



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

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Public Redacted Version of 'Prosecution reply to joint Defence response concerning Rule 154 submissions (F01818)'

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I. INTRODUCTION

1. The Response¹ is based on misconceptions of the scope of evidence that is relevant to this case and the *prima facie* nature of admissibility assessments, particularly in the context of Rule 154 of the Rules,² where the witnesses will be available for cross-examination. The Motion³ should be granted.

II. SUBMISSIONS

2. The Response, without explanation or justification, ignores prior decisions of this Panel concerning, *inter alia*:

- a. the admissibility of statements taken at different times and by different authorities, which have probative value even if (partially) duplicative and so long as the proposed evidence altogether is manageable in size;⁴
- b. the admissibility and value of opinion evidence;⁵

¹ Joint Defence Response to the Prosecution motion for admission of evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 pursuant to Rule 154, KSC-BC-2020-06/F01818, 25 September 2023, Confidential ('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.

³ Prosecution motion for admission of evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 pursuant to Rule 154, KSC-BC-2020-06/F01788, 14 September 2023, Confidential ('Motion').

⁴ *Contra* Response, KSC-BC-2020-06/F01818, paras 5-7 (arguing that admission of W00208's three statements is unjustified). *See, for example*, Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154, KSC-BC-2020-06/F01700, 24 July 2023, Confidential ('24 July Decision'), paras 25 (noting, *inter alia*, that the consistency of accounts over time (or lack thereof) might also be relevant to assessing the reliability of the proposed evidence and credibility of the witness), 28, 35; Decision on Prosecution Motion for Admission of Evidence of W00072, W02153 and W04586, KSC-BC-2020-06/F01664, 10 July 2023, Confidential ('10 July Decision'), paras 17, 19, 46.

⁵ *Contra* Response, KSC-BC-2020-06/F01818, paras 10, 17-18. There is no exclusionary principle concerning opinion evidence, its value will be assessed at the end of the proceedings, and there is thus no need to redact such evidence from Rule 154 statements and associated exhibits. *See* Oral Order, Transcript, 18 July 2023, pp.5984-5986.

- c. the admissibility of Rule 154 statements going to proof of the acts and conduct of the Accused and/or important issues in the case;⁶
- d. matters going beyond the *prima facie* reliability and authenticity of the evidence (such as inconsistencies, lack of identified source, absence of certain formal indicia of reliability, and hearsay), which can be explored during cross-examination and do not prevent Rule 154 admission;⁷
- e. evidence of matters outside the Indictment period and/or relating to unscheduled incidents, which is admissible if demonstrably relevant, including by providing context;⁸ and
- f. the admissibility of associated exhibits that are necessary for a complete and fully comprehensible Rule 154 statement, even where such exhibits (or parts thereof) are not extensively discussed or when the witness purportedly is unable to provide substantive comment.⁹

3. Defence submissions ignoring the established legal framework governing admission of evidence under Rule 154, including as set out in prior decisions of this Panel, should be summarily dismissed. The SPO further replies to certain, discrete points raised in the Response below.

⁶ *Contra* Response, KSC-BC-2020-06/F01818, paras 21-22, 39-41. *See, for example*, 10 July Decision, KSC-BC-2020-06/F01664, para.31; Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154, KSC-BC-2020-06/F01595/COR, 9 June 2023, Confidential ('Second Decision'), paras 15, 23, 33, 47, 70, 82-83. *See also* paras 4, 9 below.

⁷ *Contra* Response, KSC-BC-2020-06/F01818, paras 14 (concerning methodology used in creating reports submitted as associated exhibits), 16 (alleging there are 'no indicia of individual authorship'), 25-28, 35 (arguing that it is unclear how a video was compiled), 42-43, 47, 51-52. *See, for example*, 24 July Decision, KSC-BC-2020-06/F01700, paras 34, 45, 69; 10 July Decision, KSC-BC-2020-06/F01664, paras 18, 35, 45, 50; Second Decision, KSC-BC-2020-06/F01595/COR, paras 22, 33, 46, 55, 96. *See also* paras 5-6, 10, 12-13 below.

⁸ *Contra* Response, KSC-BC-2020-06/F01818, paras 17, 30. *See, for example*, 24 July Decision, KSC-BC-2020-06/F01700, paras 43, 89; 10 July Decision, KSC-BC-2020-06/F01664, paras 21, 28.

⁹ *Contra* Response, KSC-BC-2020-06/F01818, *inter alia*, paras 19, 47-48, 51-52. *See, for example*, 24 July Decision, KSC-BC-2020-06/F01700, paras 51, 58; 10 July Decision, KSC-BC-2020-06/F01664, paras 21, 33, 49; Second Decision, KSC-BC-2020-06/F01595/COR, para.71. *See also* paras 5-7, 12-13 below.

A. W04147

4. The SPO initially estimated eight hours of live examination for W04147 and has reduced that to 3 hours should W04147's testimony be adduced pursuant to Rule 154.¹⁰ While additional *viva voce* examination will focus significantly on W04147's interactions with the Accused and crimes committed by certain KLA members, that is no precondition for admission of W04147's statement under Rule 154, as the Defence will be able to effectively cross-examine him in any case.¹¹

5. The Defence's submissions about the authenticity and reliability of the diplomatic cables go to their weight, not admissibility.¹² Moreover, as the Defence acknowledges, W04147 explains the methodology and authorship of 15 of the cables, and states that they accurately summarised his best understanding of the facts on the ground at the time.¹³ In addition, much of the content of the cables is discussed throughout W04147's statement.¹⁴ The cables are therefore not only sufficiently reliable for admission, but also form an indispensable part of W04147's Rule 154 statement.

6. Contrary to the Defence's submissions, the fact that the cables contain some provider redactions and do not always identify all persons involved is no bar to their admission.¹⁵ The Panel has previously rejected similar submissions, which are only relevant to the weight of the tendered exhibit, especially when there is no indication that the redacted information is material to the Defence or exculpatory in nature.¹⁶

¹⁰ Submission of Pre-Trial Brief, with witness and exhibit lists, KSC-BC-2020-06/F00631/A02, 17 December 2021 p.234.

¹¹ See para.2 above and the relevant sources cited therein.

¹² Response, KSC-BC-2020-06/F01818, paras 26-27.

¹³ 075522-075551, p.075525, para.18. *C.f.* Response, KSC-BC-2020-06/F01818, para.26.

¹⁴ See 075522-075551, p.075531, para. 44, discussing information contained in 075300-075308, p.075301 (at para.4); 075522-075551, p.075532, para. 50, discussing information contained in 075316-075335, p.075334 (at para.19); 075522-075551, p.075545, para. 117, discussing information contained in 075300-075308, pp.075306-075307 (at para.15).

¹⁵ Response, KSC-BC-2020-06/F01818, paras 26-29.

¹⁶ Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, Confidential, para.95.

Moreover, the Defence's submissions challenging the relevance of certain cables simply ignore that the SPO provided this information for each individual item in the annex to the Motion.¹⁷

7. The Defence's request to admit only selected pages of W04147's calendar would lead to a fractured evidential record and needless loss of courtroom time.¹⁸ The item is of limited size and many different pages are referenced throughout W04147's statement.

8. Finally, Defence submissions concerning W04147's reserve witness status¹⁹ are irrelevant to the admissibility of his Rule 154 statement and associated exhibits, and in any event, both unfounded and premature, for the reasons given previously.²⁰

B. W04325

9. Though the SPO does intend to rely upon W04325's evidence for Rexhep SELIMI's authority in Likoc/Likovac, the Defence overstates this witness's significance on this point.²¹ W04325 is one part of a broad constellation of evidence establishing Rexhep SELIMI's presence and responsibilities in this area.²² In any event, contrary to Defence submissions, the Panel has repeatedly found that in light of the ability to cross-examine the witness, evidence going to the acts and conduct of the Accused

¹⁷ Response, KSC-BC-2020-06/F01818, para.30; Prosecution submission of list of reserve witnesses, KSC-BC-2020-06/F01811/A01, 22 September 2023, Confidential ('List of reserve witnesses'), pp.35-72, items 4 (075378-075381), 6 (075349-075360), 15 (075403-075408).

¹⁸ Response, KSC-BC-2020-06/F01818, para. 34.

¹⁹ Response, KSC-BC-2020-06/F01818, para.36.

²⁰ See Prosecution response to THAÇI and SELIMI Defence request to postpone reserve witnesses, KSC-BC-2020-06/F01820, 27 September 2023, Confidential, paras 4, 8, fn.12. In response to one such *inter partes* request, the SPO has already confirmed that W04147 is not an anticipated reserve witness for the 9-19 October 2023 evidentiary block. See SPO email to VESELI Defence dated 29 September 2023 at 17.04.

²¹ Response, KSC-BC-2020-06/F01818, para.41.

²² In the Pre-Trial Brief paragraph cited in the Response, W04325 is only cited as support for Rexhep Selimi's ability [REDACTED]. See Pre-Trial Brief, KSC-BC-2020-06/F00709/A02, 24 February 2022, para.[REDACTED], fn.[REDACTED].

and/or important issues in the case is admissible under Rule 154 and does not, without more, cause undue prejudice.²³

10. W04325's two accounts to [REDACTED] are discussed in detail in SPO statement paragraphs to which the Defence has raised no objections.²⁴ They are used and explained by the witness in such a manner that they are an indispensable and inseparable part of W04325's SPO statement.²⁵ That certain parts of these statements are inaccurate is made clear by the witness himself in his SPO statement. The Defence is free to cross-examine the witness on these matters, which do not impact the *prima facie* admissibility of the proposed evidence.²⁶

11. As for W04325's supplemental direct examination time, the SPO has recently confirmed that only two hours of direct examination are estimated,²⁷ not the three hours previously indicated.²⁸

C. W04753

12. The two KLA documents challenged by the Defence²⁹ are both used and explained by W04753 in his SPO interview. As for access permission decision [REDACTED] (labelled 'Exhibit 4' during the SPO interview), W04753 identified this as a 'special decision', explained how what was in the document led him to that description, and clarified how this document compared to standard permits the witness saw while at Drenoc/Drenovac.³⁰ As for vehicle confiscation statement [REDACTED] (labelled 'Exhibit 15' during the SPO interview), W04753 recognised [REDACTED] signatures and confirmed that [REDACTED] drove a car of the same model (BMW) described in the document.³¹

²³ See para.2 above and the relevant sources cited therein.

²⁴ 043761-043781-ET RED2, paras 3-14, 73-79.

²⁵ *Contra* Response, KSC-BC-2020-06/F01818, paras 41-42.

²⁶ See para.2 above and the relevant sources cited therein.

²⁷ List of reserve witnesses, KSC-BC-2020-06/F01811/A01, p.28.

²⁸ Motion, KSC-BC-2020-06/F01788, para.49; Response, KSC-BC-2020-06/F01818, para.43.

²⁹ Response, KSC-BC-2020-06/F01818, paras 51-52.

³⁰ [REDACTED].

³¹ [REDACTED].

13. These parts of W04753's SPO account would be incomprehensible and have lesser probative value without these documents admitted as associated exhibits. Both items also have indicia of reliability on their face in that they are signed, dated, and have headers or signature blocks indicating they emanate from the KLA in Drenoc/Drenovac.

III. CLASSIFICATION

14. This submission is filed as confidential pursuant to Rule 82(4) and because it contains information concerning protected witnesses.

IV. RELIEF REQUESTED

15. For the foregoing reasons and those previously given, the Motion should be granted.

Word Count: 1,731

/signed/

Ward Ferdinandusse

Acting Deputy Specialist Prosecutor

Monday, 2 October 2023

At The Hague, the Netherlands.