



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

In: KSC-BC-2020-06
Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 3 December 2021
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Prosecution submissions on confidential information and contacts with witnesses

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I. INTRODUCTION

1. As previously foreshadowed,¹ and having regard to Articles 21(4), 23, 35, 38, and 39(1) of the Law² and Rules 80 and 95(2) of the Rules,³ as well as Articles 6, 12, 14, and 17 of the Code of Conduct,⁴ the Specialist Prosecutor's Office ('SPO') hereby proposes a framework for (i) contacts with witnesses; and (ii) handling of confidential information during investigations.

2. While it is incumbent on all parties to act in good faith, establishing an appropriate course of conduct on such matters involves a careful balancing of the duties and prerogatives of the Specialist Prosecutor,⁵ the fundamental rights of the Accused, including their right to prepare a defence,⁶ and the necessity to protect the physical and psychological well-being of victims, witnesses, and their families.⁷

3. Noting that the Defence have been provided with a preliminary witness list, will be obtaining the Rule 95(4) witness and exhibit lists later this month, and have received the vast majority of the SPO's Rule 102(1)(b) materials, it is appropriate - in the interests of transparency and certainty - for a regulatory regime to be adopted. The SPO therefore requests that the Pre-Trial Judge adopt a framework in the terms set out below.

¹ Transcript of Status Conference dated 14 September 2021, p.620.

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

⁴ Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07, 1 March 2019.

⁵ See Articles 35 and 38.

⁶ Especially relevant are the right to have adequate facilities for the preparation of one's defence (Article 21(4)(c)), and the right to examine and obtain the attendance of witnesses (Article 21(4)(f)).

⁷ See Article 23 and Rule 80.

II. SUBMISSIONS

A. HANDLING OF CONFIDENTIAL INFORMATION IN THE FRAMEWORK OF INVESTIGATIVE ACTIVITIES

4. The Kosovo Specialist Chambers' ('KSC') statutory framework sets out a non-exhaustive array of available protective measures.⁸ Rule 80(1) empowers a Panel, and therefore the Pre-Trial Judge,⁹ to order 'appropriate measures' for the protection of witnesses, provided they are compatible with the rights of the Accused. Within the boundaries of the Accused's fundamental rights, appropriate measures may thus take different forms, and may include limits on how protected witnesses are investigated. This includes regulation on using confidential information in the course of investigations and opposing party contacts with witnesses.¹⁰

5. In order to ensure witnesses' safety, physical and psychological well-being, dignity and privacy, and to avoid frustrating protective measures that may be ordered in this case, the SPO requests the Pre-Trial Judge to order the following or equivalent measures with regard to parties' handling of confidential information:¹¹

⁸ Article 23(1); Rule 80(4); KCPC.

⁹ Rule 95(2)(e).

¹⁰ *Egs Specialist Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00314/A01, Annex to Order on the Conduct of Proceedings, Section VI(B); ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-674, Decision on the 'Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant', the 'Dual Status Witness Protocol', and related matters, 19 March 2020 (with two annexes); ICC Chambers Practice Manual (4th edition, 2019), Annex; STL, *In the case against Akhbar and Al Amin*, STL-14-06/PT/CJ/F0030, Decision on the *Amicus Curiae* Prosecutor's Application for Protective Measures and Non-Disclosure, 3 July 2014, p.2; STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ/F0269, Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, 25 May 2012; ICTY, *Prosecutor v. Mićo Stanišić*, IT-04-79-PT, Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses, 6 June 2005; ICTY, *Prosecutor v. Blagojević et al.*, Order for Protective Measures and Non-Disclosure to the Public, 18 February 2003, IT-02-60-PT, para.6; ICTR, *Prosecutor v. Nzirorera*, ICTR-98-44-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000.

¹¹ See Article 12(2) of the Code of Conduct. It is noted that at this stage of proceedings - where the case remains at pre-trial, the witness list is still being finalised, and security assessments regarding the necessity of protective measures (including in-court protective measures) remain ongoing - all SPO witnesses are protected by, at least, a confidential classification.

- a. Parties and participants are under a general obligation not to disclose to third parties¹² any confidential information.¹³
- b. A party or participant may disclose the identity of a witness¹⁴ to a third party only if such disclosure is directly and specifically necessary for the preparation and presentation of its case. If a party or participant is aware that the witness has been relocated with the assistance of the KSC/SPO, the party or participant shall inform the Witness Protection and Support Office ('WPSO') in advance of the details of the place, time and, to the extent possible, the types of organizations, institutions, and, if available, the person(s) to whom it intends to disclose the identity of the witness, and shall consult with the WPSO as to specific measures that may be necessary. If the witness is otherwise protected by the WPSO, the party or participant shall inform the WPSO of the disclosure of the witness's identity as soon as possible, but in any event before disclosure.
- c. Notwithstanding the previous sub-paragraph, parties and participants shall not reveal to third parties that any protected witness is involved with the activities of the KSC/SPO or the nature of such involvement.
- d. Visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available. To reduce the risk of disclosing the involvement of the person depicted or otherwise reflected in the activities of the KSC/SPO, a party or participant shall only use such visual material and/or non-textual material which does not contain elements which tend to reveal the involvement of the person depicted in the activities of the KSC/SPO. When a photograph of a witness is used, it shall only be shown together with other photographs of the same kind. Unless specifically authorized by the Chamber, the third party shall not retain copies of the visual material subject to this provision.
- e. If a party or participant is in doubt as to whether a proposed investigative activity may lead to the disclosure of the identity of a protected witness to third parties, it shall seek the advice of the WPSO.
- f. A party or participant shall bring to the attention of the WPSO as soon as possible any reasonable suspicion that a protected witness may have been placed at risk for any reason, including reasonable suspicion that a witness's involvement with the KSC/SPO or protected location has become known to third parties.
- g. If a party or participant has wrongly revealed confidential information, or has become aware of any other breach of the confidentiality of documents or information, or discovers that a third party has become aware of confidential information, it shall inform the recipient of the confidential nature of such information and instruct him or her not to

¹² 'Third party' shall include any person except a party or participant in these proceedings, or a Judge or staff member of the Court authorized to have access to the information in question.

¹³ 'Confidential information' shall mean any information contained in a document which is not classified as 'public' and which has not otherwise legitimately been made public, and any information ordered not to be disclosed to third parties by any Panel of the Court. *See* KSC-BC-2020-07/F00074RED, para.37.

¹⁴ 'Witness' shall mean a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely, insofar as the intention of the party or participant is known or apparent to the opposing party.

disclose it any further. In addition, the party or participant shall immediately inform the WPSO.

B. CONTACTS WITH WITNESSES OF OTHER PARTIES AND PARTICIPANTS

6. The SPO also requests the Pre-Trial Judge to order the following measures with regard to contacts with witnesses of other parties and participants – which, with respect to the modalities for interviewing such witnesses, are largely consistent with those adopted by another Panel before this court.¹⁵ These measures are necessary to avoid re-traumatisation of victim-witnesses and to safeguard privacy, dignity, and physical and psychological well-being.¹⁶

- a. Except under the conditions specified herein, prior to testimony, parties and participants¹⁷ shall not contact or interview a witness of another party or participant if the intention to call the witness to testify or to rely on his or her statement has been communicated to the other parties and participants, or if this intention is otherwise clearly apparent.
- b. If an opposing party or participant wishes to interview a witness of another party or participant, it shall notify the calling Party and CMU at least ten days prior to the intended interview. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party and shall also inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness and/or a WPSO representative present during the interview. The calling Party shall inform the opposing Party and CMU whether the witness consents. In addition, where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness, regardless of the witness's expressed preferences. The procedure in this section shall not apply to an interview conducted by the Specialist Prosecutor's Office ('SPO') with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.
- c. If a party or participant contacts an opposing party or participant witness inadvertently or during WPSO-organized courtesy meetings, the party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness's consent to be interviewed directly. A witness's consent to be interviewed may be obtained only through the procedure set out in the previous sub-paragraph.
- d. The opposing Party conducting the interview ('interviewing Party') shall:

¹⁵ *Specialist Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00314/A01, Annex to Order on the Conduct of Proceedings, Section VI(B).

¹⁶ Rule 80(1).

¹⁷ For purposes of this paragraph, this includes counsel, their clients, and their teams as defined in Article 2 of the Code of Conduct.

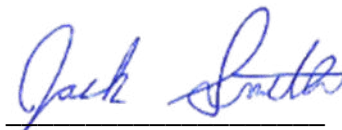
- i. ensure that the interview is conducted effectively and expeditiously;
 - ii. prepare copies of all documents to be shown to the witness in a language which he or she understands together with an English translation to be provided to the calling Party;
 - iii. refrain from talking to the witness outside the timeframe of the interview and the video-recording, so that all statements and utterances made are duly recorded;
 - iv. refrain from any action that could be regarded as threatening or provocative; and
 - v. otherwise comply with any order made by the Trial Panel.
- e. The Registry, through CMU, shall facilitate the preparation and conduct of any interview under this section. Communications between the calling Party or the interviewing Party and CMU shall occur via the email address CMUCourtOfficers@scp-ks.org. These communications shall be filed as correspondence in the case file in accordance with the Practice Direction on Files and Filings (KSC-BD-15).
- f. Once a witness has agreed to be interviewed, the calling Party shall provide CMU with the following information:
 - i. the preferred dates for, and an estimate of the duration of, the interview;
 - ii. whether protective measures have been ordered, requested or will be requested under Rule 80 in relation to the witness and whether the witness has any special needs as defined in Rule 146 or requires special measures as listed in Rule 80(4)(c);
 - iii. an updated Witness Information Form ('WIF') for the witness;
 - iv. the language which the witness is expected to use during the interview;
 - v. any information as to the persons expected to be present at the interview, including any indication of whether the witness may require the presence of a representative of the calling Party, a WPSO representative or a legal representative; and
 - vi. any other information that may facilitate the preparation for the interview, as required by CMU or WPSO.
- g. CMU may seek additional information, if required, to facilitate the preparation for the interview. The Panel shall be seized in relation to any unresolved dispute between the Parties and WPSO or CMU regarding measures recommended by the Parties and/or by WPSO/CMU.
- h. The Registry shall facilitate the process by:
 - i. providing a venue for the interview and audio-video recording equipment;
 - ii. providing interpretation, where necessary;
 - iii. ensuring that a Court Officer or another designated representative of the Registry is present during the interview; and
 - iv. ensuring that a witness-support representative is on site, where considered necessary by WPSO.
- i. Prior to the commencement of the interview, the Court Officer or another designated representative of the Registry shall advise the witness that he or she:

- i. is not required to participate in the interview and can decide to stop being interviewed at any time;
 - ii. can refuse to answer questions, in particular if they are thought to be potentially self-incriminating;
 - iii. can ask for a recess at any time; and
 - iv. can ask to meet with a WPSO representative at any time during the interview.
- j. During the interview, the Court Officer or another designated representative of the Registry shall:
 - i. ensure the presence of only the authorized individuals;
 - ii. verify the identity of the witness;
 - iii. ensure that all individuals present identify themselves on the record;
 - iv. ensure that the interview is audio-video-recorded;
 - v. ensure the safety and well-being of the witness; and
 - vi. ensure that the procedural elements of the interview are conducted in accordance with the Law, the Rules, and any subsequent order, decision, observations, or recommendations of the Panel.
- k. The Court Officer may terminate the interview if he or she considers that the interviewing Party has not complied with its obligations under the present order. The Registry shall immediately inform the Panel of the circumstances that led to the termination of the interview.
- l. The Parties shall respect the Registry's neutrality and shall refrain from seeking to involve its representative in the proceedings. Should the witness need to consult with a legal representative during the interview, the interview shall be suspended so that this can be arranged. The Registry shall inform the Defence Office, so that the necessary arrangements to assign Counsel to the witness may be made.
- m. If the interviewing Party intends to show confidential or strictly confidential records to the witness other than the witness's own statements, it shall apply for leave of the Panel.
- n. Following the completion of the interview, the Registry shall prepare:
 - i. a memorandum recording the process (indicating time, place, attendees, classification – i.e., public, confidential or strictly confidential – and any other relevant circumstance) and submit it to the Parties and the Panel; and
 - ii. the audio-video recording of the session and submit copies thereof to the Parties and to the Panel.
- o. Neither the record of the interview nor any materials used during the interview shall become part of the record in the case unless admitted in evidence by the Trial Panel *proprio motu* or upon an application by a Party, where the conditions for its admission under the Rules are met. Where admission of such a video recording is sought, CMU shall also produce the transcript of the interview.

III. RELIEF REQUESTED

7. The SPO respectfully requests the Pre-Trial Judge to adopt a regulatory framework in terms equivalent to those set out above.

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Friday, 3 December 2021

At The Hague, the Netherlands.