



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-05
Specialist Prosecutor v. Salih Mustafa

Before: Trial Panel I
Judge Mappie Veldt-Foglia, Presiding
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 22 November 2021
Language: English
Classification: Public

Public Redacted Version of
'Prosecution Application pursuant to Rule 153(1)'
KSC-BC-2020/F00263, dated 19 November 2021

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Counsel for Victims
Anni Pues

I. INTRODUCTION

1. Pursuant to Rules 153(1) and 9(5)(a) of the Rules,¹ and to the Trial Panel's oral order,² the Specialist Prosecutor's Office ('SPO') hereby files an application to admit the evidence of witness W04712 in writing *in lieu* of oral testimony ('Application').

2. The proposed evidence is relevant, reliable, probative of issues in this case and suitable for admission in written form. It is also of a cumulative nature to the evidence given by other witnesses via oral testimony, is corroborated by evidence that the Defence can effectively confront through cross-examination, and does not address the acts or conduct of the Accused.

3. A summary chart indicating the specific evidence sought for admission under Rule 153(1) for W04712 is provided in *Confidential* Annex 1. The proposed materials for admission are attached in the same Annex.

4. This Application is filed as confidential to respect the confidentiality of prior filings concerning W04712, for whom protective measures have been granted. A public redacted version will be filed.

II. SUBMISSIONS

5. Pursuant to Rule 153(1) of the Rules, the Panel may admit the written statement of a witness, which goes to proof of a matter other than the acts and conduct of the

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

² KSC-BC-2020-05, Transcript of 2 November 2021, page 1280.

Accused as charged in the indictment, *in lieu* of oral testimony.³ This provision lists factors militating both for and against the admission of such evidence.⁴

6. The proffered evidence of W04712 does not go to proof of the acts and conduct of the Accused as charged in the indictment.⁵ In fact, the witness never mentions or

³ The written statement of a witness, as referenced in Rule 153, encompasses transcripts of audio-video recorded interviews. For an example of how equivalent language in the ICTY Rules has been interpreted see ICTY, *Prosecutor v. Lukić & Lukić*, Decision on confidential prosecution motion for the admission of prior testimony with associated exhibits and written statements of witnesses pursuant to rule 92ter, 9 July 2008, para.14; ICTY, *Prosecutor v. Popović*, Decision on motion to convert *viva voce* witnesses to rule 92ter witnesses, 31 May 2007, p.2. See also ICC, *Prosecutor v. Ongwen*, Public Redacted Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-01/04-01/15-596-Red, para.9 (similarly, but conversely, interpreting 'prior recorded testimony' to encompass written statements and transcripts of interviews).

⁴ Factors militating **for the admission** of a written statement or transcript in lieu of oral testimony include, but are not limited to circumstances in which the evidence in question:

- (i) is of a cumulative nature, in that other witnesses have given or will give oral testimony on similar facts;
- (ii) is corroborated by evidence which the Accused could effectively confront, including through cross-examination;
- (iii) relates to relevant historical, political or military background;
- (iv) consists of a general or statistical analysis relating to the composition of the population in the places to which the indictment relates;
- (v) concerns the impact of crimes on victims;
- (vi) relates to the character of the Accused;
- (vii) relates to factors to be taken into account in determining sentence; or
- (viii) has been given by the witness in the presence of the Parties who have had the opportunity to examine or cross-examine him or her.

Factors militating **against the admission** of a written statement or transcript in lieu of oral testimony include instances whereby:

- (i) a Party or, where applicable, Victims' Counsel objects to the admission of the witness's evidence in written form and, demonstrates that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value;
- (ii) the evidence contained therein is incriminatory in character or pertains to an issue central to the Specialist Prosecutor's case;
- (iii) there are any other factors that make it appropriate for the witness to appear for cross-examination; or
- (iv) there is an overriding public interest in the evidence in question being presented orally.

⁵ Interpreting Rule 92bis of the ICTY Rules, which is the ICTY's version of Rule 153, the *Milošević* Trial Chamber explained that the expression 'acts and conduct of the Accused' must be given its ordinary meaning: deeds and behaviour of the Accused. ICTY, *Prosecutor v. Milošević*, Decision on Prosecution's Request to have Written Statements Admitted under Rule 92bis, IT-02-54-T, 21 March 2002, para.22. The *Galić* Appeals Chamber further clarified that acts and conduct of others who commit the crimes, even those for which the indictment alleges that the accused is individually responsible, are admissible under Rule 92bis. When considering the mode of liability, only the acts which establish the Accused's individual responsibility are inadmissible under Rule 92bis. ICTY, *Prosecutor v. Galić*, Decision on Interlocutory Appeal Concerning Rule 92bis(C), IT-98-29-AR73.2, 7 June 2002, paras 8-10. Interpreting

refers to the Accused in his statement. The witness provides purely crime-base evidence, relating, in particular, to:

- i. the arrest of [REDACTED], by persons other than the Accused;
- ii. the identification of the KLA soldiers who carried out the arrest;
- iii. attempts made by [REDACTED] to locate [REDACTED] after his arrest;
- iv. a visit [REDACTED]; and
- v. the exhumation of [REDACTED].

7. As such, the proposed evidence is relevant and probative of issues in the case, including arbitrary detention (Count 1), cruel treatment (Count 2), and murder (Count 4). It is, however, largely cumulative and corroborative of the evidence of other witnesses who have already testified or are scheduled to testify before the Panel. For example:

- i. W04712's statement on the arrest [REDACTED],⁶ is consistent with statements made by W04390,⁷ W04391,⁸ W04603,⁹ W04674,¹⁰ and W04600.¹¹
- ii. W04712's statement on the attempts made by [REDACTED],¹² is consistent with statements made by W04390,¹³ W04391,¹⁴ and W04600.¹⁵

Rule 92bis of the ICTR Rules, which is the ICTR's version of Rule 153, the *Ngirabatware* Appeals Chamber similarly found a clear distinction in the jurisprudence between the acts and conduct of the Accused, and the acts and conduct of others. Only the former is excluded from the procedure laid out in Rule 92bis of the ICTR Rules. ICTR, *Ngirabatware v. Prosecutor*, Judgement, MICT-12-29-A, 18 December 2014, para.103. See similarly ICC, *Prosecutor v. Ongwen*, Public Redacted Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-01/04-01/15-596-Red, para.11.

⁶ 077816-TR-ET Part 1 RED1, pp.8-10.

⁷ 060680-TR-ET Part 1 Revised RED3, pp.7-11.

⁸ 060723-TR-ET Part 1 Revised RED3, pp.6-11.

⁹ 076506-TR-ET Part 2 RED1, pp.6-13.

¹⁰ 076509-TR-ET Part 1 RED1, pp.13-15.

¹¹ Transcript of Trial Hearing, 23 September 2021, pp.723-727.

¹² 077816-TR-ET Part 1 RED1, pp.11-14.

¹³ 060680-TR-ET Part 1 Revised RED3, pp.14-21.

¹⁴ 060723-TR-ET Part 1 Revised RED3, pp.11-24, 27-33.

¹⁵ Transcript of Trial Hearing, 24 September 2021, pp.759-761.

- iii. W04712's statement on the [REDACTED],¹⁶ is consistent with statements made by W04390,¹⁷ W04391,¹⁸ W04674,¹⁹ W03593,²⁰ W01679,²¹ and W03594.²²
- iv. W04712's statement regarding the [REDACTED],²³ is consistent with statements made by W04390,²⁴ W04391,²⁵ and W04674.²⁶
- v. W04712's statement on the [REDACTED],²⁷ is consistent with statements made by W04390,²⁸ W04391,²⁹ W04674,³⁰ and W04676.³¹
8. Receipt of the evidence in written form would therefore enhance the efficiency of the proceedings, and spare the witness from having to further recount such painful events. Moreover, the rights of the Accused would not be prejudiced noting, *inter alia*, the cumulative and corroborative nature of the evidence at issue. In particular, [REDACTED] will be available for cross-examination by the Defence on issues addressed in W04712's statement,³² as are other witnesses who have corroborated the evidence provided by W04712.³³

¹⁶ 077816-TR-ET Part 1 RED1, pp.14-17.

¹⁷ 060680-TR-ET Part 1 Revised RED3, pp.24-26.

¹⁸ 060723-TR-ET Part 1 Revised RED3, pp.33-35.

¹⁹ 076509-TR-ET Part 1 RED1, pp.16-18.

²⁰ Transcript of Trial Hearing, 20 September 2021, pp.486-488.

²¹ Transcript of Trial Hearing, 4 October 2021, pp.910-911.

²² Transcript of Trial Hearing, 13 October 2021, pp.1153-1157.

²³ 077816-TR-ET Part 1 RED1, p.17.

²⁴ 060680-TR-ET Part 1 Revised RED3, pp.26-27.

²⁵ 060723-TR-ET Part 1 Revised RED3, p.35.

²⁶ 076509-TR-ET Part 1 RED1, pp.16.

²⁷ 077816-TR-ET Part 1 RED1, pp.22-23.

²⁸ 060680-TR-ET Part 1 Revised RED3, p.27.

²⁹ 060723-TR-ET Part 2 Revised RED3, pp.8-10.

³⁰ 076509-TR-ET Part 2 RED1, pp.1-8,

³¹ 076539-TR-ET Part 1 RED1, pp.15-18.

³² [REDACTED] are scheduled to testify during the week of 22 November 2021. *See similarly* [REDACTED].

³³ The Defence has already had the opportunity to cross-examine W03593, W04600, W01679, W03594, and W04603 on issues raised by W04712. The Defence will have the opportunity to cross-examine W04674 on issues raised by W04712 during [REDACTED] testimony scheduled for the month of December 2021.

9. The interview of W04712 was conducted by the SPO with an interpreter in a language understood by the witness.³⁴ The date, time and place of the interview, as well as all persons present, are reflected in the record of the interview.³⁵ The evidence presented is in the form of a word-for-word transcript of the interview generated after the interview from the contemporaneous audio-video recording, and as such is not itself physically signed by the witness. However, a DVD containing the audio-video recording of the interview was signed by the witness and by an SPO Prosecutor at the conclusion of the interview.³⁶ Additionally, W04712 confirmed that the contents [REDACTED] statement are true and accurate, that [REDACTED] statement was given voluntarily without any threats, force, or guarantees, and that [REDACTED] had no objections to the manner or process by which the statement was taken.³⁷

10. The associated exhibit which the SPO also tenders is integral to W04712's evidence as it relates to the relevance and reliability of the statement. The exhibit was discussed in the witness's statement and comprises an inseparable and indispensable part of the witness's evidence.³⁸

III. RELIEF REQUESTED

11. For the foregoing reasons, the SPO requests the Trial Panel to:

³⁴ 077816-TR-ET Part 1 RED1, pp.1-2.

³⁵ Rule 153(2). 077816-TR-ET Part 1 RED1, pp.1-2.

³⁶ Rule 153(2). The signed DVD, which is contained within a signed and sealed evidence bag, can be made available for inspection as necessary.

³⁷ 077816-TR-ET Part 2 RED1, pp.11-12.

³⁸ The *Karadžić* Trial Chamber noted that associated exhibits which form an 'inseparable and indispensable part of the testimony' can be admitted pursuant to Rule 92bis. ICTY, *Prosecutor v. Karadžić*, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in lieu of *Viva Voce* Testimony pursuant to Rule 92bis (Witnesses for Sarajevo Municipality), IT-95-5/18/PT, 15 October 2009, para.11. The ICTY considered a document to be an inseparable and indispensable part of the testimony if the witness discussed the document in his or her written statement or transcript, and if that written statement or transcript would become incomprehensible or have lesser probative value without the admission of the document. *Prosecutor v. Karadžić*, IT-95-5/18/PT, para.11; ICTY, *Prosecutor v. Perišić*, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92bis, IT-04-81-T, 2 October 2008, para.16; ICTY, *Prosecutor v. Lukić and Lukić*, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92bis, IT-98-32/1-T, 22 August 2008, para.21.

- i. admit, in lieu of the oral testimony of witness W04712, the SPO transcript and associated exhibit listed in Annex 1.

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Friday, 22 November 2021
At The Hague, the Netherlands.