



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 for Rule 107 measures for W04147 and W04868'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to Articles 35(2)(f), 40(2), 40(6) and 58 of the Law,¹ and Rules 107 and 116(1) and (4) of the Rules,² the Specialist Prosecutor's Office ('SPO') requests the Trial Panel to order necessary and proportionate measures to facilitate the in-court testimony of W04147 and W04868 ('Witnesses'), both former employees of [REDACTED].

2. As detailed below, the Rule 107 Provider authorised the Witnesses' testimony subject to certain conditions, which are consistent with the Specialist Chambers' legal framework, are reasonable and have been employed in similar prior testimony before the International Criminal Tribunal for the former Yugoslavia ('ICTY'), [REDACTED]. As such, there is no prejudice to the Defence, which will be able to fully cross-examine the Witnesses.

II. BACKGROUND

3. In September 1998, W04147 was [REDACTED]. In this role, W04147 interacted with members of the KLA General Staff, LDK officials and other political figures. W04147 will give evidence about, *inter alia*, his knowledge of the KLA, its General Staff, [REDACTED], as well as other incidents of persons being detained by the KLA.³

4. W04868 is a former [REDACTED] who was deployed to the [REDACTED]municipality as part of [REDACTED]post-June 1999. W04868 will testify about, *inter alia*, his knowledge of the KLA's structure and crimes that occurred in his area of operation, as well as various [REDACTED] raids that were undertaken, including at [REDACTED].⁴

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer 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'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Annex 2 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief, Confidential Redacted Version of 'Amended List of Witnesses', KSC-BC-2020-06/F01594/A02, 9 June 2023, Confidential ('Witness List'), pp.229-230.

⁴ Witness List, KSC-BC-2020-06/F01594/A02, p.558.

III. SUBMISSIONS

5. The evidence of both Witnesses was initially provided to the SPO on a confidential basis and for lead purposes only, on the express understanding that Rule 107 applied. The Rule 107 Provider has since authorised: (i) the disclosure and use of such evidence in proceedings before the Specialist Chambers;⁵ and (ii) both Witnesses to testify, subject to the following two sets of conditions being applied. Such conditions are consistent with and are appropriate means of giving effect to Rule 107 (in particular, subparagraphs (3)-(5)),⁶ which provides, *inter alia*, that the Panel may not order the production of additional evidence, beyond that authorised by the Rule 107 provider,⁷ and may not compel a witness to answer any question relating to Rule 107 information or its origin if such witness declines to answer on grounds of confidentiality.⁸

6. First, in terms of testimonial substance, the Rule 107 Provider authorised the Witnesses' testimonies on the condition that the scope would be limited to the following topics:

- 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

⁵ The Rule 107 Provider has also confirmed that the relevant material is and will remain subject to Rule 107 protections and that such Rule 107 information may not be used for any other purpose without express authorisation.

⁶ In this respect, the Panel has authority under Article 40(6)(d) to provide for the protection of confidential information, under Article 40(6)(f) and Rule 116(4)(b) to provide for the protection of witnesses, and under Article 40(2) and Rule 116(1) to take all necessary measures to facilitate fair and expeditious proceedings. Article 58 also provides that Third States '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 sensitive information.'

⁷ See Rule 107(3), (5). Rule 107(3) also provides that the Panel may not summons the Rule 107 Provider for the purpose of obtaining of such additional evidence or order the attendance of other witnesses or the production of documents, for the purpose of obtaining such additional evidence.

⁸ See Rule 107(4), (5).

- c. General information about incidents involving detentions and mistreatment by individuals associated with the KLA or other topics covered by the witness statement.

7. Second, regarding the modalities of questioning, the Rule 107 Provider authorised testimony provided that the Panel adopt the following measures for both Witnesses:⁹

- a. 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
- b. That representatives of the Rule 107 provider be authorised to be present during the testimonies of the Witnesses.

8. The above measures are lawful, proportionate, and fully respect the right of the Defence to effectively cross-examine the Witnesses.

9. Notably, under the equivalent rule at the ICTY, Rule 70,¹⁰ similar measures to those listed above were authorised [REDACTED]¹¹ and [REDACTED]¹² cases. Importantly, the above measures cause no prejudice to the Defence, as their right to effectively cross-examine – including on issues relating to credibility – remains intact. As the Trial Chamber in *Milutinović et al.* noted, ‘most matters favourable to the Defence case, which it might wish to raise, will be connected to the issues arising during examination-in-chief or during the challenges posed to the witnesses’ credibility.’¹³ Nevertheless, if there are any further matters it wishes to raise, it may seek advance permission from the Rule 107 Provider or alternative relief from the

⁹ The Rule 107 Provider also requested that the Panel order that the Witnesses may decline to answer questions on the grounds of confidentiality. However, as this is already expressly provided under Rule 107(4)-(5), additional relief is unnecessary.

¹⁰ The ICTY Appeals Chamber has held that ICTY Rule 70 is ‘the basis of cooperation with the Prosecution for governments and other bodies who possess confidential and sensitive information which could assist its investigations.’ See ICTY, *Prosecutor v. Milošević*, Appeals Chamber, IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para.9.

¹¹ [REDACTED].

¹² [REDACTED].

¹³ *Milutinović* Decision, para.32.

Panel.¹⁴ Finally, the presence of Rule 107 Provider representatives, in addition to safeguarding confidential information and related interests,¹⁵ may ultimately facilitate timely resolution of any matters pertaining to, *inter alia*, the requested measures that arise during testimony.¹⁶

IV. CLASSIFICATION

10. This filing is confidential, as it refers to confidential Rule 107 matters and information concerning witnesses whose identities are not public.

V. RELIEF REQUESTED

11. For the foregoing reasons, the Trial Panel should authorise the measures set out at paragraph 6-7 above for the Witnesses' testimonies.

Word Count: 1,272

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Ward Ferdinandusse

Acting Deputy Specialist Prosecutor

Monday, 4 September 2023

At The Hague, the Netherlands.

¹⁴ *Milutinović* Decision, paras.33-34.

¹⁵ *Milutinović* Decision, para.35 (noting that the Prosecution may not be sufficiently informed to identify questions where sensitive interests of the provider might be adversely affected).

¹⁶ *See, similarly*, ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Urgent Prosecution Motion for Protective Measures and Conditions for Witnesses RM-055, RM-120, RM-163, and RM-176 Pursuant to Rule 70, 30 November 2012, para.13.