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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2020-06/IA024**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 27 December 2022

Original language: English

Classification: **Public**

Decision on Defence Appeals 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"

Specialist Prosecutor's Office:
Alex Whiting

Counsel for Victims:
Simon Laws

Counsel for Hashim Thaçi:
Gregory Kehoe

Counsel for Kadri Veseli:
Ben Emmerson

Counsel for Rexhep Selimi:
David Young

Counsel for Jakup Krasniqi:
Venkateswari Alagendra

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel", "Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules") is seised of four appeals filed on 8 September 2022 (collectively, "Appeals") by Mr Hashim Thaçi ("Thaçi"),[2] Mr Kadri Veseli ("Veseli"),[3] Mr Rexhep Selimi ("Selimi"),[4] and Mr Jakup Krasniqi ("Krasniqi")[5] (collectively, "the Accused" or "the Defence"), 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" ("Impugned Decision").[6] On 19 September 2022 and on 21 September 2022, the Victims' Counsel[7]

[1] IA024/F00001, Decision Assigning a Court of Appeals Panel, 31 August 2022.

[2] 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").

[3] 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").

[4] 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").

[5] 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 (confidential) ("Krasniqi Appeal").

[6] 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 ("Impugned Decision").

[7] IA024/F00008, 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", 19 September 2022 ("Victims' Counsel Response").

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and the Specialist Prosecutor's Office ("SPO"),[8] respectively, responded that the Appeals should be dismissed. The Accused replied on 27 September 2022.[9]

I. BACKGROUND

1. On 3 December 2021, the SPO requested the Pre-Trial Judge to issue a protocol on the handling of confidential information and contacts with witnesses ("SPO Submissions" and "SPO Proposed Protocol").[10]

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[8] IA024/F00013, Prosecution Response to Defence Appeals from Decision on Witness Contact Framework (F00854), 21 September 2022 (confidential) ("SPO Combined Response"). On 16 September 2022, the Appeals Panel varied the time and word limits for the SPO to file a combined response to the Appeals. See IA024/F00007, Decision on Specialist Prosecutor's Office's Request for Extension of Time and of Words to File Combined Response, 16 September 2022. See also IA024/F00006, Prosecution request for extension of time and words to file combined response to the Defence appeals of Decision F00854, 14 September 2022.

[9] IA024/F00016, Thaçi Defence Consolidated Reply to Victims and SPO Responses to Defence Appeal against the Witness Contact Framework (IA024/F00008 & IA024/F00013), 27 September 2022 (confidential) ("Thaçi Reply"); IA024/F00018, Veseli Defence Consolidated Reply to Victims' Counsel and SPO Responses to its Appeal against Decision on Framework for Witness Contacts, 27 September 2022 (confidential) ("Veseli Reply"); IA024/F00017, Selimi Consolidated Reply to Victim's Counsel Response, KSC-BC-2020-06/IA024/F00008, and Prosecution Consolidated Response, KSC-BC-2020-06/IA024/F00013, 27 September 2022 (confidential) ("Selimi Reply"); IA024/F00015, Krasniqi Defence Consolidated Reply to Prosecution and Victims' Counsel Responses to Defence Appeal against the Framework Decision, 27 September 2022 (confidential) ("Krasniqi Reply") (collectively, "Defence Replies"). On 22 September 2022, the Appeals Panel varied the time and word limits for the Accused to file consolidated replies to the Victims' Counsel Response and the SPO Combined Response. See IA024/F00014, Decision on Defence Requests for Extension of Time and Word Limits to Reply, 22 September 2022. See also IA024/F00009, Krasniqi Defence Request for an Extension of Time and Word Limit to Reply to Victims' Counsel Response to Defence Appeals (IA024/F00008), 20 September 2022; IA024/F00010, Selimi Defence Joinder to KSC-BC-2020-06/IA024/F00009, 21 September 2022; IA024/F00011, Veseli Defence Joinder to Krasniqi Request IA024-F00009, 21 September 2022; IA024/F00012, Thaçi Defence Joinder to 'Krasniqi Defence Request for an Extension of Time and Word Limit to Reply to Victims' Counsel Response to Defence Appeals (IA024/F00008)', 21 September 2022.

[10] F00594, Prosecution submissions on confidential information and contacts with witnesses, 3 December 2021.

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2. On 10 December 2021, the Victims' Counsel[11] and, on 15 December 2021, the Defence responded to the SPO Submissions.[12] On 17 December 2021, the SPO submitted its List of Witnesses as an annex to the Pre-Trial Brief.[13]

3. On 3 February 2022, pursuant to an order of the Pre-Trial Judge,[14] the Registry filed its submissions on the SPO Proposed Protocol.[15] On 14 February 2022, the SPO,[16] the Victims' Counsel[17] and the Defence responded.[18] On 15 and 21 February 2022,

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[11] F00605, Victims' Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 10 December 2021.

[12] 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/RED, Public Redacted Version of Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, KSC-BC-2020-06/F00627, dated 15 December 2021, 17 December 2021 (confidential version filed on 15 December 2021); F00628, Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021.

[13] F00631/RED/A02/COR/CONF/RED, Corrected Version of Annex 2 to Public Redacted version of 'Submission of Pre-Trial Brief, with witness and exhibit lists', KSC-BC-2020-06/F00631, dated 17 December 2021, 23 May 2022 (strictly confidential and *ex parte* version filed on 17 December 2021, confidential redacted version filed on 21 December 2021) ("SPO List of Witnesses").

[14] F00650, Order to the Registrar for Submissions, 21 January 2022.

[15] F00679/RED, Public Redacted Version of 'Registrar's Submissions on Proposed Protocol for Interviews with Witnesses' (F00679), 16 February 2022 (confidential version filed on 3 February 2022).

[16] F00693, Prosecution response to 'Registrar's Submissions on Proposed Protocol for Interviews with Witnesses', 14 February 2022 (confidential, reclassified as public on 16 February 2022) ("SPO Further Response").

[17] F00690, Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations, 14 February 2022 ("Victims' Counsel Further Response").

[18] F00691, Selimi Defence Response to "Registrar's Submissions on Proposed Protocol for Interviews with Witnesses", 14 February 2022 (confidential, reclassified as public on 16 February 2022); F00692, Thaçi Defence Response to the Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022 ("Thaçi Further Response"); F00694, Veseli Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022 ("Veseli Further Response"); F00695, Krasniqi Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 14 February 2022 (confidential, reclassified as public on 21 February 2022).

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respectively, Thaçi replied to the Victims' Counsel Further Response[19] and the SPO Further Response.[20]

4. On 16 February 2022, upon Thaçi's request,[21] supported by the other Accused,[22] the Pre-Trial Judge scheduled a hearing on the matters arising from the SPO Submissions.[23] On 22 February 2022, the scheduled hearing took place.[24]

5. On 21 March 2022, Thaçi filed supplemental submissions on the SPO Proposed Protocol.[25] The SPO responded on 28 March 2022,[26] and Thaçi replied on 1 April 2022.[27]

6. On 24 June 2022, the Pre-Trial Judge issued the Impugned Decision, granting the SPO's request to adopt the SPO Proposed Protocol subject to a number of modifications, and adopting the "Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant" ("Framework") with which the Parties and participants should comply in relation to any ongoing and forthcoming investigative activities and contacts with witnesses.[28]

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[19] 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.
[20] F00705, Thaçi Defence Reply to Prosecution Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 21 February 2022.
[21] Thaçi Response, paras 4, 42-43; Thaçi Further Response, paras 1, 12-15. See also Transcript, 4 February 2022, p. 861, lines 7-15.
[22] Transcript, 4 February 2022, p. 862, lines 23-24, p. 863, lines 15-21, p. 864, lines 2-3. See also Veseli Further Response, paras 16-17.
[23] F00698, Decision on Request for Hearing, 16 February 2022.
[24] Transcript, 22 February 2022 ("22 February 2022 Hearing").
[25] F00741, Thaçi Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 21 March 2022 ("Thaçi Supplemental Submissions").
[26] F00754, Prosecution response to 'Thaçi Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses', 28 March 2022.
[27] F00758, Thaçi Defence Reply in Support of Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 1 April 2022.
[28] Impugned Decision, paras 212 (pp. 85-91), 213.

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7. On 18 July 2022, the Defence applied for leave to appeal the Impugned Decision.[29] The SPO responded on 1 August 2022,[30] and the Defence replied on 15 August 2022.[31]

8. On 26 August 2022, the Pre-Trial Judge certified the following ten issues out of the total 28 issues raised by the Defence:[32]

(a) Whether the measures of video-recording and disclosure of witness interviews ("Recording and Disclosure") represent an erroneous

[29] 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/COR, Corrected Version of Veseli Defence Request for Leave to Appeal Decision on Framework for the Handling of Confidential Information and Contacts with Witnesses (F00584), 19 July 2022 (uncorrected version filed on 18 July 2022). On 1 July 2022, pursuant to a joint request by the Defence, the Pre-Trial Judge varied the deadlines for submissions and for the issuance of a certification decision. See F00864, Decision on the Joint Defence Request for Variation of Time Limit for Leave to Appeal Decision KSC-BC-2020-06/F00854 (Decision on Confidential Information and Contact with Witnesses), 1 July 2022, paras 9-11; F00857, Joint Defence Request for Variation of Time Limit for Leave to Appeal Decision KSC-BC-2020-06/F00854 (Decision on Confidential Information and Contact with Witnesses), 29 June 2022, paras 1, 7.

[30] F00903, Prosecution response to Krasniqi Defence request for certification to appeal Decision F00854, 1 August 2022; F00904, Prosecution response to Selimi Defence request for certification to appeal Decision F00854, 1 August 2022; F00905, Prosecution response to Thaçi Defence request for certification to appeal Decision F00854, 1 August 2022; F00906, Prosecution response to Veseli Defence request for certification to appeal Decision F00854, 1 August 2022.

[31] 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, 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 (confidential, reclassified as public on 22 August 2022).

[32] F00939, Decision on Defence Requests for Leave to Appeal Decision F00854, 26 August 2022 ("Certification Decision"), paras 6-9, 94(a). The Pre-Trial Judge declined to certify the remainder of the issues put forward by the Accused, namely the Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Thaçi Issues, the Second and Third Selimi Issues, the First, Second and Fourth Krasniqi Issues, and the Second and Third Veseli Issues; see Certification Decision, paras 6-9, 94(b).

invasion of attorney-client privilege and compromise the right of the accused to investigate the case against him ("First Thaçi Issue");

(b) Whether the Framework and its measures fall within the scope of the Pre-Trial Judge's power in Article 39(11) of the Law to provide "where necessary" for the privacy and protection of witnesses ("Second Thaçi Issue");

(c) Whether the proper scope and terms of Article 39(11) of the Law required the Pre-Trial Judge to differentiate between categories of SPO witnesses in the Framework's application ("Fourth Thaçi Issue");

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

(e) Whether the Pre-Trial Judge erred in his assessment of the legal basis to adopt the Framework ("First Veseli Issue");

(f) Whether the Pre-Trial Judge erred in finding that Articles 35(2)(f), 39(1) and (11) of the Law provide a legal basis for the Framework which does not require that each witness justify their application according to their individual circumstances ("First Selimi Issue");

(g) Whether the measures of video-recording and disclosure of witness interviews are disproportionate to the stated aims of witness protection and the preservation of evidence, and that less restrictive measures should have been considered to mitigate the stated risk ("Fourth Selimi Issue");

(h) Whether the Impugned Decision erred in imposing a Framework which covers all witnesses that a party intends to call, rather than merely those

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witnesses who need the protection of the Framework ("Third Krasniqi Issue");

(i) Whether the Impugned Decision erred in finding that the adoption of the Framework was justified to protect the privacy of witnesses or preserve evidence or the expeditious conduct of the proceedings ("Fifth Krasniqi Issue"); and

(j) Whether the Impugned Decision erred in finding that the Framework does not violate the rights of the Accused, specifically the right against self-incrimination or the right to equality of arms ("Sixth Krasniqi Issue").

9. On 30 November 2022, the Pre-Trial Judge confirmed that the case file would be ready for transmission to a Trial Panel on 15 December 2022 and the President assigned Trial Panel II to the case.[33] On 15 December 2022, the case file was transferred to Trial Panel II.[34]

II. STANDARD OF REVIEW

10. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.[35]

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[33] F01131, Notification Pursuant to Rule 98(3) of the Rules of Procedure and Evidence, 30 November 2022; F01132, Decision Assigning Trial Panel II, 30 November 2022.
[34] F01166, Decision Transmitting the Case File to Trial Panel II, 15 December 2022.
[35] KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-14. See also e.g. IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021, para. 11.

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III. PRELIMINARY MATTER

A. PUBLIC FILINGS

11. The Appeals Panel notes that the Impugned Decision was filed as public, while a number of appellate filings, namely the Krasniqi Appeal, the SPO Combined Response, the Thaçi Reply, the Veseli Reply, the Selimi Reply and the Krasniqi Reply, were filed as confidential.[36] The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all non-public submissions filed before the Panel.[37] The Panel also notes that the SPO, Veseli and Selimi do not oppose the reclassification as public of the SPO Combined Response, the Veseli Reply and the Selimi Reply, respectively.[38] The Panel, therefore, orders the Accused and the SPO to file public redacted versions of the above-mentioned appellate submissions,[39] or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.

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[36] Krasniqi indicates that his appeal is confidential because it refers to filings and evidence currently classified by the Prosecution as confidential. See Krasniqi Appeal, para. 6. The SPO indicates that its response was filed confidential pursuant to Rule 82(4) of the Rules, referring to Krasniqi Appeal. See SPO Combined Response, para. 84, fn. 189. The Accused also indicate that the Defence Replies were filed as confidential pursuant to Rule 82(4) of the Rules as the SPO Combined Response is confidential. See Veseli Reply, para. 12; Selimi Reply, para. 20; Krasniqi Reply, para. 2.

[37] See e.g. IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), paras 8-9 (encouraging the parties to file public redacted versions of their filings as soon as possible, without waiting for an order to do so).

[38] SPO Combined Response, para. 84; Veseli Reply, para. 12; Selimi Reply, para. 20.

[39] Namely, Krasniqi Appeal (IA024/F00005); SPO Combined Response (IA024/F00013); Thaçi Reply (IA024/F00016); Veseli Reply (IA024/F00018); Selimi Reply (IA024/F00017); Krasniqi Reply (IA024/F00015).

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IV. DISCUSSION

A. WHETHER THE FRAMEWORK IS JUSTIFIED AND COMPATIBLE WITH THE SPECIALIST CHAMBERS' LEGAL FRAMEWORK (THAÇI GROUND B IN PART; KRASNIQI GROUND 1; VESELI GROUNDS A AND B)

12. The Court of Appeals Panel considers that part of Ground B presented by Thaçi (corresponding to Second Thaçi Issue), Grounds A and B presented by Veseli (corresponding to First Veseli Issue), as well as Ground 1 presented by Krasniqi (corresponding to Fifth Krasniqi Issue) substantially overlap in that they all concern the Framework's legal basis and compliance with the Specialist Chambers' legal provisions as well as the Pre-Trial Judge's powers to adopt the Framework. These grounds will therefore be considered together.

1. Submissions of the Parties

13. Thaçi and Veseli both submit that the Framework falls outside the scope of the Pre-Trial Judge's powers under Article 39(11) of the Law.[40] In particular, Veseli contends that the Pre-Trial Judge erred in adopting the Framework pursuant to Articles 35(2)(f), 39(1) and 39(11) of the Law while he should have instead relied on Article 23(1) of the Law and Rule 80 of the Rules which are the primary provisions on the protection of witnesses.[41] According to him, the Framework is *ultra vires* and introduces "an unacceptable open-endedness" to the exercise of the Pre-Trial Judge's discretion in Article 39(11) of the Law.[42]

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[40] Thaçi Appeal, paras 41, 44-45; Veseli Appeal, paras 16, 20-21. See also Thaçi Appeal, paras 40, 55; Veseli Appeal, para. 12; Thaçi Reply, para. 7.

[41] Veseli Appeal, paras 9-15, referring to Impugned Decision, paras 115, 117, 121. See also Veseli Reply, paras 4-6. Veseli argues that the Pre-Trial Judge fails to provide reasons for operating outside of the Rule 80 framework. See Veseli Appeal, paras 16, 18; Veseli Reply, para. 8.

[42] Veseli Appeal, paras 15-16, 20-22. See also Veseli Reply, paras 7, 10. Veseli adds that the Pre-Trial Judge seeks to enlarge the meaning of Article 39(11) of the Law. See Veseli Appeal, para. 20, referring to ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-2145-Corr-Red, Public Redacted Version of "Corrected Version of 'Narcisse Arido's Document in Support of Appeal Pursuant to Article 81', (ICC-01/05-01/13-

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14. Furthermore, Thaçi, Veseli and Krasniqi all argue that the Pre-Trial Judge erred in finding that the Framework was *necessary* to achieve the objectives of protection and privacy of witnesses, preservation of evidence and expeditious conduct of the proceedings.[43] More specifically, Krasniqi claims that the Pre-Trial Judge failed to assess whether the Framework was the least restrictive measure available and requests the Appeals Panel to conduct such an assessment.[44] In his view, simpler and less intrusive options were available and were not considered.[45] Veseli also submits that protective measures cannot be general and need to be proportionate to the risk identified and not prejudicial to the rights of the Accused.[46]

15. Thaçi and Krasniqi stress that the fact that no issue of interference has arisen after months of Defence investigations without the Framework demonstrates that the Framework was not necessary.[47] In Krasniqi's view, the fact that Defence Counsel, who are subject to the Code of Professional Conduct ("Code of Conduct"),[48] are presumed to act in good faith further renders the Framework unnecessary.[49]

16. Both the Victims' Counsel and the SPO respond that the Pre-Trial Judge had a proper legal basis to issue the Framework, which does not exceed the powers granted to the Pre-Trial Judge.[50] The Victims' Counsel submits that Articles 23(1) and 39(11) of the Law, which regulate different matters – namely protection of victims and

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2145-Conf), filed 24 April 2017" (ICC-01/05-01/13-2145-Conf-Corr), filed 8 May 2017, 31 May 2017 ("*Bemba* Defence Filing"), paras 162-166, 180-188.

[43] Thaçi Appeal, paras 39-40, 43, 45; Veseli Appeal, paras 14-16; Krasniqi Appeal, paras 17-34, referring to Impugned Decision, paras 116-125, 143. See also Krasniqi Appeal, paras 5, 38; Thaçi Appeal, para. 55; Thaçi Reply, paras 8-9; Krasniqi Reply, paras 5-9. See further Selimi Appeal, para. 10; Selimi Reply, para. 5.

[44] Krasniqi Appeal, paras 20-21, 31-34. See also Krasniqi Appeal, paras 17, 38.

[45] See Krasniqi Appeal, paras 31-32. See also Krasniqi Appeal, para. 5, fn. 8.

[46] Veseli Appeal, paras 14-15.

[47] Thaçi Appeal, para. 45; Krasniqi Appeal, paras 22-23; Krasniqi Reply, paras 10, 12. See also Krasniqi Appeal, paras 28, 41; Veseli Reply, para. 9.

[48] Registry Practice Direction, Code of Professional Conduct – for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07-Rev1, 28 April 2021 ("Code of Conduct").

[49] Krasniqi Appeal, para. 24. See also Krasniqi Appeal, paras 2, 30; Krasniqi Reply, paras 10, 12.

[50] Victims' Counsel Response, paras 5, 44-48, 57; SPO Combined Response, paras 24-46. See also SPO Combined Response, para. 13.

witnesses and powers of the Pre-Trial Judge – do not overlap but rather complement each other, without any hierarchy.[51] In his view, nothing in Article 23(1) of the Law or Rule 80 of the Rules limits or determines the Pre-Trial Judge's discretion.[52]

17. According to the SPO, the Accused fail to "fully grapple" with the legal basis on which the Pre-Trial Judge based the Framework, for instance by disregarding the significance of Article 39(1) of the Law.[53] The SPO first argues that the Framework is "firmly grounded" in similar protocols from the Specialist Chambers and other international courts.[54] It submits that the Defence's arguments fail since they interpret in an overly restrictive manner the Pre-Trial Judge's broad discretion under Article 39(1) and (11) of the Law which allows him to issue the Framework.[55] The SPO notably contends that because the Framework is not premised on Rule 80 of the Rules, the more restrictive standard invoked by the Defence does not apply.[56] In addition, the SPO argues that the Accused seek to assess elements of the Framework in isolation and fail to take into account that it advances multiple goals.[57] The SPO further challenges the Defence's arguments concerning the privacy of witnesses, pointing out notably that the Framework provides for greater protection than the Code of Conduct.[58] Finally, with regard to the allegation that the Pre-Trial Judge acted *ultra vires*, the SPO contends that articles of the Law can provide "actionable powers" even

[51] Victims' Counsel Response, para. 47.
[52] Victims' Counsel Response, paras 44, 48.
[53] SPO Combined Response, paras 25-27, 48. See also SPO Combined Response, paras 29, 32-33.
[54] SPO Combined Response, paras 19-20, referring to KSC-BC-2020-07, F00314/A01, Annex to Order on the Conduct of Proceedings, 17 September 2021 ("Case 07 Protocol"); ICC, Chambers Practice Manual, Fifth Edition, 25 March 2022, Annex ("ICC Protocol"). See also SPO Combined Response, para. 2.
[55] SPO Combined Response, paras 29, 32-33, 37-41, 43-45. See also SPO Combined Response, paras 13-14.
[56] SPO Combined Response, paras 30-31, 37, 41, 45.
[57] SPO Combined Response, paras 29-30, 33-34. See also SPO Combined Response, paras 13-14, 46.
[58] SPO Combined Response, paras 35-36. See also SPO Combined Response, paras 34, 43.

in the absence of relevant corresponding provisions in the Rules and be relied upon to create requirements beyond what is explicitly stated in the Rules.[59]

18. Thaçi replies that the SPO's position regarding Article 39(1) of the Law as a sufficient basis for the Pre-Trial Judge to implement the Framework renders Article 39(11) of the Law redundant, while the latter, as the more specific provision, restricted his statutory authority to authorise such measures only "where necessary".[60]

19. In his reply, Veseli challenges the SPO's "excessively formalistic and illogical" interpretation of Article 39(11) of the Law.[61] He points to the procedure prescribed under Rule 5 of the Rules.[62]

20. Krasniqi replies that the Pre-Trial Judge only has discretion under Article 39(1) and (11) of the Law once a "threshold of necessity" is passed, which the Framework does not meet in his view.[63]

21. Both Thaçi and Krasniqi also take issue with the SPO's assertion that the Framework is "firmly grounded" in similar protocols at the Specialist Chambers and elsewhere.[64]

2. Assessment of the Court of Appeals Panel

22. The Court of Appeals Panel notes that the Pre-Trial Judge adopted the Framework relying on Articles 35(2)(f) and 39(1) and (11) of the Law.[65]

23. Article 35(2)(f) of the Law provides that:

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[59] SPO Combined Response, paras 40, 44. The SPO further argues that Veseli's reliance on the *Bemba* case is inapposite. See SPO Combined Response, para. 45.
[60] Thaçi Reply, paras 7-8. See also Thaçi Reply, para. 9.
[61] Veseli Reply, paras 4-5. See also Veseli Reply, paras 6, 8.
[62] Veseli Reply, para. 7. See also Veseli Reply, para. 10.
[63] Krasniqi Reply, paras 5-7, 9-10. Krasniqi claims that whether a measure is "necessary" is also a requirement for the application of Rule 80 of the Rules. See Krasniqi Reply, para. 8.
[64] Thaçi Reply, paras 3-4; Krasniqi Reply, paras 3-4. See also Veseli Reply, para. 9.
[65] Impugned Decision, paras 115, 135. See also Impugned Decision, p. 1.

> The Specialist Prosecutor and other Prosecutors in the Specialist Prosecutor's Office shall have the authority and responsibility to perform the functions of his or her office, including the authority to conduct criminal investigations and to take responsibility for new or pending criminal investigations or proceedings within the subject matter jurisdiction of the Specialist Chambers and in accordance to the modalities established by this Law. These authorities and responsibilities include:
>
> […]
>
> f. taking necessary measures, or requesting that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence;

24. Article 39(1) of the Law provides that:

> The Pre-Trial Judge shall have the power to review an indictment, rule on any preliminary motions, including challenges to the indictment and jurisdiction, and make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

25. Article 39(11) of the Law provides that:

> The Pre-Trial Judge may, where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons and national security information or the preservation of assets which may be subject to a forfeiture under this Law and the Rules of Procedure and Evidence, including temporary freezing orders, temporary confiscation orders or other temporary measures.

26. The Appeals Panel will first address the legal basis to adopt the Framework. Recalling that the Pre-Trial Judge considered that Article 35(2)(f) and Article 39(1) and (11) of the Law provided him with the legal basis for ordering general measures regarding the handling of confidential information and the regulation of contacts with witnesses,[66] the Panel first observes that under Article 39(1) of the Law, the Pre-Trial Judge has discretion to take *any necessary* orders or decisions to ensure that the case is prepared properly and expeditiously for trial. The Panel notes in that regard that

[66] Impugned Decision, para. 115.

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decisions concerning trial management issues and the conduct of proceedings are generally treated as discretionary.[67] Likewise, the Panel notes that the language of Article 39(11) of the Law is worded openly and does not set an exhaustive list of measures to be taken to achieve the objectives, *inter alia*, of protection and privacy of victims and witnesses and preservation of evidence. The Panel finds that these provisions give broad discretion to the Pre-Trial Judge to adopt a range of measures for the preparation of the case for trial and that the Pre-Trial Judge is not bound to adopt only the measures that would already be specifically foreseen in the Rules. In the Panel's view, the Framework falls among the scope of general measures the Pre-Trial Judge can adopt under these legal provisions.

27. While the Panel agrees with the Defence that Article 23(1) of the Law and Rule 80 of the Rules[68] are the main provisions within the Specialist Chambers' legal framework dedicated to the protection of witnesses, as acknowledged by the Pre-Trial Judge,[69] the Panel notes that Article 39(11) of the Law also provides for the protection

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[67] See e.g. ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, 19 July 2010, para. 39; ICTR, *Kanyarukiga v. Prosecutor*, ICTR-02-78-A, Judgement, 8 May 2012, para. 26; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para. 68. Likewise, decisions related to witness protection have also been considered as discretionary decisions. See e.g. IRMCT, *Prosecutor v. Niyitegeka*, MICT-12-16-R, Decision on Appeals of Decisions Rendered by a Single Judge, 9 August 2017, para. 14. In such instances, it must be demonstrated on appeal that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion. See e.g. *Gucati* Appeal Decision, para. 14.

[68] Article 23(1) of the Law states:

> The Specialist Chambers' Rules of Procedure and Evidence shall provide for the protection of victims and witnesses including their safety, physical and psychological well-being, dignity and privacy. Such protective measures shall include, but shall not be limited to, those set out at Articles 221-226 of the Criminal Procedure Code of Kosovo, Law No. 04/L-123, Articles 5-13 of the Law on Witness Protection, Law No. 04/L-015, the conduct of *in camera* proceedings, presentation of evidence by electronic or other special means and the protection of identity.

Rule 80(1) of the Rules states:

> Pursuant to Article 23(1) of the Law, a Panel may, *proprio motu* or upon request by a Party, the Witness Protection and Support Office, a witness, or Victims' Counsel, where applicable, order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the Accused.

[69] See Veseli Appeal, para. 11; Impugned Decision, para. 121.

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of witnesses among the functions of the Pre-Trial Judge. Thus, the fact that protective measures have to be ordered pursuant to Article 23(1) of the Law and Rule 80 of the Rules does not preclude that other measures may be ordered under Article 39(11) of the Law with the aim, *inter alia*, of ensuring the protection of witnesses, since such authority precisely falls within the Pre-Trial Judge's power under that provision.[70] In the Panel's view, the Defence has failed to demonstrate that Article 39(11) of the Law cannot operate independently from Article 23(1) of the Law and that this provision cannot provide a distinct legal basis to establish the Framework. Therefore, the Panel finds that the Pre-Trial Judge did not err in relying on Article 39(1) and (11) of the Law to adopt the Framework rather than Article 23(1) of the Law and Rule 80 of the Rules.

28. The Panel rejects the Defence argument that the legal basis for the Framework *must* be provided in the Rules given that it already has a specific basis in the Law. The Panel agrees with the Pre-Trial Judge that the fact that the Specialist Chambers' provisions do not expressly provide for the Framework *per se* is of no consequence as the Pre-Trial Judge retains discretion to adopt, under Article 39 of the Law, measures or procedures he would deem necessary for the case despite not being explicitly stated in the Rules.[71] In that regard, the Panel does not consider that there is a "lacunae" in the Rules pursuant to Rule 5 of the Rules.[72]

29. Therefore, the Panel disagrees with the Defence's argument that the Pre-Trial Judge exceeded his authority, acted *ultra vires* and enlarged the meaning of

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[70] See Impugned Decision, para. 117.

[71] See Impugned Decision, para. 129. See also Impugned Decision, fn. 220, referring to F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020 ("Framework on Disclosure"); F00159, Framework Decision on Victims' Applications, 4 January 2021 ("Framework on Victims' Applications").

[72] See also Rule 4 of the Rules and Article 19(2) and (3) of the Law. Contra Veseli Reply, para. 7. As the Rules are an instrument for the implementation of the Law and are therefore subordinate to it, a provision of the Rules cannot be interpreted as narrowing the scope of a provision of the Law. See e.g. ICC, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, 9 November 2017, para. 9.

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Article 39(11) of the Law.[73] The Appeals Panel further rejects as unsupported Veseli's argument that the Pre-Trial Judge is relying on Article 39(1) of the Law to create rules and procedures beyond the material scope of the Specialist Chambers' legal framework.[74]

30. Turning next to the Pre-Trial Judge's reliance on protocols adopted in other cases before the Specialist Chambers and elsewhere, the Panel observes that although the Accused point to differences between the Framework and the ICC Protocol,[75] the Pre-Trial Judge, while finding that the ICC Protocol provided "adequate guidance" in relation to the Framework, never claimed that they were identical and in fact acknowledged the specificities of the different proceedings.[76] That being said, the Panel notes that the great majority of the measures of the Framework subject to appellate litigation are also contained in the ICC Protocol.[77] Furthermore, given the

[73] The Appeals Panel notes that Veseli misleadingly refers to an "appeal judgment" in the *Bemba et al*. case, asserting that the ICC Appeals Chamber found that the trial chamber erred in its interpretation of the term "witness" under Article 70(1)(c) of the Rome Statute and acted *ultra vires*, while in fact these are not the Appeals Chamber's findings but rather Defence appellate submissions. Quite to the contrary, the ICC Appeals Chamber found no error in the Trial Chamber's reasoning. See Veseli Appeal, para. 20, fn. 19, referring to *Bemba* Defence Filing, paras 162-166, 180-188. See also ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-2275-Red, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, paras 720-723. Veseli's submissions in that regard are therefore summarily dismissed as they misrepresent the findings. See e.g. KSC-BC-2020-07, IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), para. 29.
[74] Contra Veseli Appeal, para. 21.
[75] See Thaçi Reply, paras 2, 4; Krasniqi Reply, para. 3.
[76] Impugned Decision, paras 126-127. See also Impugned Decision, paras 131, 199; 22 February 2022 Hearing, p. 974, lines 6-10.
[77] Notably, the ICC Protocol also foresees: (i) a similar notification procedure, where the calling party has to ascertain the consent of the witness to be interviewed; (ii) that the witness can choose to have a representative of the calling party present during the interview; (iii) that the interviews are audio or video-recorded and a copy of the recordings should be provided to the calling party. See ICC Protocol, paras 31-32, 41. In addition, while the ICC Protocol does not provide for the possibility of the calling party to seek judicial leave to attend the interview against the witness's expressed preferences, the ICC Protocol foresees that despite the consent of the witness to be interviewed, the calling party can still object to the interview and seize the chamber for a ruling in that respect. *Compare* Framework, para. 212(II)(b) *with* ICC Protocol, para. 42. Furthermore, the Panel notes that although the ICC Protocol does not foresee that the Judges receive a copy of the interview recordings, or that such recordings can

similarities between Article 39(11) of the Law and Article 57(3)(c) of the Rome Statute,[78] it was correct for the Pre-Trial Judge to find that the ICC Protocol is grounded in a "nearly identical legal basis".[79] As to other cases before the Specialist Chambers, the Panel finds that the fact that no such frameworks have been so far adopted in Case 04[80] and Case 05, while a similar one was adopted in Case 07 by the Trial Panel,[81] is irrelevant given that the decision whether or not to adopt such framework is within the Pre-Trial Judge's (or Trial Panel's) discretion depending on the specific circumstances of each case.[82]

31. Turning to whether the term "where necessary" limits the Pre-Trial Judge's discretion to impose the Framework to circumstances in which it is *necessary* in light of the actual risks encountered by the witnesses, the Panel recalls that the Framework is not adopted pursuant to Rule 80 of the Rules and therefore the standard under Rule 80 of the Rules is not applicable.[83] Consequently, the Defence submissions calling

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be admitted into evidence upon an application from a party or *proprio motu* by the Judges, nothing would prevent the parties from seeking their admission into evidence.

[78] Article 57(3)(c) of the Rome Statute states:

> In addition to its other functions under this Statute, the Pre-Trial Chamber may:
>
> […]
>
> (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information.

[79] Impugned Decision, para. 126.

[80] The Trial Panel in the *Shala* case asked for submissions from the Parties and Participants on the adoption of a framework governing the handling of confidential information during investigations and witnesses taking the present Framework as a starting point, however a joint proposal could not be reached. See KSC-BC-2020-04, F00289, Decision setting the dates for trial preparation conferences and requesting submissions, 30 September 2022, para. 9(A)(f); KSC-BC-2020-04, Order to the Parties and Participants to file the joint request on framework for handling of confidential information by 16 November 2022, Transcript, 19 October 2022, pp. 405-406; KSC-BC-2020-04, F00353, Joint Submission on the Adoption of a Framework for the Handling of Confidential Information during Investigations between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 16 November 2022.

[81] The section of the Framework on contact between a Party or participant and Witnesses of the Opposing Party or of a Participant essentially mirrors the Case 07 Protocol, save for the role of the Registry in the preparation and conduct of the interviews. See Case 07 Protocol, paras 27-40.

[82] See Impugned Decision, para. 131.

[83] See above, para. 27. See also Impugned Decision, para. 117.

for a more restrictive interpretation and requiring an individualised assessment of the circumstances of each given witness and the demonstration of an existing risk, are dismissed as inapposite because such an interpretation relates to the application of the standard under Rule 80 of the Rules, which only concerns protective measures. The Panel acknowledges that the term "where necessary" sets a limit to the broad discretion the Pre-Trial Judge enjoys to determine *when* and *what kind* of measures are warranted to advance the broader goals of witness protection, privacy and preservation of evidence, but finds that the Pre-Trial Judge did not abuse his discretion in finding that the imposition of the Framework was necessary in the circumstances of this case.[84]

32. Given that the Framework does not amount to additional protective measures pursuant to Rule 80 of the Rules, the fact that the Framework is not a measure envisaged under Rule 80 is irrelevant. In the Panel's view, the Pre-Trial Judge did not have to provide reasons for operating outside the Rule 80 framework.[85] For the same reasons, the Panel is not persuaded by the Defence argument that the Pre-Trial Judge, under Article 39(1) and (11) of the Law, had to carry out an assessment of whether less restrictive measures were available.[86] The legal test advanced by Krasniqi is distinguishable as it concerns protective measures and only applies in a context where information is withheld from the receiving party pursuant to Article 21(6) of the Law and Rules 80(1) and 108(1) of the Rules, which is not the case under the Framework.[87] The Panel further notes that the jurisprudence relied upon by Krasniqi is inapposite

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[84] See Impugned Decision, para. 117.
[85] Contra Veseli Appeal, para. 16.
[86] Contra Krasniqi Appeal, paras 20, 31-34.
[87] See Framework on Disclosure, para. 85; Framework on Victims' Applications, para. 47. See also e.g. F00133/COR/CONF/RED, Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, 14 December 2020 (confidential) (uncorrected strictly confidential and *ex parte* version filed on 10 December 2020, corrected strictly confidential and *ex parte* version filed on 14 December 2020), para. 20. See also e.g. IRMCT, *Prosecutor v. Kamuhanda*, MICT-13-33, Decision on an appeal of a decision rendered by a Single Judge, 6 October 2017, para. 14 (where the IRMCT Appeals Chamber found that the means used to ascertain the consent of a protected witness to an interview do not stray from the principle that the protective measures should be the least restrictive necessary).

as none of the cited authorities concern the establishment of witness contact protocols.[88] In addition, and while Krasniqi claims that the Pre-Trial Judge failed to consider less intrusive options that were available,[89] the Panel notes that he raises this argument for the first time on appeal and did not mention such specific measures in his submissions before the Pre-Trial Judge. Nevertheless, the Panel notes that the Pre-Trial Judge engaged in assessing whether the Framework complied with the rights of the Accused and whether there was a balance between the functions advanced by the Framework and the impact on fair trial rights.[90] Alleged errors concerning this assessment are addressed in detail below.[91]

33. Furthermore, and contrary to the Defence submissions, the Panel finds that the fact that both the Defence and the SPO are bound by the Code of Conduct does not render the Framework unnecessary. While the Code of Conduct provides that Counsel shall carry out their duties in good faith and sets out a number of obligations for the Parties and participants,[92] there are certain topics it does not cover, such as contacts with non-calling Parties and participants, which are however addressed in the

[88] See ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, paras 59, 67, cited at Krasniqi Appeal, fns 29, 59 (concerning requests for redactions as protective measures under Rule 81(4) of ICC Rules of Procedure and Evidence); ECtHR, *Dayanan v. Turkey*, no. 7377/03, Judgment, 13 October 2009 ("*Dayanan v. Turkey*"), para. 32, cited at Krasniqi Appeal, fn. 28 (concerning access to counsel); ECtHR, *Paci v. Belgium*, no. 45597/09, Judgment, 17 April 2018, para. 85, cited at Krasniqi Appeal, fn. 28 (which concerns material not disclosed to the accused); ECtHR, *B and P v. The United Kingdom*, nos 36337/97 and 35974/97, Judgment, 24 April 2001, para. 37, cited at Krasniqi Appeal, fn. 31 (concerning limitations to the public nature of proceedings); ICTY, *Prosecutor v. Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 17, cited at Krasniqi Appeal, fn. 27 (concerning restrictions on the right to self-representation); ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 13, cited at Krasniqi Appeal, fn. 27 (concerning provisional release).

[89] See Krasniqi Appeal, para. 5, fn. 8 (where Krasniqi mentions the precautionary recording of interviews only to be disclosed to the Panel if an issue about the conduct of the interview arises and by giving the Witness Protection and Support Office – not the SPO – a role in contacting the witnesses). See also Krasniqi Appeal, paras 31-32.

[90] See Impugned Decision, paras 137-177.

[91] See below, Section IV.C.

[92] See e.g. Code of Conduct, Articles 6, 12, 17. See also Impugned Decision, para. 170.

Framework. As such, the Framework is not redundant and it was reasonable for the Pre-Trial Judge to consider that further protections for witnesses were necessary beyond the obligations already set out in the Code of Conduct for the reasons he noted.[93]

34. Finally, the Panel considers that whether any issue of interference or witness intimidation actually materialised in the case is irrelevant to whether the Framework can be deemed necessary since it is meant as a preventative instrument.[94] In that regard, the Panel also finds no error in the fact that the Pre-Trial Judge, while mindful of the Defence's argument that it has not been accused of any related wrongdoing, took into consideration the general climate of witness intimidation as a further justification to adopt the Framework, alongside the need to provide for the protection and privacy of witnesses and the preservation of evidence.[95]

35. In light of the above, the Panel finds that the Defence has failed to demonstrate that the Pre-Trial Judge abused his discretion in adopting the Framework on the basis of Articles 35(2)(f) and 39(1) and (11) of the Law. Part of Thaçi's Ground B, Krasniqi's Ground 1 and Veseli's Grounds A and B are dismissed accordingly.

B. Whether the Framework should have differentiated among witnesses (Thaçi Ground B in part; Selimi Ground 1; Krasniqi Ground 2)

36. The Court of Appeals Panel considers that part of Ground B presented by Thaçi (corresponding to Fourth Thaçi Issue), Ground 1 presented by Selimi (corresponding to First Selimi Issue), as well as Ground 2 presented by Krasniqi (corresponding to Third Krasniqi Issue), substantially overlap in that they all raise arguments concerning the question whether the Framework should apply to all witnesses, without

[93] See Impugned Decision, para. 130.
[94] Contra Thaçi Appeal, para. 45; Krasniqi Appeal, paras 22-23.
[95] Impugned Decision, paras 118, 170. See also Impugned Decision, para. 211.

distinguishing between witnesses in terms of the protection required. These grounds will therefore be considered together.

1. Submissions of the Parties

37. Thaçi, Selimi and Krasniqi all submit that the Pre-Trial Judge erred in applying the Framework indiscriminately to all the SPO witnesses without distinguishing whether they need protection.[96] Thaçi and Krasniqi stress that given the diversity of SPO witnesses with vastly different needs regarding protective measures, it was erroneous for the Pre-Trial Judge to treat all of them in the same way.[97] In particular, they argue that the Pre-Trial Judge failed to assess individually for each witness whether the application of the Framework was *necessary*.[98] In the same vein, Selimi contends that the Framework should include a requirement that witnesses establish a nexus between the stated risk and their individual circumstances.[99] According to him, the Pre-Trial Judge failed to make any such link in "stark contrast to the Rule 80 witnesses" where an individualised assessment of the need for protective measures has to be conducted.[100] Krasniqi further argues that it would not be "unduly cumbersome" to apply the Framework following the same approach as for protective measures which have been granted on an individual basis, claiming that he would not object to the Framework presumptively being applied to delayed disclosure witnesses as a group.[101]

[96] Thaçi Appeal, paras 38, 40-41, 44; Selimi Appeal, paras 9-10, 21, 26; Krasniqi Appeal, paras 35, 38, 44. See also Thaçi Appeal, paras 1, 7; Krasniqi Appeal, para. 3; Thaçi Reply, para. 2. Veseli also challenges the non-individualised nature of the Framework which applies by default to all SPO witnesses regardless of their particular circumstances. See Veseli Appeal, paras 14, 17, 22.
[97] Thaçi Appeal, paras 38, 40-41; Krasniqi Appeal, paras 36-38. See also Thaçi Reply, para. 2.
[98] Krasniqi Appeal, para. 38; Thaçi Appeal, paras 40-41.
[99] Selimi Appeal, paras 3, 9-10, 24. See also Selimi Appeal, paras 17, 19, 22, 26.
[100] Selimi Appeal, paras 10, 22-24. See also Selimi Appeal, para. 17; Selimi Reply, para. 11.
[101] Krasniqi Appeal, para. 39. See also Krasniqi Appeal, para. 36; Krasniqi Reply, para. 11.

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38. Thaçi, Selimi and Krasniqi all challenge the Pre-Trial Judge's decision to apply the Framework to all international or high-ranking witnesses.[102] They contend that the Pre-Trial Judge failed to provide reasons and abused his discretion since there was no factual basis for his finding,[103] arguing notably that: (i) it places 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;[104] (ii) the whole category of international witnesses is outside of the geographic scope of the alleged climate of witness interference, limited to Kosovo;[105] (iii) no witness in that category has sought protection or complained of interference although their identities were known to the Defence;[106] and (iv) the positions the witnesses occupied in 1998-1999 is irrelevant as what should matter are their current positions, circumstances and vulnerability.[107]

39. Finally, Selimi argues that the Pre-Trial Judge erred in relying on the ICC Protocol as guidance to interpret the Specialist Chambers' legal framework while ignoring decisions from the International Criminal Court ("ICC") which portray a much narrower application of the Judges' powers of protection afforded under Article 57(3)(c) of the Rome Statute in individual cases, thereby displaying some jurisprudential inconsistency.[108] Selimi submits that in these cases the ICC chambers

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[102] Thaçi Appeal, para. 42; Selimi Appeal, paras 10-12, 23-24; Krasniqi Appeal, paras 40-43, referring to Impugned Decision, para. 120. See also Thaçi Appeal, paras 1, 38; Krasniqi Appeal, paras 36-37; Selimi Reply, para. 11; Krasniqi Reply, para. 13.
[103] See Thaçi Appeal, para. 42; Selimi Appeal, paras 10, 24-25; Krasniqi Appeal, paras 41-42.
[104] Krasniqi Appeal, para. 40. See also Selimi Appeal, para. 26.
[105] Krasniqi Appeal, para. 41. See also Krasniqi Appeal, para. 37.
[106] Krasniqi Appeal, para. 41. See also Selimi Appeal, para. 23; Krasniqi Appeal, paras 37, 42.
[107] Krasniqi Appeal, para. 43. See also Thaçi Appeal, para. 42.
[108] Selimi Appeal, paras 3, 13-18, 20, referring to, *inter alia*, ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-428-Corr, Corrigendum to the Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008 ("*Katanga and Ngudjolo Chui* Decision"), paras 41-[52]; ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-51, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011 ("*Mbarushimana* Decision"), paras 2-3, 6-17; ICC, *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-129, Decision on OPCD Requests, 27 April 2012 ("*Gaddafi* Decision"), paras 1-9, 11, 13-14. See also Selimi Reply, paras 7-10.

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in fact applied a consistent approach requiring a "threshold based test requiring nexus between the risk and the witness".[109]

40. Both the Victims' Counsel and the SPO respond that the Pre-Trial Judge did not err in applying the Framework to all witnesses.[110] They stress that the individual risk assessment pursuant to Rule 80 of the Rules is not warranted within the Framework as it does not grant additional protective measures or withhold any information from the Defence.[111] The SPO submits that the Defence conflates Rule 80 measures and the measures contained in the Framework and that there is no contradiction between the two distinct assessments.[112] In the Victims' Counsel's view, there is "at least some acceptance" from the Defence that the Framework may be necessary for dual status witnesses.[113] The Victims' Counsel also submits that the regulation of communication between witnesses and the opposing party provided in the Framework is justified to address the climate of witness intimidation and interference.[114] The Victims' Counsel and the SPO further point out that the Framework will not necessarily apply in its entirety to all witnesses and that the Pre-Trial Judge allowed for some "tailoring".[115] Finally, both the Victims' Counsel and the SPO argue that the ICC jurisprudence referred to by Selimi is irrelevant.[116] The SPO contends that the ICC Protocol has been implemented in a number of ICC decisions which are "more relevant" in its view.[117]

41. Selimi replies that the "singular focus" that the Pre-Trial Judge placed on the words "where necessary" demonstrates the relevance of the practice at the ICC,

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[109] Selimi Appeal, paras 17, 20. See also Selimi Appeal, paras 18-19.
[110] Victims' Counsel Response, paras 5, 49-63; SPO Combined Response, paras 47-48, 54-56.
[111] Victims' Counsel Response, para. 60; SPO Combined Response, para. 55.
[112] SPO Combined Response, para. 54.
[113] Victims' Counsel Response, para. 50. See also Victims' Counsel Response, paras 5, 51.
[114] Victims' Counsel Response, paras 58-61. See also SPO Combined Response, para. 42.
[115] Victims' Counsel Response, para. 62; SPO Combined Response, para. 56.
[116] Victims' Counsel Response, para. 63; SPO Combined Response, paras 49-53. The SPO also contends that Selimi failed to refer to these decisions in his submissions before the Pre-Trial Judge. See SPO Combined Response, para. 49.
[117] SPO Combined Response, paras 22, 53 and references cited therein. See also SPO Combined Response, paras 20-21, 23.

especially if inconsistent, and argues that the SPO made "misleading observations" with respect to the ICC decisions he refers to.[118] He further asserts that neither the SPO nor the Victims' Counsel address the Pre-Trial Judge's inconsistent reasoning regarding the necessity of applying the Framework to all witnesses.[119]

42. In reply, Krasniqi takes issue with the SPO's reliance on "out-dated" evidence on the alleged climate of intimidation to justify the Framework, claiming that such findings are repetitious and not based on any new evidence.[120]

2. Assessment of the Court of Appeals Panel

43. The Panel recalls its finding that it was not required for the Pre-Trial Judge to condition the application of the Framework on the existence of a risk and to conduct an individual assessment of the situation of each witness as the Framework was not established pursuant to Rule 80 of the Rules and does not constitute protective measures.[121] Such risk assessment is only warranted in the context of Rule 80 protective measures as they involve withholding witness information from the Defence, which is not the case under any of the measures set forth in the Framework. The Panel therefore dismisses the Defence arguments concerning the need to conduct an individual assessment of the risks encountered personally by each witness and the existence of a nexus with an actual risk.[122] In the Panel's view, whether measures regulating contacts between witnesses and the non-calling party were treated as protective measures by some chambers of the International Criminal Tribunal for

[118] Selimi Reply, paras 5-10.
[119] Selimi Reply, para. 11.
[120] Krasniqi Reply, paras 14-15. See also Krasniqi Reply, para. 16; Veseli Reply, para. 9.
[121] See above, paras 31-32.
[122] See above, para. 32. Contra Thaçi Appeal, para. 41; Selimi Appeal, paras 10, 21-24; Krasniqi Appeal, paras 38-39, fns 58-60.

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Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") is thus irrelevant.[123]

44. As a result, and because the Framework does not constitute protective measures, the Panel finds no error in the Pre-Trial Judge finding that "there was no basis" for limiting the scope of the Framework only to witnesses needing protection and already benefiting from measures authorised under Rule 80 of the Rules.[124] The Panel further considers that the Impugned Decision could not be interpreted as asserting that all witnesses share the same security concerns or "equating" the circumstances of all witnesses.[125] The fact that witnesses may have different needs in terms of protective measures does not preclude the Framework from applying to all witnesses. There is no contradiction between the protective measures regime and the Framework regime as they are two distinct processes advancing different objectives and coexist without overlapping each other.

45. The Panel further finds no error in the fact that the Framework equally applies to high-ranking and/or international witnesses.[126] The Panel is not persuaded by the Defence arguments that this category of witnesses should be excluded from the Framework unless they are subject to Rule 80 protective measures and/or have expressed fears. Given that the Framework is not contingent upon any actual need for protection and is of a preventative nature, it will apply to all notified witnesses

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[123] See Krasniqi Appeal, fn. 58, referring to ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP, 26 October 2007 ("*Ndindiliyimana et al.* Decision"); ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Decision (Prosecutor's Request to Contact Defence Witnesses and Their Family Members), 10 October 2002 ("*Niyitegeka* Decision"). See also e.g. ICTY, *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Order for Protective Measures and Non- Disclosure to the Public, 18 February 2003; ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Defence urgent Motion for Witness Protective Measures, 9 February 2010 ("*Ngirabatware* Decision").
[124] See Impugned Decision, para. 136. The Panel notes that the Case 07 Protocol and the ICC Protocol are also meant to apply to all witnesses and not solely to protected witnesses. See Case 07 Protocol, para. 27; ICC Protocol, para. 28.
[125] Contra Thaçi Appeal, paras 38, 41. See also Selimi Appeal, para. 23; Krasniqi Appeal, para. 36.
[126] Impugned Decision, para. 120. See also Impugned Decision, para. 187.

regardless of whether they have expressed security concerns. It is therefore irrelevant whether the high-ranking and/or international witnesses complained about any impropriety or whether they fall outside of the geographic scope of interference.[127] For these reasons, the Panel finds that the Pre-Trial Judge was not required to differentiate between categories of witnesses nor to provide reasons as to why the Framework would also apply to a particular category of witnesses.[128]

46. That being said, the Panel sees no error in the Pre-Trial Judge still taking into consideration, *inter alia*, the climate of witness intimidation and interference and the fact that a significant number of witnesses in the present case benefit from protective measures, in deciding to issue the Framework,[129] while keeping in mind that it advances multiple goals beyond witness protection.[130]

47. As to the ICC decisions to which Selimi refers,[131] the Panel notes that while he claims that they were "conspicuously ignored" by the Pre-Trial Judge,[132] they are in fact mentioned for the first time on appeal. In itself, this should warrant the summary dismissal of Selimi's submissions in that regard.[133] Nevertheless, the Panel observes that none of the cited decisions concern the establishment of witness contact protocols and/or demonstrate that such protocols were implemented only after a determination of the actual risks faced by the witnesses.[134] The fact that some ICC chambers have exercised their discretion to take into consideration the existence of a risk when assessing whether to order individualised measures for witnesses pursuant to

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[127] See above, para. 34. Contra Krasniqi Appeal, paras 40-43.
[128] Contra Thaçi Appeal, paras 42, 44.
[129] See Impugned Decision, para. 118. See also above, para. 34.
[130] See above, paras 26-27.
[131] See Selimi Appeal, paras 14-16 and authorities cited therein.
[132] See Selimi Appeal, paras 13, 19-20.
[133] See e.g. *Haradinaj* Appeal Decision, para. 29.
[134] See *Katanga and Ngudjolo Chui* Decision (which concerns the inclusion of a particular witness in the ICC's witness protection program); *Mbarushimana* Decision (which concerns whether measures had to be taken to preserve the presumption of innocence of an accused); *Gaddafi* Decision (which concerns the issuance of cooperation orders to assist an accused in the preparation of his defence, while such measures were also ordered pursuant to Article 57(3)(b) of the Rome Statute).

Article 57(3)(c) of the Rome Statute does not preclude the possibility to adopt, under the same legal basis, broader measures not contingent upon any established risk, as demonstrated by the fact that numerous chambers have adopted, based on the ICC Protocol, witness contact protocols applying to *all* witnesses.[135] If anything, the decisions mentioned by Selimi rather confirm the Judges' powers and broad discretion to issue a range of measures under such provision.

48. Finally, the Panel notes that the Framework, while designed to apply presumptively to all notified witnesses, allows for some tailoring depending on the circumstances and some of its features only apply upon the witness's request.[136] In any event, the Parties retain the general prerogative to seek appropriate relief, where warranted, with regard to issues arising from the Framework's implementation.[137] The Panel further observes that the Parties have already been able to reach agreements in order to depart from certain parts of the Framework where the circumstances allow.[138]

49. In light of the above, part of Thaçi's Ground B, Selimi's Ground 1 and Krasniqi's Ground 2 are dismissed.

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[135] See e.g. ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1372, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses., 4 June 2008 ("*Lubanga* Order Regulating Contacts with Witnesses"), paras 5, 11, 14; ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-156-AnxA, Annex A to the Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses, 22 March 2019; ICC, *Prosecutor v. Ali Kushayb,* ICC-02/05-01/20-691-Anx, Annex to the Decision adopting an updated protocol on the handling of confidential information and contact with witnesses, 18 May 2022; ICC, *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-449-Anx, Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012; ICC, *Prosecutor v. Al Hassan,* ICC-01/12-01/18-674-Anx2, Annex 2 to the Decision on the 'Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant', the 'Dual Status Witness Protocol', and related matters, 19 March 2020; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2293, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", 4 September 2012.

[136] See Impugned Decision, para. 119. Notably, some protections provided by the Framework – such as the presence of a representative of the calling Party – will only be triggered if invoked by the witness or subject to judicial overview. See e.g. Framework, para. 212(II)(b).

[137] See Impugned Decision, paras 151, 175. See also Impugned Decision, paras 143, 159.

[138] See e.g. F00963, Notification relating to Decision F00854, 12 September 2022 (confidential).

C. WHETHER THE FRAMEWORK VIOLATES THE RIGHTS OF THE ACCUSED

1. Whether the Framework violates the privilege of the Accused against self-incrimination (Krasniqi Ground 3 in part)

(a) Submissions of the Parties

50. Under Ground 3 (corresponding to Sixth Krasniqi Issue), Krasniqi submits that the Pre-Trial Judge erred in finding that the Framework did not violate the right of the Accused against self-incrimination.[139] In his view, the Impugned Decision ignores the indirect means by which the Framework violates the right against self-incrimination, as the presence of the SPO during interviews and mandatory disclosure of the recorded interviews to the SPO forces the Defence to choose between exploring lines of questioning while risking that it provide the SPO with potentially self-incriminating material or not doing so, thereby losing potentially valuable information to its case.[140] Krasniqi contends that in this situation the Defence is not "at liberty" to define its case strategies.[141] He adds that the fact the admissibility of the interview is contingent on judicial authorisation does not solve the problem that the SPO would still have learned of incriminating information which it can then investigate or adduce in other ways.[142] Krasniqi further points to instances where witnesses are unwilling to speak to the SPO due to a risk of self-incrimination, arguing that their choice to speak to the Defence is "equally impaired" by such measures.[143]

51. The SPO responds that the Framework does not violate the right against self-incrimination and points to the safeguards noted by the Pre-Trial Judge; notably the

[139] Krasniqi Appeal, paras 45-46, referring to Impugned Decision, para. 150. See also Krasniqi Appeal, para. 4.
[140] Krasniqi Appeal, para. 46. See also Krasniqi Appeal, para. 47; Krasniqi Reply, paras 19-21. Thaçi similarly argues that such situation forces the Defence to conduct more limited interviews to avoid eliciting incriminating information or to decline interviews. See Thaçi Appeal, para. 35.
[141] Krasniqi Appeal, para. 46; Krasniqi Reply, para. 21.
[142] Krasniqi Appeal, para. 47, referring to Impugned Decision, paras 151-152. See also Krasniqi Reply, para. 20.
[143] Krasniqi Appeal, para. 49. See also Krasniqi Appeal, para. 37(2); Krasniqi Reply, para. 20.

fact that the SPO's attendance at interviews and the admission of the recordings into evidence depend on judicial authorisation.[144] According to the SPO, the right not to incriminate oneself does not extend to the use of witness statements obtained by the Defence.[145] The SPO further argues that Krasniqi provides no jurisprudential support for his claims of "indirect" violation and contends that none of the types of improper compulsion identified by the European Court of Human Rights ("ECtHR") are present.[146] In the SPO's view, the choice between phrasing a question that does or does not reveal incriminating evidence does not amount to a violation of the right against self-incrimination.[147] Finally, the SPO argues that Krasniqi does not have standing to raise claims on behalf of witnesses and fails to explain why he would be entitled to obtain self-incriminating statements from witnesses.[148]

52. In the same vein, the Victims' Counsel responds 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.[149] The Victims' Counsel further submits that Krasniqi offers no basis for his claim of indirect violation of the right against self-incrimination.[150]

53. Krasniqi replies that the SPO's interpretation of the right against self-incrimination is overly restrictive as it is not confined to the right to remain silent and must not be undermined by any obligation imposed on the Defence.[151] He further contends that the SPO ignores the "asymmetrical" character of the disclosure system

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[144] SPO Combined Response, paras 62-63. See also Victims' Counsel Response, para. 33.
[145] SPO Combined Response, para. 62.
[146] SPO Combined Response, para. 65 and authorities citied therein. The SPO adds that Krasniqi cites a single case which does not support the finding of a violation of the right against self-incrimination. See Krasniqi Appeal, para. 46.
[147] SPO Combined Response, paras 66-67. The SPO also submits that Krasniqi's submissions are speculative. See SPO Combined Response, para. 67.
[148] SPO Combined Response, para. 68.
[149] Victims' Counsel Response, para. 33.
[150] Victims' Counsel Response, para. 33.
[151] Krasniqi Reply, para. 18.

at the Specialist Chambers given that there is no obligation – equivalent to Rule 103 of the Rules – that the Defence disclose incriminating information to the SPO.[152]

(b) Assessment of the Court of Appeals Panel

54. At the outset, the Court of Appeals Panel recalls that Article 21(4)(h) of the Law and Article 30(6) of the Constitution of Kosovo both guarantee the right of the Accused not to be compelled to testify against himself or to admit guilt. In addition, and although this right is not specifically mentioned in Article 6 of the European Convention on Human Rights ("ECHR"), the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 of the ECHR.[153]

55. Turning first to Krasniqi's claim that the Impugned Decision ignores the *indirect* means by which the Framework violates the privilege against self-incrimination,[154] the Panel observes that the fact that the Framework does not entail any *direct* violation of that privilege is not challenged. As rightly noted by the Pre-Trial Judge, and as established by the jurisprudence of the ECtHR, the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.[155] Furthermore, in examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the following factors must be considered: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to

[152] Krasniqi Reply, para. 21. See also Krasniqi Reply, para. 19.
[153] See ECtHR, *John Murray v. The United Kingdom*, no. 18731/91, Judgment, 8 February 1996 ("*John Murray v. The United Kingdom*"), para. 45. See also ECtHR, *Saunders v. The United Kingdom*, no. 19187/91, Judgment, 17 December 1996, para. 68.
[154] See Krasniqi Appeal, para. 46.
[155] ECtHR, *Bykov v. Russia*, no. 4378/02, Judgment, 10 March 2009 ("*Bykov v. Russia*"), para. 92. See also Impugned Decision, para. 146.

which any material so obtained is put.[156] The Panel further agrees with the Defence that it is the fairness of the proceedings as a whole which must be assessed, including the way in which the evidence was obtained.[157]

56. The Panel observes that the Defence fails to cite any authority in support of its claim of indirect self-incrimination, namely that the presence of the SPO during interviews and/or the fact that it will subsequently receive the transcripts forces the Accused to decline to explore potentially useful lines of questioning to protect his privilege against self-incrimination.[158] Mindful that the privilege against self-incrimination is not limited to statements which are directly incriminating,[159] the Panel notes that indirect compulsion relates more to the adverse inferences that can be drawn from an Accused's choice to remain silent and only concerns situations involving the conduct of the Accused himself.[160] Furthermore, the Defence does not substantiate its argument that the privilege against self-incrimination would extend to statements obtained by the Defence – not against the Accused's will – emanating from persons other than the Accused.

57. The Panel recalls that the privilege against self-incrimination does not protect against making an incriminating statement *per se* but against obtaining evidence by coercion or oppression.[161] In the Panel's view, the situation mentioned by the Defence does not amount to any of the types of improper compulsion identified in the ECtHR

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[156] *Bykov v. Russia*, para. 92. See also Impugned Decision, para. 146.

[157] ECtHR, *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, Judgment, 27 October 2020, paras 125-126, cited at Krasniqi Appeal, fn. 66.

[158] Krasniqi Appeal, para. 46.

[159] ECtHR, *Ibrahim and Others v. The United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment, 13 September 2016 ("*Ibrahim and Others v. The United Kingdom*"), para. 268.

[160] See *John Murray v. The United Kingdom*, para. 50 (finding that a system which warns the accused that adverse inferences may be drawn from a refusal to provide an explanation to the police for his presence at the scene of a crime or to testify during his trial, when taken in conjunction with the weight of the case against him, involves a certain level of indirect compulsion). Cf. ECtHR, *O'Halloran and Francis v. The United Kingdom*, nos. 15809/02 and 25624/02, Judgment, 29 June 2007, para. 57 (the Court accepting that the compulsion at stake was of a direct nature).

[161] *Ibrahim and Others v. The United Kingdom*, para. 267.

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jurisprudence.[162] Indeed, the Panel finds that the fact that the Defence may, through the questioning of witnesses, risk eliciting some incriminating information does not constitute self-incrimination. The Defence fails to demonstrate any element of compulsion in that process. The Panel further finds unpersuasive the Defence's claim that it is *forced* to make a choice, and agrees with the Pre-Trial Judge that the Defence remains at liberty to define its strategy.[163] While the Panel is mindful of the potential challenges faced by the Defence in this respect, the Defence is under no obligation to conduct such interviews, and the choice of the line of questioning remains entirely its own.[164] In the Panel's view, while incriminating information might be revealed during the witness interview, this, in itself, does not violate the right to a fair trial.[165] Consequently, the Panel is satisfied that the Framework does not contain any direct or indirect elements of compulsion so as to contravene the privilege against self-incrimination.[166]

58. The Panel now turns to the Defence's argument that the possibility to have the recordings of the interviews admitted into evidence only upon judicial authorisation does not constitute an appropriate safeguard.[167] While the Panel sees some merit in the Defence's point that the SPO would still be made privy to that potentially

[162] The three kinds of situations giving rise to concerns as to improper compulsion are: (i) where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify; (ii) where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the ECHR, is applied to obtain real evidence or statements; and (iii) where the authorities use subterfuge to elicit information that they were unable to obtain during questioning. See e.g. *Ibrahim and Others v. The United Kingdom*, para. 267 and authorities cited therein.
[163] Impugned Decision, para. 150.
[164] See e.g. ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1235-Corr-Anx1, Annex I Decision on disclosure by the defence, 20 March 2008 ("*Lubanga* Decision on Disclosure by the Defence"), para. 27 (finding that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence). The present situation is also entirely distinguishable from the freedom of a suspect or accused to choose whether to speak or to remain silent when questioned which is protected under the right to remain silent and the privilege against self-incrimination. See ECtHR, *Allan v. The United Kingdom*, no. 48539/99, Judgment, 5 November 2002, para. 50.
[165] In the same vein, nothing shields the Accused from the risk of witnesses providing incriminating evidence during cross-examination.
[166] See Impugned Decision, paras 150, 154. See also Impugned Decision, para. 160.
[167] See Krasniqi Appeal, para. 47.

incriminating material via its attendance at the interviews and/or the transmission of the transcripts of their recordings, as found above, this situation does not entail any form of compulsion.[168] As such, and because there is no infringement in the first place, the Panel finds that it was unnecessary for the Pre-Trial Judge to engage in assessing whether the Framework contained any appropriate safeguards.[169] Therefore, the Panel will not consider the appropriateness of any safeguards imposed in the Framework.

59. Finally, the Panel summarily dismisses the Defence's submission that the right against self-incrimination extends to the witnesses themselves since it does not have standing to raise such claims on behalf of witnesses.[170] In any event, to the extent that the Defence alleges such violation on their behalf, the Panel fails to see how the Framework would entail any violation of their right.[171] Any submission beyond that would exceed the scope of the Sixth Krasniqi Issue.[172]

60. For these reasons, the Panel finds no error in the Pre-Trial Judge's conclusion that the Framework does not violate the privilege against self-incrimination. This part of Krasniqi's Ground 3 is dismissed accordingly.

2. Whether the Framework impacts attorney-client privilege (Thaçi Ground A in part)

(a) Submissions of the Parties

61. Under Ground A (corresponding to First Thaçi Issue), Thaçi submits that the measures of recording and disclosure of witness interviews of the Framework violate the attorney-client privilege as they make privileged information – resulting from

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[168] The Panel notes that under the ICC Protocol, the recordings of the interview shall also be provided to the calling party. See ICC Protocol, para. 41.
[169] See Impugned Decision, paras 151-154.
[170] See Krasniqi Appeal, para. 49.
[171] The Panel notes that the Framework contains provisions, in line with Rule 151(1) of the Rules, to ensure that the witnesses are advised that they can refuse to answer questions if they are thought to be potentially self-incriminating. See Framework, para. 212(II)(i)(ii).
[172] See above, para. 8(j).

information provided by the client – subject to disclosure to the SPO and the Trial Panel and potentially admissible as evidence.[173] Thaçi argues that the Defence is put in an "impossible position" to choose between revealing privileged information potentially relevant to the Defence case and losing investigative opportunities to disprove the SPO case.[174]

62. In Thaçi's view, the Pre-Trial Judge erred in: (i) relying on Rule 111(1)(b) of the Rules concerning voluntary disclosure of privileged information to a third party; (ii) considering that the Defence remained "at liberty" to assess what information to reveal or conceal with respect to interviews of witnesses on the SPO List of Witnesses; and (iii) relying on the fact that the remaining aspects of Defence investigations are not affected.[175]

63. Both the Victims' Counsel and the SPO respond that the Framework does not violate attorney-client privilege which only protects communications between the Accused and the Defence Counsel but does not extend to the conduct of Defence interviews with witnesses.[176] They submit that when information initially privileged is revealed to a witness during an interview, such information is no longer privileged.[177] In their view, whether to question a witness in such a way that it reveals privileged information is a "choice", and there is no obligation imposed by the Framework on the Defence to do so.[178]

64. Thaçi replies that the SPO overlooks that the privileged information will not only be revealed to the witness but also to the SPO and the Panel.[179] He contends that

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[173] Thaçi Appeal, paras 25-27. See also Thaçi Appeal, paras 24, 37, 55; Thaçi Reply, paras 4, 10, 13. Krasniqi also alleges that privileged matters would be revealed to the SPO. See Krasniqi Appeal, para. 4.
[174] Thaçi Appeal, paras 28-30; Thaçi Reply, para. 10. See also Thaçi Reply, para. 12.
[175] Thaçi Appeal, paras 29-31, referring to Impugned Decision, para. 157.
[176] Victims' Counsel Response, paras 24-28; SPO Combined Response, paras 69-71. The Victims' Counsel adds that witnesses are not bound by attorney-client privilege. See Victims' Counsel Response, para. 29.
[177] Victims' Counsel Response, para. 28; SPO Combined Response, para. 71.
[178] Victims' Counsel Response, para. 30; SPO Combined Response, para. 71.
[179] Thaçi Reply, para. 10. See also Thaçi Reply, para. 11.

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the Victims' Counsel "distorts" his submissions as he did not assert that witness interviews are privileged *per se*.[180]

(b) Assessment of the Court of Appeals Panel

65. At the outset, the Panel recalls that attorney-client privilege is specifically protected by Article 8 of the ECHR.[181] This privilege, guaranteed under Rule 111(1) of the Rules which provides that communications between an Accused and his or her Counsel are privileged and not subject to disclosure in the absence of the client's consent or voluntary disclosure to a third party, is also encompassed under Article 30(5) of the Constitution of Kosovo and Article 21(4) of the Law. It has been considered vital to the defence of an accused or appellant by allowing for open communication between counsel and client which is necessary for effective legal assistance.[182].

66. According to Thaçi, the Framework violates the attorney-client privilege in that it makes privileged information – provided by the client in the context of his professional relationship with Counsel – subject to disclosure to the SPO and the Trial Panel.[183] The Panel is not persuaded by Thaçi's claim that the attorney-client privilege extends to the conduct of Defence interviews with witnesses for the following reasons.

67. First, Thaçi provides no basis for this assertion which is further unsupported in the Specialist Chamber's legal framework and international jurisprudence.[184] Second, to the extent that Defence Counsel makes the informed decision to interview witnesses on the basis of information he received from the Accused, the fact that some aspects of these exchanges are deliberately revealed amounts neither to an infringement of

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[180] Thaçi Reply, para. 11.
[181] ECtHR, *Michaud v. France*, no. 12323/11, Judgment, 6 December 2012, paras 118-119.
[182] See e.g. IRMCT, *Prosecutor v. Mladić*, MICT-13-56-A, Judgement, 8 June 2021, para. 98.
[183] Thaçi Appeal, para. 25.
[184] See e.g. ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 325 (where the ICTY Appeals Chamber confirmed that the lawyer-client privilege does not cover prior Defence witness statements).

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attorney-client privilege nor to a disclosure of privileged communication between Counsel and the Accused. Indeed, if during a witness interview, Defence Counsel ultimately relies in his or her line of questioning on information provided by the Accused, it is only that initial part of the process which is covered by the privilege, namely the communications between Counsel and the Accused. In the Panel's view, the resulting work product eventually conveyed during the interview is no longer privileged, even more so as it is to be shared with a third party, being the witness. Arguably, the same would apply with regard to examinations in chief and cross-examinations of witnesses conducted by Counsel, as well as witnesses' statements, which are likely to be based on information provided by the Accused in the context of privileged communications. Yet, none of these situations are covered by attorney-client privilege.[185]

68. In that sense, the Panel agrees with the Pre-Trial Judge that it is for the Defence to evaluate what information it elects to reveal or conceal in relation to any individual it interviews during its investigation.[186] The Panel is therefore satisfied that the Framework does not violate attorney-client privilege, regardless of whether this information is revealed not only to the witness interviewed but also to the SPO and the Trial Panel through the transmission of the interview recordings.

69. The Panel turns next to whether the Pre-Trial Judge erred in considering that Rule 111(1)(b) of the Rules applied in relation to Defence interviews with witnesses under the terms of the Framework.[187] In the Panel's view, this provision foresees a two-step process, namely: (i) that a person voluntarily discloses the content of a privileged communication to a third party; and (ii) that the third party *then* gives evidence of that disclosure.[188] As rightly pointed out by the Defence, the requirement

[185] *Tadić* Appeal Judgement, para. 325.
[186] Impugned Decision, para. 157.
[187] Impugned Decision, para. 157.
[188] Rule 111(1)(b) of the Rules provides that "the person has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure".

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that the third party would then give evidence of the client's voluntary disclosure of privileged communications does not apply in the current circumstances.[189] The Panel is not persuaded that the present context amounts to a situation that would fall under Rule 111(1)(b) of the Rules in the sense that the witnesses interviewed – the third party according to the Pre-Trial Judge – would not be "giv[ing] evidence" of that alleged disclosure in the context of interviews with Defence Counsel.[190] Rather, as found above, the Appeals Panel finds that deliberately questioning a witness on the basis of information obtained through privileged communications with the Accused does not lead to *any* disclosure of privileged information. As a result, the Panel disagrees with the Pre-Trial Judge's finding regarding the applicability of Rule 111(1)(b) of the Rules in relation to Defence interviews with witnesses under the terms of the Framework. This erroneous finding of the Pre-Trial Judge does not, however, invalidate the overall conclusion that the Framework entails no violation of attorney-client privilege.

70. For these reasons, this part of Thaçi's Ground A is dismissed.

3. Whether the Framework violates the principle of equality of arms and the right to prepare for trial (Thaçi Ground A in part; Krasniqi Ground 3 in part)

71. The Appeals Panel considers that part of Ground A presented by Thaçi (corresponding to First Thaçi Issue) and part of Ground 3 presented by Krasniqi (corresponding to Sixth Krasniqi Issue) substantially overlap in that they both concern whether the Framework violates the principle of equality of arms and/or the right to prepare for trial. These grounds will therefore be considered together.

[189] See Thaçi Appeal, para. 30.

[190] Cf. SCSL, *Independent Counsel v. Bangura et al.*, SCSL-2011-02-T, Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena in Relation to the Principal Defender, 3 September 2012, paras 26-27.

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(a) Submissions of the Parties

72. Thaçi submits that his ability to investigate the case against him is compromised by the measures imposed by the Framework.[191] He argues that while his investigations were "unhindered" prior to the Framework, witnesses then cooperating are now "out of bounds".[192] Thaçi also stresses the impact on the expeditiousness of the proceedings.[193] In his view, the investigations are "stifled" by the SPO's presence and the transmission of the interview recordings to the Trial Panel, which forces the Defence to conduct – or decline – "limited and cautious" interviews to avoid eliciting incriminating information, rather than "open and unrestricted questioning".[194] Finally, Thaçi contends that the "revolutionary" requirements of recording and disclosure are the "most problematic" aspects of the Framework because the safeguards governing admissibility of evidence are eliminated.[195]

73. Likewise, Krasniqi argues that such mechanisms imposed by the Framework force the Defence to alter its investigative strategies.[196] Krasniqi further submits that the Pre-Trial Judge erred in finding that the Framework does not violate the principle of equality of arms.[197] According to him, the Framework imposes an "asymmetric" and "far greater" burden on the Defence through the imposition of "administrative delays and logistical complexities" not faced by the SPO since it completed its investigations by the time the Framework was enacted.[198]

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[191] Thaçi Appeal, paras 24, 32, 34. See also Thaçi Appeal, paras 6-7, 35, 37; Thaçi Reply, paras 4, 13-14.
[192] Thaçi Appeal, paras 33-34. See also Thaçi Reply, paras 4, 13.
[193] Thaçi Appeal, para. 34. See also Thaçi Reply, para. 6; Krasniqi Appeal, paras 29, 33.
[194] Thaçi Appeal, paras 24, 35. See also Thaçi Reply, para. 13; Krasniqi Reply, para. 19. Thaçi adds that these measures will "likely dissuade" dual status witnesses and suspects from cooperating with the Defence. See Thaçi Appeal, para. 36.
[195] Thaçi Appeal, para. 37.
[196] Krasniqi Appeal, para. 48. See also Krasniqi Reply, para. 19.
[197] Krasniqi Appeal, paras 45, 50-51, referring to Impugned Decision, paras 141, 144. See also Krasniqi Reply, paras 22-23; Thaçi Appeal, paras 6, 32, 54.
[198] Krasniqi Appeal, paras 50-51. See also Krasniqi Appeal, paras 29, 33; Krasniqi Reply, paras 22-23.

74. The SPO responds that the Pre-Trial Judge did not err in finding that the Framework does not violate equality of arms or Defence preparation rights, stressing that it applies equally to both the Defence and the SPO.[199] In the SPO's view, there is no "unfettered right" under the Law or the Rules for the Defence to conduct interviews with witnesses on their own terms.[200] The SPO further argues that the Defence fails to appreciate the differences between the mandates and roles of the SPO and Defence.[201] Finally, the SPO challenges the Defence's submission that the Framework sidesteps the normal admissibility procedure.[202]

75. The Victims' Counsel likewise submits that the Framework applies equally to the SPO and points out that at the time the SPO was conducting their interviews, there were "no Accused to invite" to attend them.[203] He also contends that the Defence fails to demonstrate that the Framework would delay Defence investigations.[204]

76. Krasniqi replies that the fact that Counsel for the Accused had not yet been appointed during most of the SPO investigations in fact illustrates the unfairness of the Impugned Decision.[205] Furthermore, Krasniqi takes issue with the SPO's assertion that its investigations into Defence witnesses will also be conducted under the Framework as the Defence bears no burden of proof or any obligation to advance a positive case, and the number of Defence witnesses would likely be much smaller.[206]

(b) Assessment of the Court of Appeals Panel

77. Turning first to the question of equality of arms and whether the Framework imposes a disproportionate burden on the Defence, the Panel recalls that under the

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[199] SPO Combined Response, paras 72-74. See also SPO Combined Response, para. 76.
[200] SPO Combined Response, para. 72.
[201] SPO Combined Response, para. 74.
[202] SPO Combined Response, para. 77. See also Victims' Counsel Response, para. 38.
[203] Victims' Counsel Response, para. 43.
[204] Victims' Counsel Response, para. 42, referring to Impugned Decision, para. 165.
[205] Krasniqi Reply, para. 22.
[206] Krasniqi Reply, para. 23. See also Krasniqi Appeal, para. 51.

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principle of equality of arms, as established by the jurisprudence of the ECtHR, each party must be afforded a reasonable opportunity to present its case under conditions that do not place it at a disadvantage vis-à-vis his opponent.[207] The Panel observes that the Framework, as noted by the Pre-Trial Judge, is framed in general, neutral terms and as such is not meant to be directed at one particular Party only but to equally apply to both Parties.[208] In reaching this finding, the Pre-Trial Judge was mindful that the Defence is under no obligation to put forward a case and that it is only if the Defence elects to do so that the Framework would effectively apply to SPO interviews with Defence witnesses. In the Panel's view, whether there will be a Defence case and whether the number of Defence witnesses is likely to be smaller are considerations extraneous to the fact that the Framework is designed to be implemented without distinction. While recognising that the number of witnesses could lead to a certain asymmetry, the Panel finds that, in the event the Defence would present a case, the Framework would operate under the same circumstances as for Defence interviews with SPO witnesses and would not place the SPO at any particular advantage or the Defence at any particular disadvantage in terms of equality of arms.[209] Likewise, the Panel finds that the Defence fails to show how the Framework would call into question the principle that the SPO bears the burden of proof and recalls the Pre-Trial Judge's finding that the Framework cannot be interpreted as shifting that burden.[210]

78. As to the timing of the Framework, the Panel finds unpersuasive the Defence's argument that the fact that the SPO had already completed its investigations when the Framework was adopted places the Defence at a disadvantage vis-à-vis the SPO given

[207] See ECtHR, *Foucher v. France*, no. 22209/93, Judgment, 18 March 1997, para. 34, cited at Impugned Decision, para. 138. See also e.g. KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017, para. 27; *Haradinaj* Appeal Decision, para. 43; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para. 181.
[208] Impugned Decision, para. 144.
[209] Contra Krasniqi Appeal, paras 50-51.
[210] Impugned Decision, para. 144. See Krasniqi Appeal, para. 51.

that: (i) while the Defence was not present during SPO interviews with witnesses, there is no entitlement to attend *every* witness interview that would take place between the opposing party and their own witnesses; and (ii) at this stage, the SPO has not been notified of any Defence witnesses – in the event the Accused choose to present a Defence case[211] – thus any SPO investigations in that respect have logically not started. In addition, the Panel recalls that the Defence may apply for relief or variation from the Framework where appropriate.[212] The Panel therefore finds that the Accused have failed to demonstrate that the Pre-Trial Judge erred in concluding that the Framework does not violate the principle of equality of arms.[213]

79. Turning next to whether the Framework compromises the right of the Accused to investigate the case against them, the Panel remarks, at the outset, that the Defence submissions seem to stem from the erroneous assumption that there exists an unlimited, automatic right to conduct interviews of witnesses of the opposing party. Indeed, the Specialist Chambers' legal framework does not reflect such a right. Although the jurisprudence of the *ad hoc* tribunals has indeed recognised that the Defence may have a legitimate interest in interviewing a Prosecution witness in order to properly prepare its case,[214] this does not support the position that the Defence may conduct such interviews as of right.[215] In fact, even if there has been no harmonised practice in that respect at the ICTY and the ICTR, such contacts always took place in the context of specific procedures, and in several instances the possibility alone to

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[211] See F01050/RED, Public Redacted Version of Pre-Trial Brief of Mr Hashim Thaçi, 8 November 2022 (confidential version filed on 21 October 2022), para. 17; F01052, Pre-Trial Brief on Behalf of Kadri Veseli, With Confidential Annexes 1-3, 22 October 2022 (confidential), para. 3; F01049, Selimi Defence Pre-Trial Brief, 21 October 2022 (confidential), para. 182; F01051, Pre-Trial Brief of Jakup Krasniqi, 21 October 2022 (confidential), para. 6.
[212] See Impugned Decision, paras 151, 175.
[213] See Impugned Decision, paras 144-145.
[214] See ICTY, *Prosecutor v. Halilović*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 12. See also Impugned Decision, para. 163.
[215] See e.g. ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, para. 13 (emphasising that the freedom to contact potential witnesses is not without limitation); *Niyitegeka* Decision, para. 8 (finding that such contacts need to follow a specific procedure). See also Impugned Decision, para. 163.

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interview witnesses from the opposing party was subject to judicial authorisation and required a demonstration of good cause, and/or entailed the attendance of the opposing party.[216] By contrast, under the present Framework, the Defence is explicitly permitted to conduct such interviews without having to seek prior judicial leave.

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[216] See e.g. *Ndindiliyimana et al.* Decision, paras 3-5 (granting the Defence's request to meet a Prosecution witness in the presence of a representative of the Prosecution because there was "a good reason" to do so); ICTR, *Prosecutor v. Bizimungu et al*., ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka's Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA, 21 April 2008, paras 14-16 (granting the Defence's request to meet a Prosecution witness in the presence of the Prosecution because it had demonstrated a legitimate interest to do so); ICTR, *Prosecutor v. Ndindiliyimana et al*., ICTR-2000-56-T, Decision on Sagahutu's Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, for Leave to Contact a Prosecution Witness, and for Access to Testimony of Protected Witnesses in the Military I Case, 3 November 2004, para. 23 (granting the Defence's request to meet with a Prosecution witness, provided that the witness consents, and permitting the attendance of a representative of the Prosecution); ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-PT, Decision on Motion to Interview Prosecution Witnesses, 24 August 2009, paras 1, 9-10 (finding that the Defence had demonstrated good reasons to interview Prosecution witnesses and granting the Defence's request to do so, finding that the Prosecution may be present for interviews of witnesses remaining on its witness list); ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Defence Motion for Leave to Meet with the Husband of Witness ANAE and for Postponement of her Testimony, 28 October 2009, paras 21-22 (granting in part the Defence's request to meet with the husband of a Prosecution witness while also granting the Prosecution's request to be present during the meeting); ICTR, *Prosecutor v. Bizimungu et al*., ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access Jean Kambanda, 24 August 2004, paras 19-21 (granting the Defence's request to lift initial restrictions and interview a Prosecution witness without a representative from the Prosecution being present, noting that such presence could render the interview impossible); *Niyitegeka* Decision, paras 15-17 (granting the Prosecution's request to contact 25 Defence witnesses and finding that the Defence could attend such interviews if it wishes); ICTR, *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on Joseph Kanyabashi's Request to Meet SW and FAT and All Other Persons Whose Identities Were Not Disclosed to the Defence, 23 November 2004, paras 11-13 (granting the Defence's request to meet with two Prosecution witnesses in the absence of the Prosecution if the witnesses agree, noting the Prosecution's consent). In other instances, while prior judicial leave was not required, the presence of a representative of the opposing party was nevertheless foreseen. See e.g. *Ngirabatware* Decision, p. 9(v) (finding that the Prosecution can contact potential Defence witnesses, upon prior notification of the Defence, and in the presence of a representative of the Defence); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision in Interview of Defence Witnesses by the Prosecution, 8 November 2012, para. 16(c) (with regard to interviews by the Prosecution of Defence witnesses, foreseeing the possibility for witnesses to request a representative of the Accused to be present); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Motion for Reconsideration of Decision on Motion for Order for Contact with Prosecution Witnesses, 15 July 2009, paras 8, 11 (with regard to interviews by the Accused of Prosecution witnesses, foreseeing the possibility for witnesses to request a representative of the Prosecution to be present); ICTY, *Prosecutor v. Prcać*, IT-98-30/1, Decision on Prosecution Motion for Protective Measures and Particularly for Witness N, 14 April 2000, paras 3-4 (finding that the Accused and the Prosecution shall contact witnesses from the opposing party upon prior written notice and that a representative of the opposing party may attend any meeting if

80. The Panel further agrees with the Pre-Trial Judge that the issue of conducting interviews with witnesses of the opposing party is different and does not call into question the fundamental right of the Accused, enshrined in Article 21(4)(f) of the Law as well as Article 6(3)(d) of the ECHR, to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.[217] It is not disputed that the Defence's ability to cross-examine at trial witnesses included in the SPO List of Witnesses remains entirely unaffected by the Framework.[218]

81. It follows from these considerations that there is no unlimited right to interview witnesses from the opposing party, and that, contrary to the Defence submissions, it is well-established that conditions can be imposed in order to regulate such contacts. In the Appeals Panel's view, the Framework, subject to necessary and proportionate safeguards, in fact provides an *additional* opportunity for the Defence to retrieve information relevant to its preparations for trial,[219] alongside other investigative avenues afforded to the Defence, such as the possibility of interviewing – outside of the Framework – individuals not included in the SPO List of Witnesses or otherwise notified, or the possibility to investigate matters related to SPO witnesses through other ways than interviews.

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the witness so requests). See also *Lubanga* Order Regulating Contacts with Witnesses, para. 11 (finding that the party or participant calling the witness is entitled to have a representative present during the interview). In some other instances, such meetings could also take place without the presence of the opposing party, but in the presence of a representative of the Registry. See e.g. ICTR, *Prosecutor v. Karemera et al*., ICTR-98-44-T, Decision on Reconsideration of Protective Measures Orders, 15 October 2009, paras 14-15.

[217] See Impugned Decision, para. 163. Contra Thaçi Appeal, paras 31-32. To the extent Thaçi relies in his Appeal on the Thaçi Supplemental Submissions, the Panel will not consider these arguments as they were not considered by the Pre-Trial Judge because they were made without legal basis or authorisation. See Impugned Decision, para. 110; Thaçi Appeal, para. 31, fn. 39, referring *inter alia* to Thaçi Supplemental Submissions, para. 10. See also SPO Combined Response, para. 60.

[218] See Impugned Decision, para. 162.

[219] See e.g. ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2192-Red, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010 ("*Lubanga* Decision on Contacts with Defence Witnesses"), para. 49.

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82. While the Defence takes issue with the emphasis placed in the Impugned Decision on the fact that it remains at liberty to define its strategy,[220] the Panel recalls its conclusion above that the Defence has entire control of what to reveal or conceal during these interviews, as well as the decision to conduct such interviews in the first place.[221] This is a balancing assessment for the Defence alone to make, as part of its strategy. Should the Defence evaluate that the risk of eliciting incriminating information through these interviews is too high, other investigative options remain available.

83. Consequently, the Appeals Panel is not persuaded that the conditions imposed under the Framework impede the Defence's ability to investigate and to collect evidence favourable to the Accused.[222] For these reasons, the Panel is satisfied that any restriction possibly arising from the Framework with regard to the opportunity for the Accused to organise their defence in an appropriate way would not violate Article 6(3)(b) of the ECHR.[223]

84. As to the alleged impact of the Framework on the expeditiousness of the proceedings, the Panel notes that while the Accused allege that the Framework will necessarily cause some delays,[224] they do not identify any specific example where delay could be attributed to the measures imposed by the Framework beyond this general assertion. The Panel finds that these claims are unsubstantiated and

[220] See Impugned Decision, paras 150, 157, 162.
[221] See above, paras 56, 68.
[222] See e.g. *Dayanan v. Turkey*, para. 32, cited at Krasniqi Appeal, para. 19, fn. 28.
[223] Impugned Decision, para. 162, referring to ECtHR, *Mayzit v. Russia*, no. 63378/00, Judgment, 20 January 2005, para. 78 (finding that the accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings). See also Impugned Decision, para. 176.
[224] See Thaçi Appeal, para. 34; Krasniqi Appeal, para. 29; Thaçi Reply, para. 6. The Panel notes that Selimi also argues that the Framework negatively impacts the Defence's right to have adequate time and facilities to prepare and to be tried within a reasonable time. See Selimi Appeal, para. 25.

hypothetical at this stage[225] and sees no error in the Pre-Trial Judge finding that the Framework's effect on the overall assessment of the length of the proceedings cannot be determined at this stage of the proceedings.[226]

85. Finally, the Panel dismisses the Defence's argument that the admission into evidence of the interview records disclosed under the Framework would violate the existing admissibility safeguards as it ignores the fact that the normal requirements governing admissibility of evidence under the Specialist Chambers' legal framework would still apply[227] and it is only "where [these] conditions are met" that the Panel may, *proprio motu* or upon the application of a Party, decide to admit evidence, as confirmed by the terms expressly used in the Framework.[228] Although the Panel observes that this possibility would go beyond what is foreseen for instance under the ICC Protocol,[229] it finds no error in the way the Pre-Trial Judge exercised his discretion to endorse this measure.[230]

86. In light of the above, the remainder of Thaçi's Ground A and Krasniqi's Ground 3 are dismissed accordingly.

4. Whether the measures of recording and disclosure of the Framework violate the disclosure regime of the Specialist Chambers (Thaçi Ground C; Selimi Ground 2)

87. The Court of Appeals Panel considers that Ground C presented by Thaçi (corresponding to Eighth Thaçi Issue) and Ground 2 presented by Selimi (corresponding to Fourth Selimi Issue) overlap to the extent that they both question

[225] The same applies to Thaçi's repeated claim that the Framework has a chilling effect on witnesses. See Thaçi Appeal, para. 34. See also Impugned Decision, para. 141.
[226] Impugned Decision, para. 165. See also Impugned Decision, para. 125.
[227] See e.g. Rules 137 and 138 of the Rules.
[228] See Framework, para. 212(II)(o). Contra Thaçi Appeal, para. 37. See also Thaçi Appeal, para. 24 (alleging that the recordings may "automatically" become part of the case record). The general rule is that the recordings should *not* become part of the record, *unless* the Panel would decide otherwise. See Framework, para. 212(II)(o) (emphasis added).
[229] See above, para.30, fn. 77.
[230] This measure is also foreseen under the Case 07 Protocol. See Case 07 Protocol, para. 40.

whether Recording and Disclosure requirements are necessary and consistent with the disclosure regime of the Specialist Chambers.[231] These grounds will therefore be considered together.

(a) Submissions of the Parties

88. Thaçi submits that while at this stage of the proceedings there is no burden on the Defence to disclose evidence – such obligations only arising after the close of the SPO case – the Framework requires the Defence to disclose statements of SPO witnesses it interviews prior to deciding whether to present a Defence case and hearing the SPO case, in violation of Rule 104(5) of the Rules.[232] In his view, this is irreconcilable with the Specialist Chambers' disclosure regime set out in Rules 104 to 111 of the Rules and compromises the burden of proof and the presumption of innocence.[233] Thaçi argues that in the event the SPO drops witnesses who the Defence will then call, he will have to call witnesses with the SPO having been in possession of their statements "potentially for years".[234] He stresses that contrary to the Pre-Trial Judge's assertion, this is "a reality" far from speculative, arguing that the SPO List of Witnesses has been compiled "without the consent or even knowledge" of some of the witnesses listed thereon.[235]

89. Selimi submits that the mandatory recording and disclosure of witness interviews are unnecessary and disproportionate to the aims of witness protection and preservation of evidence and that the Pre-Trial Judge abused his discretion in failing to consider less restrictive measures to mitigate such stated risks.[236] He contends that the Framework, as it presently stands, puts the Defence in the "dilemma" between

[231] See also Certification Decision, para. 46 (where those issues have been addressed together).
[232] Thaçi Appeal, paras 47-48, 53. See also Thaçi Appeal, para. 50; Thaçi Reply, paras 15, 17. Krasniqi also argues that such measures force the Defence to disclose evidence to the SPO in violation of the normal disclosure regime. See Krasniqi Appeal, para. 32.
[233] Thaçi Appeal, paras 46, 49, 53. See also Thaçi Appeal, para. 55; Thaçi Reply, paras 15-16.
[234] Thaçi Appeal, paras 50-51.
[235] Thaçi Appeal, paras 51-52, referring to Impugned Decision, para. 159.
[236] Selimi Appeal, paras 4, 28-30, 37. See also Selimi Appeal, paras 33, 45-46; Selimi Reply, paras 12, 17.

taking the risk of revealing information to the opposing side and its obligation to thoroughly prepare the case, regardless of whether any allegations of wrongdoing have been raised.[237] Selimi adds that it defeats the purpose of requiring judicial authorisation to attend an interview against the preference of witnesses.[238] According to Selimi, the Registry should have been appointed as a "neutral" custodian of the recorded interviews under seal which could be accessed by the Parties or the Panel "upon showing of reasonable cause to suspect wrongdoing".[239] In Selimi's view, such modification of the Framework would have maintained the same degree of protection while alleviating the Defence concerns and not interfering with the investigations of the Defence.[240]

90. With regard to Thaçi Ground C, the Victims' Counsel responds that what is being provided by suppling a copy of the recording is a *record* of the witness interview, thus "something quite different" from the material governed by Rule 104 of the Rules.[241]

91. The SPO responds that although Rule 104 of the Rules establishes some mandatory disclosure with certain timelines, it does not prohibit additional disclosure at any stage when ordered.[242] The SPO contends that Thaçi ignores the fact that the Rules require pre-trial disclosure by the Defence in certain circumstances and points to international jurisprudence in support.[243] In the SPO's view, the hypothetical

[237] Selimi Appeal, paras 35-38, 42. See also Selimi Appeal, para. 41; Selimi Reply, para. 18.
[238] Selimi Appeal, para. 44. See also Selimi Appeal, paras 34, 40, 42; Selimi Reply, paras 13-17, 19.
[239] Selimi Appeal, paras 4, 28, 37, 39. See also Selimi Appeal, paras 40-41, 45-46; Selimi Reply, para. 13. Selimi further argues that the impact on the Registry resources would be minimal. See Selimi Appeal, para. 43.
[240] Selimi Appeal, paras 38-39, 42. See also Selimi Appeal, paras 34, 45-46; Selimi Reply, para. 18.
[241] Victims' Counsel Response, para. 41.
[242] SPO Combined Response, para. 79.
[243] SPO Combined Response, para. 79, fns 183-184, referring to Rules 95(5) and 104(1) of the Rules and authorities cited therein. The SPO adds that these measures also form part of the ICC Protocol and the Case 07 Protocol. See SPO Combined Response, para. 79.

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scenario laid out by Thaçi, in addition to being entirely speculative, would not violate Rule 104(5) and (6) of the Rules which does not prohibit earlier disclosure deadlines.[244]

92. The Victims' Counsel and the SPO both respond that Selimi's submissions should be summarily dismissed on the ground that they were never raised at first instance.[245] The SPO further submits that Selimi impermissibly seeks to substitute his own discretion to that of the Pre-Trial Judge.[246]

93. Thaçi replies that the SPO's position that earlier disclosure deadlines are not prohibited is "entirely inconsistent" with the principles governing criminal proceedings and the right of the Accused to silence.[247] He challenges the SPO's assertion that Defence pre-trial disclosure is "*required*" in certain circumstances under the Rules.[248] According to Thaçi, the measures of recording and disclosure have the same "practical effect" as the disclosure obligations under Rule 104 of the Rules – namely having to disclose a "full record" of interviews of witnesses it may subsequently call while the Defence has no such obligation under the Rules.[249]

94. Selimi replies that his submissions on appeal are appropriate as he asks for "judicial safeguards to be evenly applied across the Framework".[250] According to Selimi, since the Pre-Trial Judge considered that allowing the SPO to attend every interview irrespective of the witness' expressed preferences would go beyond the Framework's stated goals, the Pre-Trial Judge exercised his discretion in an unfair and uneven manner in not modifying the Framework to include a similar degree of judicial oversight for the recording of such interviews.[251]

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[244] SPO Combined Response, para. 80.
[245] Victims' Counsel Response, para. 40; SPO Combined Response, para. 57.
[246] SPO Combined Response, para. 57.
[247] Thaçi Reply, para. 15. See also Thaçi Reply, para. 16.
[248] Thaçi Reply, para. 16 (emphasis in the original).
[249] Thaçi Reply, para. 17. See also Thaçi Reply, paras 15-16.
[250] Selimi Reply, paras 12-13.
[251] Selimi Reply, paras 14-15, 17.

(b) Assessment of the Court of Appeals Panel

95. At the outset, the Panel notes that the Pre-Trial Judge, while noting the "very broad wording" of the Eighth Thaçi Issue, found that it pertained to the question whether the measures of Recording and Disclosure comply with Rules 106 and/or 111(1) of the Rules.[252] The Pre-Trial Judge circumscribed the certified issue to the specific parts of the Impugned Decision discussing these two provisions in particular.[253] The Panel observes that under Ground C, Thaçi makes submissions concerning Rule 104(5) of the Rules.[254] Recalling that the Panel may consider arguments as long as they are intrinsically linked to the issue certified for appeal,[255] the Panel finds that Thaçi's challenge with regard to Rule 104 of the Rules is closely linked to the certified issue as defined by the Pre-Trial Judge,[256] and as such, will consider it.

96. Addressing first Thaçi's contention that the Rules contain no regime for Defence disclosure in the pre-trial phase or during the Prosecution case,[257] the Panel observes that, pursuant to Rule 119 of the Rules, the Defence is indeed under no obligation to present a Defence case and it is only if it elects to do so that its disclosure obligations under Rule 104 of the Rules are triggered. That being said, the Panel also notes that Rules 104(5) and 119(1) of the Rules only provide the time limits as to when these procedural steps should occur *at the latest* but leave discretion to the relevant panel to set earlier timelines. It also does not mean that it would not be possible, under the legal framework of the Specialist Chambers, to impose some disclosure obligations

[252] Certification Decision, para. 46.
[253] Namely, Impugned Decision, paras 155-157. See Certification Decision, para. 46.
[254] See Thaçi Appeal, paras 48-52.
[255] See e.g. IA013/F00012, Decision on Defence Appeals Against Decision on Motions Challenging the Legality of the Specialist Chambers and the Specialist Prosecutor's Office and Alleging Violations of Certain Constitutional Rights of the Accused, 20 May 2022, para. 34 and jurisprudence cited therein.
[256] The Panel also notes that the heading of the Eighth Thaçi Issue directly refers to Rule 104 of the Rules.
[257] See Thaçi Appeal, paras 47-48.

on the Defence at an earlier stage.[258] In addition, the Rules foresee some instances of pre-trial disclosure on behalf of the Defence under specific circumstances.[259]

97. Furthermore, the Panel notes that Rule 104(5)(b) of the Rules only concerns the disclosure of statements from *Defence* witnesses. Given that the Framework, by definition, only governs contacts with witnesses of the *opposing* Party, disclosure by the Defence of SPO witness interviews that took place under the Framework does not trigger the application of Rule 104(5)(b) of the Rules, and as such cannot entail a violation of that Rule, regardless of whether the Defence eventually elects to present a case. To the extent the Framework would entail additional disclosure requirements, the Panel is of the opinion that the Specialist Chambers' disclosure regime does not exclude earlier disclosure on the part of the Defence and that, therefore, the Pre-Trial Judge did not abuse his discretion. Furthermore, given that these additional disclosure requirements would equally apply to both Parties, this would not shift the burden of proof, especially since the Defence is under no obligation to conduct such interviews and since this has no impact on the Accused's decision whether to present a Defence case.[260]

98. Turning next to Thaçi's scenario where, following a Defence interview, the SPO decides not to call a witness initially on its list, and where the Defence subsequently calls this witness as its own despite the SPO having already been in possession of the witness statement, the Panel agrees with the Pre-Trial Judge that this is a speculative

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[258] See e.g. *Lubanga* Decision on Disclosure by the Defence, para. 31 (where the ICC Trial Chamber recognised the possibility under the Rome Statute framework to impose disclosure obligations upon the Accused "in advance and in appropriate circumstances"); *Lubanga* Decision on Contacts with Defence Witnesses, para. 59 (where the ICC Trial Chamber found that "specific additional details" should be provided by the Accused to the Prosecution with regard to Defence witnesses to assist its investigations).

[259] See e.g. Rule 95(5) of the Rules (which provides that the Defence shall notify the SPO of its intent to offer a defence of alibi within a time limit set by the Pre-Trial Judge) and Rule 104(1) of the Rules (which provides that the Defence shall provide the SPO with a detailed notice of alibi "sufficiently in advance of the opening of the case pursuant to Rule 124 [of the Rules]").

[260] Contra Thaçi Appeal, paras 48-49. See Impugned Decision, para. 144.

argument.[261] Furthermore, while Thaçi points to a scenario that could hypothetically arise,[262] the Panel finds that this would not undermine the integrity of the Framework or suggest an automatic violation of the Specialist Chamber's disclosure regime.[263] In any event, the Panel recalls the Pre-Trial Judge's finding that, should the circumstances warrant it, the Defence retains the possibility to apply for an appropriate remedy.[264]

99. The Panel is therefore satisfied that the Pre-Trial Judge committed no error in finding that the Framework does not violate Rule 104 of the Rules and the Specialist Chambers' disclosure regime in general.[265]

100. Turning to Selimi Ground 2, the Panel observes that while Selimi now argues that the Pre-Trial Judge abused his discretion in failing to consider less restrictive measures and that the Registry should have been appointed as the custodian of the recorded interviews under seal,[266] Selimi never suggested this proposed modification to the Framework before the Pre-Trial Judge, either in his written or oral submissions.[267] This argument is therefore being raised for the first time on appeal. Because it could reasonably have been raised at first instance and raises an issue of

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[261] Impugned Decision, para. 159. Contra Thaçi Appeal, paras 50-51.
[262] See Thaçi Appeal, para. 51. To the extent Thaçi relies in his Appeal on the Thaçi Supplemental Submissions, the Panel recalls that it will not consider these arguments as they were not considered by the Pre-Trial Judge because they were made without legal basis or authorisation. See Impugned Decision, para. 110; Thaçi Appeal, para. 52, fn. 50, referring to Thaçi Supplemental Submissions, para. 10; Thaçi Appeal, para. 50, fn. 47, referring to Thaçi Appeal, para. 30, fn. 39, referring in turn to Thaçi Supplemental Submissions, para. 10. See also SPO Combined Response, para. 60.
[263] Contra Thaçi Appeal, para. 50 (alleging a violation of Rule 104(5) of the Rules).
[264] See Impugned Decision, para. 159.
[265] Impugned Decision, para. 159. To the extent that Thaçi argues that the Framework violates the protection of privileged information under Rule 111 of the Rules in that it discloses protected information to the SPO and the Trial Panel, the Panel recalls its conclusion above that the Framework entails no such violation. See Thaçi Appeal, paras 53, 55. See above, para. 68.
[266] Selimi Appeal, paras 4, 28, 37-41, 43, 45-46, 47(ii).
[267] For instance, while Selimi argues that the impact of implementing this measure on the Registry resources would likely be minimal, the Registry was never heard on the feasibility and impact of such a measure at first instance. See Selimi Appeal, para. 43.

resources relating to the Registry, it warrants summary dismissal.[268] As a result, the Panel will not consider Selimi's arguments in that regard.[269] In any event, the Appeals Panel recalls its findings that the Pre-Trial Judge, in the context of Article 39(1) and (11) of the Law, was not required to carry out an assessment of whether less restrictive measures were available.[270]

101. For these reasons, Thaçi's Ground C and Selimi's Ground 2 are dismissed.

D. Request for Suspensive Effect

102. Thaçi makes an application for suspensive effect of the Impugned Decision pursuant to Rule 171 of the Rules, claiming that the ongoing implementation of the Framework would be irreversible as the pre-trial Defence investigations "cannot be re-done", and would defeat the purpose of his Appeal.[271] He therefore requests the Appeals Panel to order an immediate stay of the execution of the Impugned Decision.[272]

103. Both the Victims' Counsel and the SPO oppose Thaçi's request for suspensive effect.[273] The Victims' Counsel stresses that in such a situation the dual status witnesses could be contacted by the Defence directly, thus in violation of the Specialist Chambers' duty to provide for the dual status witnesses' psychological well-being, dignity and privacy pursuant to Article 23(1) of the Law.[274] The SPO submits that the interests of victims and the SPO could be irreparably harmed "as any of the harms

[268] See e.g. *Haradinaj* Appeal Decision, paras 29, 38; IA001/F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, para. 51.
[269] To the extent that Selimi's submissions also concern the Defence being faced with the balancing act of risking eliciting incriminating evidence and revealing information to the opposing side versus the Defence obligation to thoroughly prepare the case, the Panel recalls that similar claims have been addressed and dismissed elsewhere in the present Decision. See above, paras 57, 79-83. See Selimi Appeal, paras 35-38.
[270] See above, para. 32.
[271] Thaçi Appeal, para. 56. See also Thaçi Reply, para. 18.
[272] Thaçi Appeal, para. 57; Thaçi Reply, para. 21.
[273] Victims' Counsel Response, para. 65; SPO Combined Response, paras 81-83.
[274] Victims' Counsel Response, paras 64-68.

that the Framework is designed to prevent could occur while it is suspended".[275] Noting that Thaçi is the only Accused to make such a request, the SPO further contends that he fails to substantiate his claim and that the Framework imposes no restrictions that would impact his ability to interview witnesses who have not been notified.[276]

104. Thaçi replies that the Victims' Counsel's concerns regarding dual status witnesses are without a reasonable basis as no incident has ever been raised since the Defence started investigating.[277] He adds that should the Appeals Panel be minded to accept such arguments, he requests in the alternative a stay of the application of the Framework for those witnesses with whom the Defence was previously in contact before the Framework entered into effect.[278]

105. The Panel recalls that pursuant to Rule 171 of the Rules, suspensive effect shall only be granted as an exceptional measure. For the reasons set out in detail above, the Panel finds that the Framework has been properly established, is justified to address its different goals and does not amount to a disproportionate infringement upon the rights of the Accused.[279] In these circumstances, the Panel is satisfied that the Defence has and remains in a position to conduct its investigations with the Framework implemented and does not find that it has substantiated its claim that the conduct of trial preparations have been impaired or "irreparably harmed" as a result. Moreover, the Panel recalls that the Framework has a protective objective and is mindful of the possible negative impact a stay of the Framework could have on witnesses, including dual status witnesses. The Panel finds that Thaçi has failed to substantiate his claim and to demonstrate that the implementation of the Impugned Decision, and of the

[275] SPO Combined Response, para. 83.
[276] SPO Combined Response, para. 82.
[277] Thaçi Reply, para. 19.
[278] Thaçi Reply, paras 20-21.
[279] See above, paras 35, 57, 68, 78, 83, 99.

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Framework, could defeat the purpose of the appeal or lead to irreversible consequences. Consequently, the request for suspensive effect is dismissed.

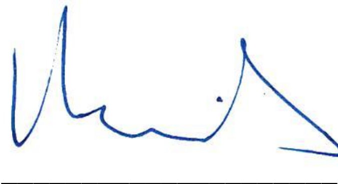
V. DISPOSITION

106. For these reasons, the Court of Appeals Panel:

DENIES the Appeals;

ORDERS the Accused and the SPO to submit public redacted versions of their appellate filings referenced in paragraph 11 or indicate, through a filing, whether these filings can be reclassified as public within ten days of receiving notification of the present Decision; and

ORDERS the Registry to execute the reclassification of the filings referenced in paragraph 11 upon indication by the Accused and the SPO that they can be reclassified.



Judge Michèle Picard,
Presiding Judge

Dated this Tuesday, 27 December 2022

At The Hague, the Netherlands