

**In:** KSC-BC-2020-06  
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi  
and Jakup Krasniqi**

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

**Registrar:** Dr. Fidelma Donlon

**Filing Participant:** Defence Counsel for Jakup Krasniqi

**Date:** 13 January 2023

**Language:** English

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**Further Krasniqi Defence Submissions**

**in Addition to Joint Defence Written Observations on the**

**Draft Order on the Conduct of Proceedings**

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## I. INTRODUCTION

1. In addition to the Joint Defence Written Observations on the draft Order on the Conduct of Proceedings, the Defence for Jakup Krasniqi (“Defence”) files these further submissions on the draft Order on the Conduct of Proceedings (“Draft Order” or “Order”), as invited by the Trial Panel in its Second Oral Order issued on 16 December 2022.<sup>1</sup>

## II. PROCEDURAL HISTORY

2. On 30 November 2022, the President of the Kosovo Specialist Chambers (“KSC”) constituted Trial Panel II (“Trial Panel”).<sup>2</sup>

3. On 15 December 2022, the Pre-Trial Judge transmitted the case file to the Trial Panel pursuant to Rule 98 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).<sup>3</sup>

4. On 16 December 2022, the Trial Panel informed the Parties and participants that, in accordance with Rule 116(3) of the Rules, a Draft Order will be circulated to the Parties and participants for them to make submissions, if they so wish, by 13 January 2023, at 16:00 hours.<sup>4</sup>

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<sup>1</sup> KSC-BC-2020-06, In Court – Oral Order, Second Order - Re. Draft Order on the Conduct of Proceedings (“Second Oral Order”), 16 December 2022, public.

<sup>2</sup> KSC-BC-2020-06, F01132, President of the Specialist Chambers, *Decision Assigning Trial Panel II*, 30 November 2022, public.

<sup>3</sup> KSC-BC-2020-06, F01166, Pre-Trial Judge, *Decision Transmitting the Case File to Trial Panel II*, 15 December 2022, public, with Annexes 1, 3, confidential, and Annexes 2, 4, strictly confidential and *ex parte*.

<sup>4</sup> Second Oral Order.

5. On 22 December 2022, the Trial Panel has circulated the Draft Order.<sup>5</sup>

### III. SUBMISSIONS

#### SECTION XV. WITNESSES: D. WITNESS PREPARATION SHOULD NOT BE ALLOWED IN THE PRESENT CASE

6. The Defence opposes witness preparation in this case,<sup>6</sup> and accordingly requests the Trial Panel to adopt a witness familiarisation protocol akin to the one adopted in the *Mustafa* case (“*Mustafa Protocol*”).<sup>7</sup> Witness preparation carries inherent risks which have the potential of disrupting the authenticity and spontaneity of witness testimony, inconsistent with the principle of immediacy. A witness familiarisation regime would address the concern of the Trial Panel to ensure the well-being of the witness and provide an opportunity for the witness to review his or her prior statements, while safeguarding the integrity of oral testimony and avoiding any risk of witness interference, coaching, or pressuring.

7. While the applicable framework at the KSC is silent with regard to witness preparation,<sup>8</sup> it is noteworthy that this practice is not envisioned in Kosovan criminal procedure.<sup>9</sup> The majority of trial chambers at the International Criminal Court (“ICC”) have rejected witness preparation and adopted a witness familiarisation procedure conducted by the Victim and Witnesses Unit of the Registry.<sup>10</sup> Moreover, no general

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<sup>5</sup> KSC-BC-2020-06, F01178, Trial Panel II, *Order for Submissions on the Draft Order on the Conduct of Proceedings*, 22 December 2022, public, with Annex 1, public.

<sup>6</sup> Draft Order on the Conduct of Proceedings, Section XV(D), paras 84-98.

<sup>7</sup> KSC-BC-2020-05, F00150, Trial Panel I, *Decision on Witness Familiarisation* (“*Mustafa Decision on Witness Familiarisation*”), 9 July 2021, public, paras 12-34.

<sup>8</sup> *Idem*, para. 36.

<sup>9</sup> *Idem*, para. 36.

<sup>10</sup> Seven chambers have rejected witness preparation in the cases of *Lubanga* (Pre-Trial Chamber and Trial Chamber), *Katanga and Ngudjolo*, *Bemba, Bemba et al.*, *Gbagbo and Blé Goudé*, *Ongwen*, and *Yekatom and Ngaïssona*. See, e.g.: ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-679, Pre-Trial Chamber I, *Decision on the Practices of Witness Familiarisation and Witness Proofing*, 8 November 2006, paras 11-17, 28-42;

principle of law allowing for witness preparation can be derived from national legal systems, not least because witness preparation has no place in civil law systems.<sup>11</sup>

8. In this context, the Defence adopts and supports the following principles set out by the Trial Panel in *Mustafa*:

- i. Providing the opportunity for witnesses to prepare for their upcoming testimony in any way other than by re-reading their prior statement(s) and related material would inevitably detract from the spontaneity and reduce the benefits of the immediacy of their testimony. Discussing matters relating to the substance of the testimony with the calling entity upfront outside the courtroom also bears the risk of unintentionally transmitting a certain expectation of the calling entity about the upcoming testimony, thereby inadvertently influencing or contaminating the witness;<sup>12</sup>

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*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* (“*Lubanga* Trial Chamber Decision”), 30 November 2007, paras 35-52; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1134, Trial Chamber II, *Decision on a Number of Procedural Issues Raised by the Registry*, 14 May 2009, paras 17-18; *Prosecutor v. Bemba*, ICC-01/05-01/08-1016, Trial Chamber III, *Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, 18 November 2010, paras 31-35; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1252, Trial Chamber VII, *Decision on Witness Preparation and Familiarisation* (“*Bemba et al.* Decision”), 15 September 2015, paras 20-25; *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-355, Trial Chamber I, *Decision on Witness Preparation and Familiarisation* (“*Gbagbo and Blé Goudé* Decision”), 2 December 2015, paras 13-19; *Prosecutor v. Ongwen*, ICC-02/04-01/15-504, Trial Chamber IX, *Decision on Protocols to be Adopted at Trial* (“*Ongwen* Decision”), 22 July 2016, paras 4-17; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-677, Trial Chamber V, *Decision on Protocols at Trial* (“*Yekatom and Ngaïssona* Decision”), 8 October 2020, paras 17-30. By contrast, only five chambers have allowed witness preparation, subject to strict conditions and the video-recording of preparation sessions: ICC, *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-588, Trial Chamber V, *Decision on Witness Preparation* (“*Muthaura and Kenyatta* Decision”), 2 January 2013, paras 30-53; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-524, Trial Chamber V, *Decision on Witness Preparation* (“*Ruto et al.* Decision”), 2 January 2013, paras 26-51; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-652, Trial Chamber VI, *Decision on Witness Preparation* (“*Ntaganda* Decision”), 16 June 2015, paras 13-18; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-666, Trial Chamber X, *Decision on Witness Preparation and Familiarisation* (“*Al-Hassan* Decision”), 17 March 2020, paras 9-18; *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20-478, Trial Chamber I, *Directions on the Conduct of Proceedings*, 4 October 2021, para. 54 and Annex A.

<sup>11</sup> *Lubanga* Trial Chamber Decision, para. 41.

<sup>12</sup> *Mustafa* Decision on Witness Familiarisation, para. 40.

- ii. Any potential inaccuracy, inconsistency or contradiction in the upcoming testimony of a witness shall not be “ironed out” in *ex parte* discussions with the calling entity, but shall be aired in the courtroom, allowing the Panel, the Parties, and Victims’ Counsel to properly assess the testimony on equal footing;<sup>13</sup>
- iii. Whether or not a witness can speak to a particular documentary item not previously shown to him or her shall best be established during the witness’ testimony before the Panel, as his/her natural reaction can also carry evidentiary value;<sup>14</sup>
- iv. The Witness Protection and Support Office (“WPSO”), as a neutral and specialized unit of the Registry, bears the primary responsibility for the witnesses’ well-being, including in relation to any alleged interference, especially in the period immediately leading up to their testimony.<sup>15</sup>

9. Whilst the Trial Panel is, of course, not bound by the decisions of the *Mustafa* Trial Panel, the Defence respectfully submits that it is desirable for there to be a consistent approach between Trial Panels at the same institution, unless there are good reasons to diverge. On this occasion, the same principles set out by the *Mustafa* Trial Panel are echoed in the developing case-law of the ICC. ICC Chambers have recognised that witness preparation is inconsistent with the principle of immediacy<sup>16</sup> and has an inherent risk of rehearsing and distorting witnesses’ evidence, which exists

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<sup>13</sup> *Mustafa* Decision on Witness Familiarisation, para. 37.

<sup>14</sup> *Idem*, para. 37.

<sup>15</sup> *Idem*, para. 41.

<sup>16</sup> *Yekatom and Ngaïssona* Decision, para. 22; *Ongwen* Decision, para. 13; *Bemba et al.* Decision, para. 25; *Gbagbo and Blé Goudé* Decision, para. 16.

regardless of the calling party's intention to do so,<sup>17</sup> and that the Registry is better placed to assist witnesses in reviewing their previous statements without the risk of transmitting the calling party's expectations.<sup>18</sup> The Defence submits that witness *preparation* is therefore better avoided to safeguard the truthfulness and spontaneity of oral testimony.

10. The Defence observes that the Draft Order for the Conduct of Proceedings proposed the adoption of witness preparation for two reasons: (i) to assist the witness by monitoring his or her well-being and help ensure that he or she gives relevant, accurate and structured testimony; and (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>19</sup> The first objective can be efficiently achieved by a witness familiarisation scheme conducted by the WPSO, and the second is outweighed by the need to protect the witness from being influenced, coached or pressured - even if involuntarily - by the calling party.

11. Firstly, the WPSO is an independent and specialist unit which is "responsible for ensuring the safety and wellbeing of witnesses".<sup>20</sup> As such, the WPSO is better placed to monitor the well-being of witnesses than the Parties, which are instead driven by their expectations as to a witness' testimony in court and, more generally, have an interest in the outcome of the case. In line with WPSO's mandate, the *Mustafa* Protocol provides for the following safeguards to protect witnesses:

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<sup>17</sup> *Lubanga* Trial Chamber Decision, paras 51-52; *Yekatom and Ngaïssona* Decision, para. 21; *Bemba et al.* Decision, para. 22; *Gbagbo and Blé Goudé* Decision, para. 17; *Ongwen* Decision, para. 10.

<sup>18</sup> *Yekatom and Ngaïssona* Decision, para. 22; *Gbagbo and Blé Goudé* Decision, para. 27; *Ongwen* Decision, paras 8, 10.

<sup>19</sup> Draft Order on the Conduct of Proceedings, para. 85.

<sup>20</sup> Kosovo Specialist Chambers & Specialist Prosecutor's Office, First Report (2016-2018), published in March 2018, p. 43, available at [https://www.scp-ks.org/sites/default/files/public/content/ksc\\_spo\\_first\\_report\\_en.pdf](https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_first_report_en.pdf).

- i. The calling party has the opportunity to inform WPSO about a witness' protection, vulnerability, medical and special needs, as well as the duty to inform WPSO if the witness is at risk of self-incrimination;<sup>21</sup>
- ii. Prior to the commencement of the familiarisation process, a meeting between WPSO and the witness will be held, in which WPSO informs the witness on topics related to his or her safety and welfare;<sup>22</sup>
- iii. After the witness' arrival in the Netherlands, a welcome and orientation briefing is provided by the WPSO, as well as a courtroom familiarisation process which enables the witness to acquaint himself/herself with the way proceedings are conducted in the courtroom;<sup>23</sup>
- iv. A specific vulnerability assessment of the witness is undertaken by WPSO and submitted to the Trial Panel ahead of testimony;<sup>24</sup>
- v. WPSO closely monitors the well-being of the witness to determine if he or she requires any assistance or support during the familiarisation process, in which the witness has a chance to re-read his or her previous statements.<sup>25</sup>

12. Secondly, the adoption of the *Mustafa* Protocol would give witnesses the opportunity to refresh their memory by re-reading their previous statements and related materials as provided by the calling party.<sup>26</sup> This will help the witness

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<sup>21</sup> *Mustafa* Decision on Witness Familiarisation, paras 12-13; KSC-BC-2020-05, F00131, Registrar, *Registry Submissions for Trial Preparation Conferences*, 2 June 2021, public, with Annex, confidential, and Annex, strictly confidential and *ex parte*, para. 14.

<sup>22</sup> *Mustafa* Decision on Witness Familiarisation, para. 15.

<sup>23</sup> *Idem*, paras 16, 22-24.

<sup>24</sup> *Idem*, para. 17.

<sup>25</sup> *Idem*, paras 28-29.

<sup>26</sup> *Idem*, para. 28.

understand the topics of discussion which will be addressed during his or her oral examination, and thus facilitate relevant, accurate and structured testimonies. Importantly, it is noteworthy that many Specialist Prosecutor's Office ("SPO") interviews have been conducted between 2020 and 2022, and thus relatively recently. For this reason, witness preparation cannot be justified by any lapse of time between the witnesses' interviews and their in-court testimony.<sup>27</sup>

13. Thirdly, the Draft Order already contains several provisions ensuring that direct, cross- and re-examinations are conducted efficiently, expeditiously, and in an organised manner.<sup>28</sup> For instance, the parties are required to limit their questions to relevant issues, to make effective use of time and to avoid length or complicated questions. These provisions are already sufficient to achieve focussed and efficient questioning of the witness and will contribute to the provision of structured testimony.

14. Fourth, the Defence notes that the SPO has already had ample opportunity to interview its witnesses. Indeed, it has taken the opportunity to interview witnesses multiple times – for, instance W04147 was interviewed on 14 – 15 May 2018, 9 September 2019 and 13 February 2020.<sup>29</sup> The SPO has spoken to witnesses by telephone and obtained additional evidence or clarifications, sometimes on multiple occasions.<sup>30</sup> The SPO should therefore have no need to assess or clarify any witness' evidence in the period shortly before he or she is called.

15. Any limited benefits of witness preparation are outweighed by the inevitable risk of influencing the witness' testimony and reducing its truthfulness and

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<sup>27</sup> *Ntaganda* Decision, paras 11, 18.

<sup>28</sup> Draft Order on the Conduct of Proceedings, paras 102-103, 105, 109, 112.

<sup>29</sup> 075522-075551, p. 1.

<sup>30</sup> For example, 090116-090118.



spontaneity. In particular, the Defence expresses its concern that, even unintentionally or indirectly, the calling party's ability to "clarify the witness's evidence"<sup>31</sup> in an *ex parte* meeting shortly before testimony carries the inherent risk of evolving into a coaching session through which the calling party can convey its expectations while "helping" the witness clarify the most controversial aspects of his or her testimony. Clarifying the witness' evidence should instead be done in court, in full transparency, with the Trial Panel's oversight and with the other parties and participants able to object to leading or suggestive lines of questioning.

16. For all the above reasons, the Defence respectfully requests the Trial Panel to adopt the witness familiarisation regime set out in the Mustafa Protocol and not to permit witness preparation in this case.

17. In the alternative, if witness preparation is permitted, the Defence submits that additional safeguards including audio or video-recording of the preparation sessions should be adopted, in line with the practice at the ICC.<sup>32</sup> The advantage of audio or video-recording is that it preserves a record of the witness preparation session, so that any concern regarding improper coaching can be definitively resolved.

18. While the Draft Order expressly prohibits "coaching, training, or practising",<sup>33</sup> it does not contain any effective safeguard against these practices, nor any opportunity for the Trial Panel and the opposing Parties to ensure that impermissible practices are not used during witness preparation sessions. Paragraph 94 of the Draft Order requires the calling Party to keep a log of each preparation session and subsequently provide the non-calling Parties and participants and the Trial Panel with a copy of that

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<sup>31</sup> Draft Order on the Conduct of Proceedings, para. 85(ii).

<sup>32</sup> *Muthaura and Kenyatta* Decision, para. 50; *Ruto et al.* Decision, para. 47; *Ntaganda* Decision, para. 24; *Al-Hassan* Decision, para. 12.

<sup>33</sup> Draft Order on the Conduct of Proceedings, para. 86.

log. However, the only specification as the content of that log is that it must include the location, duration and attendees at the session. Such a log is not capable of providing an effective safeguard against coaching, training or practising because it is not required to document exactly what the calling Party says to the witness.

19. Even in the minority of cases in which witness preparation was permitted at the ICC, trial chambers consistently ordered the video-recording of witness preparation sessions, so that the recordings can be made available to the chamber and the opposing party in the event of allegations of coaching or of any other improper interference with the evidence.<sup>34</sup>

20. Audio or video-recording has been recognised by the KSC as an appropriate safeguard in the case of interviews with a witness of the opposing party. The Protocol on the Handling of Confidential Information and Contacts with Witnesses (“Protocol”) provides that interviews by the opposing party are audio or video-recorded and a copy of the recording must be provided to the calling party.<sup>35</sup> In light of the inherent risk of witness interference, coaching, or pressuring even unintentionally in witness preparation, it is equally important that the preparation session is audio or video-recorded.

21. Further, the SPO has also adopted a practice of audio and video-recording many of its interviews.<sup>36</sup> Recording witness preparation sessions would not impose an undue burden on the SPO. Indeed, it would be anomalous if the SPO recorded witness interviews which took place years before trial but did not record a preparation session

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<sup>34</sup> See *supra*, fn. 32.

<sup>35</sup> 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, para. 212(n)(ii).

<sup>36</sup> See e.g., 088951-TR-ET Part 1 RED2; 083249-TR-ET Part 1 RED2; 077803-TR-ET Part 1 RED; 082894-TR-ET Part 1 RED; 060664-TR-ET Part 1 RED; 066544-TR-ET Part 1 RED; 072736-TR-ET Part 1 RED; 074780-TR-ET Part 1 RED; 060650-TR-ET Part 1 RED.

shortly before testimony in which the risks of, no doubt unintentional, coaching would be at their highest.

22. Moreover, the Defence opposes paragraph 95 of the Draft Order on the Conduct of Proceedings which compels the calling party to disclose “any new information obtained from the witness”<sup>37</sup> during a preparation session only 24 hours before testimony. This practice is inconsistent with the opposing party’s right to a fair trial, including the right of Mr. Krasniqi to adequate time and facilities for the preparation of his defence. The SPO has had ample opportunity to interview witnesses multiple times, to address contradictions, clarify answers, or explore new lines of questioning as their investigations progressed, and in fact has done so consistently. Allowing the calling party to adduce new information only 24 hours before their in-court testimonies defeats the rationale of Rules 102(1)(b) and 104(5)(b), which set time-limits for the SPO and the Defence respectively to disclose previous witness statements, so as to ensure that the opposing party has adequate time to review and investigate witness’ evidence. Receiving new information only 24 hours before testimony<sup>38</sup> does not allow the Defence adequate time to prepare for the testimony and, wherever the new information is significant, is likely to necessitate applications for adjournments to investigate and prepare for the new information. Should the Trial Panel decide to allow witness preparation in this case, the Defence reserves the right to file any such application after the new information is received, so as to safeguard Mr. Krasniqi’s right to have adequate time to prepare his defence.

23. The Defence therefore requests the Trial Panel to reject witness preparation in the present case, and instead adopt a witness familiarisation protocol akin to the one adopted in the *Mustafa* case. In the alternative, if the Trial Panel adopts witness preparation, the Defence respectfully requests the Trial Panel to order that the witness

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<sup>37</sup> Draft Order on the Conduct of Proceedings, para. 95.

<sup>38</sup> *Ibid.*

preparation sessions be audio or video-recorded so that, if an allegation of coaching or improper conduct is advanced, the Trial Panel can order the disclosure of the recording upon a Party's request or *proprio motu*.

#### IV. CONCLUSION

24. The Defence submits these submissions pursuant to the Trial Panel's order, and respectfully requests that the Panel adopts its proposed modifications.

**Word count: 3155**



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