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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 Rexhep Selimi

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Selimi Defence Request for Safeguards in Relation to Preparation of Identification Witnesses

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I. INTRODUCTION

1. The Defence for Rexhep Selemi requests the Trial Panel to issue further safeguards concerning the use of photographs and videos that could pertain to identification issues during preparation sessions pursuant to Article 40 of the Law[1] and Rules 116 of the Rules.[2]

2. It is now well-recognised that witnesses who give evidence on identification issues are particularly vulnerable to influence.[3] Given the effluxion of time between the date of the events and the date of testimony in this case, the need for appropriate safeguards is of even greater importance.

3. The current Order on the Conduct of the Proceedings ("Order on Conduct") addresses the right of the Parties to conduct preparation sessions but not the critical question as to which documents or items can be used during these preparation sessions.[4] Although the Order on Conduct regulates intentional forms of influence (i.e. training or coaching) it does not address subliminal forms of suggestion or influence that can have the same or even greater impact on witness memory.

4. There is also a 'gap' in process. The Order on Conduct regulates what items can be used with witnesses during their in-court testimony and allows the opposing party to challenge the use of specific items.[5] There is, however, no oversight or ability to challenge the items that are shown to witnesses during

[1] 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.
[2] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[3] B. Cohen, 'Whose Line Is It Anyway?": Reducing Witness Coaching By Prosecutors', 18 N.Y.U. J. Legis. & Pub. Pol'y 985 at p. 997.
[4] KSC-BC-2020-06/F01226, Order on the Conduct of Proceedings, 25 January 2023, Annex 1, paras 85-99.
[5] Ibid, para. 76(11)(b).

the preparation session taking place in the days prior to their testimony. The parties are also not required to list these items in the preparation log or explain the manner in which such items were used (i.e. for videos, whether they were played with or without sound, or the order in which photographs were shown).

5. Given the close temporal proximity between witness preparation and in-court testimony, the ability to subsequently challenge the use of videos or photographs during in-court testimony will not cure any memory contamination caused by the use of such items during the preparation session.

6. In order to fill this gap, the Defence respectfully requests the Trial Panel to order the following "Requested Safeguards":

   a. The calling party to notify the opposing parties, no later than five days in advance of a scheduled witness preparation, as to whether they intend to use any items for identification purposes (including but not limited to identification of uniforms, faces, and voices);
   b. The opposing party to challenge the use of such items no later than three days in advance of a scheduled witness preparation;
   c. Where images are being shown for the first time to a witness for the purpose of ascertaining whether they can identify specific individuals, the calling party to video record and disclose this aspect of the preparation session;
   d. The calling party to log all items used during witness preparation sessions, noting the order in which they were used, whether photographs were shown sequentially or simultaneously, the specific time stamps for videos and whether they were played with or without sound;
   e. That any form of witness preparation is postponed until the Panel issues its decision on this request.

7. Without such Requested Safeguards being issued, the Trial Panel risks allowing crucial identification evidence to be heard in court, which has been inadvertently contaminated by the SPO.

II. SUBMISSIONS

A. The issuance of further directions on the conduct of the proceedings does not constitute reconsideration of the Order on Conduct of Proceedings

8. It is standard practice at international courts and tribunals to issue additional directions on the conduct of the proceedings throughout the trial process to regulate issues that were not addressed in the initial order.[6] This includes additional decisions clarifying or addressing issues arising from the conduct of witness preparation.[7]

9. Through this request, the Defence does not contest the practice of witness preparation or the existing instructions concerning the modalities of witness preparation, both of which were regulated, in general terms by the Order on Conduct.

10. However, neither the issue of identification evidence nor the question as to whether it might be appropriate to regulate the items used during witness preparation were addressed in the submissions leading up to the Order on Conduct. It is therefore not necessary for the request to satisfy the threshold of reconsideration.

[6] ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman,* Second Directions on the Conduct of Proceedings, ICC-02/05-01/20-836, 15 December 2022; ICC, *Prosecutor v. Ruto & Sang,* Decision No. 2 on the Conduct of Trial Proceedings (General Directions), ICC-01/09-01/11-900, 3 September 2013.
[7] ICC, *Prosecutor v. Ruto & Sang,* 'Decision on the Defence application concerning Professional Ethics Applicable to Prosecution Lawyers', ICC-01/09-02/11-747, 31 May 2013; ICTY, *Prosecutor v. Haradinaj,* Decision on Defence Request for an Audio-Recording of Witness Proofing Sessions, 23 May 2007.

B. Identification evidence is a special category of evidence that requires additional safeguards

11. Article 6 of the European Convention on Human Rights (ECHR) enshrines a right to effectively challenge any processes that are likely to affect the reliability of evidence adduced at trial to convict the defendant. In the context of identification evidence, this encompasses the right to contest irregularities as concerns the manner used to elicit identification evidence, and to obtain the disclosure of evidence that would be relevant to a challenge to the fairness and regularity of the identification process.[8]

12. However, since there are no European countries that practice 'witness preparation' of the type used in Northern American jurisdictions,[9] there is no detailed ECHR case law concerning the specific safeguards required to protect the integrity and fairness of the proceedings in relation to the way identification evidence is handled during preparation sessions.

13. There is, however, an increasing body of jurisprudence in the United States on this subject, following significant developments concerning the science of memory and the extent to which forms of questioning and exposure to images impact on memory formation and retention. Indeed, the *ad hoc* Tribunals justified the use of witness preparation (or proofing) by reference to its use in adversarial jurisdictions, such as the United States.[10] The development of further safeguards within such adversarial jurisdictions should therefore directly inform this

[8] ECtHR, *Laska and Lika v. Albania*, Apps no. *12315/04 and 17605/04*, paras. 68-72.
[9] While the Bar of England and Wales follows an adversarial system, it does not allow witness proofing to the extent practiced in various criminal jurisdictions in the USA. As such, the jurisprudence of the ECHR in relation to such preparation is of limited assistance.
[10] ICTY, *Prosecutor v. Limaj*, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses, 10 December 2004, p. 2.

Panel's assessment as concerns whether additional safeguards are required to ensure the overarching fairness and integrity of the proceedings.

14. In this regard, the rejection by the *ad hoc* Tribunals of certain requests to implement such safeguards is not determinative of this Request. Over fifteen years have elapsed since the procedure of witness proofing was litigated at the ICTY. The assertion by the Prosecution of the ICTY that domestic jurisdictions do not require preparation sessions to be recorded[11] is therefore no longer valid, if indeed it even was at the time it was submitted. The ICTY/ICTR litigation pre-dated the scientific and jurisprudential developments which form the basis of the current request. It is further recalled that during litigation before the relevant Chambers of the ICTY, the parties never raised challenges concerning the specific category of identification evidence in a manner apposite to the present submissions.

15. The United States case of *Oregon v Lawson,* issued by the Supreme Court of Oregon in 2012, sets out a comprehensive explanation of the relevance of scientific developments to the reliability of identification evidence, noting that:[12]

> The current scientific research emphasizes how difficult it is for either the court or the witness to analytically separate the witness's original memory of the incident from later recollections tainted by suggestiveness. See, e.g., Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum Behav 1, 14-15 (2008) (noting that eyewitness experts "do not generally accept the idea that a mistaken identification, whether it arises from a suggestive procedure or not, can somehow be 'erased' or corrected by a subsequent identification test, no matter how 'fair' that subsequent test might be").Rather, eyewitness researchers

[11] ICTY, *Prosecutor v. Haradinaj,* 'Decision on Defence Request for an Audio-Recording of Prosecution Witness Proofing Sessions', 23 May 2007, p.7. In any case, the Chamber found that there was no general rule in domestic practice prohibiting the recording of preparation sessions.
[12] Supreme Court of Oregon, *State v. Lawson*, 352 Or. 724, 291 P.3d 673, 29 November 2012, p. 28.

> generally believe that, "once an eyewitness has mistakenly identified someone, that person 'becomes' the witness' memory and the error will simply repeat itself (..)

16. The led the Court to conclude that: [13]

> Because of the alterations to memory that suggestiveness can cause, it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination. Like those forms of evidence, once contaminated, a witness's original memory is very difficult to retrieve.

17. This contamination could be "led or prompted by suggestive identification procedures, suggestive questioning, and/or memory contamination from other sources."[14] Importantly, source confusion can occur in circumstances where a witness is shown the photograph of suspects on multiple occasions such that the witness can no longer recall if the visage is familiar because it was seen at the time of the events, or because it has been shown during the course of interviews.[15]

18. The Court further found that due to the inherent susceptibility of identification evidence to influence, "trial courts have a heightened role as an evidentiary gatekeeper because "traditional" methods of testing reliability --like cross-

[13] Ibid., p.27.
[14] Id., p.33.
[15] Id., p.21. "A similar problem occurs when the police ask a witness to participate in multiple identification procedures. Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness's familiarity with the suspect's face. If the police later present the witness with another lineup in which the same suspect appears, the suspect may tend to stand out or appear familiar to the witness as a result of the prior lineup, especially when the suspect is the only person who appeared in both lineups."

examination --can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence".[16]

19. The Court also underscored that the burden fell on the Prosecution to demonstrate that appropriate safeguards and procedures were utilised and to disclose any information that would allow the defence to demonstrate the contrary.[17] In terms of the type of evidence that would trigger the Prosecutor's disclosure obligations, the Court observed that:[18]

> The record clearly shows that the state failed to disclose to defense counsel that Mrs. Hilde was shown a second (or third) photographic lineup, that a detective took Mrs. Hilde to court to view defendant in person prior to trial, and that Mrs. Hilde was given a single photograph of defendant in the same clothes he wore the morning of the shooting. That kind of information is essential to an accurate determination of the reliability of an eyewitness's identification and is the kind of potentially exculpatory evidence that the state is constitutionally required to disclose to a defendant.

20. In the subsequent 2015 case of *People v Marshall,* the New York Court of Appeal addressed similar issues in the specific context of witness preparation.[19] The Court first referenced the inherent vagaries of eye-witness identification and the susceptibility of this type of evidence to lead to miscarriages of justice.[20] The

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[16] Id., p.40.
[17] Ibid., pp. 35, 36-37.
[18] Ibid., p. 5.
[19] New York Court of Appeal, *People v. Marshall*, 26 N.Y.3d 495, 17 December 2015 ("People v. Marshall").
[20] Id., "Wrongful convictions based on mistaken eyewitness identifications pose a serious danger to defendants and the integrity of our justice system (United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 [1967] ["The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"]; People v. Santiago, 17 N.Y.3d 661, 669, 934 N.Y.S.2d 746, 958 N.E.2d 874 [2011] ["mistaken eyewitness identifications play a significant role in many wrongful convictions"]; People v. Riley, 70 N.Y.2d 523, 531, 522 N.Y.S.2d 842, 517 N.E.2d 520 [1987] ["The complex psychological interplay and dependency of erroneously induced identification ... must be vigilantly guarded against because (it) drives right into the heart of the adjudicative guilt or innocence process affecting the person accused and identified"]; People v. Caserta, 19 N.Y.2d 18, 21, 277 N.Y.S.2d 647, 224 N.E.2d 82 [1966] ["One of the most stubborn problems

risks associated with this field of evidence are heightened further when any type of suggestive procedures are employed.[21] Even if the police or prosecutors employ correct procedures, there is still a risk that the mere fact of showing such images could trigger false memories.[22] The defendant in that case had the right to challenge whether there were procedural irregularities in such pre-trial processes and to request the suppression of in-court identification processes that might be tainted by such pre-trial processes (through a procedure known as a 'Wade' hearing- where the burden falls on the Prosecution to demonstrate that there were no irregularities capable of influencing the identification process). In a prior decision (*Herner),* it had been found that these procedures were not applicable to photographs shown as part of trial preparation procedures. The Court in *Herner* nonetheless urged Prosecutors:[23]

> not to use photographs of a defendant to refresh the recollections of witnesses prior to their trial testimony. Furthermore, prosecutors should inform the trial court immediately if such a procedure has been used so that the court may, if it deems it

in the administration of the criminal law is to establish identity by the testimony of witnesses to whom an accused was previously unknown, from quick observation under stress or when ... there was no particular reason to note the person's identity"])."

[21] Ibid., "Apart from the uncertainty of human memory, suggestive identification procedures "increase the dangers inhering in eyewitness identification" (Wade, 388 U.S. at 229, 87 S.Ct. 1926). A pretrial identification procedure that unduly suggests a defendant's guilt of the charged offense increases the risk of misidentification by improperly influencing the witness. As the Supreme Court has recognized, "[p]ersons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification. The witness then will be predisposed to adhere to this identification in subsequent testimony at trial" (Moore v. Illinois, 434 U.S. 220, 224–225, 98 S.Ct. 458, 54 L.Ed.2d 424 [1977])."

[22] Ibid., "Furthermore, even employing "the most correct photographic identification procedures," displays conducted by the police contain "some danger that the witness may make an incorrect identification" (*Simmons v. United States*, 390 U.S. 377, 383, 88 S.Ct. 967, 19 L.Ed.2d 1247 [1968]). "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in ... memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification" (id. at 383–384, 88 S.Ct. 967). It is inescapable that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification" (Wade, 388 U.S. at 228, 87 S.Ct. 1926).

[23] New York Court of Appeal, *People v. Herner*, 201 A.D.2d 954, 4 February 1994.

> necessary, hold a hearing to determine whether the viewing was suggestive and may taint the witness' in-court identification of defendant

21. The Court of Appeal, in *Marshall*, rejected this distinction between pre-trial investigations and trial preparation procedures. The Court found that there was no forensic basis "to maintain a distinction between viewings of a defendant's image in preparation for trial and any other out-of-court identifications. Both expose a witness to defendant's likeness, with the potential risk for undue suggestiveness."[24] The purpose of the procedure was irrelevant to the Court's assessment as to the effects of the procedure:

> Whether the procedure is intended to refresh or anchor the identification of defendant in the witness's memory before trial, or intended to assist the ADA in preparing the case, the relevant inquiry remains the same: was the observation of defendant unduly suggestive, rendering the subsequent identification unreliable.[25]

22. The Court therefore found that the safeguards governing pre-trial identification procedures should also apply to witness preparation sessions in which witnesses were shown materials capable of influencing the ability of a witness to identify the defendant.[26]

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[24] *People v. Marshall*, 495, "Indeed, this Court has previously recognized that showing one photograph of a defendant—the procedure at issue in defendant's case—carries the risk of undue suggestiveness and entitles defendant to a Wade hearing (Rodriguez, 79 N.Y.2d at 453, 583 N.Y.S.2d 814, 593 N.E.2d 268 ["Defendant was presumptively entitled to the Wade hearing on alleging that the police display of a single photo to (the identifying witness) was suggestive"]; Matter of James H., 34 N.Y.2d 814, 816, 359 N.Y.S.2d 48, 316 N.E.2d 334 [1974] ["The danger is increased when a single photograph is exhibited which tends to emphasize the person portrayed as the person sought"]). We can find no basis to maintain a distinction between viewings of a defendant's image in preparation for trial and any other out-of-court identifications. Both expose a witness to defendant's likeness, with the potential risk for undue suggestiveness."

[25] Ibid.

[26] Ibid.

23. In different US and Australian jurisdictions, these safeguards include an obligation to record the identification procedure (preferably by video).[27] This is because:

[27] Supreme Court of New Jersey, *State v. Anthony*, 237 N.J. 213, 230-32, 13 March2019 ("State v. Anthony", "With the proliferation of recording devices in recent years, the Rule's aim is easier to achieve today than in the past. Police departments of all sizes now have access to devices that can electronically record and preserve identification procedures. And departments already use recording equipment to investigate crimes. For more than a decade, law enforcement has been required to record electronically all custodial interrogations at a police station when the person being questioned is charged with murder, kidnapping, aggravated manslaughter, robbery, aggravated sexual assault, burglary, aggravated arson, crimes involving the possession or use of a firearm, and other offenses. See R. 3:17(a); see also State v. Hubbard, 222 N.J. 249, 263, 118 A.3d 314 (2015). In such cases, a recording must be made unless it is not feasible to do so or another exception applies. R. 3:17(b). Electronic recordings are preferable for identification procedures as well. Audio captures not only the words spoken between an administrator and an eyewitness but also tone, and video preserves expressions or gestures as well. (In this opinion, the term "video" refers to audio-visual recordings.) That type of information can help the trial judge and the jury accurately assess witness confidence, any feedback, and the overall reliability of an identification -- and thus help guard against mistaken identifications. To more clearly state the order of preference for preserving an identification procedure, Rule 3:11(b) should be revised along the following lines: Officers are to record all identification procedures electronically in video or audio format. Preferably, an audio-visual record should be created. If it is not feasible to make an electronic recording, officers are to contemporaneously record the identification procedure in writing and include a verbatim account of all exchanges between an officer and a witness. If a contemporaneous, verbatim written account cannot be made, officers are to prepare a detailed summary of the identification as soon as practicable. In stating a preference for video over audio recordings, we note that various organizations and entities have recommended that approach. See Nat'l Acad. of Scis., Identifying the Culprit: Assessing Eyewitness Identification 108-09 (2014) ("[V]ideotaping ... is necessary to obtain and preserve a permanent record of the conditions associated with the initial identification."); Int'l Ass'n of Chiefs of Police, Model Policy: Eyewitness Identification 2 (2010); Office of the Att'y Gen., Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification 14 (2010); Am. Bar Ass'n, Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures 3 (2004); see also Office of the Attorney General, Photo Array Eyewitness Identification Procedure Worksheet 1 (Oct. 1, 2012) (Photo Array Worksheet) (noting that video recordings can be "used to record/document the ID procedure"), https://www.state.nj.us/lps/dcj/agguide/Eye-ID-Photoarray.pdf. North Carolina and Illinois already require law enforcement officers to make an electronic recording of identification procedures, if practical. See N.C. Gen. Stat. 15A-284.52(b)(14) (requiring a video record or, if not practical, an audio record of live identification procedures); 725 Ill. Comp. Stat. Ann. 5/107A-2(f)(10) (requiring an audio or video recording of all lineup procedures when practicable). When no electronic recording is made, both states also require officers to document the reasons why. See N.C. Gen. Stat. 15A-284.52(b)(14) ("If neither a video nor audio record are practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup."); 725 Ill. Comp. Stat. Ann. 5/107A-2(h) ("If a video record is not practical or the eyewitness refuses to allow a video record to be made ... the reasons or the refusal shall be documented .... If an audio record is not practical, the reasons shall be documented ...."). That sensible approach informs courts and defendants about a key part of the eyewitness identification process and provides important context to evaluate what occurred. Perhaps investigators accommodated a fearful witness who would not speak if recorded electronically; maybe

> The use of closed and leading questions, the provision of information about the suspect, the details of accounts provided by other witnesses and the existence of other forms of incriminating evidence, might comprise the witness's memory for events. Such influence might be subtle and inadvertent, and from the witness's perspective, its effects on the way that events are recollected might be imperceptible. In the absence of a recording of the interview, it might not be possible to establish whether anything occurred during the interview that might have undermined the integrity of memories for the events recorded in the witness statement. [28]

24. In terms of the practice in New Jersey, in case a recording does not exist, the defendant will have an automatic right to convene a pre-trial hearing to challenge the admissibility of identification evidence, even if no evidence of impropriety is shown.[29]

25. As a general rule of thumb, Prosecutors can be requested to disclose whether they have used photographs or visual images during witness preparation.[30] This

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a recording device malfunctioned; or, maybe an officer failed to follow mandatory procedures without a sound reason. We rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution to require a similar practice. See Henderson, 208 N.J. at 254, 27 A.3d 872 ; Delgado, 188 N.J. at 63, 902 A.2d 888. When it is not feasible to make an electronic recording of an identification procedure, law enforcement officers must document the reasons for not having done so. The same requirement applies when officers cannot prepare a contemporaneous, verbatim written account. We ask the Criminal Practice Committee to revise Rule 3:11 consistent with the above principles."

[28] A Roberts, The Frailties of Human Memory the Accused's Right to Accurate Procedures, 24 February 2019, p. 14.

[29] *State v. Anthony*, 213, 233-34, "To address that situation, we modify the Henderson framework in this way: a defendant will be entitled to a pretrial hearing on the admissibility of identification evidence if Delgado and Rule 3:11 are not followed and no electronic or contemporaneous, verbatim written recording of the identification procedure is prepared. In such cases, defendants will not need to offer proof of suggestive behavior tied to a system variable to get a pretrial hearing. This approach supplements the other remedies listed in Rule 3:11(d)."

[30] Supreme Court of New Jersey, Appellate Division , *State v. Washington*, , 4 August 2022 ("State v. Washington"), "Prior to cross-examination, defense counsel requested a hearing, noting Matthews' prior statement to police indicated the assailant wore a "blue, white and red sweatshirt hoodie type." Counsel demanded the prosecutor disclose whether Matthews was shown any photographs of defendant during pretrial preparation. At side bar, the prosecutor stipulated that he showed Matthews during pretrial preparation the Facebook photo of defendant wearing a red- white-and-blue jacket, D-11, but he did not ask Matthews to identify defendant because Matthews could not "identify the person who shot him." The judge denied defendant's request for a hearing but directed the prosecutor to identify the photographs used during Matthews' trial preparation, which he did".

is because the mere fact of showing photographs on multiple occasions can negatively impact the reliability of true memory recall as concerns identification.[31]

26. From the above case law, the following principles can be extrapolated:

a. Eyewitness identification evidence is a special category of evidence that attracts heightened procedural safeguards;
b. The burden falls on the Prosecution to demonstrate that the reliability of in-court identifications is not tainted through procedures that were employed during pre-trial interviews and trial preparation sessions;
c. In order to facilitate the right of the Defence to challenge such procedures, the Prosecution must disclose all information in its possession concerning the reliability of the process. This includes disclosing to the Parties and the Panel specificities as to which items were shown, how they were shown, and the witness's specific reactions to being shown such items; and,
d. A video-recording is the best and most reliable mechanism for capturing this information. In case a video-recording does not exist, it may be necessary to convene a hearing to determine whether to suppress the identification evidence in question.

C. The requested safeguards are necessary, reasonable and proportionate measures, and will not occasion undue prejudice to the calling party

27. The Requested Safeguards fall squarely within the ambit of the above jurisprudential developments and constitute the minimum means to secure the

[31] *State v Washington*, "It is axiomatic that "viewing a suspect more than once during an investigation can affect the reliability of the later identification." Guerino, 464 N.J. Super. at 613 (citing Henderson, 208 N.J. at 255). "Successive views . . . can make it difficult to know whether the later identification stems from a memory of the original event or a memory of an earlier identification procedure".

integrity of the proceedings. Given the lasting and irreversible consequences that image exposure and question patterns can generate for a witness's memory, and the entailing prejudice to the Accused stemming from such contamination, this is not a matter that can, or should, be regulated by professional ethics or the discretion of the Counsel conducting the preparation session.

28. Rule 103 of the Rules of Procedure and Evidence requires the Prosecution to disclose any information in its possession that is likely to affect the reliability of Prosecution evidence. This duty continues throughout, and indeed long after the conclusion of, trial proceedings.[32] In the specific context of identification evidence, the witness's facial reactions and vocal tone constitute a core aspect of their response to being shown images. The particular manner in which images are shown and any accompanying commentary can also have a significant impact on the witness's reaction.

29. In fact, given the substantial effects such processes can have on witness evidence as outlined above, these preparation sessions may be the very progenitor of that exculpatory evidence. Due to its participation in these preparation sessions, the SPO would plainly be in 'possession' of such information. Prosecution attorneys will hear and see these reactions and commentary in the absence of both the Parties and the Panel. As they cannot be independent and impartial witnesses in their own case, a video recording is the most reliable mechanism for ensuring that the SPO is in a position to fulfil its duty to disclose all relevant information concerning the reliability of identification processes employed during preparation session.

[32] ICTY, *Prosecutor v. Milosevic*, Decision on Motion Seeking Disclosure of Rule 68 Material, 7 September 2012, para. 10. Similarly, see ICTR, *Niyitegeka v. Prosecutor*, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121, 28 September 2005 at p. 8.

30. Similarly, there may be situations concerning particularly vulnerable or sensitive witnesses where the use of any form of identification process at this advanced stage carries a risk of irreversibly contaminating that witness's memory. As explained above, due to the manner in which memory works, once a false memory has been created, it is not possible to address or cure the taint through cross-examination because the witness does not know that their memory is false.

31. Even if the Defence is successful in contesting the use of photos or videos in the trial hearing itself, the damage will already have been done. For example, even if the SPO does not show videos or photographs at trial, the use of images during the preparation session could impact on the witness's memory of the events, including key details such as descriptions of uniforms, locations, or whether the defendant was armed when the witness saw him. The only effective remedy in such circumstances would be prevention rather than cure: that is, to allow the Defence to challenge the use of such items in advance of the preparation session. This in turn requires the SPO to disclose the list of materials that it intends to use with witnesses, sufficiently in advance of the commencement of the preparation session.

32. The absence of established preparation safeguards is likely to generate additional litigation, including requests to exclude evidence since cross-examination cannot cure the taint to memory caused by improper identification techniques or exposure to images. The resulting litigation from each time the issue arises is likely to severely retard the proceedings. The Defence will also lack the ability to raise such issues in a timely manner if it does not receive a detailed log as concerns the items that were used with witnesses during preparation and the manner in which they were used.

33. The SPO has no legal basis for contesting the propriety and utility of the requested measures. In the Mustafa case, the SPO jointly proposed that the

Chamber adopt the preparation protocol adopted in the ICC *Ntaganda* and *Al Hassan* case.[33] This protocol requires the parties to video record all preparation sessions,[34] and provide a log of all items used during the preparation session.[35] These requirements have been routinely applied in ICC cases where witness preparation is allowed.[36]

34. The Requested Safeguards constitute a narrower application of the ICC approach in that the Defence is limiting the application of these procedures to a distinct class of evidence/category of procedures, rather than the entirety of the preparation session for each and every witness.

35. Finally, in order to ensure that the above request is not rendered moot, the Defence requests the Panel to order the SPO to either immediately introduce these measures as an interim measure, or, to suspend witness preparation for any witness whose evidence potentially falls under this Request, until it is resolved.

III. CONCLUSION & RELIEF SOUGHT

36. The issue of identification by SPO Witnesses of the accused or alleged JCE Members and Tools will be crucial to many of the allegations set out in the unredacted Indictment. This applies not only to allegations of physical participation in criminal activity by the accused, but also the exercise of non-

[33] KSC-BC-2020-05/F00143/A01, Annex 1 to Joint Prosecution and Defence Proposal for the adoption of a Witness Protocol with public Annex, 30 June 2021, fn. 1 ("Annex 1 to Joint Proposal for a Witness Protocol"), "This proposed Witness Preparation Protocol is based on the Witness preparation protocol (ICC-01/04- 02/06-652-AnxA), annexed to Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-652, Decision on witness preparation, 16 June 2015, as amended by Prosecutor v. AL Hassan AG Abdoul Aziz AG Mohamed Ag Mahmoud, ICC-01/12-01/18-666, Decision on witness preparation and familiarisation, 17 March 2020, with Annex: Witness preparation protocol, ICC-01/12-01/18-666-Anx".
[34] Annex 1 to Joint Proposal for a Witness Protocol, para. 9.
[35] Annex 1 to Joint Proposal for a Witness Protocol, para. 17.
[36] For the most recent protocol, issued in the Said case, see ICC, *Prosecutor v. Mahamat Said Abdel Kani, Annex A to the Directions on the Conduct of Proceedings*, ICC-02/05-01/20-478-AnxA, 9 March 2022.

criminal activity as a purported contribution to the JCE or the exercise of effective control over subordinates who are alleged to have committed crimes by both the accused and other JCE Members.

37. The Trial Panel must proactively take the necessary steps to ensure that the presentation of this special category of evidence is protected from unintended and inadvertent contamination by the SPO during the witness preparation process.

38. For these reasons, the Defence requests the Trial Panel to:

    a. Order the specific measures set out in paragraph 6 of this Motion in relation to the preparation of any SPO witness whose evidence purports to identify either the accused, or other JCE Members and Tools falling under paragraph 35 of the Indictment, either individually or by their group; and,

    b. Prohibit preparation of witnesses who evidence relates to this issue until this Request is resolved.

Word count: 5,664

Respectfully submitted on 9 March 2023,

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