

**In:** KSC-BC-2020-06

**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** Trial Panel II  
Judge Charles L. Smith, III, Presiding Judge  
Judge Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Hashim Thaçi  
Counsel for Kadri Veseli  
Counsel for Rexhep Selimi  
Counsel for Jakup Krasniqi

**Date:** 9 April 2024

**Language:** English

**Classification:** Public

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**Public Redacted Version of Joint Defence Request for Relief in the Form of  
Amendment to the Order on the Conduct of Proceedings**

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## I. INTRODUCTION

1. Pursuant to Articles 19(6), 21(6) and 40 of the Law,<sup>1</sup> and Rules 40(3) and 116(3) of the Rules,<sup>2</sup> the Defence (“Defence”) hereby files this Request for relief, specifically seeking amendment to the Order on the Conduct of Proceedings (“Impugned Order”) in relation to the conduct of Preparatory Sessions.<sup>3</sup> This Request is made in light of the developing use of the Preparatory Sessions by the SPO.

## II. PROCEDURAL HISTORY

2. On 22 December 2022, the Trial Panel circulated a draft order on the conduct of proceedings<sup>4</sup> and invited the Parties and participants to submit, by 13 January 2023, written observations in respect of the draft order.<sup>5</sup>
3. On 13 January 2023, the Parties and participants duly complied with the Trial Panel’s invitation, submitting their respective observations on the draft order.<sup>6</sup>
4. 25 January 2023, the Trial Panel issued its Decision adopting the Impugned Order.<sup>7</sup>

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<sup>1</sup> Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). Unless otherwise indicated, all references to ‘Article(s)’ are to the Law.

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

<sup>3</sup> F01226/A01, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, public.

<sup>4</sup> F01178/A01, *Annex 1 to Order for Submissions on the Draft Order on the Conduct of Proceedings*, 22 December 2022, public.

<sup>5</sup> F01178, *Order for Submissions on the Draft Order on the Conduct of Proceedings*, 22 December 2022, para. 4.

<sup>6</sup> F01202, *Victims’ Counsel’s Submissions on the Draft Order on the Conduct of Proceedings*, 13 January 2023, public; F01203, *Joint Defence Written Observations on Draft Order on the Conduct of Proceedings (F01178-A01)*, 13 January 2023, public; F01205, *Prosecution Submissions on the Conduct of Proceedings*, 13 January 2023, public; F01207, *Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings*, 13 January 2023, public.

<sup>7</sup> See generally, F01226, *Order on the Conduct of Proceedings*, 25 January 2023, public, para. 11(a)-(b); F01226/A01.

5. On 20 April 2023, the Selimi Defence requested, *inter partes*, that, moving forward, the SPO separate new information received during a witness preparation session from clarifications, additions and amendments to a witness' Rule 154 evidence.
6. On 2 May 2023, the SPO agreed to the Selimi Defence's proposal and assured the Defence that it would proceed in line with the proposal. This was reiterated during a hearing on 10 May 2023.<sup>8</sup>
7. On 19 July 2023, the Trial Panel issued an Oral Order, within which it, *inter alia*, warned the SPO of improper use of preparation notes 1 and 2, given that new information was being included in preparation note 1, as opposed to the established procedure of placing it in preparation note 2.<sup>9</sup>

### III. APPLICABLE LAW

8. Article 19(6) of the Law states that “[t]he Specialist Chambers shall have the power to adopt internal rules, policies and practice directions that are necessary for its proper functioning, the security or fairness of proceedings or to give effect to the provisions of this Law.” This is further specified in Rule 116(3) of the Rules, which allows the Panel to “give directions on the conduct of proceedings as necessary to ensure a fair and expeditious trial.”
9. Pursuant to Article 21(6) of the Law, the SPO is enjoined to provide the Accused with “[a]ll material and relevant evidence or facts” in its possession “before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.”

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<sup>8</sup> Transcript, 10 May 2023, T.5299.6-12.

<sup>9</sup> Oral Order, 19 July 2023, T.6219.20-6220.16.

10. Article 40 of the Law empowers the Trial Panel to take measures, as necessary, to, *inter alia*:

(e) order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(f) provide for the protection of the accused, witnesses and victims;

(g) take any necessary steps to maintain order in the course of a hearing.

11. Rule 40(3) of the Rules indicates that:

Any investigative act requiring the presence of a suspect, in particular any questioning, confrontation, identity parade or reconstruction of a crime scene shall not proceed without the presence of Specialist Counsel. A suspect may waive this right provided that the Specialist Prosecutor ensures that the suspect understands the nature of this right and the consequences of waiving it. When providing such information, the Specialist Prosecutor shall take into account the personal circumstances of the suspect, including his or her age, mental and physical condition. A waiver and the circumstances in which it was given shall be recorded in writing by the Specialist Prosecutor and shall be signed by the suspect.

#### IV. SUBMISSIONS

12. The Defence submits that, as a result of the manner in which the SPO have chosen to conduct preparatory sessions with witnesses, relief is required in order to protect the rights of the Accused and suspects and maintain efficient and fair case management.

13. The Defence seeks three amendments to the Impugned Order in relation to preparatory sessions, namely:

a. The inclusion of a prohibition on the intentional gathering of new evidence during preparatory sessions;

b. The inclusion of an express requirement that the SPO audio/video record all preparatory sessions; and

c. The inclusion of a requirement that the SPO disclose the preparatory session notes at least 48 hours before a witness's scheduled testimony.

## A. Fresh Evidence Gathering

14. The Impugned Order was adopted on 25 January 2023.<sup>10</sup> To date, the SPO have called 54 witnesses to testify before the Trial Panel. It has conducted a preparatory session for *every* witness that has been called to give evidence, including all witnesses admitted under Rule 154. Since the implementation of the preparation note 2 protocol on 2 May 2023, the SPO has provided a second preparation note for 40 witnesses.<sup>11</sup>

15. It has therefore now become standard practice for preparatory notes in this case to contain fresh evidence by way of a preparation note 2. More concerningly, a practice has clearly developed by which the SPO are using the preparatory sessions as fresh evidence gathering exercises and a space in which to continue their ongoing investigations. Prosecution Counsel conducting the preparatory sessions are regularly and intentionally eliciting, or seeking to elicit, fresh evidence from witnesses, either by targeted questioning on new topics, or by showing witnesses evidence such as unauthenticated and highly disputed documents the provenance of which has not been established and that witnesses have not seen before<sup>12</sup> and inviting comment.<sup>13</sup>

16. This is impermissible evidence gathering. Fresh evidence gathering is not the function or purpose of preparatory sessions. The purpose of such sessions is:

- i. To assist the witness who will be giving evidence during the proceedings:

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<sup>10</sup> See generally, F01226 and F01226/A01.

<sup>11</sup> *Namely*, W04748, W03165, W04355, W01236, W03811, W04337, W02153, W04586, W03879, W00072, W03832, W04566, W04368, W04018, W04255, W03724, W04644, W04781, W03880, W04769, W04753, W00208, W04043, W04444, W04765, W01763, W01493, W04489, W02082, W04870, W04325, W00498, W02749, W03878, W01140, W04811, W02475, W04147, W04739, W04571.

<sup>12</sup> For example, the compilation of [REDACTED] shown to W04739 by the SPO during the preparation sessions on 21-22 and 25 March 2024.

<sup>13</sup> The Defence draws the Panel's attention to the following, non-exhaustive, examples to illustrate the impugned conduct: 113129-113138 (W04748 Preparation Note 2), paras 17-39; 116072-116077 (W04769 Preparation Note 2), paras 4-5, 6, 19-21, 28-29, 32-39; 116830-116840 (W04765 Preparation Note 2), paras 12-13, 17-23, 25, 27-31; 118553-118556 (W04489 Preparation Note 2), paras 15, 18-19; 118992-118995 (W04325 Preparation Note 2), paras 18-21; 118812-118824, paras 25-39 and 41-62.

(a) to help ensure that the witness gives relevant, accurate and structured testimony; and

(b) to help ensure the well-being of the witness.

ii. For the calling Party to assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings.<sup>14</sup>

17. In addition, paragraph 97 of the Impugned Order specifically limits the purpose of the preparation sessions to providing the witness with an opportunity to review his or her prior statements and to confirm whether his or her prior statements are accurate and to explain any changes as necessary.

18. The practice of using Preparatory Sessions to gather new evidence or continuing the calling party's investigations is expressly prohibited by other internal criminal tribunals.<sup>15</sup> The Defence notes, in this regard, that the Court has frequently referred to ICC jurisprudence, and adopted similar practices, in the past.<sup>16</sup>

19. The SPO should be expressly prohibited from knowingly and intentionally gathering or seeking to gather fresh evidence in these sessions. As such, the Defence requests that the Trial Panel amend the Impugned Order to include the following prohibition (which mirrors that included in the ICC Witness Preparation Protocols):

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<sup>14</sup> F01226/A01, para. 86.

<sup>15</sup> ICC, *Prosecutor v. Al Hassan Ag Aboul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, [Decision on witness preparation and familiarization](#), 17 March 2020, [Annex](#) para 1(2); ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, [Decision on Witness Preparation](#), 16 June 2015, [Annex](#) para 1(2); ICC, *Prosecutor v. Francis Kirmi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11, [Decision on Witness Preparation](#), 2 January 2013, [Annex](#) para 1(2); ICC, *Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, ICC-01/09-01/11, [Decision on Witness Preparation](#), 2 January 2013, [Annex](#) para 1(2).

<sup>16</sup> See for example, F01983, *Sixth Decision on Specialist Prosecutor's Bar Table Motion*, 5 December 2023, para. 37, fn. 89. F01960, *Decision on Specialist Prosecutor's Request Concerning Post-Testimony Witness Contact*, 27 November 2023, para. 17, fns 30, 32; IA028/F00011, *Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning*, 4 July 2023, para 53, fn. 142.

Witness preparation should not be conducted for the purpose of seeking new evidence or continuing the calling party's investigations.<sup>17</sup>

20. For the sake of clarity, it is *not* being submitted that the SPO are *never* permitted show a witness fresh evidential material or ask a witness about previously unexplored topics. If this is sought to be done, the only two appropriate mechanisms for gathering such fresh evidence are:

- a. The SPO conducting a fresh interview in line with the requisite procedures and subject to judicial approval; or
- b. The SPO put the new evidence or questions to the witness at trial, during their live evidence, with the appropriate leave of the Panel.

21. In the case of *Prosecutor v. Yekatom and Ngaïssona*<sup>18</sup> before the ICC, the Chamber reaffirmed the principle that a witness' recollection of events should be first tested during live hearings to preserve the principle of immediacy. It found it preferable that all participants are able to examine a witness's testimony immediately and on an equal footing, especially when presented with any additional information.<sup>19</sup>

22. Further, in the case of *Prosecutor v. Lubanga*,<sup>20</sup> in response to the Prosecution request for permission to show witnesses potential exhibits during proofing sessions and inviting comment, the Panel, in refusing to allow the practice, found:

[W]ith regards to discussion on the topics to be dealt with in court or any exhibits which may be show to a witness in court, the Trial Chamber is not convinced that either greater efficiency or the establishment of the truth will be achieved by these measures.

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<sup>17</sup> ICC, [Annex A: Witness Preparation Protocol](#), 4 October 2021, Art. 1(2).

<sup>18</sup> ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-677, [Trial Chamber V, Decision on Protocols at Trial](#), 8 October 2020.

<sup>19</sup> ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-677, [Trial Chamber V, Decision on Protocols at Trial](#), 8 October 2020, para 23.

<sup>20</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1049, Trial Chamber I, [Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial](#), 30 November 2007.

Rather, it is of the opinion of the Chamber that this may come dangerously close to constituting a rehearsal of in-court testimony [...].<sup>21</sup>

23. Finally, it should be noted that this request for relief is *not* targeted at situations where a witness comes to their preparatory session with the SPO and either (a) voluntarily brings evidential material to the SPO which was previously unknown and unanticipated, or (b) in the course of the preparatory session spontaneously provides new information to the SPO. These situations are clearly unforeseeable and unavoidable and must be catered for accordingly. The relief sought is targeted at the SPO's use of preparatory sessions to continue their investigations and intentional eliciting of fresh evidence.

#### **B. Audio-Visual Recording of Preparatory Sessions**

24. As the SPO developed their preparatory session practice, they have taken an increasingly expansive approach to these sessions. This approach now involves questioning the witnesses in broad manner and, as outlined above, eliciting new evidence. This approach by SPO was not anticipated when the practice of preparatory sessions was initially instigated by the SPO and the Impugned Order made, as preparatory sessions have not been used in this manner before in other international tribunals.

25. The Defence has no means of observing how this questioning is conducted or how any new information is elicited from witnesses, i.e. whether it was done in a leading manner and then subsequently recorded as if the witness provided the material without being led.

26. Further, the SPO have adopted a practice of using the preparatory session 2 notes as prior inconsistent statement if the witness deviates from the proofing note 2 in court – despite the fact they are not witness statements but rather a

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<sup>21</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1049, Trial Chamber I, [Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial](#), 30 November 2007, para 51.



witness statement of questioning counsel (which also raises additional concerns of counsel in those circumstances rendering themselves witnesses in the case and, therefore, professionally embarrassed).<sup>22</sup>

27. Therefore, considering the manner in which the SPO are now seeking to use these preparatory sessions and the notes arising from them, the Defence renews its submission that all preparatory sessions should be audio/video recorded. These recordings can be stored unless/until required or automatically served on the Defence. This would allow the Defence an opportunity to make appropriate objections to how the testimony was elicited in the preparatory session and to request that it be excluded from use by the SPO as a prior inconsistent statement in appropriate circumstances.

28. The Defence therefore requests, by way of relief, that the Impugned Order be amended to include an express requirement that the SPO audio/video record all preparatory sessions conducted with alleged suspects

29. In addition to the concerns outlined above, the Defence notes that the SPO's witness list includes a number of suspects and alleged or potential JCE members and tools; some of whom have already given evidence and some of whom are yet do so.<sup>23</sup>

30. The rights of suspects are protected under the Rules of Procedure and Evidence.<sup>24</sup> In particular, Rule 44 provides:

(1) During the questioning of a suspect by the Specialist Prosecutor, the procedure envisaged in Rule 43 shall apply. The questioning shall be video-recorded, in accordance with the following procedure:

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<sup>22</sup> See, for example W03879 (Transcript, 14 August 2023, T.6269 and T.6328); W04769 (Transcript, 11 October 2023, T.8743; Transcript 16 October 2023, T.8972-8974); W04753 (Transcript, 30 October 2023, T.9136-9137); W04489 (Transcript, 17 January 2024, T.11349; Transcript, 24 January 2024, T.11733-34); W04147 (Transcript, 24 March 2024, T.13539.1-17; T.13547.19-13548.4; T.13549.8-20; T.13562.17-13563.14; T.13565.5-22).

<sup>23</sup> For example, W04765, W04323, W04746, W01453, W04455, W03886, W04753, W04603, W4748.

<sup>24</sup> Rules 43 and 44 of the Rules.

[...]

(2) A suspect may be questioned without the questioning being video-recorded pursuant to paragraph (1) where exceptional circumstances do not allow for such recording to take place. The Specialist Prosecutor shall record the reasons for not following the procedure in paragraph (1).

(3) Where, pursuant to paragraph (1) or (2), the questioning is not video-recorded, the Specialist Prosecutor shall prepare a written transcript of the questioning of the suspect, which shall be signed by him or her and by the suspect. The Specialist Prosecutor shall record any refusal by the suspect to read or sign the transcript and any reason he or she might give for it, and any other persons present shall be asked to read and sign the transcript.

31. As such, it is submitted that the SPO violated the rights of suspects who have been the subject of previous Preparatory Sessions (W04765, W04323 and W04746) by failing to record these sessions in according with the procedure prescribed under Rule 44.

32. It is incumbent on all parties to ensure the rights of any suspects are protected.

33. The Defence therefore requests, by way of relief, that the Impugned Order be amended to include an express requirement that the SPO audio/video record all preparatory sessions conducted with alleged suspects. This should apply equally to all persons alleged to be JCE members or tools, as such persons are also liable to be, or are also, suspects and therefore entitled to have their rights safeguarded under the Rules.

### **C. Timing of the Disclosure of the Prep Notes**

34. The SPO are required to disclose preparatory notes to the Defence 24 hours before a witness is due to give evidence.<sup>25</sup> Objection was previously taken in relation to this timescale.<sup>26</sup> The current notice requirements have been in force

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<sup>25</sup> F01226/A01, paras 94 and 96.

<sup>26</sup> F01207, para. 22.

for some time now and as such the Parties and the Panel now have the benefit of the experiences of the practice in its current form.

35. Considering the length of the preparatory notes routinely served by the SPO and persistent inclusion of new evidence by way of a preparatory note 2, the time required to adequately deal with the material arising from these notes far exceeds that initially envisaged. Further, an unfortunate practice has developed whereby the SPO are failing to provide the Defence with a full working day in advance of a relevant witness's testimony. The SPO have interpreted 24 hours to include weekends and non-working hours. This has put additional and unnecessary strain on the Defence.

36. By way of the most recent examples, the preparatory notes for W02749 were provided at 18:43 on the evening of Friday, 23 February 2024, when W02749 was scheduled to begin giving evidence at 09:00 on Monday, 26 February 2024. This allowed the Defence *zero* working hours to adequately deal with two preparatory notes, the second of which dealt with various exhibits not previously notified to the Defence for that witness. The preparatory notes for W04811 were disclosed on Friday, 15 March 2024 at 16:05 when the witness began evidence at 09:00 on Monday, 18 March 2024. This allowed the Defence 55 minutes of working hours to deal with the preparatory notes. Many more similar examples exist.<sup>27</sup>

37. The Panel will be aware that the Defence are only entitled to consult with our clients on an emergency basis on weekends. Further, when preparatory session notes are provided late during a court sitting week, our access to our clients is restricted to short periods around sitting times. As such, taking instructions on

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<sup>27</sup> See for example, W04644's preparation note was disclosed on Friday, 22 September 2023 at 18:06 and was scheduled to testify on Monday, 25 September 2023.

new issues raised in these notes, and on exhibits and documents not previously notified to the Defence, is particularly difficult.

38. The Defence notes the longer sitting days recently imposed by the court (09:00-16:30) and the intensified sitting schedule for the upcoming blocks, including a 4-week block in June. Both of these factors further impede the Defence's ability to consult their clients and adequately prepare for cross-examination.

39. The Defence also notes the more central nature of the upcoming witness from April – July 2024. It is submitted that this schedule will simply be unmanageable if preparation session notes continue to be served at a late hour. The Defence is anxious to progress trial and assist the Panel in efforts to sit for extended periods, however, it is requested that some accommodation be made by the SPO in terms of the service of these notes, given the extent to which they extend the time required to prepare for cross examination.

40. The Defence therefore requests that the Impugned Order be amended to require the SPO to disclose the preparatory notes 48 hours before a witness' scheduled testimony, to allow the Defence adequate time to prepare and to respect the wellbeing of all staff.

## V. CLASSIFICATION

41. These submissions are filed publicly as no reference is made to confidential information.

## VI. CONCLUSION

42. The Defence respectfully requests that the Panel adopts the three proposed modifications to the Impugned Order.

**Word Count: 3,421**

Respectfully submitted on 9 April 2024



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**Luka Mišetić**

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**Ben Emmerson, CBE KC**

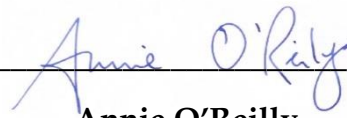
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