



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Date: 24 June 2022

Language: English

Classification: **Public**

**Decision on Framework for the Handling of Confidential Information during
Investigations and Contact between a Party or Participant and Witnesses of the
Opposing Party or of a Participant**

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THE PRE-TRIAL JUDGE,¹ pursuant to Articles 21(2), 23(1), 35(2)(f) and 39(1) and (11) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 80(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 5 November 2020, the Pre-Trial Judge confirmed an indictment against Hashim Thaçi, Rexhep Selimi, Jakup Krasniqi and Kadri Veseli ("Mr Thaçi", "Mr Selimi", Mr Krasniqi and "Mr Veseli" respectively, or "Accused" collectively).²
2. On 3 December 2021, the Specialist Prosecutor's Office ("SPO") provided its submissions on confidential information and contacts with witnesses ("SPO Submissions").³
3. On 10 December 2021, Victims' Counsel responded to the SPO Submissions ("Victims' Counsel Response").⁴

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*. A confidential redacted version was filed on 19 November 2020, F00026/CONF/RED. A public redacted version was filed on 30 November 2020, F00026/RED. The Specialist Prosecutor submitted the confirmed indictment in F00034, Specialist Prosecutor, *Submission of confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential; F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public; F00134, Specialist Prosecutor, *Lesser Redacted Version of Redacted Indictment*, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020, confidential. A further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED/A01) and public redacted (F00455/RED/A01) versions. On 17 January 2022, the SPO submitted a confidential, corrected, and lesser redacted version of the confirmed indictment, F00647/A01. A confirmed amended indictment was filed on 29 April 2022 ("Confirmed Indictment"), strictly confidential and *ex parte* (F00789/A01), with confidential redacted (F00789/A02) and public redacted (F00789/A05) versions.

³ KSC-BC-2020-06, F00594, Specialist Prosecutor, *Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 3 December 2021, public.

⁴ KSC-BC-2020-06, F00605, Victims' Counsel, *Victims' Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 10 December 2021, public.

4. On 15 December 2021, the Defence for the Accused (“Thaçi Defence”, “Selimi Defence”, “Krasniqi Defence” and “Veseli Defence” respectively, and “Defence” collectively) responded to the SPO Submissions (“Thaçi Response”, “Selimi Response”, “Krasniqi Response” and “Veseli Response” respectively, and “Defence Responses” collectively).⁵
5. On 17 December 2021, the SPO provided, as an annex to the Pre-Trial Brief, its List of Witnesses (“SPO List of Witnesses”).⁶
6. On 21 January 2022, the Pre-Trial Judge ordered the Registrar to provide submissions on any matter arising from the SPO Submissions, Victims’ Counsel Response and/or Defence Responses (“21 January 2022 Order”).⁷
7. On 3 February 2022, the Registry provided its submissions in accordance with the 21 January 2022 Order (“Registry Submissions”).⁸
8. On 14 February 2022, Victims’ Counsel (“Victims’ Counsel Further Response”),⁹ the SPO (“SPO Further Response”),¹⁰ and the Defence (“Selimi

⁵ KSC-BC-2020-06, F00625, Specialist Counsel, *Thaçi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 15 December 2021, public; F00626, Specialist Counsel, *Selimi Defence Response to “Prosecution Submissions on Confidential Information and Contacts with Witnesses”*, 15 December 2021, public; F00627, Specialist Counsel, *Krasniqi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 15 December 2021, confidential (a public redacted version was submitted on 17 December 2021, F00627/RED); F00628, Specialist Counsel, *Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 15 December 2021, public.

⁶ KSC-BC-2020-06, F00631RED/A02, Specialist Prosecutor, *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, 17 December 2021, strictly confidential and *ex parte* (a confidential redacted version was submitted on 21 December 2021, which was corrected on 23 May 2022, F00631RED/A02/COR/CONF/RED).

⁷ KSC-BC-2020-06, F00650, Pre-Trial Judge, *Order to the Registrar for Submissions*, 21 January 2022, public, paras 5-7.

⁸ KSC-BC-2020-06, F00679, Registrar, *Registrar’s Submissions on Proposed Protocol for Interviews with Witnesses*, 3 February 2022, confidential (a public redacted version was submitted on 16 February 2022, F00679/RED).

⁹ KSC-BC-2020-06, F00690, Victims’ Counsel, *Victims’ Counsel Further Submissions on the SPO’s Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations*, 14 February 2022, public.

¹⁰ KSC-BC-2020-06, F00693, Specialist Prosecutor, *Prosecution Response to ‘Registrar’s Submissions on Proposed Protocol for Interviews with Witnesses’*, 14 February 2022, public.

Further Response”, “Thaçi Further Response”, “Veseli Further Response” and “Krasniqi Further Response”)¹¹ responded to the Registry Submissions in accordance with the 21 January 2022 Order (“Further Responses” collectively).

9. On 15 February 2022, the Thaçi Defence replied to the Victims’ Counsel Further Response (“Thaçi Reply Victims’ Counsel”).¹²

10. On 16 February 2022, the Pre-Trial Judge, further to a request by the Thaçi Defence¹³ and joined by the other Defence teams,¹⁴ scheduled a hearing on the matters arising from the SPO Submissions (“16 February 2022 Decision”).¹⁵

11. On 21 February 2022, the Thaçi Defence replied to the SPO Further Response (“Thaçi Reply SPO”).¹⁶

¹¹ KSC-BC-2020-06, F00691, Specialist Counsel, *Selimi Defence Response to “Registrar’s Submissions on Proposed Protocol for Interviews with Witnesses”*, 14 February 2022, public; F00692, Specialist Counsel, *Thaçi Defence Response to the Registrar’s Submissions on Proposed Protocol for Interviews with Witnesses*, 14 February 2022, public; F00694, Specialist Counsel, *Veseli Defence Response to Registrar’s Submissions on Proposed Protocol for Interviews with Witnesses*, 14 February 2022, public; F00695, Specialist Counsel, *Krasniqi Defence Response to Registrar’s Submissions on Proposed Protocol for Interviews with Witnesses*, 14 February 2022, public. On 17 February 2022, the Krasniqi Defence requested the Pre-Trial Judge to reclassify the Krasniqi Further Response as public, see KSC-BC-2020-06, F00701, Specialist Counsel, *Krasniqi Defence Request for Reclassification of Filing KSC-BC-2020-06/F00695*, 17 February 2022, public (“Krasniqi Defence Reclassification Request”).

¹² KSC-BC-2020-06, F00697, Specialist Counsel, *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, public, paras 1, 16, 18.

¹³ Thaçi Response, paras 4, 42, 43; KSC-BC-2020-06, Transcript, 4 February 2022, public, p. 861, lines 7-15; Thaçi Further Response, paras 1, 12-15.

¹⁴ KSC-BC-2020-06, Transcript, 4 February 2022, public, p. 862, lines 23-24, p. 863, lines 15-21, p. 864, lines 2-3; Veseli Further Response, paras 16-17.

¹⁵ KSC-BC-2020-06, F00698, Pre-Trial Judge, *Decision on Request for Hearing*, 16 February 2022, public. The Pre-Trial Judge further ordered: (i) the Registrar to reclassify the Selimi Further Response and the SPO Further Response as public; and (ii) the Registrar and Krasniqi Defence to submit public redacted versions of the Registry Submissions and the Krasniqi Further Response respectively, or to indicate that these filings may be reclassified as public. Subsequently, the Registrar submitted, as mentioned, a public redacted version of the Registry Submissions and, following the Krasniqi Defence Reclassification Request, the Pre-Trial Judge ordered the Registrar to reclassify the Krasniqi Further Response as public.

¹⁶ KSC-BC-2020-06, F00705, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to Registrar’s Submissions on Proposed Protocol for Interviews with Witnesses*, 21 February 2022, public.

12. On 22 February 2022, the aforementioned hearing took place (“22 February 2022 Hearing”).¹⁷

13. On 21 March 2022, the Thaçi Defence filed supplemental submissions in relation to the SPO Submissions (“Thaçi Supplemental Submissions”).¹⁸ The SPO responded on 28 March 2022 (“SPO Response Thaçi Supplemental Submissions”).¹⁹ The Thaçi Defence replied on 1 April 2022 (“Thaçi Reply SPO Response Thaçi Supplemental Submissions”).²⁰

II. SUBMISSIONS

A. SPO SUBMISSIONS

14. The SPO, having regard to Articles 21(4), 23, 35, 38, and 39(1) of the Law, Rules 80 and 95(2) of the Rules, and Articles 6, 12, 14, and 17 of the Code of Professional Conduct (“Code of Conduct”),²¹ proposes a framework for: (i) contacts with witnesses; and (ii) handling of confidential information during investigations (“Proposed Framework”).²² In its view, Rule 80(1) of the Rules empowers the Pre-Trial Judge to order appropriate measures for the protection of witnesses, provided they are compatible with the rights of the Accused, including regulation on using confidential information in the course of investigations and opposing Party contacts with witnesses.²³

¹⁷ KSC-BC-2020-06, Transcript, 22 February 2022, public (“22 February 2022 Transcript”), pp. 956-1062.

¹⁸ KSC-BC-2020-06, F00741, Specialist Counsel, *Thaçi Defence Supplemental Submissions on the SPO’s Proposed Framework for Contacts with Witnesses*, 21 March 2022, public.

¹⁹ KSC-BC-2020-06, F00754, Specialist Prosecutor, *Prosecution Response to ‘Thaçi Defence Supplemental Submissions on the SPO’s Proposed Framework for Contacts with Witnesses’*, 28 March 2022, public.

²⁰ KSC-BC-2020-06, F00758, Specialist Counsel, *Thaçi Defence Reply in Support of Supplemental Submissions on the SPO’s Proposed Framework for Contacts with Witnesses*, 1 April 2022, public.

²¹ Registry Practice Direction, Code of Professional Conduct – for Counsel and Prosecutors before the Kosovo Specialist Chambers, KSC-BD-07-Rev1, 28 April 2021.

²² SPO Submissions, paras 1, 3, 7.

²³ SPO Submissions, para. 4.

15. The SPO requests the Pre-Trial Judge to order the following or equivalent measures with regard to confidential information:

- a. Parties and participants are under a general obligation not to disclose to third parties any confidential information.
- b. A party or participant may disclose the identity of a witness to a third party only if such disclosure is directly and specifically necessary for the preparation and presentation of its case. If a party or participant is aware that the witness has been relocated with the assistance of the KSC/SPO, the party or participant shall inform the Witness Protection and Support Office ("WPSO") in advance of the details of the place, time and, to the extent possible, the types of organizations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the WPSO as to specific measures that may be necessary. If the witness is otherwise protected by the WPSO, the party or participant shall inform the WPSO of the disclosure of the witness's identity as soon as possible, but in any event before disclosure.
- c. Notwithstanding the previous sub-paragraph, parties and participants shall not reveal to third parties that any protected witness is involved with the activities of the [Kosovo Specialist Chambers] KSC/SPO or the nature of such involvement.
- d. Visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement of the person depicted or otherwise reflected in the activities of the KSC/SPO, a party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the KSC/SPO. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorized by the Chamber, the third party shall not retain copies of the visual material subject to this provision.
- e. If a party or participant is in doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected witness to third parties, it shall seek the advice of the WPSO.
- f. A party or participant shall bring to the attention of the WPSO as soon as possible any reasonable suspicion that a protected witness may have been placed at risk for any reason, including reasonable suspicion that a witness's involvement with the KSC/SPO or protected location has become known to third parties.

- g. If a party or participant has wrongly revealed confidential information, or has become aware of any other breach of the confidentiality of documents or information, or discovers that a third party has become aware of confidential information, it shall inform the recipient of the confidential nature of such information and instruct him or her not to disclose it any further. In addition, the party or participant shall immediately inform the WPSO.

16. The SPO also requests the Pre-Trial Judge to order the following measures with regard to contacts with witnesses of other Parties and participants – which are largely consistent with those adopted by Trial Panel II in the Gucati and Haradinaj Case (“Gucati and Haradinaj Order”) and are necessary to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being.²⁴

- a. Except under the conditions specified herein, prior to testimony, parties and participants shall not contact or interview a witness of another party or participant if the intention to call the witness to testify or to rely on his or her statement has been communicated to the other parties and participants, or if this intention is otherwise clearly apparent.
- b. If an opposing party or participant wishes to interview a witness of another party or participant, it shall notify the calling party and [the Court Management Unit (“CMU”)] at least ten days prior to the intended interview. The calling party shall ascertain in good faith if the witness consents to being interviewed by the opposing party and shall also inform the witness of the possibility of having a representative of the calling party, a legal representative of the witness and/or a WPSO representative present during the interview. The calling party shall inform the opposing party and CMU whether the witness consents. In addition, where the calling party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing party and the witness, regardless of the witness’s expressed preferences. The procedure in this section shall not apply to an interview conducted by the SPO with an opposing party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.
- c. If a party or participant contacts an opposing party or participant witness inadvertently or during WPSO-organized courtesy meetings, the party or participant shall refrain from any discussion of the case

²⁴ SPO Submissions, para. 6.

and shall under no circumstances seek the witness's consent to be interviewed directly. A witness's consent to be interviewed may be obtained only through the procedure set out in the previous subparagraph.

- d. The opposing party conducting the interview ("interviewing party") shall:
 - i. ensure that the interview is conducted effectively and expeditiously;
 - ii. prepare copies of all documents to be shown to the witness in a language which he or she understands together with an English translation to be provided to the calling party;
 - iii. refrain from talking to the witness outside the timeframe of the interview and the video-recording, so that all statements and utterances made are duly recorded;
 - iv. refrain from any action that could be regarded as threatening or provocative; and
 - v. otherwise comply with any order made by the Trial Panel.
- e. The Registry, through CMU, shall facilitate the preparation and conduct of any interview under this section. Communications between the calling party or the interviewing party and CMU shall occur via the email address CMUCourtOfficers@scp-ks.org. These communications shall be filed as correspondence in the case file in accordance with the Practice Direction on Files and Filings (KSC-BD-15).
- f. Once a witness has agreed to be interviewed, the calling party shall provide CMU with the following information:
 - i. the preferred dates for, and an estimate of the duration of, the interview;
 - ii. whether protective measures have been ordered, requested or will be requested under Rule 80 in relation to the witness and whether the witness has any special needs as defined in Rule 146 or requires special measures as listed in Rule 80(4)(c);
 - iii. an updated Witness Information Form for the witness;
 - iv. the language which the witness is expected to use during the interview;
 - v. any information as to the persons expected to be present at the interview, including any indication of whether the witness may require the presence of a representative of the calling party, a WPSO representative or a legal representative; and
 - vi. any other information that may facilitate the preparation for the interview, as required by CMU or WPSO.

- g. CMU may seek additional information, if required, to facilitate the preparation for the interview. The Panel shall be seized in relation to any unresolved dispute between the parties and WPSO or CMU regarding measures recommended by the parties and/or by WPSO/CMU.
- h. The Registry shall facilitate the process by:
 - i. providing a venue for the interview and audio-video recording equipment;
 - ii. providing interpretation, where necessary;
 - iii. ensuring that a Court Officer or another designated representative of the Registry is present during the interview; and
 - iv. ensuring that a witness-support representative is on site, where considered necessary by WPSO.
- i. Prior to the commencement of the interview, the Court Officer or another designated representative of the Registry shall advise the witness that he or she:
 - i. is not required to participate in the interview and can decide to stop being interviewed at any time;
 - ii. can refuse to answer questions, in particular if they are thought to be potentially self-incriminating;
 - iii. can ask for a recess at any time; and
 - iv. can ask to meet with a WPSO representative at any time during the interview.
- j. During the interview, the Court Officer or another designated representative of the Registry shall:
 - i. ensure the presence of only the authorized individuals;
 - ii. verify the identity of the witness;
 - iii. ensure that all individuals present identify themselves on the record;
 - iv. ensure that the interview is audio-video-recorded;
 - v. ensure the safety and well-being of the witness; and
 - vi. ensure that the procedural elements of the interview are conducted in accordance with the Law, the Rules, and any subsequent order, decision, observations, or recommendations of the Panel.
- k. The Court Officer may terminate the interview if he or she considers that the interviewing party has not complied with its obligations

under the present order. The Registry shall immediately inform the Panel of the circumstances that led to the termination of the interview.

- l. The parties shall respect the Registry's neutrality and shall refrain from seeking to involve its representative in the proceedings. Should the witness need to consult with a legal representative during the interview, the interview shall be suspended so that this can be arranged. The Registry shall inform the Defence Office, so that the necessary arrangements to assign Counsel to the witness may be made.
- m. If the interviewing party intends to show confidential or strictly confidential records to the witness other than the witness's own statements, it shall apply for leave of the Panel.
- n. Following the completion of the interview, the Registry shall prepare:
 - i. a memorandum recording the process (indicating time, place, attendees, classification – i.e., public, confidential or strictly confidential – and any other relevant circumstance) and submit it to the parties and the Panel; and
 - ii. the audio-video recording of the session and submit copies thereof to the parties and to the Panel.
- o. Neither the record of the interview nor any materials used during the interview shall become part of the record in the case unless admitted in evidence by the Trial Panel *proprio motu* or upon an application by a party, where the conditions for its admission under the Rules are met. Where admission of such a video recording is sought, CMU shall also produce the transcript of the interview.

B. VICTIMS' COUNSEL RESPONSE

17. Victims' Counsel agrees with the Proposed Framework except in respect of paragraph 6(a) of the SPO Submissions.²⁵ Victims' Counsel submits that, in order to meaningfully and effectively represent the interests and rights of the Victims participating in the proceedings, it is essential that communication between such Victims and the Victims' Counsel Team should be confidential, unimpeded and unconditional.²⁶ On this basis, Victims' Counsel proposes the following amendment (in italics) to footnote 17 of the SPO Submissions: "For purposes of

²⁵ Victims' Counsel Response, paras 2, 7.

²⁶ Victims' Counsel Response, para. 8.

this paragraph, this includes counsel, their clients, and their teams as defined in Article 2 of the Code of Conduct, *but does not apply to contact between the Victims' Counsel Team and dual status witnesses*".²⁷

C. DEFENCE RESPONSES

1. **Thaçi Response**

18. The Thaçi Defence requests that the Proposed Framework be rejected.²⁸

19. As to terminologies, the Thaçi Defence submits that the definition of witness shall be limited to a person whom a Party or participant intends to call to testify or on whose statement a Party or participant intends to rely, insofar as the intention of the Party or participant to call the witness or to use his or her statement has been clearly communicated to the opposing Party, and that there should be a distinction between "*confidential document*" and "*confidential information*" (emphases in original).²⁹

20. According to the Thaçi Defence, the SPO is seeking protective measures pursuant to Rule 80 of the Rules, even though the time to do so has passed.³⁰ It adds that, contrary to this Rule, the proposed measures regarding contacts with witnesses of the opposing Party are inconsistent with the rights of the Accused, which should be given primary consideration.³¹

21. The Thaçi Defence submits, first, that the systematic requirements that the interview be video-recorded and the possibility that the SPO be present during the witness' interview infringes the Accused's right to equality and more generally the principle of equality of arms.³² The Thaçi Defence contends that, as also found

²⁷ Victims' Counsel Response, paras 9, 11.

²⁸ Thaçi Response, paras 2, 43.

²⁹ Thaçi Response, paras 10-11.

³⁰ Thaçi Response, paras 13, 24.

³¹ Thaçi Response, paras 13-14.

³² Thaçi Response, paras 2, 3, 16, 17.

by the International Criminal Tribunal for the former Yugoslavia (“ICTY”), witnesses do not belong to the SPO.³³ It adds that the Accused was not afforded the right to be present during SPO interviews and, by preparing an overbroad list of over 300 witnesses, the SPO is able to classify likely Defence witnesses as potential SPO witnesses in order to ensure that it will be present for Defence interviews with exculpatory witnesses.³⁴

22. The *Thaçi* Defence avers, second, that pre-trial questioning of witnesses by the Defence is privileged from disclosure under Rule 111(1) and (2) of the Rules, and that Rules 104 and 106 of the Rules do not require that the Defence takes any notes or record the interview of witnesses, nor that it discloses such work product – unless it intends to tender it as evidence during trial.³⁵ In its view, failure to protect the confidentiality of the Defence’s investigations will significantly infringe on the Accused’s rights either under Article 21(4)(h) (right not to testify against himself) or (c) (right to prepare his defence) of the Law.³⁶ If the Accused is required to have the SPO present and record his interviews of SPO witnesses, and there is a risk that the additional questioning may produce additional incriminating testimony against the Accused or reveal new investigative avenues, then the Accused is put in the position of either giving up his right to thoroughly prepare his defence or to take the risk of asking questions and producing more incriminating evidence against himself for use by the SPO.³⁷

23. The *Thaçi* Defence asserts, third, that the SPO is seeking protective measures now for all witnesses, without any legal basis for such a broad grant of protective measures.³⁸ In its view, this is because: (i) the SPO does not quote any case law

³³ *Thaçi* Response, paras 12, 17.

³⁴ *Thaçi* Response, para. 17.

³⁵ *Thaçi* Response, paras 2, 18-20.

³⁶ *Thaçi* Response, paras 21-22.

³⁷ *Thaçi* Response, para. 21.

³⁸ *Thaçi* Response, para. 25.

from any other courts;³⁹ (ii) the Gucati and Haradinaj Order cannot be applied *mutatis mutandis* in the present case as that case relates to alleged offences against the administration of justice which would have been committed one year ago by the Accused and it involves allegations of breach of witness protection orders;⁴⁰ (iii) the Gucati and Haradinaj Order was submitted *proprio motu* by Trial Panel II, five days after it was assigned to the case, without reliance on any specific legal basis or precedent and without prior debate between the Parties;⁴¹ (iv) Trial Panel I in Case KSC-BC-2020-05 did not find it necessary to issue specific instructions on the issue of contacts and interviews of an opposite Party's purported witnesses;⁴² (v) neither the ICTY nor the International Criminal Tribunal for Rwanda ("ICTR") have ever imposed strict guidelines for contacts and interviews of the opposite Party's purported witnesses and even the International Criminal Court's 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 ("ICC" and "ICC Protocol")⁴³ does not contain any provision requiring that the interview of an SPO witness by the Defence be organised and video recorded by a court officer in his/her presence;⁴⁴ and (vi) while some victim-witnesses may require special treatment, the SPO does not explain why the Proposed Framework would be necessary for high-profile figures.⁴⁵

24. The Thaçi Defence argues, fourth, that, in violation of the right to have adequate time and facilities to prepare for trial, the SPO's scheme would seriously impede Defence preparations as the Defence team and witnesses are based worldwide, and witnesses are unlikely to travel to The Hague.⁴⁶ The Thaçi Defence

³⁹ Thaçi Response, para. 25.

⁴⁰ Thaçi Response, para. 26.

⁴¹ Thaçi Response, para. 27.

⁴² Thaçi Response, para. 28.

⁴³ ICC, [Chambers Practice Manual](#), Fifth Edition, 25 March 2022, Annex.

⁴⁴ Thaçi Response, paras 28, 34.

⁴⁵ Thaçi Response, paras 29-31.

⁴⁶ Thaçi Response, para. 32.

adds that the conditions of interviews suggested by the SPO are even more stringent than those applied to a witness' appearance in Court, and will impose intolerable pressure on any witness interviewed in such circumstances, which makes it virtually impossible for the Defence to interview witnesses without expending enormous time and resources.⁴⁷

25. The *Thaçi* Defence, lastly, strongly opposes the SPO's request that "where the calling party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing party and the witness, regardless of the witness's expressed preferences" as the ICC Protocol does not contain any similar provision and the SPO has not earned the right to arrogate to itself the right to determine that it knows what is good for the witnesses.⁴⁸

26. As to the handling of confidential information, the *Thaçi* Defence submits that the Proposed Framework is unnecessary as Counsel and the members of their teams are professionals bound by codes of ethics and/or have signed confidentiality agreements with the Specialist Chambers ("SC" or "KSC").⁴⁹ The *Thaçi* Defence argues that, in the event that the Pre-Trial Judge would adopt the Proposed Framework, a general ban on the use of all the 22,000 documents disclosed by the SPO would unduly limit Defence investigations and would contravene the purpose of Rules 102(3) and 103 of the Rules.⁵⁰ The *Thaçi* Defence proposes to adopt, instead, the relevant provision from the ICC Protocol.⁵¹ The *Thaçi* Defence also avers that any restrictions on the disclosure of a witness' identity to a third party should not be so strict as to make it impossible in practice,

⁴⁷ *Thaçi* Response, para. 33.

⁴⁸ *Thaçi* Response, para. 35.

⁴⁹ *Thaçi* Response, para. 36.

⁵⁰ *Thaçi* Response, para. 39.

⁵¹ *Thaçi* Response, para. 40.

and should not apply to international figures and witnesses who have not been allocated any protective measures.⁵²

2. Selimi Response

27. The Selimi Defence requests the Pre-Trial Judge to deny the Proposed Framework or, in the alternative, apply only those proposed provisions for witnesses who are on the SPO List of Witnesses, have been proven to be at risk by the SPO and specifically request such measures.⁵³

28. The Selimi Defence submits that, in accordance with Article 40(2) of the Law, Rule 80 of the Rules and ICTY jurisprudence, preference must be given to fair trial guarantees and measures encroaching on those guarantees must be rejected or, at the very least, carefully modified.⁵⁴ The Selimi Defence adds that the Proposed Framework is directed almost entirely, if not entirely, at the Defence and will have a disproportionately negative impact on Mr Selimi's right to a fair trial as: (i) the SPO has been investigating for many years without involvement by the Defence with the freedom to disclose information as it saw fit; (ii) the principle of equality of arms requires that each Party be given a reasonable opportunity to present its case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent; (iii) the burden of proof rests on the SPO alone, and nothing obliges the Defence to call witnesses or to present a case; and (iv) there is considerably little time within which to carry out the necessary defence investigations and any unnecessary layer of bureaucracy imposed on the Defence in carrying out this work is an infringement on the Accused's right to have adequate time and facilities to prepare his defence.⁵⁵

⁵² Thaçi Response, para. 41.

⁵³ Selimi Response, paras 2-5, 50-52.

⁵⁴ Selimi Response, paras 6-9.

⁵⁵ Selimi Response, paras 10-16.

29. The Selimi Defence further avers that the SPO has not identified which of its witnesses, outside of those already subject to protective measures, are at risk, why the proposed measures are necessary for each witness on its list, and what specific risks to every one of these witnesses the measures are intended to alleviate.⁵⁶ It considers, on this basis, that the Proposed Framework is an inappropriate blanket measure with no specificity falling short of Rule 80 of the Rules and one which by its very nature should be rejected.⁵⁷ The Selimi Defence is also of the view that the Gucati and Haradinaj Order is not legally binding and was adopted approximately three weeks prior to the commencement of trial proceedings in a case which does not approach the level of complexity or breadth as the present one and specifically alleged separate counts of obstruction, intimidation, retaliation and violation of secrecy in relation to witnesses who provided information to the SPO.⁵⁸ The Selimi Defence also objects to the SPO's expansive definition of "witness" where it includes persons "whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely, insofar as the intention of the party or participant is known or apparent to the opposing party" on the basis that either a witness is notified to the other Party or it is not.⁵⁹

30. Furthermore, the Selimi Defence contends that the SPO has not advanced any argument which suggests that the Code of Conduct is not fit for purpose and needs to be supplemented or augmented by an order of the Pre-Trial Judge.⁶⁰ It is, therefore, of the view that the Proposed Framework, insofar as it is already covered by the Code of Conduct, should be dismissed as unnecessary.⁶¹

⁵⁶ Selimi Response, paras 17-18.

⁵⁷ Selimi Response, paras 18-21.

⁵⁸ Selimi Response, paras 22-23.

⁵⁹ Selimi Response, paras 24-25.

⁶⁰ Selimi Response, para. 27.

⁶¹ Selimi Response, paras 27-33.

31. The Selimi Defence also opposes the following provisions of the Proposed Framework or, in the alternative, requests that they are significantly modified in order to protect the rights of the Accused.

32. The Selimi Defence, first, asserts that the involvement of the calling Party in the interview process should be limited only to ensure the protection of witnesses who face an objectively justified risk: (i) the Law and Rules are silent on the issue of whether one Party in a case can interview the witnesses intended to be called, or relied upon by the other Party, prior to their appearance in court;⁶² (ii) the involvement of the calling Party in seeking a witness' consent to be interviewed is excessive, raises concerns of undue pressure and can be sought by WPSO;⁶³ (iii) the interviewing of witnesses in the presence of the SPO, especially where it seeks to have the right to override the witness's expressed preferences, may violate the right to prepare an effective defence as interviews may reveal *inter alia* details of lines of investigation and/or strategy, future cross-examination and/or persons not on the calling Party's witness list who may potentially provide exculpatory/beneficial evidence to the interviewing Party;⁶⁴ and (iv) the provisions relating to the inadvertent contact with opposing Party or participant witnesses should be restricted only to witnesses at risk.⁶⁵

33. The Selimi Defence, second, avers that the involvement of the Registry in the interview process should be restricted to cases only where such involvement is strictly necessary as the Defence must be free to arrange and to carry out its own investigations without fear of tying the proceedings up in a burdensome bureaucratic process which will undoubtedly cause excessive delay and thus violate the principle of equality of arms.⁶⁶

⁶² Selimi Response, paras 35-37.

⁶³ Selimi Response, paras 38-39.

⁶⁴ Selimi Response, paras 40-42.

⁶⁵ Selimi Response, para. 43.

⁶⁶ Selimi Response, paras 45-46.

34. The Selimi Defence, third, contends that the proposal of every interview to be audio-video recorded by the Registry and for all of these recordings to potentially be entered into evidence by the Panel, or by the SPO, is inherently prejudicial to the rights of the Accused as this measure bears absolutely no relationship to the protection of witnesses, and even if it did, its prejudicial effect on the Accused would necessitate its exclusion from any framework for the conduct of investigations.⁶⁷ It adds that potentially allowing the use of such audio-video recordings as evidentiary material would effectively force the Defence to call witnesses on behalf of the Accused when it is under no obligation to do so.⁶⁸

3. Krasniqi Response

35. The Krasniqi Defence requests the Pre-Trial Judge to reject the Proposed Framework or to invite the Parties and participants to engage in *inter partes* discussions to attempt to develop a joint protocol.⁶⁹

36. According to the Krasniqi Defence, the Proposed Framework is premature as: (i) the SPO has made no effort to engage with the Defence in order to commence *inter partes* discussions regarding the development of a non-disclosure protocol even though relevant developments have already taken place; (ii) the SPO's approach effectively leaves the Defence with less than two weeks to review and assess the Proposed Framework, conduct the necessary research and internal discussion among the four Defence teams, and attempt to agree on a protocol dealing with important matters; (iii) the SPO has not advanced any justification or purpose as to why at this stage of the proceedings a new regime dealing with the handling of confidential information is required or why the existent regime needs to be amended; and (iv) the SPO fails to assert any legal basis for the

⁶⁷ Selimi Response, para. 48.

⁶⁸ Selimi Response, para. 49.

⁶⁹ Krasniqi Response, paras 2-3, 24.

Proposed Framework other than relying on general provisions regarding witnesses' safety and their dignity, physical and psychological well-being and privacy, and the Defence is not able to identify in the Rules any legal basis.⁷⁰

37. The Krasniqi Defence further argues that the Proposed Framework is unwarranted considering that: (i) the Defence is, in the same way as the SPO, subject to strict professional obligations of confidentiality arising from the Code of Conduct; (ii) the Trial Panel to which the case-file will be transmitted will at the appropriate time issue an order on the conduct of proceedings, as is the practice in other courts and tribunals; (iii) the Proposed Framework lacks any factual and legal foundation and the SPO fails to provide clarifying details regarding the proposed regimes; (iv) the SPO's reliance on the practice in the Gucati and Haradinaj Case, ICC, ICTY, ICTR and Special Tribunal for Lebanon ("STL") is clearly insufficient in view of the principle that witnesses are the property of neither the SPO nor the Defence and the fact that the pool of witnesses available to the Defence is small; (v) the Gucati and Haradinaj Order cannot be transposed as protocols must be developed and adjusted to the specific circumstances of each case at the appropriate time; and (vi) there can be no justification for imposing any restrictions on the ability of the Defence to contact witnesses who do not have objectively justifiable concerns for their safety, such as international witnesses.⁷¹

38. The Krasniqi Defence lastly submits that multiple provisions proposed by the SPO are unduly onerous and will significantly affect Mr Krasniqi's fair trial rights including the statutory right to be tried within a reasonable time since: (i) the SPO does not explain why it made the visual and/or non-textual material subject to a cumbersome disclosure regime as all confidential information should be subject to strict protection; (ii) while in the field, the Defence cannot endlessly seek the advice of the WPSO and wait for its response as to whether the identity of a

⁷⁰ Krasniqi Response, paras 4-7.

⁷¹ Krasniqi Response, paras 9-14.

protected witness may be disclosed to a third party; (iii) the possibility of the SPO requesting to attend a meeting between a witness and the Defence against the witness' preferences, and the need for the interviewing Party to request leave to show (strictly) confidential records will delay the proceedings and the Defence investigations, and the SPO fails to provide any explanation as to why disclosure of confidential and strictly confidential records should be subjected to such treatment; (iv) the Proposed Framework does not describe its proposed purpose and intended subject, and does not use consistent definitions throughout the text of the provisions; and (v) the Proposed Framework prevents the Defence from interviewing witnesses on the same terms as the SPO has interviewed them, risks requiring the Defence to reveal lines of enquiry and the content of investigations to the SPO, and limits its ability to investigate and to prepare for trial.⁷²

4. Veseli Response

39. The Veseli Defence requests the Pre-Trial Judge to reject the Proposed Framework and instruct the Parties to engage in discussions regarding a protocol that is appropriate for this case.⁷³

40. In the view of the Veseli Defence, the Proposed Framework is not supported by precedent or the applicable legal texts of the SC.⁷⁴ It submits that the Gucati and Haradinaj Order does not constitute applicable precedent as: (i) it was issued by a Trial Panel after the defence had completed its investigations and had submitted a list of its own prospective witnesses; (ii) a robust protocol to deal with witness contact and confidential information directly relates to the underlying accusations in the Gucati and Haradinaj Case; (iii) the scale of the present case compared with the Gucati and Haradinaj Case makes any attempt to apply the

⁷² Krasniqi Response, paras 15-23.

⁷³ Veseli Response, paras 4, 34-35.

⁷⁴ Veseli Response, paras 2, 5.

conditions vastly more complex and burdensome; and (iv) no protocols have been applied during the pre-trial phase in the Cases KSC-BC-2020-04 and KSC-BC-2020-05, which involve allegations and witnesses common to the present case.⁷⁵

41. The Veseli Defence adds that none of the provisions the SPO cites supports the Proposed Framework at this stage of the proceedings as: (i) it may be reasonably expected that such an oppressive protocol would have been foreseen in the applicable texts, considering that the rights of the Accused under Article 21(4) of the Law may only be limited by law; (ii) Article 23 of the Law and Rules 80 and 95(2) of the Rules are to be exercised in respect of witnesses on an individual basis and do not permit the Pre-Trial Judge to issue a blanket protocol that must be initiated in respect of all witnesses, irrespective of their specific circumstances; (iii) any measures taken or requested by the SPO under Article 35 of the Law must comply with the Law, and the Proposed Framework does not; (iv) Article 38 of the Law does not pertain to the present stage of the proceedings; (v) Article 39(1) of the Law does not obviate the requirement that any order or decision must be both necessary and proportionate, and the Proposed Framework would significantly delay rather than expedite the pre-trial proceedings; and (vi) Articles 6, 12, 14 and 17 of the Code of Conduct do not support, even implicitly, the Proposed Framework but the opposite seems to be the case.⁷⁶

42. The Veseli Defence also contends that the existing legal framework effectively accomplishes the very protection that the SPO claims to seek with respect to protected witnesses and victims and the handling of confidential information during Defence investigations.⁷⁷

43. Furthermore, according to the Veseli Defence, the Proposed Framework would directly infringe on the right to equality of arms as the SPO has had more

⁷⁵ Veseli Response, paras 6-12.

⁷⁶ Veseli Response, paras 13-15.

⁷⁷ Veseli Response, paras 16-17.

than ten years to investigate the allegations against Mr Veseli with the freedom in choosing the methodology of contacting and interviewing witnesses, and the SPO would be privy to each Defence investigative step as it would necessarily need to access witnesses it deemed strategically relevant through the SPO.⁷⁸ It adds that the Proposed Framework would also violate the Accused's right to prepare his case as having another Party sit in on a witness interview would compromise the efficacy of the interview.⁷⁹ The Veseli Defence is further of the view that the Proposed Framework is not narrowly tailored to advance the SPO's stated purpose as it does not distinguish at all between witnesses who have expressed fear, or a desire not to be contacted by the Defence, and those who would readily volunteer to speak to any Party to the proceedings.⁸⁰

44. The Veseli Defence asserts, lastly, that the Proposed Framework would pose significant logistical challenges and result in substantial delays as: (i) the Registry stressed the considerable logistical preparations which are required to implement such a protocol even with only three witnesses in the Gucati and Haradinaj Case; and (ii) requesting that a witness fly to The Hague after having already been interviewed by the SPO would have a significant chilling effect.⁸¹

D. REGISTRY SUBMISSIONS

45. The Registry submits that any submissions it made in the Gucati and Haradinaj Case were tailored to the specificities of that case and are, therefore, not immediately applicable to another case before the SC.⁸²

⁷⁸ Veseli Response, paras 20-22.

⁷⁹ Veseli Response, paras 2, 23-25.

⁸⁰ Veseli Response, paras 3, 26-28.

⁸¹ Veseli Response, paras 29-33.

⁸² Registry Response, para. 8.

46. According to the Registry, with the existing resources, it is feasible for WPSO to consult and advise the Parties and participants with respect to the handling of confidential information in the manner foreseen in the SPO submissions.⁸³

47. The Registry, with the aim of accurately informing the Pre-Trial Judge on the feasibility, impact, and ramifications of the SPO's proposals as to contacts with witnesses of other Parties and participants, requests further information to accurately assess and determine the financial and human resources implications of delivering certain or all of the services proposed, while at the same time ensuring the expeditious provision of those services, including: (i) the approximate number of witnesses to be interviewed; (ii) whether the individual witnesses would be interviewed once or whether multiple interviews with individual witnesses is a possibility; (iii) the country location of the interviews; (iv) the estimated duration of the individual interviews; and (v) the approximate period of time during which Registry resources will be required to implement the proposals.⁸⁴

E. FURTHER RESPONSES

1. Victims' Counsel Further Response

48. Victims' Counsel supports the Proposed Framework, as it will protect the safety and wellbeing of witnesses while ensuring the fair trial rights of the Accused and swift as well as transparent communication between the Parties and participants.⁸⁵ According to Victims' Counsel, 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, which makes it unthinkable that there should

⁸³ Registry Response, para. 9.

⁸⁴ Registry Response, para. 11.

⁸⁵ Victims' Counsel Further Response, paras 8, 35.

be no framework governing Defence contact with them.⁸⁶ Victims' Counsel avers that notice from the opposing Party that it wishes to interview a witness of the calling Party helps to avoid allegations of interference with witnesses, as noted by the ICTY, and is contained in the ICC Protocol.⁸⁷ Victims' Counsel further argues that 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 condition also included in the ICC Protocol.⁸⁸ Moreover, according to Victims' Counsel, in most circumstances, the calling Party's presence will suffice to safeguard the interests of the witness, but with regard to dual status witnesses the framework should, as has also been done at the ICC, consider the presence of Victims' Counsel, or other support, if the witness so requests.⁸⁹ Victims' Counsel also submits that the advantages of an audio-video recording (which is also contained in the ICC Protocol) are: transparency, accuracy of record, and reducing the need to subject witness to further interviews.⁹⁰ Victims' Counsel adds 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.⁹¹ Lastly, in the view of Victims' Counsel, the Proposed Framework should also contain the practice of the ICC obliging 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 WPSO.⁹²

⁸⁶ Victims' Counsel Further Response, paras 9-11.

⁸⁷ Victims' Counsel Further Response, paras 13-14.

⁸⁸ Victims' Counsel Further Response, para. 15.

⁸⁹ Victims' Counsel Further Response, paras 16-17.

⁹⁰ Victims' Counsel Further Response, paras 18-19.

⁹¹ Victims' Counsel Further Response, para. 20.

⁹² Victims' Counsel Further Response, para. 21.

49. Victims' Counsel additionally contends that the Proposed Framework closely mirrors the ICC Protocol, suggesting that the Defence's criticism is overstated and misplaced.⁹³ Victims' Counsel specifies that the Defence's argument that the SPO conducted interviews with the witnesses without the Defence being present overlooks that: (i) it cannot be suggested that the SPO ought to have invited the Accused to attend investigative interviews; (ii) the SPO will not have been invited to the Defence's earlier meetings with witnesses and will accept the presence of a Defence representative at such an interview; and (iii) the Defence will also learn the SPO's approach to Defence witnesses, and the alleged disadvantage on the part of the Defence must be weighed against the idea that there should be unfettered access to the witnesses.⁹⁴ Victims' Counsel further asserts that the Proposed Framework does not as such impinge on the privilege of the Defence as the Defence chooses to waive that privilege when imparting a privileged matter to a third party and, in addition, Rules 111(1) and (2) of the Rules have no application as they do not involve the waiver of privilege involved in the sharing of privileged information with a third party.⁹⁵ Lastly, Victims' Counsel argues that, as 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 a recording.⁹⁶

2. SPO Further Response

50. The SPO again emphasises the importance of a procedure governing contacts with witnesses of other Parties and participants, and submits that, in the particular circumstances of the SC and this case, any such procedure must take into account the well-established and persistent climate of intimidation of witnesses and

⁹³ Victims' Counsel Further Response, paras 2, 22-24.

⁹⁴ Victims' Counsel Further Response, paras 2, 26-28.

⁹⁵ Victims' Counsel Further Response, paras 2, 29-32.

⁹⁶ Victims' Counsel Further Response, paras 33-34.

interference with criminal proceedings against former members of the Kosovo Liberation Army ("KLA").⁹⁷

51. In the view of the SPO, the Registry Submissions underline the potential strain of the Proposed Framework on Registry resources and the potential impact on the expeditiousness of the proceedings.⁹⁸ The SPO, accordingly, proposes the following modifications to the Proposed Framework:

- a. The Registry is not required to make the logistical arrangements for and a Registry representative is not required to be present at interviews. The calling party, however, must be present. In light of the very real pressures felt by witnesses in respect of this case, this requirement is essential. In exceptional circumstances, a party or participant may apply to the Panel to additionally require the presence of Registry representative(s). However, ordinarily the witness's 'waiver' of the presence of the SPO will not be a sufficient basis for the interview to proceed without the SPO in light of the very real compulsion that witnesses will feel to accede to an interview without the SPO. Where a Registry representative will be present, the Panel shall, as necessary and appropriate, also order that the Registry or its representative(s) fulfil the obligations set out in paragraph 6(h)-6(k) and (n) of the Proposed [Framework].
- b. In the absence of a Registry representative and unless otherwise ordered by the Panel:
 - i. The interviewing party shall make all necessary logistical arrangements in accordance with best practices. The calling party shall bear the costs associated with its attendance at the interview.
 - ii. In consultation with the parties, the Registry may, based on the information provided pursuant to paragraph 6(e)-(g) and if feasible, facilitate the process. Further, as set out in paragraph 6(h)(iv), when considered necessary by the WPSO, the Registry shall ensure that a WPSO representative is on site or otherwise available.
 - iii. In the event the calling party objects to any part of the procedure followed or any particular line or manner of questioning during the interview, it shall raise the issue with the interviewing party

⁹⁷ SPO Further Response, paras 2-3.

⁹⁸ SPO Further Response, para. 4.

outside the presence of the witness. Any disagreement shall be recorded and shall not impede or unduly disrupt the interview.⁹⁹

3. Selimi Further Response

52. According to the Selimi Defence, the fundamental rights of the Accused must be the primary concern of the Pre-Trial Judge and, as such, the general logistical feasibility of the SPO's proposed measures is irrelevant.¹⁰⁰

53. The Selimi Defence contends that, given that the Proposed Framework contains provisions that essentially ask for the Parties to assume and/or share the statutorily defined role of the WPSO in protecting witnesses, participating victims and others at risk on account of testimony given by witnesses, the Registrar's opinion on this matter would be of benefit to the Pre-Trial Judge.¹⁰¹ The Selimi Defence adds that the SPO's intention is to extend the Proposed Framework to potentially cover many more individuals than those included in the SPO List of Witnesses and the Registrar must factor this into any equation.¹⁰² It further submits that any calculation must also account for the fact that the desired date, time (and to a lesser degree, place) for interviews with witnesses is not likely to synchronise across all four Defence teams, given their independent nature and duties.¹⁰³

54. The Selimi Defence avers that it: (i) reserves its right to seek interviews with every living witness on the SPO List of Witnesses; (ii) is not in a position to state with certainty whether multiple interviews with witnesses would be required, but that it is a strong possibility that this may be the case in many instances; (iii) is not in a position to specify the location of the interviews although it is likely that interviews would need to take place in various locations outside of the

⁹⁹ SPO Further Response, paras 5-6.

¹⁰⁰ Selimi Further Response, para. 2.

¹⁰¹ Selimi Further Response, paras 5-6.

¹⁰² Selimi Further Response, para. 7.

¹⁰³ Selimi Further Response, para. 8.

Netherlands and Kosovo; (iv) is not in a position to provide the estimated duration of the individual interviews, but notes that SPO interviews with various witnesses took many hours, and in some cases, several days; and (v) considers that it is reasonably safe for the Registry to assume that its resources would be required throughout pre-trial phase and extend through the duration of trial, as the SPO does not provide any specific time-frame for the Proposed Framework.¹⁰⁴

55. As to the handling of confidential information, the Selimi Defence argues that the feasibility of the involvement of the WPSO in the manner contained in the Proposed Framework should not be used to ignore the well-founded concerns of the Defence regarding the unnecessary and accusatory nature of these proposals, aimed almost exclusively at the Defence.¹⁰⁵

4. Thaçi Further Response

56. The Thaçi Defence submits that, while the Registry confirmed that it is feasible to consult and advise the Parties/participants in the manner suggested by the SPO with regard to the handling of confidential information during investigations, it is unnecessary for the Pre-Trial Judge to issue a protocol on this issue, team members being bound by codes of ethics and/or by confidentiality agreements.¹⁰⁶ It adds that the Registry has not yet provided its position on the feasibility of the Proposed Framework insofar as it relates to contact with witnesses, and maintains its submissions set out in the Thaçi Response.¹⁰⁷

¹⁰⁴ Selimi Further Response, paras 9-15.

¹⁰⁵ Selimi Further Response, para. 16.

¹⁰⁶ Thaçi Further Response, para. 9.

¹⁰⁷ Thaçi Further Response, paras 1, 10, 11.

5. Veseli Further Response

57. The Veseli Defence estimates interviewing between 25%-33% of the SPO witnesses as part of its investigation although this number may increase.¹⁰⁸ It also envisages that it is likely that multiple interviews will be conducted with the same witness and that follow-up interviews will be conducted.¹⁰⁹ Noting that the Defence investigation relies entirely on witnesses voluntarily meeting and speaking to the Defence, the Veseli Defence intends to conduct as many interviews as possible in Kosovo or in whichever country the witnesses currently reside.¹¹⁰ Furthermore, according to the Veseli Defence, the shortest substantive interviews will likely range from one to three hours, whereas more in-depth interviews will take longer.¹¹¹ Lastly, the Veseli Defence avers that the time period during which Registry resources will be required shall be ongoing as it has been suggested that trial could start before the Defence completes its investigation.¹¹²

6. Krasniqi Further Response

58. The Krasniqi Defence indicates that it has begun its investigations, but that the bulk of it remains to be conducted and is hampered by several factors.¹¹³ It considers it premature to ask for an estimate of the number of witnesses it intends to interview.¹¹⁴ The Defence nevertheless submits that it estimates that it may require to interview approximately 75 *viva voce* witnesses.¹¹⁵ The Defence additionally avers that it considers it premature and at this time is not in a position

¹⁰⁸ Veseli Further Response, para. 7.

¹⁰⁹ Veseli Further Response, para. 8.

¹¹⁰ Veseli Further Response, paras 9-10.

¹¹¹ Veseli Further Response, para. 11.

¹¹² Veseli Further Response, para. 12.

¹¹³ Krasniqi Further Response, para. 7.

¹¹⁴ Krasniqi Further Response, paras 8-10.

¹¹⁵ Krasniqi Further Response, para. 11.

to meaningfully assess and make submissions in relation to the remaining matters on which the Registrar requested information.¹¹⁶

F. THAÇI REPLY VICTIMS' COUNSEL AND RELATED SUBMISSIONS

59. The Thaçi Defence requests the Pre-Trial Judge to strike the Victims' Counsel Further Response from the record and to remind Victims' Counsel of his obligation to abide by the deadlines set by the Rules.¹¹⁷ The Thaçi Defence submits that the Pre-Trial Judge, in the 21 January 2022 Order, invited the Parties and participants to respond only to the Registry Submissions, whereas Victims' Counsel used the opportunity to reply and refute the Defence Responses.¹¹⁸

60. Victims' Counsel does not accept the Thaçi Reply Victims' Counsel.¹¹⁹ According to Victims' Counsel, the 21 January 2022 Order specified that responses should be filed, not replies, and the Victims' Counsel Further Response was, therefore, filed within the time limit.¹²⁰ Victims' Counsel also asserts that, ordinarily, the Parties are allowed to make submissions in respect of pending judicial decisions, particularly where they are as important as this.¹²¹

61. The Thaçi Defence replies that Victims' Counsel misperceives the Thaçi Reply Victims' Counsel, which specifies that Victims' Counsel went well beyond what the Pre-Trial Judge asked them to do, which was an answer to the Registry Submissions and failed to do in a timely fashion.¹²²

¹¹⁶ Krasniqi Further Response, para. 12.

¹¹⁷ Thaçi Reply Victims' Counsel, paras 1, 16, 18.

¹¹⁸ Thaçi Reply Victims' Counsel, paras 10, 14-15.

¹¹⁹ 22 February 2022 Transcript, p. 960.

¹²⁰ 22 February 2022 Transcript, pp. 961-962.

¹²¹ 22 February 2022 Transcript, pp. 962-963.

¹²² 22 February 2022 Transcript, pp. 963-964.

G. THAÇI REPLY SPO

62. In the view of the Thaçi Defence, if the Specialist Prosecutor truly believed that the Pre-Trial Judge's refusal to adopt the Proposed Framework will create enormous risks to the integrity of the evidence in this case, then either: (i) he was derelict in his duties as Specialist Prosecutor in allowing the Defence to harm the "integrity of the evidence" by interviewing SPO witnesses for thirteen months between November 2020 and December 2021 before seeking the imposition of the Proposed Framework; or (ii) he does not believe Defence interviews pose a threat to the integrity of the proceedings, which is the truth.¹²³

63. Concerning the claim in the Victims' Counsel Further Response that the Proposed Framework is needed because some of the dual-status witnesses fear that they will be killed, the Thaçi Defence argues that Article 16 of the Code of Conduct ensures that there will be no direct contact between the Defence and dual-status witnesses.¹²⁴ The Thaçi Defence also avers that, while it is not aware of any complaints from SPO Witnesses about their experiences during Defence interviews in the last fifteen months, many SPO witnesses were made to feel that they could face indictment by the SPO if they did not provide answers that would be satisfactory to the SPO and another witness indicated that the totality of his statement seems to reflect a lesser interest in exculpatory than incriminating information.¹²⁵ Furthermore, the Thaçi Defence contends that the SPO provides no support for the assumptions underlying its application as to the pressure on witnesses and the Defence's statements regarding the SPO.¹²⁶

¹²³ Thaçi Reply SPO, para. 2.

¹²⁴ Thaçi Reply SPO, para. 7.

¹²⁵ Thaçi Reply SPO, paras 14-17.

¹²⁶ Thaçi Reply SPO, paras 18-21.

64. Furthermore, the Thaçi Defence reiterates certain submissions set out in the Thaçi Response,¹²⁷ and once more requests the Pre-Trial Judge to reject the Proposed Framework.¹²⁸

H. 22 FEBRUARY 2022 HEARING

1. SPO

65. According to the SPO, the Proposed Framework has been drafted on the basis of similar frameworks applied in another case before the SC and in multiple cases before the ICC and other international tribunals.¹²⁹ The SPO further reiterates the importance of the Proposed Framework in view of the long-standing climate of intimidation in relation to trials against KLA members.¹³⁰

66. The SPO avers that the Proposed Framework can be ordered pursuant to Article 23 of the Law and Rule 80 of the Rules for the protection of victims and witnesses, which is not time-barred in this case only because previously a deadline was imposed in the specific context of disclosure, Article 39(1), (3), (11) and (13) of the Law concerning the expeditiousness and fairness of the proceedings and the integrity of the evidence, and Rules 82 and 83 of the Rules for the protection of confidential information.¹³¹ The SPO adds that the Proposed Framework should apply to all witnesses since it serves the aforementioned purposes and some witnesses without protective measures are likely to be severely pressured.¹³²

67. As to the fair trial arguments invoked by the Defence, the SPO argues that the Defence brought forward only general assertions and these arguments have been

¹²⁷ Thaçi Reply SPO, paras 4-5, 8-13.

¹²⁸ Thaçi Reply SPO, paras 3, 4, 6, 22.

¹²⁹ 22 February 2022 Transcript, pp. 964-965, 969-970, 973-974.

¹³⁰ 22 February 2022 Transcript, pp. 965-966, 973, 1040-1042.

¹³¹ 22 February 2022 Transcript, p. 966.

¹³² 22 February 2022 Transcript, p. 967.

repeatedly raised and dismissed at the ICTY and ICC.¹³³ The SPO further submits that internal work product protections or attorney-client privilege or the right against self-incrimination do not apply when the Defence is voluntarily disclosing information to a third party.¹³⁴ It is also of the view that the right to examine witnesses does not include a right to interview the opposing Party's witnesses without oversight or regulation and, in this regard, points to an ICTY decision declining to allow the Defence to summons ICTY Prosecution witnesses because the Defence would have an opportunity to question them at trial, ICTR and ICC decisions permitting the calling Party to attend pre-trial interviews, and domestic systems in which further witness interviews once witnesses have been identified for examination at trial only take place if ordered by the court.¹³⁵

68. The SPO also avers that the Defence teams should be encouraged to conduct joint interviews, and in the case of victim witnesses, should be obliged to do so.¹³⁶

69. As to the possibility of the calling Party attending an interview against the wishes of the witness, the SPO asserts that, in view of the pressure in this case, the presence of the opposing Party, like it has been the case in other tribunals, should be given as of right with only the possibility of the Panel making an exception.¹³⁷

70. The SPO additionally contends that it is better that the Proposed Framework is now adopted and the Parties then consult as necessary and appropriate within that framework.¹³⁸ It further requests the Pre-Trial Judge to specify that the Proposed Framework also applies to contacts that have already been initiated, to order the Defence teams to report which SPO witnesses they have contacted and interviewed before the Framework was ordered, and to disclose any available

¹³³ 22 February 2022 Transcript, pp. 967, 1040.

¹³⁴ 22 February 2022 Transcript, p. 967.

¹³⁵ 22 February 2022 Transcript, pp. 967-969.

¹³⁶ 22 February 2022 Transcript, p. 969.

¹³⁷ 22 February 2022 Transcript, pp. 974-975.

¹³⁸ 22 February 2022 Transcript, p. 970.

records and recordings of those contacts and interviews.¹³⁹ In the alternative, if the Pre-Trial Judge decides that *inter partes* discussions should be held, the SPO requests the Pre-Trial Judge to order that contacts with witnesses of the opposing Party can no longer take place until the Pre-Trial Judge has decided.¹⁴⁰

71. Lastly, the SPO considers that the Defence's reference to the Code of Conduct fails as the record clearly shows that the Thaçi Defence and Veseli Defence fail to adhere to these standards on a continuing basis.¹⁴¹

2. Victims' Counsel

72. According to Victims' Counsel, the Proposed Framework should apply to all witnesses as it promotes transparency and certainty as to what was said, it avoids misunderstandings or even allegations being made in one direction or another, and it applies to both sides equally.¹⁴² Victims' Counsel is further of the view that special arrangements for dual status witnesses are required, namely giving notice to Victims' Counsel – to which there can be no objection as it is already included in the Code of Conduct – and Victims' Counsel should be permitted to be present at the interview if required by the witness.¹⁴³

73. As to the fair trial issues raised by the Defence, Victims' Counsel stands by the submissions made in the Victims' Counsel Further Response.¹⁴⁴

74. Victims' Counsel also avers that the Defence must organise joint interviews of witnesses where they are planning to interview witnesses who are also victims in the proceedings or any other vulnerable category of witness as there simply

¹³⁹ 22 February 2022 Transcript, pp. 970-971.

¹⁴⁰ 22 February 2022 Transcript, p. 971.

¹⁴¹ 22 February 2022 Transcript, pp. 971-972, 989-990.

¹⁴² 22 February 2022 Transcript, p. 976.

¹⁴³ 22 February 2022 Transcript, pp. 976-978.

¹⁴⁴ 22 February 2022 Transcript, p. 978.

cannot arise a situation in which a witness gets interviewed four times by the Defence absent some very exceptional circumstances.¹⁴⁵

75. Victims' Counsel does not object to the amendments that have been put forward in the SPO Further Response, but maintains that the Proposed Framework should, however, be flexible as to the presence of the Registry in exceptional circumstances, such as a vulnerable witness whose interview does not proceed as planned and requiring some more oversight from the Registry.¹⁴⁶

76. Furthermore, Victims' Counsel considers that the ICC model is good, which has been adopted in cases of real complexity, subject to the qualifications regarding dual status witnesses and the involvement of WPSO as set out in the SPO Further Response.¹⁴⁷ Victims' Counsel adds that the alternative is that a written application is filed justifying each individual time that a request is made for an interview, the presence of the SPO, or the video recording.¹⁴⁸

77. Lastly, Victims' Counsel is willing to take part in *inter partes* discussions and to assist in promoting a final outcome that is more agreeable to all Parties.¹⁴⁹

3. **Thaçi Defence**

78. According to the Thaçi Defence, the integrity of the system was maligned because the Defence was not present during SPO interviews with witnesses.¹⁵⁰

79. The Thaçi Defence further contends that, unlike the ICC, the SC, as a Kosovo court, must follow the European Court for Human Rights ("ECtHR"), which has found that counsel has to be able to secure, without restriction, the fundamental aspects of that person's defence, and that the ICC has not explicitly found the ICC

¹⁴⁵ 22 February 2022 Transcript, p. 978.

¹⁴⁶ 22 February 2022 Transcript, pp. 979-980, 1043.

¹⁴⁷ 22 February 2022 Transcript, pp. 980, 1043.

¹⁴⁸ 22 February 2022 Transcript, pp. 1043-1044.

¹⁴⁹ 22 February 2022 Transcript, p. 980.

¹⁵⁰ 22 February 2022 Transcript, pp. 981-982, 988-989.

Protocol to be in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).¹⁵¹ According to the Thaçi Defence, the Proposed Framework violates the right to counsel, including the right to investigate, and the right to a fair trial, including the ability to conduct cross-examination and the right against self-incrimination, under the ECHR, as the presence of the SPO would require the Defence to choose between the possibility of the Accused incriminating himself and not investigating at all.¹⁵² The Thaçi Defence is also of the view that the presence of the SPO could violate Rule 104 of the Rules as the SPO could decide not to call a witness following a Defence interview, which would require the Defence to call these witnesses, and the SPO would be in the possession of a statement that it otherwise would not be entitled to have before the Defence case.¹⁵³ It also avers that the Proposed Framework would lead to significant delay.¹⁵⁴ As to the absence of a Defence right to question witnesses before trials in certain systems with an investigative judge, the Thaçi Defence asserts that, at the SC, the Accused has the right to investigate his own case and he should not be put in the position of risking to create evidence against himself or not conducting an investigation at all.¹⁵⁵ It adds that the allegation underlying the Proposed Framework is that the Pre-Trial Judge should be suspicious of Defence counsel, despite Defence counsel being accredited.¹⁵⁶ As to the suggestion that the Proposed Framework will treat both sides equally, the Thaçi Defence contends that the Rules were set up not to treat their disclosure obligations equally as the SPO has a much higher burden of disclosure than the

¹⁵¹ 22 February 2022 Transcript, pp. 982-983, 987-988, 992, 993, 994-996.

¹⁵² 22 February 2022 Transcript, pp. 994, 995, 1051-1052.

¹⁵³ 22 February 2022 Transcript, pp. 996, 999, 1047.

¹⁵⁴ 22 February 2022 Transcript, p. 1048.

¹⁵⁵ 22 February 2022 Transcript, pp. 997-998, 1051.

¹⁵⁶ 22 February 2022 Transcript, pp. 990-991.

Accused, whereas the Proposed Framework involves the disclosure of statements and notes by the Defence that otherwise would not be required.¹⁵⁷

80. The Thaçi Defence argues that the witnesses on the SPO List of Witnesses are not the SPO's witnesses, that around 50% of these witnesses have protective measures already, and that the SPO wants to extend the protective measures to all witnesses, including international diplomats and officials, without a request or justification and after the expiry of the time limit so as to preclude the Defence from interviewing them.¹⁵⁸ In the view of the Thaçi Defence, the SPO provides no evidence for its allegations of pressure on witnesses and no allegations have been levelled against the Defence regarding the interviews that it has conducted over the past 15 months.¹⁵⁹ The Thaçi Defence adds that there is no problem regarding the witnesses who happen to be represented by Victims' Counsel or those that are particularly frail and damaged emotionally and mentally.¹⁶⁰

4. Veseli Defence

81. The Veseli Defence is of the view that, in breach of the presumption of innocence, the Proposed Framework is based on the propositions that the Accused will wish to interfere with the course of justice through their counsel and that Defence counsel cannot be trusted, even though the SPO has engaged in prosecutorial misconduct.¹⁶¹ It adds that the Proposed Framework is disproportionate and it should apply to witnesses protected under orders issued by the Pre-Trial Judge, while persons who have not requested protection for their

¹⁵⁷ 22 February 2022 Transcript, pp. 992-993, 996-997.

¹⁵⁸ 22 February 2022 Transcript, pp. 983-984, 985-986, 1047-1048.

¹⁵⁹ 22 February 2022 Transcript, pp. 984-985, 991, 1044-1047, 1049-1051.

¹⁶⁰ 22 February 2022 Transcript, pp. 986-987, 1048-1049.

¹⁶¹ 22 February 2022 Transcript, pp. 1000-1001, 1005-1006, 1058-1059.

identity could be dealt with by notification to Victims' Counsel and other persons should be excluded unless the SPO makes an application.¹⁶²

82. The Veseli Defence also argues that an adversarial process cannot borrow in aspects from an inquisitorial process, as the former type is based on the proposition that each Party is trusted to present the evidence, and the Proposed Framework would collapse the system.¹⁶³ It further avers that the ECtHR views each case individually and does not make categorical statements about what is and is not fair in general terms.¹⁶⁴

83. Moreover, according to the Veseli Defence, the borrowing of different protocols from the ICC and taking them at their highest creates the most oppressive regime possible and does not lead to proportionality in the present case.¹⁶⁵ It also avers that, in the cases to which the ICC protocols have been applied, the witness numbers were tiny by comparison to the present case.¹⁶⁶ The Veseli Defence further refers to the practice of the ICTY, which is common in Common Law systems and consistent with the process in Kosovo, according to which witnesses are the property of neither the Prosecution nor the Defence and, thus, both Parties have an equal right to interview them, contrary to the ICC practice in which the calling Party has a certain proprietary interest in the witness.¹⁶⁷

84. The Veseli Defence submits that the Defence should organise joint interviews whenever possible, and only in exceptional circumstances should witnesses need to be interviewed more than once.¹⁶⁸

85. Moreover, the Veseli Defence asserts that, while there have been numerous instances in which witnesses were either intimidated or did not give evidence after

¹⁶² 22 February 2022 Transcript, pp. 1002-1003, 1006-1008, 1011-1012, 1053-1056.

¹⁶³ 22 February 2022 Transcript, pp. 1003-1005.

¹⁶⁴ 22 February 2022 Transcript, pp. 1052-1053.

¹⁶⁵ 22 February 2022 Transcript, p. 1008.

¹⁶⁶ 22 February 2022 Transcript, pp. 1008-1009.

¹⁶⁷ 22 February 2022 Transcript, pp. 1009-1010.

¹⁶⁸ 22 February 2022 Transcript, p. 1011.

the conflict, Kosovo has moved on, and numerous witnesses in the ICTY case against Ramush Haradinaj gave a different account for diverging reasons.¹⁶⁹

5. Selimi Defence

86. The Selimi Defence submits that the most important rule cited in support of the Proposed Framework is Rule 80 of the Rules.¹⁷⁰ In its view, protective measures are exceptional and, in the event of a conflict, the balance should come out in favour of the Accused.¹⁷¹ The Selimi Defence avers that the SPO has not met the legal requirements of Rule 80 of the Rules, as there was absolutely no attempt to justify the protective measures.¹⁷² It also asserts that the SPO's reference to the integrity of the proceedings is a late-stage attempt to justify the Rule 80 application, by issuing baseless and unsubstantiated accusations against presumably the Defence as a whole.¹⁷³ The Selimi Defence also shares the concerns that the Proposed Framework would apply to every single person on the SPO List of Witnesses, and contends that an individual objective risk assessment must be carried out and the measures justified on a case-by-case basis.¹⁷⁴

87. The Selimi Defence also shares the concerns regarding the right against self-incrimination and the right to prepare a defence.¹⁷⁵ It adds, in relation to the principle of equality of arms, that the Proposed Framework targets the Defence almost exclusively.¹⁷⁶ The Selimi Defence also recalls that the burden of proof is on the SPO, as also reflected in Rule 104(5) of the Rules.¹⁷⁷

¹⁶⁹ 22 February 2022 Transcript, pp. 1056-1058.

¹⁷⁰ 22 February 2022 Transcript, pp. 1013-1014.

¹⁷¹ 22 February 2022 Transcript, pp. 1014-1015.

¹⁷² 22 February 2022 Transcript, pp. 1015-1016, 1060.

¹⁷³ 22 February 2022 Transcript, pp. 1016-1017.

¹⁷⁴ 22 February 2022 Transcript, pp. 1017-1018.

¹⁷⁵ 22 February 2022 Transcript, p. 1018.

¹⁷⁶ 22 February 2022 Transcript, pp. 1018-1019, 1020-1022.

¹⁷⁷ 22 February 2022 Transcript, pp. 1019-1020.

88. The Selimi Defence also points out that the question of joint interviews must be done at the decision of the individual Defence teams and not forced upon the Defence due to logistical considerations.¹⁷⁸

89. As to the SPO Further Response, the Selimi Defence is concerned that the obligatory presence of the SPO in witness interviews would have a chilling effect on the witnesses.¹⁷⁹ The Selimi Defence adds that the videotaping of interviews would reveal Defence investigations and the lines of questioning, whereas there is no tangible connection to the protection of witnesses.¹⁸⁰ Lastly, the Selimi Defence supports the position of the Thaçi Defence regarding the ICC Protocol, including in relation to the ECHR.¹⁸¹

6. Krasniqi Defence

90. The Krasniqi Defence submits that the key problem is that the SPO seeks to impose a blanket protocol on all the SPO witnesses without any attempt to establish that all or any of those witnesses assessed in their own circumstances actually need the protection of the Proposed Framework.¹⁸² In its view, Rule 80 of the Rules might provide a basis for imposing protective measures for a particular witness where the necessity and proportionality of those measures is objectively established to the required standard.¹⁸³ According to the Defence, either the SPO or Victims' Counsel should make a new application for protective measures, or the witnesses should be divided into categories.¹⁸⁴ Furthermore, the Krasniqi

¹⁷⁸ 22 February 2022 Transcript, p. 1022.

¹⁷⁹ 22 February 2022 Transcript, p. 1023.

¹⁸⁰ 22 February 2022 Transcript, p. 1024.

¹⁸¹ 22 February 2022 Transcript, pp. 1024-1025.

¹⁸² 22 February 2022 Transcript, pp. 1026, 1027-1028, 1029-1030, 1033, 1061.

¹⁸³ 22 February 2022 Transcript, pp. 1026-1028.

¹⁸⁴ 22 February 2022 Transcript, pp. 1028-1029, 1061-1062.

Defence considers that the mandatory presence of the SPO would have a chilling effect, and there is no need for the SPO being present if the witness consents.¹⁸⁵

91. The Krasniqi Defence further avers that requiring the SPO to attend all interviews with the SPO witnesses is nothing less than a shortcut for the SPO being granted access to the Defence lines of inquiry, documents, potentially incriminating evidence that the SPO would not normally have access to or have access to until later in the proceedings, even though the disclosure obligations in the Rules are asymmetric.¹⁸⁶

92. Furthermore, the Krasniqi Defence contends that there are likely to be differing investigative priorities and interests among the Defence teams, which means that the number of joint interviews is likely to be relatively limited.¹⁸⁷

93. It is also the position of the Krasniqi Defence that there is a danger in applying models derived from other courts directly to the SC since inevitably different courts have their own standpoint based on their own statutes and rules, and the circumstances of the cases before them.¹⁸⁸ It adds that, whereas the ICC has to be able to operate in all countries, at times regardless of whether that country is cooperating with the court or not and whether the conflict is ongoing in that situation or not, the SC operates primarily with regard to Kosovo, is established within the legal system of Kosovo, is concerned with a conflict that ended some 20 years ago and the size of this case distinguishes it from anything that the ICC has previously tackled.¹⁸⁹ The Krasniqi Defence also asserts that there was no prescriptive protocol at the STL and the ICTY by and large recognised the general

¹⁸⁵ 22 February 2022 Transcript, pp. 1030-1031, 1033.

¹⁸⁶ 22 February 2022 Transcript, p. 1032.

¹⁸⁷ 22 February 2022 Transcript, p. 1032.

¹⁸⁸ 22 February 2022 Transcript, p. 1035.

¹⁸⁹ 22 February 2022 Transcript, pp. 1035-1036.

rights to interview witnesses of another Party but to preserve the possibility for the calling Party to seek protective measures if they were needed.¹⁹⁰

94. Lastly, the Krasniqi Defence submits that it will gladly enter into *inter partes* discussions, but if the SPO's position remains that the Proposed Framework must apply to all witnesses, it may be that the discussions do not get very far.¹⁹¹

7. Registry

95. The Registry contends that it is in need of fairly precise information in order to both properly plan for these interviews and to manage the existing and any additional resources, but it unfortunately does not have that precise information right now.¹⁹² The Registry further submits that it could accommodate the arrangement foreseen in the SPO Further Response, and asks that a proper period of notice be considered.¹⁹³

I. THAÇI SUPPLEMENTAL SUBMISSIONS AND RELATED SUBMISSIONS

96. The Thaçi Defence submits that, in the course of its investigations, it has discovered that some witnesses identified in the SPO List of Witnesses were not aware that the SPO had decided, and officially notified the Pre-Trial Judge, Parties and Victims' Counsel, of its intention to call them as witnesses in the present case.¹⁹⁴ In the view of the Thaçi Defence, in seeking additional protective measures, the SPO has failed to comply with Rule 80(2) of the Rules, because it has not obtained the witnesses' consent to its additional proposed measures.¹⁹⁵

¹⁹⁰ 22 February 2022 Transcript, p. 1036.

¹⁹¹ 22 February 2022 Transcript, pp. 1036-1037.

¹⁹² 22 February 2022 Transcript, pp. 1037-1038.

¹⁹³ 22 February 2022 Transcript, pp. 1038-1039.

¹⁹⁴ Thaçi Supplemental Submissions, para. 10.

¹⁹⁵ Thaçi Supplemental Submissions, para. 12.

97. The SPO responds that the Thaçi Supplemental Submissions should be summarily dismissed.¹⁹⁶ According to the SPO, these submissions are outside the statutory briefing and hearing schedule.¹⁹⁷ The SPO adds that there is no indication as to who the Thaçi Defence is referencing, and that the SPO does not present the Proposed Framework exclusively as a protective measure.¹⁹⁸

98. The Thaçi Defence replies that the SPO cannot claim to be seeking the imposition of the Proposed Framework “to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being,” while it has not asked these witnesses whether they want the SPO present for Defence interviews and has not even told them that they are on the SPO List of Witnesses.¹⁹⁹ It adds that the SPO invokes a *lex generalis*, namely Article 39(1) of the Law, which cannot displace the *lex specialis*, namely Article 23 of the Law, which makes clear that the Pre-Trial Judge must look to Rule 80 of the Rules.²⁰⁰

III. APPLICABLE LAW

99. Pursuant to Article 21(2) of the Law, in the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 23 of the Law and any measures ordered by the SC for the protection of victims and witnesses.

100. Pursuant to Article 23(1) of the Law and Rule 80(1) of the Rules, the Pre-Trial Judge shall provide for the protection of witnesses and victims and may, *proprio motu* or upon request, 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

¹⁹⁶ SPO Response Thaçi Supplemental Submissions, para. 1.

¹⁹⁷ SPO Response Thaçi Supplemental Submissions, para. 2.

¹⁹⁸ SPO Response Thaçi Supplemental Submissions, paras 4-5.

¹⁹⁹ Thaçi Reply SPO Response Thaçi Supplemental Submissions, para. 1.

²⁰⁰ Thaçi Reply SPO Response Thaçi Supplemental Submissions, paras 2-7.

given by witnesses, provided that the measures are consistent with the rights of the Accused.

101. Pursuant to Article 35(2)(f) of the Law, the authorities and responsibilities of the Specialist Prosecutor and other Prosecutors in the SPO include 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.

102. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall have the power to make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

103. Pursuant to Article 39(11) of the Law, the Pre-Trial Judge may, where necessary, provide, *inter alia*, for the protection and privacy of victims and witnesses, and the preservation of evidence.

IV. DISCUSSION

A. PRELIMINARY MATTERS

1. **Thaçi Reply Victims' Counsel**

104. The Pre-Trial Judge recalls that, in the 21 January 2022 Order, the Parties and Victims' Counsel were specifically ordered to respond to the Registry Submissions if they so wish.²⁰¹ Accordingly, the 21 January 2022 Order did not provide the Parties and Victims' Counsel with an opportunity to provide further submissions regarding the SPO Submissions, the Victims' Counsel Response and/or the Defence Responses. Therefore, the Pre-Trial Judge considers that the Victims' Counsel Further Response, which addresses particular submissions

²⁰¹ 21 January 2022 Order, para. 6.

arising from the Defence Responses and does not respond to the Registry Submissions, exceeds the parameters of the 21 January 2022 Order.

105. It is also recalled that, in the 16 February 2022 Decision convening a hearing, the Pre-Trial Judge, besides ordering certain questions to be addressed, permitted the Parties and participants to make submissions on any other matters arising directly from the SPO Submissions insofar as such matters have not been previously addressed in their written submissions.²⁰² This means that the arguments set forth in the Victims' Counsel Further Response could have been validly made at the 22 February 2022 Hearing.

106. In these circumstances, the Pre-Trial Judge finds that it is not necessary to strike the Victims' Counsel Further Response from the record and rejects the Thaçi Defence's request to this effect. However, considering that the Victims' Counsel Further Response exceeds the 21 January 2022 Order, the arguments contained in this filing shall not, as such, be considered for the purposes of the present decision, except insofar as they have been specifically raised or adopted by Victims' Counsel at the 22 February 2022 Hearing.

2. Thaçi Reply SPO

107. The Pre-Trial Judge notes that the Thaçi Reply SPO, besides addressing certain aspects of the SPO Further Response and the Victims' Counsel Further Response,²⁰³ reiterates and/or specifies particular submissions set forth in the Thaçi Response in connection with the SPO Submissions.²⁰⁴

108. On the basis of the considerations set out in connection with the Victims' Counsel Further Response, the Pre-Trial Judge finds that the Thaçi Reply SPO

²⁰² 16 February 2022 Decision, para. 12.

²⁰³ Thaçi Reply SPO, paras 7, 18-21.

²⁰⁴ Thaçi Reply SPO, paras 4-5, 8-17; Thaçi Response, paras 12-13, 18-24, 33, 35.

equally exceeds the 21 January 2022 Order. However, for the same reasons identified in relation to the Victims' Counsel Further Response, the Pre-Trial Judge considers that, while it is not necessary to strike the Thaçi Reply SPO from the record, the relevant submissions shall not, as such, be considered for the purposes of the present decision, except to the extent that they have been specifically raised or adopted by the Thaçi Defence at the 22 February 2022 Hearing.

3. Thaçi Supplemental Submissions

109. The Pre-Trial Judge recalls that the Thaçi Defence: (i) responded to the SPO Submissions in accordance with Rule 76 of the Rules; (ii) responded to the Registry Submissions on the basis of the 21 January 2022 Order; and (iii) was authorised to provide oral submissions further to the 16 February 2022 Decision.

110. The Thaçi Defence has neither sought to demonstrate a legal basis for providing supplemental submissions nor requested the necessary authorisation to do so.²⁰⁵ Therefore, the Pre-Trial Judge finds that, in the absence of a basis in the legal texts of the SC or the aforementioned briefing schedule, the Thaçi Supplemental Submissions shall not be considered any further. This applies, by the same token, to the SPO Response Thaçi Supplemental Submissions and Thaçi Reply SPO Response Thaçi Supplemental Submissions insofar as these two filings relate to the merits of the matter under consideration.

B. PROPOSED FRAMEWORK

111. At the outset, the Pre-Trial Judge notes that, in the SPO Further Response, the SPO proposes certain amendments to the Proposed Framework set forth in the

²⁰⁵ See for instance KSC-BC-2020-06, F00326, Pre-Trial Judge, *Decision on SPO Request for Leave to Sur-Reply*, 28 May 2021, public, paras 5-6.

SPO Submissions.²⁰⁶ While Victims' Counsel and the Registry do not object, as such, to the proposed amendments,²⁰⁷ the Defence has not taken a specific position on this matter and generally maintain their objections to the Proposed Framework. In these circumstances, the Pre-Trial Judge will, for the purposes of the present decision, exclusively consider the Proposed Framework on the basis of the proposed amendments. This further entails that the Pre-Trial Judge will only entertain the Defence's submissions insofar as they relate to the Proposed Framework in conjunction with the SPO Further Response.²⁰⁸

112. Furthermore, as to the Defence's request to instruct the Parties to engage in *inter partes* discussions concerning the Proposed Framework,²⁰⁹ the Pre-Trial Judge notes that, while the SPO, Victims' Counsel and several Defence teams indicate that they are, in principle, open to *inter partes* discussions, their respective positions remain far apart.²¹⁰ Accordingly, the Pre-Trial Judge considers it necessary to issue a decision on the SPO Submissions and, for this reason, rejects the Defence's request.

113. Having made these clarifications, the Pre-Trial Judge will, in what follows, address: (i) the legal basis and scope of the Proposed Framework; (ii) the Defence arguments regarding the implications of the Proposed Framework for the right to a fair trial; and (iii) the specific aspects of the Proposed Framework that have not been addressed in the discussion regarding the aforementioned matters and that either are subject to dispute or require additional consideration.

²⁰⁶ SPO Further Response, paras 5-6.

²⁰⁷ 22 February 2022 Transcript, pp. 979-980, 1038-1039, 1043.

²⁰⁸ Thaçi Response, para. 33; Selimi Response, paras 45-46; Veseli Response, para. 31.

²⁰⁹ Krasniqi Response, paras 4-5, 8, 24; Veseli Response, paras 4, 34-35.

²¹⁰ 22 February 2022 Transcript, pp. 970, 980, 1036-1037.

1. Legal Basis and Scope

114. The SPO asserts that the Proposed Framework: (i) is based on Articles 21(4), 23, 35, 38, and 39(1), (3), (11) and (13) of the Law, Rules 80, 82, 83 and 95(2) of the Rules, and Articles 6, 12, 14 and 17 of the Code of Conduct; and (ii) extends to all witnesses included in the SPO List of Witnesses.²¹¹ The Defence conversely contends that: (i) there is either no legal basis for the Proposed Framework or that the SPO relies on Rule 80 of the Rules in relation thereto; and/or (ii) the Proposed Framework should either be rejected or confined to (dual-status) witnesses in respect of whom protective measures under Rule 80 of the Rules have been authorised.²¹² Accordingly, the Pre-Trial Judge will, before all else, determine the legal basis and the scope of the Proposed Framework.

115. Pursuant to Article 35(2)(f) of the Law, the SPO has the authority and responsibility to request that necessary measures be taken to ensure the confidentiality of information, the protection of any person or the preservation of evidence. In addition, the Pre-Trial Judge has the powers and functions to make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial under Article 39(1) of the Law, and to provide for the protection and privacy of victims and witnesses, and the preservation of evidence under Article 39(11) of the Law. In the view of the Pre-Trial Judge, these provisions provide the legal basis for ordering general measures regarding the handling of confidential information and the regulation of contacts with witnesses as further established below.

²¹¹ SPO Submissions, paras 1, 3, 4, 6, 7; 22 February 2022 Transcript, pp. 965-967, 969-970, 973, 1040-1042.

²¹² Thaçi Response, paras 3, 13, 24, 25; Selimi Response, paras 2, 7, 17-21; Krasniqi Response, paras 7, 11, 14; Veseli Response, para. 15; 22 February 2022 Transcript, pp. 986-987, 1001-1002, 1003, 1006-1008, 1013-1018, 1026-1030, 1033, 1053-1056, 1060, 1061-1062.

(a) Functions of the Proposed Framework

(i) Protection

116. The Proposed Framework ensures the protection of witnesses by defining the appropriate procedure for contacts between the Defence and the witnesses included in the SPO List of Witnesses and other notified witnesses²¹³ and by permitting the witnesses to seek assistance regarding such contacts. Since the Defence raises arguments in relation to their contacts with SPO witnesses, the present decision addresses the Proposed Framework particularly in relation to the Defence. However, as the protection of witnesses concerns, in principle, all witnesses, this Proposed Framework will apply to all witnesses in this case and their contacts with the non-calling Parties and participants.

117. In this regard, the Pre-Trial Judge considers that any protective measures ordered pursuant to Rule 80 of the Rules do not exhaust the more general responsibility of the SPO and the function of the Pre-Trial Judge to ensure the protection of witnesses under Article 39(11) of the Law. This provision stipulates that the Pre-Trial Judge may provide for the protection and privacy of witnesses “where necessary”, thus expressly establishing that this function involves the exercise of judicial discretion. As such, the Proposed Framework, is not an indirect request for additional or new measures pursuant to the Rule 80 of the Rules.

118. The Pre-Trial Judge recalls that it has been repeatedly established that there is a climate of witness intimidation and interference in connection with criminal proceedings regarding former members of the KLA,²¹⁴ and that the Accused in the present case, who were high-ranking members of the KLA and occupied other influential positions, continue to exercise significant influence.²¹⁵ The Proposed

²¹³ See paragraphs 183-185 below.

²¹⁴ See also KSC-BC-2020-07, F00611, Trial Panel II, Trial Judgment, 18 May 2022, confidential, with Annexes 1-3, public, paras 576-578 (a public redacted version was issued on the same day, F00611/RED).

²¹⁵ See for instance KSC-BC-2020-06, F00818, Pre-Trial Judge, *Decision on Periodic Review of Detention of Hashim Thaçi*, 26 May 2022, confidential, paras 37, 45 (a public redacted version was filed on 8 June 2022,

Framework serves to ensure that, in these circumstances, contacts between the Defence and the witnesses included in the SPO List of Witnesses and other notified witnesses are appropriately regulated. This is all the more so in light of the fact that individualised protective measures that have been ordered for a significant number of witnesses in the present proceedings. Therefore, the Proposed Framework also provides for an appropriate degree of protection for these individuals following or upon the expiry of these measures in light of the climate of interference coupled with the Accused's continued influence.

119. Furthermore, it is of particular importance that the Proposed Framework only applies upon the witness's request and that, as will be established below, the possibility of the SPO overriding the witness's preference is subject to judicial overview. These safeguards ensure that the protection provided by the Proposed Framework will exclusively be extended to those who themselves seek to invoke it.

120. The Defence argues, in particular, that (high-ranking) international witnesses or those not otherwise at risk should be excluded from the Proposed Framework.²¹⁶ However, the mere fact that a witness has not expressed any fear so far or that he or she has an international profile and/or occupied a high-ranking position does not, as such, establish that he or she should not be allowed to request the protection under the terms of the Proposed Framework in light of the aforementioned considerations. In addition, a significant number of the international witnesses included in the SPO List of Witnesses, in fact, did not

F00818/RED); F00819, Pre-Trial Judge, *Decision on Periodic Review of Detention of Kadri Veseli*, 26 May 2022, confidential, paras 27, 33 (a public redacted version was issued on 8 June 2022, F00819/RED); F00801, Pre-Trial Judge, *Decision on Periodic Review of Detention of Jakup Krasniqi*, 13 May 2022, strictly confidential and *ex parte*, paras 42, 50 (a confidential redacted version and a public redacted version were issued on 13 May 2022 and 24 May 2022 respectively, F00801/CONF/RED and F00801/RED); F00802, Pre-Trial Judge, *Decision on Periodic Review of Detention of Rexhep Selimi*, 13 May 2022, confidential, paras 27, 32 (a public redacted version was issued on 24 May 2022, F00802/RED).

²¹⁶ Thaçi Response, paras 29-30; Krasniqi Response, para. 14; Veseli Response, paras 26-28; 22 February 2022 Transcript, pp. 983-985, 1003, 1017, 1028-1030.

occupy high-ranking positions at the relevant time. In these circumstances, the Proposed Framework provides a degree of protection that is commensurate to the established security issues in the present case, as counterbalanced by appropriate safeguards.

(ii) Privacy

121. Furthermore, the Proposed Framework additionally upholds the privacy of all witnesses included in the SPO List of Witnesses and other notified witnesses. In this regard, the Pre-Trial Judge observes that Article 39(11) of the Law is not confined to ensuring the protection of witnesses but extends to their privacy as well. The scope of this provision, hence, falls in line with the primary provision on the protection of witnesses, namely Article 23(1) of the Law, which defines the protected values in open-ended terms (“including their safety, physical and psychological well-being, dignity and privacy”) and sets a non-exhaustive list of protective measures (“[s]uch 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”).

122. Rule 30(2)(b) of the Rules stipulates that, during an investigation, the Specialist Prosecutor shall, *inter alia*, ensure the protection of the privacy of any person. The questioning of individuals by the SPO, in particular those alleging to have been the victim of crimes and those suspected of having committed crimes within the jurisdiction of the SC, may, namely, reveal personal information, as well as sensitive information as to alleged criminal activity with or without a connection to the present case. Individuals who have provided information for potential use in the present proceedings after having been questioned by the SPO are, therefore, entitled to a reasonable expectation of privacy from the SPO in

connection with such information. At the same time, this expectation must be balanced against the Accused's right to a fair trial.

123. Accordingly, the Proposed Framework, by providing that contacts between the witnesses and the Defence are initiated through the SPO and defining the role of the SPO in any subsequent interview conducted by the Defence, ensures that the witnesses' expectation of privacy remains directed towards the SPO and guarantees that any limitation of their privacy serves the legitimate aim of permitting the exercise of the Accused's right to a fair trial.

(iii) Preserving Evidence

124. The Proposed Framework additionally enables the preservation of evidence by establishing a transparent and accessible record in relation to interviews conducted by the Defence with witnesses included in the SPO List of Witnesses and other notified witnesses and in relation to interviews conducted by the SPO with witnesses included in the Defence lists of witnesses. In view of the established risks of disclosing certain information to the Defence relating to witnesses benefitting from protective measures under Rule 80 of the Rules as well as the climate of interference, such a record assists in assessing any allegations of interference.

(iv) Expeditious Conduct Proceedings

125. Lastly, considering that the handling of confidential information during investigations and contacts with witnesses to be called by the opposing Party have not been specifically regulated in the applicable legal texts of the SC, the Proposed Framework contributes to the expeditious conduct of the proceedings by concretising the obligations of the Parties and participants, laying down a

predictable and consistent procedure to be followed, and clarifying the roles and responsibilities of all sections and organs of the SC involved.

(b) ICC Protocol

126. The Pre-Trial Judge further considers that the foregoing interpretation of the SC legal framework is supported by the ICC Protocol. The reason is that, contrary to the ICTY, ICTR and STL, the ICC Protocol is grounded in a nearly identical legal basis. The combined application of Article 57(3)(c) of the Rome Statute - empowering the Pre-Trial Chamber to, *inter alia*, provide for the protection and privacy of victims and witnesses and the preservation of evidence - and Article 68(1) of the Rome Statute - establishing the Court-wide obligation to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses - reveals that the ICC Protocol similarly extends beyond the application of protective measures under the ICC's legal framework.²¹⁷ This is confirmed by the proclaimed purpose of the ICC Protocol, namely to protect the

²¹⁷ See also Guariglia, F. and Hochmayr, G., "Article 57. Functions and Powers of the Pre-Trial Chamber" in Triffterer, O. and Ambos, K. (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Beck/Hart 2022, p. 1703 ("[a] comparison with the wording of subparagraphs (a) and (b) [of Article 57(3) of the Rome Statute], which require a request of the Prosecutor respectively of the defence, coupled with the use of the words 'where necessary' suggests that the Pre-Trial Chamber may apply at least some of these functions *ex officio*"); Donat Cattin, D., "Article 68. Protection of Victims and Witnesses and their Participation in the Proceedings" in Triffterer O. and Ambos K. (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Beck/Hart 2022, pp. 2010-2011 ("[a]ppropriate measures shall be interpreted, *inter alia*, as entailing all those enlisted in Rules 87 (*Protective measures*), 88 (*Special measures*) and 112(4) (*Recording of questioning in particular cases*) of the Rules of Procedure and Evidence, in Regulations 21, 41, 42 and 101 of the Regulations of the Court, and in Regulations 79 and 100 of the Regulations of the Registry, as well as any other arrangement that may be made through innovative technology or building upon methods of victims' protection experimented in domestic justice systems. The open-ended character of the provision on appropriate measures is reinforced by the recognition in the paragraph of a series of individuals' rights to be protected, each of them covering a wide spectrum of situations. *Safety, physical and psychological well-being, privacy* and, in particular, *dignity* of the individual victim or witness cover all areas of inalienable human rights defined in international and domestic legal instruments" [emphases in original]).

safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations.²¹⁸

127. In these circumstances, the Pre-Trial Judge, while mindful of the relevant distinctions, considers that, in general, the ICC Protocol provides adequate guidance in relation to the Proposed Framework, subject to any required modifications arising from the specificities of the present proceedings.

(c) Defence Arguments

128. In the view of the Pre-Trial Judge, the preceding conclusions are not affected by the Defence's remaining arguments.

129. First, the Defence submits that it may be reasonably expected that the Proposed Framework would have been foreseen in the applicable texts as the minimum guarantees accorded to the Accused under Article 21(4) of the Law may only be limited by law.²¹⁹ Whereas the question whether the Proposed Framework is compatible with the Accused's right to a fair trial will be addressed in more detail below, the Pre-Trial Judge recalls that it has been determined that the Proposed Framework has a specific basis in the Law. In addition, similarly to other framework decisions,²²⁰ the Pre-Trial Judge retains the authority to concretise certain procedures that have not been explicitly regulated in the Law or Rules. In these circumstances, the fact that the legal texts do not explicitly provide for the Proposed Framework is of no consequence.

130. Second, the Pre-Trial Judge considers that the Defence's argument that the existing SC legal framework obviates the need for the Proposed Framework fails.²²¹

²¹⁸ [ICC Protocol](#), para. 1.

²¹⁹ Veseli Response, para. 14.

²²⁰ See for instance KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public; F00159, *Framework Decision on Victims' Applications*, 4 January 2021, public.

²²¹ Krasniqi Response, para. 9; Veseli Response, paras 16-17.

Insofar as these arguments are based on the Code of Conduct or similar undertakings,²²² Article 3(1) of the Code of Conduct expressly stipulates that it shall be interpreted and applied in a manner consistent with the Constitution, the Law and the Rules. Similar undertakings cannot *a fortiori* be invoked to deviate from the aforementioned sources. It is, therefore, appropriate to specify the obligations of the Parties and participants in the areas under consideration on the basis of the prevailing sources of law in the context of the present proceedings. In addition and more generally, it is of fundamental importance to ensure that the rights and obligations of the Parties and participants in relation to these matters are sufficiently well-defined given their importance.

131. Third, the Pre-Trial Judge is not persuaded by the Defence's assertions that: (i) the Gucati and Haradinaj Order is inapplicable; (ii) (a variation of) the Proposed Framework has neither been adopted in other cases before the SC nor by the ICTY, ICTR and/or STL; and/or (iii) the latter Tribunals have only adopted certain restrictions regarding interviews with witnesses in the context of applications for protective measures.²²³ The approaches adopted in other SC proceedings and/or other Tribunals are specific to the situations addressed before those Tribunals and do not, as such, invalidate the conclusion that the SC legal framework allows for the adoption of such a Framework. This is all the more so since, as mentioned, the protection of witnesses under Article 39(11) of the Law entails the exercise of the Pre-Trial Judge's discretion.

132. Fourth, with regard to the Defence's contention that the decision as to the adoption of the Proposed Framework should be taken by a Trial Panel,²²⁴ the Pre-Trial Judge considers that such a deferral would be contrary to the need to

²²² Thaçi Response, para. 36; Selimi Response, paras 3, 26-33; Krasniqi Response, para. 9; Thaçi Further Response, para. 9.

²²³ Thaçi Response, paras 25-28; Selimi Response, paras 22-23; Krasniqi Response, paras 6, 12-13; Veseli Response, paras 6-12; 22 February 2022 Transcript, pp. 1009-1010, 1036.

²²⁴ Krasniqi Response, paras 6, 10.

ensure that the case is prepared properly and expeditiously for trial under Article 39(1) of the Law in view of the fact that names of witnesses, including a number of protected witnesses, have already been revealed to the Defence and the Defence, by its own admission, has already started investigating.²²⁵

133. Fifth, the Pre-Trial Judge is of the view that the Defence's argument that witnesses do not belong to the SPO is beside the point.²²⁶ The Defence invokes a decision of the ICTY relating to a request by a defence team to be granted access to the contact details of individuals that the ICTY prosecution decided not to call as witnesses,²²⁷ which is not the case in the present proceedings. More generally, the relevant question is whether Articles 35(2)(f) and 39(1) and (11) of the Law provide the basis for ordering the Proposed Framework and, as such, the existence of absence of a proprietary interest in a witness is not determinative.

134. Lastly, the Defence's opposition to the ICC Protocol is to no avail. The terms of the ICC Protocol do not contain any indication that it was purposefully designed to function only in cases of a smaller size compared to the present case or in the context of ongoing armed conflict and not, alike the present case, after the end of a conflict.²²⁸ Furthermore, the Defence's assertion that the ICC is not bound by the ECHR is not fully accurate considering that the interpretation and application of its applicable law must be consistent with internationally recognised human rights pursuant to Article 21(3) of the Rome Statute.²²⁹ In addition, in arguing that the ICC Protocol functions in the context of a legal system

²²⁵ Krasniqi Response, para. 9; 22 February 2022 Transcript, pp. 985, 1020.

²²⁶ Thaçi Response, para. 12; Selimi Response, paras 35-36; Krasniqi Response, para. 12; 22 February 2022 Transcript, pp. 983, 1009-1010, 1036.

²²⁷ ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-3211-T, [Decision on Milan Lukic's Motion to Compel Disclosure of Contact Information and on the Prosecution's Urgent Motion to Compel Production of Contact Information](#), 30 March 2009, paras 23-24.

²²⁸ 22 February 2022 Transcript, pp. 1008-1009, 1035-1036.

²²⁹ 22 February 2022 Transcript, pp. 992, 993, 994-995. *See*, in particular, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge of the Jurisdiction to the Court Pursuant to Article 19\(2\) of the Statute of 3 October 2006](#), 14 December 2006, para. 37.

in which there is an alleged proprietary interest in witnesses,²³⁰ the Defence ignores that the ICC has explicitly found that witnesses do not belong to a Party.²³¹ In any event, as mentioned, this consideration is of no consequence.

(d) Conclusion

135. In conclusion, the Pre-Trial Judge finds that the Proposed Framework: (i) is anchored in the combined effect of Articles 35(2)(f) and 39(1) and (11) of the Law; and (ii) extends to all witnesses included in the SPO List of Witnesses and other notified witnesses as well as *vice versa* in the event that the Defence would decide to put forward a case.

136. It follows that the Proposed Framework does not amount, in effect, to a request for either additional or new protective measures under Rule 80 of the Rules in respect of witnesses already benefiting from such measures, or a blanket protective measure in relation to all witnesses included in the SPO List of Witnesses and any other notified witnesses on the basis of the same Rule. This conclusion further entails that there is no basis for limiting the scope of the Proposed Framework to witnesses in respect of whom measures under Rule 80 of the Rules have been authorised.

²³⁰ 22 February 2022 Transcript, pp. 1009-1010.

²³¹ See, for example, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1049, Trial Chamber I, [Decision Regarding the Practices Used to prepare and Familiarise Witnesses for Giving Testimony at Trial](#), 30 November 2007, para. 34; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-428-Corr, Pre-Trial Chamber I, [Corrigendum in the Decision on 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, para. 30; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-38, Pre-Trial Chamber II, [Decision on Variation of Summons Conditions](#), 4 April 2011, para. 10.

2. Right to a Fair Trial

137. Notwithstanding the conclusion that the Proposed Framework enjoys a basis in the Law and serves the purposes set out above, the Pre-Trial Judge is cognisant of the fact that it must also comply with the rights of the Accused under Article 21 of the Law and international human rights law pursuant to Article 3(2)(e) of the Law.²³² Accordingly, the Pre-Trial Judge turns to the arguments of the Defence alleging that the Proposed Framework violates a number of components of the right to a fair trial.

(a) Equality of Arms

138. The ECtHR has found that, under the principle of equality of arms, 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.²³³ The Defence makes a number of submissions on the basis of this principle.

139. First, the Defence asserts that, even though witnesses do not belong to the SPO, the SPO has been able to conduct interviews with witnesses without the presence of Defence representatives, whereas the Defence would not be in the same position given that it cannot interview the witnesses included in the SPO List of Witnesses in the absence of SPO representatives.²³⁴

140. In the view of the Pre-Trial Judge, this assertion misconstrues the Law insofar as the responsibilities of the SPO and the Defence are concerned. As reflected in Article 1(2) of the Law, the allegations connected to the Council of Europe Report have been investigated by the Special Investigative Task Force (“SITF”). The SPO

²³² See Selimi Response, paras 6-9.

²³³ ECtHR, *Foucher v. France*, no. 22209/43, [Judgment](#), 18 March 1997, para. 34; *Öcalan v. Turkey [GC]*, no. 46221/99, [Judgment](#), 12 May 2005, para. 140.

²³⁴ Thaçi Response, paras 12, 17; Selimi Response, paras 11-13, 35-37; Krasniqi Response, paras 12, 23; Veseli Response, paras 20-21; 22 February 2022 Transcript, p. 987.

has taken over the mandate of the SITF pursuant to Article 24(2) of the Law and is responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the SC under Articles 35(1) and 38(1) of the Law. This mandate, especially during the time that it was executed by the SITF, necessarily contains general elements in that it also covers the allegations connected to the Council of Europe Report taken as a whole. As is implicit from Articles 21(4)(e), 38(4) and 39(1)-(4) of the Law, the responsibilities of the Defence are inherently limited to a particular case and are primarily put into effect following the confirmation of an indictment against a specific accused. On the basis of this distribution of responsibilities, it cannot be maintained that the Defence should have been afforded an opportunity to be present during interviews with witnesses in the context of the investigations of the SITF and/or SPO. By the same token, the fact that Defence investigations are, generally speaking, of a more limited scope is of no consequence in this respect.²³⁵

141. The fact that witnesses do or do not belong to a specific Party does not affect the preceding conclusion. In this regard, the primary consideration is that, for the reasons set out above, the Proposed Framework serves, *inter alia*, to protect witnesses and uphold their privacy. As a result, the presence or absence of a proprietary interest in witnesses cannot support the claim that, under the principle of equality of arms, the Defence should necessarily be permitted to interview witnesses included in the SPO List of Witnesses and other notified witnesses on its own.

142. The Pre-Trial Judge observes that, in connection with this argument, the Defence also avers that the integrity of the system was maligned because the Defence was not present during SPO interviews with witnesses, and that the SPO is able to classify likely Defence witnesses as potential SPO witnesses in order to

²³⁵ Selimi Response, para. 14.

ensure that it will be present for Defence interviews.²³⁶ However, in the absence of specific and concrete indications to the contrary, the Pre-Trial Judge finds that, for the purposes of the present decision, any suggestions of inappropriate conduct or motives on the part of the SPO are unsubstantiated or speculative.²³⁷

143. Second, the Defence contends that the involvement of the SPO in seeking the consent of a witness to be interviewed and the presence of the SPO during Defence interviews with witnesses will have a chilling effect.²³⁸ The Pre-Trial Judge considers that the hypothetical concerns raised by the Defence do not call into question the conclusion that, on the basis of the aforementioned considerations, the Proposed Framework permits the SPO to attend Defence interviews with witnesses included in the SPO List of Witnesses and other notified witnesses.²³⁹ As reflected in the Proposed Framework, the SPO shall act in good faith and, should there be a concrete and substantial reason to consider that that is not the case, the Defence may apply for appropriate relief to the Pre-Trial Judge or Trial Panel.

144. Lastly, as to the contention that the Proposed Framework exclusively targets the Defence,²⁴⁰ the Pre-Trial Judge finds that the Defence's general reference to the burden of proof is incapable of establishing that the Proposed Framework is directed at the Defence. The principle that the SPO carries the burden of proof is not in question and the Proposed Framework cannot be interpreted as shifting this burden. As such, this principle does not prevent measures of the nature and for the purpose specified in the Proposed Framework from being adopted. More

²³⁶ Thaçi Response, para. 17; Selimi Response, para. 11; Krasniqi Response, para. 23; 22 February 2022 Transcript, pp. 981-982, 1047-1048.

²³⁷ In this context, the Pre-Trial Judge notes that the Thaçi Defence has already requested specific remedies in connection with its arguments regarding the SPO's interview with Mr Everts, *see* F00724, Specialist Counsel, *Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material*, 7 March 2022, confidential (a public redacted version was submitted on 29 March 2022, F00724/RED).

²³⁸ Thaçi Response, para. 33; Selimi Response, paras 38-39; Veseli Response, para. 33; 22 February 2022 Transcript, pp. 1023, 1030, 1033.

²³⁹ *Similarly* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Interview of Defence Witnesses by the Prosecution](#), 8 November 2012, para. 14.

²⁴⁰ Selimi Response, paras 14, 16; 22 February 2022 Transcript, pp. 1018-1022.

importantly, the Pre-Trial Judge is of the view that the Proposed Framework is phrased in general terms and, as a consequence, it would equally apply to SPO interviews with Defence witnesses in the event that the Defence would decide to put forward a case. Therefore, the Proposed Framework is designed to function without distinction in respect of the matters under consideration in comparable circumstances. For these reasons, it cannot be said to be exclusively directed at a particular Party so as to lead to the conclusion that it violates the principle of equality of arms.

145. In light of the preceding considerations, the Pre-Trial Judge concludes that the Defence will not be denied a reasonable opportunity to present its case under conditions that do not place it at a disadvantage vis-à-vis the SPO as a result of the adoption and application of the Proposed Framework.

(b) Privilege against Self-Incrimination and Related Rights

146. According to 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.²⁴¹ It has further clarified that, 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 which any material so obtained is put.²⁴²

²⁴¹ ECtHR, *Bykov v. Russia* [GC], no. 4378/02, [Judgment](#), 10 March 2009, para. 92 (“ECtHR, *Bykov v. Russia* [GC]”).

²⁴² ECtHR, *Bykov v. Russia* [GC], para. 92.

(i) Balancing Fair Trial Rights

147. The Defence submits that, despite the limitations attaching to the disclosure of materials by the Defence, the presence of the SPO and the requirement of recording the interview puts the Accused in the position of, on the one hand, taking the risk of asking questions and producing more incriminating evidence against himself for use by the SPO in violation of the right not to incriminate himself or, on the other hand, giving up other fair trial rights, including the rights to thoroughly prepare a defence, counsel, and cross-examination.²⁴³

148. At the outset, the Pre-Trial Judge observes that, in this context, the Thaçi Defence invokes, *inter alia*, the right to counsel, including the right to investigate as emanating from that right, pursuant to Article 6 of the ECHR.²⁴⁴ However, under the relevant component of Article 6(3)(c) of the ECHR, the ECtHR, whilst also having discussed “the whole range of services specifically associated with legal assistance” in assessing the fairness of the proceedings as a whole, has primarily considered issues regarding the right to access to a lawyer.²⁴⁵ Indeed, in the precedent invoked by the Thaçi Defence, the ECtHR found a violation of Article 6(1) and (3)(c) of the ECHR on account of a systematic restriction regarding legal assistance in police custody,²⁴⁶ a situation inapplicable to the present proceedings. Accordingly, this aspect of the Defence’s argument rather implicates Article 6(3)(b) of the ECHR. This provision, which gives a “non-exhaustive list” of “[t]he rights of Defence” pertaining to the time and facilities required to prepare a defence, establishes that “[t]he accused must have the opportunity to organise his defence in an appropriate way and without restriction

²⁴³ Thaçi Response, paras 2, 18-23; Selimi Response, paras 40-41, 47-49; Krasniqi Response, para. 23; Veseli Response, para. 22; 22 February 2022 Transcript, pp. 987-988, 995-996, 1018, 1023-1024, 1032, 1051-1052.

²⁴⁴ 22 February 2022 Transcript, pp. 994, 995.

²⁴⁵ See for instance ECtHR, *Beuze v. Belgium [GC]*, no. 71409/10, [Judgment](#), 9 November 2018, paras 131-136.

²⁴⁶ ECtHR, *Dayanan v. Turkey*, no. 7377/03, [Judgment](#), 13 October 2009, paras 33-34.

as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings".²⁴⁷

149. Therefore, the Pre-Trial Judge will assess whether, under the Proposed Framework, the exercise of the rights protected within the latter meaning of Article 6(3)(b) of the ECHR and Article 6(3)(d) of the ECHR contravenes the privilege against self-incrimination.

150. In relation to the nature and degree of the alleged compulsion, the Pre-Trial Judge observes that the Proposed Framework does not contain any elements directly requiring the Accused to make incriminatory statements against themselves.²⁴⁸ In addition, the Defence remains at liberty to define its strategy in accordance with its assessment as to the best interests of the Accused during interviews with witnesses included in the SPO List of Witnesses and other notified witnesses and, therefore, any information so revealed does not result from compulsion. This is all the more so considering that the Proposed Framework does not otherwise affect the Defence's right to investigate either matters relating to witnesses included in the SPO List of Witnesses and other notified witnesses by other means or matters not connected with such witnesses, including the possibility of interviewing individuals not included therein. On the basis of the totality of the information collected, the Defence retains the right to, ultimately, cross-examine witnesses included in the SPO List of Witnesses and other notified witnesses. The ICC decision invoked by the Defence concerns a request to produce

²⁴⁷ ECtHR, *Mayzit v. Russia*, no. 63378/00, [Judgment](#), 20 January 2005 ("ECtHR, *Mayzit v. Russia*"), paras 78-79. See also ECmHR, *Can v. Austria*, no. 9300/81, [Report of the Commission](#), 12 July 1984 ("ECmHR, *Can v. Austria*"), para. 54 ("Unlike Art 6(3)(b) [the guarantee set forth in Article 6(3)(c) of the ECHR] is not especially tied to considerations relating to the preparation of the trial, but gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings").

²⁴⁸ ECtHR, *O'Halloran and Francis v. The United Kingdom [GC]*, no. 15809/02 25624/02, [Judgment](#), 29 June 2007, para. 53.

prior statements provided by Defence witnesses in connected proceedings and is, as such, distinguishable from the circumstances outlined above.²⁴⁹

151. Furthermore, the Pre-Trial Judge notes the safeguards included in the Proposed Framework. In particular, the SPO must act in good faith and, in addition, the possibility of the SPO attending an interview against the wishes of a witness and any admission of information arising from Defence interviews with witnesses included in the SPO List of Witnesses and other notified witnesses is contingent upon judicial authorisation. Moreover, the Parties' general prerogative to seek a remedy under the legal framework of the SC is not affected by the Proposed Framework.

152. The Pre-Trial Judge has also taken note of the limited use to which the information under consideration is put. The general principle enunciated in the Proposed Framework is that any information the Defence elects to reveal during interviews with witnesses included in the SPO List of Witnesses and other notified witnesses does not become part of the record. The only deviations permitted by the Proposed Framework require, as mentioned, judicial authorisation.

153. Lastly, the ICC Protocol provides further guidance for this conclusion considering that it explicitly foresees the possibility of the opposing Party attending the interview and the requirement of video-recording.²⁵⁰

154. Accordingly, the exercise of the Defence's rights protected under Article 6(3)(b) and (e) of the ECHR pursuant to the terms defined by the Proposed Framework does not, as such, entail any form of compulsion in connection with the privilege against self-incrimination. Even if it would be considered *arguendo* that a certain degree of compulsion exists in this regard, the

²⁴⁹ *Thaçi Response*, para. 23, referring to ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-907, Trial Chamber VII, [Decision on Prosecution Request for Production of Evidence in Possession of the Defence](#), 15 April 2015, para. 14.

²⁵⁰ [ICC Protocol](#), paras 37, 40, 41.

Proposed Framework contains appropriate safeguards and expressly stipulates that, except in limited situations requiring judicial authorisation, any information arising from Defence interviews with witnesses included in the SPO List of Witnesses and other notified witnesses does not become part of the record. In these circumstances, the Pre-Trial Judge is of the opinion that the Proposed Framework does not extinguish the very essence of the privilege against self-incrimination.

(ii) Disclosure

155. In this context, the Pre-Trial Judge notes the Defence's related submissions to the effect that the Proposed Framework involves the disclosure of statements and notes by the Defence that otherwise would not have to be disclosed.²⁵¹

156. The Pre-Trial Judge understands the Defence to be specifically arguing, first, that Defence interviews conducted under the conditions defined by the Proposed Framework could entail the disclosure of information protected under Rule 106 of the Rules and/or information provided during privileged communications under Rule 111(1) of the Rules, including incriminatory information.

157. Rule 111(1)(b) of the Rules expressly stipulates that privileged information is not exempted from disclosure when it is voluntarily disclosed to a third party and that third party then gives evidence of that disclosure. This provision applies to "any third party" and, thus, encompasses individuals included in the SPO List of Witnesses and those excluded from that List. The Defence must, therefore, make the same evaluation as to what information it elects to reveal or conceal in relation to any individual it interviews during its investigation. There is, accordingly, no reason to consider that Rule 111(1)(b) of the Rules would not apply in relation to Defence interviews with witnesses under the terms of the Proposed Framework.

²⁵¹ Thaçi Response, paras 2, 18-20; 22 February 2022 Transcript, pp. 987-988, 992-993, 996-997, 998-999, 1032; 1047.

This is similar in relation to Rule 106 of the Rules. Although it does not contain an equivalent to Rule 111(1)(b) of the Rules, the Defence, while under no obligation to disclose material falling under Rule 106 of the Rules, may consider that revealing such information to a third party would be in the best interest of the Accused. Accordingly, considering that, as mentioned, the Defence remains at liberty to define a strategy in respect of interviews with witnesses included in the SPO List of Witnesses and other notified witnesses and that the remaining aspects of its investigations are not affected, the Pre-Trial Judge does not agree that the Proposed Framework, in effect, requires the Defence to disclose information in contravention of Rules 106 and 111(1) of the Rules.

158. The Pre-Trial Judge further understands that the Defence is, second, asserting that the Proposed Framework could violate Rule 104 of the Rules as the SPO could decide not to call a witness included in the SPO List of Witnesses following a Defence interview, which would require the Defence to call these witnesses while it is under no obligation to do so, thereby providing the SPO with a statement that it otherwise would not be entitled to have before the Defence case.²⁵²

159. The Pre-Trial Judge finds the Defence's assertion to be speculative and unsubstantiated. The inclusion of an individual in the SPO List of Witnesses denotes, at this stage of the proceedings, a clear intent on the part of the SPO to call such an individual as a witness at trial. In this regard, the Pre-Trial Judge reiterates that the SPO must act in good faith and, should that prove not to be the case, the Defence may submit a reasoned and substantiated application for any remedy it considers appropriate. This means that the Proposed Framework does not entail a violation of Rule 104 of the Rules.

160. For these reasons, the Pre-Trial Judge concludes that, under the Proposed Framework, there is no obligation for the Defence to, in effect, disclose material

²⁵² 22 February 2022 Transcript, pp. 996, 999, 1047; Selimi Response, paras 14, 48-49.

relating to interviews with witnesses included in the SPO List of Witnesses and other notified witnesses in contravention of the legal framework of the SPO, let alone incriminating statements contrary to the privilege against self-incrimination, or even to call witnesses contrary to the absence of a requirement to do so. Thus, it also cannot be concluded that the Proposed Framework extinguishes the very essence of the privilege against self-incrimination under Article 6(1) of the ECHR on this basis.

(iii) Articles 6(3)(b) and (d) of the ECHR

161. To the extent that the Defence is arguing that, instead of entailing a violation of the right not to incriminate oneself in view of the supposed trade-off between this right and other elements of the right to a fair trial, the Proposed Framework contravenes the rights under Article 6(3)(b) and (d) of the ECHR as such on account of the features discussed in relation to the presumption of innocence, the Pre-Trial Judge is also unable to agree to such a proposition.

162. The ECtHR has found that Article 6(3)(b) of the ECHR is violated if it “is made impossible” for the accused to 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.²⁵³ Any restrictions arising from the Proposed Framework do not reach this threshold. As mentioned, the Defence remains at liberty to define its strategy as to the matters it elects to reveal or conceal during interviews with witnesses included in the SPO List of Witnesses and other notified witnesses, otherwise conduct investigations, and ultimately cross-examine witnesses included in the SPO List of Witnesses at trial. In these circumstances, the exercise of the right protected under Article 6(3)(b) of the

²⁵³ ECtHR, [Mayzit v. Russia](#), para. 78; ECmHR, [Can v. Austria](#), para. 53.

ECHR under the conditions defined in the Proposed Framework is not made impossible.

163. In relation to Article 6(3)(d) of the ECHR, the ECtHR has held that this provision “enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument” and that “the rights of the defence [...], as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings”.²⁵⁴ In this regard, the Pre-Trial Judge considers that, as similarly found by the ICTY,²⁵⁵ no right to conduct pre-trial interviews with witnesses included in the SPO List of Witnesses and other notified witnesses is reflected in the legal framework of the SC or international human rights law, in particular Article 6(3)(d) of the ECHR. It is of critical importance that, as mentioned, the right to cross-examine such witnesses at trial is not in question. The Pre-Trial Judge takes note of the Defence’s reference to an ICTY decision emphasising the importance for the Defence to interview a purported prosecution witness before his or her testimony.²⁵⁶ However, that decision does not stand for the proposition that the Defence may conduct such interviews as of right since the ICTY Appeals Chamber held that the Defence was required to present reasons for doing so that go beyond the need to prepare an effective cross-examination.²⁵⁷ In addition, the ICTY decision is distinguishable as the Defence in the ICTY case under consideration was entirely foreclosed from conducting such interviews, whereas the Defence in this case is explicitly

²⁵⁴ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom [GC]*, no. 26766/05 and 22228/06, [Judgment](#), 15 December 2011, para. 118.

²⁵⁵ ICTY, *Prosecutor v. Kovačević*, IT-97-24, [Decision on Prosecution Motion to Protect Victims and Witnesses](#), 12 May 1998.

²⁵⁶ *Thaçi Response*, para. 19.

²⁵⁷ ICTY, *Prosecutor v. Halilović*, IT-01-48-AR73, [Decision on the Issuance of Subpoenas](#), 21 June 2004 (“[Halilović Subpoenas Decision](#)”), para. 15.

permitted to make such a request under the terms of the Proposed Framework.²⁵⁸ The Accused are, therefore, not denied an adequate and proper opportunity to challenge and question a witness against them on the basis of the Proposed Framework.

(c) Reasonable Time

164. According to the ECtHR, the reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment.²⁵⁹ It has further found that a fair balance has to be struck between expeditiousness and the proper administration of justice.²⁶⁰

165. The Defence avers that the Proposed Framework will significantly affect the Accused's right to be tried within a reasonable time as it will inevitably slow down the Defence investigations and significantly delay the start of trial.²⁶¹ In the view of the Pre-Trial Judge, the Defence fails to demonstrate that the Proposed Framework necessarily entails a violation of the Accused's right to be tried within a reasonable time considering that its effect on the overall assessment of the length of the proceedings cannot be determined at this stage of the proceedings. The Pre-Trial Judge has also taken into account that, as demonstrated above, the Proposed Framework contributes to the proper administration of justice, in particular in relation to the protection of witnesses in the context of the significant security issues affecting the present proceedings and the preservation of evidence.

²⁵⁸ [Halilović Subpoenas Decision](#), paras 12-15.

²⁵⁹ ECtHR, *Boddaert v. Belgium*, no. 12919/87, [Judgment](#), 12 October 1992 ("ECtHR, [Boddaert v. Belgium](#)"), para. 36.

²⁶⁰ ECtHR, [Boddaert v. Belgium](#), para. 39.

²⁶¹ Krasniqi Response, para. 15; Veseli Response, paras 2, 29-33; 22 February 2022 Transcript, pp. 1048, 1053.

(d) Presumption of Innocence

166. The ECtHR has determined that the presumption of innocence under Article 6(2) of the ECHR “requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged” and that “[i]t will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law”.²⁶²

167. The Defence is of the view that, in breach of the presumption of innocence, the Proposed Framework is based on the propositions that the Accused will wish to interfere with the course of justice through their counsel and that Defence counsel cannot be trusted, whereas Defence counsel have been accredited and no allegations have been levelled against the Defence regarding interviews conducted hitherto.²⁶³

168. In light of the Defence’s reference to interference with the course of justice, the Pre-Trial Judge understands the Defence to be arguing that the adoption of the Proposed Framework would violate the presumption of innocence in that it would reflect a preconceived idea or opinion that, in the absence of a judicial decision establishing the guilt of the Accused, they are guilty of offences defined in Article 15(2) of the Law in connection with their investigations regarding the charges of war crimes and crimes against humanity contained in the Confirmed Indictment.

169. Assuming that the Accused can benefit from the presumption of innocence considering that they have not been charged with offences under Article 15(2) of the Law and the Proposed Framework does not pre-determine their guilt in respect of the charges contained in the Confirmed Indictment, the Pre-Trial Judge

²⁶² ECtHR, *Barberà, Messegue and Jabardo v. Spain*, 10590/83, [Judgment](#), 6 December 1988, para. 77.

²⁶³ *Thaçi Response*, para. 31; 22 February 2022 Transcript, pp. 984-985, 990-991, 1000-1002, 1004-1006, 1044-1047, 1049-1051, 1058-1059.

recalls that, as mentioned, the Proposed Framework is, *inter alia*, grounded in the existence of a persistent climate of witness intimidation in relation to criminal proceedings against former KLA members. As such, the Proposed Framework does not reflect a preconceived idea or opinion that the Accused are guilty of offences under Article 15(2) of the Law. Therefore, the Pre-Trial Judge cannot discern a violation of the presumption of innocence.

170. The Defence's contention that it has not been accused of wrongdoing hitherto does not affect this finding. This is primarily because it has conducted a significant part of its interviews prior to the SPO List of Witnesses having been submitted and, in addition, the majority of the protective measures under Rule 80 of the Rules will only be lifted 30 days before the start of the trial or the witnesses' testimony. The Pre-Trial Judge further considers that the Defence's assertions regarding mistrust against Defence counsel and Defence counsel having been accredited are misplaced. Given that the Accused assert their rights of defence through counsel, the Proposed Framework must necessarily ensure that counsel act in accordance with the aforementioned findings regarding the risks faced by specified individuals and the climate of interference. This does not imply or presume that counsel have engaged or would engage in such activities in the absence of any specific indications to the contrary.

(e) Adequate Time and Facilities

171. According to the ECtHR, Article 6(3)(b) of the ECHR "guarantees the accused 'adequate time and facilities for the preparation of his defence' and therefore implies that the substantive defence activity on the accused's behalf may comprise everything which is 'necessary' to prepare the trial".²⁶⁴ It has further specified that, "[w]hen assessing whether the accused had adequate time for the preparation of

²⁶⁴ ECtHR, [Mayzit v. Russia](#), para. 78.

his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and the stage of the proceedings”.²⁶⁵ In addition, it has found that “the facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence”.²⁶⁶

172. The Defence argues that the Proposed Framework violates the Accused’s right to have adequate time and facilities to prepare for trial due to logistical challenges arising from the Proposed Framework, including the number of witnesses and the fact that they are located in different parts of the world, the Defence having only recently been disclosed sufficient material to commence its investigation, and the stringent interview conditions proposed by the SPO.²⁶⁷

173. The Pre-Trial Judge recalls that the charges against the Accused, involving ten counts of serious international crimes, are of the utmost gravity, and that it is alleged that they played a significant role in these crimes.²⁶⁸ Furthermore, the purported crimes extended over a lengthy period of time (from at least March 1998 through September 1999), covered a significant geographical area (numerous locations throughout Kosovo and different districts in northern Albania) and involved scores of victims.²⁶⁹ Furthermore, a particular challenge arises from the need to impose extensive protective measures for a significant number of witnesses due to the fact that the disclosure of their identity to the Defence involves an objectively justifiable risk to these individuals, as well as the persistent climate of witness intimidation regarding criminal proceedings against former KLA members. It is also significant that the Defence’s investigations are ongoing,

²⁶⁵ ECtHR, *Gregačević v. Croatia*, no. 58331/09, [Judgment](#), 10 July 2012, para. 51.

²⁶⁶ ECtHR, *Mayzit v. Russia*, para. 79.

²⁶⁷ *Thaçi Response*, paras 32-33; *Selimi Response*, para. 15; *Krasniqi Response*, para. 23; *Veseli Response*, paras 23-24; 22 February 2022 Transcript, pp. 990-991, 1048.

²⁶⁸ Confirmed Indictment, paras 1-9, 11-12, 32-52, 172-173.

²⁶⁹ Confirmed Indictment, paras 16, 18, 32, 57-171, Schedules A-C.

the case has not yet been transmitted to a Trial Panel, and the Defence's investigations may continue beyond the pre-trial stage.

174. In the view of the Pre-Trial Judge, whereas the Proposed Framework could have a certain effect on the time and facilities afforded to the Accused to prepare a defence, certain factors raised by the Defence are inherent to large-scale criminal proceedings pertaining to war crimes and crimes against humanity. The number of witnesses reflects the scale and complexity of the charges brought against the Accused, and the locations of the witnesses stem from either the involvement of witnesses with an international profile or the relocation of individuals following the conflict in question. Other factors result from the specificities of the legal framework of the SC and the present proceedings. The disclosure of material enabling a Defence investigation is not foreseen prior to the confirmation of an indictment and the initial appearance of an accused, and the conditions attaching to Defence interviews with witnesses included in the SPO List of Witnesses and other notified witnesses are a consequence of the aforementioned security considerations.

175. In addition, the Pre-Trial Judge notes that the SPO has amended the Proposed Framework by removing potential obstacles arising from extensive involvement by the Registry. Furthermore, some of the concerns raised by the Defence can be mitigated, in particular by conducting interviews jointly and/or employing audio-visual technology. The Defence is also not prevented from submitting a reasoned application for a remedy in respect of concrete and tangible issues arising in this context, including but not limited to requests for extensions of time.

176. Accordingly, the Pre-Trial Judge is of the view that, when balanced against the aforementioned considerations, the effect on the Accused's right to have adequate time and facilities to prepare a defence is not of such a nature so as to compel a finding that the adoption and application of the Proposed Framework at the present stage of the proceedings violates Article 6(3)(b) ECHR.

(f) Conclusion

177. In view of the foregoing, the Pre-Trial Judge concludes that the Proposed Framework does not violate the aforementioned fair trial rights of the Accused.

3. Specific Elements

178. The Pre-Trial Judge turns to the specific elements of the Proposed Framework that are contested by the Parties or participants insofar as they have not been addressed in connection with the legal basis and the Accused's fair trial rights.

179. At the outset, the Pre-Trial Judge declines to address the Defence's argument that the Proposed Framework does not use consistent definitions in view of the unconvincing nature of its assertion.²⁷⁰

(a) Confidential Information (Paragraph 5(a) SPO Submissions)

180. Paragraph 5(a) of the SPO Submissions stipulates that "[p]arties and participants are under a general obligation not to disclose to third parties any confidential information" and, in this respect, it is further specified that confidential information "shall mean any information contained in a document which is not classified as 'public' and which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Panel of the Court".²⁷¹ According to the Defence, all disclosed documents have been classified as confidential, whereas many of these documents emanate from public sources, are published online, do not relate to any SPO witnesses, and/or do not contain any confidential information.²⁷² It proposes to follow the ICC

²⁷⁰ Krasniqi Response, para. 22.

²⁷¹ SPO Submissions, para. 5(a), footnote 13.

²⁷² Thaçi Response, para. 39.

Protocol in making a distinction between “confidential document” and “confidential information”, and to adopt the articles of the ICC Protocol regulating the disclosure of confidential documents and information to third parties.²⁷³

181. The Pre-Trial Judge notes that the SPO has not provided any specific reasoning as to why the Proposed Framework, as currently formulated, imposes a near absolute ban on the use of confidential information. Furthermore, despite their classification, a number of disclosed documents contain information available in the public domain or not directly pertaining to confidential matters. This measure also exceeds the approach of the ICC Protocol regarding these matters. As such, it may disproportionately hamper investigations.

182. The Pre-Trial Judge is of the view that the distinction made between “confidential document” and “confidential information” in the ICC Protocol, which permits the use of information included in a confidential document that has otherwise been legitimately made public, and the safeguards incorporated into Articles 8 and 9 of the ICC Protocol, in particular the requirement allowing such disclosure only where directly and specifically necessary for the preparation and presentation of a Party’s case and limiting it to the portions of a document directly enabling that purpose, strike an appropriate balance between the aims of maintaining the need to protect the confidentiality of certain material and sufficiently enabling a Party to investigate. As a result, the Pre-Trial Judge grants the Defence’s request to amend the Proposed Framework on the basis of Articles 4(d)-(e) and 6-9 of the ICC Protocol.

(b) Definition Witness (Paragraph 5(b) SPO Submissions)

183. The Defence objects to the definition of a witness under paragraph 5(b) and footnote 14 of the SPO Submissions, which reads as follows: “[w]itness’ shall

²⁷³ Thaçi Response, paras 11, 40.

mean a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely, insofar as the intention of the party or participant is known or apparent to the opposing party”.²⁷⁴

184. The Pre-Trial Judge observes that the SPO primarily manifests its intention to call a witness to testify or to rely on his or her statement by means of the list of witnesses under Rule 95(4)(b) of the Rules. However, contrary to the Defence’s submission, the Rule 95(4)(b) List does not amount to a final notification.²⁷⁵ This is evidenced by the reference to “intends” in Rule 95(4)(b) of the Rules and the possibility of applying for an amendment of the Rule 95(4)(b) List under Rule 118(2) of the Rules. In these circumstances, a situation could arise in which the Defence seeks to interview a person not included in the Rule 95(4)(b) List, even though the SPO may intend to seek to amend its Rule 95(4)(b) List in relation to the person concerned and assesses that, in the meantime, the Proposed Framework should apply to the Defence interview. Therefore, for the present purposes, the definition of witness is, in principle, in line with the functions of the Proposed Framework insofar as it expresses the possibility of the SPO evidencing its intention to call a witness to testify or to rely on his or her statement other than by including the person in question in the Rule 95(4)(b) List.

185. At the same time, the Pre-Trial Judge considers that it is necessary to provide more guidance in this regard so as to avoid unduly expanding the purview of the Proposed Framework. Therefore, the reference to “insofar as the intention of the party or participant is known or apparent to the opposing party” shall be replaced by “insofar as the intention of the Party or participant has been notified to the opposing Party or participant”. For the same reasons, paragraph 6(a) of the SPO Submissions, which states, in the relevant part, that the intention of calling the witness to testify or relying on his or her statement must be “communicated” or

²⁷⁴ Thaçi Response, para. 10; Selimi Response, paras 24-25.

²⁷⁵ Selimi Response, para. 25.

be “otherwise clearly apparent”, shall be amended accordingly. Thus, the Pre-Trial Judge is unable to agree, as such, to the Defence’s objection to the definition of witness in paragraph 5(b) of the SPO Submissions, but decides to amend this definition as reflected above, together with paragraph 6(a) of the SPO Submissions.

(c) Disclosure Witness Identity (Paragraph 5(b) and (c) SPO Submissions)

186. In relation to paragraphs 5(b) and (c) of the SPO Submissions regulating the disclosure of the identity of a witness to a third party, the Defence avers that any such restrictions should not be so strict as to make disclosure impossible in practice, and that they should not apply to international figures and witnesses who have not been allocated any protective measures.²⁷⁶

187. At the outset, the Pre-Trial Judge has already determined that the Proposed Framework applies to witnesses included in the SPO List of Witnesses and other notified witnesses, including international witnesses. Therefore, this aspect of the Defence’s submission will not be addressed any further.

188. Furthermore, the Defence does not specify how paragraphs 5(b) and (c) of the SPO Submissions would render the disclosure of a witness’ identity to a third party impossible. In fact, these paragraphs, which correspond to Articles 11 and 12 of the ICC Protocol, explicitly permit such disclosure under certain conditions. These conditions, notably the need to inform or consult WPSO and the obligation to refrain from revealing the involvement of a witness with the activities of the SC or SPO or the nature of such involvement, fall in line with the protective functions of the Proposed Framework. As such, the Defence’s submission fails.

²⁷⁶ Thaçi Response, para. 41.

(d) Visual and/or Non-Textual Material (Paragraph 5(d) SPO Submissions)

189. The Defence submits that, if it was required to follow the requirements regarding the disclosure of visual and/or non-textual material as set out in paragraph 5(d) of the SPO Submissions, the likelihood is that it would be largely unable to show such material during its investigative activities.²⁷⁷

190. The Pre-Trial Judge observes that this measure, which is identical to Article 13 of the ICC Protocol, aims at reducing the risk of disclosing the involvement of the person depicted or otherwise reflected in the activities of the SC or SPO. Provided that no satisfactory alternative investigative avenue is available, it nevertheless permits the use of material depicting or otherwise identifying witnesses except to the extent that it contains elements tending to reveal the involvement of the person depicted in the activities of the SC or SPO. Therefore, this measure strikes an appropriate balance between the protective functions of the Proposed Framework and the Defence's investigative activities. Accordingly, the Defence's speculative assertion regarding the likelihood that it would be largely unable to show such material is devoid of merit.

(e) WPSO (Paragraphs 5(e) and (g) SPO Submissions)

191. In the view of the Defence, the obligations reflected in paragraphs 5(e) and (g) of the SPO Submissions, namely seeking the advice of WPSO when a Party or participant is in doubt as to whether the identity of a protective witness may be disclosed to a third party and informing WPSO when a Party or participant discovers breaches of confidential information respectively, must be rejected as too onerous, inefficient and unworkable in practice.²⁷⁸

²⁷⁷ Krasniqi Response, paras 16-17.

²⁷⁸ Krasniqi Response, paras 18-19.

192. The Pre-Trial Judge notes that the legitimate aim of paragraph 5(e) of the SPO Submissions is to uphold the identity of a protected witness during investigation and, in addition, it is circumscribed to cases of doubt. Similarly, paragraph 5(g) of the SPO Submissions functions to maintain confidential information only when a Party of participant itself wrongfully reveals such information or discovers that that has been done. Therefore, the Pre-Trial Judge considers that these measures, which correspond to Articles 14 and 26 of the ICC Protocol, do not disproportionately affect a Party's investigative activities. For these reasons, the Defence's arguments must be set aside.

(f) Contact with Witness (Paragraph 6(a) SPO Submissions)

193. Victims' Counsel is concerned that paragraph 6(a) of the SPO Submissions, to the extent that it stipulates that "parties and participants shall not contact or interview a witness of another party or participant", inadvertently undermines the principle of confidential, unimpeded and unconditional communication between Victims' Counsel and dual status witnesses.²⁷⁹ Victims' Counsel proposes the following addition to footnote 17 of the SPO Submissions: "but does not apply to contact between the Victims' Counsel Team and dual status witnesses".²⁸⁰ The SPO does not object to the proposed modification.²⁸¹

194. The Pre-Trial Judge agrees that, as currently formulated, footnote 17 of the SPO Submissions could be interpreted as impeding contact between Victims' Counsel, including his team, and dual status witnesses. Considering that dual status witnesses are persons who have been included in the SPO List of Witnesses and are represented by Victims' Counsel in their capacity as victims participating in the proceedings, it is appropriate to clarify this footnote along the

²⁷⁹ Victims' Counsel Response, paras 8-9.

²⁸⁰ Victims' Counsel Response, paras 8-9.

²⁸¹ SPO Further Response, footnote 11.

lines suggested by Victims' Counsel for the avoidance of doubt. In this regard, it is noted that protocols on dual status witnesses adopted by the ICC explicitly provide that "[t]he legal representative may contact his or her client if they are a victim with dual status".²⁸² In relation to this matter, the ICC has considered that "[t]he relationship between a client and his or her counsel inherently implies that a client must be able to freely contact his or her legal representative and *vice versa*".²⁸³ The Pre-Trial Judge, therefore, accepts Victims' Counsel's submission and decides to amend the Proposed Framework accordingly.

(g) Paragraph 6(b) SPO Submissions

(i) Notification

195. Victims' Counsel is of the view that the notification requirement under paragraph 6(b) of the SPO Submissions, which provides that an opposing Party or participant wishing to interview a witness of another Party or participant shall notify the calling Party and CMU at least ten days prior to the intended interview, should be extended to Victims' Counsel in relation to dual status witnesses.²⁸⁴

196. The Pre-Trial Judge agrees that, in view of the fact that the SPO dual status witnesses are persons included in the SPO List of Witnesses and represented by Victims' Counsel in their capacity as victims participating in the proceedings, it is appropriate to specifically clarify in the Proposed Framework that the notification requirement extends to Victims' Counsel. In this regard, it is noted that protocols

²⁸² See for instance ICC, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/20-618-Anx, Trial Chamber I, [Annex to the Decision Adopting a Dual Status Witness Protocol](#), 7 March 2022 ("[Ali Kushayb Dual Status Witness Protocol](#)"), para. 6.

²⁸³ ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-674, Trial Chamber X, [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 ("[Al Hassan Protocol Decision](#)"), para. 19.

²⁸⁴ 22 February 2022 Transcript, pp. 976-977.

on dual status witnesses adopted by the ICC explicitly lay down such a requirement.²⁸⁵ The Pre-Trial Judge, therefore, accepts Victims' Counsel's submission and decides to amend the Proposed Framework accordingly.

(ii) Presence Calling Party Irrespective of Witness' Preferences

197. The Defence opposes paragraph 6(b) of the SPO Submissions insofar as it stipulates that, "where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness, regardless of the witness's expressed preferences".²⁸⁶ The SPO avers that, ordinarily, a witness's waiver of the presence of the SPO will not be a sufficient basis for the interview to proceed without the SPO in light of the very real compulsion that witnesses will feel to accede to an interview without the SPO.²⁸⁷

198. In the view of the Pre-Trial Judge, the possibility of the SPO attending a Defence interview with a witness included in the SPO List of Witnesses and other notified witnesses irrespective of the witness' preference is, as such, an appropriate and necessary measure in the circumstances of the present case. If it were otherwise, the essential functions of the Proposed Framework, namely ensuring the protection and privacy of witnesses and preserving evidence, could be impaired. This is, in particular, the case in view of the concrete possibility of a witness feeling that he or she is pressured into indicating that he or she consents to proceed in the absence of the SPO on account of the climate of witness intimidation regarding criminal proceedings against former KLA members. Therefore, a mechanism must exist so as to determine whether there are legitimate reasons requiring the presence of the SPO irrespective of the witness' preferences,

²⁸⁵ See for instance [Ali Kushayb Dual Status Witness Protocol](#), para. 5(a).

²⁸⁶ Thaçi Response, para. 35; Selimi Response, para. 42; Krasniqi Response, para. 20.

²⁸⁷ SPO Further Response, para. 5(a); 22 February 2022 Transcript, pp. 974-975.

in particular in relation to any indications that the witness' consent to proceed without the SPO has not been validly provided.

199. The Defence's assertion that the SPO has not earned such a right is, in the view of the Pre-Trial Judge, not supported by any specific information. As to the contention that the ICC Protocol does not explicitly contain an equivalent provision, the Pre-Trial Judge is of the view that there is no indication that the ICC Protocol would necessarily prevent the ICC Prosecutor from making such an application on the basis of Article 3 of the ICC Protocol, which permits the parties to deviate from the ICC Protocol with prior judicial authorisation, or pursuant to the ICC Prosecutor's power to request that necessary measures be taken to ensure the protection of any person or the preservation of evidence with respect to investigations under Article 54(3)(f) of the Rome Statute.

200. Having said that, the Pre-Trial Judge finds that the SPO cannot claim an unlimited right to attend a Defence interview with a witness included in the SPO List of Witnesses and other notified witnesses irrespective of the witness' preference. In this regard, it is noted that, whereas the SPO initially submitted that "it may request the Panel to permit it to attend any meeting between the opposing party and the witness, regardless of the witness's expressed preferences",²⁸⁸ it subsequently asserted that "the presence of the opposing party [...] should be given as of right with only the possibility of the Chamber making an exception".²⁸⁹ The SPO has not provided any specific reasoning in support of its shift in position. In addition, such an unlimited right could entail significant implications, in particular denying the freely and validly expressed consent of a witness.

201. Having balanced the preceding considerations, the Pre-Trial Judge is of the view that the possibility of the SPO attending a Defence interview with a witness included in the SPO List of Witnesses and other notified witnesses irrespective of

²⁸⁸ SPO Submissions, para. 6(b).

²⁸⁹ 22 February 2022 Transcript, pp. 974-975.

the witness's preference requires prior judicial authorisation. Accordingly, in the event that a witness included in the SPO List of Witnesses and other notified witnesses consents to proceed in the absence of the SPO during an interview with the Defence, the SPO may present a reasoned and substantiated application demonstrating legitimate reasons to attend the interview against the witness' preferences. In the view of the Pre-Trial Judge, this is adequately expressed in paragraph 6(b) of the SPO Submissions, which provides, in the relevant part, that, "where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness, regardless of the witness's expressed preferences". For the sake of clarity, the Pre-Trial Judge adds that, if the calling Party seizes the Panel or indicates to the opposing Party that it shall do so, the opposing Party shall refrain from interviewing the witness until the Panel has issued its decision.

(iii) Presence Victims' Counsel

202. Victims' Counsel is of the view that, with regard to dual status witnesses, the Proposed Framework should consider the presence of Victims' Counsel, or other support, during the interview with the Defence if the witness so requests.²⁹⁰

203. According to the Pre-Trial Judge, dual status witnesses must, in view of their twofold role in the present proceedings, be afforded the opportunity to, besides the presence of the calling Party, request the presence of Victims' Counsel during an interview with the Defence. It is noted that the protocols on dual status witnesses adopted by the ICC expressly permit dual status witnesses to do so.²⁹¹

²⁹⁰ Victims' Counsel Further Response, paras 16-17; 22 February 2022 Transcript, pp. 976-978.

²⁹¹ See for instance [Ali Kushayb Dual Status Witness Protocol](#), para. 9. In this regard, Trial Chamber X of the ICC has found that, considering that all legal representatives are under an obligation to respect secrecy and confidentiality and to refrain from performing acts which may in any way jeopardise the

Accordingly, the Pre-Trial Judge grants the Victims' Counsel's request and decides to amend the Proposed Framework accordingly.

(h) Inadvertent Contact (Paragraph 6(c) SPO Submissions)

204. The Selimi Defence argues that paragraph 6(c) of the SPO Submissions, which relates to inadvertent contact with witnesses of an opposing Party or participant, should be restricted only to witnesses at risk.²⁹²

205. As the Pre-Trial Judge has already determined that the Proposed Framework applies to all included in the SPO List of Witnesses and other notified witnesses, this argument will not be addressed any further.

(i) Confidential Records (Paragraph 6(m) SPO Submissions)

206. The Defence argues that the SPO fails to justify the need for the interviewing Party to request leave of the Panel to show (strictly) confidential records other than the witness' own statements, as set out in paragraph 6(m) of the SPO Submissions, and that such a requirement will delay the proceedings.²⁹³

207. As with paragraph 5(a) of the SPO Submissions, the Pre-Trial Judge observes that the SPO has not proposed specific reasoning in support of such a far-reaching measure, which is also not contained in the ICC Protocol. Furthermore, having found that the use of confidential documents or information during investigations should be permitted under the conditions identified above, the Pre-Trial Judge is of the view that the Parties and participants must be enabled to proceed in the same manner during an interview with a witness *mutatis mutandis*. Therefore, the

proceedings before the Court, the presence of legal representatives or contact with them does not add any risks in conducting interviews with dual status witnesses, see [Al Hassan Protocol Decision](#), para. 20.

²⁹² Selimi Response, para. 43.

²⁹³ Krasniqi Defence, paras 20-21.

Pre-Trial Judge grants the Defence's request and decides to amend the Proposed Framework accordingly.

(j) Presence Registry (Paragraph 4(b)(ii) SPO Further Response)

208. Victims' Counsel submits that the Proposed Framework should be flexible as to the presence of the Registry during Defence interviews.²⁹⁴

209. The Pre-Trial Judge observes that the SPO Further Response stipulates that, "[i]n exceptional circumstances, a party or participant may apply to the Panel to additionally require the presence of Registry representative(s)".²⁹⁵ It is, therefore, not necessary to further amend the Proposed Framework in this respect.

4 Retroactive Effect

210. The SPO further requests the Pre-Trial Judge to specify that the Proposed Framework also applies to contacts that have already been initiated by the Defence with witnesses included in the SPO List of Witnesses, to order the Defence to report which SPO witnesses they have contacted and interviewed before the Proposed Framework was ordered, and to disclose any available records and recordings of those contacts and interviews.²⁹⁶

211. In the view of the Pre-Trial Judge, the SPO fails to identify any legal basis for its request to apply the Proposed Framework retroactively. In addition, while mindful that the risks faced by (potential) witnesses have been at issue since the initial stages of the present proceedings, the SPO has not identified specific reasons regarding any contacts the Defence has had hitherto with witnesses that

²⁹⁴ Victims' Counsel Further Response, para. 20; 22 February 2022 Transcript, pp. 979-980, 1043.

²⁹⁵ SPO Further Response, para. 5(a).

²⁹⁶ 22 February 2022 Transcript, pp. 970-971.

would justify the retroactive application of the Proposed Framework. In these circumstances, the Pre-Trial Judge rejects the SPO's request.

C. CONCLUSION

212. In light of the foregoing, the Pre-Trial Judge grants the SPO's request to adopt the Proposed Framework, subject to the modifications discussed in the preceding sections and additional modifications further arising therefrom that are required for the sake of precision. Accordingly, the Parties and participants shall comply with the following **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") in relation to any ongoing and forthcoming investigative activities and contacts with witnesses.

I. Handling of Confidential Information during Investigations

- a. Parties and participants are under a general obligation not to disclose to third parties²⁹⁷ any confidential documents or information.²⁹⁸ This Framework sets out the conditions and procedures in which the disclosure of confidential documents or information to third parties as part of investigative activities by a Party or participant is exceptionally permissible.
- b. Throughout the investigation and proceedings, Parties and participants shall undertake to minimise the risk of exposing confidential documents or information to the greatest extent possible.
- c. Confidential documents or information which have been made available to a Party or participant may only be revealed by that Party or participant to a third party where such disclosure is directly and specifically necessary for the preparation and presentation of their case. A Party or participant shall only disclose to third parties those

²⁹⁷ 'Third party' shall include any person except a Party or participant in these proceedings, or a Judge or staff member of the Court authorized to have access to the information in question.

²⁹⁸ 'Confidential document' shall mean any document classified as 'confidential' or 'strictly confidential' under Rule 82(1) of the Rules. 'Confidential information' shall mean any information contained in a confidential document which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Panel.

portions of a confidential document of which the disclosure is directly and specifically necessary for the preparation and presentation of its case.

- d. When a confidential document or confidential information is revealed to a third party under the preceding paragraph, the Party or participant shall explain to the third party the confidential nature of the document or information and warn the third party that the document or information shall not be reproduced or disclosed to anyone else in whole or in part. Unless specifically authorised by the Panel, the third party shall not retain a copy of any confidential document shown to them.
- e. A Party or participant may disclose the identity of a witness²⁹⁹ to a third party only if such disclosure is directly and specifically necessary for the preparation and presentation of its case. If a Party or participant is aware that the witness has been relocated with the assistance of the KSC/SPO, the Party or participant shall inform the Witness Protection and Support Office (“WPSO”) in advance of the details of the place, time and, to the extent possible, the types of organizations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the WPSO as to specific measures that may be necessary. If the witness is otherwise protected by the WPSO, the Party or participant shall inform the WPSO of the disclosure of the witness’s identity as soon as possible, but in any event before disclosure.
- f. Notwithstanding the previous sub-paragraph, Parties and participants shall not reveal to third parties that any protected witness is involved with the activities of the KSC/SPO or the nature of such involvement.
- g. Visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement of the person depicted or otherwise reflected in the activities of the KSC/SPO, a Party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the KSC/SPO. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorized by the Chamber, the third party shall not retain copies of the visual material subject to this provision.

²⁹⁹ ‘Witness’ shall mean a person whom a Party or participant intends to call to testify or on whose statement a Party or participant intends to rely, insofar as the intention of the Party or participant has been notified to the opposing Party or participant.

- h. If a Party or participant is in doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected witness to third parties, it shall seek the advice of the WPSO.
- i. A Party or participant shall bring to the attention of the WPSO as soon as possible any reasonable suspicion that a protected witness may have been placed at risk for any reason, including reasonable suspicion that a witness's involvement with the KSC/SPO or protected location has become known to third parties.
- j. If a Party or participant has wrongly revealed confidential information, or has become aware of any other breach of the confidentiality of documents or information, or discovers that a third party has become aware of confidential information, it shall inform the recipient of the confidential nature of such information and instruct him or her not to disclose it any further. In addition, the Party or participant shall immediately inform the WPSO.

II. Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant

- a. Except under the conditions specified herein, prior to testimony, Parties and participants³⁰⁰ shall not contact or interview a witness of another Party or participant if the intention to call the witness to testify or to rely on his or her statement has been notified to the opposing Party or participant.
- b. If an opposing Party or participant wishes to interview a witness of another Party or participant, it shall notify the calling Party, the Court Management Unit ("CMU") and, in relation to dual status witnesses, Victims' Counsel at least ten days prior to the intended interview. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party and shall also inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness, Victims' Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview. In exceptional circumstances, a Party or participant may, after having consulted sufficiently in advance with the Registry, apply to the Panel to additionally require the presence of Registry representatives. The calling Party shall inform the opposing Party whether the witness consents. In addition, where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness,

³⁰⁰ For purposes of this paragraph, this includes counsel, their clients, and their teams as defined in Article 2 of the Code of Conduct but does not apply to contact between the Victims' Counsel Team and dual status witnesses.

- regardless of the witness's expressed preferences. If the calling Party seizes the Panel or indicates to the opposing Party that it shall do so, the opposing Party shall refrain from interviewing the witness until the Panel has issued its decision. The procedure in this section shall not apply to an interview conducted by the SPO with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.
- c. If a Party or participant contacts an opposing Party or participant witness inadvertently or during WPSO-organized courtesy meetings, the Party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness's consent to be interviewed directly. A witness's consent to be interviewed may be obtained only through the procedure set out in the previous subparagraph.
 - d. The opposing Party conducting the interview ("interviewing Party") shall:
 - i. ensure that the interview is conducted effectively and expeditiously;
 - ii. prepare copies of all documents to be shown to the witness in a language which he or she understands together with an English translation to be provided to the calling Party;
 - iii. refrain from talking to the witness outside the timeframe of the interview and the video-recording, so that all statements and utterances made are duly recorded;
 - iv. refrain from any action that could be regarded as threatening or provocative; and
 - v. otherwise comply with any order made by the Trial Panel.
 - e. The interviewing Party shall facilitate the preparation and conduct of any interview under this section. Communications between the calling Party and the interviewing Party shall be filed as correspondence in the case file in accordance with the Practice Direction on Files and Filings (KSC-BD-15). The calling Party shall bear the costs associated with its attendance at the interview. In consultation with the Parties and/or participants, the Registry may, based on the information provided pursuant to section II, paragraph (e)-(g) of the Framework and if feasible, facilitate the process. Further, as set out in section II, paragraph (h) of this Framework, when considered necessary by the WPSO, the Registry shall ensure that a WPSO representative is on site or otherwise available.
 - f. Once a witness has agreed to be interviewed, the calling Party shall, in consultation with WPSO where applicable, provide, as appropriate and applicable, the interviewing Party with the following information:

- i. the preferred dates for, and an estimate of the duration of, the interview;
 - ii. whether protective measures have been ordered, requested or will be requested under Rule 80 of the Rules in relation to the witness and whether the witness has any special needs as defined in Rule 146 of the Rules or requires special measures as listed in Rule 80(4)(c) of the Rules;
 - iii. an updated Witness Information Form for the witness;
 - iv. the language which the witness is expected to use during the interview;
 - v. any information as to the persons expected to be present at the interview, including any indication of whether the witness may require the presence of a representative of the calling Party, a WPSO representative, the Registry, Victims' Counsel or a legal representative; and
 - vi. any other information that may facilitate the preparation for the interview, as required by the interviewing Party.
- g. The interviewing Party may seek additional information, if required, to facilitate the preparation for the interview. The Panel shall be seized in relation to any unresolved dispute between the Parties, participants and/or WPSO/CMU regarding measures recommended by the Parties, participants and/or by WPSO/CMU.
- h. The interviewing Party shall facilitate the process by:
- i. providing a venue for the interview and audio-video recording equipment; and
 - ii. providing interpretation, where necessary.
- Furthermore, where applicable, the Registry shall ensure that a Court Officer or another designated representative of the Registry is present during the interview, and that a witness-support representative is on site, where considered necessary by WPSO.
- i. Prior to the commencement of the interview, the interviewing Party shall advise the witness that he or she:
- i. is not required to participate in the interview and can decide to stop being interviewed at any time;
 - ii. can refuse to answer questions, in particular if they are thought to be potentially self-incriminating;
 - iii. can ask for a recess at any time; and
 - iv. can ask to meet with a WPSO representative at any time during the interview.
- j. During the interview, the interviewing Party shall:

- i. ensure the presence of only the authorized individuals;
 - ii. verify the identity of the witness;
 - iii. ensure that all individuals present identify themselves on the record;
 - iv. ensure that the interview is audio-video-recorded;
 - v. ensure the safety and well-being of the witness; and
 - vi. ensure that the procedural elements of the interview are conducted in accordance with the Law, the Rules, and any subsequent order, decision, observations, or recommendations of the Panel.
- k. In the event the calling Party objects to any part of the procedure followed or any particular line or manner of questioning during the interview, it shall raise the issue with the interviewing Party outside the presence of the witness. Any disagreement shall be recorded and shall not impede or unduly disrupt the interview. On an exceptional basis, the calling Party may apply to the Panel to terminate the interview in relation to flagrant breaches of this Framework in case the parties cannot reach an agreement in accordance with the preceding procedure.
- l. In the event that a Registry representative is present during the interview in accordance with this section of the Framework, the Parties shall respect the Registry's neutrality and shall refrain from seeking to involve its representative in the proceedings. Should the witness need to consult with a legal representative during the interview, the interview shall be suspended so that this can be arranged. The interviewing Party shall inform the Defence Office, so that the necessary arrangements to assign Counsel to the witness may be made.
- m. If the interviewing Party intends to show confidential or strictly confidential records to the witness other than the witness's own statements, it shall proceed, mutatis mutandis, in accordance with section I, paragraphs (c) and (d) of this Framework.
- n. Following the completion of the interview, the interviewing Party shall prepare:
- i. a memorandum recording the process (indicating time, place, attendees, classification – i.e., public, confidential or strictly confidential – and any other relevant circumstance) and submit it to the Parties and the Panel; and
 - ii. the audio-video recording of the session and submit copies thereof to the Parties and to the Panel.
- o. Neither the record of the interview nor any materials used during the interview shall become part of the record in the case unless admitted in

evidence by the Trial Panel *proprio motu* or upon an application by a Party, where the conditions for its admission under the Rules are met. Where admission of such a video recording is sought, the interviewing Party shall also produce the transcript of the interview.

V. DISPOSITION

213. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **REJECTS** the Taçi Defence request to strike the Victims' Counsel Further Response from the record and **DECIDES** to consider the submissions contained in the Victims' Counsel Further Response only insofar as they have been specifically raised or adopted by Victims' Counsel during the 22 February 2022 Hearing;
- b) **DECIDES** to consider the submissions contained in the Taçi Reply SPO only insofar as they have been specifically raised or adopted by the Taçi Defence during the 22 February 2022 Hearing;
- c) **DECIDES** not to consider the Taçi Supplemental Submissions and, insofar as they relate to the merits of the matter under consideration, the SPO Response Taçi Supplemental Submissions and Taçi Reply SPO Response Taçi Supplemental Submissions;
- d) **REJECTS** the requests of the Krasniqi Defence and the Veseli Defence to instruct the Parties to engage in *inter partes* discussions;
- e) **GRANTS** the SPO's request to adopt the Proposed Framework subject to the modifications set forth in the present decision;
- f) **ADOPTS** the Framework and **ORDERS** the Parties and participants to comply with the Framework defined in the present decision in relation

to any ongoing and impending investigative activities and contacts with witnesses; and

- g) **REJECTS** the SPO's request to order the retroactive application of the Framework.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 24 June 2022

At The Hague, The Netherlands.