



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

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Public Redacted Version of 'Prosecution reply relating to its second Rule 155 motion (F01691)'

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I. INTRODUCTION

1. The Response¹ is speculative and unsubstantiated, raising arguments that ignore the applicable law and this Panel's previous findings. The evidence proposed in the Motion² meets the requirements of Rule 155³ and should be admitted.

II. SUBMISSIONS

2. Contrary to the Response, inconsistencies do not bar admission; rather, they can be considered when ultimately assigning weight.⁴ Likewise, corroboration is not required.⁵ Rather, it is but one of many factors considered by the Panel when assessing, in particular, prejudice.⁶ In this assessment, the Panel may take into account – as one factor⁷ – that the Specialist Prosecutor's Office ('SPO') intends to call live witnesses anticipated to provide corroborating evidence.⁸ The fact that such witnesses have not yet testified does not mean that the proposed Rule 155 statements they corroborate should not be tendered or admitted until after they appear; rather, any admitted Rule 155 statement is more appropriately considered with any corroboration

¹ Joint Defence Response to 'Prosecution second motion for admission of evidence pursuant to Rule 155', KSC-BC-2020-06/F01718, 14 August 2023, Confidential ('Response').

² Prosecution second motion for admission of evidence pursuant to Rule 155, KSC-BC-2020-06/F01691, 20 July 2023, Confidential ('Motion').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁴ See e.g. Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F01603, 14 June 2023, Confidential ('First Decision'), para.50. *Contra* Response, KSC-BC-2020-06/F01718, paras.29-33, 50-52. Likewise, the absence of certain indicia of reliability do not render a statement inadmissible, and are more appropriately considered when ultimately assigning weight. See e.g. First Decision, KSC-BC-2020-06/F01603, para.178. *Contra* Response, KSC-BC-2020-06/F01718, paras.23-25, 44, 49.

⁵ See e.g. First Decision, KSC-BC-2020-06/F01603, para.86. *Contra* Response, KSC-BC-2020-06/F01718, paras.34-37, 40, 43.

⁶ See e.g. Decision on Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the 'Decision on Prosecution for Admission of Evidence pursuant to Rule 155', KSC-BC-2020-06/F01671, 13 July 2023 ('Certification Decision'), para.11.

⁷ *Contra* Response, KSC-BC-2020-06/F01718, para.18.

⁸ Certification Decision, KSC-BC-2020-06/F01671, paras.11-14.

at the end of the proceedings in light of the entire body of evidence and relevant safeguards, including the sole or decisive rule.⁹ The Defence request concerning the timing of future Rule 155 motions¹⁰ is therefore unjustified, unnecessary, and would threaten the expeditiousness of these proceedings.¹¹

3. Further, the Defence's general submissions about the volume of purportedly 'untested evidence' in these proceedings¹² have no impact on the Motion, and, in any event, are speculative, premature, and unsubstantiated. Rule 155, and the other Rules cited in the Response,¹³ are well-established trial procedures, with built-in safeguards to ensure the fairness of the proceedings.¹⁴ The Panel has carefully applied such safeguards, exercised appropriate caution, and been mindful of the need to ensure a manageable record.¹⁵ Undeveloped Defence submissions suggesting otherwise should therefore be summarily dismissed.¹⁶

4. Below, the SPO addresses certain issues specific to W03821's evidence.¹⁷

W03821

5. Defence objections to the admission of W03821's evidence¹⁸ do not contest that W03821 is unavailable, but rather that the content of his evidence renders it

⁹ See also paras.6-8 below. The term 'sole or decisive rule', as used in this reply, refers to standard codified in Rule 140(4).

¹⁰ Response, KSC-BC-2020-06/F01718, paras.16-19.

¹¹ At the appropriate time, the Defence may make submissions about the reliability and weight of any evidence – including any Rule 155 statements – if, *inter alia*, the hypothetical and speculative scenarios raised by the Defence (see Response, KSC-BC-2020-06/F01718, para.18) come to pass.

¹² Response, KSC-BC-2020-06/F01718, paras.2-3.

¹³ Response, KSC-BC-2020-06/F01718, para.2.

¹⁴ Rules 140(4), 155(5).

¹⁵ See e.g. First Decision, KSC-BC-2020-06/F01603, paras.108, 208. In relation to Defence submissions concerning resources (see Response, KSC-BC-2020-06/F01718, para.2), the Panel has, where justified, granted Defence requests for time extensions, taking into account the timing of relevant motions. See e.g. Transcript, 20 July 2023, pp.6242-6243.

¹⁶ See e.g. IRMCT, *Prosecutor v. Kardžić*, MICT-13-55-A, Judgement, 20 March 2019, para.221. See also Certification Decision, KSC-BC-2020-06/F01671, para.32.

¹⁷ These submissions reflect the scope of replies, as limited by Rule 76.

¹⁸ Response, KSC-BC-2020-06/F01718, paras.26-38.

inadmissible. The Defence's arguments fail, as W03821's evidence falls squarely within the parameters for Rule 155 evidence.

6. Contrary to Defence submissions,¹⁹ W03821's evidence corroborates other documentary and witness evidence concerning events at Qirez/Ćirez and Baicë/Banjica, and the involvement of senior KLA officials (in particular, Sabit GECI and Hashim THAÇI²⁰). Such witnesses and documentary evidence include, but are not limited to:²¹

- a. W03825²² and [REDACTED],²³ both of whom the SPO intends to call live, were detained with W03821 at both Qirez/Ćirez and Baicë/Banjica, and provide evidence concerning the crimes charged and the involvement of, *inter alia*, GECI and THAÇI;²⁴
- b. [REDACTED], whom the SPO intends to call live and provides (i) eyewitness evidence of the events at Qirez/Ćirez and the involvement of, *inter alia*, GECI and THAÇI,²⁵ and (ii) hearsay evidence [REDACTED] received during and/or shortly after the detentions and mistreatment at Baicë/Banjica;²⁶
- c. W04147, whom the SPO intends to call live and was told – both during and soon after these events – by, *inter alia*, two of the Qirez/Ćirez and

¹⁹ Response, KSC-BC-2020-06/F01718, paras.36-38.

²⁰ While W03821 did not identify SELIMI, other evidence summarised below also establishes his involvement.

²¹ See Motion, KSC-BC-2020-06/F01691, para.38. See also Corrected Version of Prosecution Pre-Trial Brief, KSC-BC-2020-06/F00709/A01, 24 February 2022, Strictly Confidential and *Ex Parte* ('Pre-Trial Brief'), paras.458-468.

²² A witness's views expressed in a letter are not determinative of whether that witness ultimately testifies (*see* Rules 121-122), and it will be for the Panel to decide the credibility of his account, including any attempted recantation. *Contra* Response, KSC-BC-2020-06/F01718, para.37.

²³ [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

²⁴ Amended List of Witnesses, KSC-BC-2020-06/F01594/A01, 9 September 2023, Strictly Confidential and *Ex Parte* ('Witness List'), pp.198-201.

²⁵ Witness List, KSC-BC-2020-06/F01594/A01, p.202.

²⁶ See e.g. [REDACTED].

- Baicë/Banjica detainees of their mistreatment, interrogation, and the involvement of both GECI and THAÇI;²⁷
- d. W04147's contemporaneous diary, confirming details and contacts related to the detentions at Qirez/Ćirez and Baicë/Banjica and the victims' release;²⁸
 - e. Accused SELIMI's evidence, *inter alia*, that he was present at the school in Baicë/Banjica when the parliamentary delegation was there, saw GECI, and knew or presumed that THAÇI was also there;²⁹
 - f. W01456, whose evidence has been admitted pursuant to Rule 155 and who spoke to W03825 about the detentions at Qirez/Ćirez and Baicë/Banjica;³⁰
 - g. a contemporaneous KLA General Staff communique³¹ and a Military Police Directorate press release,³² which corroborate the detentions at Qirez/Ćirez and Baicë/Banjica and the reasons therefor;
 - h. evidence of the Accused's involvement in other, similar acts of detention, interrogation, and mistreatment of Opponents;³³ and
 - i. evidence of a consistent pattern of detentions and mistreatment by KLA members, which formed part of a campaign of persecution against Opponents.³⁴
7. Considered together, this evidence constitutes an interconnected and compelling account of the circumstances in which the victims were arrested, detained, interrogated, and mistreated. In this respect, at the end of the trial and in considering whether the evidence is sufficiently reliable and/or sufficient, relevant factors include whether – as here – the statement of an unavailable witness corroborates or is corroborated by: (i) statements of other eye witnesses to the same events; (ii)

²⁷ Witness List, KSC-BC-2020-06/F01594/A01, p.230.

²⁸ See e.g. 075522-075551, paras.105-107; 075419-075419; 075421-075421.

²⁹ See e.g. 074459-TR-ET Part 7, pp.10-11.

³⁰ U008-2500-U008-2535, paras.141-145, 153.

³¹ 086833-086833-ET. See also KSC-BC-2020-06/F01268/A01, p.47 (item 2M).

³² Exhibit P00158-ET, p.2.

³³ See Pre-Trial Brief, KSC-BC-2020-06/F00709/A01, para.112; see also para.2 (defining 'Opponents').

³⁴ Pre-Trial Brief, KSC-BC-2020-06/F00709/A01, paras.113, 267, 704.

statements of persons to whom the absent witness reported the events soon after their occurrence; (iii) documentary evidence; (iv) evidence of the Accused's involvement in similar acts; and (v) evidence of a consistent pattern of conduct.³⁵ W03821's complete evidence³⁶ should therefore be admitted and available to the Panel.

8. More generally, evidence going to proof of the acts and conduct of the Accused is admissible under Rule 155.³⁷ Even where the Defence suggests that certain evidence is uncorroborated, the Panel will not exclude this evidence at the point of a Rule 155 decision, but will instead make such an assessment at the end of trial.³⁸ Ultimately, the sole or decisive rule should not be applied in an inflexible manner, particularly at the admissibility stage; to do so would 'transform the rule into a blunt and indiscriminate instrument' that runs counter to considerations of the overall fairness of the proceedings.³⁹

9. The Defence also claims that W03821's evidence is contradictory. However, as outlined below, this is based on exaggerations or misreadings of the evidence, which in no case rise to a level which would impact the *prima facie* reliability of the evidence as a whole.⁴⁰ The Defence argues that there is an 'inconsistency' between two of W03821's statements in regards to terms that Sabit GECI and Hashim THAÇI used to

³⁵ See e.g. ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment, 30 January 2015, para.104; ECtHR, *Schatschaschwili v. Germany* [GC], 9154/10, Judgment, 15 December 2015, para.128. As noted previously, other safeguards also exist in relation to W03821's evidence. See Motion, KSC-BC-2020-06/F01691, fn.32, paras.37-38.

³⁶ It is important that, for purposes of considering the reliability of the statement, as well as of other corroborative evidence, the whole statement is admitted, including any parts (even those that go to the acts and conduct of the Accused) that are uncorroborated. See e.g. ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Gvero's Motion for the Admission of Evidence Pursuant to Rule 92 *quater*, 3 February 2009, para.31; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Redacted Version of "Decision on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*", 19 February 2009, paras.47-50.

³⁷ See First Decision, KSC-BC-2020-06/F01603, paras.15, 116.

³⁸ See First Decision, KSC-BC-2020-06/F01603, paras.86, 88, 137. See, similarly, ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, paras.52-52, 62.

³⁹ ECtHR, *Al-Khawaja and Tahery v. UK* [GC], 26766/05 & 22228/06, Judgment, 15 December 2011, para.146.

⁴⁰ See also para.2 above.

refer to one another.⁴¹ In fact, reference to the cited pages [REDACTED] shows that W03821 confirmed his prior evidence regarding the terms used and provided his understanding of them.⁴²

10. Another claimed inconsistency concerns W03821 mentioning an exchange in one statement that is not mentioned 13 years later in a different statement, given in a different context.⁴³ However, this does not make the statements inconsistent.

11. Further, the Defence raises inconsistencies between the two English versions of W03821's [REDACTED].⁴⁴ While the inconsistencies between the English translation of the Albanian transcript [REDACTED] and English transcript [REDACTED] of the witness's [REDACTED] are not significant, the SPO accepts that a fulsome evaluation of W03821's evidence militates in favour of the admission of both.

12. Finally, the Defence's attempts to manufacture a lack of clarity regarding W03821's basis for identifying Jakup KRASNIQI are specious.⁴⁵ W03821 is clear that his basis for believing KRASNIQI was there was purely because he was later told so. Nevertheless, as with other Defence arguments, these are all claims that the Defence can put forward as regards ultimate weight.⁴⁶

III. CLASSIFICATION

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

⁴¹ Response, KSC-BC-2020-06/F01718, para.29.

⁴² [REDACTED], pp.11-12.

⁴³ Response, KSC-BC-2020-06/F01718, paras.31-32.

⁴⁴ Response, KSC-BC-2020-06/F01718, para.30.

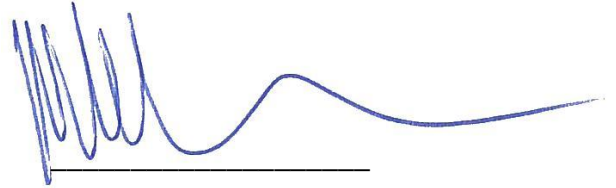
⁴⁵ Response, KSC-BC-2020-06/F01718, paras.34-35.

⁴⁶ First Decision, KSC-BC-2020-06/F01603, para.18.

IV. RELIEF REQUESTED

14. The SPO seeks leave to additionally tender [REDACTED].⁴⁷ With this amendment and for the reasons given above and previously, the Motion should be granted.

Word count: 1985



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Monday, 21 August 2023

At The Hague, the Netherlands.

⁴⁷ See para.11 above.