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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 Consolidated Reply to Prosecution and Victims' Counsel Responses to Defence Appeal against the Framework Decision, KSC-BC-2020-06/IA024/F00015, dated 27 September 2022

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I. INTRODUCTION

1. Pursuant to the Appeals Panel's authorisation,[1] the Defence for Jakup Krasniqi ("Defence") hereby replies to the Victims' Response[2] and the Prosecution Response.[3]

2. Pursuant to Rule 82(4) of the Rules,[4] this filing is confidential as it replies to a confidential response.

II. SUBMISSIONS

3. The Prosecution Response begins by wrongly asserting that the Framework Decision[5] is "firmly grounded in similar protocols and measures from this Court, the ICC, and the *ad hoc* tribunals".[6] The Framework is significantly more restrictive than anything imposed by the *ad hoc* tribunals,[7] evident even from the two cases cited by the Specialist Prosecutor's Office ("SPO").[8] In *Ndindiliyimana*, measures appear only to have been imposed on protected witnesses and only generally required the Defence

[1] KSC-BC-2020-06, IA024/F00014, Court of Appeals Panel, *Decision on Defence Requests for Extension of Time and Word Limits to Reply*, 22 September 2022, public, para. 7.
[2] KSC-BC-2020-06, IA024/F00008, Victims' Counsel, *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* ("Victims' Response"), 19 September 2022, public.
[3] KSC-BC-2020-06, IA024/F00013, Specialist Prosecutor, *Prosecution Response to Defence Appeals from Decision on Witness Contact Framework (F00854)* ("Prosecution Response"), 21 September 2022, confidential, with Annex 1, confidential.
[4] Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").
[5] 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.
[6] Prosecution Response, para. 19.
[7] *See*, Framework Decision, para. 131.
[8] Prosecution Response, fn. 47.

to seek Chamber's authorisation and witness' consent for an interview.[9] The Prosecution was exceptionally allowed to be present in one specific interview "due to the sensitivity of the issue", which concerned an apparent admission that the witness had "falsely accused" a defendant.[10] Similarly, in *Blagojević*, the protocol only required the Defence to give the Prosecution 10-days' notice of proposed contact with a witness and allowed the Prosecution to seek the witness' consent.[11] These cases – which represent the high water mark of *ad hoc* tribunal jurisprudence – provide no grounds for the imposition of a framework requiring *inter alia* SPO presence at and/or recording and disclosure of all Defence meetings with all SPO witnesses. The Framework is also more restrictive than the ICC Protocol, the only precedent which might be said to support it.[12]

4. Neither is the Framework grounded in KSC jurisprudence. Trial Chamber II imposed a framework *propriu motu* in *Gucati and Haradinaj*.[13] However, that case is readily distinguishable since its core allegations relate to interference with witnesses and obstruction of proceedings.[14] Moreover, it only involved four Prosecution witnesses and its framework, thus, imposed a far less significant constraint on Defence investigations. Further, *Mustafa* proceeded throughout trial without a framework. In *Shala*, the pre-trial phase has concluded without any formal framework. Compared with the KSC jurisprudence, the Framework Decision is an outlier; no other case imposed a framework in pre-trial proceedings and only one, very different, case imposed a framework at all. Since the alleged climate of intimidation and concerns of

[9] ICTR, *Prosecutor v. Ndindiliyimana*, ICTR-00-56-T, Trial Chamber II, *Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP* ("*Ndindiliyimana* Decision"), 26 October 2007, para. 1.
[10] *Ndindiliyimana* Decision, paras 2, 5.
[11] ICTY, *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Trial Chamber II, *Order for Protective Measures and Non-Disclosure to the Public*, 18 February 2003, para. 6.
[12] *See*, for instance, Framework Decision, para. 199.
[13] KSC-BC-2020-07, F00314, Trial Chamber, *Order on the Conduct of Proceedings*, 17 September 2021, public.
[14] KSC-BC-2020-07, F00251/A02, Specialist Prosecutor, *Submission of Corrected Indictment*, 5 July 2021, public, para. 48.

privacy, expedition and the preservation of evidence apply equally to *Mustafa* and *Shala*, the absence of any framework in those cases indeed confirms that the Framework was unnecessary.

The Framework Was Not *Necessary* in Accordance with the Legal Framework

5. The SPO seeks to uphold the Framework Decision on the basis that it was a discretionary decision based on Articles 39(1) and 39(11) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and the Pre-Trial Judge's ("PTJ") inherent discretion.[15] However, the correct interpretation of Articles 39(1) and 39(11) is that the PTJ only has a discretion once a threshold of necessity is passed. The Framework Decision erred in fact and law because this threshold was not crossed and hence no discretion arose.

6. It is unavailing for the Prosecution to criticise the Defence for directing its analysis "to language contained only in Article 39(11)",[16] because materially identical wording appears in all relevant Articles. Article 39(11) provides that the PTJ may act "where necessary". Article 39(1) provides that the PTJ may "make any necessary orders". Article 35(2)(f) permits the SPO to request "necessary measures". All relevant provisions, as reflected in the Appeals Panel's Decision cited by the SPO,[17] define the PTJ's powers by using the term "necessary" and whether a measure is "necessary" is thus a threshold assessment which must be made.

7. The Prosecution Response attempts to replace this threshold test of necessity with an unconstrained discretion. If the SPO's interpretation of Articles 35(2)(f), 39(1)

[15] Prosecution Response, para. 32.
[16] *Idem*, para. 26.
[17] KSC-BC-2020-06, IA023/F00006/COR, Court of Appeals Panel, *Decision on Veseli's Appeal Against "Third Decision on Victims' Participation"*, 15 September 2022, public, para. 50.

and 39(11) is correct, then the words "necessary" or "where necessary" would serve no function in those provisions. Instead, the correct construction of these provisions is that "necessary" and "where necessary" are a prerequisite to the PTJ's discretion;[18] these provisions do not confer a discretion to make any order which is not necessary. The issue of necessity is one of law and fact, not discretion.

8. The jurisprudence on protective measures is relevant to the assessment of what is "necessary", not because the Framework Decision was based on Rule 80,[19] but because whether a measure is "necessary" is a recognised requirement of the application of Rule 80.[20] There is no logical reason why "necessary" should mean something different in Article 39(1) and 39(11) than it does regarding protective measures. In any event, the SPO proffers no alternative definition of "necessary".

9. Further, the alternative argument that the Framework Decision was based on the PTJ's inherent discretion is without merit.[21] First, the Framework Decision articulated its legal basis as Articles 35(2)(f), 39(1) and 39(11).[22] It did not rely on inherent discretion. Second, the Court cannot use a residual discretionary power to circumvent the specific requirements of a relevant rule.[23] Articles 35(2)(f), 39(1) and 39(11) permit the PTJ to make orders "where necessary". Reliance on an inherent discretion to allow

[18] This language contrasts with Rules 178 and 202(2) of the Rules which apply where "deemed necessary". The word "deemed" suggests a subjective assessment of necessity, its absence in these provisions confirms that objective necessity is required.
[19] *Contra* Prosecution Response, para. 30.
[20] 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. 20(2).
[21] *Contra* Prosecution Response, para. 32.
[22] Framework Decision, paras 1, 115. *See* Victims' Response, para. 45.
[23] Triffterer, O. and Ambos, K. (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Beck/Hart 2022, p. 2057; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16, Appeals Chamber, *Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition*, 15 July 1999, paras 19, 21; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Appeals Chamber, *Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement*, 18 September 2000, paras 27, 30.

the PTJ to make orders which are not necessary would circumvent the specific requirements of the Law.

10. The Responses fail to show that the Framework Decision meets the threshold of necessity. Neither Response offers any reason why it became necessary to impose the Framework in June 2022, 18 months into the pre-trial phase. Further, whilst the Framework does contain additional restrictions than the Code of Conduct,[24] the Prosecution Response fails to articulate why these additional restrictions were "necessary".[25]

11. This conclusion is not undermined by the Defence offer to agree to certain more limited restrictions in relation to protected witnesses.[26] The Defence would not oppose necessary and proportionate measures.[27] The Framework Decision erred in law and fact because the measures it imposed were not necessary. There is no inconsistency in the Defence position.

12. Finally, if the SPO is correct that this aspect of the Framework Decision was discretionary, this classification is not determinative.[28] The Defence would maintain that, as described in the Appeal, the Framework Decision was vitiated by discernible legal and factual errors as to the necessity of the Framework. Further, it failed to give sufficient weight to relevant considerations contained in the Appeal, including the absence of any reported interference in the months of pre-trial procedure preceding the Framework Decision and the presumption of good conduct by Defence Counsel.

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[24] 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.
[25] Prosecution Response, para. 36.
[26] *Contra* Prosecution Response, para. 59.
[27] KSC-BC-2020-06, IA024/F00005, Krasniqi Defence, *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* ("Appeal"), 8 September 2022, para. 5.
[28] ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, *Judgement*, 13 December 2004, para. 298.

No Framework Should Apply to *All* Witnesses

13. The most striking feature of the Responses is that neither offers any reasoned case-specific justification for the application of the Framework to all witnesses. Both Responses offer general platitudes,[29] without attempting to explain the necessity of applying the Framework to the senior international witnesses identified in the Appeal, or the senior KLA witnesses who have exercised their right to silence *vis-à-vis* the SPO. This omission lays bare the error in the Framework Decision; it is simply unarguable that it was necessary to apply any framework, for example, [REDACTED].[30]

14. Submissions about the supposed climate of intimidation do not justify the imposition of the Framework on all witnesses. As the Framework Decision highlights, in reliance on this supposed climate delayed disclosure was granted for some – but not all – witnesses.[31] The Responses cannot answer the Defence submission that international witnesses are outside the geographic scope of any alleged intimidation.[32] In any event, the evidence relied upon is out-dated. Reliance on the testimony of one investigator before the ICTY,[33] whose experience with Kosovo cases ended with the *Haradinaj* Re-Trial Judgment in 2012, and who said he did not know about proceedings at the KSC in 2020,[34] cannot be stretched beyond its temporal scope to establish intimidation. Nor is the position advanced by citing to Appeals Panel findings which merely noted other submissions or findings.[35]

[29] Prosecution Response, paras 54-55; Victims' Response, paras 58-61.
[30] [REDACTED], *see* further Appeal, para. 37.
[31] Framework Decision, para. 118.
[32] Appeal, para. 41.
[33] Prosecution Response, para. 42; KSC-BC-2020-07/F00611/RED, Trial Panel II, *Public Redacted Version of the Trial Judgment*, 18 May 2022, public, paras 576-578.
[34] KSC-BC-2020-07, Transcript of Hearing, 24 January 2022, public, p. 3278, lines 16-18.
[35] Prosecution Response, para. 15, citing to KSC-BC-2020-06, IA004/F00005, Court of Appeals Panel, *Decision on Hashim Thaçi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 76; IA003/F00005, Court of Appeals Panel, *Decision on Rexhep Selimi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 17.

15. Moreover, findings about the supposed climate of intimidation in this case have been largely repetitious since being first entered by the PTJ in December 2020.[36] No new evidence has been adduced showing that any interference occurred in the 22 months since that decision, or that any such interference was connected to the Defence. If intimidation is pervasive as the SPO suggests, it is surprising there is no evidence of interference within the parameters of this case. Absent such evidence, it is inappropriate for the SPO to pressurise the KSC by threatening that "there are rarely second chances".[37]

16. Similarly, the Victims' Response that "[t]here can be no sensible dispute that the VPPs in this case have suffered either directly or indirectly at the hands of the KLA"[38] prejudges trial issues to which the presumption of innocence applies. In any event, the merits of imposing the Framework on contact with protected victim witnesses cannot be equated with the merits of imposing the same Framework on all witnesses.

The Framework Decision Does Interfere with Fair Trial Rights

17. The Responses to Ground Three of the Appeal are misconceived, misunderstand the applicable principles and ultimately unpersuasive. The Framework Decision did err in finding that the Framework does not violate the rights of the Accused.

18. The SPO's interpretation of the right against self-incrimination is erroneous and overly restrictive. The right not to incriminate oneself is not confined to the right to

[36] 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. 33.
[37] Prosecution Response, para. 16.
[38] Victims' Response, para. 50.

remain silent;[39] rather, as a fundamental component of a fair trial, it must be read so as to *effectively* ensure protection against self-incrimination in all situations[40] and must not be undermined by any obligations imposed on the Defence, or in any other way.[41]

19. The SPO's attempt to downplay the harmful consequences of the Framework for the Defence's ability to investigate is without merit. It is not speculative to submit that the Framework will inevitably force the Defence to decide whether to explore a certain line of questioning at the risk of revealing its lines of enquiry and providing the SPO with new inculpatory information, or forego the interview entirely.[42] Quite the opposite, it is hard to imagine any interview with an SPO witness in which this situation would not arise. Moreover, the quandary created by the Framework does not apply equally to both parties, since if exculpatory information is provided in an SPO interview of a Defence witness, the SPO is already obliged to disclose it to the Accused immediately.[43]

20. It is the SPO submission that "the decision of what to reveal in an interview and what to not reveal will be there nonetheless" because the witness could potentially provide testimonial evidence to the calling party of any incriminating statement that is made,[44] which is baseless and speculative. Even if the SPO was aware of a Defence interview and subsequently asked the witness about its content, the risk of the witness recalling and repeating the exact incriminating material is obviously of wholly

[39] *Contra* Prosecution Response, para. 62.
[40] *Contra* Victims' Response, para. 33. *Ex multis, see* ECtHR, *Dvorski v. Croatia*, no. 25703/11, *Judgment (Merits and Just Satisfaction)*, 20 October 2015, para. 82: "the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory" […] and "in determining Convention rights one must frequently look beyond appearances and concentrate on the realities of the situation"; *see*, further, *Soering v. The United Kingdom*, no. 14038/88, *Judgment (Merits and Just Satisfaction)*, 7 July 1989, para. 87.
[41] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1235-Corr-Anx1, Trial Chamber I, *Decision on Disclosure by the Defence*, 20 March 2008, para. 27.
[42] *Contra* Prosecution Response, paras 66-67.
[43] Article 21(6) of the Law and Rule 103 of the Rules.
[44] Prosecution Response, para. 67.

different order than if the SPO are at the interview (especially since suspect witnesses of interest to the Defence have exercised their right of silence in SPO interviews).

21. The SPO also ignores that the KSC disclosure system is designed to be asymmetrical, which allows the Defence to conduct witness interviews unrestrained. Consistent with fundamental rights, there is no obligation equivalent to Rule 103 compelling the Defence to disclose incriminating information to the SPO. Instead, the Defence's disclosure obligations are inherently linked to later strategic choices in the presentation of its case.[45] The Framework undermines those rights by imposing obligations which could lead to disclosure of self-incriminatory information, and therefore does not leave the Defence "free to conduct investigations".[46]

22. The Responses regarding equality of arms are similarly flawed. First, contending that appellate submissions have already been rejected by the PTJ[47] is irrelevant, since this ground of appeal argues that the PTJ erred in rejecting them. Second, Victims' Counsel's submission that during most of the SPO investigations, Counsel for the Accused had not yet been appointed and thus could not be present during witness interviews,[48] in fact illustrates the unfairness of the Framework Decision. The Framework violates equality of arms because it imposes, at this specific stage of the proceedings and after the SPO has already conducted almost all its investigations without constraint, an unreasonably greater burden on the Defence than on the SPO.

23. Third, the SPO asserts that there is equality of arms because its investigations into Defence witnesses have not yet commenced and will be conducted under the Framework.[49] This argument fails. The Defence bears no burden of proof and no

[45] Rule 104(5) of the Rules.
[46] Prosecution Response, para. 66; Framework Decision, para. 150.
[47] Prosecution Response, para. 74.
[48] Victims' Response, para. 43.
[49] Prosecution Response, para. 74.

obligation to advance a positive case. SPO investigations into Defence witnesses are currently wholly speculative. Even if the Defence presents a case, the number of Defence witnesses is usually much smaller than that of the SPO.[50] *In concreto*, imposing the Framework where the SPO relies on 319 witnesses[51] and the Defence is likely to rely on substantially fewer (if any), places the Defence at a substantial disadvantage.

III. CONCLUSION

24. The Defence requests the Appeals Panel to grant the Appeal.

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[50] *See*, ICTY, *Haradinaj et al.* (IT-04-84); *Limaj et al.* (IT-03-66); *Gotovina et al.* (IT-06-90); *Tadić* (IT-94-1).
[51] KSC-BC-2020-06, F00948, Specialist Prosecutor, *Prosecution Submission of Revised Witness List*, 2 September 2022, public, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential.