

**ANNEX 1 to**  
**Joint Submission on the Adoption of a Framework for the Handling of**  
**Confidential Information during Investigations between a Party or**  
**Participant and Witnesses of the Opposing Party or of a Participant**

**PUBLIC**

## **Victims' Counsel's submissions on the application of the *Thaçi et al.* Framework to the proceedings in this case**

1. Victims' Counsel regards the *Thaçi et al.* Framework<sup>1</sup> as providing important safeguards for the victims participating in the proceedings ('VPPs') who are dual status witnesses-victims and as striking an appropriate balance between the rights of the Defence and the needs of VPPs who are to be interviewed. As a result, Victims' Counsel opposes the alterations proposed by the Defence with one limited exception intended to import flexibility to some limited situations.<sup>2</sup>

### **I. Victims' Counsel's general submissions on the amendments to the *Thaçi et al.* Framework proposed by the Defence**

2. The changes proposed by the Defence fall into two categories.
3. The first comprises changes of substance. They include dispensing with the right of a dual status victim-witness to be represented by Victims' Counsel at an interview with the Defence (original paragraph b of the Framework), and dispensing with the automatic requirement to provide a copy of the recording of the interview (original paragraph n of the Framework). These

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<sup>1</sup> 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, public ('*Thaçi et al.* Framework' or 'Framework').

<sup>2</sup> The proposed amendments to which Victims' Counsel agrees is the addition of the following provision: "Where the Parties and participants agree that the interests of justice so require, they can agree to depart from the Framework with respect to the modalities of an interview (for instance, for the purposes of conducting an interview when visiting sites or places of interest) and related contact with witnesses. In the event of such an agreement, the Parties shall inform the Trial Panel accordingly. In the event of a disagreement between the Parties and participants as to whether the interests of justice require departing from the Framework, the Framework will apply."

are provisions that serve the interests of fairness and transparency and ought not to be omitted.

4. The second category are proposed changes of the style and grammar of the Framework (for example “Victims’ Counsel Team” to become “the team assisting Victims’ Counsel”). These proposals are not necessary as the Framework is entirely intelligible as it is, and are not further addressed in this submission.

## **II. Issues raised by the Defence in justification of the proposed amendments with which Victims’ Counsel disagrees**

### **a. Timing**

5. The Shala Defence asserts that:

[T]he framework in *Thaçi et al.* was adopted by the Pre-Trial Judge, during the pre-trial stage of the proceedings to regulate the matters referred to therein from an early stage of those proceedings.<sup>3</sup>

6. This is not correct. The Framework was adopted on 24 June 2022, some 19 months after the proceedings had begun – towards the end of the pre-trial phase of the proceedings.
7. In any event, the timing is of no relevance. If the Framework has value, as it is submitted it does, then it should be adopted irrespective of the point that the proceedings have reached.

### **b. The requirements of the Framework are not protective measures**

8. The Shala Defence asserts that:

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<sup>3</sup> Defence Submission, para. 6.

[A]ny limitations to the rights of the Accused, including through protective measures with respect to specific witnesses, “should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused”.<sup>4</sup>

9. As the Pre-Trial Judge made clear in his Decision adopting the Framework in the *Thaçi et al.* case, the Framework has a quite different legal basis to an order for protective measures:

In this regard, the Pre-Trial Judge considers that any protective measures ordered pursuant to Rule 80 of the Rules do not exhaust the more general responsibility of the SPO and the function of the Pre-Trial Judge to ensure the protection of witnesses under Article 39(11) of the Law. This provision stipulates that the Pre-Trial Judge may provide for the protection and privacy of witnesses “where necessary”, thus expressly establishing that this function involves the exercise of judicial discretion. As such, the Proposed Framework, is not an indirect request for additional or new measures pursuant to the Rule 80 of the Rules.<sup>5</sup>

10. It follows that the Defence arguments fall away to the extent that they are predicated on the assumption that the Framework is a form of protective measure. It is not.

**c. There is no unfairness in the fact that the Framework applies to all witnesses**

11. The Defence argues that:

The adoption of a framework providing protection to witnesses who do not require such protection pursuant to the stated purpose is unnecessary, particularly given how it limits the fundamental rights of the Accused, as analysed below. Its purported broadness is disproportionate to the said legitimate aim pursued.<sup>6</sup>

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<sup>4</sup> Defence Submission, para. 7.

<sup>5</sup> *The Specialist Prosecutor v. Thaçi et al.*, 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 (‘Decision’), para. 117.

<sup>6</sup> Defence Submission, para. 9.

12. It is then submitted that the consequence of the Framework applying to all witnesses is that:

[a]dopting the *Thaçi et al.* framework in this case would force the Defence to have a representative of the SPO and/or the Victims' Counsel present during any interviews conducted with their witnesses.<sup>7</sup>

13. This is a misreading of the Framework. As the Pre-Trial Judge explained, whether the Framework applies to a witness or not is a matter that will almost always be within the control of the witnesses themselves:

Furthermore, it is of particular importance that the Proposed Framework only applies upon the witness's request and that, as will be established below, the possibility of the SPO overriding the witness's preference is subject to judicial oversight. These safeguards ensure that the protection provided by the Proposed Framework will exclusively be extended to those who themselves seek to invoke it.<sup>8</sup>

14. It follows that the Framework does not "force" the Defence to have a representative of the SPO/Victims' Counsel present: that will only be the case if the witness him/herself makes such a request or the Panel regard it as necessary. In either of those circumstances, there can be no complaint from the interviewing party.

### III. Proposed changes of substance

#### a. There is no need to include a specific injunction against attempting to influence the decision of a witness

15. The Defence proposes that:

The calling Party or participant shall not attempt to influence the witness's decision whether to agree to be interviewed by the Party or participant seeking to interview him/her.<sup>9</sup>

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<sup>7</sup> Defence Submission, para. 29.

<sup>8</sup> Decision, para. 119.

<sup>9</sup> Defence Submission, para. 23.

16. Victims' Counsel notes that the Framework contains a requirement that the views of the witness are ascertained "in good faith".<sup>10</sup> That is a quite sufficient guarantee. Victims' Counsel is expected to provide legal advice to VPPs: as with any legal advice, it *may* influence the decision that is ultimately made, but if given in good faith, there can be no objection to that.

**b. A VPP should always be entitled to be represented at an interview**

17. The Defence proposes that the Framework be amended to delete the possibility of a VPP being represented at an interview by Victims' Counsel:

The Defence must be free to plan and conduct its investigations without the chilling effect that the presence of the other Party or participant during its interviews with witnesses of its opponent inherently implies.<sup>11</sup>

18. Article 22 (5) of the Law states that VPPs "shall be assisted and represented by a Victims' Counsel". Victims' Counsel respectfully submits that it is impossible to see how his mandate to assist and represent the VPPs does not extend to interviews conducted by the Defence.
19. As to the concerns expressed by the Defence that this part of the Framework impacts upon "its right to prepare its case, the principle of equality of arms, and the right of an accused not to incriminate himself or herself and stay silent"<sup>12</sup>, it must be emphasised that the decision as to whether to conduct an interview or not lies exclusively with the Defence. They are under no obligation to conduct an interview at all, still less to conduct it in a manner that might incriminate the Accused. Victims' Counsel respectfully adopts the reasoning of the Pre-Trial Judge in this regard.<sup>13</sup>

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<sup>10</sup> Decision, para. 212 II. (b).

<sup>11</sup> Defence Submission, para. 30.

<sup>12</sup> Defence Submission, para. 25.

<sup>13</sup> Decision, paras 146-150.

**c. Mandatory disclosure of interviews is necessary and justified<sup>14</sup>**

20. The Defence proposes that the Framework's requirement that all interviews should be disclosed ought not to apply in this case.<sup>15</sup>
21. It is submitted that, far from being unfair, this is a requirement that will promote transparency, ensure the accuracy of the record, and reduce the need to subject witnesses to further interviews. In practical terms, a representative of the calling party and Victims' Counsel, if present at the interview, will obviously be able to make notes of what is said. Why they should be prevented from having access instead to an unimpeachable record of the interview is unclear.
22. Rules 102-104 are not engaged in this part of the operation of the Framework. The disclosure obligations imposed by Rule 104, for example, ensure an orderly approach to issues such as the disclosure of an alibi or granting the SPO access to materials which are intended for use at trial. They do not apply to the Framework which is properly founded on Article 39(1) and 39(11) of the Law, and which requires its own internal rules in order to be effective.

**IV. Relief Requested**

23. The Framework provides valuable protections to VPPs and its provisions should not be diluted without very good cause.
24. Save in one limited regard, no such good cause has been shown and Victims' Counsel invites the Panel to reject all but one of the proposed amendments<sup>16</sup> to the *Thaçi et al.* Framework.

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<sup>14</sup> ICC Protocol, paras 37, 40, 41.

<sup>15</sup> Defence Submission, paras 35-36.

<sup>16</sup> Specified in footnote 2 above.