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 Guénaël 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
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Joint Defence Reply to Prosecution Response to Joint Defence Request for Amendments to the Conduct of Proceedings Order

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I. INTRODUCTION

1. The Defence hereby jointly submits this Reply to the Prosecution response to the joint Defence request[1] for amendments to the Conduct of Proceedings Order of 22 April 2024.[2]

II. SUBMISSIONS

A. Reconsideration

2. The SPO claims that the Defence effectively seeks reconsideration of the Impugned Order but fails to satisfy any of the criteria contained in Rule 79.[3] It notes, in this regard, that "Rule 79 is the only avenue available to a Party seeking to revisit [directions issued under Rule 116(3)]," offering, as support for that proposition, a Decision from Case 07.[4] This mischaracterises the Request and the Specialist Chambers' legal framework.

3. At the outset, the Defence notes that Rule 79 is not the only avenue available for the relief sought. The Defence clearly submitted its Request for relief on the basis of, *inter alia*, Article 40(6)(e)-(g) of the Law,[5] which empowers the 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;

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[1] F02230, *Joint Defence Request for Relief in the Form of Amendment to the Order on the Conduct of Proceedings*, 9 April 2023, confidential ("Request"). A public redacted version was issued on 10 April 2024 (F02230/RED).
[2] F02258, *Prosecution response to joint Defence request for amendments to the Conduct of Proceedings Order*, 22 April 2024, confidential ("SPO Response").
[3] SPO Response, para. 3 *citing* Rule 79 of the 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.
[4] SPO Response, para. 3 *citing* KSC-BC-2020-07/F00372, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, public para. 32.
[5] 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.

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

4. The Panel can act according to Article 40 either of its own volition, or upon request of the Parties. Indeed, many of the measures which the Panel has made during the course of this trial, have been made pursuant to this provision following a request by the Parties.[6] Encompassed within the authority afforded to the Trial Panel under Article 40, the Defence submits, is the power to make amendments to Orders and/or the issuance or addition of new Orders. This was recently made evident when the Panel amended its Order for the Accused to provide 48 hours' notice of waiver of appearance in court instead of the previously ordered 24 hours' notice, without the need to invoke Rule 79.[7]

5. The SPO seeks to rely upon an overly restrictive interpretation of the Rules. In doing so, it also fails to appreciate the substantive difference between 'decisions' and 'orders,' of which only the former explicitly falls within the material scope of application of Rule 79. The Rule already makes a clear distinction between 'decisions' and 'judgments,' and notes that judgments may not be subject to reconsideration. To assume that orders are included within the purview of Rule 79 is incorrect. Decisions of the Panel are materially different in form, substance and effect, to orders, particularly procedural orders.

6. Rule 116(4) gives the Panel broad discretion to issue trial management orders during trial which are necessary to ensure a fair and expeditious trial, including specifically on "disclosure obligations." Nothing in the Rules supports the SPO's suggestion that the Panel's trial management powers under Rule 116(4) are limited by its pre-trial Order on the Conduct of Proceedings. The Panel

[6] For instance, requests for protective measures or the production of evidence.
[7] Oral Order, 23 April 2024, T.14654.6-20. Additionally, the Defence refers the Panel to its Oral Order of 13 April 2023, T.2813.17-21, where it opted to amend paragraph 83 of the Impugned Order following deliberations between the Parties regarding presentation queues.

clearly has the power under Rule 116(4) to amend the SPO's disclosure obligations in preparation sessions if necessary to ensure a fair and expeditious trial.

7. Whereas the SPO relies selectively upon the *Gucati* Decision as the *only* support for its interpretation, it fails to recognise that the order challenged in *Gucati* is fundamentally different from the Impugned Order at issue. Indeed, the *Gucati* order comprised a lengthy discussion of the arguments raised by the Parties.[8] Reconsideration, in that instance, was apposite precisely because the Parties were privy to the judicial analysis underpinning the dismissal of the Rule 117 motions. Similar reasoning is not reflected in the Impugned Order currently under challenge. Rather, it comprises three brief paragraphs, none of which actually engage with the Parties' submissions on issues included in the Order.[9] Were the Defence to file a request for reconsideration it would be impossible to allege an error of reasoning because said reasoning is unavailable to it; one of the key distinctions between decisions and orders.

8. Ultimately, it is for the Defence to determine the avenues through which it may seek relief.

9. If the Panel is nonetheless of the view that reconsideration is the more appropriate avenue for such a request, it is submitted that the test for reconsideration is met in any event as the relief sought is necessary to avoid injustice and the Defence has demonstrated the existence of exceptional circumstances.[10]

[8] KSC-BC-2020-07/F00328, *Order on Rule 117 Defence Motions*, 27 September 2021, public, paras 9-17.
[9] *See*, F01226, *Order on the Conduct of Proceedings, 25 January 2023*, public, paras 8-10.
[10] Request, paras 15, 25-29 and 36-39.

B. Fresh Evidence Gathering

10. The SPO suggests that the submissions made in the Defence Request in essence mirror previously those made by the Krasniqi Defence in prior litigation in January 2023.[11] Over a year has passed since those submissions were made, in advance of the commencement of trial. As outlined in paragraph 14 of the Defence Request, the Panel is now in a position to consider these fresh submissions, in light of the manner in which these preparatory sessions have been conducted for over a period of twelve months and for over 40 witnesses. These developments constitute a material change in circumstances and warrant consideration by the Panel.

11. In reply to the SPO assertion at paragraph 8 of their response that, "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,"[12] it is noted that while the SPO is required to notify the Defence of the documents proposed for use well in advance of proceedings in their 'List of Witnesses' filing, they repeatedly fail to do so. It is now commonplace, as the Panel has had the opportunity to repeatedly observe, for witnesses to be shown numerous documents in their preparation session which were not previously notified to the Defence in any filing and only come to the attention of the Defence with the service of the preparation notes.[13] It is therefore disingenuous to assert that the "Defence [have] adequate notice, and the opportunity to provide any objections or seek any necessary and appropriate relief."[14]

12. Paragraph 10 of the SPO response clearly disregards the substance of the Defence Request,[15] which makes clear that this Request is not directed at those

[11] SPO Response, para 5
[12] SPO Response, para. 8.
[13] By way of most recent example, *see* Preparation Note 2 of W04739, 120275-120287.
[14] SPO Response, para. 8.
[15] *See*, Request, para. 23.

unforeseeable and unavoidable situations were a witness brings new information to light, unpromoted. The Request, as clearly set out, targets the intentional use of these sessions by Prosecution Counsel to illicit fresh evidence on various topics and on various documents. It is submitted that by doing so, Prosecution Counsel is improperly continuing investigations.

13. It is noted that the SPO does not contest the proposition that preparatory sessions cannot be used for fresh evidence gathering or conducting investigations. As such, there appears to be no opposition to the amendment in principle; simply a submission that this is not what the SPO considers that it is doing in practice. If there is no objection to the principle of the proposed new provision; there should be no bar to the amendment, which is in the interests of justice and necessary to ensure a fair and expeditious trial.

14. The SPO raises concerns that a fresh interview would be "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."[16] It is a matter for the SPO as to how to allocate resources and it can adapt accordingly and to consider whether a supplemental witness statement is in fact necessary for every witness they call. Further, it is unclear how such an amendment would cause delay, with appropriate use of video-conferencing technology and location-based staff. More pertinently, any concerns of impracticality and inefficiency do not trump principles of fairness and justice to the Accused.

C. Audio-Visual Recording of Preparatory Sessions

15. As outlined in the Request, there has been a material change in circumstances now that all the Parties have had the benefit of over 40 preparatory sessions

[16] SPO Response, para. 12.

conducted over 12 months. It is as a result of the observed developing and expanding use of these sessions that this Request is made.

16. The SPO submits that "the Defence does not concretely claim that existing preparation notes represent an incomplete or inaccurate record of preparation sessions."[17] It is obvious that the preparatory session notes cannot represent a complete record of these sessions. Preparatory sessions with witnesses last for hours, over multiple days and the resultant note may be 5-25 pages long. By comparison, the transcript of an SPO interview conducted during pre-trial may be 300 pages long.

17. In the absence of any transcript of these sessions, the Defence has, of course, made no assertions of impropriety and remains ignorant as to how these sessions are conducted. However, considering the manner in which the SPO examines witnesses in court and the content of the preparation notes thus far served, concerns do exist in relation to the use of leading questions.

18. In response to paragraph 14, it is not conceded that "video-recordings are presently unnecessary for the fair and expeditious conduct of proceedings."[18] It is simply accepted that the audio/video recordings, as opposed to the transcripts of the same, would not be immediately disclosable, subject to request and review.

19. In terms of the rights of suspects, the Defence, as officers of the court, when confronted with such a clear violation of the rights of an unrepresented participant to these proceedings, is bound to bring that violation before the Court, particularly in circumstances where those tasked with the responsibility of protecting that participants rights have failed to do so. It is for the Panel to

[17] SPO Response, para. 14.
[18] SPO Response, para. 14.

ensure the rights of all participants are protected, in particular witness, some of whom include suspects.

20. Suspect witnesses have an express right as set out in the Rules to audio/video recording of these sessions.[19] That right is clearly being violated,[20] for no justifiable reason. It should be noted that the measures outlined by the SPO in their response in paragraph 16, do not and cannot absolve them of the duty to protect the express rights set out in Rules 43 and 44.

21. More significantly, Orders of this Court are required to comply with the Rules of Procedure and Evidence; at present they do not and as such require amendment.[21]

D. Timing of the Disclosure of the Prep Notes

22. The Defence justification for seeking a change of timing for the disclosure of the preparation notes is clear and set out in paras 36-40 of the Defence Request.

23. The Defence does not assert that the SPO has failed to abide by the terms of the Conduct of Proceedings Order; it is submitted that the Order is no longer fit for purpose. The Order was made before any preparatory sessions had been conducted, before it became apparent that the SPO would conduct them for every witness, before it was evident how expansively they would be used, and before the sitting days were increased alongside the length of the sitting day. In light of how the trial, and the conduct of the SPO, has developed the current 24-hour service is insufficient to allow the Defence adequate time to prepare.

24. The Defence reiterates that it is for SPO is to allocate resources accordingly and that convenience to the SPO does not and cannot trump the right of the Accused

[19] Rules 43 and 44 of the Rules.
[20] *See*, for example, most recently that of suspect witness W04741.
[21] *See* Article 19(6) of the Law.

to have adequate time to prepare their defence. There is no identifiable reason why many, if not most, preparatory sessions cannot be conducted well in advance of live testimony, remotely by way of video link, or in the field. On the contrary, such approach would facilitate better preparedness by all those involved with this trial.

III. CONCLUSION

25. The Defence respectfully confirms and reiterates the relief requested in its initial Request.

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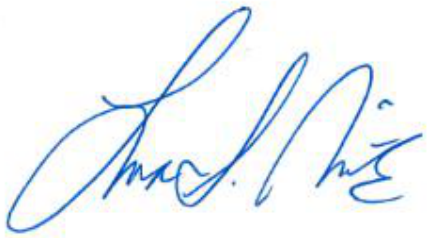
Respectfully submitted on 29 April 2024



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