

**Annex 2 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**

## SPO SUBMISSIONS

1. The SPO regards the *Thaçi et al.* Framework<sup>1</sup> as providing important safeguards for witnesses. Aside from the possibility of departing from its application in the limited circumstances addressed in the next paragraph, the SPO does not agree to any other change to the *Thaçi et al.* Framework. The *Thaçi et al.* Framework strikes the right balance between the interests of the Parties and participants, and the witnesses who will be interviewed. The application of the *Thaçi et al.* Framework in the context of the present proceedings additionally ensures consistency across the different cases before the Kosovo Specialist Chambers ('KSC').
2. The SPO would agree to the inclusion in the *Thaçi et al.* Framework of the following flexibility clause:

Where the Parties and participants agree that the interests of justice so require, they can agree to depart from the *Thaçi et al.* 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 and participants 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 *Thaçi et al.* Framework, the *Thaçi et al.* Framework will apply.

3. This modification would afford the Parties and participants a degree of flexibility to depart from the terms of the *Thaçi et al.* Framework when they

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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').

agree that the interests of justice so require. Such flexibility clause is in line with the purposes of the *Thaçi et al.* Framework, as discussed in more detail below.

4. Considering the risks of interference in this case, the circumstances and background of the Accused, and the climate of witness interference and intimidation in which these proceedings are being conducted, the *Thaçi et al.* Framework is necessary to ensure (i) witness protection and support;<sup>2</sup> (ii) witness privacy, as individuals who provided information for potential use before the KSC are entitled to a reasonable expectation of privacy in connection with such information;<sup>3</sup> (iii) preservation of evidence by establishing a transparent and accessible record;<sup>4</sup> and (iv) the expeditious conduct of proceedings.<sup>5</sup> The Defence's generalised submissions mirror those already addressed in detail and dismissed in the decision adopting the *Thaçi et al.* Framework and (i) do not detract from these multi-layered interests and risks, which justified the *Thaçi et al.* Framework and apply equally in this case; and (ii) do not constitute or risk any violation of Defence rights.<sup>6</sup> Instead, adoption of the *Thaçi et al.* Framework would advance the fair and expeditious conduct of the proceedings.
5. To the extent the Defence takes issue with aspects of the *Thaçi et al.* Framework, the *Thaçi et al.* Framework – which is consistent with the standard protocol applied across cases at the ICC<sup>7</sup> – is tailored to serve the purposes outlined

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<sup>2</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 116-120.

<sup>3</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 121-123.

<sup>4</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, para.124.

<sup>5</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, para.125.

<sup>6</sup> See *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 137-177 (addressing in detail defence submissions concerning fair trial rights – including, but not limited to, those raised by the Defence presently – and concluding that the framework does not violate the rights of the accused).

<sup>7</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 126-127.

above. The modifications requested by the Defence therefore threaten to undermine the effectiveness of the the *Thaçi et al.* Framework.<sup>8</sup>

6. First, the Defence proposal to limit the definition of ‘witness’ to persons ‘included on a Witness List formally disclosed [...]’ is inconsistent with the applicable legal framework. Under the Rules, a witness list is not a final notification of the witnesses the Parties intend to call and there may be other legitimate means for a Party or Victims’ Counsel to notify its intention to call witnesses.<sup>9</sup>
7. Second, the ‘directly and specifically necessary’ standard for disclosure of confidential information, including witness identities, to third parties for the purposes of case preparation and presentation is an important part of the *Thaçi et al.* Framework and the Defence does not explain why any lesser standard is appropriate. Indeed, as held previously, the requirement of allowing such disclosure only where directly and specifically necessary for the preparation and presentation of the Party’s case and limiting it to information directly enabling that purpose, strikes an appropriate balance – along with other relevant provisions of the *Thaçi et al.* Framework – between the aims of protecting confidential information and sufficiently enabling a Party to investigate.<sup>10</sup>
8. Third, the possibility of the Calling Party or Victims’ Counsel attending interviews is an appropriate and necessary measure, as otherwise, the essential functions of the *Thaçi et al.* Framework (in particular, the protection and privacy of witnesses and preserving evidence) could be impaired.<sup>11</sup> This is, in

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<sup>8</sup> While certain proposed modifications are addressed below, all parts of the *Thaçi et al.* Framework challenged by the Defence were considered in detail previously and for the same reasons should be maintained. See *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 178-209.

<sup>9</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 184-185.

<sup>10</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 182, 188.

<sup>11</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 198-203.

particular, the case in view of the concrete possibility of a witness feeling that he or she is pressured into indicating that he or she consents to proceed in the absence of the SPO on account of the climate of witness intimidation regarding criminal proceedings against former KLA members.<sup>12</sup> The safeguards in the *Thaçi et al.* Framework, including witness consent and/or exceptional judicial authorisation in case of non-consent, appropriately balance competing interests and rights.<sup>13</sup>

9. Finally, parts of the *Thaçi et al.* Framework that concern the possibility for and recording of objections in the context of interviews and disclosure of such information are necessary to ensure the integrity of the proceedings and the preservation of evidence, and do not impact on Defence rights. For the reasons given previously,<sup>14</sup> the Defence submissions on these matters should be rejected.
10. For the foregoing reasons, the *Thaçi et al.* Framework should be adopted in this case, with the modification proposed in para.2 above.

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<sup>12</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, para.198.

<sup>13</sup> As noted above, the Defence submissions concerning alleged violations of their rights by this and other provisions were addressed in detail previously and the Defence does not present any facts that justify modification. See *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 137-177.

<sup>14</sup> *Thaçi et al.* Framework, KSC-BC-2020-06/F00854, paras 147-163.