

In: KSC-BC-2020-06
**The 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 Rexhep Selimi
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**Public Redacted Version of Urgent Selimi Defence Request Concerning
W04846's Preparation Session**

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I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi (“the Defence”) hereby files its Urgent Request Concerning W04846’s Preparation Session (“Request”). The present Request is filed in light of the issues arising out of *inter partes* communications between the Defence and the SPO in relation to the materials that the SPO might discuss with or display to the witness in the course of his preparation session.
2. The Defence requests an urgent order directing the SPO to (i) refrain from discussing with or showing to W04846 any of his prior statements that have not been included on the SPO’s exhibit list; and (ii) provide W04846 with redacted versions of his prior statements that are included on the SPO’s exhibit list with redactions applied to the evidence contained therein that has been excluded by virtue of the Trial Panel’s Decision; (iii) respond to this Request by 14:00 on Friday 21 June; and (iv) conduct any preparation session with W04846 in accordance with the relief set out in paragraphs (i) and (ii) pending the decision of the Trial Panel on this Request.

II. PROCEDURAL HISTORY

3. On 19 June 2024, the Defence transmitted via email to the SPO a request for assurance that certain statements provided by W04846 not be shown to or discussed with the witness in the course of his forthcoming preparation session. The statements in question have been provided to [REDACTED] in 2003¹ and 2005² respectively (“W04846 [REDACTED] Statements”), and have been disclosed pursuant to Rule 102(1)(b)(i) on 26 March 2024, one year and half after

¹ SPOE00347400-SPOE00347401.

² SPOE00347362-SPOE00347368.

the SPO filed its request to add W04846 to its list of witnesses,³ and almost two years after the deadline for disclosure pursuant to Rule 102(1)(b) set by the Pre-Trial Judge.⁴ No motion to add the above two statements to the SPO's exhibit list has been filed since their disclosure.

4. On 20 June 2024, the SPO responded via email that, pursuant to paragraph 97 of the Order on the Conduct of Proceedings,⁵ it intends to provide W04846 with all prior statements during his preparation session for his review.
5. On the same day, in light of the Trial Panel's Decision on Selimi Defence Motion to Exclude Evidence of W04846,⁶ the Defence replied to the SPO's email, requesting that the witness be provided with versions of his prior statements that are included on the SPO's exhibit list where the portions which relate to evidence that has been excluded by virtue of that Decision are redacted.
6. On the same day, the SPO responded to the Defence's request stating that the decision in question does not provide any basis to alter the procedure set out in paragraph 97(iii) of the Order on the Conduct of Proceedings, and that it intends to provide W04846 with the full versions of his prior statements unless otherwise directed by the Trial Panel.

III. SUBMISSIONS

7. Pursuant to the Order on the Conduct of Proceedings, the purpose of witness preparation sessions is "[t]o assist the witness who will be giving evidence

³ KSC-BC-2020-06/F00947 KSC-BC-2020-06/F00947, Confidential redacted version of Prosecution request to add two witnesses and associated materials with strictly confidential and ex parte Annexes 1-2, 2 September 2022.

⁴ KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 60.

⁵ KSC-BC-2020-06/F01226, Annex 1 to Order on the Conduct of Proceedings, 25 January 2023.

⁶ KSC-BC-2020-06/F02393, Decision on Selimi Defence Motion to Exclude Evidence of W04846, 19 June 2024.

during the proceedings: (a) to help ensure that the witness gives relevant, accurate and structured testimony; and (b) to help ensure the well-being of the witness.”⁷ In addition, preparation sessions also serve the calling Party in assessing and clarifying “the witness’s evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings.”⁸ As interpreted by the Trial Panel, “it is clear from the Order that the purpose of witness preparation is, inter alia, to ensure the well-being of the witness and to facilitate the focused, efficient and effective questioning of the witness during the proceedings.”⁹

8. It follows from the Trial Panel’s determinations that preparation sessions, as their name suggests, are employed with the sole purpose of ensuring that a witness provides focused and relevant evidence during the upcoming in-court testimony. They are, in that respect, an ancillary process to the witness’ in-court testimony and are not independent investigative activities. As such, the procedure employed by the SPO in the conduct of preparation sessions is circumscribed by the rules that govern the questioning and presentation of evidence by the SPO in the courtroom.
9. Pursuant to Rule 95(4)(c), the SPO is required to file, within the time-limit set by the Pre-Trial Judge, the list of proposed exhibits that the SPO intends to use during its presentation of evidence. It is only after being granted leave to amend its exhibit list pursuant to Rule 118(2) that the SPO may use additional documents during its presentation of evidence that have not been previously included on this list. The Trial Panel has determined that this mechanism is an essential safeguard which ensures that the Defence is on notice of the documents

⁷ KSC-BC-2020-06/F01226, Annex 1 to Order on the Conduct of Proceedings, 25 January 2023, para. 86.

⁸ *Id.*

⁹ KSC-BC-2020-06/F02389, Decision on Joint Defence Request for Amendment of the Order on the Conduct of Proceedings, 18 June 2024, para. 19.

that the SPO is entitled to use in the course of preparation sessions.¹⁰ As such, the Trial Panel's recognition of this mechanism as a safeguard for the rights of the Accused necessarily implies that the SPO is bound to carry out its preparation sessions in compliance with that safeguard. Nothing in the Order on the Conduct of Proceedings suggests that the calling party's obligation to show the witness his or her prior statements pursuant to paragraph 97 of the Order entitles it to dispense with this safeguard. As such, the paragraph in question must be interpreted in light of the SPO's extant obligations with respect to the presentation of evidence.

10. As the SPO has not sought to add the W04846 [REDACTED] Statements to its exhibit list, it follows that it does not intend to rely on them at trial, and is therefore prevented from referring to them during the examination-in-chief of W04846. Therefore, the use of W04846 [REDACTED] Statements during the witness' preparation session cannot be conducive to facilitating "the focused, efficient and effective questioning of the witness during the proceedings" for the SPO is barred from referring to these statements in the courtroom. Accordingly, the SPO's indication that it will proceed with providing the W04846 [REDACTED] Statements to the witness for his review during his preparation session is antithetical to the very rationale for conducting preparation sessions.
11. Furthermore, the use of documents that are not included on the SPO's exhibit list during preparation sessions is contrary to the objective of Rule 95(4)(c) to place the Accused on notice of the evidentiary foundation of its case. As such, if the SPO is entitled to use documents previously not notified to the Defence as forming part of its case in preparation sessions, and thereby elicit additional evidence that it may deploy in the courtroom, the Defence is faced with the immediate risk that it may have to confront allegations of which it was not

¹⁰ *Ibid*, para. 24.

properly notified, emanating from materials similarly not properly notified. The fact that the SPO is only required to disclose preparation notes 24 hours in advance of a witness' testimony further compounds the prejudice inherent in this exercise should it be allowed to proceed as the SPO proposes to.

12. Instead, the SPO's indication that it intends to use the W04846 [REDACTED] Statements during the witness' preparation session strongly implies that the SPO intends to seek to rehabilitate the witness' credibility by alerting him to discrepancies between the answers given in his SPO interview regarding the number and content of statements and those materials which were only relatively recently retrieved from [REDACTED]. In particular, the witness stated in his SPO interview that he provided all his evidence in relation to the alleged involvement of Mr. Selimi in [REDACTED] and the mistreatment of [REDACTED] in the form of a single statement in 2003;¹¹ and that he did not provide any other statement or testimony besides that 2003 statement.¹² Nevertheless, the disclosure of the W04846 [REDACTED] Statements on 26 March 2024 demonstrated that both of these claims were false, as evidenced by the fact that the 2003 statement (and all documents from that investigation) makes no mention of Mr. Selimi, threats made by him to [REDACTED], or indeed [REDACTED]; and that a subsequent statement was provided by the witness to [REDACTED] in 2005, over a year after the [REDACTED].¹³
13. Attempting to resolve inconsistencies in a witness' evidence in such manner is contrary both to the principle of orality and the Accused's right of confrontation – by impeding upon the Defence's cross-examination avenues in an out-of-court setting. In addition, it likewise risks devolving into instances of coaching or

¹¹ 102761-TR-AT Part 3 Revised-ET, pp. 25-27.

¹² 102761-TR-AT Part 1 Revised-ET, p. 9.

¹³ SPOE00347354-00347469, p. SPOE00347354.

influencing the witness into providing evidence that would salvage his credibility, which are specifically prohibited by the Order on the Conduct of Proceedings.¹⁴

14. With respect to W04846's prior statements that are included on the SPO's exhibit list, namely his SPO interview and two contact notes,¹⁵ the Trial Panel excluded W04846's evidence in relation to two allegations which are amply discussed over the course of these statements. In that respect, the Trial Panel determined that W04846's evidence on these two allegations has no or remote *prima facie* probative value in respect of the facts and circumstances pleaded in the Indictment which is outweighed by its prejudicial effect.¹⁶ As the SPO is prevented from leading this evidence during W04846's *viva voce* testimony, allowing the witness to review the portions of his prior statements containing his evidence on these two allegations will likewise be contrary to the rationale allowing for the conduct of preparation sessions, namely to ensure that the witness provides clear and relevant evidence during his examination-in-chief.
15. The SPO's indication that it intends to allow the witness to review his prior evidence that has been excluded poses the manifest risk that the SPO intends to use this evidence to elicit further incriminating evidence from the witness during the preparation session, of which the Defence has not been put on notice. Considering that the Trial Panel has determined that W04846's evidence on these two allegations has a "substantial prejudicial effect" on the Accused,¹⁷ and the witness' history of contacts with the SPO in the course of which he progressively

¹⁴ KSC-BC-2020-06/F01226, Annex 1 to Order on the Conduct of Proceedings, 25 January 2023, paras. 87, 98.

¹⁵ 102761-TR-AT Parts 1-3 Revised-ET; 095407-095413; 110533-110535.

¹⁶ KSC-BC-2020-06/F02393, Decision on Selimi Defence Motion to Exclude Evidence of W04846, 19 June 2024, paras. 22-23, 28.

¹⁷ *Ibid*, para. 28.

volunteered additional prejudicial evidence in relation to Mr. Selimi,¹⁸ it follows that there is a substantial risk that the witness will proffer additional highly prejudicial evidence if given the opportunity to review and comment on his past evidence on these allegations.

16. Allowing the witness to do so a mere few days before his testimony, when the Defence will not be in a position to properly investigate any such new allegations, will highly prejudice the rights of the Accused to confront the evidence against him. If this occurs, the Defence reserves its right to seek an adjournment of the testimony of W04846 should the witness proffer any prejudicial evidence in relation to Mr. Selimi outside the remaining scope of his evidence notified to the Defence in accordance with Rule 95(4)(c), or seek similar relief that such evidence be excluded from the witness' live testimony.

IV. URGENCY

17. Given the SPO's notification that the preparation session for W04846 will commence [REDACTED], an urgent response by the SPO to this Request is required, as well as an urgent decision by the Trial Panel to avoid any delay in the preparation and testimony of this witness. While the Defence notes the belated timing of this application, this was substantially dependent on the Trial Panel's findings in the Decision. The Defence has also sought the position of the SPO on both issues in advance of filing.
18. As such, to prevent the SPO creating a *fait accompli* and rendering this Request moot, any preparation session conducted with W04846 should comply with the relief sought herein, pending the ruling of the Trial Panel.

¹⁸ KSC-BC-2020-06/F02207, Selimi Defence Submissions Supplement to F02201 with Confidential Annex 1, 28 March 2024, para. 8.

V. CLASSIFICATION

19. The present submissions are filed confidentially as they refer to confidential information pertaining to witnesses who have been granted protective measures. A public redacted version of this filing will be filed in due course.

VI. CONCLUSION

20. Considering the foregoing, the Defence respectfully requests the Trial Panel to direct the SPO to: (i) refrain from discussing with or showing to W04846 any of his prior statements that have not been included on the SPO's exhibit list; (ii) provide W04846 with redacted versions of his prior statements that are included on the SPO's witness list with redactions applied to the evidence contained therein that has been excluded by virtue of the Trial Panel's Decision; (iii) respond to this Request by 14:00 on Friday 21 June; and (iv) conduct any preparation session with W04846 in accordance with the relief set out in paragraphs (i) and (ii) pending the decision of the Trial Panel on this Request.

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Respectfully submitted on 20 June 2024,

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