



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: Acting Specialist Prosecutor

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Language: English

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Public Redacted Version of 'Prosecution Rule 107(2) request and related matters with strictly confidential and *ex parte* Annex 1-2', KSC-BC-2020-06/F01434, dated 6 April 2023

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I. INTRODUCTION

1. Pursuant to the Framework Decision,¹ Articles 35(2)(e)-(f) and 40(6) of the Law,² and Rule 107(2) of the Rules,³ the Specialist Prosecutor's Office ('SPO') requests relief from its disclosure obligations in relation to certain documents ('Rule 107 Documents') for which clearance has been denied by the [REDACTED].

2. As detailed below, minimal (if any) prejudice arises as counterbalancing measures, including the provision of similar information through summaries and other disclosed documents, adequately protect the rights of the Accused. The information contained in these documents – many of which fall outside the Indictment Period or summarise or analyse information already available to the Defence – is, for the most part, of a general, contextual, and/or internal nature and tangentially, if at all, relevant to the crimes charged in this case.

II. SUBMISSIONS

3. The SPO and [REDACTED] have been engaged in ongoing Rule 107 clearance consultations until late December 2022. Such consultations included multiple rounds, including follow-up requests pertaining to documents initially denied clearance. The [REDACTED] has cleared in excess of 650 documents (some with redactions) for disclosure in these proceedings. Clearance for 113 documents ('Rule 107 Documents') relevant to this case has been finally denied. Annex 1 contains an indexed table of each of these documents containing: (i) a brief description of each document; (ii) whether the document is dated inside or outside the indictment period; and (iii) proposed counterbalancing measures.⁴

¹ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020 ('Framework Decision'), paras 16, 22, 69-71, and 99(l).

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('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 Annex 2 contains copies of all 113 documents with a hyperlinked index for ease of reference.

A. THE NATURE OF THE RULE 107 DOCUMENTS

4. In general, the Rule 107 Documents consist of daily or weekly reports from different [REDACTED]. To the extent these documents are relevant, they are predominantly incriminatory. For example, they show the KLA⁵ was organised,⁶ armed,⁷ operated training bases,⁸ and had the ability to control territory.⁹

5. Of the documents falling within the Indictment Period, many relate to the humanitarian situation concerning refugees,¹⁰ aid for refugees and displaced persons,¹¹ the daily struggles of the refugees, corridors used for crossing, and refugee movements across borders,¹² and the coordination of international personnel with local officials.¹³ Others relate to, for example, the [REDACTED]'s mandate,¹⁴ security analysis and/or assessment of criminality such as kidnappings, which are generally not attributed to any group,¹⁵ tension between the Serb, Roma and Albanian communities,¹⁶ and attacks or crimes by Serbian forces unconnected to the charges.¹⁷ For such information, no prejudice arises from withholding. In this respect, many of the documents include or constitute internal [REDACTED] assessments and summaries that are sensitive by nature and not, in principle, subject to disclosure.¹⁸

6. Finally, only four documents have been assessed as containing potentially exculpatory information. Where information is deemed to be of a potential exculpatory nature, namely, internal divisions among the KLA's leadership,¹⁹

⁵ Kosovo Liberation Army ('KLA').

⁶ See e.g. item 32 in Annex 1.

⁷ See e.g. item 60 in Annex 1.

⁸ See e.g. item 3 in Annex 1.

⁹ See e.g. item 68 in Annex 1.

¹⁰ See e.g. item 46 in Annex 1.

¹¹ See e.g. item 31 in Annex 1.

¹² See e.g. item 32 in Annex 1.

¹³ See e.g. item 65 in Annex 1.

¹⁴ See e.g. item 5 in Annex 1.

¹⁵ See e.g. item 86 in Annex 1.

¹⁶ See e.g. item 94 in Annex 1.

¹⁷ See e.g. item 2 in Annex 1.

¹⁸ See Framework Decision, KSC-BC-2020-06/F00099, para.95 (Category 'C', which applies, *mutatis mutandis*).

¹⁹ See items 34 and 50 in Annex 1.

compliance with demilitarisation obligations,²⁰ or persons posing as KLA soldiers,²¹ summaries are proposed for disclosure as a counter-balancing measure.

B. WITHHOLDING THE RULE 107 DOCUMENTS CAUSES NO UNDUE PREJUDICE TO THE DEFENCE

7. The non-disclosure of the Rule 107 Documents is not prejudicial to the Defence. As set out above, (i) the majority of information contained in these documents is contextual in nature or constitutes internal [REDACTED] information; and (ii) many are from outside the Indictment Period, covering peripheral issues relating to this period such as government structures,²² local insecurity,²³ and party politics.²⁴

8. Where certain content has been identified as potentially material to Defence preparations, that information has been summarised in Annex 1. Such summaries are intended to be over-inclusive and focus on information pertaining to the charged crimes, witnesses, the Accused, and the KLA. These summaries serve to mitigate any prejudice that may arise through non-disclosure. Moreover, certain, similar information has already been disclosed to the Defence teams via Rule 102(3) and Rule 103 disclosure.²⁵

9. As such, no prejudice arises from the withholding of the Rule 107 Documents listed in Annex 1. Subject to the review of the Trial Panel – which also acts as a judicial safeguard – the application of Rule 107(2) is proportionate, having regard to the nature of the documents and the counterbalancing measures proposed.

²⁰ See item 27 in Annex 1.

²¹ See item 34 in Annex 1.

²² See e.g. item 103 in Annex 1.

²³ See e.g. item 104 in Annex 1.

²⁴ See e.g. item 97 in Annex 1.

²⁵ See e.g. items 23, 28, 29, 30, 31, 89, and 99 in Annex 1.

C. RULE 107 UPDATE

10. Over the course of the pre-trial phase of these proceedings, multiple Rule 107 information providers (including the [REDACTED],²⁶ [REDACTED],²⁷ [REDACTED],²⁸ [REDACTED],²⁹ [REDACTED],³⁰ [REDACTED], and certain third states) have cleared (sometimes with redactions or conditions) more than 23,000 documents for use and/or disclosure in these proceedings. For many of these documents (in particular, those provided by the [REDACTED]), a two or three step clearance process applied, as clearance was required not only by the direct information provider, but also by other organisations or third states. Approximately one percent of the documents provided to the SPO under Rule 107 conditions have been denied clearance. On a rolling basis, the SPO has requested and been granted disclosure relief in relation to such denied documents, including in light of available measures that adequately counterbalance any prejudice to the Defence. In this respect, the SPO (i) has prioritised potentially exculpatory and directly relevant information, including in relation to witnesses; and (ii) has endeavoured to complete the Rule 107 clearance process and related requests in advance of trial,³¹ with the exception of a limited number of outstanding matters, as outlined below.

11. First, the SPO, in consultation, as appropriate, with the relevant providers, is preparing additional Rule 107(2) request(s) concerning a relatively limited number of documents for which disclosure relief has been denied.³²

12. Second, in relation to those documents that remain pending, at the last status conference before the Pre-Trial Judge, the SPO provided an update concerning the status of Rule 107 clearances.³³ Of the less than 50 documents pending clearance

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, para.22.

³² These include 13 documents denied by the [REDACTED], one document denied by [REDACTED], four documents denied by the [REDACTED], and one document denied by the [REDACTED].

³³ Transcript (Status Conference), 4 November 2022, pp.1636-1641.

decisions at that time, clearance decisions in relation to 14 documents remain pending with [REDACTED] and three with [REDACTED]. Further, in relation to certain documents concerned by previous clearance decisions, the SPO is engaged in follow-up consultations in relation to 17 documents with [REDACTED] and 12 documents with the [REDACTED].³⁴ None of the documents pending clearance or ongoing consultation have been assessed as falling within the scope of Rule 103 or of direct relevance to the testimony of the first 12 witnesses.

13. By its very nature, the Rule 107 clearance process is dependent on external cooperation factors, beyond the control of the SPO. In this respect, limited disclosure continuing after the commencement of trial does not necessarily impact the ability of the Defence to prepare for trial.³⁵ Nevertheless, in order to mitigate any prejudice and subject to any further instructions by the Panel, the SPO undertakes to resolve the Rule 107 clearance matters outlined above – including any necessary Rule 107(2) application(s)³⁶ – by 1 May 2023.

III. CLASSIFICATION

14. This request and Annexes 1-2 are strictly confidential and *ex parte* in accordance with Rule 107(2). A confidential redacted version of the request and Annex 1 will be submitted. Pursuant to Rule 107, redactions are necessary to protect the identities of the information providers and the contents of the Rule 107 Documents that have not been authorised for disclosure.³⁷

³⁴ Such follow-up consultations concern documents previously denied clearance, as well as in relation to counterbalancing measures.

³⁵ See, for example, ICC, *Prosecutor v. Said*, ICC-01/14-01/21, Decision Setting the Commencement Date of the Trial and Related Deadlines, 21 February 2022, para.22; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Accused's Motion for Postponement of Trial, 26 February 2010, paras 38-40.

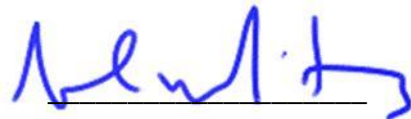
³⁶ To the extent any of the pending or outstanding consultations are not resolved by this date, the SPO will apply for disclosure relief, proposing any necessary counterbalancing measures.

³⁷ ERNs are redacted in Annex 1, as the documents all fall into the [REDACTED]. Accordingly, disclosure of such ERNs risks identifying the Rule 107 provider.

IV. RELIEF REQUESTED

15. For the foregoing reasons, the Trial Panel should relieve the SPO of its disclosure obligations in relation to the Rule 107 Documents.

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Alex Whiting

Acting Specialist Prosecutor

Wednesday 19 April 2023

At The Hague, the Netherlands.