



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 reply relating to Rule 153 motion F02299'

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## I. INTRODUCTION

1. Pursuant to Rule 76,<sup>1</sup> the Specialist Prosecutor's Office ('SPO') hereby replies to the Response,<sup>2</sup> which fails to show any convincing reasons why the Motion<sup>3</sup> should not be granted in its entirety. The evidence tendered in the Motion is admissible as it is relevant, *prima facie* authentic, and has probative value which is not outweighed by any prejudice. Moreover, the proposed evidence satisfies all of the relevant conditions for admission in lieu of oral testimony pursuant to Rule 153.

## II. SUBMISSIONS

2. Despite the Defence's claims to the contrary,<sup>4</sup> the Rules and accompanying caselaw which explicitly allow and encourage the admission of evidence in lieu of oral testimony make it clear there is no 'right' to cross-examination, and no party can simply 'elect' to cross-examine any witness it chooses.<sup>5</sup> Although the modality used to adduce evidence is, in principle, up to the calling Party, the Panel has discretion to decide whether cross-examination is warranted based on the potential prejudice to the Accused and regardless of any particular showing from the seeking Party.<sup>6</sup> When the Defence does not seek to cross-examine a witness – as is the present case for W00686, W02765, W04694, W04782, and W04788<sup>7</sup> – the interest of the Accused in confronting

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<sup>1</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rule' or 'Rules').

<sup>2</sup> Joint Defence Response to Prosecution motion for the admission of the evidence of witnesses W00686, W02765, W04491, W04694, W04782, W04788, W04820, and W04837 pursuant to Rule 153 (F02299), KSC-BC-2020-06/F02321, 21 May 2024, Confidential ('Response').

<sup>3</sup> Prosecution motion for the admission of the evidence of witnesses W00686, W02765, W04491, W04694, W04782, W04788, W04820, and W04837 pursuant to Rule 153, KSC-BC-2020-06/F02299, 8 May 2024, Confidential ('Motion').

<sup>4</sup> See *e.g.* Response, KSC-BC-2020-06/F02321, para.4.

<sup>5</sup> See *e.g.* Rule 153; Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153, KSC-BC-2020-06/F01904, 3 November 2023, Confidential ('First Rule 153 Decision'), paras 7-13 (setting out how it is the Panel, not the Parties, which decides whether a witness must appear for cross-examination). Compare Rule 127(3) (referencing the availability of cross-examination to an opposing Party 'if it elects to exercise this right,' but *only* for witnesses 'called before the Trial Panel.').

<sup>6</sup> *Prosecutor v. Mustafa*, Decision on the submission and the admissibility of evidence, SC-BC-2020-05/F00169, 25 August 2021, para.33; First Rule 153 Decision, KSC-BC-2020-06/F01904, para.34.

<sup>7</sup> Response, KSC-BC-2020-06/F02321, para.3. See *e.g.* Transcript, 7 May 2024, T.15425, 15467-15468.

the evidence of such witnesses in court is no longer at issue, and admitting the evidence pursuant to Rule 153 is clearly in the interests of justice.<sup>8</sup> That a witness's evidence pertains to issues of relatively lesser importance likewise does not justify denying admission and, instead, arguably weighs in favour of admission pursuant to Rule 153.<sup>9</sup>

3. Furthermore, and as set out in more detail below, the Defence's arguments against admission either concern matters which go to the weight to be assigned to the evidence and not to its admission, or address factors which are immaterial for assessing the admissibility of evidence pursuant to Rule 153.

4. Finally, the Motion was filed pursuant to a broader SPO initiative to streamline its case. This has included efforts to convert witnesses from Rule 154 to Rule 153 in order to save valuable court time.<sup>10</sup> It is immaterial to the merits of the Motion that the SPO previously envisaged certain witnesses as falling under Rule 154,<sup>11</sup> and it would be antithetical to streamlining the SPO's case to deny the admission of evidence under Rule 153 because such evidence was previously considered under Rule 154.

A. W00686

5. The Defence makes no submission that it wishes to cross-examine W00686.<sup>12</sup> That this evidence does not relate to persons central to the charges, but does relate to a charged crime site, supports its admission pursuant to Rule 153.<sup>13</sup> Moreover, the hearsay nature of W00686's evidence is a matter going to the weight and probative value to be assigned to the evidence in light of all evidence adduced during trial, and

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<sup>8</sup> First Rule 153 Decision, KSC-BC-2020-06/F01904, paras 11-13. *See also* Transcript, 7 May 2024, T.15425, 15467-15468.

<sup>9</sup> *See* Rule 153(1)(b)(ii) (a factor militating *against* admission is when the evidence 'pertains to an issue central to the Special Prosecutor's case').

<sup>10</sup> Prosecution notice of witness changes, KSC-BC-2020-06/F02325, 21 May 2024, Confidential.

<sup>11</sup> *Contra* Response, KSC-BC-2020-06/F02321, paras 15, 29-30.

<sup>12</sup> Response, KSC-BC-2020-06/F0221, para.3.

<sup>13</sup> *Contra* Response, KSC-BC-2020-06/F02321, para.5.

not to its admissibility at this stage of the proceedings.<sup>14</sup> Finally, to suggest that admitting W00686's modest evidence in writing creates a 'burden' on the case file<sup>15</sup> is, at best, inaccurate.

#### B. W02765

6. The Defence makes no submission that it wishes to cross-examine W02765.<sup>16</sup> The alleged inconsistencies raised in the Response<sup>17</sup> should be considered as matters going to the weight of the evidence and not its Rule 153 admissibility.<sup>18</sup>

7. As to the Defence's alternative proposal to redact portions of W02765's evidence as it relates to Hashim Thaçi, the references identified<sup>19</sup> are general and immaterial, and can hardly be said to qualify as 'acts and conduct of the accused'. These portions may be relevant to a full assessment of the witness's evidence and credibility, and may not be relied upon to prove the acts and conduct of the Accused, thus redaction is unjustified and unnecessary. The SPO has no objection, however, to admitting W02765's evidence with this section redacted, if considered appropriate by the Panel.

#### C. W04491

8. That W04491 is a former Rule 154 witness is immaterial to whether his evidence satisfies the admissibility criteria of Rule 153.<sup>20</sup> The contradictions raised by the

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<sup>14</sup> *Contra* Response, KSC-BC-2020-06/F02321, para.6; in this regard *see* Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153, KSC-BC-2020-06/F02111, 8 February 2024, Confidential ('Second Rule 153 Decision'), paras 22, 41.

<sup>15</sup> *Contra* Response, KSC-BC-2020-06/F02321, para.7. The English and Albanian transcripts of W00686's interview tendered for admission each contain only 33 pages, the Serbian transcript contains only 34 pages, *see* 077584-TR-AT Part 1 RED, 077584-TR-ET Part 1 RED2, and 077584-TR-ST Part 1 RED.

<sup>16</sup> Response, KSC-BC-2020-06/F02321, para.3.

<sup>17</sup> Response, KSC-BC-2020-06/F02321, paras 10-12.

<sup>18</sup> Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 153 (F02111), KSC-BC-2020-06/F02164, 5 March 2024, Public ('Decision on Impugned Decision'), para.14.

<sup>19</sup> Response, KSC-BC-2020-06/F02321, para.14, referring to 078044-TR-ET Part 3 RED, p.30 line 11-p.31 line 1.

<sup>20</sup> *See* paragraph 4 above.

Defence in relation to W04491 are matters to be considered when weighing his evidence in light of all the evidence at trial, and do not preclude admission pursuant to Rule 153.<sup>21</sup> Further, contradictions between statements are not, without more, sufficient grounds for requiring cross-examination of the witness if Rule 153 criteria are met.<sup>22</sup>

9. A witness's unwillingness to testify may inform a calling Party's decision to pursue admission under Rule 153, but such unwillingness is wholly extraneous to the merits of a Rule 153 motion.<sup>23</sup> W04491 is relied upon solely as a Likoc/Likovac crime-base witness, fitting within a larger group of witnesses for which the Defence have already cross-examined or did not seek to cross-examine in the Response to the Motion.<sup>24</sup>

10. As to an alleged 'improper attempt to selectively exclude evidence',<sup>25</sup> the Motion only tenders the most significant portions of W04491's prior statements so as to not create a burden on the case record.<sup>26</sup> What is tendered is in conformity with Rule 153 requirements, but the SPO has no objection to the Panel admitting any additional statements of W04491 if it so chooses in order to weigh the tendered Rule 153 evidence.

#### D. W04788

11. Not only does the Defence make no submission that it wishes to cross-examine this witness,<sup>27</sup> it fails to substantiate any objection to his Rule 153 evidence. For the reasons provided in the Motion, W04788's evidence plainly falls under the Rule 153 criteria and should be admitted in full.

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<sup>21</sup> *Contra* Response, KSC-BC-2020-06/F02321, paras 18-20, 24.

<sup>22</sup> Second Rule 153 Decision, KSC-BC-2020-06/F02111, para.50; Decision on Impugned Decision, para.14.

<sup>23</sup> *Contra* Response, KSC-BC-2020-06/F02321, para.25.

<sup>24</sup> *See* Motion, KSC-BC-2020-06/F02299, paras 8-9.

<sup>25</sup> *See* Response, KSC-BC-2020-06/F02321, para.22.

<sup>26</sup> *See* Response, KSC-BC-2020-06/F02321, para.7.

<sup>27</sup> Response, KSC-BC-2020-06/F02321, para.3.

## E. W04820

12. That W04820 is a former Rule 154 witness is immaterial to whether his evidence satisfies the Rule 153 criteria.<sup>28</sup> The Defence's arguments as to [REDACTED]'s credibility are clearly matters going to the weight to be assigned to his evidence, and the SPO categorically rejects the suggestion that [REDACTED] is not a credible, reliable witness. The depth of the Defence's challenge to [REDACTED]'s evidence betrays that it, in fact, *did* have a full opportunity to examine another witness in relation to the matters covered in W04820's evidence.<sup>29</sup>

13. There is nothing to suggest that W04820's evidence on a matter such as [REDACTED] is meaningfully different from other witnesses which the Defence has been able to cross-examine.<sup>30</sup> Moreover, the cumulative nature of W04820's evidence weighs in favour of admitting his evidence under Rule 153, for the reasons provided in the Motion.<sup>31</sup>

## F. W04837

14. The reasons the Defence want W04837 to appear go well beyond what he is relied on for the SPO's case. W04837 is principally relied on for his evidence concerning [REDACTED], on which he provides evidence cumulative to witnesses the Defence does not even seek to cross-examine [REDACTED].<sup>32</sup> That the witness is only relied upon to provide limited evidence on [REDACTED]<sup>33</sup> means his evidence relates primarily to the crime base, which is a factor weighing in favour of admitting the

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<sup>28</sup> See paragraph 4 above.

<sup>29</sup> In this regard, it is notable that for all the specific challenges to [REDACTED] in footnote 60 of the response, the Defence does not expressly challenge the [REDACTED] evidence of [REDACTED] which is most relevant to W04820.

<sup>30</sup> *Contra* Response, KSC-BC-2020-06/F02321, para.32. In this regard, *see*, for example: Transcript, 29 April 2024, T.15116 (W03865); Transcript, 24 April 2024 (W04741), T.14802; Transcript, 3 April 2024, T.14386 (W04739); Transcript, 17 January 2024, T.11273 (W01493).

<sup>31</sup> See Rule 153(a)(1)(i).

<sup>32</sup> Response, KSC-BC-2020-06/F02321, para.2.

<sup>33</sup> Motion, KSC-BC-2020-06/F02299, paras 36, 39; Response, KSC-BC-2020-06/F02321, paras 35-37.

evidence pursuant to Rule 153.<sup>34</sup> Noting the points in this witness's evidence on which the SPO seeks to rely, abstract references to KLA crimes or potential bias on the part of the witness are matters which can be considered by the Panel when weighing his Rule 153 evidence.

15. W04837's [REDACTED] is also not the part of the evidence on which the SPO seeks to primarily rely.<sup>35</sup> Noting that the Defence has already had and will have the opportunity to examine other witnesses who are familiar with [REDACTED],<sup>36</sup> the Defence's desire to examine W04837 on such matters – which are extraneous to the purposes for which the SPO is tendering W04837's evidence – does not justify denying admission or preventing the SPO from streamlining its case and helping to expedite the proceedings by using Rule 153.

### III. CLASSIFICATION

16. This submission is filed as confidential pursuant to Rule 82(4) and because it contains information concerning protected witnesses.

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<sup>34</sup> Paragraph 2 above.

<sup>35</sup> Response, KSC-BC-2020-06/F02321, para.34.

<sup>36</sup> See e.g. [REDACTED].

IV. RELIEF REQUESTED

17. For the foregoing reasons and those previously given, the Motion should be granted in its entirety.

**Word Count:** 1901



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Kimberly P. West

Specialist Prosecutor

Monday, 27 May 2024

At The Hague, the Netherlands.