



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 response to joint Defence motion to exclude Rule 153 evidence (F02478)'

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I. INTRODUCTION

1. The Motion¹ to exclude the evidence of Four Witnesses² proposed for admission under Rule 153³ should be rejected.
2. The broader posture of this trial, including ongoing streamlining efforts, is of no material or legal consequence when it comes to applying Rule 153 and ruling on the SPO Request.
3. As to the Motion's substance, the Defence effectively takes issue with the relevance of the Four Witnesses to the present case. However, the Defence submissions are premised on an erroneous understanding of the prevailing law and jurisprudence on contextual and pattern of conduct evidence. Such evidence is entirely legitimate. The statements of the Four Witnesses are therefore ripe for admission.

II. SUBMISSIONS

4. At the outset, the SPO notes that the Motion challenges relevance and probative value, and asserts prejudice. These are criteria for admission of evidence under Rules 138 and 153, and are therefore appropriately addressed in response to the SPO Request. The Defence does not provide any explanation as to why it filed the Motion instead; nor does it adequately explain why the Panel should decide the Motion before the SPO Request.⁴ Indeed, the Motion makes extensive reference to the SPO Request

¹ Joint Defence Motion to Exclude the Evidence of W01234, W04859, W04860 and W04570, KSC-BC-2020-06/F02478, 30 July 2024, Confidential ('Motion'). The SPO was granted a time extension, to 26 August 2024, to respond to the Motion. See Decision on Prosecution Request for Extension of Time to Respond to Filing F02478, KSC-BC-2020-06-F02484, 5 August 2024.

² W01234, W04859, W04860 and W04570 (referred to collectively in the present filing as the 'Four Witnesses').

³ Prosecution motion for the admission of the evidence of witnesses W01234, W01338, W01743, W04423, W04570, W04696, W04812, W04859, and W04860 pursuant to Rule 153, KSC-BC-2020-06/F02469, 24 July 2024, Confidential ('SPO Request'). Unless otherwise indicated, all references to 'Rule' or 'Rules' are to the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁴ In this regard, a motion *in limine* typically seeks exclusion of evidence before it is presented at trial. Here, the evidence has already been tendered in the SPO Request.

and cannot be fairly or efficiently considered separately. The Motion will do nothing more than result in unnecessary and repetitive additional litigation, is procedurally irregular, and could be dismissed on this basis alone. It is also without merit.

A. THE SPO REQUEST IS NOT INCONSISTENT WITH STREAMLINING THE SPO'S CASE

5. The Defence first presents its Motion by submitting that applying Rule 153 is somehow inconsistent with streamlining the SPO's case, and will cause 'prejudicial delays' by having to assess such applications outside of court time.⁵ These submissions are illogical and baseless.

6. First, Rule 153 contains a set of criteria that the Panel should consider when deciding whether or not apply the provision.⁶ Admission effectively turns on the nature and substance of the specific testimony being proffered. However, the broader posture of the trial and/or streamlining efforts cannot inform an individualised Rule 153 assessment.

7. Second, the argument that the very act of making, and responding to, Rule 153 applications, somehow causes prejudice, is illogical.⁷ Rule 153 is a statutory provision available to all Parties in the proceedings, and is not proscribed by the time needed for Parties to consider such requests. It is within the SPO's province to select and present witness as part of its case – a right equally enjoyed by the Defence. It is also the SPO's decision as to which admissibility provisions it uses to tender evidence, which the Panel can then admit or deny. Here, the alternative, namely, in-person testimony, would be unnecessary when Rule 153 exists as a legitimate and expedient vehicle to admit the Four Witnesses' evidence.⁸

⁵ Motion, KSC-BC-2020-06/F02478, paras 10-14.

⁶ Rule 153(1)(a)-(b).

⁷ *Contra* Motion, KSC-BC-2020-06/F02478, paras 12-14.

⁸ See Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153, KSC-BC-2020-06/F01904, 3 November 2023, para.13; Annex to the Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2003, para.51.

B. THE FOUR WITNESSES' EVIDENCE IS RELEVANT AND ADMISSIBLE

8. All Four Witnesses offer evidence that goes to, *inter alia*, (i) the contextual elements the SPO is *required* to prove (in addition to, and separately from, the individually charged crimes), including the existence of widespread or systematic attack, and (ii) a common criminal purpose. The Defence is therefore mistaken to assert the evidence does not go to any relevant or live issue in the case.⁹ Further, the Defence states that the evidence of the Four Witnesses 'cannot assist the Panel in determining the guilt of the accused.'¹⁰ This misplaced assertion appears to misapprehend the nature of Rule 153 (and the SPO Request), which is a provision specifically geared towards evidence other than the acts and conduct of the Accused. Furthermore, and as elaborated below, whether such evidence falls inside or outside the charged period is of no legal consequence – it remains admissible.

W01234 and W04860

9. Notably, the Defence does not offer any challenge to the credibility or reliability of the accounts given by W01234 and W04860, witnesses who speak to [REDACTED] episode of criminality at or around [REDACTED] that occurred outside of the charged period for this particular location, but well within the overall Indictment period.¹¹ Rather, the Defence alleges a lack of probative value, and argues that 'pattern of conduct' evidence is not 'properly admissible'.¹²

10. Yet, the Defence does not refer to the consistent body of jurisprudence, including from this Trial Panel and other jurisdictions, that considers, *inter alia*, 'pattern of conduct' evidence to be admissible and probative. Evidence that falls *outside* the

⁹ *Contra* Motion, KSC-BC-2020-06/F02478, para.16.

¹⁰ Motion, KSC-BC-2020-06/F02478, para.16.

¹¹ Motion, KSC-BC-2020-06/F02478, paras 18-26. The charged period for crimes occurring at [REDACTED], while the criminality witnessed by W01234 and W04860 occurred in [REDACTED] 1999 – still within the overall Indictment period, which ends in September 1999. *See* Amended Indictment, KSC-BC-2020-06/F00999/A01, 30 September 2022, Strictly Confidential and *Ex Parte*, paras 16, 32, [REDACTED].

¹² Motion, KSC-BC-2020-06/F02478, paras 21-22, 26.

temporal scope of the charges can provide context for events *within* the charged period,¹³ and help establish the existence of a common criminal purpose *before* and *throughout* the period of the charges.¹⁴ Facts from outside the charged period may also be used to establish contextual elements of the charged crimes.¹⁵ The Panel is therefore not precluded from admitting evidence of events outside the temporal scope if deemed relevant and of probative value, and if there is no compelling reason to exclude it – a principle it has already affirmed.¹⁶ In this respect, the evidence of W01234 and W04860 is relevant, as detailed in the SPO Request, and the Motion fails to establish any reason for exclusion.

W04859

11. As to W04859, the Defence does not raise any factual objection to the account itself, which describes a separate instance of KLA criminality related to the [REDACTED] site.¹⁷ When noticing adjudicated facts relating to this incident, the Panel acknowledged its relevance.¹⁸ The Motion fails to demonstrate otherwise. W04859's evidence should be admitted for the reasons given in the SPO Request.

W04570

12. Regarding W04570, the Defence takes issue with one aspect of his [REDACTED], namely the identification of a KLA member who is not on trial in these proceedings.¹⁹

¹³ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgement pursuant to Article 74 of the Statute, 14 March 2012 ('*Lubanga Trial Judgement*'), para.1022. See also ICC, *Prosecutor v. Ongwen*, Public redacted Judgement on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "*Trial Judgement*", ICC-02/04-01/15-2022-Red, 15 December 2022, paras 301-305.

¹⁴ *Lubanga Trial Judgement*, para.1352. See also ICTY, *Prosecutor v. Šešelj*, IT-03-67-AR73.7, Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008, para.24.

¹⁵ See e.g. ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Judgement on the appeal of Mr. Jean-Pierre Gombo against Trial Chamber III's "*Judgement pursuant to Article 74 of the Statute*", 8 June 2018, para.117.

¹⁶ Decision on Selimi Defence Motion to Exclude Evidence of W04846, KSC-BC-2020-06/F02393, 19 June 2024, paras 17-18. See also ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007, para.315.

¹⁷ Motion, KSC-BC-2020-06/F02478, para.26. See SPO Request, KSC-BC-2020-06/F02469, para.32, fn 75.

¹⁸ SPO Request, KSC-BC-2020-06/F02469, para.34, fn.80.

¹⁹ Motion, KSC-BC-2020-06/F02478, paras 29-30.

In its Request, the SPO offers W04570's [REDACTED] statement as evidence in support of contextual elements it is *required* to prove (in addition to, and separately from, the charged crimes) and a common criminal purpose.²⁰ The disputed identification therefore does not impact, and would not prevent the Panel from relying upon, W04570's evidence for contextual purposes. Indeed, in the relevant judgments cited by the Defence, [REDACTED] accepted as fact that [REDACTED] was severely beaten in KLA detention.²¹ This Panel has noticed related adjudicated facts from these [REDACTED] judgments.²² The Defence thus effectively highlights why W04570 is readily suitable for admission to establish, *inter alia*, the contextual elements of the charged crimes.²³ It is free to present evidence or make submissions challenging W04570's evidence at the appropriate time.

13. Finally, as indicated above and in the SPO Request, the Panel has: (i) noticed adjudicated facts concerning crimes that are not charged, but are relevant to establishing a widespread or systematic attack; (ii) thereby acknowledged that the events addressed in the evidence of the Four Witnesses are relevant; and (iii) emphasised that the Panel should be provided evidence pertaining to noticed adjudicated facts to perform its fact-finding functions, particularly concerning facts that are in dispute between the Parties.²⁴ In this respect, the Defence has not agreed to any noticed adjudicated fact. The evidence of the Four Witnesses, in particular,

²⁰ SPO Request, KSC-BC-2020-06/F02469, para.23.

²¹ See Motion, KSC-BC-2020-06/F02478, fn.15 (and citations therein).

²² SPO Request, KSC-BC-2020-06/F02469, para.23.

²³ See also ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20-625-Red, Public redacted version of the Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), 11 March 2022, paras 12-17, 75-80 (noting that even where the Defence disputes certain matters within a witness statement, this does not preclude admission for contextual reasons).

²⁴ Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534, 17 May 2023, para.26. Rule 157(2) requires, *inter alia*, that adjudicated facts must relate to matters at issue in the current proceedings.

W04859 and W04570,²⁵ should therefore be admitted to permit the Panel to fulfil its fact-finding functions.

14. In sum, the evidence of the Four Witnesses goes to ‘proof of a matter other than the acts and conduct of the accused’, including the contextual elements of the charged crimes and the common criminal purpose. Therefore, Rule 153 is the appropriate medium to admit their evidence.²⁶

III. CLASSIFICATION

15. This filing is confidential pursuant to Rule 82(4).

IV. CONCLUSION

16. For the reasons set out above and in the SPO Request, the Motion should be rejected.

Word count: 1858



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Monday, 26 August 2024

At The Hague, the Netherlands.

²⁵ As indicated above and in the SPO Request, the Panel noticed adjudicated facts specifically relating to events discussed in the evidence of W04859 and W04570.

²⁶ See e.g. ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-1833-Red, Public redacted version of First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules, 6 April 2023, paras 134, 163.