

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 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 fifth motion for admission of evidence pursuant to Rule 155

Specialist Prosecutor

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Mišetić

Counsel for Kadri Veseli

Rodney Dixon

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. The Defence for Messrs Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi ('Defence') hereby responds to the Prosecution fifth motion for admission of evidence pursuant to Rule 155 ('Motion').¹
2. The Defence re-emphasises that the principle of orality should remain the general rule for ensuring the fairness of proceedings. There are increasingly fewer valid reasons available for the SPO to seek the admission of untested evidence to an already unmanageable trial record.² Moreover, allowing the admission of unauthenticated evidence, or evidence based on facts already subject to judicial notice by the Trial Panel, from witnesses whose testimony has already been evaluated for probative value by this Court, serves no purpose and undermines the Accused's right to a fair trial.

II. APPLICABLE LAW

3. The Defence relies upon its previous submissions regarding the applicable law.³

III. SUBMISSIONS

A. LLAPUSHNIK/LAPUŠNIK

1. W01473 and W04431

4. The Defence does not dispute that W01473 and W04431 are deceased witnesses whose evidence relate to Llapushnik/Lapušnik. The Defence does not object to

¹ F02601, Specialist Prosecutor, *Prosecution fifth motion for admission of evidence pursuant to Rule 155 with confidential Annexes 1-8*, 26 September 2024, confidential.

² KSC-BC-2020-06, F01380, Trial Panel II, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, confidential, para. 30.

³ KSC-BC-2020-06, F01391, Specialist Counsel, *Joint Defence Response to "Prosecution First Motion for Admission of Evidence pursuant to Rule 155"*, 22 March 2023, confidential, paras 6-29; KSC-BC-2020-06, F01865, Specialist Counsel, *Joint Defence Response to Prosecution Third Motion for Admission of Evidence Pursuant to Rule 155 (F01804)*, 17 October 2023, confidential, paras 5-8.

the admission of the statements of W01473 and W04431 via Rule 155 – namely their [REDACTED] statements and the transcripts of the witnesses' audio-video recorded testimony in the [REDACTED].⁴

5. However, the Defence objects to the proposed admission of the audio-visual recordings of both these witnesses' [REDACTED] testimony.⁵ It is submitted by the Prosecution that their evidence was “was recorded in a manner that enables the Parties and Panel to assess the witness’s demeanour and credibility”.⁶ However, this is not possible due to the implementation of protective measures (face/voice distortion) for both witnesses. As such, the Defence submits that the audio-visual recordings have no evidential value over and above the transcripts as neither the witnesses' demeanour nor tone of voice can be observed in the recording. These recordings cannot aid in assessing probative value, as submitted by the Prosecution⁷ and will simply bloat the record.
6. The Defence does not object to the admission of the Associated Exhibit of W04431, noting that this item has already been admitted.⁸ The Defence does object, however, to the admission of two Associated Exhibits of W01473.⁹
7. During their [REDACTED] testimony, W01473 is shown a photograph of several unnamed individuals. The witness is unable to identify or recognise anyone in the photograph, does not agree to the suggested likeness between the masks in the photograph and that allegedly worn by [REDACTED], and cannot give evidence on any similarity between the uniforms in the photograph and the clothing worn by individuals in Llapushnik/Lapušnik.¹⁰ Moreover, W01473

⁴ Motion/A01, Items 1, 2, 4, 6; Motion/A02, Items 1, 2, 3.

⁵ [REDACTED].

⁶ Motion, paras 14 and 20.

⁷ *ibid.*

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

repeatedly asserts that he “cannot tell anything from the photo” and is incorrect in identifying the number of soldiers.¹¹ The Defence therefore objects to the admission of this photograph, which, in and of itself, clearly lacks any indicia of authenticity or reliability,¹² lacks probative value and the admission of which would simply bloat the record.

8. The Defence also objects to the admission of [REDACTED], which is a “360-degree Virtual Reality presentation of Llapushnik prison camp”.¹³ The Defence notes that the multimedia video suffers technical issues which render much of its content difficult to distinguish. As the locations depicted therein that are relevant to this witness’ evidence are reflected in [REDACTED], which is another associated exhibit of W01473,¹⁴ admission of this item lacking probative value is unnecessary.

B. LLAP OPERATIONAL ZONE

2. W04252

9. The SPO seeks to tender in writing W04252’s statement to Pristina SUP in 2004,¹⁵ and W04252’s 2019 SPO interview in the form of a verbatim transcript and an audio recording (‘Proposed Evidence’),¹⁶ due to W04252’s passing before he was able to give his evidence in Court.¹⁷
10. The Defence does not oppose the admission of the Proposed Evidence. It notes however that although W04252 did not sign the 2004 SUP Statement, he confirmed it as his during the 2019 SPO Interview.¹⁸

¹¹ *ibid.*

¹² Note that it is undated and unsigned and is lacking any information on its origin.

¹³ Motion/A01, Item 8.

¹⁴ Motion/A01, Item 9.

¹⁵ SITF00348368-SITF00348369-ET RED.

¹⁶ 069667-TR-ET Part 1 RED2, 069667b Part 1.

¹⁷ Motion, para. 22; 120848-120849-ET.

¹⁸ 069667-TR-ET Part 1, p. 8.

3. W04648

11. The SPO seeks admission of three [REDACTED] statements and a letter purportedly typed and signed by W04648.
12. The Defence does not contest that the [REDACTED] statements¹⁹ contain some minimum indicia of reliability; the letter²⁰ however does not. The SPO submits that this letter was sent by W04648 [REDACTED] seemingly based on the heading of the letter.²¹ The submission regarding reliability for this item does not go beyond stating that the letter is “typewritten and signed by W04648”;²² no further information is offered regarding the circumstances or other factors that could confer it any shred of reliability.
13. In the Defence’s submission, this item not only lacks sufficient indicia of reliability; in fact, it does not even come close to qualifying as a ‘statement’, even under the broad definition applied by this Panel, since it cannot be said to constitute “a record of what a witness had said in respect of facts and circumstances relevant to the case **that was taken in the context of a criminal investigation or proceedings.**”²³ On this basis, it cannot and should not be admitted under Rule 155.
14. On a more general point, the Defence notes that W04648’s evidence regarding the alleged kidnapping and murder of [REDACTED] constitutes hearsay.

¹⁹ Motion/A04, items 1 and 2.

²⁰ SPOE00130685-00130687 RED3; Motion/A04, item 3.

²¹ Motion, para. 27.

²² Motion, para. 29; In Motion/A04, item 3 – Indicia of reliability, indicates that the document includes “Witness details and signature”; these “details” amount to the name of W04648 and his village.

²³ E.g. see KSC-BC-2020-06/F02130, Trial Panel II, *Decision on Thaçi Defence Submissions Concerning use of Prior Inconsistent Statements*, 15 February 2024, para. 15; KSC-BC-2020-06/F02580, Trial Panel II, *Reasons for Admission of W03780’s Statements and Related Order*, 17 September 2024, para. 10; KSC-BC-2020-06/F02639, *Decision on Joint Defence Request for Certification to Appeal the Reasons for Admission of W03780’s Statements and Related Order (F02580)*, 11 October 2024, para. 13.

W04648 did not witness the kidnapping and had no direct knowledge of his fate after the kidnapping.

15. The Defence also notes that the Trial Panel ('TP') in Case 05 found that there were several discrepancies in the witness' evidence; while the TP did not consider that these discrepancies affected the witness' general credibility,²⁴ it also decided not to rely on key aspects of this evidence,²⁵ ultimately seemingly only relying on W04648's evidence that several attempts were made by different family members including himself in April 1999 to locate, visit or free [REDACTED].²⁶
16. The Defence notes that these facts, as well as many other related to the fate of [REDACTED], have been taken for judicial notice by this Panel. In light of this, the Defence queries the necessity and appropriateness of adding to the already gargantuan record of this case a number of additional statements with such limited relevance and probative value.

C. CAHAN, ALBANIA

4. W04381

17. The SPO seeks to tender in writing W04381's [REDACTED] witness interview ([REDACTED]),²⁷ his [REDACTED] testimony before [REDACTED] ([REDACTED]),²⁸ an [REDACTED] photo board report²⁹ and the associated

²⁴ [REDACTED]

²⁵ [REDACTED]. It is worth noting that the SPO relies on the statement containing this information, among other sources, to support the position that "Detainees were arrested in the first half of April and taken to the Zilash/Zlaš Detention Compound by KLA soldiers, including the BIA, and military police".

²⁶ [REDACTED].

²⁷ SITF00013515-00013550 RED2.

²⁸ SITF00015744-00015815 RED2, pp. SITF00015744-00015776.

²⁹ SITF00013587-00013592 RED2. pp. SITF00013587-00013588, 00013591-00013592.

[REDACTED] line-up list,³⁰ due to W04381's severe health issues which prevent W04381 from testifying, even with the application of special measures.³¹

18. The Defence does not contest the assessment of W04381's availability and does not object to the *prima facie* admissibility of W04381's Proposed Evidence.
19. Nevertheless, the probative value of the evidence is very low. W04381 did not sign the [REDACTED] Interview.³² Furthermore, in the [REDACTED] Interview and during the [REDACTED] Testimony, W04381 purported to identify perpetrators who he did neither know nor heard of prior to his detention and who he could not recognise on a subsequent photo board exercise.³³ Moreover, his basis of knowledge for the names that he gave was not explored. In these circumstances, no weight can be fairly attached to such identifications.

D. POST JUNE 1999

5. W00016

20. The Defence does not object to the admission of the SPO Interview of W00016³⁴. It does object however to the admission of the witness' 2002 Statement as a Rule 155 Statement. This statement presents a number of issues that undermine its reliability and authenticity. First, the chain of custody for this document shows "Gnjilane Police Department". The Defence reiterates its position with regards to the diminished reliability of evidence originating from Serbian institutions. Second, despite being presented with the opportunity to authenticate the statement during the witness' SPO Interview, the SPO failed to do so. The 2002 Statement was not shown to the witness by the Prosecutor during the SPO

³⁰ Associated exhibit SITF00013570-00013584.

³¹ Motion, para. 37.

³² See SITF00013515-00013550 RED2, p. SITF00013550.

³³ SITF00013515-00013550 RED2, pp. SITF00013518 and SITF0001531; SITF00013570-00013584, pp. SITF00013570 and SITF00013573.

³⁴ 082037-TR-ET Part 1 RED; 082037-TR-ET Part 2 RED.

Interview to authenticate the handwriting; the Prosecutor only had in front of him the English translation.³⁵ W00016's responses to the Prosecutor's questions regarding the 2002 Statement refute the evidence contained therein, and should have led the SPO to, at the very least, reassess its probative value and recognise the reliability concerns associated with it.

6. W04825

21. The Defence questions the interest and suitability of admitting, through Rule 155, W04825's proposed evidence. The Defence stresses its limited probative value, which is outweighed by its prejudicial effect. While it is alleged that W04825 was detained in the Gjilan/Gnjilane Dormitory on or around 23 June 1999,³⁶ the witness did not recognise some pictures of such dormitory³⁷ during his SPO interview.³⁸ In addition, contrary to the SPO assertion, his testimony is not corroborated by the documentary evidence³⁹ or witnesses listed by the SPO in its Motion;⁴⁰ while they mention the fact that some individuals may have been detained in Gjilan/Gnjilane Dormitory, none of them mention the name of W04825.

IV. CLASSIFICATION

22. This response is filed confidentially pursuant to Rule 82(4) as it responds to a filing bearing the same classification. The Defence undertakes to submit a public redacted version of this filing promptly.

³⁵ 082037-TR-ET Part 2, p.28, lines 13-15 "Just for the record, I have in front of me another statement, and for the record the no is SITF00269103-SITF00269124-ET."

³⁶ Motion, para. 42.

³⁷ 092970-092973.

³⁸ 092974-TR-ET Part 2 Revised RED, pp. 22-23.

³⁹ Motion, footnote 206.

⁴⁰ Motion, footnote 207.

V. CONCLUSION AND/OR RELIEF REQUESTED

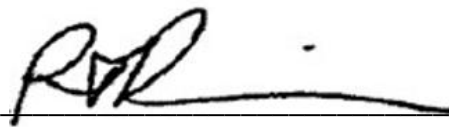
23. For the above, the Defence asks that the Trial Panel **DISMISS**, in part, the SPO fifth motion for the reasons set out herein.

Word count: 2,072

Respectfully submitted on 18 October 2024,



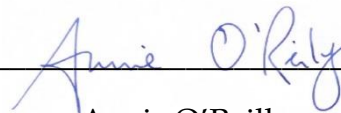
Luka Misić
Lead Counsel for Hashim Thaçi




Rodney Dixon KC
Lead Counsel for Kadri Veseli



Kerrie Ann Rowan
Co-Counsel for Kadri Veseli



Annie O'Reilly
Co-Counsel for Kadri Veseli



GEOFFREY ROBERTS

Lead Counsel for Rexhep Selimi



ERIC TULLY

Co-counsel for Rexhep Selimi



RUDINA JASINI

Co-counsel for Rexhep Selimi



Venkateswari Alagendra

Counsel for Jakup Krasniqi



Aidan Ellis

Co-Counsel for Jakup Krasniqi



Shyamala Alagendra Khan

Co-Counsel for Jakup Krasniqi



Victor Băieșu
Co-Counsel for Jakup Krasniqi