



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 F02383'

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I. INTRODUCTION

1. The Response¹ fails to show any convincing reasons why the Motion² should not be granted. The evidence tendered in the Motion is admissible as it satisfies the Rule 153³ conditions, and is relevant, *prima facie* reliable, and has probative value which is not outweighed by any prejudice.

2. As a preliminary matter, the Specialist Prosecutor's Office ('SPO') notes that for one interview tendered in the Motion, there exist further revised versions of its three parts, which it seeks to replace for the versions tendered in the Motion.⁴ These revised versions do not contain any changes impacting the submissions previously made.

II. SUBMISSIONS

3. Many of the Defence objections are premised on a purported need to call witnesses live, not to test the evidence that the SPO tenders and seeks to rely upon, but to elicit further evidence on topics relevant to the respective Defence cases. Often, the Defence merely speculates that a witness will be able to provide (further) information on such topics, does not demonstrate that the witness is in a unique position to provide such evidence, and/or provides no reason why the additional information it wishes to elicit from a particular witness could not have been – or in the future could not be – elicited through cross-examination of other, often better-suited

¹ Joint Defence Response to Prosecution motion for the admission of the evidence of witnesses W00994, W02397, W02398, W02517, W02586, W02587, W03861, W04399, W04452, and W04044 pursuant to Rule 153, KSC-BC-2020-06/F02418, 28 June 2024, Confidential ('Response').

² Public Redacted Version of 'Prosecution motion for the admission of the evidence of witnesses W00994, W02397, W02398, W02517, W02586, W02587, W03861, W04399, W04452, and W04044 pursuant to Rule 153, KSC-BC-2020-06/F02383/RED, 14 June 2024 ('Motion').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rule' or 'Rules').

⁴ 068595-TR-ET Parts 1-3 Revised 1 RED replace 068595-TR-ET Parts 1-3 Revised RED3; 068595-TR-AT Parts 1-3 Revised 1 RED replace 068595-TR-AT Parts 1-3 RED3; 068595-TR Parts 1-3 Revised 1 RED replace 068595-TR Parts 1-3 Revised RED.

witnesses who have already testified or will testify.

4. In any event, rather than use valuable courtroom time to attempt to elicit evidence relevant to the Defence case, the Defence has other means at its disposal, including interviews under the terms of the Contact Decision,⁵ which would enable it to investigate and collect evidence relevant to its case. Once it collects such evidence, the Defence is free to use it, as appropriate, during the remainder of the Prosecution case or as part of any Defence case.⁶ In such circumstances, where the requirements for Rule 153 admission are met, there is no reason to require a witness to appear for examination based only on Defence speculations about what (further) evidence that witness might or might not be able to give. To consider otherwise, would impede expeditiousness and unjustifiably disrupt the order of evidence presentation.⁷ Indeed, it is primarily the responsibility of the SPO to select the manner of presentation of its witnesses,⁸ which logically includes not only the order of witnesses,⁹ but also the proposed mode of testimony.¹⁰

A. W02397

5. The topics identified by the Defence for cross-examination are either minor inconsistencies or go well beyond what he is relied upon for the SPO's case.¹¹ W02397

⁵ Decision on Framework for Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Part or of a Participant, KSC-BC-2020-06/F00854, 24 June 2022 ('Contact Decision').

⁶ See, *similarly*, Decision on Thaçi Defence Motion Regarding the Preservation of Evidence, KSC-BC-2020-06/F01250, 2 February 2023 ('Evidence Preservation Decision'), paras 23, 29-32, 40.

⁷ See, *similarly*, Evidence Preservation Decision, KSC-BC-2020-06/F01250, paras 19-20, 39.

⁸ Transcript, 15 February 2023, p.1909.

⁹ Public Redacted Version of 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/RED, 8 February 2024 ('Second Rule 153 Decision'), para.22.

¹⁰ The Panel retains the discretionary power to admit Proposed Evidence pursuant to Rule 153. See *e.g.* Public Redacted Version of Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153, KSC-BC-2020-06/F01904/RED, 3 November 2023 ('First Rule 153 Decision'), para.13.

¹¹ Response, KSC-BC-2020-06/F02418, para.4.

and [REDACTED], [REDACTED], corroborate each other on core points of evidence.¹² Further, the Defence seeks to cross-examine W02397 on [REDACTED]'s statement that he briefly saw W02397 at the [REDACTED],¹³ an issue it could have explored during [REDACTED]'s cross-examination. These minor inconsistencies are matters to be considered when weighing the evidence at the conclusion of the trial, and do not preclude admission pursuant to Rule 153.

6. Moreover, nothing indicates that W02397 will be able to provide further significant or unique information on the issues identified by the Defence. The Defence has already had, and will have, the opportunity to cross-examine other witnesses on those topics,¹⁴ and will be able to present evidence and witnesses on such matters during the Defence case.

B. W02517

7. The Defence's preference to have either W02517 or W02549 testify to explore certain issues falling outside the topics covered in W02517's statement does not warrant rejection of the Rule 153 application.

8. The topics the Defence wishes to explore¹⁵ have little or no bearing on the SPO's case.¹⁶ In addition, two other KFOR witnesses have already appeared and been cross-examined on the same type of events and time period discussed by W02517.¹⁷ In this

¹² This includes the location of the detention site, the appearance of the room in which they were detained and beaten, and the injuries they sustained, all of which were later documented in a [REDACTED].

¹³ Response, KSC-BC-2020-06/F02418, paras 6-7.

¹⁴ For example, the Defence has already cross-examined, among others, [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] on such topics, and will have the opportunity to examine other witnesses on such topics in future.

¹⁵ Response, KSC-BC-2020-06/F02418, paras 8-10.

¹⁶ The SPO understands issues (ii) and (iii) in para.9 of the Response to concern the conditions of detention for those detained by KFOR and the degree to which those detained by KFOR were provided a fair trial.

¹⁷ W03881 and W02540.

respect, and contrary to the Defence suggestion, W03881 gave evidence on these topics at length on cross-examination.¹⁸ The Defence submission that W02517 would be able to provide any further clarity on these topics beyond his existing statements is purely hypothetical.¹⁹ While the relevance of certain topics the Defence wishes to explore remains unclear at best, the Defence has had and will have ample opportunity to elicit evidence relevant to its case, in particular during the Defence case, as well as during examination of future Prosecution witnesses, such as W02135, who is in a position to provide evidence on KFOR's role and activities during the same period W02517 was deployed in Kosovo. Accordingly, no prejudice results from the admission of W02517's evidence through Rule 153, regardless of the Panel's determination in respect of other witnesses' evidence.²⁰

9. The Response is also misleading as to the relevance of W02517's associated exhibits.²¹ Contrary to the Defence assertion, which is based on a partial reading of W02517's SPO interview, W02517 commented on the challenged document extensively, rendering the item relevant to a proper understanding of W02517's role at the time, and specifically to what he witnessed on the ground.²²

C. W02586

10. The SPO does not seek to admit the entire KFOR reports listed in the Response,²³

¹⁸ Transcript, 22 May 2024, pp.15676-15681.

¹⁹ Response, KSC-BC-2020-06/F02418, para.10. See also First Rule 153 Decision, KSC-BC-2020-06/F01904/RED, para.34.

²⁰ There is nothing the legal framework limiting the number of written statements the Panel may admit pursuant to Rule 153. See e.g. *Specialist Prosecutor v. Shala*, Decision on the submission and admissibility of non-oral evidence, KSC-BC-2020-04/F00461, 17 March 2023, para.36. See also ICTY, *Prosecutor v. Prlić*, IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92bis, 1 July 2010, paras 16, 31-33.

²¹ Response, KSC-BC-2020-06/F02418, para.11.

²² Although W02517 did not recall exactly the content of the document at first (see 068306-TR-ET Part 3, p.22), he was still able to recognise his signature on the item and to comment meaningfully on its content (see 068306-TR-ET Part 3, pp.28-34).

²³ Response, KSC-BC-2020-06/F02418, para.13.

but only five pages identified as Associated Exhibits in Annex 5 to the Motion.²⁴ The objections raised in the Response are matters going to the weight and probative value of the evidence and not admissibility pursuant to Rule 153.²⁵

D. W04044

11. The Panel previously declined to admit W04044's evidence pursuant to Rule 153 solely because it included certain, limited information concerning Jakup KRASNIQI, resulting in the prejudicial effect of admission outweighing the probative value.²⁶ The Panel found that all other factors relevant to admission had been met.²⁷ In view of the Panel's decision and considering that the information concerning KRASNIQI is in no way central to W04044's evidence, the SPO no longer seeks to admit this information and has proposed admission of W04044's evidence with redactions thereto.²⁸

12. The Defence fails to explain why the proposed redactions to W04044's evidence, which fully cover the KRASNIQI references at issue, do not alleviate the prejudicial effect considered by the Panel.²⁹ The proposed redactions mean that the prejudicial effect no longer outweighs the probative value and that there is no other bar to admission of W04044's evidence pursuant to Rule 153.

13. Further, the Response makes it clear that the KRASNIQI Defence submits W04044 should be called to testify solely to elicit the very information which the Panel had initially considered prejudicial.³⁰ In light of such submissions, the appropriate remedy would be to admit W04044's evidence without the proposed redactions, which the SPO would not object to and indeed, initially proposed. There would be no

²⁴ KSC-BC-2020-06/F02383/A05.

²⁵ Second Rule 153 Decision, KSC-BC-2020-06/F02111/RED, para.59.

²⁶ Second Rule 153 Decision, KSC-BC-2020-06/F02111/RED, para.32.

²⁷ Second Rule 153 Decision, KSC-BC-2020-06/F02111/RED, paras 27-31.

²⁸ See Motion, KSC-BC-2020-06/F02383/RED, para.47; KSC-BC-2020-06/F02383/A11.

²⁹ Response, KSC-BC-2020-06/F02418, paras 14-15.

³⁰ Response, KSC-BC-2020-06/F02418, paras 16-17.

reason to call W04044 to testify concerning this discrete issue in relation to which there is no indication that W04044 would be able to provide any information beyond that already contained in his prior statement.

14. Similarly, the fact that 'Mr. Kransiqi's role and whereabouts in the summer of 1998 are important to the Defence case'³¹ does not warrant W04044 being called to testify in court, in particular since nothing in his evidence indicates he would be uniquely, or even particularly, well-placed to testify about such factors. Several other past and upcoming Rule 154 and live witnesses have been or would be better suited to address such issues. The Defence is, of course, also free to present evidence and call witnesses during its own case.

15. Admitting W04044's evidence, either with or without the proposed redactions, would be in line with the Panel's observations concerning an associated exhibit for W04044 not tendered by the SPO, in relation to which the Panel noted that the Defence could seek to tender this item if it considers it to be relevant to its case and can raise any of its content with witnesses capable of providing evidence in relation to the issues outlined therein.³² Just as the Panel was not persuaded that the further information which the Defence wished to elicit from W04044 in relation to this item warranted W04044's attendance for cross-examination,³³ now that the Defence position is clear in relation to specifically what it wants to elicit from W04044 on the stand, the Panel should follow the same logic in relation to his prior statements.

III. CLASSIFICATION

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

³¹ Response, KSC-BC-2020-06/F02418, para.16.

³² Second Rule 153 Decision, KSC-BC-2020-06/F02111/RED, para.31.

³³ Second Rule 153 Decision, KSC-BC-2020-06/F02111/RED, para.31.

IV. RELIEF REQUESTED

17. For the foregoing reasons and those previously given, the Motion, with the replacements indicated in paragraph 2 above, should be granted in its entirety.

Word Count: 1,979



Kimberly P. West

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Monday, 8 July 2024

At The Hague, the Netherlands.