



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

Date: 18 March 2024

Language: English

Classification: Public

Public Redacted Version of 'Prosecution reply to joint Defence response to fourth Rule 155 motion'

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I. INTRODUCTION

1. The Joint Response¹ raises arguments that ignore the applicable law and previous findings of this Trial Panel ('Panel'). Pursuant to Rule 76 of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby replies to certain new issues raised in the Joint Response. The evidence proposed in the Fourth Motion³ satisfies all applicable criteria and should be admitted for a proper determination of the charges in this case.

II. SUBMISSIONS

2. Contrary to the Joint Response,⁴ inconsistencies do not bar admission; rather, they can be considered when ultimately assigning weight.⁵ Further, evidence going to proof of the Accused's acts and conduct is admissible under Rule 155.⁶ Even where the Defence suggests that certain evidence is uncorroborated,⁷ it should not be excluded at the point of a Rule 155 decision,⁸ but should instead be considered in light of the entire evidentiary record at the end of the trial proceedings.⁹

¹ Joint Defence Response to Prosecution Fourth Motion for Admission of Evidence Pursuant to Rule 155, KSC-BC-2020-06/F02173, 8 March 2024, Confidential ('Joint Response').

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 Prosecution fourth motion for admission of evidence pursuant to Rule 155, KSC-BC-2020-06/F02152, 26 February 2024, Confidential ('Fourth Motion').

⁴ See e.g. Joint Response, KSC-BC-2020-06/F02173, paras 10, 23-25, 57, 62, 69, 74.

⁵ See e.g. Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01603, 14 June 2023, Confidential ('First Decision'), para.50.

⁶ First Decision, KSC-BC-2020-06/F01603, paras 15, 116; Decision on Prosecution Second Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01864, 17 October 2023, Confidential ('Second Decision'), para.41; Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F02013, 15 December 2023 ('Third Decision'), para.54. *Contra* Joint Response, KSC-BC-2020-06/F02173, paras 6-7, 10-11.

⁷ See e.g. Joint Response, KSC-BC-2020-06/F02173, paras 12-16, 36, 70.

⁸ *Contra* Joint Response, KSC-BC-2020-06/F02173, paras 18, 33-35, 70.

⁹ First Decision, KSC-BC-2020-06/F01603, paras 15, 86, 88, 116, 137; Second Decision, KSC-BC-2020-06/F01864, para 41, 46; Third Decision, KSC-BC-2020-06/F02013, paras 33, 54. See, similarly, ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, paras 52-53, 62. For purposes of considering the reliability of the statement, as well as of other corroborative evidence, the whole statement should be admitted,

3. The Defence's submissions about the volume and number of statements submitted¹⁰ do not take into account the circumstances of Rule 155 witnesses and the fact that the number or overlap of multiple statements facilitate a fair and proper assessment of the evidence of witnesses who are not available for cross-examination in this case.¹¹ The Defence does not offer any convincing argument to the contrary.

4. Below, the SPO addresses certain specific issues with regard to the evidence of W00067, W00900, W04358, W01504, and W01914.

A. W00067

5. The ECtHR has repeatedly emphasised that a strong and considerable safeguard, counterbalancing prejudice that may arise from admission of an absent witness's statement is the availability of corroborative evidence, such as testimony of persons to whom the witness reported the events after their occurrence.¹² As acknowledged in the Joint Response, the Defence had the opportunity to question, *inter alia*, W00498,¹³ to whom W00067 reported the events immediately after her release and on a regular, even daily, basis thereafter.¹⁴ Considering the Defence's ability to cross-examine, *inter alia*, W00498, and make submissions and tender

including any specific allegations contained therein (even those that go to the acts and conduct of the Accused) that are not corroborated. *See e.g.* ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Gvero's Motion for the Admission of Evidence Pursuant to Rule 92 *quater*, 3 February 2009, para.31; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Redacted Version of "Decision on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*", 19 February 2009, paras 47-50.

¹⁰ Joint Response, KSC-BC-2020-06/F02173, para.29.

¹¹ *See* ECtHR, *Schatschaschwili v. Germany* [GC], 9154/10, Judgement, 14 December 2015 ('*Schatschaschwili* Judgement'), paras 125-131.

¹² *Schatschaschwili* Judgement, para.128; ECtHR, *McGlynn v. UK*, 40612/11, Decision, 16 October 2012, para.24; ECtHR, *Al-Khawaja and Tahery v. UK*, 26766/05 & 22228/06, Judgment, 15 December 2011, para.156. *See also* fn.9 above. While the Defence claims that the evidence of witnesses whose source was W00067 is not corroborative, the ECtHR, including in the decisions cited, has held that such evidence is corroborative and may support the reliability of an absent witness's statement. *Contra* Joint Response, KSC-BC-2020-06/F02173, para.16.

¹³ As noted in the Joint Response, the Defence also had the opportunity to examine W02153.

¹⁴ *See* Transcript, 20 February 2024, pp.12518-12519.

evidence of its own version of events and about W00067's credibility,¹⁵ W00067's statements, including the portions challenged by the Defence, should be admitted, enabling a full assessment at the conclusion of the trial. In this respect, the extensive submissions in the Joint Response demonstrate the Defence's ability to adequately test and challenge W00067's evidence, parts of which were used in questioning W00498 and W02153, and therefore already form part of the record.¹⁶ For these same reasons, the SPO does not oppose the Defence's request that all of W00067's statements, including those not tendered in the Fourth Motion, be admitted.¹⁷

B. W00900

6. The Defence objects to the admission of the SITF interview of W00900 on the grounds of reliability, alleging that the transcript of the interview is not a verbatim record of what the witness said, and requesting the Panel to order the SPO to produce a new transcript.¹⁸ The SPO reviewed the portions of the transcript – which is an English translation of the Serbian transcript¹⁹ – and the audio-video recording of the interview indicated by the Defence and considers that, as the transcript is an accurate record of the interview and contains no factual errors, the production of the new transcript is not warranted.

C. W04358

7. The Joint Response is simply misleading as to the claimed centrality of W04358's account,²⁰ even if such arguments were sufficient to bar Rule 155 admission,

¹⁵ *Schatschaschwili* Judgement, para.131.

¹⁶ Joint Response, KSC-BC-2020-06/F02173, paras 10-26.

¹⁷ Joint Response, KSC-BC-2020-06/F02173, para.27.

¹⁸ Joint Response, KSC-BC-2020-06/F02173, para.38.

¹⁹ While the audio-video record has been tendered, for completeness, the SPO will also disclose the Serbian transcript.

²⁰ Joint Response, KSC-BC-2020-06/F02173, para.47.

which they are not. W04358 is a crime base witness with no evidence concerning the acts and conduct of the Accused.

8. The Defence assertion that W04358's evidence is sole and decisive in relation to the case of [REDACTED]²¹ – [REDACTED]²² – [REDACTED],²³ [REDACTED]. While there is no requirement pursuant to Rule 155 that 'the vast majority' of a witness's evidence is corroborated by other evidence,²⁴ W04358's evidence is also supplemented by several adjudicated facts in relation to [REDACTED].²⁵

9. The lack of any actual prejudice is particularly clear when considering that the [REDACTED].²⁶ That [REDACTED] detainees [REDACTED] were mistreated appears to be largely uncontested, with recent cross-examination questions posed by Veseli Defence counsel referring to [REDACTED] as a '[REDACTED]'²⁷ and that '[REDACTED]' occurred there.²⁸

10. The alleged inconsistencies in W04358's statements are no reason to exclude the witness's evidence.²⁹ Discrepancies and contradictions between accounts of the same and/or different witnesses are matters pertaining to the weight of the evidence, and do not *per se* render the evidence inadmissible.³⁰

²¹ Joint Response, KSC-BC-2020-06/F02173, [REDACTED].

²² [REDACTED].

²³ Joint Response, KSC-BC-2020-06/F02173, [REDACTED].

²⁴ First Decision, KSC-BC-2020-06/F01603, para.86. *Contra* Joint Response, KSC-BC-2020-06/F02173, para.55.

²⁵ Annex 2 to Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534/A02, 17 May 2023, pp.[REDACTED].

²⁶ [REDACTED].

²⁷ Transcript, [REDACTED].

²⁸ Transcript, [REDACTED].

²⁹ *Contra* Joint Response, KSC-BC-2020-06/F02173, paras 62, 64.

³⁰ Second Decision, KSC-BC-2020-06/F01864, 17 October 2023, paras 83, 92; Third Decision, KSC-BC-2020-06/F02013, paras 13, 27, 51, 55.

D. W01504

11. Contrary to the Defence's challenges on the witness's unavailability,³¹ W01504's health issues are severe and his condition has further deteriorated since 2018, not allowing him to testify. The SPO defers to the Trial Panel as to whether the strictly confidential and *ex parte* filing³² should be made available to the Defence, and reiterates it does not oppose its reclassification.

12. The excerpt of W01504's SPO interview that [REDACTED],³³ should not be excluded from W01504's evidence.³⁴ [REDACTED] around the relevant time is corroborated by other evidence.³⁵ W01504 also identifies his source of knowledge in relation to this matter, and such hearsay is admissible. Finally, as repeatedly held by the Panel, Rule 155 does not foreclose the admission of evidence that goes to proof of the acts and conduct of the Accused, which can be assessed at the end of the trial in light of the entirety of the evidence.

13. The statements comprising W01504's Rule 155 Statement are not redundant.³⁶ In particular, W01504's [REDACTED] statements form an integral part of his SPO interview since they are discussed therein at length and W01504 made clarifications and corrections to them.³⁷ W01504's SPO interview would be less comprehensible and incomplete without the underlying [REDACTED] statement. Finally, W01504's

³¹ Joint Response, KSC-BC-2020-06/F02173, para.65.

³² KSC-BC-2020-06/F02097; KSC-BC-2020-06/F02097/A03.

³³ 054060-TR-ET Part 3 RED2, p.10, line 9 to p.11, line 4.

³⁴ *Contra* Joint Response, KSC-BC-2020-06/F02173, [REDACTED].

³⁵ For example, as alleged in the Pre-Trial Brief and supported by the evidence cited therein, [REDACTED]. *See* Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief', KSC-BC-2020-06/F01594/A03, 9 June 2023, Confidential, [REDACTED].

³⁶ *Contra* Joint Response, KSC-BC-2020-06/F02173, para.71.

³⁷ *See* Fourth Motion, KSC-BC-2020-06/F02152, para.46 and footnote 162 which contains references to the corrections and clarifications W01504 made in his SPO interview about his [REDACTED] statements.

[REDACTED] statement is very limited in length, and its four pages would not unnecessarily burden the record.³⁸

E. W01914

14. The Defence's objections to the admission of W01914's evidence³⁹ are without merit. W01914 is a crime base witness and does not provide information about any of the Accused. His evidence is – as the Defence acknowledges – connected with the evidence of other witnesses,⁴⁰ [REDACTED].⁴¹

15. With regard to the alleged discrepancies in W01914's statements,⁴² comparable objections were previously raised unsuccessfully.⁴³ The Defence fails to explain why the alleged discrepancies in W01914's evidence should be treated differently and render his evidence *per se* inadmissible.

16. Finally, the Defence challenges W01914's inability to provide testimony *viva voce*,⁴⁴ but disregards evidence, including from W01914, concerning his serious health issues.⁴⁵ The Panel possesses sufficient information to reach an informed conclusion about W01914's inability to testify.⁴⁶

III. CLASSIFICATION

17. This reply is classified as confidential pursuant to Rule 82(4).

³⁸ *Contra* Joint Response, KSC-BC-2020-06/F02173, para.71.

³⁹ Joint Response, KSC-BC-2020-06/F02173, para.73.

⁴⁰ Joint Response, KSC-BC-2020-06/F02173, para.73 and [REDACTED].

⁴¹ [REDACTED].

⁴² Joint Response, KSC-BC-2020-06/F02173, para.74.

⁴³ Third Decision, KSC-BC-2020-06/F02013, paras 13, 27, 30.

⁴⁴ Joint Response, KSC-BC-2020-06/F02173, para.75.

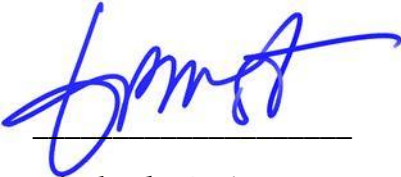
⁴⁵ Fourth Motion, KSC-BC-2020-06/F02152, para.58 and fn.200.

⁴⁶ Fourth Motion, KSC-BC-2020-06/F02152, para.59 and fn.199, *citing* KSC-BC-2020-06/F02097/A02.

IV. RELIEF REQUESTED

18. For the foregoing reasons and those given previously, the Fourth Motion should be granted.

Word Count: 1,928



Kimberly P. West

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Monday, 18 March 2024

At The Hague, the Netherlands.