



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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

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**Public Redacted Version of 'Prosecution Reply to Joint Defence Response (F01688)
concerning Rule 153 witnesses'**

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') submits this reply to the Response.¹ The Defence fail to justify why the proposed Rule 153² witness evidence should not be admitted.³ Moreover, the Defence submissions regarding the purported exceptional application of Rule 153 are misguided. In addition, the SPO replies concerning select witnesses.

II. SUBMISSIONS

2. The requirements of Rule 153 must not be interpreted in a manner that would effectively defeat its very purpose,⁴ namely, to streamline and expedite the proceedings in circumstances where *viva voce* testimony is unnecessary.⁵ In this respect, the Defence is not at liberty to merely 'elect' to cross-examine any witness.⁶ Rules that allow for the submission of evidence through prior transcripts when they meet the requirements of those rules are '*per se* generally considered compatible with the rights of the accused.'⁷

¹ Joint Defence Response to 'Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04871, W04673 and W04362 pursuant to Rule 153', KSC-BC-2020-06/F01688, 20 July 2023 ('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 See Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04871, W04673 and W04362 pursuant to Rule 153, KSC-BC-2020-06/F01658, 7 July 2023 ('Motion').

⁴ See e.g. *Specialist Prosecutor v. Pjetër Shala*, Public Redacted Version of Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules, KSC-BC-2020-04/F00556RED, 23 June 2023 ('Case 4 Decision'), para.32.

⁵ Case 4 Decision, KSC-BC-2020-04/F00556RED, para.18; *Prosecutor v. Salih Mustafa*, Public redacted version of Decision on the Prosecution application pursuant to Rule 153 of the Rules, KSC-BC-2020-05/F00286/RED, 17 December 2021 ('Mustafa Decision'), para.21.

⁶ ICC, Trial Chamber V, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18, First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules, 17 April 2023, para.39.

⁷ ICC, Trial Chamber V, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18, Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, para.26.

3. The Defence label Rule 153 as an ‘exceptional procedure’ admitting ‘untested evidence’,⁸ but ignore that the Trial Panel has encouraged the parties to use Rule 153, alongside Rules 154 and 155, ‘to the greatest extent possible, with a view to expediting proceedings.’⁹ The ICTY Appeals Chamber, responding to a similar claim, explained that: ‘[f]ar from being an “exception”’ the Rule 153 equivalent ICTY procedure ‘identifies a particular situation in which, once the provisions of [that rule] are satisfied ... it is in principle in the interests of justice ... to admit the evidence in written form.’¹⁰

4. Regarding the orality of proceedings,¹¹ this Trial Panel has observed that ‘the principle of orality, which underpins the SC’s regulatory regime, is not absolute, but qualified by a variety of provisions ([including Rule 153]) that provide for the possibility of witness evidence being elicited and tendered by means other than calling a witness to testify *viva voce* in court.’¹² The majority of the SPO’s witnesses are anticipated to appear in court, including all available witnesses whose evidence goes to the acts and conduct of the Accused. Rule 153 has no impact on the publicity of the proceedings, as the Panel is free to admit public versions of the written evidence of appropriate witnesses and, even if called to testify, witnesses may require protective measures including private session.

5. The SPO is mindful of the need for an expeditious trial—Rule 153 is indispensable in that regard. Contrary to the speculative concern by the Defence about the volume of evidence and the size of the trial record,¹³ the judicious use of Rule 153 limits the size of

⁸ Response, KSC-BC-2020-06/F01688, paras 1-2.

⁹ Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023, para.51.

¹⁰ ICTY, Appeals Chamber, *Prosecutor v Galić*, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para.12.

¹¹ Response, KSC-BC-2020-06/F01688, para.4.

¹² Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, para.18; *see also* Decision on Thaçi Defence Motion Regarding the Preservation of Evidence, KSC-BC-2020-06/F01250, 2 February 2023, para.29; ICTY, Appeals Chamber, *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, paras 16-17.

¹³ Response, KSC-BC-2020-06/F01688, para.4.

the record and the use of court time. Converting Rule 153-eligible witnesses to Rule 154 lengthens the proceedings and increases the volume of evidence in the record.¹⁴

a. W04362

6. As regards W04362, the Defence understates its confrontation opportunity with W04584.¹⁵ W04584 was outside Kosovo when [REDACTED] disappeared, but he has given a detailed explanation of his basis for knowing what happened to him.¹⁶ In particular, W04584's mother, [REDACTED] – who lived in Kosovo during [REDACTED]'s detention and went to visit him at [REDACTED] – gave an account of what happened in a statement written for her by W04584.¹⁷ W04584's mother may presently struggle with remembering these events, but W04584 will explain why her more contemporaneous account from 2003 is reliable.¹⁸

7. No utility is gained by calling W04362 to discuss the circumstances of the [REDACTED] statement when the SPO is not tendering it and W04362 himself denies its reliability.¹⁹ Contrary to the Defence claim, the SPO is not using Rule 153 to 'jettison the statement it regards as less favourable and admit its preferred evidence'.²⁰ W04362's mistreatment is portrayed as more severe in the [REDACTED] statement compared to

¹⁴ If called pursuant to Rule 154, the same prior statements would be tendered, and the size of the record would increase due to preparation note 1 and testimony.

¹⁵ *Contra* Response, KSC-BC-2020-06/F01688, para.37.

¹⁶ *See e.g.* [REDACTED]; [REDACTED].

¹⁷ [REDACTED].

¹⁸ The Defence summary of [REDACTED]'s knowledge of these events is therefore misleading in focusing only on her present capabilities. Response, KSC-BC-2020-06/F01688, para.37, n.48. The basis of his knowledge, explored in his SPO interview, is further noted in his Rule 95 summary. *See* Annex 2 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief, KSC-BC-2020-06/F01594/A02, 9 June 2023, pp.383-384.

¹⁹ *Contra* Response, KSC-BC-2020-06/F01688, para.38. In his tendered SPO interview, he explained the basis for inconsistencies with the [REDACTED] statement. [REDACTED], pp.22-42.

²⁰ Response, KSC-BC-2020-06/F01688, para.38.

W04362's SPO interview,²¹ meaning the SPO is tendering the more conservative, exculpatory account, as verified by the witness.

8. W04362 is part of a large group of crime base witnesses for the [REDACTED] site.²² Several such witnesses have testified²³ – and the Defence already cut over 80% of their original cross-examination estimates for one [REDACTED] crime base witness ([REDACTED]). The THAÇI Defence also introduced [REDACTED] as a Defence exhibit,²⁴ suggesting that the presence of a detention site at [REDACTED] and the commission of crimes there are not heavily contested propositions. The Defence's actions betray their words about the necessity to cross-examine W04362, and it is more appropriate to introduce W04362's account in writing pursuant to Rule 153.

b. W04592

9. The SPO primarily intends to rely on W04592's evidence to prove the death of murder victim Skender KUQI,²⁵ a fact which is corroborated by the evidence of multiple other witnesses, including Rule 154 witnesses available for cross-examination.²⁶ The Defence does not wish to examine W04592 about Skender KUQI or the circumstances of his death. Rather, the THAÇI Defence wishes to 'explore' W04592's evidence concerning the treatment of injured persons at a KLA field hospital in the Dukagjini Zone and the involvement of Ramush HARADINAJ and Tahir ZEMAJ.²⁷ The Defence's ability to elicit

²¹ As noted by the Defence, the [REDACTED] statement states that W04362 was stabbed several times. W04362 denied this in his SPO interview (*see* [REDACTED]). *See* Response, KSC-BC-2020-06/F01688, para.38.

²² *Contra* Response, KSC-BC-2020-06/F01688, para.39.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ *Contra* Response, KSC-BC-2020-06/F01688, para.27.

²⁶ Motion, KSC-BC-2020-06/F01658, para.54.

²⁷ Response, KSC-BC-2020-06/F01688, para.24.

further information from W04592 on these topics, which are of limited relevance,²⁸ is speculative at best, and to require the attendance of the witness in such circumstances would undermine the very purpose of Rule 153.²⁹

10. A number of other witnesses, who are able – and better placed – to testify about ‘the practices of the KLA’ and the related ‘attitudes’ of Dukagjini Zone commanders are anticipated to be available for cross-examination, including [REDACTED].³⁰ If the Defence considers further exploration of such matters - through W04592 specifically - to be important, it may seek to interview him³¹ and, as part of its case, seek to elicit any evidence it obtains.³²

11. Accordingly, W04592’s evidence should be admitted pursuant to Rule 153 and there is no need to require his attendance for cross-examination.

c. W04673

12. [REDACTED].³³ During [REDACTED] cross-examination, the THAÇI Defence tendered a statement of [REDACTED].³⁴ W04673’s subsequent statements, tendered pursuant to Rule 153,³⁵ indicate [REDACTED] uncertainty in this belief, and lack of knowledge on [REDACTED], with [REDACTED] final statement indicating that

²⁸ Neither HARADINAJ, nor ZEMAJ, are alleged in the Indictment or Pre-Trial Brief to be directly responsible for any charged crimes. Further, other than the fact that Skender KUQI allegedly died there, the KLA field hospital in Irzniq/Irznić and its functioning are not directly related to the charges. The fact that three Defence teams do not wish to cross-examine the witness underscores the limited relevance of the witness’s evidence.

²⁹ ICTY, Trial Chamber, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Second Motion for Admission of Slobodan Stojković’s Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 22 March 2012 (‘*Karadžić* Decision’), para.18.

³⁰ *Contra* Response, KSC-BC-2020-06/F01688, paras.25-26.

³¹ Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, KSC-BC-2020-06/F00854, 24 June 2022.

³² *Karadžić* Decision, para.18.

³³ Transcript (Trial Proceedings), [REDACTED].

³⁴ Transcript (Trial Proceedings), [REDACTED].

³⁵ Annex 6 to Motion, KSC-BC-2020-06/F01658/A06.

[REDACTED] only knew that [REDACTED] and did not know any further details.³⁶ The fact that a statement is contradictory to other evidence on the record ‘is no ground for denying admission’ if the requirements of the Rule are otherwise met.³⁷ Admission of the remaining evidence of W04673, a crime-base witness with evidence that is of limited scope and is cumulative to that which the THAÇI defence has already had an opportunity to confront, will fairly place all relevant evidence before the Panel, to assign weight to the evidence, taken as whole, and make determinations as to the relevant facts and issues at the end of the case and based on the totality of the evidence.³⁸

III. CLASSIFICATION

13. This submission is filed as confidential pursuant to Rule 82(4), and contains information concerning witnesses with protective measures.

IV. RELIEF REQUESTED

14. The SPO has carefully considered the imperative of fair and efficient proceedings and requests that the Panel admit the evidence of the relevant witnesses pursuant to Rule 153.³⁹

Word Count: 1973

³⁶ SPOE00122496-00122509 RED, p.7; SPOE0038138-SPOE00038146 RED, pp.5-6.

³⁷ ICTY, Trial Chamber I, *Prosecutor v. Mladić*, Decision on Prosecution Motion to Admit Evidence Pursuant to Rule 92bis: Witness RM-159, IT-09-92-T, 28 June 2013, para.10; Case 4 Decision, KSC-BC-2020-04/F00556RED, paras 35, 45.

³⁸ See *Mustafa* Decision, KSC-BC-2020-05/F00286/RED, para.33. The fact that three Defence teams do not wish to cross-examine the witness further underlines the limited utility of requiring in-court testimony.

³⁹ Motion, KSC-BC-2020-06/F01658, para.88.

\signed\

Ward Ferdinandusse
Acting Deputy Specialist Prosecutor

Tuesday, 25 July 2023

At The Hague, the Netherlands.