



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Specialist Prosecutor's Office

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Prosecution response to joint Defence request for amendments to the Conduct of Proceedings Order

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I. INTRODUCTION

1. The Request¹ seeks reconsideration of the Conduct of Proceedings Order² without addressing – let alone meeting – the requisite standard under Rule 79.³
2. Moreover, the three amendments sought in the Request are ill-founded, based on a specious portrayal of preparation sessions to date, and are otherwise unwarranted because: (i) the Specialist Prosecutor’s Office (‘SPO’) adheres to the terms of the Conduct of Proceedings Order; (ii) audio-video recording is unnecessary; (iii) a new 48-hour disclosure rule is neither necessary, nor practicable; and (iv) the Defence fails to demonstrate any concrete prejudice. The Request simply attempts to re-litigate matters which the Panel has already considered and which the existing provisions of Conduct of Proceedings Order already include sufficient safeguards for. It should be rejected by the Trial Panel.

II. SUBMISSIONS

A. THE RECONSIDERATION TEST IS NOT MET

3. In seeking amendments to what the Request refers to as the ‘Impugned Order’,⁴ the Defence effectively seeks reconsideration of the Conduct of Proceedings Order, but does not even attempt to explain how the reconsideration test is met. Once directions are issued under Rule 116(3), Rule 79 is the only avenue available to a Party seeking to revisit them.⁵ In the Request, the Defence seeks to sidestep the requirements of Rule 79, which requires the moving party to demonstrate ‘exceptional

¹ Joint Defence Request for Relief in the Form of an Amendment to the Order on the Conduct of Proceedings, KSC-BC-2020-06/F02230, 9 April 2024 (‘Request’).

² Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 (‘Conduct of Proceedings Order’).

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All reference to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

⁴ Request, KSC-BC-2020-06/F02230, para.14.

⁵ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Haradinaj Defence’s Application for Certification of F00328, KSC-BC-2020-07/F00372, 25 October 2021, para.32.

circumstances' and a clear error of reasoning, or that reconsideration is necessary to avoid injustice.⁶ The Defence does not tie any of these criteria to its three proposed amendments.

4. Notably, the Defence has not sought to discuss the concerns it raises *inter partes* before filing the Request⁷ and had ample opportunity previously to raise its concerns with the Panel.⁸ Indeed, as set out below for each, the Defence has already made specific submissions concerning the provisions now being challenged. In such circumstances – and considering that the Request is based on a distorted view of witness preparation thus far, ignores previous decisions of the Panel, and seeks an unrealistic adjustment of existing disclosure practice – modification of the Conduct of Proceedings Order at this stage of the trial is wholly unjustified.

B. LEGITIMATE WITNESS PREPARATION IS NOT 'EVIDENCE GATHERING'

5. The KRASNIQI Defence previously challenged the Conduct of Proceedings Order, *inter alia*, on the basis that it would allow the SPO to 'explore new lines of questioning' and 'adduce new evidence', including in relation to exhibits, during witness preparation sessions.⁹ The Panel took these submissions into account when issuing the Conduct of Proceedings Order, and later rejected the KRASNIQI Defence's certification request,¹⁰ which repeated the same arguments.¹¹ This issue has already been litigated and the Defence's submissions do not demonstrate any change in

⁶ Rule 79; Decision on Urgent Prosecution Request for Reconsideration of Decision F01727, KSC-BC-06/F01736, 23 August 2023, para.11.

⁷ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.7.

⁸ See, *similarly*, Decision on Selimi Request for Safeguards in Relation to Preparation of Identification Witnesses, KSC-BC-2020-06/F01456, 14 April 2023 ('SELIMI Video Decision'), para.12.

⁹ See *e.g.* Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings, KSC-BC-2020-06/F01207, 13 January 2023 ('KRASNIQI Initial Submissions'), paras 6, 8(iii), 9, 14, 22.

¹⁰ Decision on Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings", KSC-BC-2020-06/F01300, 16 February 2023 ('Certification Decision'), paras 22-29.

¹¹ See *e.g.* Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings", KSC-BC-2020-06/F01246, 1 February 2023 ('KRASNIQI Certification Request'), paras 23, 26-27.

circumstances, let alone one justifying a modification of the Conduct of Proceedings Order. The Request does not identify any specific witness where application of the current provisions caused – or will cause – concrete prejudice. As already acknowledged by the KRASNIQI Defence,¹² if any concrete prejudice arises in the context of any specific witness's preparation, the Defence can, as appropriate and necessary, apply for additional time to prepare in relation to any new information obtained during preparation.¹³

6. The Defence's contention that the SPO is engaging in 'fresh evidence gathering' is a specious description of legitimate witness preparation, conducted by professional SPO personnel, the scope of which was preordained by the Trial Panel. What the Defence refers to as 'impermissible' is, in fact, permitted by the plain terms of the Conduct of Proceedings Order.¹⁴ Witness preparation is intended to ensure 'the witness gives relevant, accurate and structured testimony' and 'facilitate the focused, efficient and effective questioning of the witness during the proceedings.'¹⁵ The Conduct of Proceedings Order permits – and, indeed, requires – the SPO to record (i) any clarifications, changes or corrections made by the witness to their statements, and (ii) any new information obtained from the witness.¹⁶

7. In the course of live testimony, witnesses may legitimately be asked questions about information and evidentiary material (both familiar and new) that is separate from their statements. In order to achieve the primary goal of witness preparation – to ensure streamlined and focused testimony – it is both logical and appropriate to show potential exhibits to witnesses in advance, during witness preparation.¹⁷ This

¹² See KRASNIQI Initial Submissions, KSC-BC-2020-06/F01207, para.22.

¹³ See, similarly, SELIMI Video Decision, KSC-BC-2020-06/F01456, para.14.

¹⁴ *Contra* Request, KSC-BC-2020-06/F02230, paras 14-17.

¹⁵ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.86.

¹⁶ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.96.

¹⁷ ICC, *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-588, Decision on witness preparation, 2 January 2013 ('Muthaura Decision'), para.37.

was accepted practice at the ad hoc tribunals,¹⁸ with a new, formal statement from the witness not normally required.¹⁹ To not show exhibits in advance would significantly prolong witness testimony needlessly, using up valuable court time.

8. Importantly, the SPO is also required to inform the Panel and Parties, sufficiently in advance of a witness's appearance, of the exhibits it intends to use with the witness.²⁰ This gives the Defence adequate notice, and the opportunity to provide any objections or seek any necessary and appropriate relief.²¹ Moreover, 'new information' is not automatically part of a witness's evidence. It must still be led on direct examination, and is open to reasonable objection from the Defence.²² By disclosing this information in advance via Preparation Note 2 and giving prior notice to the Defence, this process *enhances* the fairness of proceedings.²³

9. The Defence's repeated reference to 'fresh evidence gathering' assumes that the SPO interprets 'new information' to be only incriminatory material, but it also includes exculpatory information that may be newly provided during preparation.²⁴ The SPO is legally obliged to disclose such information immediately.²⁵ Furthermore, recording and disclosing 'new information' (including what might often be tangential information), does not mean that the SPO will seek to elicit such information during direct examination, but that information must still be recorded and disclosed.

10. The Request also does not substantiate its generalised allegation of transgression, instead citing to preparation notes containing examples of 'impugned conduct',

¹⁸ ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR.73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007 ('Karemera Decision'), para.4.

¹⁹ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004, p.3.

²⁰ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.74(vi).

²¹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.76(ii)(b).

²² See e.g. Oral Order, Transcript, 19 July 2023, p.6220.

²³ See *Muthaura* Decision, para.46.

²⁴ *Karemera* Decision, para.4.

²⁵ Rule 103.

without explaining or supporting this assertion whatsoever.²⁶ Moreover, it adopts an overly restrictive interpretation of paragraph 97 of the Conduct of Proceedings Order, as supposedly ‘limiting’ the purpose of preparation sessions to reviewing statements only.²⁷ Yet, this paragraph must be viewed as a whole. It lists a series of procedural steps that ‘must’ be taken as part of every preparation session, including reiterating the witness’s obligation to tell the truth, and reminding the witness of their right to counsel, as appropriate. In any event, the provision of ‘new information’ is often a natural consequence of the witness ‘reviewing’ their own prior statements, as paragraph 97(iii) expressly permits.²⁸

11. There is no need to amend the Conduct of Proceedings Order in the terms suggested by the Defence, as the SPO does not use witness preparation to ‘continue investigations’.²⁹ Rather, the SPO conducts preparation with a view to focus and streamline testimony and the topics the witness can speak to. As to the ICC protocols referred to by the Defence in support of its suggested wording, the Defence neglects to acknowledge that each of these protocols in fact expressly permit the recording of new information and showing new material to a witness.³⁰ Notably, in the *Al Hassan* case, the Chamber opined that when new materials are shown to a witness in preparation, what is important is that the materials were disclosed to the Defence,

²⁶ Request, KSC-BC-2020-06/F02230, fn.13.

²⁷ Request, KSC-BC-2020-06/F02230, para.17.

²⁸ For example, this was the case for the Preparation Note for W04586, the witness related to the Oral Order of 19 July 2023, which is referred to at para.7 of the Request.

²⁹ *Contra* Request, KSC-BC-2020-06/F02230, para.19.

³⁰ ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01-666, Decision on witness preparation and familiarisation, 17 March 2020, paras 27-28 and fn25, together with accompanying Annex, paras 24 (permitting the showing of exhibits during preparation), 32(b) (requiring the recording of new information). *See also* ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-652-Anx, Witness preparation protocol, 16 June 2015, paras 24, 32; ICC, *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-588-Anx, Witness preparation protocol, January 2013, para.23; ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-524-Anx, Witness preparation protocol, 2 January 2013, para.23.

appear on the list of evidence, and relate to an issue for which adequate notice was provided.³¹ These standards also exist in the preparation conducted by the SPO.

12. Moreover, the other Defence suggestion³² that ‘a fresh interview’ be conducted in order to show new material in witness preparation is impractical and inefficient, as such an interview would have to be transcribed and disclosed, causing significant delay to the witness’s testimonial appearance and unnecessary resource pressure. In any event, given that Preparation Note 2 is read back to the witness, who is then asked to confirm its content,³³ and any such information must be elicited live in testimony to the extent the SPO seeks to rely upon it, it is hard to see how conducting a fresh interview is useful or warranted. Furthermore, the Defence’s reliance on practice in the *Yekatom* and *Lubanga* cases³⁴ is inapposite and of no assistance to its Request, since witness preparation in those cases was not permitted at all, but is permitted in this case.

C. AUDIO-VIDEO RECORDING IS UNWARRANTED

13. In seeking to have prospective witness preparation sessions video-recorded, the Defence neglects to acknowledge its own prior submissions on the same issue and decisions of the Trial Panel, which twice rejected Defence requests for the precise relief it seeks here.³⁵ Three Defence teams previously made submissions on preparation sessions for suspects, failing to request that such sessions be video-recorded and instead, expressing concern – not about suspect rights, as it does not now – but instead that ‘[h]aving the status of a suspect may have a chilling effect on an individual’s willingness to participate in the proceedings’.³⁶ Further, the Panel has already

³¹ ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01-1142-Red, Public redacted version of ‘Decision on Defence request for remedy concerning P-0065’s witness preparation log,’ 4 November 2020, para.6.

³² Request, KSC-BC-2020-06/F02230, para.20(a).

³³ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.96.

³⁴ Request, KSC-BC-2020-06/F02230, paras 21-22 and citations therein.

³⁵ SELIMI Video Decision, KSC-BC-2020-06/F01456; Certification Decision, KSC-BC-2020-06/F01300.

³⁶ Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01), KSC-BC-2020-06/F01203, 13 January 2023 (‘Joint Defence Submissions’), para.40 (requesting

rejected³⁷ extensive submissions by the KRASNIQI Defence requesting video-recording of all witness preparation sessions.³⁸ When rejecting SELIMI's subsequent attempt to introduce video-recording for a certain category of witnesses, the Panel noted: 'Insofar as it seeks to revisit the Order [on the Conduct of Proceedings], the Selimi Defence has failed to establish that the requirements for reconsideration under Rule 79 are met.'³⁹ The present Request suffers from the same defect. The request for video-recording is premised on 'an increasingly expansive approach' to witness preparation.⁴⁰ However, as noted above, the alleged transgressions of 'broad questioning' and 'eliciting fresh evidence' are without merit, and do not warrant a change in practice.

14. Tellingly, the Defence does not concretely claim that existing preparation notes represent an incomplete or inaccurate record of preparation sessions, nor does it claim that any witness preparation session was conducted with impropriety, such that video recording might be an appropriate and necessary remedy. It merely speculates as to possible transgressions without any factual basis to do so.⁴¹ The Defence submission that video-recordings be stored 'unless/until required' further undermines the Request, as it effectively concedes video-recordings are presently unnecessary for the fair and expeditious conduct of proceedings.⁴²

15. Finally, the Defence places special emphasis on video-recording witness preparation with alleged suspects.⁴³ As a general matter, the Defence does not have standing to invoke the rights of – or make requests on behalf of – witnesses.⁴⁴ The

modification of the provision to require withdrawal of a Rule 143 notification where there is no longer a reasonable suspicion against the person).

³⁷ Certification Decision, KSC-BC-2020-06/F01300, paras 26-29.

³⁸ KRASNIQI Initial Submissions, KSC-BC-2020-06/F01207, paras 17-21.

³⁹ SELIMI Video Decision, KSC-BC-2020-06/F01456, para.12.

⁴⁰ Request, KSC-BC-2020-06/F02230, para.24.

⁴¹ Request, KSC-BC-2020-06/F02230, para.25.

⁴² Request, KSC-BC-2020-06/F02230, para.27.

⁴³ Request, KSC-BC-2020-06/F02230, paras 29-30.

⁴⁴ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Defence Motion to preclude portions of the anticipated testimony of Prosecution witness DCH, for the postponement of DCH's testimony, and

rights inherent to Rules 43-44 are unique to the suspect alone. Furthermore, the Defence suffers no prejudice from any hypothetical non-application of Rule 43.⁴⁵

16. In any event, when called to testify, suspects are subjected to the same procedure as any other witness, including that envisaged under Rule 151. A preparation session – which respects the rights of all witnesses, including suspects, against self-incrimination⁴⁶ – is intended to assist the witness, and facilitate focused, efficient, and effective testimony.⁴⁷ In this context, and as also detailed above, a preparation session is not an investigative interview.⁴⁸ Sufficient safeguards are already included in the Conduct of Proceedings Order, which requires that, during witness preparation, the questioning lawyer must: (i) ‘indicate if the witness is concerned that information could be self-incriminatory that he or she is permitted to seek the advice of counsel before answering such questions’;⁴⁹ (ii) provide, where appropriate, a Rule 43 notification;⁵⁰ and (iii) permit the witness’s legal advisor to be present, if the witness so requests.⁵¹ The rights of witnesses of all categories, including suspects, are therefore sufficiently safeguarded, without any need for video recording.

D. THE PROPOSED 48-HOUR DISCLOSURE RULE IS NOT PRACTICABLE

17. Lastly, the Defence – without adequate justification – seeks a change of timing for the disclosure of the preparation notes from 24 hours before testimony, to 48 hours.⁵² Once again, the Defence ignores prior submissions and decisions. Three

for the appointment of Defence Counsel for DCH, 29 March 2004, para.10; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision of the President on the complaint of Milan Martić regarding the assignment of counsel, 8 April 2013, p.1.

⁴⁵ *Contra* Request, KSC-BC-2020-06/F02230, para.31.

⁴⁶ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 97(v), 99.

⁴⁷ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.86.

⁴⁸ *See, similarly*, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-734, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, para.26.

⁴⁹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.97(v).

⁵⁰ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.99.

⁵¹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.91.

⁵² Request, KSC-BC-2020-06/F02230, paras 34-40.

Defence teams did not previously raise any objection to the 24-hour deadline.⁵³ The KRASNIQI Defence, however, made detailed submissions claiming hypothetical and abstract prejudice that would arise from new information being disclosed ‘only 24 hours before [witnesses’] in-court testimonies’.⁵⁴ The Panel rejected these submissions when issuing the Conduct of Proceedings Order.⁵⁵

18. Notably, the SELIMI Defence previously requested *inter partes* the provision of preparation notes for a specific witness in advance of the deadline set in the Conduct of Proceedings Order. While the SPO was not able to accommodate that specific request due to its timing and the witness’s circumstances, the SPO indicated to the Defence that it may be able to accommodate such requests in future when made sufficiently in advance of scheduled testimony.⁵⁶ Particularly in this context, the failure of the Defence to first raise this issue *inter partes* in connection with specific witnesses justifies summary dismissal.⁵⁷ In any event, consistent with the purposes of witness preparation, important considerations taken into account when making logistical arrangements for witness preparation and testimony – which necessarily impact the timing of preparation note disclosures – include the need to assist the witness in giving relevant, accurate, and structured testimony, and ensure witness well-being.⁵⁸ These considerations should inform any decision on the merits.

19. The SPO has abided by the terms of the Conduct of Proceedings Order in good faith, and notes that the Order does not specify the 24-hour limit to be one working day in advance of testimony. Indeed, the Conduct of Proceedings Order contains five different references to 24-hour deadlines, which also relate to issues such as the

⁵³ Joint Defence Submissions, KSC-BC-2020-06/F01203.

⁵⁴ See e.g. KRASNIQI Initial Submissions, KSC-BC-2020-06/F01207, para.22.

⁵⁵ See also Certification Decision, KSC-BC-2020-06/F01300, paras 22-29.

⁵⁶ See Prosecution reply relating to video-conference request F01826, KSC-BC-2020-06/F01841, 6 October 2023, Confidential, para.6 (and the sources cited therein).

⁵⁷ See, similarly, SELIMI Video Decision, KSC-BC-2020-06/F01456, para.14.

⁵⁸ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.86.

uploading of presentation queues and the prior raising of objections.⁵⁹ Yet none of these are stipulated or understood to mean ‘one working day’ deadlines.⁶⁰ The Defence itself does not request that the deadline be modified in terms of working days, but instead requests an increase in the number of hours before testimony.

20. The Defence also neglects to note that many of the SPO’s preparation notes are transmitted significantly in advance of the required 24-hours before testimony.⁶¹ Indeed, all examples provided in the Request concerned preparation notes provided more than 48-hours in advance of testimony.⁶² As is apparent, the SPO is already in good faith providing the Defence with greater notice than 24hours, when it is possible to do so. However, importantly, the Defence does not refer to the practical consequences of imposing, as a requirement, a new 48-hour disclosure deadline on the well-being of witnesses, who are often vulnerable and have complex medical and security needs. It would mean additional time away from their families and support network, and by having to wait longer to testify, would negatively impact their well-being. Given the often unpredictable pace of witness examinations, such a requirement would have concrete and significant impact on witnesses. More generally, it would make planning the logistics of witness travel more difficult. As noted above, the Defence has already been invited to make timely *inter partes* requests on a witness specific basis, and to the extent any additional preparation time is needed

⁵⁹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 43, 79, 82, 94, 96.

⁶⁰ Indeed, the Panel purposely used 24 hours, as opposed to one day or one working day in the Conduct of Proceedings Order.

⁶¹ E.g. W00072 (one month before testimony); W00208 (more than 40 days before testimony); W00498 (more than 2 months before testimony); W01493 (more than 5 days before testimony); W01763 (4 days before testimony); W02652 (about 5 days before testimony); W03827 (4 days before testimony); W04355 (6 days before testimony); W04444 (more than 4 days before testimony); W04448 (nearly a month before testimony); W04489 (4 days before testimony); W04739 (7 days before testimony); W04781 (6 days before testimony); W04870 (6 days before testimony). This list focusses on disclosures occurring four or more days before witness testimony, however, in most cases, witness preparation notes were disclosed more than 48 hours before witness testimony.

⁶² Request, KSC-BC-2020-06/F02230, para.36. While the Defence submissions in this paragraph focus on the number of working days, the Defence ultimately requests a 48-hour deadline, without any working day qualification.

for any specific witnesses, the Defence can seek appropriate relief from the Panel, after demonstrating concrete prejudice.

21. In all the circumstances, a 48-hour rule is not justified, and the present 24-hour rule should be maintained.

III. CONCLUSION

22. For the foregoing reasons, the Request should be rejected.

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Monday, 22 April 2024

At The Hague, the Netherlands.