



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2020-04**

The Specialist Prosecutor v. Pjetër Shala

Before: **Trial Panel I**

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 8 June 2023

Language: English

Classification: **Public**

**Decision on 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**

with one public annex

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TRIAL PANEL I (Panel) hereby renders this decision on the framework for the handling of confidential information during investigations and contact between a Party or participant and witnesses of the opposing Party or participant.

I. PROCEDURAL BACKGROUND

1. On 10 and 11 October 2022, pursuant to a decision by the Panel,¹ the Specialist Prosecutor's Office (SPO), the Defence for Pjetër Shala (Defence and Accused, respectively) and Victims' Counsel (collectively, Parties and participants) filed written submissions on, *inter alia*, the adoption of a framework governing the handling of confidential information during investigations and contacts with witnesses.²
2. On 19 October 2022, the Panel ordered³ the Parties and participants to file a joint request on the adoption of a framework, setting out its terms, using as a starting point the framework adopted by the Pre-Trial Judge in KSC-BC-2020-06 (*Thaçi et al.* case and Framework, respectively).⁴

¹ KSC-BC-2020-04, F00289, Trial Panel I, [Decision setting the dates for trial preparation conferences and requesting submissions](#), 30 September 2022, public, paras 9(A)(f), 11, 13(c), with Annex 1, strictly confidential and *ex parte*.

² KSC-BC-2020-04, F00301, Victims' Counsel, *Victims' Counsel Submissions for Trial Preparation Conference*, 10 October 2022 (Victims' Counsel Submissions for Trial Preparation Conference), public; F00303, Specialist Prosecutor, *Prosecution submissions in advance of the trial preparation conference*, 10 October 2022 (SPO Submissions for Trial Preparation Conference), confidential, with Annexes 1-2, strictly confidential and *ex parte*, and Annex 3, confidential. A public redacted version was issued on 11 October 2022, F00303/RED2; F00305, Defence, *Defence Submissions Pursuant to Order on Trial Preparation Conferences*, 10 October 2022 (Defence Submissions for Trial Preparation Conference), strictly confidential and *ex parte*. A public redacted version was issued on the same day, F00305/RED.

³ Transcript, 19 October 2022, p. 405, line 24 to p. 406, line 16.

⁴ KSC-BC-2020-06, F00854, Pre-Trial Judge, [Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant](#), 24 June 2022, public.

3. On 16 November 2022, the Parties and participants filed a joint submission, detailing their respective positions on the adoption of a framework (Joint Submission).⁵

4. On 27 December 2022, the Court of Appeals Panel denied the appeals submitted in the *Thaçi et al.* case against the decision adopting the Framework (Appeals Decision on Framework).⁶

II. SUBMISSIONS

A. SPO

5. The SPO submits that the Framework should be adopted in the present case with one modification, namely the inclusion of a flexibility clause that would allow the Parties and participants to depart from the terms of the Framework when they agree that the interests of justice so require. In particular, the SPO maintains that the Framework provides important safeguards for witnesses and it strikes the right balance between the interests of the Parties and participants and the interests of the witnesses who will be interviewed. Additionally, the SPO argues that the application of the Framework in the context of the present proceedings ensures consistency across the different cases before the Kosovo Specialist Chambers (SC/KSC).⁷

⁵ KSC-BC-2020-04, F00353, Specialist Prosecutor, Defence, Victims' Counsel, *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*, 16 November 2022, public, with Annexes 1-5, public.

⁶ KSC-BC-2020-06, IA024/F00019, Court of Appeals, [Decision on Defence Appeals 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"](#), 27 December 2022, public.

⁷ KSC-BC-2020-04, F00353/A02, Specialist Prosecutor, *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*, 16 November 2022 (SPO Submissions), public, paras 1-3, 10. *See also* SPO Submissions for Trial Preparation Conference, para. 17.

B. DEFENCE

6. The Defence submits that, in view of the size of the present case, the number of witnesses on the Parties' lists of witnesses and the *inter partes* agreement with the SPO that has so far regulated related matters, the adoption of the Framework is unnecessary. The Defence thus objects to its adoption in the present proceedings. In the alternative, the Defence requests that the Framework be modified in accordance with its list of amendments, as detailed in Annex 4 and Annex 5 to the Joint Submission.⁸

C. VICTIMS' COUNSEL

7. Victims' Counsel submits that the Framework provides important safeguards for the victims participating in the proceedings (VPPs) who are dual status witnesses-victims. According to Victims' Counsel, the Framework also strikes an appropriate balance between the rights of the Defence and the needs of VPPs who are to be interviewed. Victims' Counsel also concurs with the inclusion of a provision in the Framework that would grant the Parties and participants the ability to depart from it, where they agree that the interests of justice so require. However, Victims' Counsel opposes the remainder of the amendments proposed by the Defence.⁹

⁸ KSC-BC-2020-04, F00353/A03, Defence, *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*, 16 November 2022 (Defence Submissions), public, paras 1-3. See also Defence Submissions for Trial Preparation Conference, para. 7.

⁹ KSC-BC-2020-04, F00353/A01, Victims' Counsel, *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*, 16 November 2022 (Victims' Counsel Submissions), public, para. 1. See also Victims' Counsel Submissions for Trial Preparation Conference, para. 7.

III. APPLICABLE LAW

8. The Panel notes Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 30(6) of the Constitution of the Republic of Kosovo (Constitution), Articles 3(2)(e), 21(4)(c), (e) and (h), 35(2)(f), 38(4), 39(1)-(4) 40(2), 40(6)(d) and (f) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 80 and 116(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).

IV. DISCUSSION

9. At the outset, the Panel clarifies that when deciding on the subject matter of the present decision it has been guided by the findings of the Court of Appeals Panel in the Appeals Decision on Framework. Therefore, the Defence's request to include a provision in the Framework that would allow its amendment following the Court of Appeals Panel's determination¹⁰ is moot and will not be addressed further by the Panel.

A. LEGAL BASIS AND SCOPE

10. The Panel notes that, pursuant to Article 35(2)(f) of the Law, the SPO has the authority and responsibility, *inter alia*, to request that necessary measures be taken to ensure the confidentiality of information, the protection of any person or the preservation of evidence. In addition, the Panel has the power to adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings, in accordance with Article 40(2) of the Law and Rule 116(1) of the Rules. The Panel is also responsible to provide for the protection

¹⁰ Defence Submissions, para. 41(b).

of victims and witnesses as well as that of confidential information under Article 40(6)(d) and (f) of the Law. These provisions provide the legal basis for ordering general measures regarding the handling of confidential information and the regulation of contacts with witnesses.¹¹

11. In addition, the Panel notes that the Framework is meant to apply presumptively to all witnesses in accordance with the definition of witnesses provided therein;¹² nevertheless, the Framework “allows for some tailoring depending on the circumstances and some of its features only apply upon the witness’s request”.¹³ The Panel further recalls that the Parties and participants maintain the general prerogative under the SC’s legal framework to seek a remedy, where warranted, with regard to issues arising from the Framework’s implementation.¹⁴

12. In this regard, the Defence argues that the application of the Framework to all witnesses violates the requirement that protective measures “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”. More specifically, the Defence objects to the application of the Framework 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.¹⁵

13. Victims’ Counsel responds that the Defence’s arguments are based on a misreading of the Framework and he notes that the Framework has a legal basis distinct from an order for protective measures. He further recalls that the

¹¹ *Similarly* Appeals Decision on Framework, para. 26; Framework, para. 115.

¹² Framework, paras 183-185.

¹³ Appeals Decision on Framework, para. 48; Framework, para. 119.

¹⁴ Appeals Decision on Framework, para. 48; Framework, para. 151.

¹⁵ Defence Submissions, paras 7-8.

application of the Framework to a witness is a matter that will often be within the control of the witnesses themselves.¹⁶

14. As regards the requirement to identify an objectively justifiable risk based on an individual assessment of the situation of each witness, the Panel considers that the Defence misconstrues the legal basis upon which the Framework is adopted. As the Court of Appeals Panel confirmed, the Framework “is not adopted pursuant to Rule 80 of the Rules”.¹⁷ Nor is it an indirect request for additional or new measures pursuant to Rule 80 of the Rules.¹⁸ Accordingly, the Panel rejects the Defence’s submissions that an individualised assessment of the circumstances of each witness is required, as such assessment is only warranted in the context of protective measures under Rule 80 of the Rules.¹⁹

15. As regards the Defence’s argument that the Framework should not apply to witnesses who have not so far expressed any fear about their safety or in relation to whom no risks have been identified, the Panel notes that, in line with its finding in the previous paragraph, the Framework’s application to a witness is not contingent upon the existence of a risk. Indeed, the Framework is a preventative instrument and, as such, whether any issue of interference or actual intimidation in relation to a witness materialised in the present case is immaterial to its application.²⁰ Consequently, the Panel finds that there is no basis for limiting the scope of the Framework to witnesses who have expressed fear about their safety or to those in relation to whom risks have been identified.

B. FUNCTIONS AND NECESSITY OF THE FRAMEWORK

¹⁶ Victims’ Counsel Submissions, paras 9-14.

¹⁷ Appeals Decision on Framework, paras 27, 31.

¹⁸ Framework, paras 117, 136.

¹⁹ Appeals Decision on Framework, paras 31, 43.

²⁰ Appeals Decision on Framework, paras 34, 45.

16. The Panel takes note of the Pre-Trial Judge's findings regarding the essential functions of the Framework which consist of (i) ensuring the protection and upholding the privacy of witnesses by defining the appropriate procedure for contacts between a witness and an opposing Party or participant; (ii) enabling the preservation of evidence by establishing a transparent and accessible record in relation to interviews conducted by the Parties and participants; and (iii) contributing to the expeditious conduct of the proceedings by concretising the obligations of the Parties and participants, laying down a predictable and consistent procedure to be followed, and clarifying the roles and responsibilities of all sections and organs of the SC and the SPO involved.²¹

17. The Defence contends that, in light of the size of the present case, the number of witnesses and the existing *inter partes* agreement between the Defence and the SPO, the adoption of the Framework in the context of the present proceedings is not necessary. The Defence further argues that the present case differs significantly from the *Thaçi et al.* case as regards the individual circumstances of the Accused, who does not exercise any influence in Kosovo. Lastly, the Defence avers that, contrary to the *Thaçi et al.* case where the Framework was adopted during the pre-trial stage of the proceedings, the adoption of such framework would be untimely in the present case, which has already been referred to a Trial Panel and Defence investigations are currently ongoing.²²

18. The SPO responds that the adoption of the Framework is necessary in light of the risks of interference, the circumstances and background of the Accused, and the climate of witness interference and intimidation in which the proceedings are being conducted.²³

²¹ Framework, paras 116, 121-125.

²² Defence Submissions, paras 2, 5-6, 8-9.

²³ SPO Submissions, para. 4.

19. Victims' Counsel responds that, contrary to the Defence's assertions, the Framework was in fact adopted approximately nineteen (19) months after the beginning of the *Thaçi et al.* proceedings, towards the end of the pre-trial phase. Victims' Counsel also argues that in light of the Framework's value, the timing of its adoption is of no relevance.²⁴

20. First, the Panel notes that the *inter partes* agreement between the Defence and the SPO is merely a "gentlemen's agreement",²⁵ namely an oral agreement between the SPO and the Defence establishing an informal procedure on how the Parties can contact witnesses.²⁶ Such a verbal agreement cannot substitute the Framework in fulfilling the functions mentioned above, notably in light of its limited scope and informal nature. Indeed, the *inter partes* agreement does not regulate comprehensively the appropriate procedure to be followed when a Party or participant wishes to conduct an interview with a witness of an opposing Party or participant. Similarly, it does not address how confidential information should be handled during investigations. Against this background, the Panel finds that the existing *inter partes* agreement cannot sufficiently provide for the protection and privacy of witnesses nor the preservation of evidence. On the contrary, the Panel finds that the Framework establishes a clear and comprehensive regime to ensure that the handling of confidential information and contacts between a witness and an opposing Party or participant are appropriately regulated. In laying down a consistent and clear procedure to be followed during the conduct of investigations, the Framework will not only provide for an appropriate degree of protection for witnesses and victims but it will further assist the Panel in assessing any allegations of interference.

²⁴ Victims' Counsel Submissions, paras 6-7.

²⁵ Transcript of 18 October 2022 Hearing, p. 339, lines 14-21.

²⁶ Transcript of 18 October 2022 Hearing, p. 339, lines 14-21 and p. 341, lines 7-11.

21. Second, the Panel is not persuaded by the Defence's argument that the size of the present case and the number of the witnesses in the Parties' witnesses lists further render the adoption of the Framework unnecessary. These considerations do not dispose of the need to provide in detail for the protection and privacy of witnesses and the preservation of evidence.

22. Furthermore, as regards the Defence's assertion that the Accused did not have in the past nor has currently an influential position, the Panel emphasizes that the question is not whether the Accused exercises any influence in Kosovo or whether he personally contributed to the overall climate of witness intimidation, but whether such a climate exists or continues to exist, thus impacting the proceedings in the present case.²⁷ Moreover, the Panel recalls that whether any issue of interference or witness intimidation actually materialised in the case is irrelevant to the adoption of the Framework since the latter is meant as a preventative instrument, as the Court of Appeals Panel confirmed.²⁸ Therefore, the Panel rejects the Defence submissions in this regard.

23. Lastly, the Panel finds the Defence's argument concerning the timing of the adoption of the Framework during the early stage of the *Thaçi et al.* proceedings to be misleading. Given that the identities of the SPO witnesses in the present case have already been disclosed to the Defence and the latter is currently conducting its investigations, the Panel finds that the adoption of the Framework at this stage of the proceedings will in fact contribute to the proper and expeditious conduct of the proceedings and ensure the proper administration of justice. In this respect, the Panel considers that the legal framework of the SC and more generally the requirements of the proper conduct of the proceedings do not define a single stage

²⁷ KSC-BC-2020-04, F00365, Trial Panel I, *Decision on the Eighth Review of Detention of Pjetër Shala*, 6 December 2022, confidential, para. 25. A public redacted version was issued on 21 December 2022, [F00365/RED](#).

²⁸ Appeals Decision on Framework, para. 34.

of the case when it is most appropriate to adopt any such protocol. To the contrary, this is left to the discretion of the Panel seized of the case within its responsibilities to organise the proceedings in a fair and expeditious manner.

C. RIGHT TO A FAIR TRIAL

24. Notwithstanding the conclusion that the adoption of the Framework has a basis in the Law and serves the purposes set out above, the Panel is cognisant of the fact that the Framework must also comply with the rights of the Accused under Article 21 of the Law and international human rights law pursuant to Article 3(2)(e) of the Law. In this regard, the Defence submits that the Framework violates a number of components of the right to a fair trial.²⁹

1. Disclosure of witness identity to third parties

25. The Defence requests the amendment of Section I(e) of the Framework which sets forth the conditions upon which a Party or participant may disclose the identity of a witness to a third party during the conduct of investigations.³⁰ The Defence argues that this amendment allows for more clarity on how the Framework is to be applied. Moreover, the Defence asserts that the current test for making enquiries related to witnesses³¹ is excessively restrictive for the effective exercise of the rights of the Accused.³² Relying on jurisprudence from the European Court of Human Rights (ECtHR), the Defence argues that the relevance and importance of certain information is not always apparent during the investigative phase of the proceedings and that the preparation of its case should

²⁹ Defence Submissions, paras 21, 26-27, 36.

³⁰ Defence Submissions, paras 17-20.

³¹ The relevant part of Section I(e) of the Framework stipulates: "A Party or participant may disclose the identity of a witness to a third party only if such disclosure is directly and specifically necessary for the preparation and presentation of its case."

³² Defence Submissions, para. 19.

not be limited to the evaluation and assessment of information directly and specifically relevant to its case.³³

26. In this regard, the SPO submits that the “directly and specifically necessary” standard for disclosure of the identity of a witness to third parties strikes an appropriate balance between the aims of protecting confidential information and sufficiently enabling a Party to investigate.³⁴

27. The Panel observes that, in the precedent invoked by the Defence, the ECtHR has primarily considered issues regarding the right of access to a lawyer under Article 6(3)(c) of the ECHR.³⁵ Indeed, in the *Dayanan v. Turkey* case, the ECtHR found a violation of Article 6(3)(c) of the ECHR, taken in conjunction with Article 6(1), on account of a systematic restriction regarding legal assistance in police custody, a situation which is markedly different from the present proceedings and therefore inapplicable.³⁶ The Panel considers the core of the Defence’s argument to actually fall within the scope of Article 6(3)(b) of the ECHR, which is tied to considerations relating to the preparation of the trial.³⁷ According to the established jurisprudence of the ECtHR, Article 6(3)(b) of the ECHR guarantees the accused “adequate time and facilities for the preparation of his defence”.³⁸ Therefore, this provision implies that the substantive defence activity may comprise everything which is “necessary” to prepare for the main trial of the accused.³⁹ The ECtHR has further specified that the facilities which must be

³³ Defence Submissions, para. 20.

³⁴ SPO Submissions, para. 7.

³⁵ ECtHR, *Dayanan v. Turkey*, no. 7377/03, [Judgment](#), 13 October 2009 (*Dayanan v. Turkey*), paras 30-34.

³⁶ [Dayanan v. Turkey](#), paras 33-34.

³⁷ ECtHR, *Can v. Austria*, no. 9300/81, [Report of the Commission](#), 12 July 1984 (*Can v. Austria*), para. 54.

³⁸ ECtHR, *Lilian Erhan v. The Republic of Moldova*, no. 21947/16, [Judgment](#), 5 July 2022 (*Lilian Erhan v. The Republic of Moldova*), para. 19; *Mayzit v. Russia*, no. 63378/00, [Judgment](#) (*Mayzit v. Russia*), 20 January 2005, para. 78.

³⁹ ECtHR, [Lilian Erhan v. The Republic of Moldova](#), para. 19; [Mayzit v. Russia](#), para. 78; [Can v. Austria](#), para. 53.

granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.⁴⁰ Accordingly, Article 6(3)(b) of the ECHR is violated if it “is made impossible” for the accused to have the opportunity to organise his or her defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings.⁴¹

28. The Panel considers that any restriction arising from Section I(e) of the Framework does not reach the threshold developed by the ECtHR. In fact, the restrictions set out in the Framework, in particular the requirement allowing the disclosure of a witness’s identity to a third party only where directly and specifically necessary for the preparation and presentation of a Party’s case, aim at ensuring the protection and privacy of witnesses. Moreover, any limitations to the right of the Accused to conduct investigations are further justified by the need to address the pervasive climate of witness intimidation and interference in Kosovo. The Panel is not persuaded that the new conditions proposed by the Defence for the disclosure of a witness’s identity to a third party could address the aforementioned security and safety considerations. Furthermore, the Panel stresses that Section I(e) of the Framework relates solely to the investigative activities which require the Parties and participants to disclose the identity of a witness to a third party and not the entirety of the investigations that a Party may conduct in preparation of its case. In light of the above, the Panel considers that the existing restrictions set out in Section I(e) of the Framework strike an appropriate balance between the aim to protect the witnesses and their privacy, on the one hand, and the need to sufficiently enable a Party to investigate.

⁴⁰ ECtHR, [Mayzit v. Russia](#), para. 79.

⁴¹ ECtHR, [Mayzit v. Russia](#), para. 78; [Can v. Austria](#), para. 53.

29. The Panel also finds that the Defence fails to substantiate its claim that the proposed amendment offers more clarity on how the Framework is to be applied. The Defence provides a specific example, namely that the proposed amendment would allow the Parties to reveal the name of a witness without identifying the person's capacity or his/her involvement in the proceedings.⁴² In this respect, the Panel recalls that the Framework already incorporates an appropriate safeguard preventing the Parties and participants from revealing to third parties "that any protected witness is involved with the activities of the KSC/SPO or the nature of such involvement".⁴³ Accordingly, the Panel considers that the Defence concerns on this issue are already met by an existing provision of the Framework and, therefore, no amendment to that effect is necessary.

2. Consent of witness to be interviewed

30. The Defence requests the addition, in Section II(b) of the Framework, of a provision according to which "[t]he 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" and the simultaneous deletion of other parts of the same section.⁴⁴ The Defence submits that this additional guarantee aims at securing that the consent of the witness to be interviewed is voluntary and not the result of external influences by the calling Party.⁴⁵

31. Victims' Counsel responds that the inclusion of this provision is unnecessary as the Framework already contains a requirement that the views of the witness are ascertained "in good faith" which constitutes a sufficient guarantee.⁴⁶

⁴² Defence Submissions, para. 19.

⁴³ Framework, para. 212.I(f).

⁴⁴ Defence Submissions, para. 23.

⁴⁵ Defence Submissions, para. 24.

⁴⁶ Victims' Counsel Submissions, para. 16.

32. The Panel considers that, in the absence of specific and concrete indications to this effect, the Defence's argument regarding external influences to witnesses is speculative. In addition, as the Victims' Counsel noted, the Framework, as it stands, stipulates that the calling Party shall act in good faith in determining whether the witness consents to being interviewed by the opposing Party or participant.⁴⁷ Accordingly, the Panel considers that the Defence concerns in this regard are already addressed by an existing provision of the Framework. The Panel also recalls that, should there be a concrete and substantial reason to consider that this is not the case, the Defence may apply to the Panel seeking appropriate relief.⁴⁸ Consequently, the Defence's request to add a relevant provision to, and to delete some from, Section II(b) of the Framework is rejected.

3. Presence of a representative of the calling Party or participant in the interview

33. The Defence objects to the presence of a representative of the calling Party or participant during an interview by the opposing Party or participant on the basis that it violates a number of components of the right to a fair trial, including the right of the Accused to prepare his case, the principle of equality of arms as well as the privilege against self-incrimination and the right to silence.⁴⁹ Relatedly, the Defence also requests the deletion of Section II(k) of the Framework that regulates the issue of objections raised by the calling Party during an interview by the opposing Party or participant with its witnesses.⁵⁰

34. In this regard, the SPO submits that the possibility of the calling Party or participant attending the interviews is an appropriate and necessary measure of

⁴⁷ Framework, para. 212.II(b).

⁴⁸ Appeals Decision on Framework, para. 48; Framework, para. 151.

⁴⁹ Defence Submissions, para. 25.

⁵⁰ Defence Submissions, paras 31-32.

the Framework and that the safeguards envisaged in the latter appropriately balance competing interests and rights.⁵¹

35. Victims' Counsel submits that, under the Law, his mandate is to assist and represent the victims participating in the proceedings and that right extends to interviews conducted by the Defence.⁵²

- a) The right to have adequate time and facilities for the preparation of a defence

36. As regards the right of the Accused to prepare his case, the Defence avers that the presence of a representative of the calling Party or participant "may impose pressure on the witness interviewed to remain faithful to the 'other side'[...], [thus] prevent[ing] [him from] speaking freely".⁵³ Additionally, the Defence argues that, as a result of the presence of a representative of the SPO and/or Victims' Counsel, it would be forced to be "cautious" as to proceeding to conduct such interviews and thus, not free to plan and conduct its investigations, which is in breach of the Accused's right to have an effective opportunity to prepare his case.⁵⁴

37. The Panel finds these claims to be speculative. The Defence fails to demonstrate how the presence of a representative by the calling Party or participant will exert pressure on the witness and prevent him or her from freely testifying. The same is true with regard to the presence of Victims' Counsel in relation to dual status victims-witnesses. In this regard, the Panel reiterates that, should the circumstances warrant it, the Defence may apply for an appropriate remedy under the SC's legal framework.⁵⁵ Similarly, the Defence does not

⁵¹ SPO Submissions, para. 8.

⁵² Victims' Counsel Submissions, para. 18.

⁵³ Defence Submissions, para. 26.

⁵⁴ Defence Submissions, paras 26, 30.

⁵⁵ See above para. 11. See also Appeals Decision on Framework, para. 48; Framework, para. 151.

substantiate its argument that the presence of a representative by the calling Party will impede its ability to freely conduct interviews with witnesses of that Party. In this respect, the Panel recalls the wording of the Court of Appeals Panel that the Defence remains at liberty to “conduct such interviews in the first place”,⁵⁶ and define its strategy in respect of interviews with witnesses of the opposing Party. Thus, the choice of “what to reveal or conceal during these interviews”⁵⁷ and the line of questioning remains entirely its own.⁵⁸ Accordingly, the Panel considers that the Framework already meets the Defence concerns on this issue, and strikes a fair balance between the presence of a representative of the calling entity and the right of the opposing entity to pursue its interests during the witness interview.

b) The principle of equality of arms

38. In addition, the Defence avers that the presence of a representative by the calling Party is in breach of the principle of equality of arms for the following reasons: (i) Section II(b) of the Framework does not apply to an interview conducted by the SPO with a witness of an opposing Party concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case; (ii) the SPO has completed its investigations by carrying out interviews, for years, without the presence of a representative of the Defence; and (iii) the presence of a representative of the SPO and/or Victims’ Counsel during any interviews conducted with their witnesses constitutes substantial and unfair disadvantage.⁵⁹

39. As regards the Defence’s argument that the SPO has carried out interviews for years without the presence of a representative of the Defence, the Panel

⁵⁶ Appeals Decision on Framework, para. 82.

⁵⁷ Appeals Decision on Framework, para. 82.

⁵⁸ Appeals Decision on Framework, para. 82; *see also*, Framework, para. 150.

⁵⁹ Defence Submissions, paras 27-29.

considers that the Defence misinterprets the Law insofar as the responsibilities of the Parties are concerned. As reflected in the Pre-Trial Judge's reasoning adopting the Framework, the SPO's mandate "necessarily contains general elements in that it also covers the allegations connected to the Council of Europe Report taken as a whole".⁶⁰ On the contrary, as it stems from Articles 21(4)(e), 38(4) and 39(1)-(4) of the Law, the responsibilities of the Defence are inherently limited to a particular case and are primarily put into effect following the confirmation of an indictment against a specific accused.⁶¹ Against this background, it cannot be maintained that the Defence should have been afforded an opportunity to be present during interviews with witnesses in the context of the SPO investigations. The Defence submissions in this regard are, therefore, rejected.

40. As regards the non-application of the procedure set out in Section II(b) of the Framework to the interviews conducted by the SPO, the Panel stresses that this exception applies solely to interviews concerning other cases before the SC. On the contrary, in the event that the SPO plans to ask questions to a witness during an interview that is relevant to the charges in the present case, Section II(b) ordinarily applies and the SPO has to abide by the procedure set out therein. Therefore, also bearing in mind the Panel's findings in the previous paragraph with regard to the respective responsibilities of the SPO and the Defence, the Panel rejects the Defence's argument that the exception envisaged in Section II(b) of the Framework violates the principle of equality of arms.

41. Furthermore, the Panel recalls that, contrary to the Defence's assertion, the adoption of the Framework does not automatically entail the presence of a representative of the calling Party or participant during any interviews that may

⁶⁰ Framework, para. 140.

⁶¹ Framework, para. 140.

be conducted by the opposing entity. As it was established, while the Framework is designed to apply presumptively to all witnesses, in accordance with the definition of witnesses provided therein,⁶² the application of certain provisions, such as the one requiring the presence of a representative of the calling Party, will only be triggered upon the witness's request.⁶³

42. In this regard, the Panel further recalls the finding of the Court of Appeals Panel that the SC's legal framework does not provide for an unlimited, automatic right to conduct interviews with witnesses of the opposing Party and that it is well established that conditions can be imposed in order to regulate such contacts.⁶⁴ Under the terms of the Framework, the Parties and participants are explicitly permitted to conduct such interviews. The Panel emphasizes that the conditions imposed by the Framework, such as the presence of a representative of the calling Party or participant, do not restrict the ability of the Parties and participants to interview witnesses of the opposing Party or participant but, rather, set out a predictable and consistent procedure to be followed.

43. In light of the above, the Panel finds that the presence of a representative by the calling Party or participant during interviews with the opposing Party or participant does not violate the principle of equality of arms.

c) The right to remain silent and not to incriminate oneself

44. Lastly, the Defence contends that the presence of a representative by the calling Party or participant during an interview has an "obvious impact" on the right of the Accused to remain silent and not to incriminate himself.⁶⁵

⁶² Framework, paras 183-185.

⁶³ See above para. 11. See also Appeals Decision on Framework, para 48; Framework, para. 119.

⁶⁴ Appeals Decision on Framework, paras 79, 81.

⁶⁵ Defence Submissions, para. 25.

45. In this regard, the Panel recalls that Article 30(6) of the Constitution and Article 21(4)(h) of the Law both guarantee the right of the Accused not to be compelled to testify against himself or to admit guilt. In addition, the right to remain silent and the privilege against self-incrimination “are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 [of the ECHR]”.⁶⁶ However, the Panel observes that the Defence has not provided any specific reasoning in support of its claim that the presence of the calling Party or participant during interviews affects the Accused’s privilege against self-incrimination. As found above, the presence of a representative of the calling entity is an additional safeguarding measure which aims at rendering the process of interviewing a witness of the opposing entity more balance and fair, with a view to protecting the different interests, including the rights of the Accused. Therefore, this aspect of the Defence’s submission is dismissed.

d) Conclusion

46. In light of the above, the Panel finds that the presence of a representative by the calling Party or participant during interviews with the opposing Party or participant is in line with the protective functions of the Framework and does not violate the Accused’s right to a fair trial. In the view of the Panel, the Framework already addresses the Defence concerns and strikes a fair and effective balance between the different interests at stake. Consequently, as the Defence’s overall objection to the presence of the calling Party or participant is rejected, the

⁶⁶ ECtHR, *O’Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, [Judgment](#), 29 June 2007, para. 46; *Bykov v. Russia* [GC], no. 4378/02, [Judgment](#), 10 March 2009, para. 92.

additional request⁶⁷ to delete Section II(k) from the Framework is moot and the Panel will not address it.

4. Disclosure of memorandum and audio-video recordings

47. The Defence objects to the “systematic and mandatory disclosure” of all interviews and their audio-video recordings set forth in Section II(n) of the Framework. The Defence contends that this requirement infringes upon the right of the Accused to adequately prepare his defence and adopt the preferred investigative methods, and it contravenes the spirit of Rules 104 and 106 of the Rules.⁶⁸

48. Victims’ Counsel responds that this requirement will promote transparency, ensure the accuracy of the record, reduce the need to subject witnesses to further interviews, and that Rules 102-104 of the Rules are not engaged in this part of the operation of the Framework.⁶⁹

49. The Panel recalls that the right of the Accused, under Article 6(3)(b) of the ECHR, to prepare his defence is violated if it “is made impossible” for him to have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.⁷⁰ The Panel finds that the procedure set out in Section II(n) of the Framework does not reach this threshold. While the Panel is mindful of the potential challenges faced by the Defence in this respect, the Panel recalls that the Defence has entire control on what to reveal or conceal during its interviews with witnesses of the opposing

⁶⁷ Defence Submissions, paras 31-32. Section II(k) of the Framework concerns possible objections by the calling entity to parts of the procedure or any particular line or manner of questioning.

⁶⁸ Defence Submissions, paras 34-36.

⁶⁹ Victims’ Counsel Submissions, paras 21-22.

⁷⁰ See above para. 27.

Party or participant, and more generally on the decision to conduct such interviews in the first place.⁷¹ This is a balancing assessment for the Defence alone to make, as part of its strategy.⁷² In this context, while the Defence is not required to disclose material falling under Rule 106 of the Rules, it may consider that revealing such information to a third party would be in the best interest of the Accused.⁷³

50. Furthermore, the Panel notes that Rule 104(5)(b) and (6) of the Rules only concern the disclosure of statements provided by Defence witnesses. Taking into consideration that the Framework only governs contacts with witnesses of the opposing Party, disclosure by the Defence of SPO witness interviews that took place under the Framework does not trigger the application of Rule 104(5) and (6) of the Rules, and as such, cannot entail a violation of that Rule.⁷⁴

51. Lastly, the Panel recalls that the requirement to prepare a memorandum of the interviewing process as well as an audio-video recording and submitting it to the non-calling Party, Victims' Counsel and the Panel is in line with the protective functions of the Framework.⁷⁵ Specifically, establishing a transparent and accessible record in relation to interviews conducted by the Parties and participants with witnesses of the opposing Party or participant enables the preservation of evidence and assists in assessing any allegations of interference.⁷⁶

52. In light of the above, the Panel finds that the Framework does not require the Defence to disclose information in contravention to Rules 104 and 106 of the

⁷¹ See above para. 37. See also Appeals Decision on Framework, para. 82.

⁷² Appeals Decision on Framework, para. 82; Framework, para. 157.

⁷³ Framework, para. 157.

⁷⁴ Appeals Decision on Framework, para. 97.

⁷⁵ The Panel clarifies that Section II(n) of the Framework is modified to include also Victims' Counsel.

⁷⁶ Framework, para. 124.

Rules and thus, is not in breach of the right of the Accused to prepare his defence under Article 6(3)(b) of the ECHR and Article 21(4)(c) of the Law.

D. SPECIFIC ELEMENTS

53. The Defence proposes three additional modifications to the Framework.

54. First, the Defence submits that the definition of “witness” in the Framework is not sufficiently precise and requests that the definition be amended as follows:

‘[W]itness’ 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.⁷⁷

55. The Defence contends that limiting the definition’s application to actual witnesses in the present proceedings would allow for more certainty regarding the Framework’s application and limits. The Defence further submits that the proposed amendment does not restrict the right of any Party to amend its witness list.⁷⁸

56. The SPO responds that the Defence’s proposal is inconsistent with the SC’s legal framework on the basis that a witness list is not a final notification of the witnesses the Parties intend to call and there may be other means for a Party or Victims’ Counsel to notify its intention to call witnesses.⁷⁹

57. The Panel finds that the Defence fails to explain how the definition of “witness” already incorporated in the Framework is not sufficiently precise. The Panel also recalls that the Pre-Trial Judge has already modified the definition of “witness” to avoid “unduly expanding the purview” of the Framework.⁸⁰

⁷⁷ Defence Submissions, para. 11.

⁷⁸ Defence Submissions, para. 13.

⁷⁹ SPO Submissions, para. 6.

⁸⁰ Framework, paras 184-185.

58. Furthermore, the Panel understands that the Defence's proposal is mainly aimed at limiting the application of the Framework to those persons who are already on the SPO's witness list. However, as argued by the SPO, the Panel is of the view that this runs counter to the possibility provided expressly to the SPO under Rule 118(2) of the Rules to apply to the Panel for an amendment of its witness list. Insofar as the SPO's intention to call a person to testify or to rely on his or her statement has been duly notified to the opposing Party or participant, as required by the Pre-Trial Judge in the Framework, there is no reason why the Framework should not apply to such person pending the amendment of the SPO's witness list.⁸¹ In light of the foregoing, the Panel considers that the definition of "witness", as it stands, is sufficiently precise and need not be amended.

59. Second, the Defence requests the replacement of the references to "person" by the term "witness" in Section I(g) of the Framework concerning the visual and/or non-textual material depicting or otherwise identifying witnesses that is shown to third parties.⁸²

60. The Panel notes that the Defence offers no other argument in support of its proposed amendment than it "would enhance clarity in the application of the framework".⁸³ Absent any further basis for the proposed amendment and considering that the change proposed by the Defence does not bring any tangible added value or clarification to the section concerned, the Panel dismisses the Defence's request in this regard.

61. Finally, the Defence proposes the addition of a paragraph in the Framework that will afford the Parties and participants a certain degree of flexibility to depart

⁸¹ See also Framework, para. 184

⁸² Defence Submissions, paras 14-16.

⁸³ Defence Submissions, para. 16.

from it upon mutual agreement. In this regard, 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 may seize the Panel.⁸⁴ Although the SPO and Victims' Counsel agree to the inclusion of the flexibility clause, they submit that, contrary to the Defence's proposal, in the event of a disagreement between the Parties and participants as to whether departing from the Framework is justified, the Framework will apply.⁸⁵

62. The Panel is cognizant of the complex nature of investigations and of the Parties' and participants' need to maintain a certain degree of flexibility in the conduct of their investigative activities. However, the Panel recalls that the essential function of the Framework is to provide for the protection and privacy of witnesses and confidential information, notably by concretising the obligations of the Parties and participants and establishing a formal and consistent procedure to be followed by them, under the judicial oversight of the Panel, which adopted the Framework. The inclusion of a flexibility clause, as proposed by the Parties and Victims' Counsel, would instead contravene the purpose of the Framework. This is so because, while responsibility for the application of the Framework lies with the Parties and participants, the Panel retains judicial oversight to determine (or amend if necessary) the scope of applicability of said Framework. In light of this, the Panel considers that the Parties and participants cannot deviate from the Framework's established procedures without prior authorisation from the Panel. Thus, the request of the Parties and participants is rejected.

E. RETROACTIVE EFFECT

⁸⁴ Defence Submissions, paras 38-40.


⁸⁵ Victims' Counsel Submissions, para. 1, fn. 2; SPO Submissions, paras 2-3.

63. The Panel determines that the Framework, as adopted herein, will enter into force on the date of issuance of the present decision and shall have no retroactive effect.

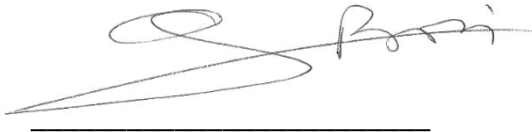
V. DISPOSITION

64. For the above-mentioned reasons, the Panel hereby:

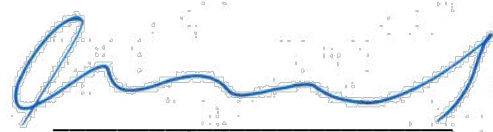
- a. **REJECTS** the Defence request to amend the Framework;
- b. **REJECTS** the Parties and participants' request to include a flexibility clause in the Framework;
- c. **ADOPTS** the Framework in the present proceedings as annexed to this decision; and
- d. **ORDERS** the Parties and participants to comply with it in relation to any ongoing and impending investigative activities and contacts with witnesses.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Thursday, 8 June 2023

At The Hague, the Netherlands.