In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi**
Before:	**A Court of Appeals Panel** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Victims' Counsel
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Victims' Counsel Response to Defence Appeals 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. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law"), Rule 114(4)(a) and Rule 170(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Victims' Counsel responds to the Defence Appeals[1] against the Pre-Trial Judge's "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" ("Impugned Decision")[2].

2. This response is filed by Victims' Counsel in order to protect the rights of the dual status witnesses in this case. The Framework adopted by the Impugned Decision ("Framework")[3] provides important safeguards for those in this category.

3. The Defence objections to the Framework fall into three parts:

   i. That it undermines or is inconsistent with the fair trial rights of the Accused.

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

[2] KSC-BC-2020-06, F00854, 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.

[3] Impugned Decision, para. 212.

ii. That it improperly fails to differentiate between the different types of witnesses that form the Specialist Prosecutor's Office's ("SPO") list.

iii. That it is not compatible with the Law and the Rules.

4. Finally, the Thaçi Defence Appeal makes a request for suspensive effect pending the decision of the Court of Appeals Panel.

5. Victims' Counsel submits that the Appeals should be dismissed because:

i. The Framework is entirely consistent with the fair trial rights of the Accused and reflects the practice at the International Criminal Court ("ICC").

ii. There is nothing improper in treating the witnesses uniformly and, in any event, there must be a Framework for the dual status witnesses.

iii. The Framework is fully consistent with the Law and the Rules.

6. Finally, the request for suspensive effect should be denied: it is important for the protection of the dual status witnesses.

II. CLASSIFICATION OF FILING

7. Pursuant to Rule 82(4) of the Rules, this filing is classified as public as it responds to a previous filing that is public, and does not contain any confidential information.

III. PROCEDURAL HISTORY

8. On 3 December 2021, the SPO requested that the Pre-Trial Judge issue a protocol for the handling of confidential information and contacts with witnesses.[4] The

[4] KSC-BC-2020-06, F00594, Prosecution Submissions on Confidential Information and Contacts with Witnesses, 3 December 2021.

SPO submitted a 'Proposed Framework' for (i) handling of confidential information during investigations and for (ii) contacts with witnesses.

9. Victims' Counsel responded on 10 December 2021.[5] On 15 December 2021, the Defence for Messrs Thaçi, Selimi, Krasniqi and Veseli filed their responses.[6]

10. Pursuant to the Pre-Trial Judge's order,[7] on 3 February 2022, the Registrar provided her submissions on the Proposed Framework.[8]

11. On 4 February 2022, the Pre-Trial Judge invited the parties to respond to the submissions by 14 February 2022.[9]

12. On 14 February 2022, all parties[10] and Victims' Counsel[11] filed responses to the Registrar's submissions. On 15 and 21 February 2022 respectively, the Thaçi Defence further replied to responses of Victims' Counsel[12] and the SPO[13].

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[5] KSC-BC-2020-06, F00605, Victims' Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 10 December 2021.
[6] KSC-BC-2020-06, F00625, Thaçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021; F00626, Selimi Defence response to "Prosecution submissions on confidential information and contacts with witnesses", 15 December 2021; F00627, Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021; F00628, Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021.
[7] KSC-BC-2020-06, F00650, Order to the Registrar for Submissions, 21 January 2022.
[8] KSC-BC-2020-06, F00679, Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 3 February 2022.
[9] KSC-BC-2020-06, Transcript of 4 February 2022, T.860:1-13.
[10] KSC-BC-2020-06, F00691, Selimi Defence Response to "Registrar's Submissions on Proposed Protocol for Interviews with Witnesses", 14 February 2022; F00692, Thaçi Defence Response to the Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022; F00693, Prosecution response to 'Registrar's Submissions on Proposed Protocol for Interviews with Witnesses', 14 February 2022; F00694, Veseli Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022; F00695, Krasniqi Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022.
[11] KSC-BC-2020-06, F00690, Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations, 14 February 2022.
[12] 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.
[13] 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.

13. On 22 February 2022, the parties and Victims' Counsel presented oral submissions.[14]

14. On 24 June 2022, the Pre-Trial Judge issued the Impugned Decision.[15]

15. On 18 July 2022, the Defence for Messrs Thaçi, Selimi, Krasniqi and Veseli filed requests for certification to appeal the Impugned Decision.[16] The SPO responded on 1 August 2022,[17] and the Defence for Messrs Thaçi, Selimi, Krasniqi and Veseli filed their replies on 15 August 2022.[18]

16. On 26 August 2022, the Pre-Trial Judge issued his decision[19] and granted leave to appeal 10 issues raised by Messrs Thaçi, Selimi, Krasniqi and Veseli.

17. On 8 September 2022, the Defence Appeals were filed.[20]

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[14] KSC-BC-2020-06, Transcript of 22 February 2022.
[15] KSC-BC-2020-06, F00854, 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.
[16] 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; F00884, Selimi 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; F00886, Krasniqi 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; F00887, Krasniqi 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.
[17] KSC-BC-2020-06, F00905, Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00854, 1 August 2022.
[18] 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; F00925, Krasniqi Defence Reply to Prosecution Response to Krasniqi Defence Request for Certification to Appeal Decision F00854 with public Annex 1, 15 August 2022; F00926, Selimi Defence Reply to SPO Response to Selimi Defence Request for Certification to Appeal Decision F00854, 15 August 2022; F00927, Veseli Defence Reply to Prosecution Response to Request for Certification to Appeal Decision F00854 (F00906), 15 August 2022.
[19] KSC-BC-2020-06, F00939, Decision on Defence Requests for Leave to Appeal Decision F00854, 26 August 2022.
[20] See footnote 1.

IV. SUBMISSIONS

A. THE FRAMEWORK AND THE FAIR TRIAL RIGHTS OF THE ACCUSED

18. As a general observation, Victims' Counsel notes that the core provisions of the Framework that are said to impinge upon the fair trial rights of the Accused are all present in the ICC Protocol (on which the Framework is modelled).[21]

19. In particular, the requirements to:

    i. inform the calling party (and where appropriate Victims' Counsel) of the intention to conduct an interview with one of its witnesses,

    ii. permit a representative of the calling party to be present at the interview,

    iii. make an audio-video recording of the interview and provide a copy to the calling party,

    are all matters within the ICC Protocol.[22]

20. This fact tends to suggest that some of the criticisms ("[P]roper investigations are impossible under the Framework as it stands"[23], "so unfair and unreasonable that can (sic) only be the product of an abuse of discretion"[24]) of the Framework are exaggerated.

21. Although the Selimi Defence in particular puts forward what it sees as reasons to qualify the weight to be attached to the existence of the ICC Protocol[25], these are unconvincing in light of the fact that the Protocol is in routine use and has never been successfully challenged by a Defence team at the ICC.

22. At the oral hearing in respect of this issue, the Defence were driven to submit that the ICC Protocol was inconsistent with the ECHR, and that the manner in

[21] ICC, Chambers Practice Manual, Fifth Edition, 25 March 2022, Annex.
[22] ICC, Chambers Practice Manual, Fifth Edition, 25 March 2022, Annex (see paras 29, 33 and 37).
[23] Thaçi Appeal, para. 38.
[24] Selimi Appeal, para. 46.
[25] Selimi Appeal, paras 13-20.

which many civil law jurisdictions operate also breached the suggested standards of fairness:

> 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 any 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 can be used against him, yes, we do think it would violate the ECHR.[26]

> 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 would follow-up on what I was saying earlier. You know that in most civil law systems, even when the Defence get 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 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.[27]

23. Turning to the issue of the asserted infringements of the fair trial rights, it is respectfully submitted that there is nothing in these complaints at all.

i. Erosion of Attorney-Client privilege

24. The Thaçi Defence argues that the conduct of interviews with witnesses is covered by Attorney-Client privilege. It is not.

25. With respect to the Thaçi Defence's argument, it relies on a misapprehension as to the nature of Attorney-Client privilege. The privilege "protects communications (1) between a client and his or her attorney (2) that are intended

[26] KSC-BC-2020-06, Transcript of 22 February 2022, T.994:22-25 – T.995:1-6.
[27] KSC-BC-2020-06, Transcript of 22 February 2022, T.1024:25 – T.1025:1-14.

to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice."[28]

26. The common law has developed some narrow amendments to this essential description[29], but none of these are remotely apt to cover a defence lawyer interviewing a prosecution witness in circumstances in which there is (1) no professional relationship between them, (2) the confidential instructions of the lawyer's client are freely shared by the lawyer with his consent and (3) the purpose is patently not to provide legal advice to the client, who is not even present[30].

27. Applying that test to the Thaçi submissions, it is obviously correct that information received from the Accused by his lawyers, and on which they base their interviews, is privileged.[31] The difficulty arises at the next step:

> Witness interviews allow Defence counsel to follow investigative avenues and lines of inquiry which have been provided by the client, *and are also privileged*.[32]

28. Such an interview is not privileged. Attorney-Client privilege exists, as its name suggests and as the authorities emphasise, between a lawyer and a client. A witness, being interviewed by the Thaçi Defence, is neither lawyer nor client but a third party to whom they may choose to impart privileged material. Anything that is said to him/her is done without the protection of privilege. The privilege that attached to the information when in the possession of the Attorney is waived at the point at which it is imparted to a third party.

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[28] *US v Mejia*, 655 F.3d 126 (2d.Cir.2011) United States Court of Appeals, Second Circuit at p. 9.
[29] E.g. accountants facilitating communication for lawyers, see *US v Mejia*, p. 10.
[30] See further commentary as to this in *US v Mejia* at p.10 "Nevertheless, the extension has always been a cabined one, and "[t]o that end, the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client." *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999). "
[31] Thaçi Appeal, para. 25.
[32] Thaçi Appeal, para. 25.

29. The witness is not and cannot be bound by Attorney-Client privilege: indeed, the witness is free to share what was said at the interview with anyone they choose.

30. Thus, it is not the Framework which impinges on the Attorney-Client privilege, but rather the decision to communicate privileged information to a third party, in this case the witness. There is no obligation on the Defence to do so, still less any obligation imposed by the Framework.

31. The fact that the interview becomes (potentially) admissible is a further source of complaint by the Thaçi Defence.[33] But, as the worked example in paragraph 27 of the Thaçi Appeal demonstrates, what the Thaçi Defence really seeks is a dress rehearsal with the SPO's witnesses, but one in which if matters do not proceed to the satisfaction of the Defence, no proper record will survive. Desirable though this may be for the Defence, it cannot be elevated into a fair trial right without some proper basis for doing so. None is proposed.

32. The Krasniqi Defence does not argue that the interviews are privileged per se, but that the presence of the SPO at the interviews is "unfair because it would reveal privileged matters to the Prosecution". Again, the answer to this lies in the fact that these are interviews of a voluntary nature being undertaken by the Defence.

ii. Right against self-incrimination

33. The Selimi Defence asserts that the presence of an SPO representative at the interview is a breach of the Accused's right not to incriminate himself.[34] The Pre-Trial Judge's analysis of the right against self-incrimination, and the fact that the Framework does not breach that right, is entirely persuasive and is not repeated here.[35] As with the Thaçi argument in respect of privilege, this submission

[33] Thaçi Appeal, para. 37, see further on this topic at paras 37-38 below.
[34] Krasniqi Appeal, paras 45 *et seq.*
[35] Impugned Decision, paras 146-154.

founders on the fact that the choice as to what, if anything, to say in an interview of a witness, lies with the Defence and is not governed by the Framework. To couch this as an "indirect" violation of the right against self-incrimination[36] is to attempt to extend the scope of the right to cover the unintended consequences of holding an interview. No basis is offered on which such an extension of the right against self-incrimination could be made.

iii. The requirement for an audio-video recording

34. The requirement that an interview with a witness to be called by the opposing party has to be audio-video recorded attracts significant criticism.[37]

35. Victims' Counsel submits that there can be no principled objection to the interview being recorded. What basis can there be for not wanting an unimpeachable record of the proceedings to exist? Presumably, in the absence of a recording, there would be no objection to a written record being made by the representative of the calling party. It is unclear why this obviously inferior method of recording should be used, and equally unclear how any later dispute as to what was said at the interview should be resolved.

36. The Krasniqi Defence submits that, "in the absence of any allegation of impropriety, it is not necessary to preserve evidence."[38] This takes no account of later disputes as to what was said at the interview and is no answer to the issue of the need for an unimpeachable record.

37. The fact that the recording is then capable of being admitted in evidence is the subject of further criticism. It is said to be "perhaps the most problematic aspect of the Framework".[39]

[36] Krasniqi Appeal, para. 46.
[37] Krasniqi Appeal, para. 3(4).
[38] Krasniqi Appeal, para. 28.
[39] Thaçi Appeal, para. 37.

38. However, the question of the admissibility of the recording is a matter for the Trial Panel itself. The Framework could not and does not seek to render the recording admissible as is acknowledged by the terms of paragraph o. An application to admit the evidence would have to be decided on a case-by-case basis by the Panel. If a decision were to be taken by a Trial Panel to admit a recording *proprio motu* then it would, self-evidently, have decided that the recording contained relevant and admissible evidence and have decided that there was no procedural unfairness involved in its admission. Neither party can legitimately complain about evidence of that kind being admitted.

39. The Selimi Defence argues that the Registry, rather than the Trial Panel, should receive the recording[40]. The submission is made that this would be a "less restrictive measure", and "more proportionate to the aims of the Framework."[41] The Pre-Trial Judge is strongly criticised for failing to contemplate the involvement of the Registry as custodian of the recording.[42]

40. It should be noted that at no stage in the proceedings at first instance, either in its written or oral submissions, did the Selimi Defence (or any other Defence team) propose this as an alternative, notwithstanding that it is now promoted as an obvious amendment to the Framework's regime. It is submitted that these Appeal proceedings are not the appropriate point at which to propose modifications to the Framework that were not raised and litigated at first instance and that this argument should be summarily dismissed as a result.

41. The Thaçi Defence further argues (Eighth Issue) that the requirement to disclose a copy of the recording to the SPO "contravenes the Court's disclosure regime set out in Rules 104-111 of the Rules".[43] Victims' Counsel respectfully disagrees.

[40] Selimi Appeal, para. 28.
[41] Selimi Appeal, para. 28.
[42] Selimi Appeal, para. 48.
[43] Thaçi Appeal, para. 46.

The "disclosure" of material by the Defence has already taken place once the interview has occurred: it is the content of the interview itself. What is being provided thereafter, by supplying a copy of the recording, is a record of the interview in relation to which differing notes/interpretations/recollections may exist. The provision of the recording replaces all these with an accurate record. The provision of the recording is therefore something quite different from the material governed by Rule 104, which mandates the provision of material/information to the SPO by the Defence in order to provide adequate notice to the prosecution of the issues and evidence that it will need to confront in the course of the Defence case. There is no reason to expect the Rules to regulate a procedure which they do not provide for themselves, but which supplements them.

iv. Compromise of the right of the accused to investigate the case against the Accused

42. Complaint is made that the Defence investigations will take longer under the Framework.[44] It is not at all clear that this will amount to an appreciable delay within the context of the case as a whole: the Pre-Trial Judge was entitled to conclude that the defence had failed to demonstrate this and that, in any event, "the Proposed Framework contributes to the proper administration of justice, in particular in relation to the protection of witnesses in the context of the significant security issues affecting the present proceedings and the preservation of evidence".[45]

[44] Krasniqi Appeal, para. 29.
[45] Impugned Decision, para. 165.

v. Equality of arms

43. The Framework applies equally to the SPO. The Krasniqi Defence argues that account should be taken of the fact that the SPO did not have to work within the Framework when conducting its investigations.[46] A retrospective view of the process is not helpful: at the time that the SPO were conducting the majority of their interviews, there were no Accused to invite to attend them.

B. THE FRAMEWORK IS CONSISTENT WITH THE LAW AND THE RULES

i. The Pre-Trial Judge did not err in his assessment of the Legal Basis to Order the Framework

44. The Veseli Defence submits that the Pre-Trial Judge erred by issuing the Framework relying primarily on Article 39(11) of the Law.[47] It argues that Article 39(11) does not operate independently from Article 23(1) of the Law; nor does it authorise the Pre-Trial Judge to order other measures than those provided by Article 23(1) of the Law and Rule 80 of the Rules.[48] Victims' Counsel disagrees with these submissions.

45. At the outset Victims' Counsel notes that the Impugned Decision was issued by the Pre-Trial Judge pursuant to Articles 21(2), 23(1), 35(2)(f) and 39(1) and (11) of Law and Rule 80(1) of the Rules.[49] However, in paragraph 115 of the Impugned Decision the Pre-Trial Judge specifically explained that Articles 39(1) and (11) as well as Article 35(2)(f) of the Law provide the legal basis for the Pre-Trial Judge *to order* general measures regarding, *i.a.,* the regulation of contacts with witnesses.[50]

[46] Krasniqi Appeal, paras 50-51.
[47] Veseli Appeal, para. 11.
[48] Veseli Appeal, para. 12.
[49] Impugned Decision, p. 1.
[50] Impugned Decision, para. 115.

46. Article 39(11) regulates the powers and functions of the Pre-Trial Judge and entrusts the Pre-Trial Judge with the protection and privacy of victims and witnesses in general. Article 23(1) of the Law guarantees that the Rules of Procedure and Evidence shall provide for the protection of victims and witnesses (first sentence). This guarantee takes effect, among others, in Rule 80 of the Rules which regulates granting of (individual) protective measures to victims and witnesses. Moreover, Article 23(1) itself includes also a non-exhaustive list of protective measures (second sentence).

47. There is no doubt that Article 23(1) of the Law constitutes the primary substantive provision on the protection of victims and witnesses in the Kosovo Specialist Chambers' ("KSC") legal framework and that it takes effect partly in Rule 80 of the Rules.[51] However, Article 23(1) and Article 39(11) of the Law regulate different matters (powers of the Pre-Trial Judge and protection of victims and witnesses) which do not overlap but rather complement one another. There is no hierarchical competition between these two provisions.

48. Contrary to what the Veseli Defence submits, nothing in Article 23(1) or Rule 80 of the Rules can be understood as limiting or determining the Pre-Trial Judge's (or the Trial Panel's) discretionary authority to provide measures for the protection and privacy of victims and witnesses pursuant to Article 39(11) of the Law. Such limitation certainly cannot be derived solely from the wording of Article 23(1), first sentence, which, as noted above, ensures that the Rules shall provide for the protection of victims and witnesses.

[51] Impugned Decision, para. 121.

ii. The framework does not exceed the scope of Article 39(11) of the Law nor does it infringe on the principle of necessity/proportionality

49. The criticism directed at the Framework under this heading is that not all witnesses will require the protection of the Framework, that it should apply only to those who can be shown to be at risk, *i.e.* it must be shown to be necessary within Article 39 (11) and its measures must be proportionate.

50. Whatever the competing arguments on this point, there seems to be at least some acceptance from the Defence that it *may* be necessary to have some form of Framework for the dual status witnesses.[52] Victims' Counsel submits that this is a realistic approach. There can be no sensible dispute that the VPPs in this case have suffered either directly or indirectly at the hands of the KLA. It takes little imagination to picture the likely effect on the VPPs of receiving direct contact on behalf of such senior KLA figures as the Accused. The Court should not contemplate permitting such contact, should regard the necessity as self-evident, and should apply the Framework to all dual status witnesses without the need for further inquiry.

51. In this regard, Victims' Counsel notes that the Framework requires the inclusion of Victims' Counsel in communication between the opposing party and dual status witnesses, in compliance with the Code of Professional Conduct (Article 16).

52. Victims' Counsel further submits that the Defence submissions based on the Law and the Rules on this topic are without merit.

53. According to the Thaçi Defence, the Pre-Trial Judge erred in imposing the Framework pursuant to Article 39(1) of the Law as the latter is limited to measures that are necessary. The Thaçi Defence submits that the Pre-Trial

[52] KSC-BC-2020-06, F00625, Thaçi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021, para. 29.

Judge's blanket application of the Framework to all witnesses is excessive,[53] and therefore submits that it falls outside the scope of the Pre-Trial Judge's power provided for in Article 39(11).[54]

54. The Veseli Defence argues that the KSC's legal framework, and specifically, Articles 23(1) and 39(11) of the Law and Rule 80 RPE, exclude the application of measures of a general nature which, by definition, do not entail an assessment of necessity or proportionality.[55]

55. The Selimi Defence submits that the Pre-Trial Judge abused his discretion by adopting the Framework based on article 39(11) of the Law and that he should at least have established a nexus between the risk and the individual circumstances of the witness in question.[56] It argues that "such a framework must only be adopted on request by witnesses whose circumstances necessitate its application".[57]

56. Similarly, the Krasniqi Defence submits that the Impugned Decision erred in law in failing to carry out a structured necessity assessment and that the Framework was unnecessary to achieve its objectives.[58] Further, the Krasniqi Defence argues that the Impugned Decision is erroneous as it indiscriminately applies the Framework to all witnesses in the case, including those who have no need of protection.[59]

57. Contrary to the Defence's submissions, the Framework does not exceed the powers granted to the Pre-Trial Judge under Article 39(11) of the Law. Neither does it infringe on the principle of necessity/proportionality.

[53] Thaçi Appeal, paras 40-41, 44.
[54] Thaçi Appeal, para. 41.
[55] Veseli Appeal, para. 15.
[56] Selimi Appeal, para. 9.
[57] Selimi Appeal, paras 10 *et seq*.
[58] Krasniqi Appeal, para. 21.
[59] Krasniqi Appeal, paras 35 *et seq*.

58. The Pre-Trial Judge explicitly stated in the Impugned Decision that the Framework serves to ensure that contacts between the witnesses of the calling party and the opposing party are appropriately regulated.[60] In this regard the Framework offers additional protection to witnesses of the calling party in relation to their communication with the opposing party, and upholds the privacy of witnesses by providing that contacts between the witnesses and the opposing party are initiated through the calling party, and defining the role of the calling party in the subsequent interviews conducted by the opposing party.[61]

59. The need for this protection has been sufficiently justified by the Pre-Trial Judge who pointed to the "climate of witness intimidation and interference in connection with criminal proceedings regarding former members of the KLA" and the rank and influential position of the Accused.[62]

60. It is in this context that the Framework puts in place a system which guarantees the rights of witnesses provided for in Article 23(1) in their communication and engagement with the parties to the proceedings outside of the courtroom. The Framework does not grant additional individual protective measures under Rule 80 of the Rules therefore there is no need to conduct an individual risk assessment.

61. Regulation of communication between witnesses of the calling party and the opposing party addresses the above-mentioned general climate of witness intimidation and the influential position of the Accused in this case. It offers to witnesses an important initial sense of security while having no real bearing on the fair trial rights of the Accused: communication takes place through the channels already known to the witness, the witness is under no pressure to refuse communication or to request or decline the presence of the calling party's

[60] Impugned Decision, paras 118 and 116.
[61] Impugned Decision, paras 116-123.
[62] Impugned Decision, para. 118.

and/or the Victims' Counsel during a potential interview, and the interview is recorded.

62. The Framework will not necessarily apply in its entirety to all witnesses. After initiation of communication, participation of the calling party in the subsequent meeting between the opposing party and the witness will be triggered only if requested by the witness or subjected to judicial review.[63]

63. Finally, Victims' Counsel submits that ICC jurisprudence relating to Article 57(3)(c) of the Rome Statute referred to by the Selimi Defence is of no relevance to the matter. The examples put forward by the Selimi Defence to undermine the Pre-Trial Judge's reliance on the ICC jurisprudence concern protection requests in relation to specific individuals (inclusion of a witness in the Court's protection programme, threat to the rights of the accused by a prosecution press release, protection of the accused against the State detaining him),[64] and not the adoption of protocols regulating contacts between a party and witnesses of opposing party.

C. THAÇI DEFENCE REQUEST FOR SUSPENSIVE EFFECT

64. The Thaçi Appeal includes a request that the Court of Appeal panel orders "an immediate stay of execution of the Impugned Decision".

65. Victims' Counsel strongly opposes this application. The effect would be that, until such time as a replacement Framework is in place, the dual status witnesses would face the prospect of being contacted by the Defence directly. As already mentioned, for dual status witnesses, especially but not exclusively those living in Kosovo, direct contact from the Defence in this case is simply inappropriate, however professionally it is managed.

[63] Impugned Decision, para. 212 II (b).
[64] Selimi Appeal, paras 13-19.

66. The Thaçi Defence itself appeared to acknowledge that there *may* need to be a regime of some kind in place for those in this category:

> At the very most, it is possible that some victim-witnesses may require special treatment when being contacted, and eventually, interviewed by the Defence, but this number should be limited after the SPO has made a specific showing that such measures are required for each specific witness it identifies, such as vulnerable and sensitive victims of crime, who have been granted protective measures by the PTJ.[65]

67. The Veseli Defence has made its position clear:

> "[…] 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."[66]

68. To suspend the Framework, and to have nothing in its place, would be to make the dual status witnesses vulnerable to contacts of a kind that are incompatible with the KSC's duty to provide for their protection under Article 23(1), in particular their psychological well-being, dignity and privacy. That is certainly no criticism of Counsel, who would be making the contact in perfectly good faith: it is a question of how that contact would be perceived by the VPPs. The Framework provides needed regulation and order to a practice that requires care and conscientiousness, particularly when it involves vulnerable victims.

V. CONCLUSION

69. The Pre-Trial Judge's Framework is a proportionate response to a serious and legitimate concern. It is consistent with his duty under Article 23(1). It is consistent with the established practice of the International Criminal Court. It does not impact the fair trial rights of the Accused. It is entirely compatible with the legal framework of the Kosovo Specialist Chambers. It fulfils a real need, as

[65] KSC-BC-2020-06, F00625, Thaçi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021, para. 29.
[66] KSC-BC-2020-06, Transcript of 14 September 2021, T.618:22-25 – T.619:1-7.

correctly identified by the Pre-Trial Judge. For all these reasons these Appeals should be denied.

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