

ANNEX 3 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

## Submissions by the Defence

### I. INTRODUCTION

1. The Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) requests that the Trial Panel does not adopt the 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 that has been imposed by the Pre-Trial Judge in the *Thaçi et al.* case.
2. The Defence reiterates its position that in view of the size of the present case, the number of witnesses on the Parties’ lists, and the *inter partes* agreement with the SPO that has so far regulated related matters, the adoption of the proposed framework is unnecessary. In the view of the Defence, the *inter partes* agreement should continue to regulate the Parties’ conduct in this respect.<sup>1</sup> The Defence also notes that the framework adopted in the *Thaçi et al.* case is under review by the Appeals Chamber.<sup>2</sup>
3. Should the Panel be inclined to request the Parties to adhere to a framework on these matters, the Defence would request that the *Thaçi et al.* framework be modified as indicated by the Defence in Annexes 4 and 5 that are provided in support of the present submission.<sup>3</sup>
4. The Defence sets out below the reasons justifying the proposed amendments as instructed by the Trial Panel.<sup>4</sup>

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<sup>1</sup> T. 18 October 2022 pp. 339-340; p. 341, lines 1, 2; p. 342, lines 21-25; p. 343, lines 1, 2; pp. 343-345. See also KSC-BC-2020-04, F00305, Public Redacted Version of the Defence Submissions Pursuant to Order on Trial Preparation Conferences, 10 October 2022, para. 7.

<sup>2</sup> KSC-BC-2020-06, F00939, Decision on Defence Requests for Leave to Appeal Decision F00854, 26 August 2022, para. 94 (a).

<sup>3</sup> Annex 4 indicates, in track changes, the proposed amendments to the *Thaçi* framework. Annex 5 sets out the proposed framework by the Defence in a clean version.

<sup>4</sup> T. 19 October 2022, p. 405, line 24; p. 406, line 16; p. 408, lines 2-5.

## II. SUBMISSIONS

5. At the outset, the Defence invites the Trial Panel to take into consideration the individual circumstances of the present case that significantly differ from the *Thaçi et al.* case. The Accused is neither a “high-ranking member of the KLA” nor someone who had an influential position, nor a person who currently exercises any influence in Kosovo.
6. In addition, the 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. In contrast, the present case has already been referred to a Trial Panel and, while the Defence investigations are ongoing, it is expected that the trial will start in early 2023.
7. Article 40(2) of the KSC Law requires the Trial Panel to ensure that the trial is “fair and expeditious” and that the proceedings “are conducted in accordance with the Rules of Procedure and Evidence, with *full* respect for the rights of the accused and *due regard* for the protection of victims and witnesses” (emphasis added). In line with this, the Defence reiterates that any 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>5</sup>

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<sup>5</sup> See, for instance, ICC, *The Prosecutor v. Alfred Rombhot Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-1254-Red, Public Redacted Version of “Ngaïssona Defence Consolidated Response to ‘Confidential redacted version of ‘Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888’” (ICC-01/14-01/18-1241-Conf-Red) and ‘Confidential redacted version of ‘Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1416’” (ICC-01/14-01/18-1244-Conf-Red)”, ICC-01/14-01/18-1254-Conf, 19 January 2022, 9 February 2022, para. 8 referring to *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-902-Red2, Public redacted version of “Decision on ‘Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses’”, 3 September 2013, para. 13; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1667-Red-tENG, Public redacted version of “Order on protective measures for

8. The stated purpose of the *Thaçi et al.* framework was to ensure the protection of safety, dignity, and privacy of witnesses consistent with the rights of the Accused, as well as the avoidance of retraumatisation of witnesses.<sup>6</sup> The proposed framework is meant to apply to all witnesses.<sup>7</sup> This in itself is a *de facto* deviation from the requirement that protective measures be justified in respect of the individual circumstances of each witness.<sup>8</sup> The Defence does not see any reason as to why the *Thaçi et al.* framework should apply to witnesses who will willingly testify in public, have not expressed fear about their safety, or in relation to whom no risks have been identified. The interests of

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certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence)", 9 December 2009, paras. 8, 9.

<sup>6</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. *See, for instance*, paras. 14 ("Rule 80(1) of the Rules empowers the Pre-Trial Judge to order appropriate measures for the protection of witnesses, provided they are compatible with the rights of the Accused"), 16 ("[t]he SPO also requests the Pre-Trial Judge to order the following measures with regard to contacts with witnesses of other Parties and participants – which [...] are necessary to avoid retraumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being"), 100 ("[p]ursuant to Article 23(1) of the Law and Rule 80(1) of the Rules, the Pre-Trial Judge shall provide for the protection of witnesses and victims and may, *proprio motu* or upon request, order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the Accused").

<sup>7</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, para. 116 ("as the protection of witnesses concerns, in principle, all witnesses, this Proposed Framework will apply to all witnesses in this case and their contacts with the non-calling Parties and participants").

<sup>8</sup> Rule 80 of the Rules. *See also* ICC, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-1254-Red, Public Redacted Version of "Ngaïssona Defence Consolidated Response to 'Confidential redacted version of 'Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888'" (ICC-01/14-01/18-1241-Conf-Red) and 'Confidential redacted version of 'Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1416'" (ICC-01/14-01/18-1244-Conf-Red)", ICC-01/14-01/18-1254-Conf, 19 January 2022, 9 February 2022, para. 8 referring to *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-902-Red2, Public redacted version of "Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses'", 3 September 2013, para. 13; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1667-Red-tENG, Public redacted version of "Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence)", 9 December 2009, paras. 8, 9.

convenience that may require the adoption of a consistent framework in all proceedings before the KSC cannot override the defence rights of the Accused.

9. The adoption of a framework providing protection to witnesses who do not require such protection and without considering the particular circumstances of this case is unnecessary and violates the fundamental rights of the Accused, as analysed below. The purported broadness of the proposed framework is disproportionate to the legitimate aim pursued.

### *A. Proposed Amendments to the *Thaçi et al.* Framework*

#### *I. Handling Confidential Information during Investigations*

10. In the *Thaçi et al.* framework, the definition of a “witness” is set out as follows:

‘Witness’ shall mean a person whom a Party or participant intends to call to testify or on whose statement a Party or participant intends to rely, insofar as the intention of the Party or participant has been notified to the opposing Party or participant.<sup>9</sup>

11. The Defence requests that the definition of “witness” be amended as follows:

‘Witness’ shall mean a person **included in a Witness List formally disclosed in case KSC-BC-2020-04 and identified as a person** ~~whom~~ a Party or participant intends to call to testify or a **person** on whose statement a Party or participant intends to rely **pursuant to Rules 153–155 of the Rules**, insofar as the intention of the Party or participant to that effect has been notified to the opposing Party or participant.

12. The SPO and Victims’ Counsel propose to use the definition of a “witness” in the *Thaçi et al.* framework in the present proceedings.<sup>10</sup>
13. As stated above, the definition in the *Thaçi et al.* framework is not sufficiently precise and further certainty in the form proposed by the Defence by limiting

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<sup>9</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, n. 299.

<sup>10</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, n. 299. The SPO and Victims’ Counsel do not propose an amendment to the definition of “witness” in the present case but adopts the definition in the *Thaçi et al.* framework.

its application to actual witnesses in the present proceedings would be of benefit and allow more certainty as to the framework's application and its limits. The Defence submits that the proposed amendment does not restrict the right of any Party to amend its Witness List as provided in the KSC Rules. The proposed framework would apply with regard to any persons included in a Party's Witness List at any given time.

*a. Audio-Video Recordings*

14. The *Thaçi et al.* framework Section I.(g) provides as follows:

Visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement of the person depicted or otherwise reflected in the activities of the KSC/SPO, a Party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the KSC/SPO. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorized by the Chamber, the third party shall not retain copies of the visual material subject to this provision.<sup>11</sup>

15. The Defence proposes the replacement of references to "person" by the term "witness" so that the above be amended as follows:

Visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement of the **witness** depicted or otherwise reflected in the activities of the KSC/SPO, a Party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the **witness** depicted in the activities of the KSC/SPO. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorized by the Chamber, the third party shall not retain copies of the visual material subject to this provision.

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<sup>11</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, p. 86.

16. The Defence suggests that the above proposed change would enhance clarity in the application of the framework.

*b. Correspondence with Third Parties for the Purposes of Investigations*

17. Section I.(e) of the *Thaçi et al.* framework provides as follows:

A Party or participant may disclose the identity of a witness<sup>299</sup> to a third party only if such disclosure is directly and specifically necessary for the preparation and presentation of its case. If a Party or participant is aware that the witness has been relocated with the assistance of the KSC/SPO, the Party or participant shall inform the Witness Protection and Support Office (“WPSO”) in advance of the details of the place, time and, to the extent possible, the types of organizations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the WPSO as to specific measures that may be necessary. If the witness is otherwise protected by the WPSO, the Party or participant shall inform the WPSO of the disclosure of the witness’s identity as soon as possible, but in any event before disclosure.<sup>12</sup>

18. The Defence requests that the above be amended as follows:

A Party or participant may ~~disclose the identity of~~ **make specific enquiries addressed to third parties** concerning a witness<sup>13</sup> ~~to a third party~~ only if such ~~disclosure is directly and specifically necessary~~ **enquiries are required** for the preparation and presentation of its case. If a Party or participant is aware that the witness has been relocated with the assistance of the **Kosovo Specialist Chambers (“KSC”)/Specialist Prosecutor’s Office (“SPO”)**, the Party or participant shall inform the Witness Protection and Support Office (“WPSO”) in advance of the details of the place, time and, to the extent possible, the types of organizations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the WPSO as to **any** specific measures that may be necessary. If the witness is otherwise protected by the WPSO, the Party or participant shall inform the WPSO of the disclosure of the witness’s identity as soon as possible, but in any event before disclosure.

19. The Defence finds that the revised version offers more clarity on how the framework is to be applied. For instance, the name of a witness may be

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<sup>12</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, p. 86.

<sup>13</sup> ‘Witness’ shall mean a person included in a Witness List formally disclosed in case KSC-BC-2020-04 and identified as a person a Party or participant intends to call to testify or a person on whose statement a Party or participant intends to rely pursuant to Rules 153–155 of the Rules, insofar as the intention of the Party or participant has been clearly notified to the opposing Party or participant.



identified without identifying such person's capacity as a witness or involvement in the present proceedings in the context of enquiries that concern such person. The Defence further finds that the proposed test for making enquiries related to witnesses during investigations ("only if such disclosure is directly and specifically necessary for the preparation and presentation of its case") to be excessively restrictive for the effective exercise of the defence rights of the Accused.

20. In the case of *Dayanan v. Turkey*, the European Court of Human Rights held that "counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning".<sup>14</sup> Such enquiries inherently involve information whose degree of relevance and importance—let alone, whether it is "directly and specifically necessary for the preparation and presentation of its case"—cannot possibly be known to the Defence in advance, prior to assessing the outcome of its investigations. In addition, the preparation of its case should not only involve the evaluation and assessment of information directly and specifically relevant to its case, as the contribution of such information might be of a corroborative or otherwise supporting nature to the case of the Defence.

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

21. The amendments proposed by the Defence in Part II of the *Thaçi et al.* framework are based on the effective protection of the rights of the Accused.

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<sup>14</sup> ECtHR, *Dayanan v. Turkey*, no. 7377/03, 13 October 2009, para. 32.



As it stands, the *Thaçi et al.* framework and, in particular, its proposed Sections II.(b) and II.(n), are highly prejudicial to the rights of the Accused to a fair trial.

22. Specifically, Section II.(b) of the *Thaçi et al.* framework provides as follows:

If an opposing Party or participant wishes to interview a witness of another Party or participant, it shall notify the calling Party, the Court Management Unit (“CMU”) and, in relation to dual status witnesses, Victims’ Counsel at least ten days prior to the intended interview. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party and shall also inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness, Victims’ Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview. In exceptional circumstances, a Party or participant may, after having consulted sufficiently in advance with the Registry, apply to the Panel to additionally require the presence of Registry representatives. The calling Party shall inform the opposing Party whether the witness consents. In addition, where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness, regardless of the witness’s expressed preferences. If the calling Party seizes the Panel or indicates to the opposing Party that it shall do so, the opposing Party shall refrain from interviewing the witness until the Panel has issued its decision. The procedure in this section shall not apply to an interview conducted by the SPO with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.<sup>15</sup>

23. The Defence proposes that the above be amended as follows:

If an opposing Party or participant wishes to interview a witness of another Party or participant, it shall notify the calling Party, the Court Management Unit (“CMU”) and, in relation to dual status witnesses, Victims’ Counsel at least ten days prior to the intended interview. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party ~~and shall also inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness, Victims’ Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview.~~ **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. In** exceptional circumstances, a Party or participant may, after having consulted sufficiently in advance with the Registry, apply to the Panel to additionally require the presence of Registry representatives. The calling Party shall inform the opposing Party whether the witness consents. ~~In addition, where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the~~

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<sup>15</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, pp. 87, 88.

~~opposing Party and the witness, regardless of the witness's expressed preferences. If the calling Party seizes the Panel or indicates to the opposing Party that it shall do so, the opposing Party shall refrain from interviewing the witness until the Panel has issued its decision. The procedure in this section shall not apply to an interview conducted by the SPO with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.~~

24. First, the Defence considers it necessary to add a guarantee securing that the consent of the witness to be interviewed is voluntary and not the result of external influences by the calling Party. The importance of the said guarantee was acknowledged and included in the International Criminal Court's Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant.<sup>16</sup>
25. Second, the Defence objects to the presence of a representative of the calling Party or participant during the interview by the interviewing Party or participant, due to the obvious impact this condition has on 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.
26. The presence of a representative of the calling Party or participant during any interviews of a witness of the calling Party or participant the Defence wishes to pursue, may impose pressure on the witness interviewed to remain faithful to the "other side" supervising the interview, and may prevent the witness from speaking freely. It also forces the Defence to be excessively cautious as to proceeding to have such interviews in light of the circumstances in which these will be held. This is in breach of the rights of the Accused to have an effective opportunity to prepare his case and consequently, the objective of the adoption of the framework itself. The presence of a representative of the calling Party or

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<sup>16</sup> ICC, Chambers Practice Manual, fifth edition, Adopted following the judicial retreat of 2021, Annex.

participant during the Defence's interviews would unjustifiably prejudice the rights of the Accused.

27. In addition, such presence is in breach of the principle of equality of arms, which is a corollary of the right to a fair trial. The *Thaçi et al.* framework provides that: “[t]he procedure [set out in Section II.(b)] shall not apply to an interview conducted by the SPO with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case”.<sup>17</sup> That this condition would only apply to the Defence and not to the SPO, which has already completed its investigations, deprives the Defence of an equal opportunity to prepare and present its case.
28. The Defence highlights the possibility that a party may have good grounds to interview witnesses called by its opponent to obtain information related to issues going beyond the witnesses' expected testimony that could nonetheless be of value to its case. As the ICTY Appeals Chamber noted in *Halilović*:

[t]he opposing party may have a legitimate expectation of interviewing such witness in order to obtain this information and thereby better prepare a case for its client. To deprive this expecting party of such ability would hand an unfair advantage to the opposing party, which would be able to block its opponent's ability to interview crucial witnesses simply by placing them on its witness list.

13. Moreover, the party which placed the witness in question on its list of witnesses may then decide not to call the witness at all. While the other party, such as the Defence in this case, could subsequently petition the Trial Chamber for a subpoena to obtain information from the witness, that party would have lost valuable time in procuring this information and may therefore end up at an unfair disadvantage with respect to the preparation of its case.

14. The Trial Chamber also seems to have overlooked the fact that during cross-examination, the party conducting cross-examination can elicit from the witness evidence exceeding the subject matter of the evidence-in-chief and matters affecting the credibility of the witness, provided that ‘the witness is able to give evidence relevant to the case for the cross-examining party.’ Given that during cross-examination the Defence can elicit from the Prosecution witness information which

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<sup>17</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, p. 88.

is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case.<sup>18</sup>

29. The Defence notes, therefore, that interviews with persons appearing on the opponent's witness list (who may or may not ultimately be called by that Party) can form an important part of a party's preparation for trial and investigations. The SPO has completed its investigations by carrying out its interviews, for years, without the presence of a representative of the Defence. The investigations of the Defence are still ongoing. The possibility to interview persons previously interviewed by the SPO is important for the advancement of the Defence case. Adopting 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. This is a substantial and unfair disadvantage for the Defence with regard to the preparation of its case.
30. 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. The prejudice for the Defence is amplified by the fact that the same procedure will plainly not apply to the same extent to interviews conducted by the SPO.
31. Moreover, the Defence requests that Section II.(k) of the *Thaçi et al.* framework be omitted from any framework to be applied in the present case:

In the event the calling Party objects to any part of the procedure followed or any particular line or manner of questioning during the interview, it shall raise the issue with the interviewing Party outside the presence of the witness. Any disagreement shall be recorded and shall not impede or unduly disrupt the interview. On an exceptional basis, the calling Party may apply to the Panel to terminate the interview

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<sup>18</sup> ICTY, *The Prosecutor v. Sefer Halilović*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras. 12-14.

in relation to flagrant breaches of this Framework in case the parties cannot reach an agreement in accordance with the preceding procedure.<sup>19</sup>

32. The above proposed revision is in line with the Defence objection to allowing the presence of the calling Party during the interviews carried out by the interviewing Party.

33. Section II.(n) of the *Thaçi et al.* framework provides as follows:

Following the completion of the interview, the interviewing Party shall prepare:

- i. a memorandum recording the process (indicating time, place, attendees, classification – i.e., public, confidential or strictly confidential – and any other relevant circumstance) and submit it to the Parties and the Panel; and
- ii. the audio-video recording of the session and submit copies thereof to the Parties and to the Panel.<sup>20</sup>

34. The Defence proposes that the above be revised so that it reads as follows:

Following the completion of the interview, the interviewing Party shall prepare:

- i. a memorandum recording the process (indicating time, place, attendees, classification–i.e., public, confidential, or strictly confidential–and any other relevant circumstance) ~~and submit it to the Parties and the Panel;~~ and
- ii. the audio-video recording of the session ~~and submit copies thereof to the Parties and to the Panel.~~

**Disclosure of the aforesaid memorandum and audio-video recording shall be subject to Rules 102–104 of the Rules.**

35. The Defence objects to the systematic and mandatory disclosure of all interviews and their audio-video recordings. In addition, the conditions proposed by the SPO and Victims' Counsel are inadequately linked to the

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<sup>19</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, p. 90.

<sup>20</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, p. 90.

protection of witnesses and, in any case, the Defence submits that they would unnecessarily reveal the Defence investigations to its opponent.

36. The conditions proposed by the SPO and Victims' Counsel in this respect would place the Defence at a clear disadvantage. The Defence reiterates that, under Rules 104 and 106 of the Rules, it is under no obligation to disclose "reports, memoranda or other internal documents"<sup>21</sup> unless they are "intended for use by the Defence as evidence at trial"<sup>22</sup> or relate to witnesses or exhibits that "the Defence intends to present at trial".<sup>23</sup> Imposing a systematic obligation to disclose all interviews, together with their audio-video recordings, to the Parties and the Panel would infringe the right of the Accused to adequately prepare his defence and adopt the Defence's preferred investigative methods, without having to disclose its lines of questioning or the information received from witnesses' interviews. In this respect, therefore, the proposed framework would contravene the spirit of Rules 104 and 106 as well as the fundamental defence rights of the Accused.
37. In light of the above, the Defence submits that its proposed amendments are necessary to secure the defence rights of the Accused.
38. In addition, the Defence proposes the addition of the following text as Section II.(o):

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 the disapplication of the Framework, the Party or participant requesting departure from the Framework may seize the Trial Panel to decide upon such a request.

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<sup>21</sup> Rule 106 of the Rules.

<sup>22</sup> Rule 104(5)(a) of the Rules.

<sup>23</sup> Rules 104(5)(b), 104(5)(c), 104(6), and 104(7) of the Rules.

39. The above would afford the Parties and participants a certain degree of flexibility to depart from the framework upon mutual agreement, so as to accommodate the need to conduct, on an *ad hoc* basis, interviews in an informal manner avoiding unnecessary procedures or delay.
40. The Defence submits that, in the event of a disagreement as to whether departure from the framework is justified, the Party or participant requesting such departure must be able to seek judicial determination of the matter at issue.

### ***B. Additional Clarifications***

41. The Defence further requests that the following provisions be included:
- a. The Framework will enter into force on the date of the decision by the Trial Panel on its adoption and shall have no retroactive effect.
  - b. The Framework may be amended further to the determination of the appeal currently pending in Case 06.<sup>24</sup>
42. The Victims' Counsel indicated its agreement with the above additional clarifications.<sup>25</sup> The Defence does not oppose the interpretation of the first

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<sup>24</sup> KSC-BC-2020-06, F00939, Decision on Defence Requests for Leave to Appeal Decision F00854, 26 August 2022, para. 94(a).

<sup>25</sup> Email from the Victims' Counsel to Defence Counsel, 3 November 2022, at 4:37 pm.



clarification by the Victims' Counsel with whom the SPO is in agreement.<sup>26</sup> In addition, the Defence accepts the SPO's provisions in this respect.<sup>27</sup>

### III. RELIEF REQUESTED

43. For the above reasons, the Defence respectfully requests that the Trial Panel does not adopt the *Thaçi et al.* framework but modify it as indicated in Annexes 4 and 5 to the present submissions in order to ensure effective protections of the defence rights of the Accused.
44. The Defence reserves the right to respond to the submissions made by the SPO and Victims' Counsel that are presented in this joint submission and requests that it be given an opportunity to file such response in the event that it is deemed required.

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<sup>26</sup> Email from the Victims' Counsel to Defence Counsel, 3 November 2022, at 4:37 pm (“[w]ith regard to the two points of clarification, our views are as follows: 1. Agreed, in the sense that where interviews have already taken place there would be no requirement to conduct them again in a manner that is compliant with the Framework. However, where contact with a witness has begun, but an interview has not yet taken place by the date of the Trial Panel's decision, the Framework would apply. 2. Agreed”); email from the SPO to Defence Counsel, 8 November 2022, at 7:03 pm (stating: “[r]egarding your requests for clarifications below, we agree with both and endorse Victims' Counsel's answer regarding question (1)”).

<sup>27</sup> Email from the SPO to the Defence Counsel, 8 November 2022, at 7:03 pm (“we agree to the introduction of a ‘flexibility clause’ as proposed in section ‘o’ of the document you shared, provided the following conditions are included: a. the Panel will be informed each time there is an agreed departure from the Framework; and b. in case of disagreement between the Parties and Participants as to whether the interests of justice require departing from the Framework, the Framework will apply”).