

In: KSC-BC-2020-06
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Victims' Counsel

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**Victims' Counsel Further Submissions on the SPO's Framework for Handling of
Confidential Information and Contacts with Witnesses During Investigations**

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I. INTRODUCTION

1. Pursuant to the Pre-Trial Judge's oral order on 4 February 2022,¹ the Victims' Counsel hereby provides further submissions on the issue of the Registrar's submissions on the Specialist Prosecutor's Office ("SPO") proposed Framework for Handling of Confidential Information and Contacts with Witnesses during Investigations ("Proposed Framework")² and advance notice of the submissions that would be made at the oral hearing if one were to be convened, in order to assist the Pre-Trial Judge in determining the need for such a hearing.
2. It is submitted that:
 - i. the Proposed Framework is an appropriate model to adopt, albeit it should also adequately consider contacts with vulnerable witnesses and dual status witnesses;
 - ii. the Proposed Framework is, contrary to its characterisation by the Defence, not an unprecedented and unfair model: in fact, it closely reflects the practice at the International Criminal Court ("ICC"); and
 - iii. the analysis on behalf of the Defence in opposing its adoption is flawed.

II. PROCEDURAL HISTORY

3. On 3 December 2021, the SPO submitted the Proposed Framework for (i) handling of confidential information during investigations and for (ii) contacts with witnesses.³
4. The Victims' Counsel responded on 10 December 2021.⁴

¹ *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, Transcript of 4 February 2022, T.860:1-13.

² *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, F00594, Prosecution Submissions on Confidential Information and Contacts with Witnesses, 3 December 2021.

³ *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, F00594, Prosecution Submissions on Confidential Information and Contacts with Witnesses, 3 December 2021.

⁴ *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, F00605, Victims' Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 10 December 2021.

5. The Defence for Messrs Thaçi, Selimi, Krasniqi and Veseli responded on 15 December 2021.⁵
6. Pursuant to the Pre-Trial Judge's order,⁶ on 3 February 2022, the Registrar provided her submissions on the Proposed Framework.⁷
7. On 4 February 2022, the Pre-Trial Judge invited the parties to reply to the submissions in writing by 14 February 2022.⁸

III. SUBMISSIONS

8. The Victims' Counsel supports the Proposed Framework, noting that its adoption will protect the safety and wellbeing of witnesses while ensuring fair trial rights of the Accused and swift as well as transparent communication between the parties and participants.
9. This topic needs to be considered against the background of the very real climate of fear in which the witnesses, including dual status witnesses, live. Some of the dual status witnesses, for example, fear that they will be killed for taking part in these proceedings.
10. Whatever the basis for these fears, this makes it unthinkable that there should be no framework governing Defence contact with them. In fairness, three of the

⁵ *Prosecutor v. Thaçi et al.*, Case No. KSC-BC-2020-06, F00625, Thaçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021; F00626, Selimi Defence response to "Prosecution submissions on confidential information and contacts with witnesses", 15 December 2021; F00627, Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021 (a public redacted version as filed on 17 December 2021); F00628, Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021.

⁶ *Prosecutor v. Thaçi et al.*, F00650, Order to the Registrar for Submissions, 21 January 2022.

⁷ *Prosecutor v. Thaçi et al.*, F00679, Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 3 February 2022.

⁸ *Prosecutor v. Thaçi et al.*, Case No. KSC-BC-2020-06, Transcript of 4 February 2022, T.860:1-13.

Defence teams recognise that some form of framework needs to be in place to protect at least some of the witnesses.⁹

11. It is very important to stress that the Victims' Counsel is not in any way suggesting that any of the Defence teams would ever do anything improper towards the witnesses: but the fact is that simply for them to be contacted by the Defence would be frightening (at this stage, not least because it would indicate that the protective measures in place had failed to protect them). It is against that background that the Victims' Counsel makes these submissions.

A. THE PROPOSED FRAMEWORK IS AN APPROPRIATE MODEL TO ADOPT

12. Victims' Counsel submits that the elements set out below provide adequate conditions for contacting and interviewing witnesses of the calling party or participant.

- i. *Notice from the opposing party that it wishes to interview a witness of the calling party*

13. The requirement of notice is not only an organisational matter or a matter of courtesy but, as noted by various Chambers at the International Criminal Tribunal for the former Yugoslavia, it helps to avoid allegations of interference with witnesses,¹⁰ and therefore it serves the best interest of all parties and participants.

⁹ *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, F00625, Taçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021, para. 29; F00626, Selimi Defence response to "Prosecution submissions on confidential information and contacts with witnesses", 15 December 2021, paras 34 and 37; F00627, Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021, para. 14.

¹⁰ ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on interview of Defence Witnesses by the Prosecution, 8 November 2012, see in particular paras 10 and 14; *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, Decision on the Prosecution's Motion to Interview Defence Witnesses, 1 September 2006,

14. The ICC's "Protocol on the handling of Confidential Information during Investigations and Contact between a Party and Participant and witnesses of the Opposing Party or of a Participant" ("ICC Protocol") adopted as an annex to the Chambers Practice Manual¹¹ contains a notification requirement similar to the one in the Proposed Framework.¹² Such a notification requirement has been also implemented by various Pre-Trial and Trial chambers in proceedings before the ICC.¹³

ii. *Consent of the witness*

15. The witness, especially a dual status witness, should be allowed to make an informed choice about whether to be interviewed by the opposing party or not, and given adequate time to make his/her decision. A similar condition as to the one included in the Proposed Framework, and emphasising consent, can be

para. 4; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses, 6 June 2005, para. 17.

¹¹ Chambers Practice Manual, available at: <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, see Annex.

¹² ICC Protocol, para. 29.

¹³ ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, Case No. ICC-01/14-01/18, Annex to the Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses, 22 March 2019, para. 31; *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Annex to Decision on the Adoption of a 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, 31 May 2018; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15, Annex to the Decision adopting the 'Protocol on disclosure of the identity of witnesses of other parties and of the LRV in the course of investigations, use of confidential information by the parties and the LRV in the course of investigations, inadvertent disclosure and contacts between a party and witnesses not being called by that party', 31 August 2015, para. 32; *Prosecutor v. Jean-Pierre Bemba et al.*, Case No. ICC-01/05-01/13, Annex to Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, 20 July 2015, para. 35; *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Annex to the Decision on adoption of a Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant, 12 December 2014, para. 34.

found in the ICC Protocol.¹⁴ It is difficult to see how this could infringe upon the fair trial rights of the Accused.

iii. *Presence of a representative of the calling party at the interview and, in some circumstances, presence of Victims' Counsel or other support*

16. In most circumstances the calling party's presence will suffice to safeguard the interests of the witness. However, with regard to dual status witnesses the framework should consider the presence of Victims' Counsel, or other support, during the interview if the witness so requests.
17. Again, there is support for allowing dual status witnesses to be represented in the practice of the ICC, *e.g.* in the *Al Hassan* case:

[T]he Chamber is of the view that dual status witnesses are entitled to have their legal representatives attend interviews, should they so decide.¹⁵

iv. *The interview should be video recorded*

18. An audio-video recording of the interview should be made. The advantages of this practice are manifold: transparency, accuracy of record, reducing the need to subject witness to further interviews.
19. The Proposed Framework reflects, to a very substantial degree, the ICC Protocol, which requires that "[a] video or audio recording of the interview shall be

¹⁴ ICC Protocol, para. 28. Moreover, see ICC Protocol, para. 29: "The party or participant seeking to interview a witness of another party or participant shall notify the latter of its intent to do so. The Calling party or participant should ask the witness within five days whether he or she agrees to be contacted or interviewed. The Calling party or participant shall not attempt to influence the witness's decision".

¹⁵ ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, 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, para. 20.

provided to the calling party or participant as soon as practicable after the conclusion of the interview.”¹⁶

v. *The involvement of the Registry as a neutral third party supervising the proceedings*

20. Victims’ Counsel submits that for some (and especially dual status) witnesses, the prospect of being interviewed by an opposing party under the auspices of the Registry is likely to be much more attractive than an interview without such oversight. Therefore, the Registry’s involvement, in respect of some witnesses, is in the interests of both the witnesses and the Accused.

vi. *Assistance to vulnerable witnesses*

21. Victims’ Counsel notes the solution adopted before the ICC which obliges the calling party/participant to ensure that witnesses particularly vulnerable or otherwise in need of assistance during the interview receive adequate support, including from the Victims and Witnesses Unit (WPSO equivalent) representative.¹⁷ There is no explicit provision to that effect in the Proposed Framework; Victims’ Counsel submits that there should be.

¹⁶ ICC Protocol, para. 37.

¹⁷ ICC Protocol, para. 32:

The calling party or participant shall ensure that, if the witness is particularly vulnerable or otherwise in need of assistance during the interview, such appropriate assistance is provided and that, where necessary, the VWU is informed sufficiently in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.

B. THE PROPOSED FRAMEWORK IS NOT AN UNPRECEDENTED AND UNFAIR MODEL

22. The Defence suggest that the Proposed Framework is an unprecedented and wholly unfair proposal, and it has been characterised in dramatic and sinister terms, *e.g.*:

The Proposed Framework is nothing more than a thinly veiled attempt to unduly interfere with and disrupt Defence preparations. Having delayed providing its pre-trial brief until the last working day of the year, the SPO now seeks to prevent the Defence from properly investigating these allegations and the evidence which purports to support them.¹⁸

[I]t's an invasion of the attorney-client privilege, and it is just unsupportable [...] completely untenable [...].¹⁹

23. Contrary to the concerns expressed by the Defence, the Proposed Framework closely mirrors the ICC Protocol, as demonstrated at paragraphs 14-19 above.
24. This strongly suggests that the Defence criticism of the Proposed Framework is overstated and misplaced.

C. THE ANALYSIS ON BEHALF OF THE DEFENCE IN OPPOSING THE ADOPTION OF THE PROPOSED FRAMEWORK IS FLAWED

25. It is argued by the Defence that the Proposed Framework would violate the Accused's fair trial rights, principally because it infringes:
- i. the principle of equality of arms, and
 - ii. the privilege of the Accused.

¹⁸ *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, F00626, Selimi Defence response to "Prosecution submissions on confidential information and contacts with witnesses", 15 December 2021, para. 50.

¹⁹ *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, Transcript of 4 February 2022, T.861:8-12.

26. Taking these in turn, the complaint in relation to equality of arms focuses on the fact that the SPO conducted interviews with the witnesses without the Defence being present, and now insists on being present at the Defence interviews.
27. This argument overlooks the facts that:
- i. these interviews will be taking place at a quite different stage of the proceedings – it cannot be suggested that the SPO ought to have invited the Accused to attend investigative interviews: this is not the practice at any international court or tribunal and in any event many of them took place pre-charge at a time when there were no accused; and
 - ii. equality of arms underlines the Proposed Framework as its rules apply to all parties. In due course there may be defence witnesses whom the SPO wish to interview. They will not have been invited to the Defence’s earlier meetings with these witnesses and will accept the presence of a Defence representative at such an interview. In other words, there will be full equality of arms.
28. The Veseli Defence makes the additional submission under this heading that the SPO would have the advantage of learning the Defence’s approach to the case.²⁰ The same will be true for the Defence if the SPO decides to interview Defence witnesses. And this alleged disadvantage must be weighed in the scales against the idea that there should be unfettered access to the witnesses, with the obvious problems that would bring for the dual status witnesses.
29. Turning to the argument derived from the Accused’s privilege: it is argued that because the Defence may reveal a matter that attracts privilege in questioning a witness within the confines of the Proposed Framework, their privilege is compromised.
30. This argument conflates two distinct matters, namely: (i) legal privilege, and ii) the tactical (and legitimate) desire of the defence to keep their case as hidden

²⁰ *Prosecutor v. Thaçi et al.*, Case No. KSC-BC-2020-06, F00628, Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021, para. 22.

from view as possible, within the limits imposed by their disclosure obligations under the Rules.

31. Legal privilege entitles the Defence to confidentiality in respect of all aspects of its preparation. But where it chooses to impart a matter that would otherwise be privileged, for example by telling a witness for the opposing party about it in the course of interviewing them or by asking specific questions, it cannot then complain that its privilege has been infringed. There is no obligation on it to make the disclosure, but once made, the privilege that attached to the matter has been waived. The fact that there is no property in a witness means that a witness is free to report back to the calling party, or to anyone else, whatever he or she has been told in the course of the interview.
32. Thus, the Proposed Framework does not in itself impinge on the privilege of the Defence: the Defence choose to waive that privilege when imparting a privileged matter to a third party. Contrary to the assertion made by the *Thaçi* Defence,²¹ Rules 111(1) and 111(2) have no application to this situation: they do not involve the waiver of privilege involved in the sharing of privileged information with a third party.
33. The fact that there is a recording of that disclosure is irrelevant to the principle: without the recording, the witness could still pass back to the calling party all that has been said in the interview.
34. This important distinction leads to the next topic, namely whether the recording of the interview is in itself objectionable, as the *Thaçi* Defence suggest it is.²² Given that the calling party is free to discuss the contents of the interview with the witness, there can be no principled objection to the calling party receiving an

²¹ *Prosecutor v. Thaçi et al.*, Case No. KSC-BC-2020-06, F00625, *Thaçi* Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021, para. 18.

²² *Prosecutor v. Thaçi et al.*, Case No. KSC-BC-2020-06, F00625, *Thaçi* Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021, para. 17.

accurate and unimpeachable record of what was said, rather than relying on the recollection of the witness.

IV. CONCLUSION

35. The SPO's Proposed Framework is a proportionate response to a very serious concern, it is strongly supported by the practice of the ICC and does not infringe the fair trial rights of the Accused. For all those reasons, it should be adopted subject to the proposed amendments (at paragraphs 16-17 and 21 above) with regard to dual status witnesses, vulnerable witnesses and witnesses in need of assistance, and the proposal made in Victims' Counsel initial filing²³ on this topic.

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²³ *Prosecutor v. Taçi et al.*, Case No. KSC-BC-2020-06, F00605, Victims' Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 10 December 2021, paras 9 and 11.