



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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 31 May 2023

Language: English

Classification: Public

Prosecution submissions concerning publicity measures

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to the Order,¹ Articles 21 and 23 of the Law,² and Rules 80 and 120 of the Rules,³ the Specialist Prosecutor's Office ('SPO') hereby files submissions on potential measures to ensure greater publicity of the proceedings. The SPO engaged *inter partes* with the Defence and Victims' Counsel, and as appropriate, indicates below where agreement on proposed measures was or was not reached.

II. SUBMISSIONS

2. The Accused are entitled to a fair and public hearing.⁴ However, as acknowledged in the legal framework of the Specialist Chambers, the publicity requirement is subject to strictly necessary exceptions, for example, to protect the safety and privacy of witnesses and the integrity of the proceedings.⁵ In this respect, risks to the clarity and accuracy of a protected witness's testimony are relevant considerations in assessing the extent to which the public may be excluded.⁶ The ECtHR has confirmed that, where required in the specific circumstances of a given hearing and in the interests of justice, the public may be justifiably excluded from parts of, or even the entire, trial to ensure a comprehensive and objective examination of the case and to avoid pressure on victims and witnesses.⁷

¹ Oral Order, Transcript, 17 May 2023, pp.4207-4209 ('Order').

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' or 'Articles' are to the Law.

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 Article 21(2).

⁵ Article 23; Rules 80, 120; Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01 ('Conduct of Proceedings Order'), paras 1, 68, 70, 105. *See also* European Court of Human Rights ('ECtHR'), *Krestovskiy v. Russia*, 14040/03, Judgment, 28 October 2010 ('*Krestovskiy* Judgment'), para.25.

⁶ *Krestovskiy* Judgment, para.31.

⁷ *See, for example*, ECtHR, *Volkov v. Russia*, 64056/00, Judgment, 4 December 2007, paras 29-33 (considering that the request by an important witness (the widow of one of the alleged murder victims in the case) for a private hearing due to fear and threats to be sufficient to justify an *in camera* trial, also considering the opportunity for the parties to make submissions on the matter).

3. In this case, the requirement of publicity is being respected and the trial is being conducted transparently, even though, as outlined below, certain further measures may be available to increase the amount of information available to the public. The charges and summaries of the Parties' respective cases are publicly available through, *inter alia*, public versions of the indictment and pre-trial briefs. Developments, evidence, procedural matters, and other issues relating to the proceedings are available through, *inter alia*, public filings and hearings. At this stage, in-court protective measures have not been requested and are not currently considered necessary for more than 150 witnesses.⁸ In scheduling witnesses, the SPO takes into account protective measures and publicity. In this respect, one third of the initial 12 witnesses notified had been anticipated to testify without protective measures.

4. Moreover, the in-court protective measures granted in this case are strictly necessary and proportionate exceptions to the requirement of publicity, and adequate safeguards already exist in the legal framework to ensure that such measures are varied when they are no longer justified. The Pre-Trial Judge and Trial Panel, after having heard the Parties, have issued reasoned decisions granting in-court protective measures, including private and closed session, where required by the specific circumstances of individual witnesses and objective security risks, and where such measures are proportionate to the rights of the Accused.⁹ Further, the Conduct of Proceedings Order requires the Parties to, *inter alia*, (i) consider on an ongoing basis whether existing protective measures remain necessary; (ii) contact witnesses as soon as practical and sufficiently in advance of their testimony to verify whether they wish to, *inter alia*, maintain existing protective measures;¹⁰ and (iii) structure questioning so

⁸ This includes witnesses proposed to be heard *viva voce* (including Rule 154 witnesses), as well as witnesses whose evidence will be tendered pursuant to Article 37 and/or Rules 153 and 155.

⁹ See also Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.70.

¹⁰ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.67.

that as much may be heard in public session as possible.¹¹ Within this framework, the Parties and Victims' Counsel have consulted on the following measures.

5. All Parties and Victims' Counsel agree that, consistent with the Conduct of Proceedings Order and where it can be meaningfully done, the Parties and Victims' Counsel should continue to organise questioning in a manner which facilitates portions of evidence that need to be heard in private session being grouped together.¹² Where possible, the SPO has endeavoured to do so, while Defence cross-examinations have frequently been entirely in private session.¹³

6. For certain witnesses, use of a basic code system may enable a further significant portion of their evidence to be heard publicly. The SPO agrees with the Defence that such codes should be fixed to the extent possible in advance of a witness's testimony, and should be read into the record at the outset of the witness's testimony and made available in hard copy to the witness.¹⁴ To the extent possible, the calling Party can notify the other Parties and participants of the intended codes in advance of the testimony.¹⁵ For ease of reference and for the sake of completeness and accuracy, such code sheets should also be tendered into evidence at the conclusion of the witness's testimony.

7. However, there will be many instances in which use of codes or grouping of questions (i) may be inappropriate for use with certain witnesses (potentially for reasons of literacy, health or other particular circumstances); (ii) creates risks for

¹¹ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.104.

¹² Email from Veseli Defence (on behalf of all Defence teams) to SPO dated 25 May 2023 at 18.11 ('Defence Email'): 'We agree that we should all continue to structure our 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.'

¹³ See, for example, Transcript, 18 May 2023, pp.4373-4387.

¹⁴ Defence Email: 'In that regard, we will support the continued use of codes, which we suggest should be fixed to the extent possible in advance of a witness's testimony, by agreement between the parties and participants. The code should then be read into the record at the outset of the witness's testimony and made available to the witness and the Accused in hard copy.'

¹⁵ At a minimum, these would be provided together with the preparation note 24 hours in advance of the witness's testimony.

witnesses; (iii) causes confusion, not only for the witnesses, but also potentially for the Parties, participants, Panel, and public;¹⁶ (iv) distracts the witnesses from and/or has a chilling effect on the witnesses' primary duty to provide truthful and complete testimony;¹⁷ (v) leads to indirect and inefficient questioning (including the need to double back and elicit the further identifying details in private); and/or (vi) results in valuable court time being expended in discussion as to what content can or cannot be led in open session. The use of codes will also significantly complicate subsequent transcript review and evidence analysis for all parties and participants, as well as the Panel. For example, it will not be possible to run searches across evidentiary material for, as appropriate, relevant names and places, and the transcripts themselves will not be comprehensible without constant reference to the code sheet, whether admitted separately or read into the record. As such, inappropriate or incautious use of codes could ultimately compromise both the fairness and expeditiousness of the proceedings.

8. Therefore, with a view to maximising publicity while ensuring efficiency (both in court and in subsequent analysis), safeguarding the quality of the evidence and integrity of the proceedings, and minimising risk, the SPO proposes¹⁸ that, where the alternatives outlined above are not possible, the following procedure is appropriate for witnesses granted in-court protective measures (specifically, the use of a pseudonym, voice/face distortion, and private or closed session for identifying information):

¹⁶ In this respect, the more codes used, the more likely it could become for the witness to confuse or incorrectly indicate one code, when he or she means another.

¹⁷ Resort to codes or artificial grouping of questioning could also reduce spontaneity in the witness's answers.

¹⁸ Victims' Counsel supported this proposal. *See* Email from Victims' Counsel to SPO dated 24 May 2023 at 15.18 ('VC Email'): 'We think that the SPO's proposal tackles these issues and we therefore support it.' No Defence team supported this proposal. *See* Defence Email: 'There is no support among the Defence for your proposal for witnesses who require in-court protective measures to be questioned entirely in private session. The proposal would violate the rights of our clients to be tried publicly. An essential component of publicity is 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'.

(i) *The witness is examined entirely in private session.* This would allow for the most efficient and secure examination of the witness possible, without having to consider in real time which parts of the examination could be public or not public.

(ii) *The parties propose a redacted version of the transcript.* This could be on a staggered schedule (for instance, the calling party sends a proposed redacted transcript within 10 days of the last transcript relevant to the witness becoming available, and the non-calling parties could then have a further 10 days to accept or challenge any of the redactions).

(iii) *The Trial Panel rules on any disputed redactions.*

(iv) *A redacted version of the live broadcast mirroring the final redacted transcript is released.* This would be subject to the Registry's ability to implement such redactions on the broadcast.

9. The end result of this procedure would be a final product consisting of the most public version of the witness's evidence possible. It would both maximise court time and allow for a properly considered, retrospective assessment of how much content can be made available to the public, without any of the accompanying risks. A redacted broadcast – with all private sessions edited out – would actually be a superior product for public consumption than the open session broadcasts currently produced, which are broken up by frequent private sessions of indeterminate length. The procedure is consistent with measures already under consideration by the Panel¹⁹ and practice at other courts, where, in certain circumstances, evidence was provisionally heard in private or closed session or admitted under seal, with public versions issued

¹⁹ Order, p.4208 ('The parties are hereby informed that the Panel 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').

after resolution of outstanding matters (including submissions and decisions about the nature of information to remain confidential).²⁰

10. Finally, the SPO supports additional proposals by both the Defence and Victims' Counsel concerning, respectively, a limited, further delay to the public broadcast²¹ and, in appropriate circumstances and where the evidence is an important part of the witness's testimony, a public summary of evidence heard in private or closed session.²²

Word count: 2081



Alex Whiting

Acting Specialist Prosecutor

Wednesday, 31 May 2023

At The Hague, the Netherlands.

²⁰ See, for example, ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Decision on Serbia's Requests for Provisional Protective Measures in relation to Defence Documents, 19 October 2012, paras 18-19; ICTY, *Prosecutor v. Stanišić and Simatović*, Decision on the Republic of Serbia's Motion for Protective Measures Concerning Three Witnesses, IT-03-69-T, 17 April 2012, paras 3, 7, 19-26. See also ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Status of Exhibits Provisionally under Seal, 14 December 2012.

²¹ Defence Email: 'We would also support a further delay to the public broadcast. We note that during [...]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. We therefore believe we should explore the possibility of a short extension of the delay to the public broadcast with a view to ensuring that portions of the feed are not terminated unnecessarily.'

²² VC Email: 'Where a section of narrative has been removed completely, but involves an essential part of the story, a short neutral summary of the missing evidence could be displayed as text'.