 80, comes a requirement to meet the legal standards of such an application and, in our submission, the SPO has failed to do so.

So a brief note on the legal basis for protective measures, according to Rule 80, Your Honour. By their very nature, protective measures run the risk of curtailing the rights of the accused. For example, a delayed disclosure might hamper the right of the accused to prepare an effective Defence, or protections of anonymity run the risk of violating the right to a public hearing. So because of this risk, and this is something we ask you to bear in mind when making your decision, protective measures are exceptional. They are the exception to the rule. They should not be taken lightly. And most importantly, they should not improperly derogate the fair trial rights of the accused, which we submit to you is happening exactly here, and this will happen if the protocol is adopted.

So the balance between the rights of the accused and the witnesses - I'll give a headline as my colleague also did - we submitted it in our written filing of 15 December, is that in Article 40(2), regarding the conduct of proceedings, it's noted that there must be full respect for the rights of the accused and due regard for the rights of the witnesses; this is that when the two things come into conflict with each other, the balance must come out in favour of the accused. And this is reflected in Rule 80, which states, that "measures may be imposed provided the measures are

consistent with the rights of the accused."

Some of the things to bear in mind before I move onto the specific submissions of the Prosecution is that, first, the burden rests on the party seeking measures to justify in each case why they should be granted, that is, witness by witness.

Second, protective measures have set requirements. This is well set out in the jurisprudence of various different international criminal courts, but we don't have to go too far afield because they are set out also in the annex to the Gucati and Haradinaj decision from which the Prosecution more or less copies and pastes the proposed protocol. It's in the section immediately preceding the section where it is lifted from. And that says, if I can bend your ear for one second, Your Honour, that a party seeking protective measures "shall indicate with specificity the circumstances objectively justifying the issuance of those protective measures." So we distill this down to the SPO must specifically identify the risk to be alleviated in each case and why the proposed measures will alleviate that risk.

And finally, before I move onto the submissions of the SPO, the balance between the rights - and this is something that I refer to in regard to Article 40 and the wording in Rule 80 - the balance of the rights means that there is a well-established principle that any measures imposed must be the least restrictive necessary to provide the protection of victims or witnesses. And the latest iteration of that I've read is in Kamuhanda and a decision on appeal of the

decision rendered by a Single Judge dated the 6th of the tenth, 2017.

So, Your Honour, if I can move onto the submissions of the SPO in this regard. In our view, the SPO has not met the legal requirements of Rule 80. In the initial protocol, there was absolutely no attempt to justify the protective measures. Nothing. There was vague references to the dignity, the safety, the well-being of the witnesses. We understand this. This is something that's present in every one of these trials. Nobody is ignorant to these issues. But there was no attempt to clearly identify any witness at risk.

The Defence responses on 15 December, I believe to a tee, asked them to justify these risks. We pointed out the deficiencies in what they had just done. And no response. No reply. Nothing. We heard nothing for two and a half months until Your Honour ordered responses to the submissions of the Registry.

Now, on 14 February, we're introduced to this new phrase. This is the integrity of the evidence. This is something that's not contained in Rule 80, and it's not something that appeared in the 3rd of December filing. So why does it appear now?

Well, Your Honour, I'm referring to the allegations leveled against our colleagues, and these are selective quotes taken from the submissions of our colleagues. In our view, this is a late-stage attempt to justify the application, the Rule 80 application, by issuing baseless and unsubstantiated accusations against our colleagues, presumably to the Defence as a whole.

So, Your Honour, whatever else these accusations are - and the counsel who have gone before me have specifically addressed these, and I don't want to go too much into them - whatever they are, they certainly are not an objectively justified risk, nor do they fulfil any of the other legal requirements necessary for a protective measures application.

And so to finish on this point, the SPO has failed to satisfy the legal requirements of the Rule 80 application that they are attempting to make.

Now, I'll move on to question 2, Your Honour.

Our position on this largely ties into our first. We share the same concerns of both counsels for Mr. Thaci and counsels for Mr. Veseli when they called into question the absurdity of the proposition that these measures would apply to every single person on the witness list. I believe diplomats, generals, so on and so forth have been mentioned. We share those concerns and that's not the point of my submissions here today.

In line with our submissions on the first question, our submission is very simple: An individual objective risk assessment must be carried out and the measures justified on a case-by-case basis.

To be clear, Your Honour, we are not opposing any idea that a protective measure is brought in against a witness, and we resent any insinuation that we are. What we ask simply is that the rules and procedures that have been there for years that every other

prosecution in other courts and the Prosecution here has previously followed, that they do so here if they are making a Rule 80 application. They tell us they are making a Rule 80 application. They tell us they're making a Rule 80 application; we ask them to do it properly. That is all.

So, Your Honour -- oh, and finally on that point, again to remind you, if the measures are to be imposed, we ask that they are the least restrictive in order to ensure that specific protection to the victims.

Moving on to question 3, the position regarding the right to a fair trial. Again, not to echo myself too much, but we share the concerns of our colleagues, specifically, regarding the violation of the specific rights against self-crimination and the right to prepare a Defence. And we have nothing more substantial to add on this.

But a note on the violation of the equality of arms, Your Honour. This is something that is a difficult topic to deal with. In our view, to make it clear, our proposal is that -- our view is that this proposed protocol is a one-sided affair. We see these as measures that are being unilaterally sought against the interests of the Defence and this should concern you. This concerns us and we ask that it concerns you too.

Now, when we turn to the formulation of the equality of arms, my colleague Mr. Kehoe used a different formulation to the one I do, but I also support the formulation used there. But for my purposes, I believe the clearest statement of the principle is this, and it comes

from Cress [phoen]: "A person must have a reasonable opportunity to present a case under conditions which do not place them at a substantial disadvantage vis-à-vis their opponent." And that's all we ask here, Your Honour.

This is a simple formulation. But where the difficulty comes in is where we apply the equality of arms to the circumstances of the case because this is inherently a subjective application. How do we determine whether equality of arms has been breached in a given case? The circumstances of each one are different. The parties have different resources which doesn't necessarily lead to an inequality, but we are putting to you that there is in this case enough pointers that should be triggering alarm bells in your mind that this is a violation of this specific right.

One specific point that's important for assessing this violation, Your Honour, is that where a proposal only affects one side, it should trigger those alarm bells. And we have submitted in our written filings, and we resubmit here and we echo the submissions of our colleagues, that the parting neutral language that is used throughout this proposal is a smoke screen. The protocol targets the Defence almost exclusively. This can be discerned from looking at the context of any of the position of the defence in any criminal trial.

We ask you to bear in mind that the Defence has no obligation to call witnesses and the burden of proof is on the SPO. You've heard this already. Not to put too fine a point on it, but the Defence

needs to prove nothing; the Prosecution needs to prove everything. This is reflected in Rule 104(5), where it states the Defence "should it choose to present a case," and this indicates a discretionary nature of this choice. That is, if the Defence can put the Prosecution to proof on its case, which it has done so successfully in the past, and we ask that we have the same opportunity to do that again today -- excuse me, do it through these proceedings.

Now, obviously, the specifics of the provision regarding the videotape threaten the discretion not to call the case. I'll deal with them separately. But, Your Honour, even if a case is called by the Defence, there is never a parity in the number of witnesses internationally or domestically. The numbers are not even close, especially in this case. We are talking about 300-plus witnesses.

So we ask you now also to consider the stage of proceedings and the position the Defence is in now. Yes, it has been possible to carry out certain investigations in the past, but we are only now in receipt of the information that would provide the key to us to begin in earnest the investigations.

Our view is that when you are reading this protocol, whenever you read "calling party," realistically, this should be read as "SPO," and "opposing party" realistically should be read as "the Defence."

Now, Your Honour, the SPO response on 14 February 2022 effectively confirms this, and I'll offer four points in support of this.

First, we see the accusations against our colleagues as an attempt to ring-fence the entire witness list as the property of the SPO.

And, second, the unsubstantiated claim that "all witnesses face enormous and improper pressure to prove their patriotism by cooperating with the accused and distancing themselves from the SPO." Again, without evidence, without reference.

Third, the unsubstantiated references to alleged "risks to the integrity of the evidence simply by virtue of the Defence investigations being carried out."

And, Your Honour, finally, and this is where we believe the mask truly comes off, is the revised position in the latest round of submissions that, in fact, the most important part of the protocol is simply that the SPO is present in all interviews and this cannot be waived by the witness. To bring you back to the theme of my submissions, this has not objectively been justified along with the requirements of Rule 80.

And we ask you further to take into account two other matters before I move on.

The SPO has gone straight to seeking a judicial order in order to carve out all witnesses as theirs, and this is to ring-fence witnesses as their property. There is no need to repeat the already-provided submissions on the property of a witness.

And, second, as they are not following the established procedure of applying for protective measures and, instead, are appealing to

the discretionary power of the judge, should trigger more yet alarms in totem.

In conclusion on this point, these points in addition to those previously made in our written filings support the position that this a one-sided affair and that equality of arms is under threat by the proposed protocol.

Your Honour, if I can move to question 4. It's brief. And this is do the Defence teams intend to organise joint interviews.

We are always open to working with our colleagues. We would endeavour to do so at any point in the future, but we would like to point out that our position is that this must be done at the decision of the individual Defence teams and not forced upon us.

The simple matter is the logistics of the Defence team, the different stage in investigations that we are in, may prevent us from carrying out those joint interviews effectively. And a rule which would force us to do so may result in the lost opportunity to interview a witness. It also may be the case that there are different interests of the Defence teams in interviewing those witnesses.

Now, we are conscious of the fact that it has been raised that witnesses might have to submit to four interviews, but we would also point out that the consent of the witness has not been negated here. If the witness does not wish to appear for four interviews, then they can simply say so.

And number 5 is not directed at us.

And number 6 is the position of the Defence teams, Victims' Counsel, and Registry in relation to the adjusted proposals set forth in the SPO's response to the Registry's submissions.

Again, we support the submissions of our colleagues in this matter. I have brief comments. Regarding the obligatory presence of the SPO in witness interviews, our concern can be distilled as this: We are concerned that this would have a chilling effect on the witnesses who would appear for interview with us, whether these are interviews who may feel compelled to help the SPO, not be forthcoming -- specifically not to be forthcoming to the Defence with their evidence out of fear of the Prosecution, whether they are suspects -- people who have been interviewed as suspects previously, or those who have a desire to help one side over the other and withhold exculpatory evidence for any other reason. So the logic of the SPO submissions on this topic cuts both ways, Your Honour.

We have one final position -- one final submission to make regarding the videotaping of witness interviews, Your Honour.

I realise that this is not actually in the latest Registry submissions as a point. However, it is referred to, and it's referred to as appropriate and necessary.

So, Your Honour, to remind you here, this is not a proposition that witnesses are videotaped simply for transparency. This is not a simple record of the interview. The proposals are that they are videotaped -- the Defence investigations are videotaped, and then the party has the right to enter this into evidence.

So our obvious concern would be the revelation of Defence investigations and the lines of questioning that are carried out during these interviews, and we need to be free to carry out those investigations with fear that they might not hurt the interest -- excuse me, without fear that they might hurt the interest of the accused.

But specifically on this point, Your Honour, what we are interested in is finding out what is the connection between the protection of witnesses and the use of those videotapes in support of the Prosecution's case. Surely these two things are separate. The charges against the accused are leveled by the SPO. Why would they need their hands on these tapes in order to support that case? And, Your Honour, the elephant in the room on that submission is that the measure benefits the SPO immensely, and there is no tangible connection to the protection of witnesses.

Regarding the model adopted at the ICC. We support and endorse the position taken by our colleagues for Mr. Thaci.

Thank you, Your Honour.

JUDGE GUILLOU: Thank you, Mr. Tully. You mean that you support the fact that it's against the ECHR; correct?

MR. TULLY: Yes, Your Honour.

JUDGE GUILLOU: And on that specific note, it's with the same argument as developed by the Thaci Defence?

MR. TULLY: Yes, Your Honour.

JUDGE GUILLOU: And does it mean that basically their right

against self-incrimination is infringed when basically you have to disclose any material during the investigation phase; correct?

MR. TULLY: That is correct, Your Honour. Yes.

JUDGE GUILLOU: But, I mean, I will follow up on what I was saying earlier. You know that in most civil law systems, even when the Defence gets to interview any witness, this is before the investigating judge, and there is no privilege against self-crimination because then the Defence has to disclose it before the court, and the prosecution can be here at the same time.

MR. TULLY: Yes, Your Honour. We're aware of that. But our position is that by disclosing --

JUDGE GUILLOU: I'm not trying to trick anybody. I'm just saying that, I mean, if you say that this is a problem, then it means that it's a problem for a large number of European countries.

MR. TULLY: Well, Your Honour, I'm not -- it's a tricky situation. I'm not in the habit of trying to insult any other systems, but our view is, indeed, that this is a violation of the rights of the accused. I don't want to get too much further into it than that, but we see the disclosure of this information is a violation of the rights of the accused.

JUDGE GUILLOU: Thank you.

MR. TULLY: Thank you, Your Honour.

JUDGE GUILLOU: Let me now move to the last Defence team, Mr. Baiesu, please.

MR. BAIESU: Thank you, Your Honour.

We, the Krasniqi team, strongly supports and adopts the submissions made by the other Defence teams in opposing the protocol.

The key problem is that the Prosecution seeks to impose a blanket protocol on all the Prosecution witnesses without any attempt to establish at all or even that any of those witnesses assessed in their own circumstances actually need the protection of the protocol.

If an individual witness requires protections, let the Prosecution make an application. But the Court must avoid applying protective measures to all the witnesses in this case, many of whom, for instance, the international witnesses, have no need for such protection.

On question 1 from the agenda. Identifying the legal basis for the protocol is revealing for the following reason: Rule 80 might provide a basis for imposing protective measures for a particular witness where the necessity and proportionality of those measures is objectively established to their required standard. It does not and cannot provide the legal basis for the imposition of a blanket protocol applicable to all witnesses.

The text of Rule 80 makes it clear that any protective measures must be consistent with the rights of the accused, that the consent of the relevant witness should be sought, and that the protective measures have to be appropriate in the specific circumstances of the case.

As early as in the Framework Decision on Disclosure of Evidence and Related Matters, filing F99, the Court made it clear that

protective measures need to be assessed on a case-by-case basis. That assessment has been carried out on every application for protective measures.

The fundamental problem with this protocol is that it effectively circumvents any assessment of whether a particular witness needs a particular protection by seeking to impose a protocol on all witnesses regardless of any showing of the need for such measures, even, tellingly, in the Prosecution's latest submission, regardless of whether the witness actually wants the protection or not.

The second question, with your permission, Mr. Ellis is going to be making our submissions.

JUDGE GUILLOU: Thank you, Mr. Baiesu.

Mr. Ellis, please.

MR. ELLIS: [via videolink] Thank you, Your Honour.

May I start by saying this, and simply this: We fully understand and support the desire to protect the dignity and the privacy and the well-being of witnesses in this case. We're alert to the need not to retraumatise the victim witnesses, and with or without a protocol today, we have no intention of acting in a manner that will affect the dignity, privacy, and well-being of any witness in this case.

The best evidence in support of that is that we've been in possession of disclosure of witnesses names since the very first disclosure batches in December of last year, and we're aware of no

complaints against our activities in the many months that have passed.

Question 2 on the agenda item is an important one, in our submission, because whether this issue is looked at through the lens of Rule 80 of the rules or, indeed, more generally, through a human rights framework, proportionality is a critical question here. Protection to those witnesses who need it but not protection to every witness in circumstances where there is no showing of any objective need for the measures sought.

And it is the blanket nature of the protocol that the Prosecution seeks to impose that is the clearest evidence of its overreach, in our submission. Amongst the 300 or more witnesses on the Prosecution's list, there's a diversity of backgrounds, of positions, and in the content of the evidence that the witnesses could give, and many of those witnesses simply have no need of the proposed protocol.

The clearest example that all Defence teams have given, and I rely on again, is the example of the international witnesses on the list. We have here more than 30 who are senior political and military officials from international organisations, from states, from NGOs, expert witnesses. These are exactly the sort of witnesses that the Defence may wish to speak to. But what justification is there for imposing a protocol on contact with those witnesses?

Is it seriously being said that a high-ranking military officer is going to be afraid of speaking to the Defence, or seriously said

that an interview with the Defence would traumatise or affect the dignity and privacy of such witnesses? Clearly not, in our submission. And that applies to a significant number of the witnesses on the list.

In our submission, it's a clear example that the protocol cannot and should not be applied to every witness.

JUDGE GUILLOU: If I may, Mr. Ellis, as you were talking about the proportionality principle. Who appreciates, basically, the scope of the witness who should benefit from the protocol, according to you? Should we duplicate the list of witnesses who have already been granted protective measures, or do you think there should be another assessment, basically, based on the application of the principle of proportionality; and, if so, would it be on an individual basis? Meaning that for each witness, there should be a new appreciation by the competent Panel? Is it what you would envisage?

MR. ELLIS: [via videolink] Your Honour, thinking practically, I can only see two ways to do it.

One is for the Prosecution or, perhaps, Victims' Counsel to make a new application for what is effectively protective measures for those witnesses where is a justifiable need.

The only other approach that I can see is, perhaps, the one that agenda item 2 hinted at, which is to try and find a way of dividing the witnesses into categories. And that was, I think, the -- and I hope I've understood it, the submission made by Mr. Emmerson for Mr. Veseli, that one such obvious category might be victim witnesses.

But those are the only two ways that I can see.

And of the two, my preference would be for a new application to be made for specific witnesses based on their specific circumstances. Building on the work that's already been done, I suspect that's less onerous than it may initially appear.

The other example I was going to give Your Honour of witnesses who should not benefit from a protocol would be those witnesses -- including those witnesses drawn from former members of the KLA, including those people who have previously given evidence in public on multiple occasions, those witnesses who have expressed no concerns about their identity being known to the Defence and, indeed, whose identity we've had for many months, those witnesses who the Prosecution has interviewed as suspects. There are witnesses on the list, of course, who the Prosecution summonsed as suspects who attended with their own counsel and who declined to answer the Prosecution's questions in exercise of their rights.

If such witnesses are agreeable to and consent to meeting with the Defence, why should the Prosecution sit in on that interview? Plainly, their presence would have a chilling effect. And I did choose those words carefully when I said if those witnesses agreed to talk to the Defence because it bears emphasising that all of our work here is based on consent. I have no power to compel a witness to meet with me if they don't want to. If they do meet with me, I have no power to force them to answer questions. So the work of the Defence is inevitably based on consent.

And I do, in relation to the victim witnesses, agree with the submission that's been made; that where witnesses are represented by counsel, Article 16 of the Code of Conduct would come into play and contact must, therefore, be made as a matter of courtesy but also as a matter of obligation under the Code of Conduct with Mr. Laws before that contact can take place. But that's, of course, subject to the practical point that we would need to know who the victim witnesses are who he represents in order to facilitate that conduct -- that contact.

I am concerned about the submission made in the Prosecution's adjusted proposal that the Prosecution must always be present at an interview with one of the witnesses on its list, whether or not that witness actually wants them there. The logic of the submission in filing 693 seems to be that because there may be some witnesses who would feel compelled to accede to an interview without the Prosecution present, it follows that the Prosecution must be present for all interviews.

But what about those witnesses who when they say they're happy to be interviewed without the Prosecution present mean just that? They want the interview to take place without the Prosecution present. Ought not the protocol provide for that?

Your Honour, that's what I propose to say on agenda item 2. I believe agenda item 3, with an apology for jumping around, is with Mr. Baiesu.

JUDGE GUILLOU: Thank you, Mr. Ellis.

Mr. Baiesu, please.

MR. BAIESU: We fully support this agenda item about the fair trial rights. We fully support the submissions of the previous speakers on these issues.

Requiring the SPO to attend all interviews with the SPO witnesses is nothing less than a shortcut for the SPO granting -- for the SPO being granted access to the Defence lines of inquiry, documents, potentially incriminating evidence that the SPO would not normally have access to or have access to until later in the proceedings.

And as it was said today, the disclosure obligations in the rules are asymmetric. The Defence have a right not to disclose inculpatory evidence. The Defence do, by Rule 104(5), have to disclose the documents to the SPO no later than 15 days prior to the opening of the Defence case, and then only if they are intended to rely on this at trial.

On the next question, on agenda item 4. The Krasniqi Defence are open to the idea of joint interviews. However, there are likely to be differing investigative priorities and interests among the Defence teams, which means that the number of joint interviews is likely to be relatively limited.

I'm going to jump to agenda item 6, and later my colleagues will make the submissions on the other agenda items to avoid switching between speakers.

On agenda 6, on the adjusted proposals -- adjusted proposal.

Our fundamental objection to the SPO-proposed protocol is not addressed in any way by the adjusted proposals. The core problem with the proposed protocol is it applies in a blanket way to all the witnesses on the SPO list without any distinction between those who actually need the protected -- need to be protected and those who do not, and without requiring the SPO to show that a particular witness needs and desires protection. Until that fundamental issue is addressed, any drafting changes will be insufficient to protect the fair rights of the accused.

Finally, we disagree strongly with the SPO's revised approach with demands its presence in all interviews even if the witness does not want them to be there. If a witness has something they wish to share with the Defence and they do not want the SPO to be there, then the SPO presence has a chilling effect on the investigation -- on the witness himself but also on the investigation.

Suppose a witness wants to talk to the Defence about the manner in which the SPO conducted the interview or prepared the statements, and it's obvious that the witness will not talk freely in the presence of the SPO.

I think now I will -- with your permission, I will let Mr. Ellis to cover the other agenda points over which I jumped.

JUDGE GUILLOU: Thank you, Mr. Baiesu.

Mr. Ellis, please. And I think we're close to the 15 minutes, so quickly. Thank you.

MR. ELLIS: [via videolink] In that case, Your Honour, I will

pass swiftly over agenda item 5, which I think was primarily to the --

JUDGE GUILLOU: Mr. Ellis, sorry, we have an issue with your connection.

MR. ELLIS: [via videolink] I move to number 7.

JUDGE GUILLOU: Sorry, we have an issue with your connection. So if you could repeat what you just said, and hopefully the connection will be a bit better.

MR. ELLIS: [via videolink] I apologise, Your Honour. Is it -- is it clear now?

JUDGE GUILLOU: Unfortunately, it's not clear. So I suggest that if you don't mind, you just switch on your microphone and not the video because that might help.

MR. ELLIS: [via videolink] Are you able to [indiscernible] ...

JUDGE GUILLOU: Unfortunately, we don't hear you now. And I think the image is frozen on Zoom.

MR. ELLIS: [via videolink] I'm trying to turn the video off. Are you able to hear me?

JUDGE GUILLOU: Now I think we're able to hear you.

MR. ELLIS: [via videolink] Your Honour, I was -- I apologise for the issue. I was merely beginning by saying that agenda item 5 is primarily directed to the Registry and therefore one I can pass over quickly.

I did wish to say something about agenda item 7, though, in the time I have left.

JUDGE GUILLOU: Please proceed.

MR. ELLIS: [via videolink] Thank you, Your Honour.

Your Honour, our position is in general that there is a danger in applying models derived from other courts directly to the KSC since inevitably different courts have their own standpoint based on their own statutes, their own rules, and the circumstances of the cases before them.

In particular, in relation to the ICC, of course, its statute and its rules are materially different from those before the KSC. The ICC, by its nature, has to be able to operate in all countries, at times regardless of whether that country is cooperating with the court or not and at times regardless of whether the conflict is ongoing in that situation or not.

The KSC operates primarily with regard to Kosovo, is established within the legal system of Kosovo so that it benefits from the enforcement powers, for example, of the Kosovo police, and it's concerned with a conflict that ended some 20 years ago. It's also worth noting that the size of this case distinguishes it from anything that the ICC has previously tackled.

The case of Bemba, for instance, concerned around 42 prosecution witnesses who gave oral evidence; Gbagbo, 82 prosecution witnesses giving oral evidence. But none of these ever had to address a case with 265 witnesses expected to give oral evidence. And that must [indiscernible] of applying the protocol because a procedure that works for 80 witnesses with two accused is not necessarily going to

work with three times as many witnesses and four accused.

The practice of other tribunals is not identical on this issue. So far as I'm aware, there was no prescriptive protocol at this time at the Special Tribunal for Lebanon. At the ICTY, which, of course, is the closest to the jurisdiction of the KSC in terms of the temporal and geographical scope, the jurisprudence of that court, including the cases that the Prosecution has cited, was by and large to recognise the general rights to interview witnesses of another party but to preserve the possibility for the calling party to seek protective measures if they were needed.

I would note an example of that might be the Karadzic decision of 8 November 2012, which I note will be well known to the Prosecution because Mr. Tieger was counsel for the prosecution in that case. The decision concerned the interview of defence witnesses. The prosecution's position in that case was that there was no propriety interest in a witness and so it should be able to interview the witnesses, and the court strongly endorsed that the parties were free to contact witnesses of another party.

And that, in my submission, is exactly what we're proposing here. There should be a general right to interview the witnesses of another party subject, of course, to the possibility to seek protective measures where they are needed and where, in accordance with the regime for protective measures, those measures can objectively be shown to be justified.

I think that leaves item 8, Your Honour. We will gladly enter

into *inter partes* discussions. Although, if the Prosecution's position remains that the protocol must apply to all witnesses, it may be that the discussions don't get very far.

JUDGE GUILLOU: Thank you, Mr. Ellis.

Let me now move to the Registry.

Mr. Nilsson, if you can address the various questions in the Scheduling Order. And also if you want to update your previous submissions after the latest SPO response, especially on the impact for the Registry on the budget and the organisation.

Mr. Nilsson, you have the floor.

MR. NILSSON: Thank you, Your Honour.

Yes, I was going to focus on questions 5 and 6, which is directed to the Registry. In fact, we have no submissions on the other questions.

Starting with the fifth question, which concerns whether the Registry can provide a more specific information on the ramification of its proposed involvement in light of the responses given to the submissions. With regard to this question, I'm leaving aside the updated or the revised protocol proposed by the Prosecution. I will come back to that.

So we have, indeed, received some indications from at least some of the Defence teams with regard to the number of witnesses to be interviewed. We have also received certain indications with regard to other questions indicated in our filings, so these questions concerning the number of interviews, where the interviews will take

place, length of interviews, and so on.

With regard to these questions, the Defence has not been able to provide that much specificity, and that's, I would say, understandable. It's difficult to answer these questions in abstract. We are, nevertheless, grateful for the indication, because they have made it a little bit more concrete on what we are dealing with here, both for us and I think for you as well, Your Honour.

What I can say from the perspective of the Registry, we are in need of fairly precise information in order to both properly plan for these interviews and to manage our -- manage the existing resources but also to seek additional resources if that should be needed. And we, unfortunately, do not have that precise information right now.

Therefore, should the Registry be instructed to assist in the manner foreseen in the original protocol, we would have to get together with the parties and discuss and consult on how that best can be carried out, and then from there we would create a plan like we would do any mission plan. And I think it's only in that concrete context that this feasibility assessment will be -- could be made. So the question is not so much whether we can assist but more how we can assist.

So I think that's, unfortunately, as far as I can go with the information we have before us today.

Moving to question 6. So here we note that the revised proposal foresees a much more limited role of the Registry. Essentially, the revised protocol describes an arrangement according to which the

Registry might be involved in some interviews in exceptional circumstances and only after a decision by yourself or by a Panel. And the, I would say, exact scope and role of the Registry in those circumstances, that would then be the subject of a request by the calling party or by any party and then ultimately a decision.

Very short. In such an arrangement as foreseen in the revised protocol, that could and certainly would be accommodated by the Registry. I think the only thing we would ask to consider in that respect is to provide for a proper period of notice to be built into such an arrangement to ensure that we would be in a position to provide effective and timely services. I think that's as far as I can go with that question.

With regard to maybe the last question that you have asked, I am not sure whether we are in the situation where we would instruct the parties to have *inter partes* discussions. Should that happen, the Registry, of course, stands ready to participate or at least be available for consultations if that should be needed, acknowledging that it might be a limited role for us in that context.

Thank you, Your Honour.

JUDGE GUILLOU: Thank you, Mr. Nilsson.

Let me now turn to the Prosecution. Do you wish --

MR. EMMERSON: [via videolink] Your Honour, just before the Prosecutor responds, would you hear from me just for two minutes?

JUDGE GUILLOU: I will first give the floor to the Prosecution and then we will do another round and you will be able to present

your views then.

MR. EMMERSON: [via videolink] All right. Very well.

JUDGE GUILLOU: Mr. Prosecutor, please. And, again, only on what has been said by the Defence. No new argument. We are wrapping up now.

MR. FERDINANDUSSE: Thank you, Your Honour.

First, two brief legal points in response to the Defence. Article 21(iii) of the Rome Statute requires that the interpretation and application of all ICC law be consistent with internationally recognised human rights, and thus suggesting that the ICC and the right to a fair trial are two separate worlds is inaccurate.

Second, claims the disclosure of witness Defence statements would violate any aspect of the right to a fair trial have been consistently rejected since the Tadic appeal judgement of 15 July 1999. And I refer to paragraphs 323 to 327.

Then a more elaborate point. Several Defence teams have made submissions that there is supposedly no climate of intimidation in Kosovo, and nothing could be further from the truth. There has been significant evidence offered on this specific point in connection with detention. There is a history of cases in Kosovo and at the ICTY where this occurred, and this court has been established with this well-known history in mind.

In fact, the situation is so grave that the SPO has been unable to obtain the cooperation of an international expert and other international witnesses expressly because of security concerns

connected to that climate in Kosovo. And those are international witnesses.

We have previously provided the Court specific examples of such security concerns and intimidation felt by international witnesses. I refer to filing F5, Annex 1, paragraphs 6 and 7. And for many of the other international witnesses, the SPO itself has had to adhere to strict clearances and other requirements in order to be able to speak to the witnesses at all.

For witnesses in Kosovo, those concerns apply much stronger. There is a reality of rules and regulations in this courtroom, and there is also a reality in Kosovo. And that reality is one of enormous pressure for witnesses who have no real choice when they are approached by the Defence and are asked to agree to what the Defence wants.

The Thaci Defence team is actively fostering this climate by publicly claiming that this is a case against the KLA. They know that is not true. The SPO has pointed out before that there are no cases against the KLA before this court. The Thaci Defence deliberately continues to distort the truth about the nature of this case to increase pressure on witnesses, and it openly emphasises that it is planning to keep doing exactly that.

Now, let's be clear. The proposed protocol is not meant to solely guard against misconduct on the part of the Defence. The protocol aims to provide at least a degree of protection to all parties in their interactions and to protect the integrity of the

evidence and the expeditiousness of the proceedings.

But we also need to acknowledge reality here. We see that reality in Kosovo and we see it in this courtroom, and part of that reality, for example, is the publication in *Bota Sot*, on the 3rd of November, 2021. And that report includes that several former members of Kosovar intelligence services are now rendering their services to the Thaci Defence team. And one of the men named in that coverage is a former KIA official who is currently being prosecuted in Kosovo for abuse of office, and he is also accused in the press of being involved both in KIA attempts to obtain confidential information from the Kosovo president's office and of organising false witness testimony by KIA agents in a trial in Kosovo.

Obviously, we do not know the full story behind this reporting. The SPO does not know who is working directly or indirectly for the Thaci team. We do know that the code of conduct only applies to counsel and not to their team more generally, so that code is not helpful when it comes to individuals engaged as investigators by the Defence. And we do know that this court can't afford to ignore the past and the very real and specific information in the present but needs to act on it.

Thank you, Your Honour.

JUDGE GUILLOU: Thank you, Mr. Prosecutor.

Before I give the floor to the Defence, let me just ask Mr. Laws.

Mr. Laws, do you have anything you would like to add? And maybe

just one follow-up question on my side is do you have any position on the updated SPO proposal that proposed that the Registry has a more limited role compared to the initial proposal? Thank you.

MR. LAWS: Your Honour, I thought I had dealt with that in my submissions earlier today. But if I didn't, then may I say, no, we don't have any objection to the more limited role for the Registry subject to, as we suggested, certain exceptional circumstances.

Just very briefly this, Your Honour: The ICC protocol plainly takes what might be called a broad-brush approach. It applies its rules to all the witnesses. And the reason for that is that there are, as the SPO, we respectfully submit, have properly stressed, a number of different factors making up that protocol that commend it as a sensible way to manage large numbers of witnesses or small numbers of witnesses; for example, the fact that it's got to be video-recorded.

So it's sensible for there to be a solution that accommodates all the different categories of witnesses. And when we look at the alternative, we can see why the ICC would want to stick with their protocol and apply it equally to all comers.

What we're going to end up with in the alternative, as proposed by Mr. Ellis, for example, is eventually 150 written applications, justifying each individual time that a request is made for an interview, justifying the presence of the SPO, or justifying the video recording. That will never end. That will be a recipe for utter stagnation because it will be 150 applications followed by 150

responses, 150 replies, 150 rulings, 150 appeals, and we'll get to a stage where we've had just little whispers of it already, where evidence will need to be called to substantiate what's being said about each individual.

This is, we respectfully submit, a path which is going to lead to difficulty. I'm not going to put it any higher than that. And we, on behalf of the participating victims, do have an interest in witnesses beyond those that we directly represent. And I confined myself to a specific part of the agenda for today earlier when I said -- made the remark that Mr. Emmerson alighted upon: We do have an interest on behalf of the victims in relation to the viability of these proceedings because the participating victims have an interest in the proceedings as a whole.

We respectfully submit that what we're looking at here is a proposal that's coming which is going to end in these proceedings being non-viable.

JUDGE GUILLOU: Thank you, Mr. Laws.

Mr. Kehoe, please.

MR. KEHOE: Yes, Your Honour. Just briefly, and if I might, time permitting, just one last comment from Mr. Misetic if need be.

I trust Your Honour sees what the Prosecution is trying to do with elevating some type of climate of intimidation that he's talking about with no proof. They did the same thing with the Kosovo police when we came to the detention application. They put forth a litany of what I can only describe as nonsense without standing behind it or

showing it to the light of day concerning that.

They're doing the same thing here, and they're asking this Court to give them what they want because they're saying, "Oh, there is some climate of intimidation." Who has been intimidated? They have 326 witnesses. They have 157 protected witnesses. Who of the 157 protected witnesses have been intimidated? And how about the rest whose names have been listed that, frankly, Mr. McCloskey has been interviewing? Have they been intimidated? Is there any proof whatsoever?

But they expect you to cave to this nonsense by just putting it before Your Honour as if to say, "Oh, I'm going to tell you about this parade of horribles. You have to give us what we want and we have to appear in every interview." Even with their adjustments, the one thing that they say is "we have to appear before every interview conducted by the Defence and" - and - "the witness can't waive it." It's a remarkable slay of hand that is put forth under the guise of there is this climate of intimation.

Some international expert who somehow couldn't be retained by the SPO in order to present evidence, was he threatened? Was he somehow advised not to do it or personal harm would come to either him or some loved one? Of course not.

The problem, Judge, is that what they're putting before Your Honour is this climate of fear for their own purposes to the detriment of my client and the other accused who are entitled to talk to these witnesses and are entitled to talk to these witnesses

outside the presence of the SPO who, trust me, Judge, will bring their own fear and intimidation.

Take example the individual who was called and told he was going to be a suspect, and he hasn't been indicted but he was advised he going to be -- he was a suspect. And mind you, Judge, there are scores of such witnesses. Were they intimidated by the Prosecution? Of course they were. They didn't want to get charged. They didn't want to get indicted. Was the Defence part of any of those interviews or we had asked to come in for these suspect interviews? Of course not. Were we invited in for any of these witnesses? No.

And this whole idea advanced by the Prosecution that these witnesses have no choice, I read a transcript yesterday - yesterday - where a witness -- and I can tell you who the witness was in closed session if need be, where the witness refused to testify and invoked his rights.

Why wasn't that person intimidated? Why wasn't that person so taken by this climate of intimidation that he spoke to the Prosecution? He invoked his rights against self-incrimination. Mind you, he was brought in for a suspect interview.

So far as no real choice - no real choice - the Prosecution should go through their hundreds of witnesses, not only the ones they have listed but the ones they haven't turned over to us, and set forth all of those witnesses who, for whatever reason, declined to testify, declined to give a statement, on matters that have nothing to do with President Thaci and the accused.

They are trying to instill this Court with fear - with fear - based on nothing. This indictment has been pending since November of 2020, and the Prosecution has come forth with no witness in their hundreds of witnesses that have been intimidated. Certainly, he cannot cast any spectre on anybody in this room.

Nevertheless - nevertheless - they reach down, they reach down and throw the fear card before the Court and say, "You have to engage in this, Judge," and they want to do it to the detriment of the rights of these accused.

Other courts have come up with protocols like this, Judge. Nothing remotely comes close to this. Nothing remotely comes close to a situation where an interview is conducted in the presence of the SPO, it is taped, and then they get to use that in evidence in their case in-chief.

How that is not a violation of Rule 104(5), it's difficult to fathom. We can talk about other protocols, ICC, ICTY, ICTR, et cetera, but we have to be guided by the rules that the KSC has put before us. And 104(5) is the rule that we have to follow.

So under the entire -- engulfing the entire scope of what the Prosecution wants to do is, as I started, they want control. They want control of how the Defence does their investigation, they want control on who says what and asks what to witnesses, they want to know about exculpatory information coming from these witnesses, that the Defence has the authority to develop. They want control of all of that - let's keep in mind that they have 157 protected witnesses

and 103 anonymous witnesses - in order to take control of this entire proceeding away from Your Honour.

Now putting aside what they have put on the table, let us talk about the practicalities of what they're saying. They have 326 witnesses. I just heard from Mr. Ellis that he heard the number of 265 being called. I would tell you, Judge, that the interviews of those individuals, of those remaining witnesses will be in excess of 100. I don't know where it's going to be, between 100 and 200, I can't tell you at this point, Judge, with all due respect. But it's over 100 witnesses.

100 witnesses to coordinate and bring before and under the regime that they have to be filmed and the SPO is there and getting all of these schedules together. This trial is not going to be tried in 2022, 2023, or 2024. The pure, pure undertaking of what the SPO has put on the table is completely unmanageable. And nobody -- or certainly not the SPO has infused that consideration into what they're proposing that this Court should set forth in a protocol.

Now, as my colleagues have mentioned, if a particular witness is a particular frail person that is significantly damaged emotionally and mentally, again, nobody in this court is interested in damaging anybody. They want to do what's necessary to protect their respective clients, but they don't want to bring harm, ill-will, and any suffering upon anybody else. But, again, as my colleagues have mentioned, there has to be a balance. Who are those witnesses? Tell us who those witnesses are. Tell us what the particular problem is,

and we can work with that problem. But we don't have that. What we have is a broad blanket, every witness, including retired diplomats in a variety of other --

JUDGE GUILLOU: Please conclude, Mr. Kehoe. You've already --

MR. KEHOE: [Overlapping speakers] ... yes, Your Honour.

JUDGE GUILLOU: -- explained that several times today.

MR. KEHOE: [Overlapping speakers] ... so, suffice it to say -- yes. Without this -- suffice it to say, the issue of time is a significant one.

And if Mr. Misetic can just briefly comment, and we'll finish. Thank you.

JUDGE GUILLOU: Thank you, Mr. Kehoe.

Very briefly, Mr. Misetic. You have one minute.

MR. MISETIC: [via videolink] I'll do my best.

Mr. President, let me just briefly respond to the Prosecution. You have not heard a response to our submission that for 13 months they allowed all Defences to contact their witnesses without any protocol being requested. So the issue comes up if there's such threat from the Defence counsel, why did they stay quiet for 13 months?

We raised it in our written pleadings, we've raised it in our submissions this morning, they stayed quiet. Because I think the facts are what they are.

We've mentioned this morning we are accredited counsel through a vigorous process. None of us have, as far as I know, with respect to

any Defence team, any prior verifiable interference with witnesses or tampering with evidence. Anything of that sort. And there's been nothing since we've been accredited in the case. No allegation by the Prosecution that any witness has come forward with any complaint about contact from the Defence.

So we have that factual record. And in response now, in rebuttal, for the first time, I would say improperly, there is an allegation made directly that the Thaci Defence is, first, putting pressure on witnesses and is saying that it will continue to do so. You can read our submission. I'm sure you have, Your Honour. We've made no such claim. As a matter of fact, we've said consistently the contrary.

I'm surprised that the Prosecutor is not familiar with the Code of Professional Conduct, because you were made a submission now that the Code of Professional Conduct only applies to counsel. And I would just refer you to Article 34 in the Code of Professional Conduct which imposes supervisory liability on counsel and co-counsel for all those over whom they have direct supervision.

There's a -- to my, frankly, shock, the Prosecutor comes into court in the last submission to quote what is apparently a tabloid in Kosovo to say that some person is working for the Thaci Defence, raised for the first time not in written submissions, not in first submissions, but in the last round, and then concludes by saying the SPO, of course, doesn't know whether any of this is true. We leave it to you to assess, and we think it should reflect on the

credibility of counsel to make such claims, which are very serious allegations, and then say we have no ability to actually verify whether anything we've said is true.

We submit to you, Your Honour, it's not true. And I'm frankly shocked by how these submissions have regressed to this point.

And, finally, the last point, and I think the most substantive point here, is going again to the European Convention. It is not our position that we are calling into question other judicial systems in other European countries. Our point is that in a system such as this, where there is an adversarial system, where the defence was not allowed to participate in the investigative stage, where other systems would allow the defence to participate, particularly Kosovo, which is the system we're in, we would have been, under the Code of Criminal Procedure, allowed to participate in the investigative phase. We weren't. It was to our exclusion.

We're now in a different system, and in this system we would again rely on the European Convention to say we should also have the right to investigate without -- which we didn't have in the pre-trial -- in the investigative phase. We should have the right to investigate without having to potentially sacrifice the right against self-incrimination. And on this point, and we'd be happy to brief it further on the implications for the European Convention -- let me just direct your attention to one case of the ECHR, which is the case of Sander v. The United Kingdom. It says:

"The right not to incriminate oneself, in particular,

presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."

And this is a right that is closely linked to the presumption of innocence in Article 6(2).

And we would rely on that and other cases, if you want additional written submissions on this point.

And with respect to the issue of whether the KLA is implicated or not, we leave it to you but we would just direct you to paragraph 35 of the indictment and let you draw your own conclusions on whether our own positions are unreasonable on this point.

Thank you, Your Honour.

JUDGE GUILLOU: Thank you, Mr. Misetic.

Mr. Emmerson, please.

MR. EMMERSON: [via videolink] Your Honour, can I deal with that first point, first of all.

As I'm sure Your Honour will appreciate, and in my case, as one speaking as counsel who has litigated in front of the ECHR probably more than any other over the years, the ECHR views each case individually. It doesn't make categorical statements about what is and isn't fair in general terms. It may be an adversarial process, it may be an inquisitorial process, but the court will look in granular detail at how that process is applied in the individual case.

So you can have a situation where there is an infringement to some extent of the rights of the defence, but it's kept as narrow as possible and is safeguarded by alternative safeguards. And in those circumstances, what might appear to be the start of an unfair process can become fair by the way in which it's managed. In other words, putting it bluntly, there is a world of difference between an excessive interference into the rights of the defence and one which is proportionate.

And like Mr. Laws, we are deeply concerned about the viability of these proceedings at all if this protocol is adopted as it has been presented. We are -- it is impossible for the case to be ready at a reasonable time if that additional liability is imposed. And in practical terms, that directly impacts our client, because the longer the pre-trial period is required to take, they are in custody for the purposes of this, and we have to assume they will remain in custody.

So this is all a process which, if applied excessively and indiscriminately, as the Prosecution ask you to, will have the direct effect of prolonging their pre-trial incarceration - as men presumed innocent - by at least a year. I mean, that's a rough estimate, but it's obvious.

So that's a good start for why we need to look for a proportionate response, and I wanted, having heard the submissions of all parties, to make a proposal for your consideration. It seems, with respect, to those who perhaps disagree on the Defence side, that if you have a witness who is protected by your order, and those

protections remain in place. In other words, we are not past the 30-day pre-trial or the 30-day pre-testimony situation, then it seems to me -- and I don't wish to be categorical, but this is how it seems to me, that those individuals ought to be subject or could be subject to the protocol's requirements without infringing the rights of the accused because the rights of the accused are already, to some extent, restricted in relation to those witnesses. And one has to assume this. I don't know whether it's true or not. Perhaps the Prosecution could confirm. That those witnesses, when asked, indicated that they wanted this protection. In other words, it wasn't just the Prosecution making decisions for them. It was an application made after if not a request then at least an agreement from the witness. If not, then we have a real problem.

But assuming that's the case, then those witnesses, it seems to me, it would be very difficult to interview them while those protective measures were in place without infringing the protective measures, to put it bluntly, because one wouldn't know what questions one could legitimately ask and what questions one couldn't. And in the end, then Prosecution would be the referee of the conversation that was taking place, and that can't be right.

So it seems to me that the protection could apply in those circumstances without significantly interfering.

The second category is victim witnesses who are not the subject of protective measures, so these are people who have not requested any protection for their identity. Now, it seems to me that that

category could be dealt with by notification to Mr. Laws, because he represents them all, and by a guarantee that all interviews are conducted by counsel subject to the Code of Conduct, rather than by investigators, as well as the requirement from counsel to explain to the person to be interviewed that they have the right to discuss their situation with Mr. Laws and he has the right to make representations to the tribunal if he thinks, on discussing it with the individual person concerned, who, after all, hasn't requested protective measures up to now, that it's necessary.

It's difficult to see why it would be necessary if a witness has not sought protective measures, but, yes, contrary to what Mr. Laws says is that will result in 150 applications that he's got to draft, that's not [indiscernible] because, in reality, if a witness hasn't asked for protective measures, it will be the exceptional circumstances in which it's appropriate to enforce the protocol because there would have to be something that's changed since the time that the protective measures discussion took place with them.

As for all other witnesses, it's simply no justification for applying the protocol to them. On the other hand, it does seem appropriate that counsel conducting the interview should explain to them that if the witness objects or has concerns they are entitled to contact the Prosecution. At which point, if justified, having discussed it with the witness, the Prosecution will make a suitable application for the matter to be dealt with under the protocol.

So you have there what arguably would be considered a

proportionate and staged approach which enables the core of the Defence rights to remain intact. It's not exactly -- it's not excessive, overbroad and categorical for every witness, which is ridiculous, and obviously you can't justify, and it focuses core attention on the witnesses we know have concerns, applying it automatically to those witnesses, and it enables it to be applied by application of Mr. Laws or the Prosecution if having notified the witness of the right concerned to consult the person -- Mr. Laws or the Prosecution. After all, Mr. Laws would already know that the witness has been contacted and may well have spoken to them before we do.

It should be kept clear, and it may well be that some of Mr. Laws's witnesses have absolutely no objection whatsoever to being interviewed by the Defence. They may well want to be. It's simply a question of how the situation is put in a proportionate way.

So that's my first --

JUDGE GUILLOU: Mr. Emmerson, your microphone is off.

MR. EMMERSON: [via videolink] [Microphone not activated].

I don't know how that happened.

The second submission relates brief -- and these are brief submissions. To the -- the suggestion of there being an atmosphere of intimidation in Kosovo.

I'm not going to dispute at all that there have been numerous instances in which -- in Kosovo where witnesses were either intimidated or didn't give evidence or, for one reason or another,

failed to testify or testify in accordance with their statements. Almost all of them go back to the immediate post-war period or the years following, and it's absurd to suggest that the passage of time since the conflict is irrelevant.

Kosovo has moved on. It's governed by a new political party, and the situation is not one where there is -- where one can simply transpose what happened in 2006 to what is happening on the ground now. That's the first point.

The second point is that there were numerous witnesses - for example, in the Haradinaj trial, which is cited by the Prosecution - who were called and gave a different account. But that's because there were numerous witnesses who admitted that they had given a false account in their refugee claim when they claimed, for example, refugee status in another European state, and that -- they had been held for that up until trial. In other words, they were telling lies in order to get refugee status and then were not in a position where they wanted to repeat those lies on oath in a court.

And there were a number of witnesses who were reluctant and gave evidence and turned out to be people who had been put up to saying what they had said by the Serbian intelligence services. In other words, their first contact with law enforcement had been with Serbian intelligence services, and they had given false accounts in that process. There were numerous witnesses who gave that. One of whom, indeed, admitted in his testimony that he had been asked to come and lie to the ICTY in a very serious matter.

JUDGE GUILLOU: Mr. Emmerson, please conclude, because we have ten minutes left for all the other Defence teams, please.

MR. EMMERSON: [via videolink] That's fine. I will conclude on that.

I'm just trying to say that's a much more nuanced position than is being presented to you by the Prosecution. And the two witnesses that were referred to in the Haradinaj Appeals Chamber judgement as not having to testify did testify at the retrial and, of course, all accused were entirely acquitted. So -- all apart from one who got a minor conviction, but not relating to that witnesses's evidence, either of those witnesses' evidence.

That's the position in relation to witness intimidation.

I want to touch on the criticism of Mr. Thaci's counsel and also of me for suggesting that in public that this is a case directed against the KLA rather than against these four accused. And I'm not going to say very much about it, other than to say this.

The case against Mr. Veseli does, as the Prosecution has accepted in its pre-trial brief, depend essentially on the fact that he was part of the KLA leadership dealing with intelligence. There is no other evidence against him. There is no involvement in any specific crime, as the Prosecution has acknowledged. They're simply trying to say that because of the role that he had he must be responsible for everything that was done by anyone wearing a KLA uniform at any time in any case in Kosovo between beginning of the relevant indictment period and the end.

Now, that is saying we are attacking the KLA as a joint criminal enterprise, and this man --

MR. FERDINANDUSSE: Point of order, Your Honour.

JUDGE GUILLOU: Please, Mr. Ferdinandusse, I will give you the floor.

But, Mr. Emmerson, please conclude in the next 20 seconds.

MR. EMMERSON: [via videolink] Last point then.

Counsel for the Prosecution seems to backpedal to some extent on his reliance on the risk of Defence counsel committing a crime in conducting interviews. He seemed to backpedal on that a little bit.

That submission, Your Honour, was unprofessional, professionally immature, and undermines the credibility of not only counsel but the Prosecution as a whole. The whole charade is nonsense. I would ask him to formally withdraw that outrageous and defamatory allegation and to apologise for it, failing which we will consider whether to make a complaint about his conduct.

JUDGE GUILLOU: Mr. Prosecutor, very briefly. And only on what has just been said, because we need to wrap up, and I still need to give the floor to two Defence teams, and we have nine minutes.

MR. FERDINANDUSSE: Yes, Your Honour.

Counsel has just mischaracterised both the Haradinaj case and the indictment and pre-trial brief of the SPO. It's unprofessional. It is dishonest. And he should stop doing it. Everybody can read those judgements. Everybody can read the indictment and the pre-trial brief. And there is no use trying to change up and down

and down and up. It's simply dishonest and it needs to stop.

Thank you.

MR. EMMERSON: [via videolink] Please.

JUDGE GUILLOU: Mr. Tully, please.

MR. TULLY: Thank you, Your Honour. Very briefly.

We didn't hear anything in the response from the Prosecution which contradicted our submissions.

We would note that if the information contained in the response is, indeed, accurate, that there are witnesses who face a risk, we simply go back to our same submissions, that Rule 80 has parameters, they must be met, and identify the witnesses at risk on a case-by-case basis, show us the circumstances of the risk, indicate them with specificity that objectively justify those measures. And if it is decided that the measures should be imposed, then the least restrictive measures should be applied to negate that specific risk.

That's all, Your Honour. Thank you.

JUDGE GUILLOU: Thank you, Mr. Tully.

Mr. Baiesu, please.

MR. BAIESU: With your permission, Mr. Ellis is going to respond.

JUDGE GUILLOU: Thank you, Mr. Baiesu.

Mr. Ellis, please.

MR. ELLIS: [via videolink] Thank you, Your Honour. I see the video is holding up for the time being, but I'll be brief in any event.

Just two points, Your Honour. The first this is. We asked for as justification for imposing a protocol on international witnesses. As I heard the response from the Prosecution, it was to look at Filing 5, Annex 1, paragraphs 5, 6, and 7. Well, I've done that. Paragraphs 5 and 6 are general assertions of the type we've heard orally today. Paragraph 7 relates to one specific international witness who appears to be somebody at a junior level as compared to these senior military officers and diplomats referred to in the Defence submissions and appears to be an individual who had family ties to Kosovo.

That is clearly not a good source of evidence justifying imposing a protocol on all the international witnesses in this case.

Secondly, coming back to Mr. Laws' submission. No, of course, I'm not asking for 150 separate applications to be made. That's not the way protective measures have worked in this case. We've got some 100 witnesses still subject to delayed disclosure. We didn't have 100 applications made individually for each of them.

If Your Honour is with me that this is a question of protective measures, then the Prosecution and, indeed, Victims' Counsel could be given a time limit to make one compendium application dealing with those witnesses who actually need the protection of a protocol. If Your Honour thinks even that would be disproportionately intensive, then I commend the nuanced position that Mr. Emmerson advanced in relation to categorising witnesses.

But what I do emphasise should be avoided. It is just imposing

a one-size-fits-all approach, a protocol on all witnesses when that clearly is not justified.

JUDGE GUILLOU: Thank you, Mr. Ellis.

This concludes today's hearing. I thank the parties and the participants for their attendance today. And I remind everyone that the next Status Conference has been scheduled for Thursday, 24 March, at 1430 Hague time.

I also wish to thank the interpreters, as usual, stenographer, security personnel, and audio-visual technicians for their assistance.

The hearing is adjourned.

--- Whereupon the hearing adjourned at 5.55 p.m.