

**In:** KSC-BC-2020-06  
**The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** Trial Panel II  
Judge Charles L. Smith, III, Presiding  
Judge Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence Counsel for Hashim Thaçi  
Defence Counsel for Rexhep Selimi  
Defence Counsel for Jakup Krasniqi

**Date:** 18 September 2023

**Language:** English

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**Public Redacted Version of ‘Thaçi, Selimi and Krasniqi Defence Response to  
‘Prosecution request for Rule 107 measures for W04147 and W04868’ (F01764)**

**With Confidential Annex 1’**

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## I. INTRODUCTION

1. The Defence for Hashim Thaçi, Rexhep Selimi and Jakup Krasniqi (altogether “Defence”) hereby responds to the Prosecution request for Rule 107 measures for W04147 and W04868<sup>1</sup> (thereafter the “Witnesses”), who are [REDACTED] (“Rule 107 Provider”). The SPO asks the Trial Panel to endorse the conditions defined by the Rule 107 Provider for their testimony, namely:

- 1) that the scope of their testimony be limited to: “(a) the structure, command and operations of the KLA; (b) the roles and responsibilities of particular individuals within the KLA, including their involvement in prisoner releases; and (c) general information about incidents involving detentions and mistreatment by individuals associated with the KLA or other topics covered by the witness statement”;<sup>2</sup> and
- 2) that the scope of cross-examination be limited to the scope of direct examination, as well as to issues regarding the credibility of the Witnesses; and that representatives of the Rule 107 provider be authorised to be present during their testimony.<sup>3</sup>

2. The conditions sought are restrictive and prejudicial to the Defence. Inclusion of the Witnesses on the SPO witness list does not justify the automatic acceptance of any conditions set by the Rule 107 Provider for their testimony. While the Rule 107 Provider may legitimately want to impose certain conditions on the testimony of [REDACTED], these conditions must be balanced against the right of the Accused. At stake is the Accused’s right to conduct a proper and meaningful cross-examination of a Rule 107 witness and, consequently, the equality of arms between the Parties and the fairness of the trial.

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<sup>1</sup> KSC-BC-2020-06/F01764, 4 September 2023 (“SPO Request”).

<sup>2</sup> *Ibid.*, para. 6.

<sup>3</sup> *Ibid.*, para. 7.

3. In terms of ensuring this balance, Rule 107(7) empowers the Trial Panel to exclude such evidence, if the conditions imposed by the Rule 107 Provider ultimately affect the fairness of the trial,<sup>4</sup> in particular if the Defence is deprived of the opportunity to cross-examine the witness on issues relevant for its case. For these reasons, the Defence files the present response to make a number of observations as regards the proposed Rule 107 conditions, and to request that the Trial Chamber take certain measures to ensure the Witnesses can present their evidence in a manner that accords with the rights of the accused to confront the case against them.

## II. APPLICABLE LAW

4. Article 6(3)(d) of the European Convention on Human Rights and Article 21(4)(f) of the KSC Law guarantee the right of the accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.<sup>5</sup>

5. Rule 143(3) of the Rules provides that cross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness; where the witness is able to give evidence relevant to the case of the cross-examining Party, he or she may be examined on the subject-matter of that case, provided that the cross-examining Party puts to that witness the nature of that case.<sup>6</sup>

6. Article 58 of the KSC Law provides that “Third States and international institutions may make an application for necessary measures to be taken in respect of the protection of their servants or agents and for the protection of their confidential or

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<sup>4</sup> KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

<sup>5</sup> See also Article 31(4) of the Kosovo Constitution.

<sup>6</sup> See also KSC-BC-2020-06/F01226/A01, Order on the conduct of proceedings, para. 106.

sensitive information. The Rules of Procedure and Evidence shall provide for the procedure for such applications.”

7. Rule 107 of the Rules defines the regime applicable to “protected information not subject to disclosure”:

(1) If the Specialist Prosecutor has custody or control over information which has been provided on a confidential basis and solely for the purpose of generating new evidence, such information and its origin shall be protected under Article 58 of the Law. The initial material or information shall not be disclosed without the consent of the provider and shall, in any event, not be tendered into evidence without prior disclosure to the Accused.

[...]

(3) If, after obtaining the consent of the provider of the initial material or information under paragraph (1), the Specialist Prosecutor chooses to present any of it as evidence, the Panel, notwithstanding Rule 121, Rule 122 and Rule 132, may not:

(a) order either Party to produce additional evidence received from the provider of the initial material or information;

(b) summons the provider of the initial material or information as a witness or order their attendance in accordance with the Rules, for the purpose of obtaining such additional evidence; or

(c) order the attendance of other witnesses or require the production of documents, for the purpose of obtaining such additional evidence.

(4) If the Specialist Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Panel may not compel that witness to answer any question relating to the information or its origin if the witness declines to answer on grounds of confidentiality.

(5) The right of the Accused to challenge the evidence presented by the Specialist Prosecutor shall remain **unaffected**, subject to the limitations contained in paragraphs (3) and (4).

[...]

(7) Nothing in paragraphs (3) and (4) shall affect the power of the Panel to **exclude this evidence or to take any measures necessary to ensure the fairness of the proceedings**.

8. This Rule does not appear to have been applied before the KSC yet with regard to eventual conditions imposed by a Rule 107 provider on the in-court testimony of a witness.

9. The ICTY Rules of Procedure and Evidence contained a similar provision, at Rule 70. Rule 70(g) provided that restrictions on the presentation of evidence shall not

affect a Trial Chamber's power "to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." On the basis of this Rule 70, in the *Milutinović et al.* case, the ICTY Trial Chamber dismissed a Prosecution request to add Wesley Clark to its witness list because two Rule 70 restrictions imposed by the United States would have rendered the trial unfair, namely, limiting the scope of the Defence's cross-examination of General Clark, and requiring the Defence to seek prior agreement from the United States if it wished to have that restriction varied.<sup>7</sup> The ICTY Appeals Chamber approved the Trial Chamber reasoning by considering, *inter alia*, that:<sup>8</sup>

18. [...] [A] trial Chamber may, as the Trial Chamber did here, assess the conditions placed upon proposed Rule 70 witness testimony and determine, **without hearing that testimony**, that it may not be admitted on the basis that the Rule 70 conditions would result in substantial unfairness to the trial, which outweighs that testimony's probative value.

[...]

20. [...] It was reasonable for the Trial Chamber to conclude this in light of the fact that the Rule 70 restriction, as presented, would unfairly limit the ability of the Defence to challenge General Clark's credibility and **prevent it from obtaining evidence from General Clark relevant to its case** as allowed under Rule 90(H)(i) of the Rules **unless it had obtained prior approval from the Rule 70 provider**. The provisions of Rule 90(H)(i) are important for effective realization of an accused's right to confront the witnesses brought against him, and their restriction would appear to be patently unfair. Thus, it was reasonable for the Trial Chamber to conclude that its only recourse was exclusion of General Clark's testimony.

[...]

22. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber held that "[t]here is no obligation on the Defence to indicate in advance the line of cross-examination to be pursued" and that "[t]o require them to seek permission for examination on a particular subject would oblige them to make disclosure not required by the Rules." It considered that this Rule 70 condition required it to exclude the proposed testimony under Rules 70(G) and 89(D) of the Rules. The Appeals Chamber finds that the Prosecution has failed to demonstrate a discernible error in this

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<sup>7</sup> ICTY, *Prosecutor v. Milutinović et al.*, Appeals Chamber, IT-05-87-AR73.1, Decision on interlocutory appeal against Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 20 April 2007, para. 6, referring to ICTY, *Prosecutor v. Milutinović et al.*, Trial Chamber, IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 16 February 2007, paras 26-31.

<sup>8</sup> ICTY, *Prosecutor v. Milutinović et al.*, Appeals Chamber, IT-05-87-AR73.1, Decision on interlocutory appeal against Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 20 April 2007, paras 18, 20, 22.

approach. While the Trial Chamber did not specifically state to whom the Defence would unfairly be obliged to make **disclosure with respect to its line of cross-examination**, it is clear that it would at least have to do so **to the Rule 70 provider and, consequently**, General Clark as **the witness**. The Rule 70 provider would have to inform General Clark that he is allowed to answer questions beyond the original scope of cross-examination stipulated and, as a result, any advantage gained by pursuing a new line of cross-examination would be mitigated or even lost given that General Clark would be prepared for it.

10. [REDACTED]:

[REDACTED].<sup>9</sup>

11. [REDACTED]:<sup>10</sup>

[REDACTED].

12. Subsequently, [REDACTED]:

[REDACTED].<sup>11</sup>

[REDACTED]<sup>12</sup>

### III. SUBMISSIONS

13. The Defence has no objection to the presence of representatives of the Rule 107 provider during the testimony of the Witnesses.

14. With regard to the limit to the scope of the Witnesses' testimony, the Defence understands that their testimony can cover *any* topic covered by their statements<sup>13</sup> or related to the KLA (structure, members, alleged crimes, *etc.*).

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<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> [REDACTED].

<sup>12</sup> *Ibid.*

<sup>13</sup> The SPO motion refers to "other topics covered by the witness statement" at para. 6(c).

15. Concerning the scope of cross-examination, the Rule 107 Provider requests, pursuant to the SPO, that it be limited to (1) the scope of direct examination, as well as to (2) issues regarding the credibility of the Witnesses.

16. The accused's right to cross-examine a witness is a core component of a fair trial. At this stage, the Defence does not object to the application to certain Rule 107 restrictions, in light of the Witnesses' relevance for the case, subject to the following observations. If, ultimately, the Defence's right to cross-examine these Witnesses is not sufficiently preserved, and in particular if the Defence is deprived of the opportunity to cross-examine the Witnesses on issues relevant for its case, this may warrant the exclusion of part or all of their evidence, to ensure the fairness of the proceedings, pursuant to Rule 107(7).

17. Concerning the scope of direct examination, a particular issue arises in light of the fact that W04147 and W04868 are both Rule 154 witnesses. W04147 is [REDACTED]. The SPO has applied to tender through Rule 154 his 30 pages SPO statement [REDACTED]<sup>14</sup> and 21 associated exhibits, 2 being not tendered and 1 having already been admitted as evidence.<sup>15</sup> The SPO has indicated that "to avoid mere repetition of admitted Rule 154 statements, the SPO intends to elicit brief oral testimony for a maximum of three hours on essential matters, in order to highlight, clarify, supplement, or explain certain aspects of W04147's evidence, in particular regarding his interactions with several of the Accused and [REDACTED]."<sup>16</sup>

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<sup>14</sup> 075522-075551.

<sup>15</sup> KSC-BC-2020-06/F01788, Prosecution motion for admission of evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 pursuant to Rule 154, 14 September 2023 ("SPO Rule 154 motion"); see Annex 4 related to W04147, listing his proposed Rule 154 statement and associated exhibits.

<sup>16</sup> *Ibid.*, para. 37.

18. In the course of *inter partes* discussions,<sup>17</sup> the SPO has confirmed that it shares the Defence understanding that, subject to the Trial Panel's approval of the SPO Rule 154 motion for W04147, "the restriction proposed in para. 7(a) would not prevent the Defence from cross-examining on the content of the Rule 154 statements since they would, effectively, be his direct examination."<sup>18</sup>

19. Therefore the Defence submits that the proposed Rule 107 restrictions should be interpreted as authorising the Defence to cross-examine W04147 on *any* issue raised in any statement and associated exhibits admitted as evidence through this witness pursuant to Rule 154.

20. W04147's proposed Rule 154 statement covers most, if not all the issues that the Defence may want to address with the witness. Nevertheless, some of them are discussed very briefly in the statement, such as the LDK, FARK, Serb attacks, NATO intervention, *etc.* The Defence should not be prevented from developing further these issues during his cross-examination, where relevant for the defence of the Accused and/or potentially exculpatory, for instance to clarify the relationship between the KLA and the LDK or FARK, the intensity and impact of the Serb attacks on the KLA, [REDACTED]. Similarly, while some [REDACTED], have not been commented by the witness in his SPO statement, the Defence should be authorised to cross-examine him with such documents, especially if they emanate from his office, were sent to his office, or refer to him, provided that they are directly related to the issues mentioned in his proposed Rule 154 evidence or direct examination.

21. W04868, [REDACTED], is also a Rule 154 witness. Nevertheless, the SPO has not filed any Rule 154 application for this witness yet. Therefore, the Defence has no

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<sup>17</sup> See Annex 1.

<sup>18</sup> The present submissions do not prejudice the Defence position with regard to the eventual admissibility of W04147's proposed Rule 154 statement and associated exhibits; the Defence will respond to the SPO Rule 154 motion in due course.

indication, as this stage, about the scope of his expected examination-in-chief beyond the two succinct paragraphs of his Rule 95 summary, *i.e.* that he will provide information about his knowledge of KLA's organization and the crimes that would have occurred [REDACTED].<sup>19</sup>

22. The Defence intends to cross-examine the Witnesses on additional topics or individuals not mentioned in the Witnesses' statements or anticipated examination-in-chief, and not related to their credibility. For instance, the Defence would be particularly interested in questioning W04147 on [REDACTED]. In such case, the Defence maintains that it should be allowed to contact the Rule 107 Provider *ex parte* in order to request leave to address such additional topics during its cross-examination, as suggested by [REDACTED] and by the SPO,<sup>20</sup> and hereby confirms that it does intend to do so as soon as practicable, if authorised by the Panel.

23. At the Defence request, and provided that the Defence acts diligently, the Trial Panel may order that the testimony of the Witnesses be postponed until the Rule 107 Provider notifies its response, to ensure the fairness of the proceedings, in accordance with Rule 107(7).<sup>21</sup>

24. If the Rule 107 provider ultimately refuses this request and, the Defence is deprived of the opportunity to cross-examine the Witnesses on additional topics particularly relevant and/or exculpatory for its case, then the Defence reserves its right to apply to exclude parts or all of the evidence of the Witnesses when the limits imposed upon its cross-examination would have rendered the trial unfair. [REDACTED]<sup>22</sup> W04147, who interacted with several Accused, alleged JCE members,

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<sup>19</sup> KSC-BC-2020-06/F01594/A02, Confidential Redacted Version of 'Amended List of Witnesses', p. 558.

<sup>20</sup> SPO motion, para. 9.

<sup>21</sup> Rule 107(7) provides that the Panel may "take any measures necessary to ensure the fairness of the proceedings."

<sup>22</sup> [REDACTED].

Serbian authorities and alleged victims during the Indictment period, is a significant witness for both the SPO and the Defence. The Defence has made repeated requests to interview him after his inclusion to the SPO witness list,<sup>23</sup> which were denied.<sup>24</sup> The Defence is entitled to conduct a proper and meaningful cross-examination of this witness to ensure the fairness of the trial. If the Defence is prevented by the conditions in place from cross-examining him on issues relevant to its case, this may warrant the exclusion of his testimony, the probative value of his evidence being then substantially outweighed by the need to ensure a fair trial.

#### IV. CONCLUSION

25. The implementation of Rule 107 should not jeopardise the fairness of the trial. In the instant case, in order to mitigate the prejudice caused to the Accused by the restrictive conditions sought by the Rule 107 Provider, the Defence requests the Trial Panel to find that:

- The ‘scope of direct examination’ of a Rule 154 witness includes not only his/her in-court testimony but also any statement and associated exhibits admitted as evidence through this witness pursuant to Rule 154;
- Consequently, the Defence is entitled to cross-examine a Rule 154 witness on *any* issues raised in his/her Rule 154 evidence and direct examination, including through additional documents directly related to such issues;

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<sup>23</sup> KSC-BC-2020-06/F01068, *Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities with confidential Annexes 1-8*, 28 October 2022 (see Annex 2 related to W04147); KSC-BC-2020-06/F01191, *Thaçi Defence Motion Regarding the Preservation of Defence Evidence*, 9 January 2023 (see Annex 2 related to W04147); KSC-BC-2020-06/F01345, *Thaçi Defence Request to vary the Contact Decision 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*, 6 March 2023.

<sup>24</sup> KSC-BC-2020-06/F01125, *Decision on Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities*, 29 November 2022; KSC-BC-2020-06/F01250, *Decision on Thaçi Defence Motion Regarding the Preservation of Evidence*, 2 February 2023 ; KSC-BC-2020-06/F01467, *Decision on Thaçi Defence Request to Vary the Contact Decision for W04147*, 18 April 2023.

- The Defence may contact the Rule 107 Provider *ex parte* to ask permission to cross-examine the Witnesses on certain additional topics outside of the scope of direct examination and which do not affect the Witnesses' credibility;
- Upon notification by the Defence of the submission of such a request to the Rule 107 Provider, the Trial Panel may order that the testimony of the Witnesses be postponed until the Rule 107 Provider notifies its response; and
- Should the Rule 107 Provider not allow the Defence to cross-examine the Witnesses on certain additional topics relevant to its case, the Trial Panel may consider that this warrants the exclusion of all or part of the Witness' evidence to ensure the fairness of the proceedings.

[Word count: 3.845 words]

Respectfully submitted on 18 September 2023

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

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