In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Selimi Defence Appeal against "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant"

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I. INTRODUCTION

1. Pursuant to Article 45(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 170(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Defence for Mr. Selimi ("Defence") hereby submits its appeal against the "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant" ("Impugned Decision"),[1] which *inter alia*, granted, with modification, the Specialist Prosecutor's Office's ("SPO") request[2] to adopt the Proposed Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant ("Framework").

2. On 18 July 2022, the Defence filed its request for leave to appeal the Impugned Decision.[3] On 26 August 2022, the Pre-Trial Judge issued his decision on the Request for Certification,[4] in which he granted leave for the Selimi Defence to appeal the following two issues arising from the Impugned Decision:

   (i) **Issue 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

[1] KSC-BC-2020-06/F00854, Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022.
[2] KSC-BC-2020-06/F00594, Prosecution Submissions on Confidential Information and Contacts with Witnesses, 3 December 2021.
[3] KSC-BC-2020-06/F00884, Selimi Defence Request for Certification to Appeal the Decision on Framework for the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant ("Request for Certification"), 18 July 2022.
[4] KSC-BC-2020-06/F00939, Decision on Defence Requests for Leave to Appeal Decision F00854 ("Certification Decision"), 26 August 2022.

which doesn't require that each witness justify its application according to their individual circumstances;[5] and

(ii) **Issue 2**: Whether the provisions under Section II.j.iv and n.ii of the […] Framework, relating to the mandatory recording of witness interviews and their disclosure (respectively submission to the Panel) are disproportionate to the stated aims of witness protection and the preservation of evidence, and that less restrictive measures should have been considered to mitigate the stated risk.[6]

3. This Appeal will show in relation to Issue 1 that the Pre-Trial Judge abused his discretion by not including a requirement in the Framework that witnesses show a nexus between the stated risk and their individual circumstances, by using the ICC protocol as sound guidance for the interpretation of the SC Legal Framework while ignoring or failing to account for the inconsistent and/or contradictory ICC jurisprudence regarding the use of judicial protection powers at the ICC and through inconsistent reasoning as to the actual necessity for the Framework to be applied to the SPO witnesses.

4. This Appeal will further show, in relation to Issue 2, that by forcing the Defence to choose between not thoroughly preparing its case/potentially incriminating the Accused or revealing sensitive information to the SPO through the mandatory submission of audio-visual recordings to the Panel and SPO, and not using the more proportionate measure of sealing the records and appointing the Registry as their custodian, the Pre-Trial Judge issued a decision so unfair and unreasonable that it constituted an abuse of discretion.

[5] Certification Decision, para. 7(1)
[6] Certification Decision, para. 7(4). *Reformulated by the Pre-Trial Judge pursuant to* Certification Decision, paras 43, 45 – 49; 62, 63.

II. APPLICABLE LAW

5. It is established in KSC jurisprudence that the Court of Appeals Panel will apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law,[7] which specifies, in relevant part, the following grounds of appeal:

(iii) An error on a question of law invalidating the judgment;

(iv) An error of fact which has occasioned a miscarriage of justice; or

(v) […]

6. In relation to errors of law, the Law states that:

> "When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard."[8]

7. KSC jurisprudence further establishes that:

> "A party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments

[7] KSC-BC-2020-07/ IA001-F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention ("*Gucati* Appeal Decision"), 9 December 2020, paras 4-13; KSC-BC-2020-07/ IA002-F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention ("*Haradinaj* Appeal Decision"), 9 February 2021, paras 11-13.
[8] Article 46(4) of the Law.

> are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law."[9]

8. In challenging a discretionary decision, the appellant must demonstrate that the lower-level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower-level panel's discretion. The Court of Appeals Panel will also consider whether the lower-level panel has given weight or sufficient weight to relevant considerations in reaching its decision.[10]

III. SUBMISSIONS

A. Issue 1

9. In the Certification Decision, the Pre-Trial Judge correctly articulated that this ground of appeal essentially questions whether the Framework should apply to all witnesses, without distinguishing whether they require protection.[11] Specifically, this ground of appeal 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 otherwise not at risk, at least have established a nexus between the risk and the individual circumstances of the witness in question.[12]

10. Whether or not **a** Framework may be based on Article 39(11), such a framework must only be adopted on request by witnesses whose circumstances necessitate its application. This is what is implied in Article 39(11) by the phrase "where

[9] *Gucati* Appeal Decision, para. 14.
[10] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.
[11] Certification Decision, para. 33.
[12] Request for Certification, paras 1, 10, 15-16 (referring to Impugned Decision, paras 115-118, 120, 135, 169, 173, 198); *See* also KSC-BC-2020-06/F00926, Selimi Defence Reply to SPO Response to Selimi Defence Request for Certification to Appeal Decision F00854, 15 August 2022 ("Defence Reply"), para. 2.

necessary". In his reasoning, the Pre-Trial Judge focused simply on whether Article 39(11) could, in theory, form the legal basis for such a Framework,[13] but failed to further examine whether the **application** of its provisions to individual witnesses under Article 39(11) *in lieu* of Rule 80 allowed him to dispense with the requirement that protective measures be applied only in objectively justified circumstances. Furthermore, while not formally requiring such a test, the Pre-Trial Judge employed inconsistent reasoning in the Impugned Decision by attempting to link the risk to the Rule 80 protected witnesses, but dispensing with this approach regarding the "(high-ranking) international witnesses or those not otherwise at risk".[14] In doing so, the Pre-Trial Judge abused his discretion. As a consequence of this legal error, the Impugned Decision should be modified to include a requirement that a witness establish a nexus between the risk[15] and the necessity for the Framework to be applied in their specific circumstances.

11. As a matter foundational to Issue 1, the Impugned Decision mischaracterises the submissions of the Defence regarding the scope of the Framework's application. In summing up the Defence position, the Pre-Trial Judge incorrectly states that "the Defence argues […] that (high-ranking) international witnesses or those otherwise not at risk should be excluded from the [Framework]", reasoning upon this misinterpretation that "the mere fact that a witness has not expressed any fear so far or that he or she has an international profile and/or occupied a high-ranking position does not, as such, establish that he or she should not be allowed to request the protection under the terms of the [Framework] in light of

[13] Impugned Decision, para.115.
[14] Impugned Decision, paras 118, 120.
[15] *See* paras 118, 120, 124. In identifying the risk, or "security issues" at question in the present case, the Pre-Trial Judge noted generally a "climate of witness intimidation and interference" in cases similar to the present one, adding that "individualised protective measures […] have been ordered for a significant number of witnesses in the present proceedings".

the aforementioned circumstances".[16] This is neither representative of the Defence submissions during litigation before the Lower Panel, nor is it presently before the Appeals Panel.

12. The fundamental point of the Defence submissions made with regard to the scope of the Framework's application was not that the category of witnesses identified above should be precluded from *requesting* protection by virtue of their status, but that such measures should not be *applied* unless they can be tangibly linked to the stated risk.[17]

13. While the Impugned Decision reasoned that the Pre-Trial Judge's interpretation of the SC legal framework is supported by the ICC Protocol, owing to a combined application of Articles 68(1) and 57(3)(c) of the Rome Statute,[18] the Pre-Trial Judge conspicuously ignored, or failed to take into account decisions emanating from the same court which portray a much narrower application of the powers afforded under Article 57(3)(c) of the Rome Statute, when examined in individual cases, and as such, portray jurisprudential inconsistency in how the ICC judges exercise their powers of protection pursuant to that Article.

14. In the *Katanga* case, the Single Judge considered a situation in which the Registrar had failed to implement a decision of the court as it related to the inclusion of a specific witness in the Court's witness protection programme. In overruling the decision of the Registrar, which was found to be contrary to the criteria he himself had promulgated, as well as disregarding a decision of the court,[19] the

[16] Impugned Decision, para. 120.
[17] *See e.g.* KSC-BC-2020-06/F00626, Selimi Defence Response to "Prosecution Submissions on Confidential Information and Contacts with Witnesses" ("Defence Response"), 15 December 2021, paras 2, 18 – 21 [emphasis added]; Transcript of the 22 February 2022 Hearing, pp. 1017, 1018.
[18] Impugned Decision, para. 126.
[19] ICC-01/04-01/07-428, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation, and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules ("*Katanga* Decision"), 25 April 2008, paras 41 – 51.

Single Judge noted in her own assessment that an objective risk existed,[20] that the witness had specific circumstances which linked them to this threat,[21] that the Registrar's behaviour had created a serious risk for the witness's safety,[22] and that in these "exceptional circumstances", she considered it "necessary to resort to the powers [of Article 57(3)(c)]".[23] Throughout this decision, the Single Judge emphasised an analysis of the "seriousness" of the threat.[24]

15. In the *Mbarushimana* case, the Pre-Trial Chamber considered a Defence request for an order to the Prosecutor to publish an immediate, public retraction of a press release, which was argued to threaten the rights of the accused.[25] The Pre-Trial Chamber invoked *inter alia* Article 57(3)(c) of the Rome Statute, noting in particular its discretionary power to, "*where necessary*, provide for […] the protection" of certain persons, and reiterated its specific responsibility to protect the rights of a suspect, even before they are in the custody of the Tribunal, as well as its power to take "appropriate measures" to protect these rights.[26] The court then identified an objective risk posed to the rights of the accused by the press release, if the allegations of the defence were substantiated.[27] The Pre-Trial Chamber proceeded to analyse the content of the press release in question against the specific circumstances of the accused,[28] and although it found that it may be potentially harmful to the accused; in rejecting the Defence request, the

[20] *Katanga* Decision, paras 41 – 43, 46, 49.
[21] *Katanga* Decision, para. 47.
[22] *Katanga* Decision, para. 51.
[23] *Katanga* Decision, para. 52.
[24] *Katanga* Decision, paras 41 – 44, 47, 49 – 51.
[25] ICC-01/04-01/10, *Prosecutor v. Callixte Mbarushimana*, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, ("*Mbarushimana* Decision"), 31 January 2011, paras 2, 3.
[26] *Mbarushimana* Decision, para. 6 [emphasis added].
[27] *Mbarushimana* Decision, para. 7, with an analysis of the relevant international standards on the contested issue from paras 8 – 11.
[28] *Mbarushimana* Decision, paras 12 – 16.

Pre-Trial Chamber found that "the risk […] *is not of such seriousness* as to warrant the ordering of the measures sought…".[29]

16. In the *Gaddafi* case, the Pre-Trial Chamber considered an application by the Office of Public Counsel for the Defence ("OPCD") requesting a protection order for an accused's rights, argued to be threatened by the actions of a State detaining him at the time.[30] Once again, the Pre-Trial Chamber identified its discretionary powers of protection under Article 57(3)(c),[31] identified the risk to the accused's right to prepare a defence if made contingent upon a State's cooperation, as well as its own responsibility to protect those rights,[32] and *inter alia* ordered that the State in question inform the court if the accused was moved to another detention facility thus ensuring that his rights remained protected, tacitly indicating that it had fully assessed the individual circumstances of the witness versus the seriousness of the risk and therefore the need to pre-emptively act in order to protect the accused.[33]

17. In the cases outlined above, in deciding whether it was "necessary" to exercise its Article 57(3)(c) powers, the ICC chambers showed a consistent approach by (i) determining whether there was an actual risk faced by an individual; and (ii) making an actual threat assessment based on that individual's circumstances/an assessment of the seriousness of the risk faced by the person. The ICC Appeals Chamber stated in relation to abuses of discretion that "the degree of discretion afforded to a Chamber may depend on the nature of the decision in question".[34]

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[29] *Mbarushimana* Decision, para. 17 [emphasis added].
[30] ICC-01/11-01/11 *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on OPCD Requests ("*Gaddafi* Decision"), 27 April 2012, paras 1 – 7.
[31] *Gaddafi* Decision, para. 8.
[32] *Gaddafi* Decision, paras 9, 11.
[33] *Gaddafi* Decision, paras 13-14.
[34] ICC-01/05-01/13, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu

Discretionary powers thus may not be unlimited and cannot exist out of context with the circumstances in which the decision is reached. This is consistent with the interpretation of the exercise of discretion at the KSC by the Appeals Panel in *Gucati*, wherein in held that "[w]hat is certain however – even from a semantic point of view – is that discretion too involves some sort of constraint."[35] It is no accident that the factors considered by the ICC judges in the above cases align with the type of test applied in the application of protective measures pursuant to the specific rule for that purpose (at the KSC, Rule 80).

18. In addition, although the chamber found in *Mbarushimana* that there was indeed a potential for harm to the accused, it still reasoned that this risk did not rise to a level of seriousness which warranted the intervention of the court. This clearly indicates that the court approaches the use of protective powers under Article 57(3)(c) sparingly and that in addition to the two-prong test outlined above,[36] there is a threshold level of risk which needs to be met before the court will exercise its power.

19. Furthermore, the Pre-Trial Judge, while ignoring, or failing to take into account, this body of jurisprudence, also failed to note that in all cases where the ICC Protocol was considered, it was adopted largely with the consent of all parties, despite some challenges to certain particulars, with no challenge which would call on the relevant Chamber to examine whether its powers under Article 57(3)(c) allowed it to dispense with the need for an individualised assessment of need.[37] The Pre-Trial Judge also failed to consider, to any degree, that the case

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and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, para. 101.

[35] *Gucati* Appeal Decision, para. 44.

[36] *See above*, para. 17.

[37] ICC-01/04-01/06, *Prosecutor v. Lubanga*, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008; ICC-01/05-01-08 *Prosecutor v. Bemba*, Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", 4 September 2012.

law outlined above indicated that when called upon to specifically consider the exercise of those discretionary powers, the ICC had established a consistent practice of examination which is directly in line with the type of test called for by the Defence in its submissions.[38]

20. It is absurd to consider that the ICC would apply a restrictive approach to exercising such discretionary powers when it came to individual cases, yet would then wield them in wholesale fashion, without individual scrutiny, when applied to an entire witness list. The Pre-Trial Judge failed to examine or distinguish, in any detail, the inconsistent practice at the ICC of the judicial protection powers under the Rome Statute, and in doing so, based his finding that the ICC Protocol, insofar as it relates to the universal application of the Framework to all witnesses regardless of circumstance or nexus to the risk, on an error of law.[39] Furthermore, the Pre-Trial Judge failed to give weight to relevant cases showing that when called upon to examine the scope of its discretionary powers, the ICC chambers showed consistent practice in applying a threshold based test requiring nexus between the risk and the witness.

21. With regard the reasoning of the Pre-Trial Judge as it relates to the body of the witnesses to whom the Framework now applies, his inconsistent application of the "necessity" element of Article 39(11) is laid bare.[40]

22. First, the Pre-Trial Judge specifically highlighted the "significant number of witnesses" for whom individualised protective measures have been ordered in the present proceedings, singling them out as a special interest group, and reasoned that the "Framework also provides for an appropriate degree of protection for these individuals following or upon the expiry of these measures

[38] *See above,* para. 17.
[39] Impugned Decision, paras 126, 127.
[40] Impugned Decision, paras 118, 120.

in light of the climate of interference coupled with the Accused's continued influence".[41] While this may fall short of the level of scrutiny applied in the ICC cases above, or a Rule 80 determination, it nevertheless shows the Pre-Trial Judge instinctively reasoned that since he could show a least some nexus between the risk and the Rule 80 witnesses, the Framework's application was "necessary".[42]

23. Second, unlike the treatment of the Rule 80 witnesses, for whom the Pre-Trial Judge recognised as individuals requiring specific protection as a result of their personal circumstances, the Pre-Trial Judge dispensed with any need to acknowledge the diversity of individuals making up the remaining body of witnesses, grouping them as a reductive monolith of "(high-ranking) international witnesses or those not otherwise at risk",[43] ignoring specific distinctions in the categories of witnesses who are senior political and military officials from international organisations, from states, from NGOs, expert witnesses, and further:

> "witnesses drawn from former members of the KLA, including those people who have previously given evidence in public on multiple occasions, those witnesses who have expressed no concerns about their identity being known to the Defence and, indeed, whose identity we've had for many months, those witnesses who the Prosecution has interviewed as suspects. There are witnesses on the list, of course, who the Prosecution summonsed as suspects who attended with their own counsel and who declined to answer the Prosecution's questions in exercise of their rights […] such witnesses [who] are agreeable to and consent to meeting with the Defence…"[44]

24. Third, in stark contrast to the Rule 80 witnesses, for whom the Pre-Trial Judge at the very least attempted to establish the nexus of risk and circumstances, the Pre-

[41] Impugned Decision, para. 118.
[42] Impugned Decision, para. 118.
[43] Impugned Decision, para. 120.
[44] Transcript of the 22 February 2022 Hearing (n 17), pp. 1028, 1030.

Trial Judge failed to make any such link between the risk and the witnesses in question.[45] In treating these two categories of witnesses with such a stark degree of inconsistency and poor reasoning, the Pre-Trial Judge committed an error of law which portrays a clear abuse of discretion.

25. This abuse of discretion, in its present form, negatively impacts the Defence'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), due to the bureaucratic and convoluted process which inevitably results in delay in Defence investigations, even before the question of whether such interviews can actually be conducted given the further requirement that a videotape of any interview must be produced, disclosed and potentially entered into evidence by the SPO.

26. Including in the Framework a requirement that at least some nexus between the stated risk and the witness is established would remove the onerous burden upon the Defence to apply measures for the protection of witnesses in cases where it simply is not required, or even where SPO witnesses have specifically indicated that they wish to speak with the Defence, which at present time, due to its universal application without justification, violates both articles mentioned above.

27. As a final note, and in anticipation of any arguments that the considerations of prejudice to the Defence are misplaced, due to the fact that such conditions will "in principle"[46] also apply to the SPO, such contentions are purely speculative

[45] Besides the bizarre *non-sequitur* that "a significant number of the international witnesses […] in fact, did not occupy high-ranking positions at the relevant time", which was offered with no explanation of relevance to the need for protection today in 2022. *See* Impugned Decision, para. 120.
[46] Impugned Decision, para. 116.

and unsubstantiated.[47] As set out clearly in Rule 104(5), and consistent with well-established practice, the choice to present a case following the conclusion of the evidence-in-chief rests with the Defence alone. In fact, the speculative nature of discussing a Defence case at this stage of proceedings was specifically alluded to twice by the Pre-Trial Judge.[48] At the present time, evidence-in-chief has not yet begun, let alone concluded, and as such, the Defence has no case to answer, thus no Defence list of witnesses exist, nor can be assumed will ever come into existence.

B. Issue 2

28. The mandatory recording of witness interviews and their disclosure (respectively submission to the Panel) are disproportionate to the stated aims of witness protection and the preservation of evidence, and that less restrictive measures should have been considered to mitigate the stated risk. Namely, the Registry should have been appointed as the custodian of the audio-visual recording of the recordings placed under seal, to be accessed only upon application by the opposing party (*proprio motu* by the Panel respectively) through a showing of substantiated allegations of wrongdoing. This provision would have been more proportionate to the aims of the Framework in terms of protecting witnesses and preserving evidence, while preserving the rights of the Accused in the preparation of his defence.

29. Further, that the Framework as currently worded (i) amounts to an unnecessary and continuous monitoring by the SPO and Panel, of Defence[49] Investigations;

[47] *See* Impugned Decision treatment of Defence arguments, paras. 142, 159, 190. *See also*, Certification Decision, para. 63.
[48] Impugned Decision, paras 135, 144, specifically the use of the phrase indicating the hypothetical nature of this consideration "in the event". *See also*, para. 116, "in principle".
[49] *See above*, para. 27.

and (ii) thus defeats the purpose of the judicial safeguards relating to witness interviews.[50]

30. By issuing a decision which did not seek the least restrictive means to achieve the aims of the Framework, the Pre-Trial Judge exercised his discretion in a manner which is so unfair and unreasonable that it constitutes and abuse of discretion.

31. In finding the Issue appealable, the Pre-Trial Judge noted that it relates specifically to Section II.j.iv and n.ii of the Framework,[51] and more generally, to the Pre-Trial Judge's findings on the Framework's legal basis and scope[52] and on the balance of fair trial rights and disclosure,[53] to the extent that they concern Recording and Disclosure.[54]

32. In the Impugned Decision, the Pre-Trial Judge, in setting out the need for a recording of the witness interviews, found that the Framework:

> "enables the preservation of evidence by establishing a transparent and accessible record in relation to interviews conducted by the Defence with witnesses included in the SPO List of Witnesses and other notified witnesses and in relation to interviews conducted by the SPO with witnesses included in the Defence list of witnesses.[55] In view of the established risks of disclosing certain information to the Defence relating to witnesses benefitting from protective measures under Rule 80 of the Rules as well as the climate of interference, such a record assists in assessing any allegations of interference."[56]

[50] Certification Decision, para. 43.
[51] Reformulated from the Issue as stated in the Request for Certification. *See above*, para. 2(ii).
[52] Impugned Decision, paras 114 – 136.
[53] Impugned Decision, paras 147 – 160.
[54] Certification Decision, para. 46.
[55] *See above*, para. 28.
[56] Impugned Decision, para. 124.

33. As a preliminary matter, the Second Issue is limited to an examination of the relationship between the stated risk,[57] and the proportionality of the measures implemented to counter or mitigate this risk. As such, merely for the purpose of arguments on proportionality and without prejudice to the First Issue, the Second Issue will assume that all witnesses have established that the specific provisions of the Framework are necessary in their circumstances.

34. The adoption of the Framework by the Pre-Trial Judge was, as set out in the Impugned Decision, based on the discretionary powers afforded to him by Article 39(11).[58] In addition, this discretionary power to adopt the Framework, also allowed the Pre-Trial Judge to make discretionary modifications to the Framework as proposed by the SPO where necessary in the interests of fairness; a power he exercised by, for example, requiring judicial authorisation prior to allowing the SPO to attend an interview against the express preference of a witness.[59]

35. Outlining the Defence arguments, the Pre-Trial Judge summed up the dilemma whereby the Accused is put in the position of, "on one hand, taking the risk of asking questions and producing more incriminating evidence against himself [though the Defence submissions also included the risk of revealing to the opposing side the nature and direction of Defence lines of investigation[60]] or, on the other hand, giving up other fair trial rights, including [the right to thoroughly prepare a defence]".[61]

[57] *See* Impugned Decision, paras 118, 120, 124. In identifying the risk, or "security issues" at question in the present case, the Pre-Trial Judge noted generally a "climate of witness intimidation and interference" in cases similar to the present one, adding that "individualised protective measures […] have been ordered for a significant number of witnesses in the present proceedings".
[58] Impugned Decision, paras 117, 131.
[59] Impugned Decision, para. 201.
[60] *See* Transcript of the 22 February 2022 Hearing (n 17), pp. 1023 – 1024.
[61] Impugned Decision, para. 147.

36. In his reasoning, examining Defence arguments against ECHR Article 6(3)(b) and (d),[62] the Pre-Trial Judge found, in relation to the "nature and degree of the alleged compulsion", that the Framework "does not contain any elements *directly* requiring the Accused to make incriminatory statements against themselves"[63] and further reasoned that since the Defence had the choice of simply not interviewing any of these witnesses, that is to say hundreds of people deemed by the SPO to be most relevant to its case, then it could not be said to suffer any prejudice under the Framework.[64]

37. By not considering the use of the Registry as a neutral custodian of the recorded interviews under seal, thus ensuring the protection of the witnesses and preservation of the evidence to the exact same degree, without requiring the Defence to engage in a balancing act of the Accused's rights versus its obligation to thoroughly prepare the case, the Pre-Trial Judge failed to exercise his discretion judiciously and failed to give weight to relevant considerations in exercising that discretion.

38. First, the above modification would, in effect, have maintained, to the exact same degree, the protective and evidence preservation aim of the Framework and negated, to a substantial degree, the Defence concerns over revealing information to the opposing side while still maintaining and simultaneously allowing the Defence the freedom it requires to conduct its investigations and preparation thoroughly.

39. Second, the essence of the need for the recording of interviews, as stated by the Pre-Trial Judge, is to "enable the preservation of evidence by establishing a transparent and accessible record in relation to interviews" conducted with

[62] Impugned Decision, para. 149.
[63] Impugned Decision, para. 150 [emphasis added].
[64] Impugned Decision, para. 150.

listed and notified witnesses.[65] The modification of the Framework to allow for each interview to be recorded, sealed and placed in the custody of the Registry, would have left this very provision entirely intact.

40. Moreover, since the record would still be accessible to any party or the Panel, upon showing of reasonable cause to suspect wrongdoing, none of the SPO's obligations towards the witnesses in question would be disturbed. This is all the more so, since under the Framework, the SPO already has the possibility of attending, in person, interviews against the personal preference of the witness in question, albeit with the requirement that they receive judicial authorisation first. [66]

41. Third, the Pre-Trial Judge reassured the Defence that its "assertions regarding mistrust against Defence counsel […] are misplaced", with there being no implication "that counsel have engaged or would engage [in wrongdoing] absent specific indications to the contrary".[67] Therefore, the consideration that "such a record would assist in assessing any *allegations* of interference"[68] is better served by a system whereby the record is only accessed upon those specific indications to the contrary mentioned by the Pre-Trial Judge in the Impugned Decision.

42. The Framework, as it presently stands, places the Defence under the constant scrutiny of both the decision-maker and the opposing party, if it interviews any of these hundreds of witnesses, regardless of whether any allegations of wrongdoing have been raised, much less substantiated by "specific indications".[69] The very fact that the interviews under the Framework, as it

[65] Impugned Decision, para. 124.
[66] Impugned Decision, para. 201.
[67] Impugned Decision, para. 170.
[68] Impugned Decision, para. 120 [emphasis added].
[69] Impugned Decision, para. 170.

stands, are immediately under review, with no judicial oversight as to the access of these records, flies in the face of the Pre-Trial Judge's reassurances outlined above.[70] The modification would ensure that parties are in practice assumed to act in good faith, subject to a reasoned and substantiated challenge,[71] or that absent any specific and concrete indications to the contrary, suggestions of inappropriate conduct or motives are indeed treated as unsubstantiated and speculative.[72] As with the treatment of the Defence arguments concerning the revelation of information to the opposing side, the modification would similarly leave "the Parties' general prerogative to seek a remedy under the legal framework of the SC [un]affected by the […] Framework".[73]

43. Fourth, while it would be for the Registry to confirm the impact on its resources of this modification, the obligation to record and submit the interviews would remain with the parties. Accordingly, the impact on the Registry resources would most likely be minimal, entailing only the filing and storing of relevant materials.

44. Finally, the Framework as it presently stands, insofar as it relates to Recording and Disclosing, defeats the purpose of requiring judicial authorisation to attend an interview against the express preference of the witness in question.[74] The Pre-Trial Judge noted *inter alia* in the paragraph immediately following his consideration of the Defence arguments regarding the danger of revealing of information to the SPO during interviews, that the proposal of the SPO that it be allowed to attend every witness interview regardless of witness preference had been balanced by making it contingent upon judicial authorisation.[75] This

[70] *See above,* para. 41.
[71] Impugned Decision, para. 22.
[72] Impugned Decision, para. 142.
[73] Impugned Decision, para. 151.
[74] Impugned Decision, paras 201, 212(II)(b).
[75] Impugned Decision, para. 151.

safeguard is essentially rendered meaningless if the SPO is not in attendance at every interview, yet is free to simply observe each interview at its leisure, with the ostensible purpose of protecting witnesses and preserving evidence, but with the added benefit of determining the investigative and potential cross-examination strategy of the Defence.

45. Given the broad discretionary powers afforded to the Pre-Trial Judge under the Law, there is no reasonable explanation as to why the above measures could not have been imposed as a judicious means of achieving the aims of the Framework, while not unreasonably interfering with the investigation and preparation of the Defence. Indeed, the Registry had been considered as an active participant in the modalities of the Framework in varying degrees since December 2021, and still remains an actor in its operation.

46. That the possibility of employing the Registry in the manner described above was not even contemplated, despite the strong objections of the Defence, and that provisions of the Framework which could cause profound and potentially irreversible damage to the Accused were instead imposed when an equally effective, less restrictive option was available, belies a decision which is so unfair and unreasonable that can only be the product of an abuse of discretion.

IV. RELIEF REQUESTED

47. For the abovementioned reasons, the Defence respectfully requests the Appeals Panel to **GRANT** the appeal and:

(i) In relation to Issue 1: Order the Pre-Trial Judge to include in the Framework a provision which requires witnesses requesting its application to show a connection between their circumstances and the identified risk; and

(ii) In relation to Issue 2: Order the Pre-Trial Judge to modify the framework to make the Registry the custodians of the audio-visual recording of any

interviews conducted with the relevant witnesses, with such recordings to be held under seal, accessed by the parties and/or the Panel only upon the showing of good cause and for the purpose of assessing allegations of wrongdoing by the interviewing party.

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Respectfully submitted on 8 September 2022,

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