

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
Judge Christoph Barthe,
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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Public Redacted Version of Joint Defence Response to Prosecution motion for the admission of the evidence of witnesses W03808, W03812, W03815, W03870, W04785, and W04786 pursuant to Rule 153

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I. INTRODUCTION

1. The Defence for Messrs. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (“Defence”) hereby responds to Prosecution motion for the admission of the evidence of witnesses W03808, W03812, W03815, W03870, W04785, and W04786 pursuant to Rule 153 (“SPO Motion”).¹
2. As noted by the SPO,² the Defence and the SPO have engaged *inter partes* regarding the admission of evidence which is subject of this response. Consequently, the Defence does not object to the admission, pursuant to Rule 153, of the proposed evidence of W03808, W04785, and W04786.
3. The Defence objects to the admission of W03812, W03815, W03870’s proposed evidence in written form. Considering that this evidence is relevant to (i) the SPO’s core allegations concerning the KLA structure in [REDACTED] and other locations, and (ii) the credibility of other evidence already heard by the Trial Panel; and further, (iii) considering the manner in which certain evidence was elicited, as well as (iv) issues of authenticity and reliability; the prejudicial effect of admitting such evidence clearly outweighs probative value.

II. SUBMISSIONS

A. W03812

4. The Defence opposes the admission of W03812’s evidence pursuant to Rule 153, and seeks to cross examine W03812.
5. W03812’s evidence is not suitable for Rule 153 admission because, first, it is fundamentally inconsistent with the evidence of other witnesses who have

¹ KSC-BC-2020-06/F02322, Prosecution motion for the admission of the evidence of witnesses W03808, W03812, W03815, W03870, W04785, and W04786 pursuant to Rule 153 with confidential Annexes 1-6, 21 May 2024.

² SPO Motion, paras 32-33.

already testified and, second, it goes to the core of the SPO's allegations about the KLA structure in [REDACTED] and other locations, and hence is important to the determination of critical issues in this case.

6. W03812's evidence is closely related to the evidence of [REDACTED], in relation to the alleged detentions of [REDACTED] and indictment victims [REDACTED]. It is further relevant to matters of KLA structure and organisation raised by [REDACTED] the latter of whom is yet to testify and is an important witness for the Defence. W03812 will provide evidence regarding his role within [REDACTED], which is a significant matter for the Defence.
7. The witness joined the KLA in June 1998 and remained a part of the KLA throughout the war. He provides evidence about KLA restructuring, the duties of various departments [REDACTED], the [REDACTED] at the battalion level, KLA communications, and KLA training.³ The Defence observes that W03812 has been the subject of discussion several times throughout this trial.⁴ Moreover, his SPO interview is referenced 23 times in the SPO's Pre-Trial Brief.⁵ Given his significance to the SPO's case, the Defence is not in a position to waive its right to cross-examine the witness.
8. In order for the Panel to properly determine the truth and address certain inconsistencies concerning the matter of [REDACTED], as well as issues surrounding KLA structure and organisation as compared with the accounts of various witnesses, some of whom have already testified in Court, it is necessary that this witness appears for cross-examination.

³ See especially, 088941-TR-ET Parts 2-4.

⁴ Transcript of Hearing, [REDACTED].

⁵ KSC-BC-2020-06/F01594/A03, ANNEX 3 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief, Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief', 9 June 2023 ("SPO PTB"), paras [REDACTED].

9. Should the witness' evidence be deemed admissible pursuant to Rule 153, the Defence would separately oppose the admission of the second proposed associated exhibit⁶ through this witness. Its alleged author, [REDACTED], appears to have written this document for the purpose of a commemorative event, some seven years after the war's end.⁷ Given this fact, coupled with the absence of any citations contained therein, the Defence submits that this document is not sufficiently reliable for admission.
10. Moreover, W03812 is not competent to authenticate this item or otherwise enhance its reliability. W03812 is not the author of the document, has not seen it before, lacks the knowledge to comment on much of its content,⁸ was not shown or asked to comment on most of the item's content, and disagrees with other propositions contained therein.⁹ Most significantly, the witness explicitly contradicts the purpose for which it is being offered, namely to establish the existence of an organised structure in the [REDACTED] KLA during 1998.¹⁰

B. W03815

11. The SPO's request to admit W03815's statements and associated exhibits through Rule 153 should be denied.¹¹

⁶ Annex 2 to the SPO Motion, Item 2: 083226-083248 RED2, pp.083227-083239 and its corresponding English translation 083227-083248-ET RED2, pp.083227-083239, discussed at 088941-TR-ET Part 2 RED, pp. 10-16.

⁷ 083226-083248 RED2, p. 083239.

⁸ He is not, for instance, able to comment on what role [REDACTED] held. 088941-TR-ET Part 2, p.13.

⁹ For instance, as far as he is aware [REDACTED] (088941-TR-ET Part 2, page 12) and there was [REDACTED] (088941-TR-ET Part 2, p.14).

¹⁰ 088941-TR-ET Part 2, page 11.

¹¹ Annex 3 to the SPO Motion, Annex 3 to Prosecution motion for the admission of the evidence of witnesses W03808, W03812, W03815, W03870, W04785, and W04786 pursuant to Rule 153, 21 May 2024. SITF00032782-SITF00032791 RED, pp. SITF00032782- SITF00032784, SITF00032787- SITF00032791; 089115-TR-ET Part 1 RED, 089115-TR-ET Part 2 RED; 089115-TR-ET Part 3 RED, 089115b Part 1, 089115b Part 2, 089115b Part 3 and SITF00032785- SITF00032786- ET ("W03815 evidence").

12. W03815's [REDACTED] statement,¹² should not be considered authentic or reliable. During his SPO interview, W03815 reiterated that this statement had not been read back to him, and that he signed it upon being asked [REDACTED].¹³ W038015 further raised specific concerns about the integrity of the evidence recorded therein.¹⁴
13. In considering these concerns raised by the witness, it must be noted that the [REDACTED] officer failed to provide their name, CP# and signature on all attestations that the statement was "read (or read in native language to the stating person) and confirmed by the stating person".¹⁵ Thus, the mere fact that "W03815's [REDACTED] statement is recorded in an official [REDACTED] template and contains W03815's signatures, including as acknowledgement of his rights and obligations" as submitted by the SPO¹⁶ is not sufficient to confirm the authenticity and reliability of this document.
14. W03815's evidence touches upon a live issue directly relevant to the charges in the case. W03815, along with [REDACTED], is a unique source of information regarding the alleged order given by [REDACTED], [REDACTED] and other circumstances of alleged detention of [REDACTED].
15. During testimony, [REDACTED] identified by the SPO as a corroborating witness, was questioned about this alleged order and surrounding circumstances by the Parties and by the Trial Panel.¹⁷ [REDACTED] denied any personal knowledge of the order and involvement in the arrest, and emphasised

¹² SITF00032782-SITF00032791 RED ("W03815's [REDACTED] statement").

¹³ 089115-TR-ET Part 2 RED, p.9, 089115-TR-ET Part 3 RED, p.21-23.

¹⁴ 089115-TR-ET Part 3 RED, p.21-23.

¹⁵ SITF00032782-SITF00032791 RED, pp. SITF00032787- SITF00032791.

¹⁶ SPO motion, para. 18.

¹⁷ Transcript of Hearing, [REDACTED].

that W03815 and [REDACTED] would be better placed to provide evidence relevant to the matter.¹⁸

16. In light of the SPO's articulated intent to rely solely on [REDACTED] statement and SPO interview and to disregard his in-court evidence on the matter,¹⁹ the Panel should not be denied the opportunity to holistically assess the evidence related to these allegations by hearing W03815 and allowing the Defence the opportunity to test his evidence through cross-examination.
17. Additionally, the SPO intends to rely on W03815's evidence regarding a range of structural issues which are key to the present case. For instance, the SPO relies in its Pre-Trial Brief on W03815's evidence regarding the establishment and structure of [REDACTED],²⁰ and the functions and composition of a [REDACTED]²¹.
18. W03815's [REDACTED] statement was put to [REDACTED] in court.²² When asked to provide evidence on the structure of [REDACTED], and W03815's role within the KLA,²³ [REDACTED] stated that he had no knowledge of this matter and could not answer for W03815.²⁴ Noting the importance of the matters upon which the SPO intends to rely with W03815's evidence, and that [REDACTED] declined to provide evidence in this regard, the Defence should not be denied the opportunity to cross-examine in court W03815 on the issue.
19. W03815's SPO interview was conducted in a leading manner and contained comments by the SPO representatives which would not have been allowed had the evidence been heard orally. In particular, the SPO confronted W03815 with

¹⁸ Transcript of Hearing, [REDACTED].

¹⁹ Transcript of Hearing, [REDACTED].

²⁰ SPO PTB, para. [REDACTED].

²¹ SPO PTB, para. [REDACTED], SPO motion, para. 17.

²² Transcript of Hearing, [REDACTED].

²³ Transcript of Hearing, [REDACTED].

²⁴ Transcript of Hearing, [REDACTED].

accusations that his evidence did not mirror certain facts that they claimed to have already in possession of, implying untruthfulness on his behalf.²⁵ The investigators also made it clear to W03815 that it was expected for him to be aware of certain facts,²⁶ telling him that it was “hard to believe” that he was not in a possession of such information.²⁷ Indeed, W03815 complained of being subjected to “psychological pressure” by the SPO representatives.²⁸

20. It is relevant in this regard that the Trial Panel previously took a note of a similar issue regarding the admission W04820’s SPO interview under Rule 154, concluding that provided the Defence would have an opportunity to cross-examine the witness, its admission would not cause unfair prejudice to the Accused.²⁹ With this in mind, and in the interests of justice, it is necessary to provide the Defence an opportunity to cross-examine W03815.
21. The SPO erroneously claims that W03815’s evidence is “cumulative to other witness and documentary evidence”,³⁰ referring to seven witnesses,³¹ four of whom have already testified.³² However, none of these witnesses have provided meaningful evidence regarding the alleged arrest, detention and transfer of [REDACTED]. For instance, both [REDACTED] either did not have direct knowledge of the above and based their testimony on hearsay or did not testify as to who ordered the arrest and/or transfer.³³ Further, as submitted above, [REDACTED] denied having personal knowledge about the circumstances of the

²⁵ 089115-TR-ET Part 3 RED, pp. 22-23.

²⁶ 089115-TR-ET Part 3 RED, p. 4.

²⁷ 089115-TR-ET Part 3 RED, pp. 6-8, p. 2- 4, 20-23. *See also*, 089115-TR-ET Part 3 RED, pp. 2- 4, 20-23.

²⁸ 089115-TR-ET Part 3 RED, p. 23.

²⁹ KSC-BC-2020-06/F02044, Decision on Prosecution Motion for Admission of Evidence of Witnesses W01163, W02144, W02749, W04230, W04445, W04489, W04576, W04739, W04741, and W04820 Pursuant to Rule 154 and Related Request, 8 January 2024, para. 85.

³⁰ SPO motion, para. 19 including fn. 24.

³¹ SPO motion, para. 20 including fn. 24 which lists [REDACTED].

³² [REDACTED] have already provided their in-court testimonies.

³³ Transcripts of testimony of [REDACTED]; Transcripts of testimony of [REDACTED].

alleged arrest and/or transfer.³⁴ The remaining three, [REDACTED], who could have potentially provided substantial evidence on the above matter are submitted [REDACTED] for admission under Rule 153.

22. The SPO further submits that W03815's evidence is corroborated by witnesses "whom the Accused have confronted or will be able to confront, including through cross-examination", namely, [REDACTED].³⁵ However, the evidence of both W03815 and [REDACTED], the only two witnesses alleged to have personally participated in the transfer of [REDACTED], as noted above, has been submitted [REDACTED] for admission under Rule 153. By virtue of this fact, both W03815 and [REDACTED] are, or may be, in possession of unique evidence on the matter, and denying the Defence the opportunity of cross-examination would deprive the Accused of a the opportunity "to examine, or have examined, the witness against him or her".³⁶
23. While it is imperative that the Defence not be deprived of this right to confrontation for the reasons outlined above, given the overlap between the evidence of W03815 and W03812, it *may* not be necessary for both witnesses to appear for cross-examination. Thus, the Defence respectfully requests that the Panel defer the admission of W03815 and W03812 pursuant to Rule 153 until it has heard the evidence of one or the other, and is satisfied that the rights of the Defence have been preserved.

C. W03870

24. The Defence opposes the admission of W03870's evidence pursuant to Rule 153, and seeks to cross examine W03870.

³⁴ See para. 15 above.

³⁵ SPO motion, para. 21 including fn. 25.

³⁶ Article 21(4)(f) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

25. W03870's evidence is not suitable for Rule 153 admission because, first, it is fundamentally inconsistent with the evidence of other witnesses who have already testified and, second, it goes to the core of the SPO's allegations about the KLA structure in [REDACTED] and other locations, and hence is important to the determination of critical issues in this case.
26. First, W03870's evidence that [REDACTED] issued alleged orders for the arrest and detention of individuals is inconsistent with evidence already before the Panel. Specifically, [REDACTED] himself denied knowledge of the individual cases and denied giving any orders to arrest more generally. [REDACTED] evidence in this regard has been corroborated in Court by other witnesses.³⁷ The Defence should be thus granted an opportunity to test W03870's evidence on this matter in Court.
27. W03870's evidence is also closely related to the evidence of [REDACTED], in relation to the alleged detentions of [REDACTED] and indictment victims [REDACTED]. In order that the Panel can properly determine the truth and address the inconsistencies about this incident in the accounts of the various witnesses, some of whom have already testified in Court, it is necessary that the relevant witnesses are cross-examined.
28. Second, W03870 says that he was a member of the KLA in variety of roles and at different structural levels. For instance, in or around July 1998, he was an ordinary soldier.³⁸ In around October 1998, he was responsible for the remobilisation of soldiers in [REDACTED]. In February 1999, W03870 appears to be associated with the [REDACTED]. W03870's evidence thus includes information on the structure and organisation of the KLA, reporting lines

³⁷ Transcript of Hearing, [REDACTED]; Transcript of Hearing [REDACTED].

³⁸ 088944-TR-ET Part 1, p. 16.

between different levels of the alleged KLA structure, appointments of the KLA members, and information that he received about General Staff meetings.

29. W03870's evidence includes reference to the training he was given by [REDACTED] when joining the KLA and the training that W03870 was instructed to give to other soldiers.³⁹ He was appointed to his role in [REDACTED], who instructed him to provide trainings in [REDACTED] to KLA soldiers engaged in different areas.⁴⁰ The nature, content and extent of any such training are relevant issues and are topics which would be explored in cross-examination.
30. During the SPO interview, W03870 was shown pages of a document describing the background of the KLA [REDACTED], which the SPO seeks to admit through W03870 pursuant to Rule 153. The Defence objects to such admission as W03870 told the SPO he has never seen this document before, was not able to confirm and has disagreed with the relevant parts of its content. The document has been shown to, but not authenticated by [REDACTED]. [REDACTED] could not authenticate the document either and disputed its content in Court.
31. The SPO requests, pursuant to Rule 153, to admit handwritten notes from a Notebook page, allegedly taken at one of W03870's lectures.⁴¹ In his SPO interview, W03870 commented that he had never seen the notes before and does not know who authored them.⁴² Furthermore, W03870 was neither asked about nor commented on the mentions of the collaborators in the notes. The Notebook [REDACTED] and the SPO provides no information about its author. It cannot fairly be admitted in writing pursuant to Rule 153 without the Defence having

³⁹ See 088944-TR-ET Part 1, pp. 11, 13; 088944-TR-ET Part 2, pp. 14-17.

⁴⁰ 088944-TR-ET Part 1, p. 22.

⁴¹ Annex 4 to the SPO Motion, p. 5; U001-2310-U001-2319-ET, p. U001-2318.

⁴² 088944-TR-ET Part 2, pp. 27-29.

the opportunity to explore with W03870 the content, authorship and context to these notes.

32. Finally, it is evident from the SPO's disclosure that there are other relevant aspects of the witness' evidence which need to be clarified in oral evidence. In particular, W03870 sought to distinguish between an 'order to arrest' and an 'order for verification'.⁴³ Precisely what he means can only be clarified in oral evidence. Further, W03870 has indicated in the same official note that he did not know any of the Accused during the war, which confirms that oral evidence is required to clarify his evidence about the reporting structure at relevant locations.

III. CLASSIFICATION

33. This filing is submitted confidentially because it responds to a filing with the same classification⁴⁴ and contains confidential information about witnesses.

IV. CONCLUSION AND RELIEF REQUESTED

34. For the foregoing reasons, the Defence respectfully requests that the Trial Panel
- (i) deny the admission of W03870's evidence and associated exhibits pursuant to Rule 153;
 - (ii) deny the admission of both (1) W03815's evidence and associated exhibits; and (2) W03812's evidence pursuant (including deny the admission of 083226-083248 RED2, pp.083227-083239 and its corresponding English translation 083227-083248-ET RED2, pp.083227-083239) to Rule 153, at this stage;

⁴³ See 107757-107757.

⁴⁴ SPO motion, para. 34.

- (iii) invite the SPO to call either W03815 or W03812 pursuant to Rule 154; and,
- (iv) after the completion of the evidence of the witness selected by the SPO, authorize further submissions from the Defence on the admissibility of the evidence of the non-called witness pursuant to Rule 153.

Word count: 3106

Respectfully submitted on 31 May 2024,



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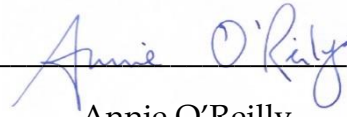


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