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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:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Appeal against Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, KSC-BC-2020-06/IA024/F00005, dated 8 September 2022

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I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and the Decision on Defence Requests for Leave to Appeal Decision F00854,[1] the Defence for Jakup Krasniqi ("Defence") hereby submits its 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.[2]

2. For over eighteen months, between the first disclosures of inculpatory material in November 2020, and the Impugned Decision ("ID") on 24 June 2022, the Defence had been able to contact and interview any witness freely, subject to the Code of Conduct, which obliges Counsel to act with dignity, integrity and compatibly with human rights standards and, specifically, not to intimidate, harass or subject witnesses to unreasonable pressure.[3]

3. The ID imposed a blanket and cumbersome framework on all contacts with all witnesses of the opposing party.[4] The effect of the Framework is *inter alia* that if the Defence wishes to interview any of the 319 witnesses on the Prosecution's List of Witnesses:[5] -

[1] KSC-BC-2020-06, F00939, Pre-Trial Judge, *Decision on Defence Requests for Leave to Appeal Decision F00854* ("Certification Decision"), 26 August 2022, public, para. 94(a).
[2] 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, public.
[3] Code of Professional Conduct - for Counsel and Prosecutors before the Kosovo Specialist Chambers ("Code of Conduct"), 28 April 2021, Articles 6(1)(c), 6(1)(e), 17.
[4] ID, para. 212.
[5] *Idem*. 212(b), (f), (j)(iv), (n).

1) the Defence cannot contact the witness but must notify the Prosecution, Court Management Unit ("CMU") and, regarding dual-status witnesses, Victims' Counsel at least 10 days prior to the intended interview;

2) the Prosecution must then contact the witness and ascertain their willingness to be interviewed and whether the witness wishes the Prosecution, Witness Protection and Support Office ("WSPO"), a legal representative or, in the case of dual-status witnesses, Victims' Counsel to be present;[6]

3) the Prosecution must then provide the Defence with *inter alia* the preferred dates and estimated duration of the interview;

4) the Defence must ensure that the interview is audio-video recorded;

5) and the Defence must prepare, file and disclose to the Prosecutor a memorandum and the audio-video material after the interview.

4. The Defence has a legitimate interest in interviewing Prosecution witnesses because they may have information of value to the Defence.[7] Requiring the Prosecution to be present at, or informed about the content of, such interviews is fundamentally unfair because it would reveal privileged matters to the Prosecution and chill lines of enquiry relating to the conduct of the Prosecution's investigation.

[6] The Protocol reserves the possibility for the SPO to insist on its attendance even if the witness does not want the SPO to be present; ID, para. 212(b).
[7] ICTY, *Halilović*, IT-01-48-AR73, Appeals Chamber, *Decision on The Issuance of Subpoenas*, 21 June 2004, para. 12.

5. The Defence would not oppose necessary and proportionate measures to safeguard the limited number of witnesses, who genuinely need protection.[8] However, as explained below, the Framework errs in far exceeding what is necessary or proportionate. The Certification Decision permitted the Defence to appeal the following issues: -

(1) Whether the ID erred in finding that imposing the Framework was justified to protect the privacy of witnesses or preserve evidence or the expeditious conduct of proceedings;

(2) Whether the ID erred in law and fact in imposing a framework which covers all witnesses that a party intends to call, rather than merely those witnesses who need the protection of a framework;

(3) Whether the ID erred in law in finding that the Proposed Framework does not violate the rights of the Accused, specifically the right against self-incrimination and the right to equality of arms.[9]

II. CLASSIFICATION

6. This Appeal is confidential because it refers to confidential filings and evidence which is currently classified by the Prosecution as confidential.[10]

[8] For instance, less restrictive measures could include the precautionary recording of interviews (only to be disclosed to the Panel if an issue about the conduct of the interview arose) and by giving WPSO (not the SPO) a role in contacting the witnesses.
[9] Certification Decision, para. 94(a). These issues were originally the Fifth, Third, and Sixth Issues respectively on which the Defence requested leave to appeal. The Defence has re-numbered the Issues in this Appeal for convenience and to follow the order in which the PTJ addressed the Issues in the Certification Decision.
[10] Rule 82(4) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").

III. PROCEDURAL HISTORY

7. On 20 November 2020, the Prosecution began disclosing evidentiary material to the Defence, including the statements of Prosecution witnesses.[11] Pursuant to the Framework Decision on the Disclosure of Evidence and Related Matters,[12] Rule 102(1)(a) disclosure was substantially completed in December 2020 and included further statements or interviews of named Prosecution witnesses.[13]

8. On 22 March 2021, the Defence indicated that it intended to commence its investigations in April 2021.[14] On 18 May 2021, the Defence confirmed that its investigation had commenced.[15]

9. On 14 September 2021, the Defence for Kadri Veseli placed the Prosecution on notice that "we're investigating at the moment without any restriction on who we speak to, and we do not regard ourselves as under any obligation to notify the Prosecution about whoever we wish to speak to" and invited the Prosecution to indicate if it disagreed with that approach.[16] The Prosecution reserved the right to make further submissions in writing but made no immediate objection.[17]

[11] [REDACTED].
[12] KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on the Disclosure of Evidence and Related Matters*, 23 November 2020, public, para. 99(b).
[13] [REDACTED].
[14] KSC-BC-2020-06, F00234, Krasniqi Defence, *Krasniqi Defence Submissions for Fourth Status Conference*, 22 March 2021, public, para. 8.
[15] KSC-BC-2020-06, F00313, Krasniqi Defence, *Krasniqi Defence Submissions for Fifth Status Conference*, 18 May 2021, confidential, para. 10.
[16] KSC-BC-2020-06, Transcript of Hearing, 14 September 2021, public, p.618, line 22 – p.619, line 7.
[17] *Idem*., p. 620, lines 8-11.

10. On 22 October 2021, the Prosecution disclosed to the Defence a preliminary witness list setting out the names or pseudonyms and summaries of the evidence of its witnesses.[18]

11. On 3 December 2021, the Prosecution requested the Pre-Trial Judge ("PTJ") to impose a protocol governing the handling of confidential information and contact with the witnesses of an opposing party.[19]

12. On 15 December 2021, the Defence responded and opposed the imposition of the proposed protocol.[20]

13. On 17 December 2021, the Prosecution filed its Witness List.

14. On 22 February 2022, the Parties made further submissions on the issue at an oral hearing.

15. On 24 June 2022, the PTJ issued the ID.

IV. STANDARD OF REVIEW

16. Appeals may challenge errors of law and errors of fact.[21] In the *Gucati Appeal Decision*, the Court of Appeals Panel elaborated the standards of review applicable in

[18] KSC-BC-2020-06, F00542, Specialist Prosecutor, *Prosecution Submission of Preliminary Witness List*, 22 October 2021, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential.
[19] KSC-BC-2020-06, F00594, Specialist Prosecutor, *Prosecution Submissions on Confidential Information and Contacts with Witnesses* ("Prosecution's Proposed Protocols", "SPO Submissions" or "SPO Request"), 3 December 2021, public.
[20] KSC-BC-2020-06, F00627, Krasniqi Defence, *Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 15 December 2021, confidential.
[21] Article 46(1) of the Law applies *mutatis mutandis* to interlocutory appeals; KSC-BC-2020-07, IA001/F00005, Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention* ("Gucati Appeal Decision"), 9 December 2020, public, para. 10.

an interlocutory appeal. In relation to errors 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] In alleging an error of fact, a party must identify sources of doubt about the accuracy of the impugned finding, recognising that a reasonable trier of fact could not have reached the same conclusion(s) on the basis of the same evidence.[23]

V. ISSUE ONE

(1) Whether the ID erred in finding that imposing the Framework was justified to protect the privacy of witnesses or preserve evidence or the expeditious conduct of proceedings.

17. The ID erred in law and fact in finding that it was necessary and/or justified to impose the Framework. The Framework was not necessary to achieve the stated objectives and, insofar as the stated objectives were sufficiently important to justify intrusion into Defence investigations, the Framework was not the least restrictive measure to achieve them.

18. It is clear from the Certification Decision that this issue covers all the justifications erroneously offered by the ID for the imposition of the Framework. Importantly, the Defence had also sought certification to appeal on the issue of whether the ID erred in fact or law in finding that it was necessary to impose a framework.[24] In refusing certification for that issue, the PTJ held that "the Fifth Krasniqi Issue [which is this Ground of Appeal] already covers the topics of the Framework's legal basis and necessity".[25] Accordingly, it is clear that in certifying the

[22] Gucati Appeal Decision, para. 12. In the same paragraph, the Appeals Chamber continued "[…] *even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law*".
[23] Gucati Appeal Decision, para. 13.
[24] Leave to Appeal, para. 2(ii).
[25] Certification Decision, para. 84.

ground of appeal, the PTJ also intended it to cover the Framework's legal basis and necessity.[26]

19. As legal basis for imposing the Framework, the ID relied on Article 39 of the Law, which provides, *inter alia*, that "[t]he PTJ may, where necessary, provide for the protection and privacy of victims and witnesses" (emphasis added). The phrase "where necessary" expressly incorporates the long-established principle of proportionality, which requires that "any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective".[27] This principle applies here because the right to a fair trial, which includes the right to organise the defence and collect evidence favourable to the defence, is impeded.[28]

20. The meaning of "necessary" has been considered in the context of witness protection measures. The ICC has held that the assessment of necessity includes "whether it is the least intrusive measure necessary to protect the person concerned".[29] The PTJ has repeatedly accepted and applied this principle in assessing protective measures in this case.[30] Although it may be necessary to withhold evidence from the Defence to preserve the fundamental rights of another individual (i.e. a victim or witness), such steps should only be taken where doing so is in the interests of public

[26] Certification Decision, para. 19.
[27] *See* ICTY, *Milošević*, IT-02-54, Appeals Chamber, *Decision on the Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel*, 1 November 2004, para. 17; *Limaj et al.*, IT-03-66-AR65, Appeals Chamber, *Decision on Fatmir Limaj's Request for Provisional Release*, 31 October 2003, para. 13.
[28] ECtHR, *Dayanan v. Turkey*, no. 7377/03, *Judgement*, 13 October 2009, para. 32; *Paci v Belgium*, no. 45597/09, *Judgement*, 17 April 2018, para. 85.
[29] *ICC, Katanga,* ICC-01/04-01/07-475, Appeals Chamber, *Judgment on the Appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I Entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, para. 67.
[30] *See,* for instance, KSC-BC-2020-06, F00133, Pre-Trial Judge, *Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures*, 10 December 2020, confidential, para. 42.

order and/or national security; is required by the interests of juveniles; or is necessary for the protection of the private life of the parties.[31]

21. The ID found that the Framework was justified to protect witnesses, uphold the privacy of witnesses, enable the preservation of evidence, and contribute to the expeditious conduct of proceedings.[32] It erred in law in failing to carry out a structured assessment of whether the Framework was necessary for these purposes. Instead, the ID identified benefits of the Framework without demonstrating that any actually reached the threshold of necessity. Moreover, the ID wholly failed to assess whether the Framework was the least restrictive measure available.

22. It was not necessary to impose the Framework to achieve any of the stated objectives. The ID erred in failing to consider (or give appropriate weight to) the Defence submission that Defence investigations had been ongoing for many months with no complaint of impropriety in relation to any witness.[33] In the period of over one year between the Defence commencing investigations in April 2021, already knowing the identity of many witnesses, and the imposition of the Framework, nothing inappropriate occurred. Nor did the Prosecution even propose a framework at the time when it disclosed a preliminary list of its witnesses. The fact that no framework was proposed until December 2021 highlights that it was unnecessary to impose this blanket Framework.[34]

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[31] European Convention on Human Rights, Article 6(1); ECtHR, *B and P v. The United Kingdom*, no. 36337/97 and 35974/97, *Judgment*, 5 September 2001, para. 37.
[32] ID, paras 116-125.
[33] KSC-BC-2020-06, F00627, Krasniqi Defence, *Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 15 December 2021, confidential, paras 6, 9.
[34] The only development in December 2021 was that the SPO was preparing to disclose the identity of 128 witnesses with its Witness List, suggesting that this prompted the SPO's request – not the protection of the other, public witnesses. *See* KSC-BC-2020-06, F00411, *Krasniqi Defence, Krasniqi Defence Response to the SPO Eighth Request for Protective Measures*, confidential, para. 9.

23. If a genuine need to impose the Framework to prevent interference with witnesses did exist, it is surprising that, following the oral hearing in February 2022, the PTJ waited four months to impose the Framework in June 2022. The lack of urgency in applying for and imposing a framework, and the absence of any actual complaint of interference during the period in which there was no framework, is evidence that the Framework was unnecessary.

24. Furthermore, the imposed Framework was not necessary because it applies to Defence interviews of witnesses by a team of professionals, including or supervised by Counsel, who are subject to the Code of Conduct. The Code of Conduct requires Counsel to act compatibly with human rights (including the right to privacy) and prohibits inappropriate behaviour towards witnesses.[35] Absent evidence of impropriety, it must be presumed that Counsel will carry out their duties appropriately,[36] just as the ID presumes that the SPO will act in good faith.[37]

25. The ID erred in law and fact in relying on considerations of privacy, expeditiousness and preserving evidence to justify the Framework; it cites no authority whatsoever to support its findings in this regard.[38]

26. The Framework was not justified in order to "uphold the privacy of all witnesses".[39] A witness in criminal proceedings does not have an unlimited expectation of privacy from the opposing party. Each Party is required to investigate the credibility and reliability of the other Party's witnesses and that investigation

[35] Articles 6(1)(e) and 17(1).
[36] ICTY, *Prlić et al.*, IT-04-74-AR73.10, Appeals Chamber, '*Decision on Prosecution's Appeal Against Trial Chamber's Order on Contact between the Accused and Counsel During an Accused's Testimony Pursuant to Rule 85(C)*', 5 September 2008, para. 18; SCSL, *Taylor*, SCSL-03-01-T, Trial Chamber II, *Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination*', 20 November 2009, p. 3.
[37] ID, para. 143.
[38] *Idem*, paras 121-125.
[39] *Idem*, para. 121.

necessarily affects privacy. For instance, in *Mustafa* the SPO investigated Facebook accounts and telephone records of defence witnesses although these are plainly 'private' matters.[40] Disclosure may include private matters such as medical conditions suffered by the witness.[41] As a result, upholding the privacy of witnesses is not a sustainable justification for restricting Defence investigations.

27. Moreover, the ID's finding that Prosecution witnesses are "entitled to a reasonable expectation of privacy from the SPO"[42] is not a reason to impose a Framework which restricts the right to organise the defence and collect evidence favourable to the Defence. Nor does any supposed need to ensure that the witnesses' expectation of privacy remains directed towards the SPO[43] justify imposing the Framework on the Defence. Indeed, pursuant to the Code of Conduct, the Defence already has similar obligations to the SPO regarding privacy rights.[44] Finally, it cannot be claimed that the imposition of the Framework "guarantees" that restrictions of privacy serve the legitimate aim of permitting the exercise of the Accused's right to a fair trial. The reverse is true; prior to the imposition of the Framework, the Accused exercised their right to a fair trial unencumbered and it is the Framework which obstructs this right.

28. The ID erred in law and fact in finding that the Framework was justified for "the preservation of evidence". In the absence of any allegation of impropriety against the Defence, and presuming that Counsel will carry out interviews appropriately,[45] there is no necessity to preserve evidence.

[40] With regard to Facebook posts, *see* KSC-BC-2020-05 20220323 ENG, pp. 2697-2704; 20220328 ENG, pp. 2845-2854. With regard to telephone records, *see* KSC-BC-2020-05 20220329 ENG, pp. 2923-2925.
[41] [REDACTED].
[42] ID, para. 122.
[43] *Ibid*.
[44] *See,* for instance, Code of Conduct, Article 12.
[45] *Supra*, fn. 36.

29. The ID's reliance on the expeditious conduct of proceedings was also erroneous.[46] First, in assessing the expeditious conduct of proceedings, the ID failed to consider the delays, which the Framework will cause. Speed and efficiency are important components of expedition. Imposing administrative and logistical barriers, including the need to arrange interviews through another party and to arrange for multiple parties to attend the same interview, inevitably makes investigations less expeditious. Even if the Framework's "effect on the overall assessment of the length of the proceedings cannot be determined" the imposition of additional hurdles plainly slows rather than expedites proceedings.[47]

30. Second, any intangible benefits of "concretising the obligations of the parties and participants, laying down a predictable and consistent procedure to be following and clarifying the roles and responsibilities of all sections and organs" do not reach the threshold of necessity.[48] Defence Counsel are professionals and, in conducting witness interviews, are subject to the Code of Conduct.[49] The Defence is aware of its obligations and laying down an onerous procedure does not expedite the conduct of proceedings.

31. Additionally, the ID erred in law by failing to carry out any assessment of whether the Framework was the least restrictive way to achieve the stated objectives, which is a fundamental part of the assessment of necessity. Since the ID failed to perform this assessment, the Defence requests the Appeals Chamber to carry it out. First, the Framework was not the least restrictive measure capable of upholding the privacy of witnesses. Simpler and less intrusive options were available and were not considered in the ID. If the concern is to avoid the Defence contacting witnesses directly, that could be met by requiring contact to be initiated through the Registry,

[46] ID, para. 125.
[47] *Idem*., para. 165.
[48] *Idem*., para. 125.
[49] *See above,* para. 24.

not the SPO. Considerations of privacy do not justify the presence of the SPO in Defence interviews: the presence of fewer participants is more respectful of privacy and the presence of WSPO would be less restrictive than the SPO's attendance.

32. Second, the Framework goes beyond the least restrictive measures required to preserve evidence. The least restrictive measure to preserve evidence is to require the interviewing party to audio-video record interviews with a witness of the opposing party and for such recording only to be disclosed if an issue arises about the conduct of the interview. Such a recording would preserve evidence and deter any possible misconduct. The Framework exceeds this reasonable minimum. Regulating contact with the witnesses and attendance at the interviews is irrelevant to the preservation of evidence. Requiring the interviewing party to produce and disclose a memorandum and the audio-video recording, even where no concern is raised about the conduct of the interview, goes beyond preserving the evidence and actually forces the Defence to disclose evidence to the SPO, in violation of the normal disclosure regime.

33. Third, the Framework is plainly not the least restrictive measure to aid the expeditiousness of the proceedings. Indeed, proceedings were more expeditious without the Framework and its many provisions and requirements create unnecessary administrative hurdles for the parties.

34. The ID thus erred in finding the Framework was justified, when in fact the Framework fails every step of the assessment of necessity. It was not needed for any of the stated objectives and was not the least restrictive way to achieve them.

VI. ISSUE TWO

Whether the ID erred in law and fact in imposing a framework which covers all witnesses that a party intends to call, rather than merely those witnesses who need the protection of the Framework.

35. Even if, contrary to Ground One, the ID was correct to find that the Framework was justified in relation to some witnesses, it erred in law by indiscriminately applying the Framework to all witnesses in the case, including those who have no need of protection.

36. Amongst the 319 witnesses on the SPO's List of Witnesses, there is a diversity of witnesses with vastly different needs regarding protective measures. The ID erred in treating them all in the same way. The Defence acknowledges that 98 witnesses (typically alleged victims or insider witnesses) have been granted delayed disclosure of their identities as a protective measure and, if the Framework is justified, those might benefit from it. However, the Witness List also includes internationals and senior members of the KLA who cannot conceivably benefit from the Framework.

37. Three examples illustrate the absurdity of applying the Framework to all witnesses: -

1) The Framework applies to all international witnesses, including military officers from [REDACTED] countries,[50] diplomats,[51] senior [REDACTED] officials,[52] and senior [REDACTED] officials.[53] These internationals live outside Kosovo, far from any alleged climate of interference. By virtue of

[50] [REDACTED].
[51] [REDACTED].
[52] [REDACTED].
[53] [REDACTED].

their seniority and experience, it is patronising to assume that they would be susceptible to interference. Their public profile limits any reasonable expectation of privacy. [REDACTED]. [REDACTED].[54] It is farcical to suggest that his privacy or protection could be affected by meeting the Defence;

2) [REDACTED]. [REDACTED].[55] There is no evidence that they need any protection and their identity has long been known to the Defence. SPO involvement in Defence interviews of those witnesses would defeat the purpose of the interviews, since it is clear that they will exercise their right to silence *vis-à-vis* the SPO;

3) The Framework applies to [REDACTED], whose identity was disclosed to the Defence as long ago as November – December 2020[56] and who has previously given evidence in public without protective measures, on multiple occasions.[57] There is no basis whatsoever for assuming that he needs any protection or assistance from the SPO and no reason to prevent the Defence from reasonable interaction with him.

38. It is respectfully submitted that the ID erred in law in failing to assess individually whether each witness needed the Framework. Pursuant to Article 39(11), the PTJ only has a discretion to impose the Framework where "necessary". Necessity can only properly be assessed by reference to the specific circumstances of individual witnesses. In this regard, the application of the Framework cannot be distinguished from the application of protective measures (indeed, at the ICTR measures restricting

[54] [REDACTED].
[55] [REDACTED].
[56] *See* Disclosure Batch 9.
[57] [REDACTED].

interviewing the other parties' witnesses were treated as protective measures).[58] Ample authority demonstrates that the assessment of necessity depends on the individual circumstances of each witness assessed in each case.[59] There is no justification for imposing the Framework in relation to any witness for whom it is not necessary to do so. Further, imposing the Framework on all witnesses is not the least restrictive way to achieve the stated goals.

39. It would not be unduly cumbersome to apply the Framework on an individual basis. First, protective measures have been assessed on an individual basis throughout these proceedings.[60] Adopting the same approach for the Framework would be no more burdensome. Indeed, it would simply require the SPO to make one consolidated application covering each witness who it alleges needs the protection of the Framework. Second, there is considerable overlap between the category of witnesses who may benefit from the Framework and the category of witnesses who have been granted delayed disclosure of their identities. The Defence would not object to the Framework presumptively being applied to delayed disclosure witnesses as a group.

40. The ID's reasons for concluding that there was justification for applying the Protocol to international or senior KLA witnesses are erroneous. First, as with protective measures, the burden of proof is on the party seeking to impose the

[58] ICTR, *Ndindiliyimana et. al.,* ICTR-00-56-T, Trial Chamber II, *Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness Gap*, 26 October 2007, para. 1; *Niyitegeka*, ICTR-96-14-T, Trial Chamber I, *Decision (Prosecutor's Request to Contact Defence Witnesses and Their Family Members)*, 10 October 2002, para. 8.
[59] ICTY, *Lukić et al*., IT-98-32/1-T, Trial Chamber III, *Order on Milan Lukić's Request for Protective Measures*, 23 July 2008, p. 4; ICC, *Katanga,* ICC-01/04-01/07-475, Appeals Chamber, *Judgment on the Appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I Entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, para. 59.
[60] KSC-BC-2020-06, F00373/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Sixth Decision on Specialist Prosecutor's Request for Protective Measures*, 25 June 2021, confidential, para. 28; F00407/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Seventh Decision on Specialist Prosecutor's Request for Protective Measures*, 21 July 2021, confidential, para. 6.; F00438/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Eighth Decision on Specialist Prosecutor's Request for Protective Measures*, 24 August 2021, confidential, para. 16.

Framework.[61] Yet, in finding "that he or she has an international profile and/or occupied a high-ranking position does not, as such, establish that he or she should not be allowed to request the protection under the terms of the Protocol",[62] the ID placed the burden on the Defence to prove that the Framework should exclude these witnesses, rather than on the SPO to prove that it should apply to them.

41. Second, no reasonable trier of fact could have concluded that it was necessary to apply the Framework to these witnesses. All findings about a climate of witness interference, on which the decision is based, are geographically limited to the territory of Kosovo. The whole category of international witnesses is outside the geographic scope of that climate. There is no rational basis for finding that those witnesses need the Framework. Moreover, that no witness in these categories has sought protection or has complained of interference in this case, although their identities were known to the Defence (in many cases) for 18 months before the application of the Framework, itself suggests that for them the Framework was unnecessary. Indeed, the ID itself accepts that the need for protection arises particularly in relation to witnesses who benefit from "individualised protective measures".[63] The necessary corollary of those findings is that the justification for the Framework is reduced in relation to other witnesses.

42. Third, there was no factual basis upon which the ID could have concluded that it was necessary to apply the Framework to these witnesses. The only evidence relied upon by the SPO was that during the oral hearing it referenced security concerns expressed by one junior member of an international team, with ongoing connection to Kosovo, and sought to extrapolate these concerns to prominent international

[61] ICTY, *Brđanin et al.*, IT-99-36-PT, Trial Chamber II, *Decision on Motion by Prosecution for Protective Measures*, 3 July 2000, para. 16.
[62] ID, para. 120.
[63] *Idem.*, paras 118, 124.

witnesses.[64] That is plainly an insufficient basis to justify the imposition of a Protocol on all international witnesses.

43. Finally, the ID's express reasoning that "a significant number of the international witnesses […] did not occupy high-ranking positions at the relevant time" is erroneous. In relation to any issue of witness protection, what matters is the current position, circumstances and vulnerability of the witness and not the position that they occupied in 1998-1999.[65] The ID failed to assess the current position of any international witness. Moreover, the conclusion that certain international witnesses, which the ID failed to identify, did not occupy high-ranking position, necessarily concedes that other international witnesses *did* occupy high-ranking positions – yet the ID entirely failed to justify the application of the Framework to them.

44. Accordingly, the Appeals Panel should overturn the finding that the Framework should apply to all witnesses and direct that the Framework can only apply to those witnesses who are assessed to need its protection.

VII. ISSUE THREE

Whether the ID erred in law in finding that the Proposed Framework does not violate the rights of the Accused, specifically the right against self-incrimination and the right to equality of arms.

45. The ID erred in law in finding that the Framework's provisions do not violate the rights of the Accused against self-incrimination, nor has equality of arms been violated.

[64] KSC-BC-2020-06, Transcript of Hearing, 22 February 2022, public, p. 1041.
[65] The Defence relies on high-ranking positions in 1998-1999 as evidence of the current stature and experience of the witness; any former General is unlikely to be susceptible to interference.

46. When assessing whether there has been a violation of the right against self-incrimination, it is necessary to look to the fairness of the proceedings as a whole, including the means by which evidence is obtained.[66] The ID found that the right against self-incrimination was not violated because the Accused is not *directly* required to make self-incriminatory statements by the Framework, and the Defence remains free to define its case strategies without external influence.[67] It thus ignores the *indirect* means by which the Framework violates the right against self-incrimination. If the SPO is present during an interview or will receive a transcript of an interview subsequently, the Defence is faced with a choice: it can either choose to explore lines of questioning with the tangible risk of providing the SPO with information it would normally not have access to (including potentially self-incriminatory material), or it can choose not to explore lines of questioning, thereby potentially losing valuable information material to its case. The Defence would thus no longer be "at liberty to define its case strategies."[68] To the contrary, in order to protect Mr. Krasniqi's right against self-incrimination, it would have to decline to explore lines of questioning which could have assisted the Defence.

47. The ID further erred in finding that the right against self-incrimination is protected by making the admission of information arising from Defence interviews contingent on judicial authorisation.[69] If the SPO learns incriminating information through attending a Defence interview, the Defence takes no consolation from the admissibility of the interview being contingent on judicial authorisation. The problem is not that the incriminating information could be admitted through the interview, but that the SPO would have learnt incriminating information which it is then free to

[66] ECtHR, *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, *Judgement*, 27 October 2020, paras 125-128.
[67] ID, para. 150.
[68] *Ibid.*
[69] *Idem.*, paras 151-152.

investigate and adduce in any other way (most obviously through examination-in-chief at trial).

48. Furthermore, the Defence possesses a right to mount its arguments through proceedings that do not require mental contortions in defending its position. However, the Framework's imposition of mechanisms through which the Prosecution may observe the Defence's evolving case strategies, forces the Defence to alter its approach to the selection of witnesses it wishes to interview and to the interviews themselves. Knowledge that any interviews with SPO witnesses will be recorded and subsequently disclosed unnecessarily forces the Defence to alter its investigative strategy.

49. Further, the right not to self-incriminate extends to the witnesses themselves.[70] The presence of the SPO and the mandatory disclosure of the recorded interview to the SPO, raises the stakes for any witness interviewed by the Defence, to respond to the line of questioning as truthfully and in as detailed a manner as possible while in the presence of the Prosecution. As previously stated,[71] in instances where witnesses are unwilling to speak to the Prosecution due to a risk of self-incrimination, the conditions imposed under the Framework would mean that their choice to speak to the Defence may be equally impaired by the presence of the Prosecution and the mandatory disclosure of interview recordings.

50. The ID asserts that the comparatively narrower scope of the Defence's case, in comparison to that of the SPO, and the lack of proprietary interest by any party (in particular witnesses) means that equality of arms remains unaffected.[72] While equality of arms does not require the imposition of *exactly the same* conditions on all Parties, a

[70] Rule 151(1) of the Rules.
[71] *See* para. 37(2) above.
[72] ID, paras 141, 144.

proportional approach is needed to govern the amount of time and resources allocated to all sides to prepare for trial.[73] A violation of equality of arms may be found, even in the absence of prejudice against a particular party.[74] Despite the assertion that the Framework is "phrased in general terms,"[75] it nevertheless imposes an asymmetric burden on the Defence through the imposition of administrative delays and logistical complexities not faced by the SPO in conducting its own investigations.

51. The ID erred in finding that the Framework operates without distinction, as the required presence of the calling party at interviews applies equally to Defence witnesses, should the SPO wish to interview them at a later stage.[76] However, the timing of the imposed Framework does allow for a distinction to manifest. The SPO's investigation was completed at the time the Framework was enacted.[77] Moreover, the SPO bears the burden of proof and has placed more than 300 witnesses on its List of Witnesses. The Defence has no burden of proof and no obligation to call any witnesses at all. The practical effect of the Framework is thus to impose a far greater burden on the Defence than would ever be imposed on the SPO.

52. Other tribunals have ruled that the effective management of proceedings should never be allowed to trump the fair trial rights of the Accused[78] – this represents one such instance where the former is indeed trumping the latter.

[73] ECtHR, *Foucher v. France*, no. 22209/43, *Judgment*, 18 March 1997, para. 34.
[74] ECtHR, *Zahirović v. Austria*, no. 58590/11, *Judgment*, 25 April 2013, para. 48; *Milatová and Others v. the Czech Republic*, no. 61811/00, *Judgement*, 21 September 2005, para. 65; *Bajić v. North Macedonia*, no. 2833/13, *Judgement*, 10 September 2021, para. 59.
[75] ID, para. 144.
[76] *Ibid.*
[77] KSC-BC-2020-06, F00742, Specialist Prosecutor, *Prosecution Submissions for Eleventh Status Conference*, 21 March 2022, public, paras 11-13.
[78] *See* ICC, *Lubanga*, ICC-01/04-01/06-2192-Red, Trial Chamber, *Second Decision on Disclosure by the Defense and Decision on Whether the Prosecution May Contact Defence Witnesses*, 20 January 2010, para. 49.

VIII. CONCLUSION

53. The Defence respectfully requests the Appeals Chamber to grant the appeal on the three grounds stated above and to overturn the Impugned Decision.

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