



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 14 April 2023

Language: English

Classification: Public

**Decision on Selimi Request for Safeguards in Relation to Preparation of
Identification Witnesses**

Acting Specialist Prosecutor
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Counsel for Rexhep Selimi
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TRIAL PANEL II (“Panel”), pursuant to Article 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 79 and 116 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 16 December 2022, the Panel informed the Parties and participants that a draft order on the conduct of proceedings (“Draft Order”) would be circulated for them to make submissions, if they so wished, by 13 January 2023.¹
2. On 22 December 2022, the Panel circulated the Draft Order to the Parties and participants.²
3. On 13 January 2023, the Panel received submissions from Counsel for Victims, the Specialist Prosecutor’s Office (“SPO”), joint written observations from the Defence teams, and further submissions from the Defence for Mr Krasniqi.³
4. On 18 January 2023, the Panel held the Trial Preparation Conference, during which the Defence for Mr Thaçi and Counsel for Victims made further oral submissions on the Draft Order.⁴
5. On 25 January 2023, the Panel issued its order on the conduct of proceedings (“Order”).⁵

¹ Transcript of Hearing, 16 December 2022, pp. 1772-1773.

² F01178, Panel, *Order for Submissions on the Draft Order on the Conduct of Proceedings*, 22 December 2022, with Annex 1.

³ F01202, Counsel for Victims, *Victim’s Counsel’s Submissions on the Draft Order on the Conduct of Proceedings*, 13 January 2023; F01203, Specialist Counsel, *Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01)* (“Joint Defence Observations on the Draft Order”), 13 January 2023; F01205, Specialist Prosecutor, *Prosecution Submissions on the Conduct of Proceedings*, 13 January 2023; F01207, Specialist Counsel, *Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings*, 13 January 2023.

⁴ Transcript of Hearing, 18 January 2023, pp. 1893-1895, 1897-1901.

⁵ F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023.

6. On 9 March 2023, the Defence for Rexhep Selimi (“Selimi Defence”) filed a request for safeguards in relation to preparation of identification witnesses (“Request”).⁶
7. On 22 March 2023, the SPO responded to the Request (“Response”).⁷
8. The Selimi Defence did not reply.

II. SUBMISSIONS

9. The Selimi Defence requests the Panel to issue further safeguards concerning the use of photographs and videos that could pertain to identification issues during preparation session.⁸ It submits that such safeguards are needed as: (i) witnesses who give evidence on identification issues are particularly vulnerable to influence;⁹ and (ii) identification evidence is a special category of evidence.¹⁰ The Selimi Defence avers that there is a gap in the Order, insofar as the Order does not address the question as to which items can be used with witnesses during the preparation sessions prior to their testimonies.¹¹ To fill this gap and to protect the presentation of identification evidence from inadvertent contamination by the SPO, the Selimi Defence requests the Panel to order the following safeguards:¹²

- (i) 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

⁶ F01360, Specialist Counsel, *Selimi Defence Request for Safeguards in Relation to Preparation of Identification Witnesses*, 9 March 2023.

⁷ F01390, Specialist Counsel, *Prosecution Response to Selimi Request for Safeguards in Relation to Preparation of Identification Witnesses*, 22 March 2023.

⁸ Request, para. 1.

⁹ Request, para. 2.

¹⁰ Request, paras 11-34.

¹¹ Request, paras 3-4 referring to F01226/A01, Panel, *Annex 1 - Order on the Conduct of Proceedings*, 25 January 2023, paras 85-99.

¹² Request, para. 7.

- to use any items for identification purposes (including but not limited to identification of uniforms, faces, and voices);
- (ii) the opposing party to challenge the use of such items no later than three days in advance of a scheduled witness preparation;
 - (iii) 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;
 - (iv) 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; and
 - (v) any form of witness preparation is postponed until the Panel's decision on the Request (collectively, "Requested Safeguards").¹³

10. The Selimi Defence submits that the issuance of further directions does not constitute reconsideration of the Order.¹⁴ Lastly, the Selimi Defence requests the Panel to order the SPO: (i) to immediately introduce the Requested Safeguards in relation to the preparation of any SPO witness whose evidence purports to identify either the Accused, or other joint criminal enterprise members and tools falling under paragraph 35 of the Indictment ("Identification Witnesses"), either individually or by their group; or (ii) to suspend the preparation of any potential Identification Witnesses until resolution of this Request.¹⁵

¹³ Request, paras 6, 37-38.

¹⁴ Request, paras 8-10.

¹⁵ Request, para. 35.

11. The SPO submits that the Request should be rejected.¹⁶ It argues that the Request is out of time, insofar as the Selimi Defence neither made submissions advanced in the Request on the draft Order, nor sought to appeal the Order.¹⁷ It avers that the Request seeks reconsideration of the Order, but fails to meet the reconsideration standard under Rule 79.¹⁸ It contends that all the authorities cited by the Selimi Defence addressed specific issues that arose during the trial, contrary to the Request which seeks to revisit the Order weeks after its issuance.¹⁹ The SPO further submits that the Request is unsubstantiated.²⁰ It also argues that the Order includes sufficient safeguards against the concerns raised in the Request.²¹ Lastly, the SPO contends that the Requested Safeguards are inappropriate.²²

III. DISCUSSION

12. The Panel considers that the Selimi Defence had ample opportunities, before the Panel issued the Order, to raise the concerns contained in the Request. The Selimi Defence could have raised the content of the present Request by 13 January 2023, whether as part of the joint written observations filed by the Defence,²³ or as part of individual submissions.²⁴ The Selimi Defence could also have made oral submissions during the course of the Trial Preparation Conference. In addition, the Selimi Defence could have sought leave to appeal the Order after its issuance by the Panel insofar as it considered the Order

¹⁶ Response, para. 24.

¹⁷ Response, paras 1, 3-5

¹⁸ Response, paras 1, 6-9.

¹⁹ Response, para. 9.

²⁰ Response, paras 10-16.

²¹ Response, paras 2, 17-21.

²² Response, paras 22-23.

²³ See Joint Defence Observations on the Draft Order.

²⁴ See e.g. F01207, Specialist Counsel, *Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings*, 13 January 2023.

inadequate.²⁵ The Selimi Defence has failed to provide reasons for its failure to raise any concern it had in relation to the process of identification at any of these relevant junctures. Insofar as it seeks to revisit the Order, the Selimi Defence has failed to establish that the requirements for reconsideration under Rule 79 are met.

13. While not a determinative factor for present purposes, the Panel recalls that the SPO asserts that the Selimi Defence has not yet sought to discuss with the SPO *inter partes* the concerns it raised in the Request.²⁶ The Panel recalls that Parties and participants are generally expected to conduct *inter partes* discussions with a view to finding agreeable solutions and, only if this cannot happen, to seize the Panel.²⁷

14. Further, the Panel observes that the Request is based on the arguments that: (i) identification witnesses are highly vulnerable; and (ii) without the Requested Safeguards, these witnesses may inadvertently be contaminated during the SPO's preparation sessions.²⁸ The Panel notes that the Selimi Defence does not identify in the Request any specific witness or witnesses where identification issues during witness preparation sessions is likely to become a concern that would require the intervention of the Panel at this stage. The application is therefore hypothetical and, at best, premature. If any of the concerns underpinning the Request were to materialize in relation to specific witnesses, the Selimi Defence – or any other Party with similar concerns in the future – can raise the issue with the SPO, and, if they fail to find an agreeable solution, seek appropriate relief from the Panel.²⁹

²⁵ See e.g. F01246, Specialist Counsel, *Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings"*, 1 February 2023.

²⁶ Response, para. 23.

²⁷ Order, para. 7.

²⁸ Request, paras 5, 7, 37.

²⁹ See similarly F01300, Panel, *Decision on Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings"*, 16 February 2023, para. 23.

IV. DISPOSITION

15. In light of the above, the Panel **DENIES** the Request.

A handwritten signature in black ink that reads "Charles L. Smith III". The signature is written in a cursive style with a horizontal line underneath the name.

Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 14 April 2023
At The Hague, the Netherlands.