



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 motions F02465 and F02469'

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I. INTRODUCTION

1. Pursuant to Rule 76 of the Rules,¹ the Specialist Prosecutor's Office ('SPO') hereby replies to the Defence Response,² which fails to show any convincing reasons why either Motion F02465³ or Motion F02469⁴ should not be granted in their entirety. Contrary to the Defence submissions, all of the evidence tendered in the motions is admissible as it is *prima facie* relevant, reliable, and of probative value which is not outweighed by any prejudice. Moreover, all of the proposed evidence at issue satisfies the conditions for admission in lieu of oral testimony pursuant to Rule 153.

2. As a preliminary matter, the SPO submits the following corrections with respect to evidence listed in the annexes to Motion F02469 for witnesses W01743 and W04423:

- Annex 3 – W01743, Item 1: a Serbian language version of the SPO interview transcript, ERNs '041326-TR Part 1 RED' and '041326-TR Part 2 RED', should also be listed for admission.
- Annex 4 – W04423, Item 1: the ERN listed as '092646-TR-AT Part 1 RED2', should instead be '092763-TR-AT Part 1 RED2'.

II. SUBMISSIONS

A. MOTION F02465

3. The Defence objections to the admission of the evidence of W04797 and W04808 pursuant to Rule 153, like its objections to the related Rule 154 witnesses,⁵ fail to

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

² Joint Defence Response to Prosecution Rule 153 Motions F02465 and F023469, KSC-BC-2020-06/F02523, 30 August 2024, Confidential ('Response').

³ Prosecution consolidated Rule 153 motion for W04797 and W04808 and Rule 154 motion for W04798, W04809, and W04854, KSC-BC-2020-06/F02465, 22 July 2024, Confidential ('Motion F02465').

⁴ 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 ('Motion F02469').

⁵ Joint Defence Consolidated Response to F02450, F02451, F02460 and F02465, KSC-BC-2020-06/F02507, 23 August 2024, Confidential, paras 57-63, 65-68, 70-72.

appreciate the necessity of considering the evidence of these witnesses holistically, alongside that of W04798, W04809, and W04854, as set out previously.⁶

4. Contrary to the Defence position,⁷ the Rules explicitly allow and encourage the admission of certain types of evidence in lieu of oral testimony and make it clear there is no 'right' to cross-examination.⁸ No party can simply 'elect' to cross-examine any witness it chooses. Moreover, the Defence merely speculates that W04797 and W04808 will provide further information on certain topics, without explanation of how or why these witnesses are in a unique position to do so. Indeed, viewing the evidence of [REDACTED] in its totality, there is no reason to believe that the information the Defence seeks to elicit cannot be elicited from W04798 and W04809, [REDACTED], respectively, as W04797 and W04808 in the [REDACTED]. Therefore, the Defence has failed to establish that any prejudice would arise from an inability to cross-examine W04797 and W04808.⁹

B. MOTION F02469

5. The Defence argues the evidence of witnesses W01234, W04859, W04860, and W04570 is neither relevant nor probative enough to be admitted pursuant to Rule 153.¹⁰ These arguments represent a misunderstanding and/or misstatement of the general requirements for admissibility as well as the purpose and effect of Rule 153;

⁶ See e.g. Prosecution reply relating to Rule 154 motions F02450, F02460, and F02465, KSC-BC-2020-06/F02526, 2 September 2024, Confidential, paras 12-16.

⁷ Response, KSC-BC-2020-06/F02523, paras 14, 18.

⁸ Rule 153. See e.g. 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.').

⁹ '[W]hile the onus of establishing the conditions of admission under Rule 153 is with the SPO, the Defence [must] establish that questions regarding this matter cannot effectively be explored with other witnesses and that prejudice would arise from its inability to raise those issues with this particular witness.' See Decision on 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/F02464, 22 July 2024, Confidential ('Decision F02464') para.97.

¹⁰ Response, KSC-BC-2020-06/F02523, paras 2, 10, 12.

and misconstrue the content of the witnesses' evidence.

6. The Defence submissions on relevance and probative value ignore the body of KSC jurisprudence dismissing similar arguments and affirming the *prima facie* threshold for the admission of evidence.¹¹ For purposes of admissibility, evidence is relevant as long as it is connected, directly or indirectly, to elements of the offences or modes of liability pleaded in the indictment, or to other facts or circumstances material to the case.¹² Evidence has probative value as long as it assists the Panel in reaching a conclusion about a material fact or circumstance, or in assessing the reliability of other evidence.¹³ As set out in Motion F02469 and Response F02508:¹⁴ (i) the evidence of witnesses W01234, W04859, W04860, and W04570 is relevant because it is connected to elements of the offences and modes of liability pleaded in the Indictment; and (ii) it has probative value because it will assist the Panel in reaching conclusions about material facts and in assessing the reliability of other evidence.

7. Contrary to the Defence submission that admitting the witnesses' evidence pursuant to Rule 153 would 'bloat the already vast trial record',¹⁵ the purpose and effect of Rule 153 is to alleviate such potential burdens on the record by streamlining and expediting the proceedings.¹⁶ Specifically, the admission of the evidence of these witnesses in lieu of oral testimony will not only save valuable court time and resources, it will likely generate *less* of an evidentiary record than if the witnesses

¹¹ See Decision F02464, KSC-BC-2020-06/F02464, paras 12, 14-15, 20-21, 61, 73, 76-77; Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W00996, W02257, W02303, W04352, W04367, W04420, W04569, W04645, W04677, and W04732 Pursuant to Rule 153, KSC-BC-2020-06/F02421, 2 July 2024, Confidential ('Decision F02421'), paras 24, 27, 79, 82; First Rule 153 Decision, KSC-BC-2020-06/F01904, paras 38, 40.

¹² Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/F01409, 31 March 2023, Confidential ('Decision F01409'), para.10. See also Decision on the Prosecution Request for Admission of Items Through the Bar Table, KSC-BC-2020-07/F00334, 29 September 2021, para. 12; Decision F02421, KSC-BC-2020-06/F02421, para.79.

¹³ Decision F01409, KSC-BC-2020-06/F01409, para.13.

¹⁴ Prosecution response to joint Defence motion to exclude Rule 153 evidence (F02478), KSC-BC-2020-06/F02508, 26 August 2024, Confidential ('Response F02508').

¹⁵ Response, KSC-BC-2020-06/F02523, para.10.

¹⁶ First Rule 153 Decision, KSC-BC-2020-06/F01904, para.13.

testified *viva voce* or pursuant to Rule 154.

8. Moreover, the Defence submission that these witnesses should be withdrawn from the SPO witness list¹⁷ should be dismissed not only as meritless – it is the SPO which determines its witness list – but also because it is beyond the scope of the underlying motions, which concern only the admissibility of the witnesses' evidence pursuant to Rule 153.

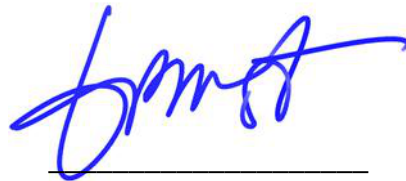
III. CLASSIFICATION

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

IV. RELIEF REQUESTED

10. For the reasons given above and previously, Motion F02465 and Motion F02469 should be granted in their entirety.

Word count: 1204



Kimberly P. West

Specialist Prosecutor

Monday, 9 September 2024

At The Hague, the Netherlands.

¹⁷ Response, KSC-BC-2020-06/F02523, paras 2, 11.