

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 Guénaél 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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**Public Redacted Version of Joint Defence Submissions on Trial Publicity,
With Confidential Annexes 1-4**

Specialist Prosecutor's Office

Alex Whiting

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. Pursuant to the Trial Panel's Oral Order of 17 May 2023;¹ Articles 21(2) and 40(4) of the Law;² and Rules 80, 81 and 120(1) of the Rules,³ the Defence for Messrs Thaçi, Veseli, Selimi and Krasniqi hereby submit their proposals on achieving greater trial publicity.
2. Since the opening of trial on 3 April 2023, the vast majority of the evidence has been heard in private session. At the time of writing, seven trial transcripts are available to the public, from which virtually all testimonial content has been removed.⁴
3. Consequently, the Trial Panel invited the Parties and Participants to engage in *inter partes* discussions to identify solutions for the current lack of transparency from which these proceedings suffer. Having done so without reaching an agreement, the Defence identifies a number of steps that could be taken by the Parties, Participants and other actors within the Specialist Chambers, which it believes would allow for a greater portion of this trial to take place in public.
4. The Defence looks forward to the adoption of robust action by the Trial Panel to safeguard the Rights of the Accused to a fair and public hearing guaranteed by Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") and Article 21(2) of the Law.

¹ Transcript, 17 May 2023, pp. 4207-4209.

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 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 See, Transcripts of 11, 12, 13, 17, 18, 19 and 20 April 2023. With the exception of a handful of pages of evidence from 17 April 2023, all these transcripts are currently devoid of witness testimony.

II. PROCEDURAL BACKGROUND

5. From 3 to 5 April 2023, opening statements were heard in this case. Evidence commenced on 11 April 2023.
6. Since 11 April 2023, the Trial Panel has heard the testimony of seven prosecution witnesses, all of whom were granted protective measures despite objections from the Defence.⁵ Consequently, the vast majority of their evidence was heard in private session.
7. On 17 May 2023, by oral order, the Trial Panel: (a) recalled the right of each Accused to a fair and public hearing subject to protective measures, and the public interest in these proceedings taking place in a public fashion, to the extent possible; (b) expressed its concern that almost all evidence up to then had been heard in private session; (c) informed the Parties that it may consider “ordering the parties to propose public redacted versions of the transcripts of private or closed session testimonies so that the public can understand what is happening in this trial;” and (d) ordered the Parties to submit in writing to the Panel, by 31 May 2023, possible solutions to ensuring greater trial publicity, inviting them to first engage in *inter partes* discussions on the matter.⁶
8. On 19 May 2023, the SPO submitted its proposals to the Defence and Victims, indicating their support for the ongoing use of a code system where appropriate; the SPO further suggested that witnesses benefiting from in-court protective measures (use of pseudonym and voice/face distortion) be examined *entirely* in private session, and that the Parties thereafter propose de-redactions to their

⁵ Transcript, 17 April 2023, p. 2908, lines 11 – p. 2909, line 13.

⁶ Transcript, 17 May 2023, pp. 4208-09.

evidence to be approved by the Trial Panel, so that lesser redacted trial records be made available to the public after the fact.⁷

9. On 23 May 2023, the Defence indicated that they would discuss the matter internally and revert to the SPO on 25 May 2023.⁸
10. On 24 May 2023, Victims' Counsel additionally proposed the use of neutral summaries *in lieu* of testimony to be made available to the public.⁹
11. On 25 May 2023, the Defence responded to the SPO's proposal in which it, *inter alia*, expressed its support for the continued use of codes, suggested a further delay to the public broadcast, recommended that the SPO pursue variation of protective measures where appropriate, and rejected the SPO's proposal to hear protected witnesses *entirely* in private session on the basis that it was inconsistent with the rights of the Accused.¹⁰

III. APPLICABLE LAW

12. Article 21(2) of the Law provides that "[i]n the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 23 of this Law and any measures ordered by the Specialist Chambers for the protection of victims and witnesses."

⁷ Annex 1, Email entitled 'SPO proposal pursuant to the Trial Panel's 17 May 2023 oral order,' sent by the SPO at 16:14 on 19 May 2023. For the purpose of these submissions, the email contained in Annex 1 is the most relevant given that it sets out the SPO's position regarding the publicity of the proceedings. The emails contained in Annexes 2-4, as indicated in footnotes 8-10 below, are included for the sole purpose of providing context to the *inter partes* discussions which occurred.

⁸ Annex 2, Email entitled, 'RE: SPO proposal pursuant to the Trial Panel's 17 May 2023 oral order,' sent by Defence Co-Counsel at 16:29 on 23 May 2023.

⁹ Annex 3, Email entitled, 'RE: SPO Proposal Pursuant to the Trial Panel's 17 May 2023 Oral Order,' sent by Victims' Counsel at 15:18 on 24 May 2023.

¹⁰ Annex 4, Email entitled, 'RE: SPO proposal pursuant to the Trial Panel's 17 May 2023 oral order,' sent by Defence Co-Counsel at 16:36 on 25 May 2023.

13. Article 40(4) of the Law reflects the presumption that hearings before the Kosovo Specialist Chambers **shall** take place in public. That provision states that “[t]he hearings shall be public unless the Trial Panel decides to close the proceedings in accordance with the Rules of Procedure and Evidence.”
14. The presumption of publicity is reiterated in Rule 120(1) which states that “[a]ll proceedings before a Panel, other than deliberations, shall be held in public, unless otherwise decided by the Panel after hearing the Parties.”
15. Article 23(1) requires the Specialist Chambers to promulgate rules for the protection of victims and witnesses, which are contained, largely, in Rule 80 of the Rules and serve to limit the right to a public trial in certain circumstances.
16. Rule 80 sets out a number of measures that may be taken to protect a witness’s identity including the redaction of names and identifying information from public records, as well as the use of private or closed session. As a prerequisite for granting protective measures, Rule 80(2) requires that “[p]rior to making an order, the Panel shall seek to obtain the consent of the person in respect of whom the protective measures are sought.”
17. Rule 81 provides for the possibility of the Parties seeking a variation of protective measures either in the same or in subsequent proceedings.

IV. SUBMISSIONS

18. The Defence shares the Trial Panel’s concern regarding the extent to which this trial has so far been conducted in private session. The Defence has long maintained that the SPO’s over-zealous use of protective measures is corrosive to the fairness of these proceedings.¹¹ The unrestricted use of private session that

¹¹ See for instance, F00351, Veseli Defence Response to SPO Request KSC-BC-2020-06/F00339/CONF/RED (“Seventh Request for Protective Measures”), 15 June 2021, confidential, paras. 8-9; F00362, Krasniqi Defence Response to the SPO Seventh Request for Protective Measures, 21 June

has been permitted to date violates the right to a public trial. Such unfairness, left unchecked, will lead to irreversible prejudice to the Accused.

a. Defence Proposals

i. Manner of Questioning

19. Firstly, the Defence agrees that there are a number of practical steps that will allow the Court to spend more time in open session than it has done to date. The Defence undertakes to continue to structure its cross-examinations so that, where feasible, (a) matters that need to be elicited in private or closed session are grouped together; and (b) questions are designed to avoid the need to go into private or closed session.

2021, confidential, paras 2(b) and 13; F00410, Veseli Defence Response to the SPO Request KSC-BC-2020-06/F00387/CONF/RED (“Eighth Request for Protective Measures”), 22 July 2021, confidential, paras 8-10; F00472, Thaçi Defence Response to Eleventh Request for Protective Measures, 17 September 2021, confidential, paras 6-8; F00537, Thaçi Defence Response to Prosecution Twelfth Request for Protective Measures, 22 October 2021, confidential, paras 9-11; F00541, Veseli Defence Response to Confidential Redacted Version of SPO’s Twelfth Request for Protective Measures (KSC-BC-2020-06/F00519/CONF/RED), 22 October 2021, confidential, para. 2. The Defence notes that the overuse of redactions has also affected the SPO’s requests for Protective Measures for Rule 102(3) and Rule 103 information: F00840, Veseli Defence Response to SPO Request for Protective Measures for Items Containing Rule 103 Information (F00821), 13 June 2022, confidential, para. 2 *responding to* F00821, Confidential Redacted Version of ‘Prosecution request for protective measures for items containing Rule 103 information’, KSC-BC-2020-06/F00821, dated 27 May 2022, 2 June 2022, confidential; F00880, Veseli Defence Response to Third Prosecution Request for Protective Measures for Items Containing Rule 103 Information (F00861), 13 July 2022, confidential, para. 2 *responding to* F00861, Confidential Redacted Version of ‘Third Prosecution request for protective measures for items containing Rule 103 information’, KSC-BC-2020-06/F00861, dated 30 June 2022, 1 July 2022, confidential; F00915, Veseli Defence Response to SPO Request for Protective Measures for Items Requested by the Defence Pursuant to Rule 102(3) Material (F00893), 4 August 2022, confidential, paras 3–7 *responding to* F00893, Confidential Redacted Version of ‘Prosecution request for protective measures for certain information requested by the Defence pursuant to Rule 102(3) with strictly confidential and *ex parte* Annexes 1-21’, 22 July 2022, confidential. A lesser redacted version was released on 24 October 2022; F01146, Veseli Defence Response to Sixth Prosecution Request for Protective Measures for Items Containing Rule 103 Information (F01123), 8 December 2022, confidential, para 2 *responding to* F01123, Confidential Redacted Version of ‘Sixth Prosecution request for protective measures for items containing Rule 103 information and disclosure report with strictly confidential and *ex parte* Annexes 1-5’, KSC-BC-2020-06/F01123, dated 25 November 2022, with strictly confidential and *ex parte* Annex 1, 28 November 2022, confidential.

20. The Defence is willing to continue the use of a code system like that which was employed with W03165, whereby numbers and letters are assigned to key persons and locations relevant to a witness's account.¹² In order to make these codes more user-friendly for those involved with the hearings, the Defence suggests that the full code be fixed to the extent possible in advance of a witness's testimony by agreement between the Parties and Participants. The Defence proposes that the calling Party provide the code three working days in advance of the witness's testimony. Other Parties and Participants should endeavour to add any additional names and locations with a suggested code within 12 hours of receiving the calling Party's preparation notes, although it may still be necessary for additional names to be given a code at the outset of cross-examination because the lines of cross-examination may evolve during testimony. The code should then be read into the record in private session at the outset of the witness's testimony and made available to the witness and the Accused in hard copy.¹³

ii. Further Delay to the Public Broadcast

21. The Defence would also support a further, limited, delay to the public broadcast of one to two hours, in order to facilitate the Registry's work. The Defence notes that during W01236's testimony, the Registry was obliged to terminate the delayed public feed for a redaction request that was ultimately rejected, when the ruling was not received in time.¹⁴ In light of the time sensitive nature of such requests, the Defence believes that it may be helpful to order a short extension of

¹² Transcript, 18 May 2023, p. 4293, line 20 – 4297, line 10; p.4327, line 9 – p. 4328, line 7; Transcript, 22 May 2023 p. 4395, lines 17-19; p. 4416, line 15 – p. 4417, line 16.

¹³ The Defence notes that the Accused did not have access to the code used by W03165 during [REDACTED] testimony which made it significantly more difficult for them to follow [REDACTED] evidence.

¹⁴ Email entitled 'RE: Redaction request,' sent at 14:07 on 23 May 2013 by Court Management personnel.

the delay to the public broadcast by one to two hours, with a view to ensuring that portions of the feed are not terminated unnecessarily.

22. Whereas the Defence appreciates the Registry's assurance that the abovementioned portion of testimony will be restored to the public record after the fact, it nonetheless submits that such a remedy is not effective and should not be relied upon routinely. It is unrealistic to expect the public, in general, to seek out missing portions of testimony after the fact. The Defence submits that in order to facilitate meaningful public scrutiny of this trial, it is necessary to make as much of the courtroom feed publicly available, in as close to real time as reasonably practicable.

iii. SPO Scheduling

23. The Defence submits that it is incumbent upon the SPO to do more to ensure that entire blocks of trial are not held in private session, as has occurred to date. The Defence's preference remains for witnesses who will testify on the same events and incidents to be grouped together. However, with this preference in mind, when scheduling witnesses in future, the Defence proposes that the Calling Party also be required to: (a) ensure that protected and non-protected measures are interspersed; and (b) seek leave of the Trial Panel in the event that it foresees that two or more consecutive witnesses will be heard largely in private session, to be granted only on a showing of good cause.

iv. Variation of Protective Measures

24. Additionally, the Defence submits that the SPO should be ordered to undertake a review of the current protective measures for its witnesses. The Defence makes this proposal having regard for the grave lack of transparency that has affected these proceedings to date, and multiple instances in which individuals have expressed ignorance of the fact that they are on the SPO's list of witnesses for

trial,¹⁵ indicated that they do not perceive themselves to be at risk,¹⁶ and/or have published or allowed others to publish information about them and their involvement with the Specialist Chambers, despite having protective measures.¹⁷ Another individual was granted protective measures who confirmed in [REDACTED] testimony that [REDACTED] gave statements to anyone who asked and who had previously testified in public about the same events.¹⁸ The SPO should be ordered to (a) contact all witnesses who currently have protective measures, (b) ascertain whether they wish to benefit from such measures, and (c) determine whether, based on their current circumstances, there is a genuine and objectively justifiable need for those measures.¹⁹

25. The Defence underscores that where a witness has expressed a desire to forego protective measures, the witness must be presumed to be competent to make this decision for themselves. In this regard, the Defence observes that Rule 80, which concerns the provision of protective measures, explicitly requires the Trial Panel to seek to obtain the witness' consent for the imposition of protective measures

¹⁵ See for instance, 106560-106560 where [REDACTED] and asked not to be contacted again by the SPO; 103533-103533 where [REDACTED] stated, *inter alia*, that [REDACTED] did not want to testify against [REDACTED] own people and that the Accused in the instant proceedings had done nothing to [REDACTED].

¹⁶ See for instance, 083285-TR-ET Part 1 RED2 where [REDACTED] told the SPO that [REDACTED] did not have any security concerns arising from [REDACTED] participation in the "SPO process"; 089190-089191 where [REDACTED] told the SPO that [REDACTED] had no security concerns at the time [REDACTED]. Whereas [REDACTED] wanted to remain anonymous this was not linked to any security concern *per se*. Some other witnesses, such as [REDACTED], have publicly attacked Mr Taçi, in general, politically and/or in connection with the case specifically.

¹⁷ For instance, [REDACTED] who has given countless interviews to the media both inside and outside of Kosovo, the most recent of which appeared in an edition of the [REDACTED]. Similarly, during a TV show broadcasted on [REDACTED], [REDACTED] repeatedly declared that [REDACTED] the public will see [REDACTED] in Court. The same holds true in respect of [REDACTED], who told [REDACTED] that [REDACTED] was interviewed by the SPO regarding [REDACTED] activities during the war in Kosovo.

¹⁸ Transcript of 17 May 2023, p.4233 lines 16-17.

¹⁹ The Defence would be willing to exclude from this proposal any witnesses whose security assessment demonstrated a genuine and objectively justifiable need for protective measures, within the last six months, from the time of writing.

and contains no provision that would explicitly permit the Trial Panel to order protective measures for a witness who has declined the same.

26. Rule 81, by contrast, permits the Trial Panel, in certain circumstances, to rescind protective measures, even in the absence of the witness's consent. The Defence submits that taken together, Rule 80 and Rule 81 clearly reflect the presumption that trials before the Specialist Chambers shall take place in public.
27. Accordingly, the Defence submits that, once in receipt of updated information, the SPO should request that the Trial Panel vary or rescind the protective measures of any witnesses who do not currently have an objectively justifiable need for protective measures. Moreover, as the Defence's ability to assist the judges in their determinations has so far been limited by over-zealous redactions in preparing such requests,²⁰ the Defence suggests that the SPO take a more modest approach to redactions, bearing in mind that all Defence counsel are bound by confidentiality and as far as the Defence is aware, there have been no incidents attributable to it which would give rise to any concern in this regard.

b. SPO Proposal

28. The SPO proposes that witnesses who have protective measures be heard entirely in private session. It further proposes that, once a witness has left the stand: (a) the calling Party would have 10 days to propose a version of the transcript for publication; (b) the Non-Calling Parties should have 10 days to accept or challenge any of the redactions; and (c) the Trial Panel would then rule any disputes at a later date. There is no support among the Defence for a tool as blunt as that which the SPO proposes. In the Defence's united view, the SPO's

²⁰ See, footnote 11 above.

proposal violates the rights of the Accused to be tried publicly, as guaranteed under the Law and other binding international human rights instruments.²¹

29. The Defence notes that the jurisprudence of European Court of Human Rights (“ECtHR”) is particularly apposite in this respect, given that the Court has held on multiple occasions that the principle of publicity:

protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.²²

30. Whereas the Defence realises that this right is not absolute and any measures which lessen a trial’s public character ought to be viewed in light of the overall fairness of the proceedings, it nonetheless submits that the overly private nature of the current proceedings will, if not properly remedied, risk causing irreparable damage to their fair trial rights. In this respect, the Defence recalls the case of *Kilin v. Russia* whereby the ECtHR found that the private nature of proceedings must be “strictly required in the circumstances of the present case, namely, for ensuring the safety of any person participating in that hearing.”²³ Importantly, while the Defence does not contest the necessity of protective measures from time-to-time, such necessity will inherently decrease the more damage the Accused’s fair trial rights sustain.
31. Simply put, the use of protective measures cannot be considered fair, nor strictly necessary, when almost **half** of SPO witnesses are protected. Given the current trajectory of these proceedings, it is almost a foregone conclusion that the

²¹ See, Article 3(2)(e) of the Law referring to “criminal justice standards” as contained in ECHR and the International Covenant on Civil and Political Rights (“ICCPR”). In this respect, the Defence refers specifically to Article 6(1) of the ECHR and Article 14(1) of the ICCPR.

²² See, ECtHR, *Case of Riepan v. Austria*, 35115/97, [Judgement](#), 14 November 2000, para. 27. See also, ECtHR, *Case of Krestovskiy v. Russia*, 14040/03, [Judgement](#), 28 October 2010, para. 24; ECtHR, *Case of Sutter v. Switzerland*, 8209/78, [Judgement](#), 22 February 1984, para. 26.

²³ ECtHR, *Case of Kilin v. Russia*, 10271/12, [Judgement](#), 11 May 2021, para. 112.

remaining protected witnesses will have their testimonies heard in private session – in similar fashion to the first seven witnesses. It is the Defence’s position that **now** is the time when the rights of the Accused ought to be given the consideration they duly deserve. The concept of publicity is predicated upon the notion that the public retains the ability to monitor proceedings as they unfold. Being informed of developments long after the fact is not compatible with the right to a public trial, nor is it conducive to public discourse.

32. The SPO’s proposal would have the *sole* effect of ensuring the public *may* have access to certain transcripts at some *undetermined* point in the future. This is all the more true when considering that the proposed process by which transcripts will be (a) reviewed; (b) redacted; (c) ruled upon and (d) released to the public is bound to be a lengthy one and will inevitably result in the public acquiring access to transcripts long after a witness has come to testify.
33. Moreover, the Defence foresees disagreements regarding proposed redactions as inevitable and will undoubtedly have the effect of availing entirely new (and rather unnecessary) lines of litigation between the Parties. Whereas the proposal is foreshadowed as an efficient alternative to the current procedure, the Defence notes that the opposite is, in fact, true, given that the proposal would call for the Parties’ views/submissions in respect of proposed redactions to transcripts. This case is already rife with litigation on a number of important issues, notwithstanding the on-going preparation for witnesses due to testify before the Court; adding an additional (and recurrent) task to an already high workload will result in a significant amount of unnecessary labour for all involved.
34. The SPO’s proposal does not attempt to uphold the basic principle of publicity.

c. **Victims' Counsel Proposal**


35. Finally, the Defence for Mr Krasniqi and Mr Veseli would support Victims' Counsel's proposal for the publication of a summary for key parts of a witness' testimony which cannot otherwise be made available to the public, provided that (a) resort to such summaries *in lieu* of transcripts are only permitted in truly exceptional of circumstances where it is not possible to allow the witness's own words to be published to any meaningful degree; and (b) such summaries are neutral, meaning that they are not prepared by or on the basis of materials prepared by the Parties or Participants, and where relevant include evidence adduced through Defence questioning, as well as through Prosecution, Victims Representatives' and Judicial questioning.

V. CONCLUSION AND RELIEF REQUESTED

36. The Defence requests that the Trial Panel gives serious consideration to the proposals set out above.

Word count: 3,988

Respectfully submitted on 31 May 2023.



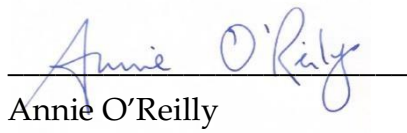
Gregory W. Kehoe
Counsel for Hashim Thaçi




Ben Emmerson, CBE KC
Counsel for Kadri Veseli




Andrew Strong
Co-Counsel for Kadri Veseli



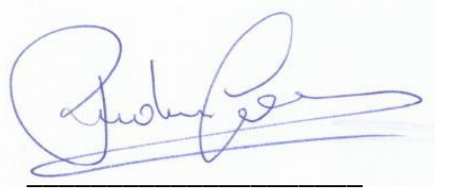
Annie O'Reilly
Co-Counsel for Kadri Veseli




Geoffrey Roberts
Co-Counsel for Rexhep Selimi




Eric Tully
Co-Counsel for Rexhep Selimi



Rudina Jasini
Co-Counsel for Rexhep Selimi



Venkateswari Alagenda
Lead Counsel for Jakup Krasniqi



Aidan Ellis
Co-Counsel for Jakup Krasniqi



Victor Băieșu
Co-Counsel for Jakup Krasniqi