



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: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 1 December 2022

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Public Redacted Version of 'Prosecution response to THAÇI request for unique investigative opportunities', KSC-BC-2020-06/F01096, dated 10 November 2022

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I. INTRODUCTION

1. The Request¹ seeks relief that has no legal basis and lacks adequate justification for any of the exceptional measures sought. The Witnesses² age and the potential length of the Prosecution case are – without more – inadequate to justify unique investigative opportunities under Rule 99 or the taking of depositions under Rule 100. The Request should be denied.

II. SUBMISSIONS

2. The primary relief sought – namely, hearing of the Witnesses by member(s) of the yet-to-be appointed trial panel³ – exceeds the powers vested in the Pre-Trial Judge. The President appoints a trial panel upon transfer of the case file⁴ and presentation of evidence thereafter – the sequence of which is set in the Rules⁵ – falls squarely within the powers of the trial panel.⁶ The primary relief in the Request should therefore be summarily dismissed.

3. In any event, contrary to the Order⁷ and the Rules,⁸ the Request fails to demonstrate that any measures under Rules 99 or 100 – which enable the Pre-Trial Judge to take necessary measures to exceptionally preserve evidence that may otherwise become unavailable – are justified.

¹ Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, KSC-BC-2020-06/F01068, 28 October 2022, Confidential ('Request'). See also Thaçi Defence Notice of Unique Investigative Opportunities, KSC-BC-2020-06/F01018, 7 October 2022 ('Notice').

² The eight witnesses identified in the Request are referred to herein as the 'Witnesses'.

³ Notice, KSC-BC-2020-06/F01018, paras 10-14; Request, KSC-BC-2020-06/F01068, para.13.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'), Articles 33(1)(b), 40(1); Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), Rules 98, 115. All references to 'Article' or 'Articles' and 'Rule' or 'Rules' herein refer, respectively, to the Law and Rules, unless otherwise specified.

⁵ Rule 127.

⁶ Article 40; Rules 116-119.

⁷ Transcript, 8 September 2022, pp.1582-1583 (requiring the Defence to, *inter alia*, 'justify the need for such measures') ('Order').

⁸ Rules 99(1)-(2), 100(1)-(2).

A. THE DEFENCE FAILS TO DEMONSTRATE THAT THE WITNESSES' EVIDENCE MAY BE UNAVAILABLE AT TRIAL

4. As the Defence has acknowledged,⁹ infirmity and poor health – not age alone – may be sufficient, in certain circumstances, to show that evidence may be unavailable subsequently.¹⁰ The Request relies solely on the Witnesses' age and the potential length of the Prosecution case, declaring that 'ill health [...] is not currently a factor in play in this case'.¹¹ It is, therefore, insufficient on its face.

5. While the Defence mentions in passing the 'varying degrees of health' of the Witnesses,¹² none of the annexes provides specific information concerning any health concerns¹³ and Annexes 3 and 4 indicate that at least two of the Witnesses are professionally active. Accordingly, the Request fails to demonstrate that the Witnesses' evidence may be unavailable at trial.

⁹ Transcript, 20 May 2022, p.1282 (THAÇI Defence Counsel: 'we have, at this point, nine people that we want to depose before trial, and we do that because of age considerations and, most importantly, deteriorating health'). See also Request, KSC-BC-2020-06/F01068, para.26 referring to ICTY, *Prosecutor v. Krajišnik and al.*, IT-00-39 & 40-PT, Decision to proceed by way of deposition pursuant to Rule 71, 16 November 2001; and ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Callixte Nzabonimana's motion for protection measures and deposition of Witness RW-42, 27 October 2009. In these cases, the Chambers noted, *inter alia*, the poor health condition or infirmity of the relevant witnesses and that the Defence had provided supporting medical evidence. See also ICTR, *Prosecutor v. Bagasora and al.*, ICTR-98-41-I, Decision on Prosecutor's motion for deposition of Witness OW, 5 December 2001, para.12.

¹⁰ Article 56 of the Rome Statute contains a similarly worded provision on unique investigative opportunities and related jurisprudence is therefore instructive. See ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Décision relative aux requêtes du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour les témoins MLI-OTP-P-0066, MLI-OTP-P-0004, MLI-OTP-P-0605, MLI-OTP-P-0582 et MLI-OTP-P-0537, 13 December 2018, para.44; ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Décision relative à la requête du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour le témoin MLI-OTP-P-0065, 30 January 2019, para.18. See, similarly, ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Confidential Redacted Version Decision on the prosecution's application pursuant to Article 56, 18 January 2013, para.17 ('As for health concerns, although these concerns are persistent and recurring ones for the Witness, the prosecution provides no supporting materials attesting that the Witness's undeniable existing emotional and behavioural difficulties are at risk of deteriorating to such an extent that he may no longer be available to testify at trial [...]'). ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Confidential Order regarding 'Prosecution's application pursuant to Article 56', 29 November 2012, para.3.

¹¹ Request, KSC-BC-2020-06/F01068, para. 26.

¹² Notice, KSC-BC-2020-06/F01018, para.6; Request, KSC-BC-2020-06/F01068, para.16.

¹³ While Annex 2 refers to the 'risk of age and fragile health' of W04147, no specific information is provided.

B. THE DEFENCE DOES NOT DEMONSTRATE THE NECESSITY OF ANY MEASURES

6. Even if the Defence demonstrated that the Witnesses' evidence may become unavailable at trial (which it did not), the Request fails to adequately explain why any of the proposed unique investigative opportunities are necessary.¹⁴ There is nothing unique in the circumstances presented in the Request, which would warrant any departure from the normal procedure. To the contrary, the situation presented in the Request – namely, the identification and interview of witnesses during Defence investigations, and the presentation of Defence witnesses during the Defence case, which follows the Prosecution case – is common in adversarial proceedings, including in Kosovo and before the Specialist Chambers ('SC'). The advanced age of certain witnesses is also inherent in the SC's mandate, which concerns crimes committed between 1998 and 2000. In this regard, the Specialist Prosecutor's Office ('SPO') intends to call a number of elderly witnesses. The proposed measures could unnecessarily and unjustifiably delay or impact the ability of such witnesses to testify.

7. While Rule 99-100 measures are significant, evidence preservation tools and the SPO does not object to appropriate use of such measures, they should only be granted when they are justified and necessary to ensure fair and expeditious proceedings. In this respect, the Defence has the ability to, itself, take steps to preserve the Witnesses' evidence and, in order to demonstrate that the Pre-Trial Judge's intervention is necessary, must show that it has exhausted available measures or explain why such measures are inadequate. For example, the Defence does not fully acknowledge its ability, subject to the applicable framework,¹⁵ to interview the Witnesses itself and at

¹⁴ Article 39(3) (providing that the Pre-Trial Judge may issue any orders, including pertaining to investigative opportunities and measures, 'as may be required'), 39(10) (providing that the Pre-Trial Judge may issue 'such orders as may be necessary' to assist in the preparation of a defence), 39(11) (providing the Pre-Trial Judge may, 'where necessary', provide for the preservation of evidence); Rules 99(1) ('the Pre-Trial Judge may take such measures as may be necessary'), 100(1)-(2).

¹⁵ The Contact Decision applies to W04147. *See* 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 ('Contact Decision').

the appropriate time, seek to call the Witnesses or admit their evidence under Rules 153-155.¹⁶

8. Moreover, the Defence does not fully engage with the fact that W04147 is an SPO witness who will be called live.¹⁷ Since October 2021,¹⁸ the Defence has known that it would have the opportunity to cross examine W04147, whom the SPO intends to call among the first 40 witnesses.¹⁹ The Defence could also seek to interview W04147 under the conditions of the Contact Decision, which provides for many of the same procedures that feature in Rule 100.²⁰ The Defence has not made any request to interview any witness under the Contact Decision, let alone W04147, and its request for any variation²¹ is therefore premature and unsubstantiated.

9. The importance of the evidence the Defence seeks to preserve is also a key factor going to necessity. The Defence generally argues that the evidence of the Witnesses is 'indispensable for Mr Thaçi's defence'.²² However, none of these Witnesses made it to any Rule 95(5)(c) witness list.²³ Moreover, while the Request was filed by the deadline set in the Order, the Defence waited until the very end of the pre-trial proceedings and does not explain why it did not request to hear the Witnesses earlier. In this respect, (i) the Defence states that the Witnesses were all senior international diplomats, administrators, and military figures;²⁴ (ii) related materials

¹⁶ While the same procedures and safeguards are not available for investigative interviews as for Rule 100 depositions, the Request lacks adequate explanation as to why investigative interviews and available admissibility provisions are insufficient at this stage and for the purposes stated in the Request.

¹⁷ Witness List, KSC-BC-2020-06/F01078/A04, 2 November 2022, Confidential, p.222.

¹⁸ Prosecution submission of preliminary witness list, KSC-BC-2020-06/F00542, 22 October 2021.

¹⁹ The SPO will file a provisional list of its first 40 witnesses by 18 November 2022. *See* Transcript, 8 September 2022, p.1584.

²⁰ *See* Contact Decision, KSC-BC-2020-06/F00854, para.212 (II)(d)-(j), (n) and (o).

²¹ Request, KSC-BC-2020-06/F01068, para.30. *See also* Transcript, 4 November 2022, pp.1645-1646.

²² Request, KSC-BC-2020-06/F01068, para.24.

²³ Pre-Trial Brief of Mr Hashim Thaçi, KSC-BC-2020-06/F01050, 21 October 2022, Confidential, para.17 (indicating that the Defence is not in a position to provide a list of potential witnesses).

²⁴ Request, KSC-BC-2020-06/F01068, para.15.

have long been disclosed;²⁵ and (iii) as of May 2022, the Defence had forecast its intention to request to depose these witnesses.²⁶ This delay in making the Request – coupled with the fact that the Defence does not propose to hear the Witnesses until February 2023 at the earliest and in one case, April 2023²⁷ – does not denote a sense of urgency on the part of the Defence to preserve this evidence, antithetical to the *raison d'être* of measures under Rules 99-100.

10. Finally, contrary to the Defence's contention, the fact that Witnesses interacted closely with THAÇI on a professional and, in some cases, personal level²⁸ does not necessarily render their evidence 'crucial'.²⁹ In this respect, the general summary of Witnesses' anticipated testimony in the Request³⁰ does not always correspond to the information provided in the annexes and, even taken at its best, the anticipated evidence of some Witnesses is marginally relevant.³¹ The Defence also inflates the nature and frequency of the direct contacts between certain Witnesses and THAÇI. For example, based on the information provided in the Annexes, [REDACTED] only interacted with THACI on one occasion³² and [REDACTED] on an unspecified 'number of occasions'.³³

11. Lacking in substance and reasons demonstrating the necessity of any unique investigative opportunity, the Request appears to be nothing more than a thinly veiled attempt to circumvent the applicable framework and impermissibly reverse the order

²⁵ For example, the SPO Statement of W04147 was disclosed to the THAÇI Defence on 12 December 2020 (Package 9) and the SPO statement of Daan Everts was disclosed on 2 February 2022 to the THAÇI Defence (Package 160).

²⁶ Transcript, 20 May 2022, pp.1282-1283; Thaçi Defence Submissions for the Twelfth Status Conference, KSC-BC-2020-06/F00804, 18 May 2022, para.12.

²⁷ Request, KSC-BC-2020-06/F01068, paras 32-34.

²⁸ Notice, KSC-BC-2020-06/F01018, para.7; Request, KSC-BC-2020-06/F01068, paras 15, 29, 36.

²⁹ Request, KSC-BC-2020-06/F01068, para.29.

³⁰ Request, KSC-BC-2020-06/F01068, para.35.

³¹ For example, the assertion that the Witnesses will testify on 'persons holding themselves out as KLA, but were in no way related to the KLA' has no corresponding basis in any of the Annexes. In relation to [REDACTED], the information provided at paragraphs 7 and 8 of Annex 1 do not fall within any of the themes listed at paragraph 35.

³² Annex 5, para.5.

³³ Annex 1, para.7.

of the case presentation prescribed, *inter alia*,³⁴ in Rules 124,³⁵ 126,³⁶ 127,³⁷ 129,³⁸ and 131.³⁹

III. CLASSIFICATION

12. This response is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

IV. RELIEF REQUESTED

13. For the foregoing reasons, the Pre-Trial Judge should reject the Request in its entirety.

Word count: 2100



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Thursday, 1 December 2022

At The Hague, the Netherlands.

³⁴ See also para.2 above (Rules 98, 115-119).

³⁵ Rule 124 sets out the procedure to follow to open the Case.

³⁶ Rule 126 details the sequencing of the opening statements before the presentation of evidence by the Specialist Prosecutor.

³⁷ Rule 127 prescribes a specific order in which the evidence shall be presented at trial, with the evidence of the Specialist Prosecutor being presented first.

³⁸ Rule 129 regulates the closing of the Specialist Prosecutor's Case.

³⁹ Rule 131 relates to the closing of the Defence Case. See also Rule 119 which provides a timeframe for the Defence to decide whether a Defense case will be presented and sets out the relevant procedure to follow in case it elects to do so.