



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

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Public redacted version of

'Prosecution request to vary protective measures and admit evidence of W04363'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to Articles 37 and 40 of the Law,¹ and Rules 80-81, 137-138 and 155 of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby seeks: (i) variation of protective measures for anonymous witness W04363 to allow for disclosure of his identity to the Defence; and (ii) admission of W04363's statements and associated exhibits ('Proposed Evidence')³ pursuant to Rule 155(1).

2. W04363's anonymity was premised on the understanding that the Defence would get to at least question him by means of an anonymous procedure,⁴ something which is no longer possible in light of recent information provided by WPSO. There have been extensive efforts to secure W04363's consent to vary his protective measures since the Panel's previous consideration of this matter,⁵ but this new information necessitates a variation of protective measures due to exigent circumstances and/or to avoid a miscarriage of justice within the meaning of Rule 81(5).⁶

3. The Proposed Evidence should be admitted because: (i) W04363 is unavailable within the meaning of Rule 155(1)(a); and (ii) the Proposed Evidence is relevant, *prima facie* authentic, and reliable, and has probative value, which is not outweighed by any

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article(s)' 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'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

³ See Annex 1.

⁴ See Rule 147; Confidential Redacted Version of Decision on Specialist Prosecutor's Second Request for Protective Measures and Renewed Request for Protective Measures and Procedural Matters, KSC-BC-2020-06/F00190/CONF/RED, 5 February 2021, Confidential ('5 February 2021 Decision'), para.91.

⁵ Decision on the SPO Request to Vary Protective Measures, KSC-BC-2020-06/F01466, 18 April 2023, Confidential ('18 April 2023 Decision').

⁶ The SPO's previous request for variation of protective measures was based on consent, making this the first application predicated under varying protective measures due to exigent circumstances and/or a potential miscarriage of justice. The relief sought does not therefore require any reconsideration of the 18 April 2023 Decision. See similarly ICTY, *Prosecutor v. Mladić*, Decision on Application Pursuant to Rule 75(H), IT-09-92-R75H.6, 10 March 2016, para.12 (without engaging in a reconsideration analysis, finding exigent circumstances to vary protective measures absent consent after denying a previous request to do so). To the extent Rule 79 is engaged, reconsideration is 'necessary to avoid injustice' for the same reasons why a protective measures variation is needed to avoid a miscarriage of justice.

prejudice.⁷ As these admissibility criteria are satisfied, admission is in the interests of justice.⁸

4. Attached to this Motion are three Annexes. Annex 1 contains a table identifying the Proposed Evidence. Annex 2 contains SPO-W04363 contact notes relevant to his unavailability, with limited redactions applied. Annex 3 contains these same notes without redactions for the benefit of the Panel.

II. SUBMISSIONS

A. VARIATION OF PROTECTIVE MEASURES

5. On 5 February 2021, W04363 was granted full anonymity in these proceedings by the Pre-Trial Chamber.⁹ The Pre-Trial Judge indicated that this determination was ‘without prejudice to any future ruling by the relevant Trial Panel in this regard’.¹⁰

6. On 7 February 2023, the SPO requested to vary W04363’s protective measures so as to be able to lift the non-standard redactions to these materials.¹¹ This was largely predicated on W04363 having informed the SPO that his statements could be used (revealing his identity) if he did not have to go to court and testify.¹² The Defence did not file any response to this request.

7. On 4 April 2023, WPSO reported that they had spoken with W04363 and he indicated he did not consent to varying his protective measures.¹³

⁷ Rules 137-138, 155(1)(b).

⁸ The applicable law has been set out in prior submissions and decisions in this case. *See e.g.* Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01603, 14 June 2023, Confidential, paras 10-19.

⁹ 5 February 2021 Decision, KSC-BC-2020-06/F00190/CONF/RED, paras 84-92.

¹⁰ 5 February 2021 Decision, KSC-BC-2020-06/F00190/CONF/RED, para.79.

¹¹ Prosecution request to vary protective measures, KSC-BC-2020-06/F01261, 7 February 2023, Confidential.

¹² KSC-BC-2020-06/F01261, para.4.

¹³ WPSO Further Submissions Pursuant to Order F01328, KSC-BC-2020-06/F01420, 4 April 2023, Confidential (with annex), para.5. This report was requested by the Trial Panel. Order to WPSO, KSC-BC-2020-06/F01328, 1 March 2023, Confidential.

8. On 18 April 2023, the Panel rejected the SPO's request to vary W04363's protective measures due to W04363's lack of consent.¹⁴

9. Ever since, the SPO has made multiple unsuccessful further efforts to engage with W04363 regarding his protective measures and potential testimony.¹⁵

10. [REDACTED]. [REDACTED]¹⁶ [REDACTED].

11. Rule 81 permits the variation of previously granted protective measures, generally requiring the consent of the protected person.¹⁷ However, Rule 81(5) provides that '[i]n the absence of such consent, variation of protective measures may be ordered *proprio motu* if justified by exigent circumstances or where a miscarriage of justice would otherwise result'.

12. [REDACTED]. [REDACTED].

13. [REDACTED] makes it impossible for the Defence to question W04363 through the procedure contemplated when the Pre-Trial Judge found total anonymity to be a proportionate measure.¹⁸ [REDACTED]. Noting the SPO's long-indicated position that the objectively justifiable risks to the safety of W04363 can be sufficiently managed by tendering his evidence in writing,¹⁹ [REDACTED].

14. W04363 provides notable evidence concerning the Drenoc/Drenovac and Malishevë/Mališevo detention sites, which would be of significantly less value if the Defence did not have an opportunity to learn his identity and thereby properly

¹⁴ 18 April 2023 Decision, KSC-BC-2020-06/F01466, para.14.

¹⁵ Annex 2, pp.50-55.

¹⁶ [REDACTED].

¹⁷ Rule 81(5).

¹⁸ Rule 147; 5 February 2021 Decision, KSC-BC-2020-06/F00190/CONF/RED, para.91.

¹⁹ KSC-BC-2020-06/F01261, para.5. [REDACTED].

challenge his evidence. [REDACTED]. [REDACTED].²⁰ [REDACTED].
[REDACTED].²¹ [REDACTED].²²

15. In light of [REDACTED], the manageable security risks, the significance of his account, the rights of the Accused to challenge that account, and the other victims whose evidence (and potential reparations eligibility)²³ depend on the weight given to his evidence, a variation of W04363's protective measures is justified by exigent circumstances and/or to avoid a miscarriage of justice within the meaning of Rule 81(5). This variation would allow the SPO to lift the non-standard redactions to W04363's evidence so that it can be effectively tendered in writing pursuant to Rule 155(1). The SPO requests this variation accordingly.

B. RULE 155

16. Considering available counterbalancing factors and the ability of the Defence to challenge the Proposed Evidence upon disclosure of W04363's identity,²⁴ there is an opportunity for a full Rule 155 assessment. The absence of an opportunity for the Defence to confront a witness whose evidence is tendered through Rule 155 does not bar its admission, but is a factor that goes to the assessment of the weight of this evidence.²⁵

17. W04363's Proposed Evidence is relevant to prove the charges in the Indictment related to Drenoc/Drenovac and Malishevë/Mališevo.²⁶

²⁰ [REDACTED]. [REDACTED]. [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ See ECtHR, *Schatschaschwili v. Germany* [GC], 9154/10, Judgment, 15 December 2015, paras 126-131.

²⁵ Decision on Prosecution Second Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01864, 27 October 2023, Confidential, paras 11, 72; Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F02013, 15 December 2023, paras 12, 30; Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F02283, 3 May 2024, Confidential, para.66.

²⁶ [REDACTED].

18. *Relevance.* [REDACTED].²⁷ [REDACTED].²⁸ [REDACTED].²⁹ [REDACTED].³⁰
19. [REDACTED].³¹ [REDACTED].³² [REDACTED].³³ [REDACTED].³⁴
20. [REDACTED].³⁵ [REDACTED].³⁶ [REDACTED].³⁷ [REDACTED].³⁸
21. [REDACTED].³⁹ [REDACTED].⁴⁰
22. [REDACTED].⁴¹ [REDACTED].⁴²
23. [REDACTED].⁴³ [REDACTED].⁴⁴
24. [REDACTED].⁴⁵ [REDACTED].⁴⁶ [REDACTED].⁴⁷
25. [REDACTED].⁴⁸ [REDACTED].⁴⁹ [REDACTED].⁵⁰
26. *Authenticity and reliability.* The Proposed Evidence for W04363 is listed in Annex 1. [REDACTED]. The date, time and place of the interview, as well as all persons present, are reflected in the record.⁵¹ W04363 was given his rights as a witness, which

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED]. [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

he confirmed he understood.⁵² W04363 also confirmed at the end of the interview that he gave his statement truthfully and voluntarily.⁵³

27. [REDACTED].⁵⁴ [REDACTED]. [REDACTED].

28. Annex 1 also lists one document with four pages of exhibits associated to the SPO Interview to be tendered, namely two small sketches and two annotated pictures.⁵⁵ This document should be admitted as an inseparable and indispensable part of the Rule 155 statement, which would be less comprehensible or have lesser probative value without it.

29. *Fairness.* The probative value of W04363's Proposed Evidence is not outweighed by any prejudice. W04363 is a crime base witness who provides no evidence on the acts and conduct of the accused. [REDACTED]⁵⁶ [REDACTED]⁵⁷ [REDACTED].⁵⁸ The probative value of the Proposed Evidence is not outweighed by undue prejudice because the evidence: (i) may not be relied upon to a sole or decisive extent in reaching a conviction;⁵⁹ (ii) was recorded in a manner – including by different law enforcement bodies and at different times – that enables the Parties and Panel to assess the witness's demeanour and credibility; and (iii) is consistent with and corroborated by documentary evidence⁶⁰ and the statements of other witnesses in the case.⁶¹

III. CLASSIFICATION

30. This motion and its Annexes are confidential and *ex parte* pursuant to Rule 82(4) and W04363's current protective measures. A confidential redacted version of the motion will be filed, with only limited parts of the submissions accessible to preserve

⁵² [REDACTED].

⁵³ [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED]. [REDACTED]. [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ Rule 140(4)(a).

⁶⁰ [REDACTED].

⁶¹ [REDACTED]. [REDACTED].

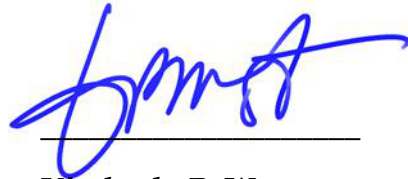
W04363's anonymity. Should the requested variation be granted, the SPO has no objection to reclassifying both the motion and Annexes 1-2 as 'confidential'.

IV. RELIEF REQUESTED

31. For the foregoing reasons, the SPO requests that the Trial Panel (i) vary W04363's protective measures to allow for disclosure of his identity; and (ii) admit the Proposed Evidence as identified above and in Annex 1.

32. Should the requested protective measures variation be granted, the SPO further requests that the information provided by WPSO [REDACTED]⁶² be reclassified as 'confidential'.⁶³

Word Count: 3133



Kimberly P. West

Specialist Prosecutor

Friday, 31 January 2025

At The Hague, the Netherlands.

⁶² [REDACTED].

⁶³ The SPO also stands ready to lift the non-standard redactions to W04363's materials – including the Proposed Evidence - and disclose upon any such ruling. The SPO has no objection to the Defence being given a further opportunity to respond to the Rule 155 relief should this occur.