



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: Acting Specialist Prosecutor

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Public Redacted Version of 'Prosecution reply to 'Joint Defence Response to "Prosecution first motion for admission of evidence pursuant to Rule 155"', KSC-BC-2020-06/F01406, dated 29 March 2023

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I. INTRODUCTION

1. The Joint Response¹ contains misrepresentations of the applicable legal framework and mischaracterisations of fact. Pursuant to Rule 76 of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby replies to certain new issues raised in the Joint Response. The evidence proposed in the Rule 155 Motion³ satisfies all applicable criteria and should be admitted for a proper determination of the charges in this case.

II. SUBMISSIONS

2. Contrary to Defence submissions asserting the 'exceptional' nature of Rule 155,⁴ the Panel has already found that the principle of orality is not absolute.⁵ In the context of the Kosovo Specialist Chambers, the principle is qualified by several provisions, including Rule 155, which form an integral part of the applicable framework.⁶ As stated unambiguously by the Trial Panel, Rule 141(1) does not formulate 'a requirement of subsidiarity vis-à-vis *viva voce* evidence'.⁷

3. Further, the Defence's arguments on the number and type of statements submitted by the SPO⁸ do not take into account that the circumstances of Rule 155 witnesses are different from Rule 154 witnesses. Since evidence submitted pursuant to Rule 155 pertains to unavailable witnesses, the number or overlap of multiple statements facilitate a fair and proper assessment of the evidence of witnesses who

¹ Joint Defence Response to "Prosecution first motion for admission of evidence pursuant to Rule 155", KSC-BC-2020-06/F01391, 22 March 2023, Confidential ('Joint Response').

² 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. *See also* Transcript (Trial Preparation Conference), 18 January 2023, p.1903.

³ Prosecution first motion for admission of evidence pursuant to Rule 155, KSC-BC-2020-06/F01329, 1 March 2023, Confidential ('Rule 155 Motion').

⁴ Joint Response, KSC-BC-2020-06/F01391, *inter alia*, paras 1, 148 (asserting that Rule 155 is an extraordinary remedy).

⁵ Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, Confidential ('Rule 154 Decision'), para.18.

⁶ Rule 154 Decision, KSC-BC-2020-06/F01380, para.18.

⁷ Rule 154 Decision, KSC-BC-2020-06/F01380, para.19.

⁸ Joint Response, KSC-BC-2020-06/F01391, paras 25, 36, 59.

are not available for cross-examination in this case.⁹ The Defence also disregards the fact that previous prior statements of a witness may be referred to and discussed in other tendered statements.¹⁰ Admission of all such prior statements effectively provides the Panel with a fuller understanding of the witness's evidence.

4. Where multiple statements are proposed, the Joint Response often ignores the fact that they were taken at different times, by different authorities, by different means (including by audio-video recording), and for different purposes and cases. Accordingly, each bears distinct indicia of reliability¹¹ and/or contain unique, corroborative, or complementary information. Particularly in the context of Rule 155 witnesses, such circumstances weigh in favour of admission of multiple statements to enable the Panel to fully assess the reliability of the evidence and, where audio or video records exist, assess the witness's demeanour.¹² As also addressed below, (i) the Defence's detailed submissions on alleged inconsistencies between statements demonstrate the value of the admission of multiple statements to enable challenges to the witnesses' credibility despite their absence; and (ii) to the extent the Defence alleges fabrication or recantation,¹³ multiple consistent statements are essential to fully and fairly assess such allegations.¹⁴

5. The Defence's attempt to challenge the relevance of statements on the basis that they were not cited, or only cited once or twice, in the SPO Pre-Trial Brief¹⁵ is unfounded. By its very nature, and pursuant to Rule 95(4), the Pre-Trial Brief is a

⁹ See ECtHR, *Schatschaschwili v. Germany* [GC], 9154/10, Judgement, 14 December 2015 ('*Schatschaschwili* Judgement'), paras 125-131.

¹⁰ See e.g. W00100, Rule 155 Motion, KSC-BC-2020-06/F01329, Annex 1, items no.2-6 and Annex 1, item no.1: 069697-TR-ET Part 1 Revised RED, pp.4, 5, 7 (referring to prior statements).

¹¹ For example, certain statements were taken closer in time to the events, while others were audio or video recorded and/or subject to cross-examination.

¹² See, similarly, *Schatschaschwili* Judgement, para.127.

¹³ See e.g. Joint Response, KSC-BC-2020-06/F01391, para.53.

¹⁴ See e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-A, Judgement, 14 December 2015, paras 2955-2956.

¹⁵ Joint Response, KSC-BC-2020-06/F01391, paras 37, 44, 55.

summary of the evidence the SPO intends to rely on to prove its case and, consequently, the evidence it cites to is by no means intended to be exhaustive.¹⁶

6. Finally, the Defence misstates the applicable framework insofar as it claims that, if evidence goes to ‘pivotal’ matters, it is precluded from admission without cross-examination.¹⁷ To the contrary, consistent with the plain language of Rule 155, evidence of acts and conduct of the Accused and ‘pivotal’ matters is admissible.¹⁸ Such submissions – as well as others concerning hearsay,¹⁹ the extent and quality of previous cross-examination,²⁰ alleged inconsistencies and ‘evasive’ answers²¹ – throughout the Joint Response fail to appreciate the distinction between admissibility, which is on a *prima facie* basis, and the final assessment of the evidence. Such submissions do not render an item inadmissible; rather, they may be considered during the Panel’s holistic consideration of all of the evidence at the end of the trial.²² In this respect, a conviction may not be based solely or to a decisive extent on the statement of a witness that the Defence did not have the opportunity to examine.²³ The

¹⁶ See e.g. Submission of Pre-Trial Brief, with witness and exhibit lists, KSC-BC-2020-06/F00631, 17 December 2021, para.2. See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on the Admission of Documents related to Telephone Subscriber and User Information, 4 November 2016, para.32.

¹⁷ Joint Response, KSC-BC-2020-06/F01391, para.19.

¹⁸ Whether it goes to the acts and conduct of the Accused is a relevant, but not determinative, factor. See Rule 155(5). See also Rule 155 Motion, KSC-BC-2020-06/F01329, para.11.

¹⁹ Joint Response, KSC-BC-2020-06/F01391, para.24. See *contra* ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Judgement, 4 December 2012 (‘Lukić Appeal Judgment’), para.570.

²⁰ Joint Response, KSC-BC-2020-06/F01391, paras 27, 35, and 137. See *contra* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution motion for admission of testimony of sixteen witnesses and associated exhibits pursuant to Rule 92 *quater*, 30 November 2009, paras 7-8.

²¹ See e.g. Joint Response, KSC-BC-2020-06/F01391, paras 26, 34, 39, 42, 94. See *contra* *Specialist Prosecutor v. Mustafa*, Corrected version of Public redacted version of Trial Judgment, KSC-BC-2020-05/F00494, 16 December 2022, para.36; *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of the Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022, para.44.

²² See e.g. ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*, 20 August 2009, para.15; *Prosecutor v. Dorđević*, IT-05-81/1-T, Decision on Prosecution’s renewed motion for admission of evidence of Antonio Russo pursuant to Rule 92 *quater*, 23 July 2009, para.10; ICTY, *Lukić Appeal Judgment*, para.567.

²³ Rule 140(4). See also ICTY, *Prosecutor v. Prlić*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para.53; ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgement, 23 July 2009, para.61.

Panel, composed of professional judges, will approach and evaluate all evidence with appropriate caution in reaching its judgment.²⁴

7. In addition to the foregoing submissions concerning the applicable framework and criteria, the SPO also provides the following submissions concerning parts of the Joint Response pertaining to certain witnesses and which underline the general deficiencies in the Joint Response.

W04416

8. Contrary to the Defence's arguments²⁵ and consistent with submissions throughout the Rule 155 Motion pertaining to this and other witnesses, the ultimate reliability, relevance, and significance of W04416's Rule 155 statement²⁶ should only be considered at the end of the proceedings based on an overall consideration of the evidence in the case, including corroborating and complementary evidence yet to be admitted. For example, in relation to the Defence's submissions concerning W04416's motives, the evidence from both W04416 and other witnesses is consistent that he was not only 'terribly beaten' while detained in Bajgorë/Bajgora, but also that he was too sick and too afraid to testify or provide complete evidence.²⁷ In this respect, another witness, [REDACTED], states that, [REDACTED], as he was too afraid.²⁸ He further told [REDACTED].²⁹ W04416's Rule 155 statement therefore illustrates the reality of a climate of witness intimidation in cases concerning crimes committed by former KLA members and should be admitted and assessed at the end of the trial, including in light of corroborative and complementary evidence.

W04418

²⁴ See, similarly, Rule 154 Decision, KSC-BC-2020-06/F01380, para.21.

²⁵ Joint Response, KSC-BC-2020-06/F01391, paras 39-43.

²⁶ See Rule 155 Motion, KSC-BC-2020-06/F01329, Annex 2, item no.1: SPOE00123775-00123786 RED.

²⁷ See [REDACTED] reporting that W04416 stated he was held prisoner in a KLA Camp, was terribly beaten and was still scared of being killed by former KLA members. See also Rule 155 Motion, KSC-BC-2020-06/F01329, Annex 2, item no.1: SPOE00123775-00123786 RED, pp.8-9.

²⁸ See [REDACTED].

²⁹ See [REDACTED].

9. Contrary to the Defence's arguments,³⁰ the circumstances of W04418's recantation after his initial statements³¹ are clearly explained in the SPO interview: fear and pressure.³² Such circumstances do not warrant barring admission of W04418's statements. In this respect and considering the Defence's submissions, prior consistent statements should be admitted for a full assessment of the witness's evidence.³³ The Defence is at liberty to request admission of W04418's other (recantation) statements cited in the Joint Response.³⁴ A consideration of the witness's prior statements in light of all evidence presented at trial and relevant circumstances, including the persisting climate of intimidation, will enable a fair and proper assessment of the witness's evidence.

W02618

10. The Defence wrongly claims that the SPO has redacted significant information about the witness advisories given to W02618³⁵ and erred in failing to explain the content and provisions of German law as compared to warnings under the Rules.³⁶ There is no requirement for the SPO to explain provisions of German law and the Defence identifies no deficiency in the advisories given—W02618 was duly advised of his rights and obligations.³⁷

11. The remaining arguments by the Defence opposing admission of the Rule 155 Statement and associated exhibits are transparently contradictory attempts to exclude relevant and probative evidence by mischaracterising W02618's associated exhibits and misstating the detailed and expansive information provided in his SPO interview.

³⁰ Joint Response, KSC-BC-2020-06/F01391, paras 51-53.

³¹ See Rule 155 Motion, KSC-BC-2020-06/F01329, Annex 3, items no.2-3.

³² See Rule 155 Motion, KSC-BC-2020-06/F01329, Annex 3, item no.1: [REDACTED].

³³ See also paras 3-4 above.

³⁴ Joint Response, KSC-BC-2020-06/F01391, para.47.

³⁵ *Contra* Joint Response, KSC-BC-2020-06/F01391, para.101. The standard redactions to 086914-TR-ET RED (Parts 1-2) do not affect the visibility of language pertaining to the rights and obligations but cover the location of the interview (A.1) and identifying information of one official present. See 089614-TR-ET RED Part 1, p.1 and 089614-TR-ET RED Part 2, p.1.

³⁶ Joint Response, KSC-BC-2020-06/F01391, para.101.

³⁷ 089614-TR-ET RED Part 1, p.1.

As the Defence concedes, [REDACTED] reports discussed and authenticated by W02618, including those concerning incidents in which he was personally involved, are admissible.³⁸ This includes SITF00189153-SITF00189178-ET, which is discussed and authenticated by W02618, as he prepared the report.³⁹

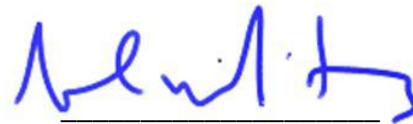
III. CLASSIFICATION

12. This reply is confidential pursuant to Rule 82(4). A public redacted version will be submitted.

IV. RELIEF REQUESTED

13. For the foregoing reasons and those given in the Rule 155 Motion, the Trial Panel should admit the evidence proposed.

Word Count: 1,906



Alex Whiting

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Thursday, 13 April 2023

At The Hague, the Netherlands.

³⁸ Joint Response, KSC-BC-2020-06/F01391, para.102.

³⁹ See Rule 155 Motion, KSC-BC-2020-06/F01329, Annex 11. W02618 made clear his knowledge of this incident, the official procedures employed by him in his report, and that he had many interactions with Nexhmedin Krasniqi, 'time and time again' and spanning the duration of his deployment. See 086914-TR-ET Part 2 RED, pp.7-8, 11; Part 3 RED, pp.1-6; Part 4 RED2, pp.1-4.