



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Specialist Prosecutor's Office

Date: 15 November 2024

Language: English

Classification: Public

Prosecution request concerning presentation queues and related relief

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Mišetić

Counsel for Kadri Veseli

Rodney Dixon

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

1. Pursuant to Article 40(2) of the Law¹ and Rule 116(1) of the Rules,² the Specialist Prosecutor's Office ('SPO') requests that the Trial Panel: (i) impose safeguards on Duty Counsel's access to presentation queues;³ and (ii) order an expedited briefing schedule to enable timely resolution of this request.

2. Presentation queues are intended to provide adequate notice to the Parties and participants of the documents a calling Party intends to use with a witness, so that they may effectively prepare for their respective examinations.⁴ Such access is not required for Duty Counsel, considering such Counsel's limited and specific role. A witness is obliged to answer the questions put,⁵ may object to providing testimony that might tend to incriminate her/him,⁶ and assigned Duty Counsel advises the witness on such self-incrimination matters that may arise during testimony.⁷ To facilitate this, a witness's own prior statements are available to appointed or assigned Duty Counsel in advance.⁸ As outlined below, additional safeguards should be imposed for any access to materials beyond this, noting that such material frequently contains sensitive and confidential documents, including information subject to court-ordered protective measures⁹ and other restrictions.

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the Law, unless otherwise specified.

² 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' are to the Rules, unless otherwise specified.

³ Such access is not regulated by the Conduct of Proceedings Order. *See* Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order').

⁴ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 79-80, 82-83. *See also* Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.1 (defining 'Parties and participants').

⁵ Rules 141, 143.

⁶ Rule 151(1).

⁷ Rule 151(4).

⁸ After assignment and upon request, the witness's prior statements are available to Duty Counsel. The SPO has also previously released presentation queues containing only a witness's prior statements, specifically for access by Duty Counsel. In any event, the witness and Duty Counsel have the opportunity to review prior statements during preparation. *See* Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.97(iv).

⁹ For witnesses other than the one represented by Duty Counsel.

3. Notably, both the witness and Duty Counsel are members of the public, and unrestricted, advance access to the documents in a presentation queue could undermine: (i) the questioning Party's ability to effectively examine a witness;¹⁰ and (ii) safeguards in the legal framework intended to protect witnesses and confidential information.¹¹ While Duty Counsel are bound by, *inter alia*, the Code of Professional Conduct for Counsel, Law, and Rules,¹² they do not fall within the definition of a Party or participant, are not expressly bound by, notified of, or in a position to know all related orders, regulations, and restrictions, and their access to confidential information should be limited to that strictly necessary for their confined assignment. Witnesses are subject to even fewer safeguards.

4. Considering past practice in this case,¹³ the Panel's decision to authorise the release of presentation queues to Duty Counsel, and, in particular, one Duty Counsel's indication that he understood that documents in a presentation queue had been provided to his client and would review the contents thereof with his client to 'adequately prepare',¹⁴ the SPO requests that certain restrictions be imposed to the extent the Panel considers it appropriate to continue providing presentation queues to Duty Counsel in future:

- a. Duty Counsel should be provided access to presentation queues no earlier than the start of a witness's testimony, thereby enabling them to consult

¹⁰ Frequently, not all documents in a presentation queue would be shown to a witness during preparation, and their use in testimony would be contingent upon the posture of the witness concerned. Indeed, in some instances, no substantive preparation session may have been held. Providing a presentation queue to the Duty Counsel and thereby the witness in advance, effectively deprives the calling Party of the ability to make such choices in a meaningful way.

¹¹ See e.g. Articles 23, 35(2)(e)-(f); Rules 80-82, 107; Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, Section XV(A)-(B), 98(iii)-(iv); Decision on Specialist Prosecutor's Request Concerning Post-Testimony Witness Contact, KSC-BC-2020-06/F01960, 27 November 2023; 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, KSC-BC-2020-06/F00854, 24 June 2022.

¹² See e.g. Notification of Assignment of Duty Counsel, KSC-BC-2020-06/F02679/A01, 28 October 2024.

¹³ See e.g. E-mail from CMU to Parties and Participants dated 28 June 2024 at 13:06.

¹⁴ See e.g. Transcript, KSC-BC-2020-06, 4 November 2024, pp.21801-21806.

(parts of) documents as they are used in questioning. This restriction is proportionate to the risks outlined above and Duty Counsel's assignment, considering that the contents of a document do not *per se* raise issues of self-incrimination, but only the portion of the document and related questions put to the witness.

- b. Other than a witness's prior statements and testimony, which may be reviewed with the witness for the purpose of advice on self-incrimination matters, Duty Counsel should be instructed not to review any other documents in a presentation queue with the witness. This would ensure equal treatment of witnesses, safeguard the quality of the witness's evidence, avoid any preparation outside the bounds of the Conduct of Proceedings Order,¹⁵ and ensure that any confidential and protected information is not (inadvertently) disclosed to witnesses.¹⁶
- c. The Parties and participants should be notified of and provided the opportunity to make submissions on any request by Duty Counsel to vary the above conditions.

5. Finally, the SPO notes that witnesses in the upcoming evidentiary block are anticipated to have Duty Counsel appointed. The SPO requests an expedited briefing schedule for this reason. In the interim, the SPO requests that the measures set out in paragraph 4 be applied on a provisional basis.

¹⁵ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, paras 85-99. Under these provisions, the witness is only entitled to an opportunity to review prior statements. That the witness may also be shown certain documents where it serves the purposes of preparation does not translate into a right for the witness to review all – frequently confidential and sensitive – documents a Party intends to use during testimony.

¹⁶ The Parties and participants are bound to use confidential documents in a manner that is consistent with applicable protective measures and restrictions. In certain cases, this means reading certain contents, but not reading other contents or showing a document. In other cases, it means showing part of a document, but not other parts. Duty Counsel, considering his/her limited assignment, is not in a position to know what information in a given document may be discussed with or shown to a witness without breaching applicable restrictions.

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Kimberly P. West

Specialist Prosecutor

Friday, 15 November 2024

At The Hague, the Netherlands.