



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:** 26 August 2022

**Language:** English

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**Decision on Defence Requests for Leave to Appeal Decision F00854**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 24 June 2022, further to a request by the Specialist Prosecutor's Office ("SPO") for a protocol on the handling of confidential information and contacts with witnesses,<sup>2</sup> the Pre-Trial Judge issued the "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant" ("Impugned Decision" and "Framework").<sup>3</sup>

2. On 1 July 2022, further to a joint request by the Defence for Hashim Thaçi ("Mr Thaçi" and "Thaçi Defence"), Kadri Veseli ("Mr Veseli" and "Veseli Defence"), Rexhep Selimi ("Mr Selimi" and "Selimi Defence") and Jakup Krasniqi ("Mr Krasniqi" and "Krasniqi Defence", collectively "Accused" and "Defence") for an extension of the time limit to submit a request for certification to appeal the Impugned Decision,<sup>4</sup> the Pre-Trial Judge varied the briefing schedule and determined to issue the decision on Friday, 26 August 2022.<sup>5</sup>

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

<sup>2</sup> KSC-BC-2020-06, F00594, Specialist Prosecutor, *Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 3 December 2021, public, paras 1, 7.

<sup>3</sup> KSC-BC-2020-06, F00854, Pre-Trial Judge, *Decision on Framework for the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, 24 June 2022, public.

<sup>4</sup> KSC-BC-2020-06, F00857, Specialist Counsel, *Joint Defence Request for Variation of Time Limit for Leave to Appeal Decision KSC-BC-2020-06/F00854 (Decision on Confidential Information and Contact with Witnesses)*, 29 June 2022, public, paras 1, 7.

<sup>5</sup> KSC-BC-2020-06, F00864, Pre-Trial Judge, *Decision on the Joint Defence Request for Variation of Time Limit for Leave to Appeal Decision KSC-BC-2020-06/F00854 (Decision on Confidential Information and Contact with Witnesses)*, 1 July 2022, public, paras 9-11.

3. On 18 July 2022, the Defence requested certification to appeal the Impugned Decision (collectively “Defence Requests”).<sup>6</sup>
4. On 1 August 2022, the SPO responded to the Defence Requests (collectively “SPO Responses”).<sup>7</sup>
5. On 15 August 2022, the Defence replied to the SPO Responses.<sup>8</sup>

## II. SUBMISSIONS

### A. THAÇI DEFENCE

6. The Thaçi Defence requests leave to appeal the Impugned Decision on the following 15 issues:

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<sup>6</sup> KSC-BC-2020-06, F00883, Specialist Counsel, *Thaçi Defence Request for Certification to Appeal the “Decision on Framework for the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant”* (“Thaçi Request”), 18 July 2022, public; F00884, Specialist Counsel, *Selimi Defence Request for Certification to Appeal the Decision on Framework for the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant* (“Selimi Request”), 18 July 2022, public; F00886, Specialist Counsel, *Krasniqi Defence Request for Certification to Appeal the “Decision on Framework for the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant”* (“Krasniqi Request”), 18 July 2022, public; F00887/COR, Specialist Counsel, *Corrected Version of Veseli Defence Request for Leave to Appeal Decision on Framework for the Handling of Confidential Information and Contacts with Witnesses (F00854)* (“Veseli Request”), 19 July 2022, public, with Annex 1, public. The original Veseli Request was submitted duly on 18 July 2022.

<sup>7</sup> KSC-BC-2020-06, F00903, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Request for Certification to Appeal Decision F00854* (“SPO Response to Krasniqi Request”), 1 August 2022, public; F00904, Specialist Prosecutor, *Prosecution Response to Selimi Defence Request for Certification to Appeal Decision F00854* (“SPO Response to Selimi Request”), 1 August 2022, public; F00905, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00854* (“SPO Response to Thaçi Request”), 1 August 2022, public; F00906, Specialist Prosecutor, *Prosecution Response to Veseli Defence Request for Certification to Appeal Decision F00854* (“SPO Response to Veseli Request”), 1 August 2022, public.

<sup>8</sup> KSC-BC-2020-06, F00924, Specialist Counsel, *Thaçi Defence Reply to “Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00854” (F00905)* (“Thaçi Reply”), 15 August 2022, public; F00925, Specialist Counsel, *Krasniqi Defence Reply to Prosecution Response to Krasniqi Defence Request for Certification to Appeal Decision F00854* (“Krasniqi Reply”), 15 August 2022, public, with Annex 1, public; F00926, Specialist Counsel, *Selimi Defence Reply to SPO Response to Selimi Defence Request for Certification to Appeal Decision F00854* (“Selimi Reply”), 15 August 2022, public; F00927, Specialist Counsel, *Veseli Defence Reply to Prosecution Response to Request for Certification to Appeal Decision F00854 (F00906)* (“Veseli Reply”), 15 August 2022, public.

- (1) Whether the recording and disclosure of witness interviews represents an erroneous invasion of attorney-client privilege and compromises the right of the accused to investigate the case against him (“First Thaçi Issue”);
- (2) Whether the [Framework] and its measures fall within [...] the scope of the Pre-Trial Judge’s power in Article 39(11) [of the Law] to provide “where necessary” for the privacy and protection of witnesses (“Second Thaçi Issue”);
- (3) Whether the Pre-Trial Judge erred in declining to consider the Thaçi Supplemental Submissions, given the relevance of the SPO practice of including people on its List of Witnesses without their knowledge and/or consent, to the issues under consideration (“Third Thaçi Issue”);
- (4) Whether the proper scope and terms of Article 39(11) [of the Law] required the Pre-Trial Judge to differentiate between categories of SPO witnesses in the [Framework’s] application (“Fourth Thaçi Issue”);
- (5) Whether ordering the recording and disclosure of Defence interviews on the basis of a “climate of witness intimidation and interference” and the continued “significant influence” of the accused violates the presumption that Defence Counsel act in good faith (“Fifth Thaçi Issue”);
- (6) Whether reliance on “the established risks of disclosing information to the Defence” creates an erroneous double standard, where the Pre-Trial Judge accepted that the SPO acts in good faith, and found that “any suggestion of inappropriate conduct or motives on the part of the SPO are unsubstantiated and speculative” (“Sixth Thaçi Issue”);
- (7) Whether the Pre-Trial Judge adopted an erroneously narrow definition of “compulsion” in finding that, because “the Defence remains at liberty to define its strategy” during interviews with SPO witnesses, the information revealed during Defence interviews has not been compelled (“Seventh Thaçi Issue”);

- (8) Whether the requirement on the Defence to disclose the audio-video records of its interviews is consistent with the regime set out in Rules 104-111 of the Rules (“Eighth Thaçi Issue”);
- (9) Whether the Pre-Trial Judge’s reliance on the fact that the interview recordings do not automatically become part of the case record, fails to consider or give sufficient weight to the Defence submissions as to other practical risks to the accused, including creating an adverse record, and revealing investigatory avenues that assist the SPO (“Ninth Thaçi Issue”);
- (10) Whether the Pre-Trial Judge’s framing of the question of witnesses’ privacy entirely with respect to SPO witnesses, with no reference to the rights or expectations of Defence witnesses, requires the reversal of all findings based on this reasoning (“Tenth Thaçi Issue”);
- (11) Whether the Pre-Trial Judge erred in relying on the SPO witnesses’ expectation of privacy to require the recording and disclosure of Defence interviews, in the absence of any link being established between SPO witness privacy and this measure, or any reasoning as to how the accused’s rights are being affected, balanced, or taken into account (“Eleventh Thaçi Issue”);
- (12) Whether the Pre-Trial Judge was legally entitled to find that the [Framework] applies equally to the SPO and Defence, when all SPO interviews before 24 June 2022 were conducted in the absence of the Defence, in contravention of the procedural framework in Kosovo which provides for Defence participation in Prosecution investigations (“Twelfth Thaçi Issue”);
- (13) Whether the Pre-Trial Judge erred in finding that the Defence was not entitled to be present during [Special Investigative Task Force] and SPO interviews because they concerned “the Council of Europe report taken as a whole”, given the more recent case-specific investigations into Mr Thaçi himself (“Thirteenth Thaçi Issue”);
- (14) Whether the Pre-Trial Judge’s conclusion that the [Framework] “contributes to the expeditious conduct of proceedings” was open to a reasonable finder of fact (“Fourteenth Thaçi Issue”); and

- (15) Whether the impact on the right of an accused to adequate time and facilities under Article 21(4)(c) of the Law can be considered mitigated through measures such as joint Defence interviews of SPO witnesses, or remote interviews of SPO witnesses, when the Defence objections to these measures were not taken into account (“Fifteenth Thaçi Issue”).<sup>9</sup>

## B. SELIMI DEFENCE

7. The Selimi Defence requests leave to appeal the Impugned Decision on the following four issues:

- (1) Whether the Pre-Trial Judge erred in finding that Articles 35(2)(f), 39(1) and (11) [of the Law] provide a legal basis for the [...] Framework which doesn’t require that each witness justify its application according to their individual circumstances (“First Selimi Issue”);
- (2) Whether the Pre-Trial Judge made a factual error in setting out, in his view, the counterbalancing “safeguards” relating to the scope of the [...] Framework’s application, namely judicial overview of the witness’[s] preference (“Second Selimi Issue”);
- (3) Whether Section II.n.ii. and o. of the [...] Framework, relating to the mandatory submission of audio-visual records of witness interviews to the Panel and the opposing Party, and their potential to be entered onto the record, exceeds the functions of the Pre-Trial Judge as set out in Article 39(11) [of the Law] (“Third Selimi Issue”); and
- (4) Whether the provisions under Section II.n.ii. and o. of the [...] Framework, relating to the mandatory submission of audio-visual records of witness interviews to the Panel and the opposing Party, and their potential to be entered onto the record, are disproportionate to the stated aims of witness protection and the preservation of evidence, and that less restrictive measures

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<sup>9</sup> Thaçi Request, para. 6; see also Thaçi Reply, para. 9.

should have been considered to mitigate the stated risk (“Fourth Selimi Issue”).<sup>10</sup>

### C. KRASNIQI DEFENCE

8. The Krasniqi Defence requests leave to appeal the Impugned Decision on the following six issues:

- (1) Whether the Impugned Decision erred in law in imposing the Framework without first establishing that it was necessary to do so (“First Krasniqi Issue”);
- (2) Whether, to the extent that the Impugned Decision did find that it was necessary to impose a framework at this stage of proceedings, the Impugned Decision erred in fact or law in finding that it was necessary to impose a framework (“Second Krasniqi Issue”);
- (3) Whether the Impugned Decision erred in law and fact in imposing a framework which covers all witnesses that a party intends to call, rather than merely those witnesses who need the protection of the framework (“Third Krasniqi Issue”);
- (4) Whether the Impugned Decision erred in finding that “[g]iven 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” (“Fourth Krasniqi Issue”);
- (5) Whether the Impugned Decision erred in finding that imposing the Framework was justified to protect the privacy of witnesses or preserve evidence or the expeditious conduct of proceedings (“Fifth Krasniqi Issue”);  
and

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<sup>10</sup> Selimi Request, para. 1; *see also* Selimi Reply, para. 13.



- (6) Whether the Impugned Decision erred in law in finding that the [...] Framework does not violate the rights of the Accused, specifically the right against self-incrimination and the right to equality of arms (“Sixth Krasniqi Issue”).<sup>11</sup>

#### D. VESELI DEFENCE

9. The Veseli Defence requests leave to appeal the Impugned Decision on the following three issues:

- (1) Whether the Pre-Trial Judge erred in his assessment of the legal basis to adopt the SPO Proposed Framework (“First Veseli Issue”);
- (2) Whether the Framework violates the Accused’s right to a fair trial (“Second Veseli Issue”); and
- (3) Whether the Pre-Trial Judge discriminated Mr Veseli and other accused in KSC-BC-2020-06 *vis-à-vis* other accused in similar situations before the [Specialist Chambers] (“Third Veseli Issue”).<sup>12</sup>

#### E. SPO

10. The SPO responds that the Defence Requests should be rejected because: (i) the purported issues fail to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules; and/or (ii) the Defence fails to meet the burden in respect of some or all of the requirements.<sup>13</sup> As regards the Thaçi Request and the Krasniqi Request, the SPO avers, in particular, that they fail to adequately specify the purported errors.<sup>14</sup>

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<sup>11</sup> Krasniqi Request, para. 2; *see also* Krasniqi Reply, para. 10.

<sup>12</sup> Veseli Request, para. 2.

<sup>13</sup> SPO Response to Thaçi Request, paras 1-2, 26; SPO Response to Selimi Request, paras 1, 16; SPO Response to Krasniqi Request, paras 1, 19; SPO Response to Veseli Request, paras 1, 14.

<sup>14</sup> SPO Response to Thaçi Request, para. 2; SPO Response to Krasniqi Request, para. 1.

### III. APPLICABLE LAW

11. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the SPO in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

12. Rule 77(2) of the Rules further provides that the Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

### IV. DISCUSSION

#### A. LEGAL TEST

13. At the outset, the Pre-Trial Judge recalls that a right to appeal arises only if the Pre-Trial Judge is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.<sup>15</sup> The interpretation of these provisions has been set out in detail previously.<sup>16</sup>

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<sup>15</sup> KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Decision on Leave to Appeal”), 11 January 2021, public, para. 9.

<sup>16</sup> Decision on Leave to Appeal, paras 10-17.

14. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- (1) Whether the matter is an “appealable issue”;
- (2) Whether the issue at hand would significantly affect:
  - i. The fair and expeditious conduct of the proceedings, or
  - ii. The outcome of the trial; and
- (3) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>17</sup>

#### B. ISSUES FOR WHICH LEAVE TO APPEAL IS GRANTED

##### 1. Second Thaçi Issue, Fifth Krasniqi Issue and First Veseli Issue

15. According to the Thaçi Defence, the Second Thaçi Issue concerns the interpretation of Article 39(11) of the Law as it challenges whether said provision (and particularly the phrase “where necessary”) empowers the Pre-Trial Judge to adopt the Framework and the measures contained therein.<sup>18</sup> Further, the Thaçi Defence argues that this issue significantly impacts both the fair and expeditious conduct of the proceedings, as it concerns: (i) in particular, Mr Thaçi’s right to have adequate time and facilities to prepare his defence, and to be tried within a reasonable time; and (ii) the central issue of striking a balance, as required by Article 39(11) of the Law, between Mr Thaçi’s rights, on the one hand, and the protection and privacy of witnesses, on the other hand.<sup>19</sup> Lastly, the Thaçi Defence avers that intervention of the Court of Appeals Panel at this stage is warranted to

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<sup>17</sup> Decision on Leave to Appeal, para. 10.

<sup>18</sup> Thaçi Request, paras 4, 6 (*referring to Impugned Decision*, para. 120), 8.

<sup>19</sup> Thaçi Request, paras 12-13.

prevent irreparable prejudice caused by the Framework to the ongoing Defence investigations and Mr Thaçi's rights.<sup>20</sup>

16. Similarly, the Krasniqi Defence argues with the Fifth Krasniqi Issue that the Pre-Trial Judge erred in finding that the Framework's adoption was necessary to protect the privacy of witnesses, and to ensure the preservation of evidence and the expeditious conduct of the proceedings.<sup>21</sup> The Krasniqi Defence further argues that this issue has substantial repercussions for the fair and expeditious conduct of the proceedings, in particular because imposing additional steps to be undertaken by the Defence leads to the Defence needing additional time, which in turn affects the length of the proceedings and Mr Krasniqi's right to an expeditious trial.<sup>22</sup> Lastly, the Krasniqi Defence argues that an immediate resolution of this issue by the Court of Appeals Panel will materially advance the proceedings by preventing that they take a wrong course and reducing litigation time.<sup>23</sup>

17. The Veseli Defence essentially argues with the First Veseli Issue that the Pre-Trial Judge: (i) failed to establish that Article 39(11) of the Law provides an independent legal basis for the Framework; (ii) failed to specify how the necessity of judicial intervention pursuant to Article 39(11) of the Law is to be assessed; and (iii) abused his discretion and exceeded his powers under the SC legal framework by adopting the Framework.<sup>24</sup> The Veseli Defence further argues that this issue directly affects the outcome of the proceedings, by potentially infringing Mr Veseli's right to a fair trial as protected by the Kosovo Constitution and relevant international human rights instruments.<sup>25</sup> Lastly, the Veseli Defence argues that a determination by the Court of Appeals Panel at this stage is

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<sup>20</sup> Thaçi Request, para. 18.

<sup>21</sup> Krasniqi Request, paras 2, 26 (*referring to* Impugned Decision, paras 121, 123-125).

<sup>22</sup> Krasniqi Request, para. 27 (*referring to* Impugned Decision, para. 164).

<sup>23</sup> Krasniqi Request, para. 28.

<sup>24</sup> Veseli Request, paras 2, 5-8 (*referring to* Impugned Decision, paras 115-136, in particular paras 117, 135-136).

<sup>25</sup> Veseli Request, para. 12.

warranted as it would obviate the risk of any prejudice being caused to Mr Veseli and provide clarity on the Framework's legal basis.<sup>26</sup>

18. The SPO responds, as regards the Second Thaçi Issue, that by presuming that the Framework needed to fall within Article 39(11) of the Law alone, the Thaçi Defence misrepresents the Impugned Decision, which states that the Framework is additionally based on Articles 35(2)(f) and 39(1) of the Law. According to the SPO, the interpretation of Article 39(11) of the Law is thus an abstract question that fails to meet the certification test.<sup>27</sup> The SPO further avers that the Thaçi Defence fails to establish that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>28</sup> As regards the Fifth Krasniqi Issue and the First Veseli Issue, the SPO essentially responds that they do not constitute appealable issues as they are insufficiently specific or discrete and represent mere disagreements with the Pre-Trial Judge's findings.<sup>29</sup> In addition, the SPO argues with respect to the First Veseli Issue that: (i) it mischaracterises the Impugned Decision; and (ii) the Veseli Defence fails to meet its burden on whether the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and on whether an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>30</sup>

19. *Appealable issue.* Noting that an "issue" is an "identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion",<sup>31</sup> the Pre-Trial Judge finds that all three issues concern, and are in fact limited to, the question of the Framework's

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<sup>26</sup> Veseli Request, para. 13.

<sup>27</sup> SPO Response to Thaçi Request, para. 7 (*referring to* Impugned Decision, para. 115).

<sup>28</sup> SPO Response to Thaçi Request, paras 8-10.

<sup>29</sup> SPO Response to Krasniqi Request, paras 3, 5-6; SPO Response to Veseli Request, paras 2-5.

<sup>30</sup> SPO Response to Veseli Request, paras 5, 12-13.

<sup>31</sup> Decision on Leave to Appeal, para. 11.

compliance with Article 39(11) of the Law, in particular whether the Framework's adoption was necessary for the protection and privacy of witnesses, the preservation of evidence and the expeditious conduct of proceedings.<sup>32</sup> All three issues arise from paragraphs 115-136 of the Impugned Decision, where the legal basis of the Framework was discussed. Accordingly, the Pre-Trial Judge finds that all three issues are appealable issues.

20. *Fairness and expeditiousness.* The Pre-Trial Judge is satisfied that all three issues would significantly affect the fair conduct of the proceedings, because they concern the interpretation and application of Article 39(11) of the Law and, thus, the fundamental questions of the Framework's legal basis and compliance with the SC legal framework as well as the Pre-Trial Judge's powers to adopt the Framework. The Pre-Trial Judge is also satisfied that all three issues would significantly affect the expeditious conduct of the proceedings, because early resolution of these issues would also streamline the proceedings and facilitate, in particular, the Accused's right to have adequate time and facilities to prepare his defence (Article 21(4)(c) of the Law) and to be tried within a reasonable time (Article 21(4)(d) of the Law).

21. *Materially advance the proceedings.* The Pre-Trial Judge considers that an immediate resolution of these issues by the Court of Appeals Panel may materially advance the proceedings, as this would: (i) provide further clarity for the Defence investigations; and (ii) minimise delays and the diverting of resources at subsequent stages of the proceeding to address claims regarding this matter.

22. In light of the above, the Pre-Trial Judge grants leave to appeal the Second Thaçi Issue, Fifth Krasniqi Issue and First Veseli Issue.

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<sup>32</sup> See, in particular, Thaçi Request, paras 6, 8; Krasniqi Request, paras 2, 26; Veseli Request, paras 7-8. However, as regards the First Veseli Issue, the Pre-Trial Judge clarifies that contrary to what seems to be suggested by the Veseli Defence, the Pre-Trial Judge did not, without amendments, adopt the Proposed Framework of the SPO.

## 2. Sixth Krasniqi Issue

23. The Krasniqi Defence submits that this issue challenges the Impugned Decision's central conclusion that the Framework does not violate the privilege against self-incrimination or the right of the Parties to have an equal opportunity to present their case.<sup>33</sup> The Krasniqi Defence further submits that this issue inherently concerns the fair and expeditious conduct of the proceedings, as it directly relates to the above-mentioned fair trial rights.<sup>34</sup> Lastly, the Krasniqi Defence submits that, in light of the significance of these fair trial rights, further clarification by the Court of Appeals Panel is necessary to ensure that the proceedings follow the right course.<sup>35</sup>

24. The SPO responds that this is not an appealable issue as the Krasniqi Defence fails to identify any specific error, instead expressing mere disagreement with the Pre-Trial Judge's findings.<sup>36</sup> In addition, the SPO avers that the Krasniqi Defence fails to provide any legal basis for the claim that fair trial rights would be impacted by the Framework, thus failing to demonstrate that the issue would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.<sup>37</sup>

25. *Appealable issue.* The Pre-Trial Judge notes that this issue concerns the findings in paragraphs 137-163 of the Impugned Decision that concern the question of the Framework's compliance with the privilege against self-incrimination (Article 21(4)(h) of the Law) and the principle of equality of arms (Article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental

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<sup>33</sup> Krasniqi Request, para. 29 (*referring to* Impugned Decision, paras 138-163, in particular paras 140-145, 150-154, 159-163).

<sup>34</sup> Krasniqi Request, para. 30 (*referring to* Impugned Decision, paras 138-145, 150).

<sup>35</sup> Krasniqi Request, para. 31.

<sup>36</sup> SPO Response to Krasniqi Request, para. 18.

<sup>37</sup> SPO Response to Krasniqi Request, para. 17.

Freedoms [“ECHR”]). Accordingly, the Pre-Trial Judge finds that this constitutes an appealable issue.

26. *Fairness and expeditiousness.* The Pre-Trial Judge is satisfied that this issue would significantly affect the fair and expeditious conduct of the proceedings. The issue relates to the Accused’s right not to incriminate himself, as enshrined in Article 21(4)(h) of the Law, and the principle of equality of arms, both of which directly affect the fairness of the proceedings. In addition, the Pre-Trial Judge considers that it is important to resolve this issue early on, in order to streamline the proceedings and facilitate, in particular, the Accused’s right to have adequate time and facilities to prepare his defence (Article 21(4)(c) of the Law) and to be tried within a reasonable time (Article 21(4)(d) of the Law).

27. *Materially advance the proceedings.* The Pre-Trial Judge considers that, for the reasons set out in paragraph 21 above, an immediate resolution of this issue by the Court of Appeals Panel may materially advance the proceedings.

28. In light of the above, the Pre-Trial Judge grants leave to appeal the Sixth Krasniqi Issue.

### **3. Fourth Thaçi Issue, Third Krasniqi Issue and First Selimi Issue**

29. The Thaçi Defence submits that the Fourth Thaçi Issue, challenging the Framework’s application to SPO witnesses regardless of their “category”, raises a clear and discrete issue regarding the scope and terms of Article 39(11) of the Law and its application, and emanates from the Impugned Decision.<sup>38</sup> The Thaçi Defence’s arguments that the issue would affect the fair and expeditious conduct of the proceedings or the outcome of the trial are set out in paragraph 15 above.<sup>39</sup> Lastly, the Thaçi Defence submits that intervention of the Court of Appeals Panel

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<sup>38</sup> Thaçi Request, paras 6, 7, 8; Thaçi Reply, para. 4.

<sup>39</sup> Thaçi Request, paras 12-13.



is warranted at this stage, because if the Pre-Trial Judge erroneously decided that the Framework applies to all SPO witnesses, then the prejudice suffered to the ongoing Defence investigations and to Mr Thaçi's rights will be irreparable.<sup>40</sup>

30. The Krasniqi Defence submits that the Third Krasniqi Issue arises directly from the Impugned Decision, challenging the applicability of the Framework to all witnesses included in the SPO List of Witnesses and other notified witnesses, without distinguishing whether they require protection.<sup>41</sup> The Krasniqi Defence further avers that this issue significantly affects the fair and expeditiousness of the proceedings, because: (i) the Framework generally places limits on the Defence's ability to contact witnesses and requires the Defence teams to take additional steps; and (ii) if the Framework applied to fewer witnesses, then the administrative burden it imposes would be reduced.<sup>42</sup> Lastly, the Krasniqi Defence avers that the immediate resolution of this issue by the Court of Appeals Panel will materially advance proceedings, because the fairness of the proceedings would be tainted if the Framework was wrongly imposed (and thus future Defence investigations wrongly constrained).<sup>43</sup>

31. The Selimi Defence submits that the First Selimi Issue arises from the Impugned Decision.<sup>44</sup> The Defence does not challenge whether the Framework should, in theory, be applicable to all witnesses. Rather, it challenges whether, in light of the phrase "where necessary" contained in Article 39(11) of the Law, the Pre-Trial Judge should, for international witnesses and those not otherwise at risk, at least have established a nexus between the risk and the individual circumstances of the witness in question.<sup>45</sup> The Selimi Defence further submits that

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<sup>40</sup> Thaçi Request, para. 18.

<sup>41</sup> Krasniqi Request, paras 2, 21 (*referring to* Impugned Decision, paras 120, 135).

<sup>42</sup> Krasniqi Request, paras 17, 22.

<sup>43</sup> Krasniqi Request, paras 18, 22.

<sup>44</sup> Selimi Request, para. 9.

<sup>45</sup> Selimi Request, paras 1, 10, 15-16 (*referring to* Impugned Decision, paras 115-118, 120, 135, 169, 173, 198); *see also* Selimi Reply, para. 2.

this issue significantly affects the fair conduct of the proceedings as the Impugned Decision is based on an abuse of discretion by the Pre-Trial Judge affecting the Defence's conduct at trial. As regards expeditiousness, the Selimi Defence contends that the overly broad Framework impacts the Defence's conduct regarding investigations and interviews well into the trial phase, causing unnecessary delays to the investigation (given that Defence investigations will be ongoing during the trial phase).<sup>46</sup> Lastly, the Selimi Defence submits that an immediate intervention by the Court of Appeals Panel could rid the proceedings of possible mistakes and move them along the right course.<sup>47</sup>

32. The SPO responds, regarding the Fourth Thaçi Issue, that the Thaçi Defence misrepresents the Impugned Decision by ignoring: (i) that the Framework is not only based on Article 39(11) of the Law, but also Articles 35(2)(f) and 39(1) of the Law; and (ii) the Framework's counterbalancing safeguards tailor its application to the specific circumstances of the witnesses.<sup>48</sup> Regarding the Third Krasniqi Issue and the First Selimi Issue, the SPO responds, in particular, that they ignore that: (i) the Pre-Trial Judge reached a necessity finding which considered, *inter alia*, the circumstances of relevant witnesses; and (ii) the Framework's counterbalancing safeguards tailor its application to the specific circumstances of the witnesses.<sup>49</sup> In addition, the SPO submits that the Third Krasniqi Issue is insufficiently discrete and fails to identify a sufficiently discrete error,<sup>50</sup> while resolution of the First Selimi Issue would not be essential, as required by the certification test.<sup>51</sup> Lastly, regarding all three issues, the SPO avers that the respective Defence team fails to

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<sup>46</sup> Selimi Request, paras 17, 25-28; *see also* Selimi Reply, para. 4.

<sup>47</sup> Selimi Request, paras 25-28.

<sup>48</sup> SPO Response to Thaçi Request, paras 7-8 (*referring to* Impugned Decision, paras 115, 119).

<sup>49</sup> SPO Response to Krasniqi Request, para. 8 (*referring to* Impugned Decision, paras 119-120); SPO Response to Selimi Request, para. 3 (*referring, in particular, to* Impugned Decision, paras 119-120).

<sup>50</sup> SPO Response to Krasniqi Request, para. 7.

<sup>51</sup> SPO Response to Selimi Request, para. 3 (*referring, inter alia, to* Impugned Decision, paras 114-125).

establish that the issue would significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>52</sup>

33. *Appealable issue.* The Pre-Trial Judge considers that all three issues arise, in particular, from paragraph 120 of the Impugned Decision, where it is discussed whether certain “categories” of witnesses should be excluded from the Framework. Despite certain differences between the Fourth Thaçi Issue and the Third Krasniqi Issue, on the one hand,<sup>53</sup> and the First Selimi Issue, on the other hand,<sup>54</sup> the Pre-Trial Judge is satisfied that they essentially question whether the Framework should apply to all witnesses, without distinguishing whether they require protection. Accordingly, the Pre-Trial Judge finds that these issues constitute appealable issues.

34. *Fairness and expeditiousness.* The Pre-Trial Judge considers that, for the reasons set out in paragraph 20 above, all three issues would significantly affect the fair and expeditious conduct of the proceedings.

35. *Materially advance the proceedings.* The Pre-Trial Judge considers that, for the reasons set out in paragraph 21 above, an immediate resolution of these issues by the Court of Appeals Panel may materially advance the proceedings.

36. In light of the above, the Pre-Trial Judge grants leave to appeal the Fourth Thaçi Issue, Third Krasniqi Issue and First Selimi Issue.

#### **4. First Thaçi Issue**

37. According to the Thaçi Defence, this issue seeks appellate determination on whether the measures of video-recording and disclosure of witness interviews

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<sup>52</sup> SPO Response to Thaçi Request, paras 8-10; SPO Response to Krasniqi Request, paras 9-11; SPO Response to Selimi Request, paras 4-6.

<sup>53</sup> Claiming that the Pre-Trial Judge should have distinguished between different “categories” of witnesses.

<sup>54</sup> Claiming that the Pre-Trial Judge should at least have established a nexus between the risk and the individual circumstances of the witness in question.

(“Recording and Disclosure”) violate attorney-client privilege and the right of the accused to investigate the case against him (which derives from his right to be represented by counsel and to have adequate time and facilities to prepare his defence).<sup>55</sup> Further, the Thaçi Defence essentially argues that, thereby, and because Recording and Disclosure makes Defence investigations more time-consuming, this issue significantly impacts the fair and expeditious conduct of the proceedings.<sup>56</sup> Lastly, the Thaçi Defence argues that intervention of the Court of Appeals Panel is warranted at this stage, because if imposing Recording and Disclosure violates attorney-client privilege and Mr Thaçi’s right to investigate the case against him, then the prejudice suffered to the ongoing Defence investigations and to Mr Thaçi’s rights will be irreparable.<sup>57</sup>

38. The SPO responds that the Thaçi Defence, besides not engaging with the Impugned Decision, fails to clearly articulate a specific error, thus expressing mere disagreement with the Pre-Trial Judge’s findings. The SPO further avers that the Thaçi Defence fails to substantiate any significant impact on the fair and expeditious conduct of proceedings or the outcome of the trial.<sup>58</sup>

39. *Appealable issue.* The Pre-Trial Judge, noting the Thaçi Defence’s failure to identify specific parts of the Impugned Decision, considers that this issue arises, in particular, from paragraph 212.II.j.iv. and n.ii. of the Impugned Decision. More generally, it also stems from paragraphs 147-177 of the Impugned Decision (“Balancing Fair Trial Rights”), in particular paragraphs 155-160 (“Disclosure”) and 171-176 (“Adequate Time and Facilities”), to the extent they relate to Recording and Disclosure. Accordingly, the Pre-Trial Judge finds that this constitutes an appealable issue.

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<sup>55</sup> Thaçi Request, paras 6, 8; *see also* Thaçi Reply, para. 3.

<sup>56</sup> Thaçi Request, paras 12-13.

<sup>57</sup> Thaçi Request, para. 18.

<sup>58</sup> SPO Response to Thaçi Request, paras 4-6.

40. *Fairness and expeditiousness.* The Pre-Trial Judge considers that this issue concerns, in particular, Mr Thaçi's right to communicate with his counsel in private, and to have adequate time and facilities to prepare his defence (Article 6(3)(b) and (c) of the ECHR and Article 21(4)(c) and (e) of the Law). If the measures of Recording and Disclosure violate these rights, the fair conduct of the proceedings would be significantly affected. In addition, early resolution of this issue would streamline the proceedings and facilitate the Accused's right to be tried within a reasonable time (Article 21(4)(d) of the Law). Thus, the Pre-Trial Judge is satisfied that this issue would also significantly affect the expeditious conduct of proceedings.

41. *Materially advance the proceedings.* The Pre-Trial Judge considers that, for the reasons set out in paragraph 21 above, an immediate resolution of this issue by the Court of Appeals Panel may materially advance the proceedings.

42. In light of the above, the Pre-Trial Judge grants leave to appeal the First Thaçi Issue.

## **5. Fourth Selimi Issue and Eighth Thaçi Issue**

43. The Selimi Defence submits that this issue challenges whether imposing Recording and Disclosure (respectively submission of a copy to the Panel) was necessary and proportionate to ensure the protection of witnesses and preservation of evidence.<sup>59</sup> The Selimi Defence further submits that this issue significantly affects the fair and expeditious conduct of the proceedings, because Recording and Disclosure (respectively submission of a copy to the Panel) would, as currently worded in the Framework: (i) amount to an unnecessary and continuous monitoring by the SPO and the Panel of Defence investigations; and

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<sup>59</sup> Selimi Request, paras 1, 12, 22-23 (*referring to Impugned Decision, paras 115, 124, 142-143, 151, 159, 170, 212.II.n.ii. and o.*); *see also* Selimi Reply, para. 12.

(ii) thus, defeat the purpose of the judicial safeguards regarding the opposing Party's presence during an interview, contrary to that witness's expressed preference.<sup>60</sup> The Selimi Defence's arguments that an immediate resolution by the Court of Appeals Panel may materially advance the proceedings are set out in paragraph 31 above.

44. The Thaçi Defence argues that this issue seeks appellate determination on whether imposing Recording and Disclosure is consistent with Rules 104-111 of the Rules.<sup>61</sup> The Thaçi Defence further argues that this issue significantly affects the fair and expeditious conduct of the proceedings because it concerns: (i) the measures' compatibility with Defence protections intended by the SC legal framework; (ii) the disclosure of privileged information or work product, thus significantly impacting Mr Thaçi's right to counsel and to have adequate time and facilities to prepare his defence; and (iii) a procedural error which will make Defence interviews more complex, cumbersome and time-consuming.<sup>62</sup> Lastly, the Thaçi Defence argues that intervention by the Court of Appeals Panel at this stage is warranted, because if imposing Recording and Disclosure violates Rules 104-111 of the Rules, then the prejudice suffered to the ongoing Defence investigations and to Mr Thaçi's rights will be irreparable.<sup>63</sup>

45. As regards the Fourth Selimi Issue, the SPO responds that the Selimi Defence fails to demonstrate any discrete error, instead simply challenging the Pre-Trial Judge's exercise of discretion and thus merely disagreeing with the Impugned Decision.<sup>64</sup> As regards the Eighth Thaçi Issue, the SPO responds, *inter alia*, that by posing such a general question on the Framework's compliance with Rules 104-111 of the Rules (which cover a wide array of provisions, including many Rules

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<sup>60</sup> Selimi Request, para. 24.

<sup>61</sup> Thaçi Request, paras 6, 9; *see also* Thaçi Reply, para. 6.

<sup>62</sup> Thaçi Request, paras 12, 14.

<sup>63</sup> Thaçi Request, para. 18.

<sup>64</sup> SPO Response to Selimi Request, para. 15.

exclusively related to the SPO's disclosure obligations), the Thaçi Defence fails to identify a sufficiently discrete issue/error.<sup>65</sup>

46. *Appealable issue.* As regards the Fourth Selimi Issue, the Pre-Trial Judge is satisfied that this issue arises from paragraph 212.II.j.iv. and n.ii. of the Impugned Decision, and more generally, the Pre-Trial Judge's findings in paragraphs 114-136 (on the Framework's legal basis and scope) and 147-160 (on balancing fair trial rights and on disclosure), to the extent they concern Recording and Disclosure (respectively submission of a copy to the Panel). As regards the Eighth Thaçi Issue, the Pre-Trial Judge, noting the very broad wording of this issue, understands the Thaçi Defence to refer to the Pre-Trial Judge's findings in paragraphs 155-157 of the Impugned Decision, relating to the Defence's concern on disclosure of material that otherwise would not have to be disclosed.<sup>66</sup> As such, this issue pertains, in particular, to the question whether the measures of Recording and Disclosure comply with Rules 106 and/or 111(1) of the Rules. Accordingly, the Pre-Trial Judge finds that both issues arise from the Impugned Decision and constitute appealable issues.

47. *Fairness and expeditiousness.* The Pre-Trial Judge is satisfied that both issues would significantly affect the fair conduct of the proceedings, as they pertain to the central question of the compliance of paragraph 212.II.j.iv. and n.ii. of the Impugned Decision with the SC legal framework. In addition, early resolution of these issues would streamline the proceedings and facilitate, in particular, the Accused's right to have adequate time and facilities to prepare his defence (Article 21(4)(c) of the Law) and to be tried within a reasonable time (Article 21(4)(d) of the Law). Thus, both issues would also significantly affect the expeditious conduct of the proceedings.

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<sup>65</sup> SPO Response to Thaçi Request, para. 16.

<sup>66</sup> See Thaçi Request, para. 14 ("privileged information or work product").

48. *Materially advance the proceedings.* The Pre-Trial Judge considers that, for the reasons set out in paragraph 21 above, an immediate resolution of both issues by the Court of Appeals Panel may materially advance the proceedings.

49. In light of the above, the Pre-Trial Judge grants leave to appeal the Fourth Selimi Issue and the Eighth Thaçi Issue.

### C. ISSUES FOR WHICH LEAVE TO APPEAL IS REJECTED

#### 1. Third Thaçi Issue

50. The Thaçi Defence submits that this issue seeks resolution of whether, in light of their relevance to the issue under consideration, it was legally permissible for the Pre-Trial Judge not to consider the Thaçi Supplemental Submissions<sup>67</sup> (which allegedly sought to demonstrate that the SPO's list of witnesses pursuant to Rule 95(4)(b) of the Rules ("SPO Witness List") includes persons who neither know nor have consented to being on the list).<sup>68</sup> The Thaçi Defence further avers that this issue significantly affects the fair and expeditious conduct of the proceedings, as: (i) it concerns Mr Thaçi's right to investigate the case against him (deriving from his right to counsel and to have adequate time and facilities to prepare his defence); and (ii) the length of the SPO Witness List (having repercussions for the Framework's application) significantly impacts the expeditiousness of the proceedings.<sup>69</sup> Lastly, the Thaçi Defence argues that intervention of the Court of Appeals Panel at this stage is warranted, because if the Pre-Trial Judge erroneously disregarded the Thaçi Supplementation

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<sup>67</sup> 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.

<sup>68</sup> Thaçi Request, paras 6 (*referring to Impugned Decision*, paras 109-110), 8, 13 (*referring to Thaçi Supplemental Submissions*, paras 10-12); *see also* Thaçi Reply, para. 4.

<sup>69</sup> Thaçi Request, paras 12-13.



Submissions, then the prejudice suffered to the ongoing Defence investigations and to Mr Taçi's rights will be irreparable.<sup>70</sup>

51. The SPO responds that the Taçi Defence fails to raise any legal issue arising from the Pre-Trial Judge's refusal to consider the Taçi Supplemental Submissions, which were, in the SPO's view, filed in disregard of the Rules and the Pre-Trial Judge's schedule for submissions. The SPO also avers that this issue would not significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>71</sup>

52. *Appealable issue.* The Pre-Trial Judge notes that paragraphs 109-110 of the Impugned Decision explicitly state that the Taçi Supplemental Submissions were not considered any further because the Taçi Defence has neither sought to demonstrate a legal basis for providing supplemental submissions nor requested the necessary authorisation to do so. The Taçi Request does not present any legal arguments related to the admissibility of supplemental submissions but only discusses the context of these submissions. The Pre-Trial Judge therefore considers that the Taçi Defence fails to demonstrate an error and, thus, fails to present an appealable issue. Accordingly, leave to appeal the Third Taçi Issue is rejected.

## **2. Fifth and Sixth Taçi Issues**

53. The Taçi Defence avers, as regards the Fifth Taçi Issue, that by imposing Recording and Disclosure on the basis of a climate of witness intimidation and interference, and the continued significant influence of the Accused, the Pre-Trial Judge: (i) violated the presumption that Defence counsel act in good faith; and (ii) created a double standard for the Defence (compared to the SPO).<sup>72</sup> As regards the Sixth Taçi Issue, the Taçi Defence also avers that the Pre-Trial Judge created

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<sup>70</sup> Taçi Request, para. 18.

<sup>71</sup> SPO Response to Taçi Request, para. 11.

<sup>72</sup> Taçi Request, paras 6 (*referring to Impugned Decision, para. 118*), 9.

an impermissible double standard by relying on “the established risks of disclosing information to the Defence” for justifying the imposing of Recording and Disclosure.<sup>73</sup> The Thaçi Defence further avers that these two issues significantly affect the fair and expeditious conduct of the proceedings, as they: (i) impact Mr Thaçi’s right to have adequate time and facilities to prepare his defence, pursuant to Article 21(4)(c) of the Law, and the right to be afforded this guarantee “in full equality”, pursuant to the chapeau of Article 21(4) of the Law; and (ii) identify a procedural error which will make Defence interviews more complex, cumbersome and time-consuming.<sup>74</sup> Lastly, the Thaçi Defence avers that intervention of the Court of Appeals Panel at this stage is warranted, because if imposing Recording and Disclosure is a partial measure, then the prejudice suffered to the ongoing Defence investigations and to Mr Thaçi’s rights will be irreparable.<sup>75</sup>

54. The SPO responds that these two issues should be rejected because they misrepresent the Impugned Decision. In particular, the SPO avers that the requirement to act in good faith emanates from the Framework and applies to any calling party when seeking the consent of witnesses to be interviewed. Lastly, the SPO avers that the Impugned Decision already addressed submissions relating to the alleged mistrust towards the Defence and held that it is not implied or presumed that counsel would engage in wrongdoing.<sup>76</sup>

55. *Appealable issue.* As regards the Fifth Thaçi Issue, the Pre-Trial Judge recalls that the references in paragraph 118 of the Impugned Decision to the repeatedly established climate of witness intimidation and interference, as well as the continued significant influence exercised by the Accused in the present case, were

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<sup>73</sup> Thaçi Request, paras 6 (*referring to* Impugned Decision, paras 124, 142-143), 9; *see also* Thaçi Reply, para. 5.

<sup>74</sup> Thaçi Request, paras 12, 14.

<sup>75</sup> Thaçi Request, para. 18.

<sup>76</sup> SPO Response to Thaçi Request, para. 14 (*referring, in particular, to* Impugned Decision, para. 170).

made to explain the protective function of the Framework.<sup>77</sup> It is clear from paragraphs 114-136 of the Impugned Decision that the measures of Recording and Disclosure were not (solely) based on these considerations. The Pre-Trial Judge further recalls that: (i) the Framework's protection only applies upon the witness's request;<sup>78</sup> (ii) the Framework applies not only to SPO witnesses, but all witnesses in the present case;<sup>79</sup> and (iii) paragraph 170 of the Impugned Decision already addresses the Defence's concern. As regards the Sixth Thaçi Issue, the Pre-Trial Judge notes that the phrase on "the established risks of disclosing information to the Defence": (i) clearly related to "witnesses benefitting from protective measures under Rule 80 of the Rules"; and (ii) was clearly used for demonstrating the Framework's additional function of ensuring the preservation of evidence, but not for justifying, in itself, the measures of Recording and Disclosure.<sup>80</sup>

56. In light of the above, the Pre-Trial Judge considers that these two issues do not constitute appealable issues as they misrepresent the Impugned Decision and, thus, do not arise from it. Accordingly, leave to appeal the Fifth and the Sixth Thaçi Issue is rejected.

### **3. Seventh, Ninth and Eleventh Thaçi Issues, and Third Selimi Issue**

57. With the Seventh Thaçi Issue (relating to the measures of Recording and Disclosure), the Thaçi Defence claims that the Pre-Trial Judge adopted an erroneously narrow definition of compulsion in paragraph 150 of the Impugned Decision.<sup>81</sup> With the Ninth Thaçi Issue, the Thaçi Defence questions whether the "finding reached by the Pre-Trial Judge"<sup>82</sup> should be invalidated due to the Pre-

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<sup>77</sup> In particular, for witnesses for which protective measures have been ordered in the present proceedings, following or upon the expiry of these measures (*see* Impugned Decision, para. 118 *in fine*).

<sup>78</sup> Impugned Decision, para. 119.

<sup>79</sup> Impugned Decision, para. 116.

<sup>80</sup> Impugned Decision, para. 124.

<sup>81</sup> Thaçi Request, paras 6, 9.

<sup>82</sup> Thaçi Request, para. 9 (which does not further specify to which finding the Thaçi Defence refers).

Trial Judge's reliance on the fact that interview recordings do not automatically become part of the record, without considering other practical risks expressed by the Defence regarding Recording and Disclosure.<sup>83</sup> The Thaçi Defence further argues that the Seventh and Ninth Thaçi Issues significantly affect the fair and expeditious conduct of the proceedings as they: (i) significantly impact the privilege against self-incrimination; and (ii) identify a procedural error which will make Defence interviews more complex, cumbersome and time-consuming.<sup>84</sup> Lastly, the Pre-Trial Judge understands the Thaçi Defence to argue for both issues that intervention of the Court of Appeals Panel at this stage is warranted, because if the measures of Recording and Disclosure violate the privilege against self-incrimination, then the prejudice suffered to the ongoing Defence investigations and the rights of Mr Thaçi will be irreparable.<sup>85</sup>

58. As regards the Eleventh Thaçi Issue, the Thaçi Defence submits that it concerns the impact of the Pre-Trial Judge's (alleged) failure to balance, when imposing Recording and Disclosure, the privacy expectation of witnesses against Mr Thaçi's fair trial rights.<sup>86</sup> The Thaçi Defence further submits that this issue significantly affects the fair and expeditious conduct of the proceedings, in particular because Mr Thaçi's right to have adequate time and facilities to prepare his defence is significantly impacted.<sup>87</sup> Lastly, it submits that intervention of the Court of Appeals Panel at this stage is warranted, because if the privacy issues of SPO witnesses have been wrongly assessed, then the prejudice suffered to the ongoing Defence investigations and to Mr Thaçi's rights will be irreparable.<sup>88</sup>

59. The Selimi Defence essentially argues with the Third Selimi Issue that imposing Recording and Disclosure (respectively submission of a copy to the

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<sup>83</sup> Thaçi Request, paras 6, 9; *see also* Thaçi Reply, para. 7.

<sup>84</sup> Thaçi Request, paras 12, 14; *see also* Thaçi Reply, para. 6.

<sup>85</sup> Thaçi Request, para. 18.

<sup>86</sup> Thaçi Request, paras 6 (*referring to* Impugned Decision, paras 121-123), 10; *see also* Thaçi Reply, para. 7.

<sup>87</sup> Thaçi Request, paras 12, 15.

<sup>88</sup> Thaçi Request, para. 18.

Panel) exceeds the powers of the Pre-Trial Judge pursuant to Article 39(11) of the Law, as this provision is limited to measures that are necessary for the *preservation*, but not the *gathering* of evidence. In this regard, the Selimi Defence: (i) avers that the Framework unlawfully mandates the Defence to engage in evidence gathering on behalf of the SPO and the Panel, by allowing for the possibility that the interview recordings become part of the record (through submission to the Panel); and (ii) adds that this issue also challenges the “sufficiency of the judicial safeguards”.<sup>89</sup> The Selimi Defence further argues that this issue significantly affects the fair and expeditious conduct of the proceedings (and possibly the outcome of the trial), as the (alleged) abuse of judicial discretion by the Pre-Trial Judge leads to: (i) the Defence’s discretion in carrying out its investigations being unfairly limited; and (ii) the Defence being unlawfully mandated to engage in evidence gathering on behalf of the SPO and the Panel.<sup>90</sup> Lastly, the Selimi Defence argues that immediate intervention by the Court of Appeals Panel could rid the proceedings of possible mistakes and move them along the right course.<sup>91</sup>

60. The SPO responds, regarding the Seventh Thaçi Issue, that the Thaçi Defence fails to properly articulate: (i) a discrete issue, the resolution of which would be essential for the future conduct of proceedings; and (ii) how this issue would significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>92</sup> Regarding the Ninth Thaçi Issue, the SPO avers that the Thaçi Defence: (i) fails to properly specify which submissions the Pre-Trial Judge allegedly disregarded or how the Pre-Trial Judge erred in assigning them weight;<sup>93</sup> and (ii) misrepresents the Impugned Decision because the Pre-Trial Judge

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<sup>89</sup> Selimi Request, paras 1, 12, 20-21 (*referring to* Impugned Decision, paras 115, 124, 212.II.n.ii. and o.); *see also* Selimi Reply, paras 7, 11.

<sup>90</sup> Selimi Request, para. 21.

<sup>91</sup> Selimi Request, paras 25-28.

<sup>92</sup> SPO Response to Thaçi Request, para. 15.

<sup>93</sup> SPO Response to Thaçi Request, para. 17.

considered the Thaçi Defence's submissions in detail and addressed its concerns.<sup>94</sup> Regarding the Eleventh Thaçi Issue, the SPO avers that it misrepresents the Impugned Decision because the Pre-Trial Judge did not rely on witness privacy to justify the measures of Recording and Disclosure, but rather to explain why the Framework: (i) requires that the SPO initiate contact with the witness on its own list; and (ii) defines the SPO's subsequent involvement.<sup>95</sup>

61. As regards the Third Selimi Issue, the SPO responds that this issue rests on a mischaracterisation of the Impugned Decision, as the latter: (i) does not mandate the Defence to gather evidence on behalf of the SPO or the Panel; and (ii) expressly provides that interview recordings shall not automatically become part of the record.<sup>96</sup> Lastly, the SPO submits that the Selimi Defence's arguments that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, fail for the same reasons.<sup>97</sup>

62. *Appealable issue.* At the outset, the Pre-Trial Judge notes that the present decision already grants leave to appeal three issues on Recording and Disclosure.<sup>98</sup> As regards the Seventh Thaçi Issue, the Pre-Trial Judge considers that the Thaçi Defence fails to identify a discrete error in the Impugned Decision, instead merely disagreeing with the Pre-Trial Judge's conclusion as to the absence of compulsion. As regards the Ninth Thaçi Issue, the Pre-Trial Judge notes that the Thaçi Defence fails to clearly identify which "finding" of the Impugned Decision should be "invalidated". In addition, in case the Thaçi Defence intends to refer to paragraphs 146-154 of the Impugned Decision, the Pre-Trial Judge considers that the Thaçi Defence fails to identify a discrete error in the Pre-Trial Judge's

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<sup>94</sup> SPO Response to Thaçi Request, para. 18 (*referring to Impugned Decision, paras 22, 79, 147-148*).

<sup>95</sup> SPO Response to Thaçi Request, para. 21 (*referring to Impugned Decision, paras 121-123*).

<sup>96</sup> SPO Response to Selimi Request, paras 12-13 (*referring to Impugned Decision, para. 212.II.o.*).

<sup>97</sup> SPO Response to Selimi Request, para. 14.

<sup>98</sup> *See above, paras 42 (First Thaçi Issue), 49 (Fourth Selimi Issue and Eighth Thaçi Issue).*

reasoning.<sup>99</sup> Lastly, as regards the Eleventh Thaçi Issue, the Pre-Trial Judge notes that, while paragraphs 121-123 of the Impugned Decision set out the Pre-Trial Judge's reasoning on the privacy-related function of the Framework, paragraphs 137-177 of the Impugned Decision are dedicated to the assessment of the Framework's compliance with the right to a fair trial. The Pre-Trial Judge considers that, instead of identifying a discrete error arising from the Impugned Decision, the Thaçi Defence merely disagrees with the Pre-Trial Judge's findings in the above-mentioned paragraphs of the Impugned Decision.

63. As regards the Third Selimi Issue, the Pre-Trial Judge notes that, as initially worded,<sup>100</sup> this issue concerns the question whether the measures of Recording and Disclosure (respectively submission of a copy to the Panel) comply with Article 39(11) of the Law. However, the Selimi Defence later limits this issue to one particular argument. It avers that by allowing for the possibility of interview recordings becoming part of the record, the Framework mandates the Defence to engage in evidence gathering on behalf of the SPO and the Panel, despite the fact that evidence gathering (in contrast to evidence preservation) is not covered by the purposes mentioned in Article 39(11) of the Law.<sup>101</sup> In this regard, the Pre-Trial Judge recalls that paragraph 212.II.o. of the Impugned Decision expressly stipulates that, except in limited situations requiring judicial authorisation (and compliance with the conditions for admission of evidence under the Rules), any information arising from Defence interviews with witnesses included in the SPO Witness List and other notified witnesses does not become part of the record. Therefore, the Pre-Trial Judge considers that the Selimi Defence not only raises

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<sup>99</sup> Seeing as the Pre-Trial Judge summarised and addressed the Thaçi Defence's arguments in paragraphs 147-148 of the Impugned Decision, and held in paragraph 154 of the Impugned Decision that "the [...] Framework 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".

<sup>100</sup> See Selimi Request, para. 1.

<sup>101</sup> See Selimi Request, paras 12, 20.

merely hypothetical concerns but also misrepresents the Impugned Decision, as the latter mandates in no way the Defence to engage in evidence gathering on behalf of the SPO and the Panel. Lastly, the Pre-Trial Judge recalls that the present decision already grants leave to appeal for the Fourth Selimi Issue on the compliance of paragraph 212.II.j.iv. and n.ii. of the Impugned Decision with Article 39(11) of the Law.<sup>102</sup>

64. In light of the above, the Pre-Trial Judge finds that these four matters do not constitute appealable issues and, accordingly, rejects leave to appeal the Seventh, Ninth and Eleventh Thaçi Issues, and the Third Selimi Issue.

#### 4. Tenth Thaçi Issue

65. According to the Thaçi Defence, this issue asks whether, in light of the Pre-Trial Judge (allegedly) framing the question of witnesses' privacy entirely with respect to SPO witnesses, without referring to the rights or expectations of Defence witnesses, all findings based on this reasoning should be reversed.<sup>103</sup> The Thaçi Defence further argues that this issue significantly affects the fair and expeditious conduct of proceedings because it significantly impacts Mr Thaçi's right to have adequate time and facilities to prepare his defence and to exercise his rights in full equality (in relation to the SPO).<sup>104</sup> Lastly, the Thaçi Defence's arguments on whether an immediate resolution by the Court of Appeals Panel may materially advance the proceedings, are set out in paragraph 58 above.

66. The SPO responds that the Thaçi Defence merely raises abstract or hypothetical concerns which cannot constitute an appealable issue. In particular, the SPO avers that the Thaçi Defence fails to adequately identify which findings it

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<sup>102</sup> See above, para. 49.

<sup>103</sup> Thaçi Request, paras 6 (*referring to Impugned Decision, paras 121-123*), 10; *see also* Thaçi Reply, para. 7.

<sup>104</sup> Thaçi Request, paras 12, 15.



seeks to challenge or why the resolution of this issue would be essential for the determination of matters arising in the judicial cause.<sup>105</sup>

67. *Appealable issue.* The Pre-Trial Judge recalls that paragraph 116 of the Impugned Decision: (i) clearly states that the Framework applies to all notified witnesses in this case and their contacts with the non-calling Parties and participants;<sup>106</sup> and (ii) explains why the Framework is discussed particularly in relation to the Defence, namely because the Defence raises arguments in relation to their contact with SPO witnesses. The Pre-Trial Judge therefore finds that the Tenth Thaçi Issue is not an appealable issue as, besides failing to adequately identify which findings it seeks to challenge, it rests on a misrepresentation of the Impugned Decision and, thus, does not arise from it. Accordingly, leave to appeal the Tenth Thaçi Issue is rejected.

## 5. Twelfth and Thirteenth Thaçi Issues

68. The Thaçi Defence submits that the Twelfth Thaçi Issue seeks resolution on the impact of the Framework's adoption after years of SPO interviews having been conducted without the Defence's presence.<sup>107</sup> As regards the Thirteenth Thaçi Issue, the Thaçi Defence submits that this issue arises from the Pre-Trial Judge's dismissal of the Defence's concerns that the (SITF and) SPO conducted witness interviews without the Defence's presence, on the basis that these investigations were broader than the present case, even though SPO disclosures show investigations being conducted into Mr Thaçi himself.<sup>108</sup> As regards both issues, the Thaçi Defence further avers that they significantly impact the fair and

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<sup>105</sup> SPO Response to Thaçi Request, para. 20.

<sup>106</sup> *See also* Impugned Decision, para. 121 ("Furthermore, the Proposed Framework additionally upholds the privacy of all witnesses included in the SPO List of Witnesses and other notified witnesses.").

<sup>107</sup> Thaçi Request, paras 6 (*referring to* Impugned Decision, paras 142-145, and to certain provisions of the Kosovo Criminal Procedure Code), 11; *see also* Thaçi Reply, para. 8.

<sup>108</sup> Thaçi Request, paras 6 (*referring to* Impugned Decision, para. 140), 11; *see also* Thaçi Reply, para. 8.

expeditious conduct of proceedings, particularly because adopting the Framework at this point in time results in its uneven application between the Defence and the SPO, significantly impacting the equality of arms.<sup>109</sup> Lastly, the Thaçi Defence avers that intervention of the Court of Appeals Panel at this stage is warranted, because if the Protocol violates the equality of arms, then the prejudice suffered to the ongoing Defence investigations and to Mr Thaçi's rights will be irreparable.<sup>110</sup>

69. The SPO responds that the Twelfth Thaçi Issue does not arise from the Impugned Decision as the Framework regulates only contacts with notified witnesses of a Party or participant, and applies equally thereto, but not investigations or interviews more generally.<sup>111</sup> Regarding the Thirteenth Thaçi Issue, the SPO submits that the Thaçi Defence misrepresents the Impugned Decision when arguing that the Pre-Trial Judge dismissed the Defence's concerns solely based on the fact that the interviews related to the Council of Europe Report as a whole. According to the SPO, the Impugned Decision referred to the investigations on the Council of Europe Report merely to illustrate the different responsibilities of the Defence and the SPO under the SC legal framework.<sup>112</sup>

70. *Appealable issue.* As regards the Twelfth Thaçi Issue, the Pre-Trial Judge recalls that: (i) paragraph 144 of the Impugned Decision explicitly states that the Framework "would equally apply to SPO interviews with Defence witnesses in the event that the Defence would decide to put forward a case"; and (ii) paragraphs 138-145 of the Impugned Decision address in detail the principle of equality of arms and the arguments made, *inter alia*, by the Thaçi Defence in this regard. As such, the Pre-Trial Judge finds that the Thaçi Defence's arguments: (i) concern abstract questions; (ii) constitute a mere disagreement with the Pre-

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<sup>109</sup> Thaçi Request, paras 12, 15.

<sup>110</sup> Thaçi Request, para. 18.

<sup>111</sup> SPO Response to Thaçi Request, para. 22.

<sup>112</sup> SPO Response to Thaçi Request, para. 23 (*referring to Impugned Decision, para. 140*).

Trial Judge's findings; and (iii) misrepresent the Impugned Decision when averring a "post-facto application" of the Framework.<sup>113</sup>

71. As regards the Thirteenth Thaçi Issue, the Pre-Trial Judge recalls that paragraphs 140-145 of the Impugned Decision set out in detail the Pre-Trial Judge's reasoning for dismissing the Defence's arguments in this regard. The Pre-Trial Judge considers that instead of demonstrating a discrete error in the Pre-Trial Judge's reasoning and how this would affect Mr Thaçi's rights, the Thaçi Defence merely disagrees with the Pre-Trial Judge's findings.

72. In light of the above, the Pre-Trial Judge finds that these two matters are not appealable issues and, accordingly, rejects leave to appeal the Twelfth and Thirteenth Thaçi Issues.

## **6. Fourteenth Thaçi Issue**

73. According to the Thaçi Defence, this issue questions the basis for the Pre-Trial Judge's finding in paragraph 125 of the Impugned Decision that the Framework contributes to the expeditious conduct of the proceedings.<sup>114</sup> The Thaçi Defence submits that this issue significantly affects the fair and expeditious conduct of proceedings, in particular as it significantly impacts Mr Thaçi's rights to have adequate time and facilities to prepare his defence, and to be tried without undue delay.<sup>115</sup> Lastly, the Thaçi Defence argues that intervention of the Court of Appeals Panel at this stage is warranted, because if the Framework is incompatible with the above-mentioned rights, then the prejudice suffered to the ongoing Defence investigations and to Mr Thaçi's rights will be irreparable.<sup>116</sup>

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<sup>113</sup> See Thaçi Request, para. 11.

<sup>114</sup> Thaçi Request, paras 6, 11; *see also* Thaçi Reply, para. 8.

<sup>115</sup> Thaçi Request, paras 12, 16.

<sup>116</sup> Thaçi Request, para. 18.

74. The SPO responds that the above-mentioned conclusion by the Pre-Trial Judge is only one of many considerations supporting his finding on the Framework's necessity for regulating, *inter alia*, the handling of confidential information and contact with witnesses. Thus, according to the SPO, the Thaçi Defence fails to explain how the Pre-Trial Judge's finding impacts his overall conclusion that the Framework is necessary.<sup>117</sup>

75. *Appealable issue.* The Pre-Trial Judge notes that paragraph 125 of the Impugned Decision clearly explains how, in his view, the Framework contributes to the expeditious conduct of the proceedings.<sup>118</sup> The Pre-Trial Judge thus considers that, instead of demonstrating a discrete error by the Pre-Trial Judge, the Thaçi Defence raises hypothetical and abstract concerns, and merely disagrees with the Pre-Trial Judge's finding. Therefore, the Pre-Trial Judge finds that this is not an appealable issue and, accordingly, rejects leave to appeal the Fourteenth Thaçi Issue.

## 7. Fifteenth Thaçi Issue

76. The Thaçi Defence challenges whether the Framework's impact on Mr Thaçi's right to have adequate time and facilities to prepare his defence, pursuant to Article 21(4)(c) of the Law, can be considered mitigated through measures such as joint Defence interviews of SPO witnesses or remote interviews of SPO witnesses, when the Defence objections to these measures were (allegedly) not considered.<sup>119</sup> The Thaçi Defence's arguments on whether the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and

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<sup>117</sup> SPO Response to Thaçi Request, para. 24 (*referring to* Impugned Decision, paras 116-135).

<sup>118</sup> Namely "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".

<sup>119</sup> Thaçi Request, paras 6 (*referring to* Impugned Decision, para. 175), 11; *see also* Thaçi Reply, para. 8.

on whether an immediate resolution by the Court of Appeals Panel may materially advance the proceedings, are set out in paragraph 73 above.

77. The SPO responds that by (erroneously) claiming that the Pre-Trial Judge failed to consider certain (unspecified) Defence objections, the Thaçi Defence expresses mere disagreement with the Pre-Trial Judge's conclusions.<sup>120</sup>

78. *Appealable issue.* The Pre-Trial Judge recalls that paragraphs 171-176 of the Impugned Decision discuss in detail the right of the Accused to have adequate time and facilities to prepare their defence, and explicitly address the concerns raised by the Defence (including those on logistical challenges). The Pre-Trial Judge considers that the Thaçi Defence fails to demonstrate a discrete error in the Impugned Decision, instead merely disagreeing with the Pre-Trial Judge's findings. Thus, the Pre-Trial Judge finds that this is not an appealable issue and, accordingly, rejects leave to appeal the Fifteenth Thaçi Issue.

## 8. Second Selimi Issue

79. The Selimi Defence avers that the Pre-Trial Judge made a factual error in stating that the protection provided by the Framework "will exclusively be extended to those who themselves wish to invoke it", and in setting out that the witness's preference and judicial overview thereof is a counterbalancing safeguard on the Framework's scope of application, when in fact any interview with all concerned witnesses must take place under the Framework.<sup>121</sup> The Selimi Defence further avers that this issue significantly affects the fair and expeditious conduct of the proceedings, because a deficient or incorrect understanding by the Pre-Trial Judge of the counterbalancing safeguards leads to the Framework being

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<sup>120</sup> SPO Response to Thaçi Request, para. 25 (*referring, inter alia, to Impugned Decision, paras 172, 175*).

<sup>121</sup> Selimi Request, paras 1, 11, 18 (*referring to Impugned Decision, paras 119-120*); *see also Selimi Reply, para. 6*.

unfairly broad in scope. According to the Selimi Defence, this results in: (i) the Defence being unlawfully prevented from potentially interviewing any of the concerned witnesses outside of the Framework; (ii) the content of those interviews being potentially unfairly limited; and (iii) the Defence investigations being unnecessarily delayed.<sup>122</sup> Lastly, the Selimi Defence argues that immediate intervention by the Court of Appeals Panel could rid the proceedings of possible mistakes and move them along the right course.<sup>123</sup>

80. The SPO responds that this issue misrepresents the Impugned Decision, in particular as the sentence in paragraph 119 of the Impugned Decision, cited by the Selimi Defence, clearly referred only to the Framework's protections, which witnesses may opt to avail themselves of. The SPO adds that the Selimi Defence fails to show why that finding would be factually incorrect.<sup>124</sup> Lastly, the SPO avers that the Selimi Defence's arguments regarding this issue's impact on the fair and expeditious conduct of the proceedings are baseless.<sup>125</sup>

81. *Appealable issue.* The Pre-Trial Judge notes that, as clearly evidenced by the structure and subheadings of the Impugned Decision (“(a) Functions of the Proposed Framework”; “(i) Protection”), paragraph 119 of the Impugned Decision relates to the protective function of the Framework. The focus of paragraphs 116-120 is plainly the procedure for contacts between witnesses and the opposing Party or participant, in particular the assistance and protection that witnesses may seek when an opposing Party or participant wishes to interview them.<sup>126</sup> As such, the sentence cited by the Selimi Defence evidently relates to paragraph 212.II.b. of the Impugned Decision, setting out the procedure for obtaining the witness's consent to be interviewed. The Pre-Trial Judge therefore finds that the Selimi

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<sup>122</sup> Selimi Request, para. 19.

<sup>123</sup> Selimi Request, paras 25-28.

<sup>124</sup> SPO Response to Selimi Request, paras 7-8.

<sup>125</sup> SPO Response to Selimi Request, para. 10.

<sup>126</sup> See, in particular, Impugned Decision, para. 116 *ab initio*.

Defence: (i) takes the cited sentence out of context, thereby misrepresenting the Impugned Decision; and (ii) fails to identify a discrete error in the reasoning of the Impugned Decision. Therefore, the Pre-Trial Judge finds that this is not an appealable issue and, accordingly, rejects leave to appeal the Second Selimi Issue.

## 9. First and Second Krasniqi Issues

82. With the First Krasniqi Issue, the Krasniqi Defence challenges whether the Pre-Trial Judge applied the necessity test regarding the Framework's measures, as required by Articles 35(2)(f) and 39(1) and (11) of the Law.<sup>127</sup> As regards the Second Krasniqi Issue, the Krasniqi Defence argues that, to the extent he applied the necessity test, the Pre-Trial Judge erred in fact and in law in finding that the Framework was necessary.<sup>128</sup> The Krasniqi Defence further argues that these two issues significantly affect the fair and expeditious conduct of the proceedings, because the Framework places limits on the Defence's ability to contact witnesses and requires the Defence teams to take additional steps.<sup>129</sup> Lastly, the Krasniqi Defence argues that an immediate resolution of these two issues by the Court of Appeals Panel will materially advance proceedings, because a wrongly imposed Framework will wrongly constrain future Defence investigations and taint the fairness of the proceedings.<sup>130</sup>

83. The SPO responds that the First Krasniqi Issue ignores and misrepresents relevant findings in the Impugned Decision, in particular as the Impugned Decision demonstrates that the Pre-Trial Judge was clearly cognisant of the necessity requirement, and as he gave detailed reasons for why he considered the Framework's adoption to be necessary.<sup>131</sup> As regards the Second Krasniqi Issue,

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<sup>127</sup> Krasniqi Request, paras 2, 16; *see also* Krasniqi Reply, para. 5.

<sup>128</sup> Krasniqi Request, paras 2, 19; *see also* Krasniqi Reply, para. 6.

<sup>129</sup> Krasniqi Request, paras 17, 20.

<sup>130</sup> Krasniqi Request, paras 18, 20.

<sup>131</sup> SPO Response to Krasniqi Request, para. 2 (*referring to* Impugned Decision, paras 115, 117-118, 198).

the SPO responds that: (i) the issue is insufficiently specific or discrete; (ii) the Krasniqi Defence fails to specify the alleged error; and (iii) the issue represents a mere disagreement with the Pre-Trial Judge's overall conclusions.<sup>132</sup>

84. *Appealable issue.* The Pre-Trial Judge notes that, *inter alia*, the Fifth Krasniqi Issue, for which leave to appeal is granted,<sup>133</sup> already covers the topics of the Framework's legal basis and necessity. Further, the Pre-Trial Judge finds that, in light of their generic wording and substantiation, the First and Second Krasniqi Issues do not properly identify a discrete error arising from the Decision, instead representing mere disagreements with the Pre-Trial Judge's findings on the necessity of the Framework's measures. Therefore, the Pre-Trial Judge finds that they do not constitute appealable issues and, accordingly, rejects leave to appeal the First and Second Krasniqi Issues.

#### **10. Fourth Krasniqi Issue**

85. The Krasniqi Defence takes issue with one discrete sentence in paragraph 170 of the Impugned Decision,<sup>134</sup> alleging an error by the Pre-Trial Judge in that he failed to distinguish between the Accused and counsel. According to the Krasniqi Defence, this issue is essential to the Impugned Decision as it challenges the relevance of general findings about the climate of intimidation and influence of the Accused, on which the Impugned Decision (allegedly) rests for imposing measures for counsel's contact with witnesses.<sup>135</sup> The Krasniqi Defence further argues that this issue significantly affects the fairness of the proceedings as it impacts the principle of equality of arms and Mr Krasniqi's right to have adequate

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<sup>132</sup> SPO Response to Krasniqi Request, paras 3-4, 6.

<sup>133</sup> See above, para. 22.

<sup>134</sup> "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".

<sup>135</sup> Krasniqi Request, para. 23 (*referring to* Impugned Decision, paras 118, 124, 169-170, 173, 198); *see also* Krasniqi Reply, para. 7.



facilities to prepare his defence (as enshrined in Article 21(4)(c) of the Law).<sup>136</sup> Lastly, in addition to the reasons set out in paragraph 82 above, the Krasniqi Defence argues that an immediate resolution of this issue by the Court of Appeals Panel will materially advance proceedings by maintaining the equality of arms and determining appropriate boundaries to Defence Counsel in preparing their strategic approach to the case.<sup>137</sup>

86. The SPO responds that this is not an appealable issue as the Krasniqi Defence fails to identify a precise issue, instead combining several issues or even challenging the Impugned Decision as a whole.<sup>138</sup> The SPO further avers that the Krasniqi Defence: (i) misrepresents the Impugned Decision; (ii) fails to provide any legal basis for the claim that fair trial rights would be impacted by the Framework; and (iii) thus, fails to demonstrate that the issue would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.<sup>139</sup>

87. *Appealable issue.* The Pre-Trial Judge recalls that directly after the sentence cited by the Krasniqi Defence, the Impugned Decision states that this does not imply or presume that counsel have engaged or would engage in witness intimidation or interference with proceedings in the absence of any specific indications to the contrary.<sup>140</sup> The Pre-Trial Judge therefore finds that the Krasniqi Defence takes the cited sentence out of context, thereby misrepresenting the Impugned Decision. In addition, the Pre-Trial Judge considers that the Krasniqi Defence fails to identify any specific error. Therefore, the Pre-Trial Judge finds that this is not an appealable issue and, accordingly, rejects leave to appeal the Fourth Krasniqi Issue.

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<sup>136</sup> Krasniqi Request, para. 24 (*referring to* Impugned Decision, paras 142-143, 151, 159, 170).

<sup>137</sup> Krasniqi Request, paras 18, 25.

<sup>138</sup> SPO Response to Krasniqi Request, paras 12-13.

<sup>139</sup> SPO Response to Krasniqi Request, paras 14-17.

<sup>140</sup> Impugned Decision, para. 170 *in fine*.

## 11. Second Veseli Issue

88. The Veseli Defence submits that this issue: (i) derives from paragraphs 137-177 of the Impugned Decision; and (ii) concerns the Framework's compliance with Mr Veseli's right to a fair trial, such as the right to equality of arms, which would be infringed by denying the Defence the same "freedom in choosing the methodology of contacting and interviewing witnesses [...]".<sup>141</sup> In addition, the Veseli Defence challenges the Framework's necessity.<sup>142</sup> The Veseli Defence further argues that this issue directly affects the outcome of the proceedings by potentially infringing Mr Veseli's right to a fair trial.<sup>143</sup> Lastly, the Veseli Defence argues that a determination by the Court of Appeals Panel at this stage is warranted as it would obviate the risk of any prejudice caused to Mr Veseli and provide clarity on the Framework's legal basis.<sup>144</sup>

89. The SPO responds that this issue is insufficiently discrete, seeing as it challenges the Framework's compliance with fair trial rights, thus taking issue with 41 paragraphs of the Impugned Decision without properly identifying specific findings.<sup>145</sup> In addition, the SPO avers that with the examples of purported errors the Veseli Defence: (i) simply repeats submissions it has previously made; (ii) expresses mere disagreement with the Pre-Trial Judge's respective findings; and (iii) misrepresents the Impugned Decision when claiming that these submissions were not addressed or that the respective issues remain open.<sup>146</sup> Furthermore, the SPO avers that the Veseli Defence fails to specify which (and how) fair trial rights would be unnecessarily and/or disproportionately limited by the Framework.<sup>147</sup> Lastly, the SPO avers that the Veseli Defence fails to meet its

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<sup>141</sup> Veseli Request, paras 2, 9 (*referring, inter alia, to Impugned Decision, para. 140*).

<sup>142</sup> Veseli Request, para. 10 (*referring, inter alia, to Impugned Decision, paras 120, 130*).

<sup>143</sup> Veseli Request, para. 12 (and reference therein).

<sup>144</sup> Veseli Request, para. 13.

<sup>145</sup> SPO Response to Veseli Request, para. 6.

<sup>146</sup> SPO Response to Veseli Request, para. 7.

<sup>147</sup> SPO Response to Veseli Request, para. 8.

burden on whether the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and on whether an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>148</sup>

90. *Appealable issue.* The Pre-Trial Judge notes that this issue is phrased in very broad terms (“whether the Framework violates the Accused’s right to a fair trial”) and is not sufficiently specified in the remainder of the Veseli Defence’s submission(s).<sup>149</sup> In particular, the Veseli Defence fails to substantiate (other than mentioning the principle of equality of arms) which, and in what way, fair trial rights would be violated by the Framework. Noting that the present decision already grants leave to appeal for the Sixth Krasniqi Issue,<sup>150</sup> which also relates to fair trial rights but is more specific, the Pre-Trial Judge considers that the Second Veseli Issue does not constitute an appealable issue and, accordingly, rejects leave to appeal.

## 12. Third Veseli Issue

91. The Veseli Defence argues that: (i) this issue derives, *inter alia*, from paragraph 131 of the Impugned Decision;<sup>151</sup> and (ii) the Pre-Trial Judge failed to adequately explain why the Accused in the present case must be treated differently from other Accused in substantially similar, if not identical situations (for instance KSC-BC-2020-04 and KSC-BC-2020-05).<sup>152</sup> The Veseli Defence’s arguments on whether the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and whether an immediate

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<sup>148</sup> SPO Response to Veseli Request, paras 12-13.

<sup>149</sup> See also Veseli Reply, paras 6-8, which remain generic.

<sup>150</sup> See above, para. 28.

<sup>151</sup> Where the Pre-Trial Judge found that “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”.

<sup>152</sup> Veseli Request, paras 2, 11; see also Veseli Reply, para. 9.

resolution by the Court of Appeals Panel may materially advance the proceedings, are set out in paragraph 88 above.

92. The SPO responds that: (i) this matter does not arise from the Impugned Decision, as the Pre-Trial Judge was required to consider the Framework's legal basis and appropriateness only in relation to the present case; (ii) it would have not only been irrelevant but even inappropriate for the Pre-Trial Judge to consider the Framework's applicability or relevance to other cases before the SC; and (iii) the Pre-Trial Judge carefully reasoned why he considered the Framework to be necessary in the present case.<sup>153</sup> Lastly, the SPO argues that the Veseli Defence fails to meet its burden on whether the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and on whether an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>154</sup>

93. *Appealable issue.* The Pre-Trial Judge considers that: (i) paragraph 131 of the Impugned Decision already addresses the concerns submitted by the Veseli Defence; and (ii) the Veseli Defence fails to identify a specific error, instead merely disagreeing with the Pre-Trial Judge's findings in this regard. Therefore, the Pre-Trial Judge finds that this matter does not constitute an appealable issue and, accordingly, rejects leave to appeal the Third Veseli Issue.

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<sup>153</sup> SPO Response to Veseli Request, paras 10-11 (*referring to* Impugned Decision, para. 118).

<sup>154</sup> SPO Response to Veseli Request, paras 12-13.

## V. DISPOSITION

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

- a. **GRANTS** leave to appeal the: (i) First, Second, Fourth and Eighth Thaçi Issues; (ii) First and Fourth Selimi Issues; (iii) Third, Fifth and Sixth Krasniqi Issues; and (iv) First Veseli Issue; and
- b. **REJECTS** leave to appeal the: (i) Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Thaçi Issues; (ii) Second and Third Selimi Issues; (iii) First, Second and Fourth Krasniqi Issues; and (iv) Second and Third Veseli Issues.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Friday, 26 August 2022

At The Hague, the Netherlands.