In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
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Thaçi Appeal Against the "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant"

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I. INTRODUCTION

1. The measures imposed by the Framework[1] have crippled Defence investigations. By refusing to draw a distinction between the situations of SPO witnesses, the Pre-Trial Judge has wrongly equated vulnerable dual status SPO victim witnesses with high ranking military officers and international diplomats, and applied an unparalleled and overbroad regime to witnesses who neither need nor have sought the Court's protection. The Framework is an unwarranted incursion into the daily work of the Defence. It has severed communication with witnesses with whom the Defence was in regular and productive contact on the basis that these witnesses have been listed – in some cases without their knowledge – as an "SPO witness". This is unjustified, and erroneous.

2. The SPO has spent years investigating its case, and contacting witnesses, without constraint. There was no obligation on the SPO to audio-video record interviews. It was not required to seek authorisation to interview witnesses, nor was the Registry involved. The SPO was not required to disclose its interviews to the Trial Panel. Nor were the interviews subject to *proprio motu* admission as evidence in the case.

3. The SPO witness list[2] currently comprises 319 witnesses, and rising.[3]

4. The concept of "witness ownership" is important in this context. These 319-plus people are held out by the SPO as being capable of presenting incriminating evidence.

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[1] KSC-BC-2020-06/F00854, Pre-Trial Judge, Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022 ("Decision"), see particularly pages 85-91 containing the 'Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant' ("Framework").

[2] KSC-BC-2020-06/F00948/A02, Annex 2 to Prosecution submission of revised witness list – Revised Witness List, 2 September 2022 ("SPO Witness List").

[3] The SPO has requested to add four further witnesses, *see*: KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022; KSC-BC-2020-06/F00947/CONF/RED, Confidential redacted version of Prosecution request to add two witnesses and associated materials, 2 September 2022.

Many, if not all, will also have information that tends to **disprove** the SPO case, which is amply demonstrated by a review of their statements, interviews, and related material. As was well understood by the ICTY Appeals Chamber, "[w]here a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not follow that this witness will have no information of value to the opposing party on other issues related to the case."[4]

5. Witnesses to an armed conflict often do not fall easily into "Prosecution" and "Defence" categories. Many of the 319-plus people on the SPO Witness List could easily have also been called by the Defence. Many are likely to be called by the Defence if dropped by the SPO. This makes sense: a prosecutor acting as an impartial minister of justice engaged in a legitimate search for the truth should not limit interviews to witnesses with only allegedly incriminating information.

6. In practical terms, this means that the SPO has spent years interviewing people of relevance to the charges without constraint, and then placed them on a list whereby the Defence is now precluded from enjoying the same access. The impact on fairness, equality of arms, and the right to Defence preparations is undeniable, and not reasonably in dispute.

7. While the SPO was not restrained in any fashion, the Framework is the most restrictive regime for witness contact in the history of international criminal justice and negatively impacts the Defence. It applies to all witnesses, regardless of who they are, where they live, their vulnerability, preferences, or security or privacy concerns. In perhaps the most intrusive development, the Framework requires the Defence to audio-video record all interviews with SPO witnesses, and then disclose this recording to the

[4] ICTY, *Prosecutor v. Halilović*, IT-01-48-AR73, Appeals Chamber, Decision on the issuance of subpoenas, 21 June 2004 ("*Halilović* Decision"), paras. 12-15.

SPO, and the Trial Panel itself. The Panel can then admit this recording into evidence *proprio motu*.

8. The Defence does not oppose regulation of contact with other parties' witnesses, where objective security concerns can be established. However, in devising the Framework to be used in this case, the pendulum has swung too far. The balance that has been struck between the purported protection and privacy of witnesses and ensuring the rights of the accused is now misaligned. Importantly, in approving the Framework, the Pre-Trial Judge has made a number of errors set out below, which warrant the intervention of the Court of Appeals Panel.

9. The Defence therefore appeals, with leave of the Pre-Trial Judge, the following four issues:[5]

> **Issue 1:** Whether the recording and disclosure of witness interviews represents an erroneous invasion of attorney-client privilege and compromises the right of the accused to investigate the case against him ("First Issue");
>
> **Issue 2:** Whether the Framework and its measures fall within the scope of the Pre-Trial Judge's power in Article 39(11) to provide "where necessary" for the privacy and protection of witnesses ("Second Issue");
>
> **Issue 4:** Whether the proper scope and terms of Article 39(11) required the Pre-Trial Judge to differentiate between categories of SPO witnesses in the Framework's application ("Fourth Issue");

[5] KSC-BC-2020-06/F00939, Pre-Trial Judge, Decision on Defence Requests for Leave to Appeal Decision F00854, 26 August 2022 ("Certification Decision"), paras. 22, 36, 42, 49, 94(a).

Issue 8: Whether the requirement on the Defence to disclose the audio-video records of its interviews is consistent with the regime set out in Rules 104-111 of the Rules ("Eighth Issue").

II. PROCEDURAL BACKGROUND

10. On 3 December 2021, the SPO filed submissions requesting that the Pre-Trial Judge issue a protocol for the handling of confidential information and contacts with witnesses.[6]

11. On 15 December 2021, the Defence filed a response, objecting to the framework on the basis it violated the fundamental rights of Mr Thaçi.[7]

12. On 21 January 2022, the Pre-Trial Judge ordered the Registrar to submit on matters arising from the submissions of the parties.[8] The Registry filed on 3 February 2022.[9] On 14 February 2022, all parties filed responses to the Registry Submissions.[10]

13. On 15 and 21 February 2022 respectively, the Defence replied to the further responses of Victims' Counsel[11] and the SPO.[12]

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[6] KSC-BC-2020-06/F00594, Prosecution Submissions on Confidential Information and Contacts with Witnesses, 3 December 2021 ("SPO Submissions"), paras. 1, 7.
[7] KSC-BC-2020-06/F00625, Thaçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021 ("Thaçi Response"), paras. 1-2.
[8] KSC-BC-2020-06/F00650, Pre-Trial Judge, Order to the Registrar for Submissions, 21 January 2022, paras. 5-7.
[9] KSC-BC-2020-06/F00679, Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 3 February 2022 ("Registry Submissions").
[10] KSC-BC-2020-06/F00692, Thaçi Defence Response to the Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022.
[11] KSC-BC-2020-06/F00697, Thaçi Defence Reply to Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations, 15 February 2022.
[12] KSC-BC-2020-06/F00705, Thaçi Defence Reply to Prosecution Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 21 February 2022.

14. On 22 February 2022, the parties presented oral submissions on the proposed protocol,[13] at the request of the Defence.

15. On 21 March 2022, the Defence filed supplemental submissions.[14] The SPO responded on 28 March 2022,[15] and the Defence replied on 1 April 2022.[16]

16. On 24 June 2022, the Pre-Trial Judge issued the Impugned Decision, which contained the Framework.[17]

17. On 18 July 2022, the Defence filed a request for certification to appeal the Impugned Decision.[18] The SPO responded on 1 August 2022,[19] and the Defence replied on 15 August 2022.[20]

18. On 26 August 2022, the Pre-Trial Judge issued the Certification Decision, in which he granted leave to appeal four of the fifteen issues raised by the Defence. These issues are the subject of the current appeal.

III. STANDARD OF REVIEW

[13] KSC-BC-2020-06, Transcript of Hearing, 22 February 2022, pp. 956-1062.
[14] KSC-BC-2020-06/F00741, Thaçi Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 21 March 2022 ("Defence Supplemental Submissions").
[15] KSC-BC-2020-06/F00754, Prosecution Response to 'Thaçi Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses', 28 March 2022.
[16] KSC-BC-2020-06/F00758, Thaçi Defence Reply in Support of Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 1 April 2022.
[17] *See* Impugned Decision, pp. 85-91.
[18] KSC-BC-2020-06/F00883, Thaçi Defence Request for Certification to Appeal the "Decision on Framework for the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant", 18 July 2022 ("Defence Request for Certification").
[19] KSC-BC-2020-06/F00905, Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00854, 1 August 2022 ("SPO Response to Request for Certification to Appeal").
[20] KSC-BC-2020-06/F00924, Thaçi Defence Reply to "Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00854" (F00905), 15 August 2022 ("Thaçi Reply on Certification").

19. The standard of review applicable to interlocutory appeals is the standard provided for appeals against judgments, as specified in the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").[21]

20. In relation to an **error of law**, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision."[22] For **errors of fact**, a party must demonstrate that no reasonable trier of fact could have made the impugned finding and only an error that has caused a miscarriage of justice will cause the Panel to overturn a decision.[23]

21. In relation to a **discretionary decision**, a party must demonstrate that the lower level panel has committed a discernible error, in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion..[24] The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations.[25]

IV. GROUNDS OF APPEAL

A. FIRST ISSUE: WHETHER THE RECORDING AND DISCLOSURE OF WITNESS INTERVIEWS REPRESENTS AN ERRONEOUS INVASION OF ATTORNEY-CLIENT PRIVILEGE AND COMPROMISES THE RIGHT OF THE ACCUSED TO INVESTIGATE THE CASE AGAINST HIM

[21] KSC, *Prosecutor v. Gucati*, KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeals Decision"), para. 10.
[22] *Gucati* Appeals Decision, para. 12.
[23] *Gucati* Appeals Decision, para. 13.
[24] *Gucati* Appeals Decision, para. 14.
[25] *Gucati* Appeals Decision, para. 14; KSC-BC-2020-07/IA002/F00005, Appeals Panel, Decision on Nasim Haradinaj's Appeal against Decision Reviewing Detention, 9 February 2021, para. 14.

22. An accused before the KSC has a statutory right to communicate with counsel of their choosing.[26] Communication in the context of a professional relationship between a KSC accused and their counsel is privileged, and not subject to disclosure.[27] Also protected are the rights of an accused to adequate time and facilities to prepare a defence, and to obtain the attendance of witnesses under the same conditions as witnesses against him.[28]

23. The Framework provides that the interviewing Party shall "ensure that the interview is audio-video recorded".[29] Following the completion of the interview, the interviewing Party is required to prepare "the audio-video recording of the session and submit copies thereof to the Parties and to the Panel".[30] The record of the interview can then directly become part of the evidentiary record of the case, where "admitted in evidence by the Trial Panel *proprio motu"*.[31]

24. In practical terms, Defence Counsel is therefore required to conduct interview with the 319-plus SPO witnesses, in the knowledge that the video recording of the interview will be provided to the finder of fact, may automatically become part of the evidential record of the case, and can then be relied upon to make adverse findings against his or her client. The stifling effect of this measure on Defence investigations and the right of the accused to investigate the case is monumental. It is also erroneous, as it erodes the attorney-client privilege, and compromises the ability and right of the accused to investigate the case against him.

[26] KSC Law, Article 21(4)(c).
[27] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Rule 111.
[28] KSC Law, Articles 21(4)(c) and (f).
[29] Framework, Section II(j)(iv)
[30] Framework, Section II(n)(ii).
[31] Framework, Section II(o).

1. Erosion of Attorney-Client Privilege

25. As the ICTY Appeals Chamber acknowledged,[32] Defence interviews are being conducted in order to determine whether the SPO witness has information relevant to the Defence theory of the case, and what that information is. These Defence interviews are framed around information received from the client. A central difference between the SPO and Defence counsel, is that Defence counsel are reliant on, and guided by, their instructions. They receive and act on information from their clients that informs all aspects of their investigative and trial strategy. This information is provided by the client in the context of the professional relationship. It is therefore privileged, and not subject to disclosure.[33] Witness interviews allow Defence counsel to follow investigative avenues and lines of inquiry which have been provided by the client, and are also privileged. The Framework therefore directly encroaches on attorney-client privilege, by making this information subject to disclosure to the SPO and Trial Panel.

26. Importantly, under the Framework this information also becomes potentially admissible as evidence in the case, simply by virtue of having been mentioned during an interview. This means that information uncovered by Defence counsel can be transformed into evidence through the simple act of it being discussed during Defence investigations. This represents an entirely unprecedented and wholly unwarranted incursion into the Defence camp.

27. To take a practical example, the SPO interviewed Witness A, who gives incriminating information about a crime site. Witness A is placed on the SPO List of Witnesses. The client tells his Defence counsel that Witness A is also in a position to testify about a specific aspect of the KLA's structure that undermines part of the SPO's case. This information is privileged. However, under the Framework, Defence counsel is now

[32] *Halilović* Decision, paras. 12-15.
[33] Rules 111(1) and (2).

required to ask Witness A about this topic in front of the SPO, with his answers being transmitted directly to the Trial Panel, thereby revealing privileged information, and putting the SPO and Trial Panel on notice about a potential aspect of the Defence case. Should Witness A reject Defence counsel's suggestions about KLA structure, this information (now incriminating) will still be directly transmitted to the Trial Panel, can be admitted as evidence, and can be relied upon to draw adverse inferences against the accused.

28. While this may read like the theoretical fact pattern for an exam question, these are not abstract concepts. These are concrete and daily risks that now pervade the Defence investigations, stifle its conduct, and undermine its ability to do its job. The Framework puts the Defence in an impossible position, previously unknown in international criminal law: either reveal privileged information and run the gauntlet of its potential admission by the Trial Panel, or lose key investigative avenues and information that could disprove the SPO case. Of course, the prejudice in the present case is exacerbated by the sheer number of witnesses on the SPO Witness List.

29. In the Impugned Decision, this **choice** presented to Defence counsel is relied upon as a justification for the measures themselves. The Pre-Trial Judge cites Rule 111(1)(b), that privileged information shall not be subject to disclosure unless "the person has voluntarily disclosed the content of the communications to a third party and that third party then gives evidence of that disclosure". According to the Pre-Trial Judge, "[t]his provision applies to 'any third party' and, thus, encompasses individuals included in the SPO List of Witnesses".[34] He then considered that Defence counsel is free to make an evaluation "as to what information it elects to reveal or conceal in relation to any individual that it interviews", and that "the Defence remains at liberty to define a strategy in respect of

[34] Impugned Decision, para. 157.

interviews with witnesses included in the SPO List of Witnesses" and that "the remaining aspects of its investigations are not affected".[35]

30. This reasoning is legally flawed, and invalidates the conclusion. First, it is based on an erroneous reading of Rule 111(1)(b), the application of which requires the third party to give evidence of the client's voluntary disclosure of privileged communications, and therefore does not extend to discussions between Defence counsel and a third party in a witness interview. Second, the fact that Defence counsel is "at liberty" to choose between: (i) breaching attorney-client privilege in front of the SPO and Trial Panel; or (ii) acting in the best interests of the client by conducting effective investigations, is not a meaningful or real choice, and compromises the fairness of the process by undermining the effectiveness of Defence Counsel and their preparation.[36]

31. Thirdly, the Pre-Trial Judge was wrong to rely on the fact that "the remaining aspects of [Defence] investigations are not affected".[37] It is erroneous to assert that a Framework that impermissibly encroaches on attorney-client privilege becomes permissible because there are aspects of investigations to which it does not apply. Attorney-client privilege is "vital to the defence of an accused, by allowing for open communication between counsel and client necessary for effective assistance".[38] There are witnesses on the SPO Witness List who the Defence would otherwise have called.[39] Defence counsel should be able engage in in-depth exchanges with them, to find out what they know and how, on the basis of privileged communication that should not be shared with the adverse party and the finder of fact.

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[35] *Ibid*.
[36] Article 21(4)(c) of the KSC Law, which gives an accused the right to adequate facilities for the preparation of his defence.
[37] Impugned Decision, para. 157.
[38] ICTY, *Prosecutor v Mladić*, MICT-13-56-A, Appeals Chamber, Judgment, 8 June 2021, para. 98.
[39] See, e.g., Defence Supplemental Submissions, para. 10. KSC-BC-2020-06, Transcript of Thirteenth Status Conference, 13 July 2022, p. 1382 lines 1-14.

2. Compromise of the right of the accused to investigate the case against him

32. The right of the Defence to investigate its case and interview witnesses flows from the principle of equality of arms, the right to obtain the attendance and examination of witnesses under the same conditions as against him, and the right to have adequate time and facilities for the preparation of a defence.[40] The accused's ability to investigate the case is compromised by the novel measures in the Framework.

33. Firstly, the Framework was put in place in June 2022, 18 months after the accused were arrested. In these intervening 18 months, in the diligent exercise of their duties, Defence counsel had been in contact with many people who now appear on the SPO Witness List, who had consented to being interviewed, and who had exculpatory information in the course of these Defence interviews. Some witnesses told the Defence that they had been interviewed by the SPO, prompting disclosure requests for their records of interview. No security or privacy concerns have been raised by witnesses interviewed by the Defence, who were in many cases eager and willing to share information. Defence investigations were progressing unhindered.

34. Against this backdrop, it is difficult to overstate the enormity of the roadblock the Framework has placed on Defence investigations and trial preparation. Witnesses for whom interviews were scheduled, and travel plans booked, are now out of the Defence's reach. Witnesses who willingly cooperated with the Defence for weeks and months through regular exchanges are now out of bounds, purportedly for their own protection and privacy. Even if all parties act in the strictest good faith, the process for Defence investigations will be far more complicated, and take much longer. The impact on the

[40] See, e.g., *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras. 52-55; KSC-CC-PR-2017-01/F00004, Specialist Chamber of the Constitutional Court, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017.

expeditiousness of these investigations, and therefore the proceedings, is immediate and significant.

35. Once interviews are scheduled (or re-scheduled), then larger problems arise. Investigations, by their nature, aim to finding **new** information. Defence counsel will be actively seeking to uncover information not already part of the casefile, and previously unknown to the parties. This exercise will be immeasurably stifled when the SPO is present, and where its results are transmitted directly to the finder of fact. Rather than open and unrestricted questioning in a search for new information, Defence interviews must now be strategic and tactical, and seek to avoid eliciting any incriminating information, whether truthful or otherwise. Defence counsel cannot act in the best interests of their client, when they are forced to conduct limited and cautious interviews or decline interviews entirely because of the risks involved. Proper investigations are impossible under the Framework as it stands.

36. Consider, for example, the situation of witnesses with the dual status of witnesses and suspects. The sensitivities concerning self-incrimination cannot be reconciled with the SPO's attendance at Defence counsel interviews. More significantly, the SPO's mandatory presence and transmission of interviews to the Trial Panel will likely dissuade these dual status witness suspects from cooperating with the Defence, further compromising the right of the accused to investigate the case against him.

37. The requirement that Defence interviews be disclosed to the Trial Panel who can then admit them as evidence is particularly revolutionary, and perhaps the most problematic aspect of the Framework. Normally, for information to form part of the evidential record of a case, it is either given under oath through *viva voce* witness testimony subject to cross-examination, or introduced through documentary evidence following a debate among the parties as to admissibility; provenance, authenticity, relevance, and reliability. Under the Framework, these safeguards are effectively eliminated, and

information can become evidence simply because it formed part of a witness interview by Defence counsel. This is an extraordinary and dramatic shift that will set this trial apart from any others in international criminal justice, and is so unreasonable and unfair as to constitute an abuse of discretion. The Framework is an unwarranted encroachment of attorney-client privilege, and compromises the right of the accused to investigate the case against him. It must be revised.

B. SECOND AND FOURTH ISSUES: WHETHER THE FRAMEWORK AND ITS MEASURES FALL WITHIN THE SCOPE OF THE PRE-TRIAL JUDGE'S POWER IN ARTICLE 39(11) TO PROVIDE "WHERE NECESSARY" FOR THE PRIVACY AND PROTECTION OF WITNESSES AND THE TERMS OF ARTICLE 39(11) REQUIRED THE PRE-TRIAL JUDGE TO DIFFERENTIATE BETWEEN CATEGORIES OF SPO WITNESSES IN THE FRAMEWORK'S APPLICATION

38. The 319-plus people on the SPO Witness List have dramatically different lives and circumstances. Importantly, they have very different security risks and protection needs. They range from vulnerable and dual status victim witnesses who reside in Kosovo, to high-ranking international witnesses with no security or privacy concerns and for whom the SPO has neither sought nor been granted protective measures. By applying a one-size-fits-all level of protection, the Framework equates the circumstances of all SPO witnesses. This was a legal error.

39. Both the SPO and the Defence understood the Framework to be putting in place additional protective measures under Rule 80 of the KSC Rules.[41] Rejecting this position, the Pre-Trial Judge identified the Framework's legal basis as Articles 39(1) and (11) of the KSC Law.[42] Article 39(1) addresses the general powers of the Pre-Trial Judge. Article 39(11)

[41] SPO Submissions, para. 4; Thaçi Reponse, paras. 13, 24; KSC-BC-2020-06/F00626, Selimi Defence Response to "Prosecution Submissions on Confidential Information and Contacts with Witnesses", 15 December 2021, paras. 6-9; KSC-BC-2020-06/F00628, Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021, para. 15.
[42] Impugned Decision, paras. 117, 135-136.

is the more specific provision which empowers a Pre-Trial Judge to "**where necessary**, provide for the privacy and protection of victims and witnesses". As such, the measures in the Framework are required to be "necessary" for protection and privacy. They can only put in place if required, and can only go as far as is necessary.

1. "Where necessary, for the protection of witnesses"

40. The Defence submitted that the Framework should apply only to witnesses for whom "the SPO has made a specific showing that such measures are required, such as vulnerable and sensitive victims of crime".[43] The Pre-Trial Judge expressly declined to draw the distinction sought by the Defence between those witnesses with security concerns and those with none.[44] This was an error: the Pre-Trial Judge's power to impose measures under Article 39(11) is limited to measures that **are necessary**. As such, this blanket application of the Framework is, by definition, excessive, as it applies to witnesses for whom it is unnecessary.

41. If all SPO witnesses had the same security concerns, they would all be subject to the same protective measures. Instead, inordinate amounts of time have been spent by the parties and Pre-Trial Judge tailoring protective measures to each of the individual SPO witnesses. Many witnesses remain unprotected, as no risks have been identified arising from their status as an SPO witness that would warrant any limitation on the accused's rights. In this context, the Framework's extreme and intrusive measures considered by the Pre-Trial Judge as being "necessary" for all witnesses, are unjustifiable. Witnesses without protection concerns do not need measures for their protection. The Framework falls outside the scope of the Pre-Trial Judge's power in Article 39(11), and is invalidated by this legal error.

[43] Thaçi Response, para. 29.
[44] Impugned Decision, para. 120.

42. Compounding this error is the Pre-Trial Judge's failure to give adequate reasons why these measures are necessary for international or high-ranking witnesses without protection risks or security concerns. He offered two bases for not tailoring the Framework: (i) the fact that a witness holds an international or high-ranking position should not mean that they would "not be allowed" to request protection; and (ii) a "significant number" of the international witnesses did not occupy high-ranking positions at the relevant time.[45] First, there is no basis to assert that a tailored Framework imposing measures only where necessary would prevent any SPO witness from seeking protection if and when it became necessary, regardless of their profile or rank. Second, no explanation is given why, in 2022, measures should apply to a high-ranking international witness with no protection or security concerns on the basis that he or she held a different position 20 years earlier. This erroneous reasoning constitutes an abuse of discretion warranting correction on appeal.

2. "Where necessary, for the privacy of witnesses"

43. Article 39(11) authorized the Pre-Trial Judge to provide, where necessary, for the protection **and privacy** of witnesses. The Impugned Decision contains no reasoning linking the particular measures in the Framework, such as disclosing witness interviews to the Trial Panel, to protecting the privacy of SPO witnesses. There is no conceivable link. More concerning, no attempt was made whatsoever to balance this right to privacy of SPO witnesses against the rights of the accused being eroded by the measures in place. In reality, the Framework's requirement for audio-video recording Defence interviews, the wider distribution of these recordings, including to the Trial Panel and staff, and their potential admission into evidence, are far more likely to encroach on SPO witnesses' privacy than the Defence interview itself.

44. Regardless, the blanket nature of the Framework is erroneous, and again exceeds the Pre-Trial Judge's authority under Article 39(11). This is best demonstrated by the fact

[45] Impugned Decision, para. 120.

that the Pre-Trial Judge himself recognised that different SPO witnesses will have different privacy concerns. Specifically, the Pre-Trial Judge identified witnesses "alleging to have been the victim of crimes and those suspected of having committed crimes" as having heightened privacy concerns.[46] The proper scope and terms of Article 39(11) required the Pre-Trial Judge to differentiate between categories of SPO witnesses in the Framework's application. His failure to do so was an error which invalidates the decision.

45. Putting each of these legal errors aside, the simple fact is that many of the witnesses on the SPO Witness List were communicating willingly with the Defence, were ready to give interviews (or had already given them), and expressed no hesitation whatsoever on the grounds of security or privacy. After months of Defence investigations without the Framework, not a single issue has arisen. The hugely intrusive measures contained in the Framework are not necessary, and therefore exceed the scope of Article 39(11).

C. EIGHTH ISSUE: WHETHER THE REQUIREMENT ON THE DEFENCE TO DISCLOSE THE AUDIO-VIDEO RECORDS OF ITS INTERVIEWS IS CONSISTENT WITH THE REGIME SET OUT IN RULES 104-111 OF THE RULES

46. The above submissions demonstrate how the Framework undermines the accused's statutory rights. The Framework also contravenes the Court's disclosure regime set out in Rules 104-111 of the Rules.

47. At this stage of the proceedings, there is no burden on the Defence to disclose or produce any evidence. The Rules contain no regime for Defence disclosure in the pre-trial phase or during the Prosecution case. The burden rests solely on the SPO to prove its case beyond a reasonable doubt, which is reflective of the presumption of innocence which the accused must enjoy.

[46] Impugned Decision, para. 122.

48. Disclosure obligations for the Defence therefore only arise after the close of the SPO case, and only after the Defence elects to present a positive defence case. Rule 104(5)(b) accordingly provides that, should the Defence choose to present a case, it should disclose all statements, if any, of witnesses it intends to call at trial, no later than 15 days prior to the opening of the Defence case. The Framework, by contrast, requires the Defence to disclose the statements of any of the 319-plus SPO witnesses it interviews before deciding whether to present a Defence case, before hearing the SPO case, and while SPO disclosure is still unfinished.

49. This procedure is therefore irreconcilable with the disclosure regime set out in Rules 104-111, and inconsistent with the fact that the burden of proof rests firmly on the SPO. Where burdens of proof and the presumption of innocence are not respected, the fairness of the proceedings are irreparably compromised.

50. A further problem arises in the event that the SPO decides **not** to call witnesses on its list, which it is perfectly entitled to do. As noted above, there are witnesses who appear on the SPO Witness List who the Defence would otherwise have called.[47] If the SPO decides to drop these witnesses, whether as a result of exculpatory information that is revealed during Defence interviews or otherwise, the Framework puts the Defence in the position of calling the witness, with the SPO having been in possession of the witness' statement, potentially for years, in violation of Rule 104(5). Again, this is not a risk for merely a handful of witnesses; the SPO Witness List runs into the hundreds.

51. The Pre-Trial Judge dismissed this reality as "speculative and unsubstantiated", on the basis that the inclusion of a witness on the SPO Witness List denotes a clear intent on

[47] See para. 30 fn. 39.

the part of the SPO to call the person at trial.[48] This reasoning is flawed. A clear intent is entirely consistent with the subsequent commonplace occurrence in a trial of this size (and a witness list of this length), of the SPO dropping witnesses who the Defence will then call. In fact, in the course of preparing the most recent iteration of the SPO Witness List, the SPO dropped seven witnesses including, for example, a high ranking international witness with whom the Defence had previously been in contact, intended to call as a Defence witness, and has now been prevented under the Framework from contacting since June.[49] The scope for unwarranted interference in Defence investigations and preparation is enormous. More specifically, the disclosure requirement in these circumstances automatically gives rise to a violation of the legal framework of the Court, meaning the Framework must be revised.

52. Moreover, the Defence is already on the record about the fact that there are people on the SPO Witness List who were entirely unaware of the SPO's intention to call them as witnesses,[50] and so any clear intent must also be tempered by the reality that the SPO Witness List has been compiled without the consent or even knowledge of some of the people listed thereon. Nor can it be discounted that Defence interviews with SPO witnesses will elicit exculpatory evidence, leading the SPO to drop the witnesses, and the Defence to pick them up.

53. In addition to this incompatibility with Rule 104, the Framework also requires the disclosure of privileged information to the SPO and to the Trial Panel, in breach of the protection of privileged information in Rule 111, for the reasons set out in Ground 1 above.

V. CONCLUSION AND RELIEF REQUESTED

[48] Impugned Decision, para. 159.
[49] KSC-BC-2020-06/F00948, Prosecution submission of revised witness list, 2 September 2022, para. 6.
[50] Defence Supplemental Submissions, para. 10.

54. The measures in place are inconsistent with a litany of cornerstone rights protected in Article 21(4) of the KSC Law: the right to communicate with counsel of his or her choosing, to adequate time and facilities to prepare a defence, to be tried within a reasonable time, and the principle of equality of arms. When faced with measures which objectively encroached on these fundamental fair trial rights, Pre-Trial Judge failed to properly balance these against the purported security and privacy concerns and risks of witnesses, including those who had no problem communicating with the Defence.

55. The Framework's measures exceed the Pre-Trial Judge's powers under Articles 39(1) and (11) of the KSC Law, as their blanket application precludes any reasonable conclusion that they were **necessary**. The recording and disclosure of Defence witness interviews constitute a breach of the disclosure and attorney-client privilege regimes established by Rules 104-111 of the Rules. The end result, is a stifling and one-sided Framework, that will slow down the trial, and cannot be reconciled with its fair conduct or the Court's statutory framework.

56. The Defence accordingly makes an application for suspensive effect of the Impugned Decision pursuant to Rule 171 of the Rules. The ongoing implementation of the Framework would defeat the purpose of the appeal, by requiring this central period of pre-trial Defence investigations to be conducted in accordance with measures that violates the accused's rights and are incompatible with the Court's statutory framework. These Defence investigations cannot be "re-done". As such, the ongoing implementation of the Framework would be irreversible, justifying its suspension.

57. The Defence accordingly requests that Court of Appeals Panel:

ORDER an immediate stay of execution of the Impugned Decision; and

ORDER the creation of a revised Framework which corrects the errors and violations of the accused's rights identified in the present appeal.

Word Count: [5843] words

Respectfully submitted,

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At The Hague, The Netherlands