

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: Counsel for Kadri Veseli

Date: 30 May 2023

Language: English

Classification: Public

Public Redacted Version of Veseli Defence Request for the Admission of Evidence Associated With W04748's Testimony, With Confidential Annexes 1 and 2

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. The Defence for Mr Kadri Veseli (“Defence”) hereby submits this application for the admission of evidence pursuant to Articles 37 and 40(6)(h) of the Law,¹ and Rules 137-139 of the Rules.²
2. The Defence seeks to admit two items into evidence as associated exhibits of W04748’s testimony before the Specialist Chambers. These items are included in Annexes 1-2 of this Request and comprise:
 - i. **Annex 1:** [REDACTED] statement [REDACTED] (“[REDACTED] Statement”).³
 - ii. **Annex 2:** An extract of the Main Trial Hearing [REDACTED] (“[REDACTED] Testimony”).⁴
3. The Defence submits that these items form an inseparable component of W04748’s testimony before the Specialist Chambers such that the Defence’s cross-examination of that witness cannot be fully understood without them. It is further noted that the items fall within the scope of admissibility enshrined in Article 37(1) and (3) of the Law, as well as Rule 138(1) of the Rules. The Defence’s position is that the material is admissible under both provisions, though it nonetheless requests that the Panel admit the Annexed items in accordance with the legal basis deemed most appropriate.

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’).

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.

³ See specifically, SITF00299825-00299851 RED, pp. SITF00299827-SITF00299834 (includes the corresponding Albanian translation).

⁴ See specifically, SITF00370155-00370178 RED, pp. SITF00370155- SITF00370173.

II. PROCEDURAL BACKGROUND

4. W04748 testified before the Specialist Chambers on 10-12 and 15-17 May 2023.
5. On 16 May 2023, the Defence confronted W04748 with, *inter alia*, [REDACTED] Testimony,⁵ as well as [REDACTED] Statement.⁶ Whereas the Defence sought to admit portions of the former and the totality of the latter the Trial Panel deferred its decision in respect of both items and marked them for identification as [REDACTED]and [REDACTED]respectively.⁷
6. On 17 May 2023, the Trial Panel admitted the first page of [REDACTED]– which contained a [REDACTED] – but ruled against admitting the items contained in Annexes 1 and 2 on the basis that they were statements being offered for the truth of their contents, which, in turn, required that they be admitted pursuant to Rules 153-155 of the Rules.⁸

III. APPLICABLE LAW

A. Interpretation of the Specialist Chambers’ Legal Framework

7. Pursuant to Rule 4(1) of the Rules, “[t]he Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code.”
8. The Defence notes that Article 3(2)(b) of the Law states that the Court “shall adjudicate and function in accordance with [...] this law as the *lex specialis*.”
9. It is further noted that Rule 4(2) of the Rules dictates that where conflict arises between the Law and the Rules, “the Law shall prevail.”

⁵ Transcript, 16 May 2023, pp. 4046 *et seq.*

⁶ [REDACTED].

⁷ Transcript, 16 May 2023, pp. 4063-4064.

⁸ Transcript, 17 May 2023, pp. 4251-4252.

10. Lastly, the Defence draws the Panel's attention to Rule 4(3) of the Rules which indicates that "[a]ny ambiguity not settled in accordance with paragraph 1 shall be resolved by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances."

B. Provisions Regarding the Admission of Evidence

11. Article 37(1) of the Law states that:

Evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by any national or international law enforcement or criminal investigation authority or agency including the Kosovo State Prosecutor, any police authority in Kosovo, the ICTY, EULEX Kosovo or by the SITF may be admissible before the Specialist Chambers. Its admissibility shall be decided by the assigned panels pursuant to international standards on the collection of evidence and Article 22 of the Constitution. The weight to be given to any such evidence shall be determined by the assigned panels.

12. Article 37(3) of the Law further delineates four specific categories of documents, falling within the purview of Article 37(1), which, "subject to judicial determination of admissibility and weight", may be admissible before the Court. In this regard, the Defence draws the Panel's attention to Article 37(3)(b) and (c):

b. transcripts of testimony of witnesses given before a Kosovo court, including pre-trial testimony or testimony preserved as part of a Special Investigative Opportunity under any criminal procedure code applicable in Kosovo at the relevant time, may be admissible before the Specialist Chambers, regardless of whether the judges sitting on the Panel heard the original testimony;

c. original documents, certified copies, certified electronic copies and copies authenticated as unaltered in comparison to their originals and forensic evidence collected by any authority listed in paragraph 1 may be admissible in proceedings before the Specialist Chambers; and

13. In accordance with Article 40(2) of the Law, the Trial Panel:

[S]hall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Trial Panel, having heard the parties, may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings. It may give

directions for the conduct of fair and impartial proceedings and in accordance with the Rules of Procedure and Evidence.

14. Article 40(6)(h) of the Law states that “the Trial panel may, as necessary rule on any other matters, including the admissibility of evidence.”
15. Pursuant to Rule 137(2) of the Rules, the “Panel shall assess freely all evidence submitted in order to determine its admissibility and weight.”
16. As regards admissibility, Rule 138(1) states that evidence submitted to the Panel will be admitted “if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.”
17. According to Rule 139(4) of the Rules, “[i]n determining the weight to be given to the testimony of a witness, a Panel shall assess the credibility of the witness and the reliability of his or her testimony.”

IV. SUBMISSIONS

18. The Defence submits that Article 37 of the Law and Rule 138(1) of the Rules both constitute valid legal bases for admission of the Annexed items.
19. The Defence’s position is that either legal base is a suitable medium for the admission of evidence, though it nonetheless maintains that Article 37 of the Law is the *lex specialis* in the present instance, as acknowledged by the Specialist Chambers Legal Framework.⁹
20. Additionally, the Defence recalls that the SPO Bar Table Motion also forwarded Article 37 and Rule 138 as alternative legal bases for the admissibility of written

⁹ See specifically, Rule 4(1) of the Rules referring to Article 3 of the Law, within which paragraph 2(b) states that the Law is the *lex specialis*. The Defence also notes that Rule 4(2) of the Rules places the Law above the Rules in situations of conflict between the two authorities and Rule 4(3) of the Rules requires unresolved ambiguities to be settled in favour of the Accused when such ambiguities are incapable of resolution pursuant to Rule 4(1).

evidence.¹⁰ Whereas the Defence argued against the admission of various expert testimonies pursuant to Article 37 of the Law, its position in that instance was motivated by the fact that the items for which admission was sought had not been produced in the presence of the Accused at a public hearing and had not resulted in adversarial arguments between the Parties.¹¹ Contrarily, the Annexed items pertinent to this Request satisfy the principle of orality precisely because they were used during the cross-examination of an SPO witness, in the presence of the Accused, where the SPO had the opportunity to carry out re-direct examination.¹² The SPO suffers no prejudice in this respect.

21. Consequently, in the ensuing paragraphs, the Defence sets out specific arguments as to the suitability of admission of the Annexed items under Article 37 of the Law and/or Rule 138 of the Rules. As indicated above in paragraph 3, the Defence requests that the Panel admit the Annexed items in accordance with the legal basis deemed most appropriate.

A. The Annexed Items are Admissible under Article 37 of the Law

i. Annex 1

22. Annex 1 contains the original handwritten version of [REDACTED] statement, as well as certified typed copies of the same statement in English and Albanian.¹³

23. Both the handwritten and typed versions of the statement are signed by [REDACTED] personnel, as well as [REDACTED].¹⁴ Hence, not only does the

¹⁰ F01268, Prosecution application for admission of material through the bar table with public Annexes 5 and 8, and confidential Annexes 1-4, 6 and 7, 8 February 2023, public, para. 31, fn. 36.

¹¹ F01289, Joint Urgent Preliminary Defence Response to SPO Application for Admission of Material through the Bar Table, 14 February 2023, public, paras 27-34 *referring specifically* to jurisprudence of the European Court of Human Rights, especially, ECtHR, *Case of Al-Khawaja and Tahery v. The United Kingdom*, 26766/05 and 22228/06, [Judgement](#), 15 December 2020, para. 118.

¹² [REDACTED].

¹³ *See*, Annex 1, pp. 3-10.

¹⁴ *See*, Annex 1, pp. 3-10.

statement fulfil the general requirements of provenance contained in Article 37(1) of the Law but it also falls squarely within the specific subset of admissible documents provided for in Article 37(3) of the Law. More specifically, the Defence submits that the statement is admissible under Article 37(3)(b) as a written record of a pre-trial interview in domestic proceedings and/or under Article 37(3)(c) as an original document accompanied by certified typed copies stemming from an authority in Article 37(1) – namely, [REDACTED] (such as [REDACTED]).

24. Furthermore, the Defence reiterates the submissions made in paragraph 20 above to the extent that [REDACTED] Statement also satisfies the principle of orality and confrontation contained in Article 37(2) of the Law precisely because the item was used during the cross-examination of W04748 and in the presence of the Accused.¹⁵
25. Annex 1 ought to be admitted pursuant to Article 37 of the Law as evidence collected prior to the establishment of the Specialist Chambers.

ii. Annex 2

26. As regards Annex 2, the Defence notes that [REDACTED]'s Testimony [REDACTED] also satisfies the conditions for admissibility contained in Article 37(1) and (3)(b) of the Law. This is especially true considering that Annex 2 is an extract of a transcript of a witness' testimony before [REDACTED] – [REDACTED] – which, at the time of [REDACTED].¹⁶ Moreover, and in similar fashion to the item in Annex 1, the case to which [REDACTED]'s testimony pertains, concerns crimes with which Mr Veseli and his co-accused are charged in the instant proceedings.

¹⁵ [REDACTED].

¹⁶ See generally, Annex 2.

27. Lastly, the Defence recalls that the item in Annex 2 was also used in the presence of the Accused, during the cross-examination of W04748.
28. Annex 2 ought to be admitted pursuant to Article 37 of the Law as evidence collected prior to the establishment of the Specialist Chambers.

B. The Annexed Items are Admissible under Rule 138 of the Rules

29. At the outset, the Defence submits that the Annexed items yield sufficient indicia of authenticity, reliability, relevance and probative value, rendering them admissible as associated exhibits of W04748 pursuant to Rule 138 of the Rules. No prejudice is caused to any of the parties and participants to these proceedings. In fact, admission only serves to safeguard the fair trial rights of the Accused.
30. Whilst cognisant of the Presiding Judge's insistence that the Annexed items are "subject to Rules 153-155",¹⁷ the Defence notes that the Trial Panel enjoys broad discretion insofar as the admissibility of evidence is concerned.¹⁸ It further observes that on 23 May 2023, the Trial Panel provisionally admitted W01236's [REDACTED] transcript from [REDACTED], under Rule 138(1) of the Rules.¹⁹ In that instance, the SPO had initially tendered W01236's testimony for admission pursuant to Rule 154 of the Rules. However, one day prior to W01236's testimony before the Court, the SPO rescinded its intention to tender the statement at all after which it was tendered and provisionally admitted by the Defence via Rule 138.²⁰ The fact that the item was a witness statement given under oath had no bearing upon its admissibility under Rule 138 of the Rules. The SPO tendered the statement for admission because it repeated information

¹⁷ Transcript, 17 May 2023, pp. 4251-4252.

¹⁸ See generally, Article 40(2) and 40(6)(h) of the Law.

¹⁹ Transcript, 23 May 2023, p. 4602.

²⁰ Transcript, 23 May 2023, pp. 4597-4602.

already contained in W01236's SPO interview, upon which the SPO sought to rely for the truth of its contents.²¹

31. Accordingly, the Defence avers that the Annexed items are admissible for the truth of their contents pursuant to Rule 138(1) of the Rules.

i. Annex 1

32. [REDACTED] Statement satisfies the conditions of admissibility under Rule 138(1) of the Rules. It is authentic, reliable, relevant and probative. No prejudice is caused by its admission.

1. Authenticity

33. The item displays the [REDACTED] symbol on multiple pages and was authored by [REDACTED]. The investigators responsible for compiling [REDACTED] are clearly stated on the cover page.²² Lastly, the statement at issue was admitted into evidence by [REDACTED] and forms part of the final judgement in that case.²³

2. Reliability

34. The statement is reliable because [REDACTED]'s signature appears next to the attestation that (i) the statement was given in the absence of duress;²⁴ and (ii)

²¹ See, Transcript, 23 May 2023, p. 4599 where the Specialist Prosecutor stated that "[t]he Rule 154 decision actually encouraged the Prosecution to seriously consider whether it wanted to tender and seek to admit both the SPO interview and the [REDACTED] transcripts because of their length and because, as counsel said, **they both covered the same topics**. The SPO yesterday did notify the Defence that the Prosecution followed [the Judges'] instructions and decided **to only tender the SPO interview so as not to litter the record with repetitive materials**. The supplemental questioning actually was purposely intended to elicit a piece of evidence that was not in the SPO interview but was in the [REDACTED] testimony."

²² See Annex 1, p. 1.

²³ See, 095034-095135, p. 095044.

²⁴ Annex 1, pp. 3, 5 and 7.

the statement is accurate.²⁵ Yet again, the Defence notes that this statement was admitted into evidence by the by the [REDACTED].²⁶

3. Relevance

35. Annex 1 is highly relevant to the Defence's case given that it forms an inseparable component of W04748's testimony; the Defence's cross-examination of [REDACTED] cannot be fully understood without Annex 1. Moreover, the Defence contends that the statement is crucial for properly understanding the obvious credibility issues associated with W04748 and forms part of a larger pool of evidence concerning versions of [REDACTED] which stand directly opposed to that forwarded by W04748.²⁷

4. Probative Value and Prejudice

36. The Defence submits that [REDACTED] Statement demonstrates that W04748 is not a witness of truth and cannot be relied upon in any way whatsoever to adduce evidence against the Accused in respect of crimes alleged to have occurred in and around [REDACTED]. While W04748 told the Specialist Chambers that [REDACTED] was not involved in, but merely present at, [REDACTED] presents a totally different version of events [REDACTED].²⁸ Notably, his version of events accords with those forwarded [REDACTED],²⁹ [REDACTED],³⁰ and the findings of [REDACTED].³¹
37. Additionally, the Defence re-emphasises the fact that the SPO maintains that [REDACTED]:

²⁵ Annex 1, pp. 4, 6 and 7-10.

²⁶ See, 095034-095135, p. 095044.

²⁷ See for instance, 083285-TR-ET Part 3, pp. 5-6; 083285-TR-ET Part 4, pp. 7 and 19; 083285-TR-ET Part 6, pp. 8 and 16; 095034-095135, pp. 095036-095037 and 095128.

²⁸ See for instance, Annex 1, p. 3.

²⁹ 083285-TR-ET Part 3, pp. 5-6; 083285-TR-ET Part 4, pp. 7 and 19; 083285-TR-ET Part 6, pp. 8 and 16.

³⁰ 095034-095135, p. 095128.

³¹ 095034-095135, pp. 095036-095037 and 095128.

[REDACTED].³²

38. It is especially notable that the Trial Panel [REDACTED].³³
39. Consequently, the Defence submits that [REDACTED] statement is probative insofar as it is an authentic, reliable account of events that cannot be reconciled with that of W04748, thereby casting grave doubt on his credibility. He was found to have lied [REDACTED] and did so again before the Specialist Chambers.
40. Admission of [REDACTED] statement into evidence does not cause any prejudice to the SPO. Rather, it conforms fulsomely with its own case theory on this issue.

ii. Annex 2

41. [REDACTED]' Testimony [REDACTED] satisfies the conditions of admissibility under Rule 138(1) of the Rules. It is authentic, reliable, relevant and probative. No prejudice is caused by its admission.

1. Authenticity

42. The first page of Annex 2 indicates that [REDACTED]'s testimony [REDACTED].³⁴ This is sufficient for establishing the item's authenticity.

2. Reliability

43. [REDACTED] was read his rights [REDACTED].³⁵ Moreover, the Court found him to be fully reliable [REDACTED]:

³² See, F01330, Annex 1 to Prosecution motion for judicial notice of adjudicated facts, 1 March 2023, confidential, [REDACTED].

³³ F01534, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex 1 (Confidential) and Annex 2 (Public), 17 May 2023, public, [REDACTED].

³⁴ See, Annex 2, p. 1.

³⁵ Annex 2, p. 3.

[REDACTED].³⁶

3. Relevance

44. [REDACTED]'s testimony is relevant to the Defence's case because W04748's cross-examination by the Defence cannot be properly understood without it. The Defence avers that Annex 2 casts additional doubt over W04748's credibility and advances the Defence's case in respect of crimes alleged to have occurred in [REDACTED] with which the Accused have been charged.

4. Probative Value and Prejudice

45. The Defence argues that [REDACTED]'s testimony is probative insofar as it demonstrates that W04748 is not a credible witness upon whom the Trial Panel can reasonably rely for a finding of fact. The Defence recalls that W04748 testified that [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].

46. The SPO suffers no prejudice from the admission of Annex 2.

iii. Conclusion

47. Both Annexes 1 and 2 ought to be admitted as associated exhibits of W04748's testimony before the Specialist Chambers pursuant to Rule 138(1) of the Rules.

C. Admission of the Annexed Items is Crucial for Determining the Weight to be Given to W04748's Testimony

48. Irrespective of the legal basis pursuant to which the Annexed items are admitted, the Defence avers that their admission forms an integral component of the weight to be accorded to W04748's testimony. Pursuant to Rule 139(4) of the Rules, it is incumbent upon the Panel to assess W04748's credibility when

³⁶ 056747-056952, p. 056802.

³⁷ Transcript, 16 May 2023, p. 4045.

³⁸ Annex 2, p. 7.

determining the weight to be given to his evidence. It is the Defence's position that Annexes 1 and 2 inform heavily upon that assessment.

V. CONCLUSION

49. In light of the foregoing, the Defence requests that the Trial Panel:

- i. Admit Annexes 1 and 2 pursuant to Article 37 of the Law, as evidence collected prior to the establishment of the Specialist Chambers.
- ii. Alternatively, admit Annexes 1 and 2 pursuant to Rule 138(1) of the Rules as associated exhibits of W04748's testimony before the Specialist Chambers.

Word Count: 3,708

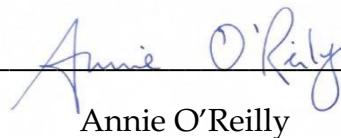


Ben Emmerson, CBE KC
Counsel for Kadri Veseli

Tuesday, 30 May 2023,
London, The United Kingdom



Andrew Strong
Co-Counsel for Kadri Veseli



Annie O'Reilly
Co-Counsel for Kadri Veseli

Tuesday, 30 May 2023,
The Hague, The Netherlands

Tuesday, 30 May 2023,
The Hague, The Netherlands