



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: Specialist Prosecutor's Office

Date: 22 January 2024

Language: English

Classification: Public

Public Redacted Version of 'Prosecution reply relating to Rule 153 motion F01994'

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I. INTRODUCTION

1. Pursuant to Rule 76 of the Rules,¹ the Specialist Prosecutor's Office ('SPO') hereby replies to the Defence Response² which, through misstatements or misconceptions concerning the applicable law and underlying facts, fails to establish any reasons why the SPO's Motion³ should not be granted in its entirety.

II. SUBMISSIONS

2. The Defence's claim that recourse to Rule 153 should be exceptional⁴ is baseless and ignores the applicable law, including the Panel's decisions on similar Defence submissions.⁵ Despite the Defence's repeated claims to the contrary,⁶ the Rules and accompanying caselaw, which expressly allow for evidence to be admitted without cross-examination, make it clear there is no 'statutory right to cross-examine,' nor can the Defence simply 'elect' to cross-examine a witness.⁷

A. W04016

3. The THAÇI Defence claims that it should be allowed to explore in cross-examination the reasons that [REDACTED] was arrested.⁸ However, W04016's proposed evidence already addresses his knowledge of the reasons why

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rule' or 'Rules').

² Joint Defence Response to Prosecution motion for the admission of the evidence of witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153, KSC-BC-2020-06/F02063, 15 January 2024, Confidential ('Response').

³ Prosecution motion for the admission of the evidence of witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153, KSC-BC-2020-06/F01994, 8 December 2023, Confidential ('Motion').

⁴ Response, KSC-BC-2020-06/F02063, para.2.

⁵ Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153, KSC-BC-2020-06/F01904, 27 November 2023, Confidential ('First Rule 153 Decision'), paras 7-13; Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, Confidential ('First Rule 154 Decision'), paras 17-19.

⁶ Response, KSC-BC-2020-06/F02063, paras 3, 4, 10, 12, 15, 32, 33, 41, 47.

⁷ See e.g. First Rule 153 Decision, KSC-BC-2020-06/F01904, paras 7-13; Rules 153, 155. Compare Rule 127(3) (referencing the availability of cross-examination to an opposing Party 'if it elects to exercise this right,' but only for witnesses 'called before the Trial Panel.').

⁸ *Contra* Response, KSC-BC-2020-06/F02063, paras 6-8.

[REDACTED] may have been detained.⁹ There is no reason – beyond mere speculation – to believe W04016 could significantly add thereto.

B. W04044

4. The Defence wrongly argues W04044's evidence is unsuitable for admission because it goes to the acts and conduct of THAÇI; is a unique source of evidence for SPO allegations; and because the SPO did not tender a book authored by the witness.¹⁰

5. The 'acts and conduct' clause of Rule 153 refers exclusively to acts and omissions of an accused as described in the indictment or relied upon to establish their criminal responsibility. In interpreting an analogous rule, the ICC Appeals Chamber held the concept of 'acts and conduct' must not be applied in a manner defeating the rule's purpose, and incidental references to an accused do not constitute a bar to admission.¹¹

6. W04044's references to THAÇI are incidental. W04044 briefly recounts the vague and unsubstantiated statements of two people about Thaçi, without giving an opinion on their veracity or accuracy.¹² W04044 goes on to say that one of these people has since stated that he 'didn't know' and 'it wasn't' THAÇI.¹³ W04044 is plainly not making any claims about or attributing any roles to THAÇI, or giving evidence of THAÇI's involvement or lack thereof in the events in question. W04044 makes this even more clear when he says 'I don't know the event,'¹⁴ 'I don't know if they put pressure on him,'¹⁵ and 'I heard this on television.'¹⁶ These incidental references do not

⁹ See e.g. SPOE00089596-00089615, pp.SPOE00089602-SPOE00089603; SPOE00092299-00092324, pp.SPOE00092306-00092307.

¹⁰ Response, KSC-BC-2020-06/F02063, paras 10-14.

¹¹ ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18 OA4, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, paras 50, 55.

¹² 053336-TR-ET Part 2, pp.3-4; 053336-TR-ET Part 3, p.46.

¹³ 053336-TR-ET Part 2, p.4; 053336-TR-ET Part 3, p.46.

¹⁴ 053336-TR-ET Part 2, p.4.

¹⁵ 053336-TR-ET Part 3, p.46.

¹⁶ 053336-TR-ET Part 3, p.47.

rise to the level of proof of THAÇI's acts and conduct as charged and should not, therefore, prevent W04044's evidence from being admitted.

7. With regard to W04044's statements being a unique source of evidence, the incident cited by the Defence, while relevant to, *inter alia*, contextual elements, is not specifically charged. Furthermore, any lack of corroboration for this incident would be a matter going to the weight to be assigned to W04044's evidence in light of all the evidence at trial, and not to its admissibility.

8. Lastly, the SPO did not tender the book [REDACTED]¹⁷ because it did not meet the associated exhibit admissibility test. Although the Defence is free to tender this book if it considers the content to be relevant to its case, it cannot use the SPO's decision not to tender the book as an argument against the admission of W04044's statements.

C. W04305

9. The THAÇI Defence fails to provide adequate reasons why the evidence of W04305 is not suitable for admission pursuant to Rule 153.¹⁸ A number of the proposed lines of cross-examination have already been explored during the witness's [REDACTED].¹⁹ Considering the availability of audio-video records of [REDACTED] and SPO interview, the Panel will have the opportunity to observe the witness's demeanour and, through the admission of his statements and [REDACTED] at different times and to different authorities, consider and weigh any inconsistencies. Other witnesses, including [REDACTED], have already testified on matters corroborated by W04305, and the Defence had every opportunity to cross-examine those witnesses.

10. Lastly, contrary to the claim that W04305's credibility is at issue due to new information which has emerged since his [REDACTED] statements, his SPO statement

¹⁷ 053384-053385.

¹⁸ *Contra* Response, KSC-BC-2020-06/F02063, paras 15-22.

¹⁹ [REDACTED].

confirms and clarifies his prior statements which predate his alleged criminal conduct and W04305 has not sought the SPO's assistance with immigration issues.²⁰

D. W04361

11. The Defence fails to provide adequate reasons why the evidence of W04361 is not suitable for admission.²¹ W04361 confirmed each of his prior statements were made to the best of his knowledge based on what he could recall at the time and was candid about the reasons for his lapses in memory.²² Despite the multitude of traumas W04361 has endured which have impacted his ability to accurately recall certain details, he remained consistent on several key facts including, that he was detained in a basement in Drenoc/Drenovac by the KLA including, [REDACTED].²³

12. [REDACTED].²⁴ The Trial Panel will have the ability to evaluate W04361's statements, including the full video of his SPO interview,²⁵ alongside the testimony of various corroborating live witnesses²⁶ whom the Defence has had the opportunity to cross-examine, and can determine what weight to give to W04361's evidence.

E. W04722

13. The Defence fails to provide adequate reasons why the evidence of W04722 is not suitable for admission.²⁷ W04722 confirmed he [REDACTED], to the best of his knowledge based on what he could recall,²⁸ with his 2020 SPO statement largely confirming his earlier account. W04722's evidence concerning his opinion and

²⁰ The note cited in the Defence submissions (*see* Response, KSC-BC-2020-06/F02063, para.20, fn.49), does not indicate that W04305 has sought the SPO's assistance, but that he informed the SPO about a potential issue with obtaining a travel document, thus impacting his ability to travel for testimony.

²¹ *Contra* Response, KSC-BC-2020-06/F02063, paras 23-32.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ Transcript of Hearing, 15 January 2024, at T.11022.

²⁶ Motion, KSC-BC-2020-06/F01994, para.27.

²⁷ *Contra* Response, KSC-BC-2020-06/F02063, paras 33-40.

²⁸ 078658-TR-ET Part 1, pp.17-18.

understanding of the term ‘collaborator’ clearly addresses his basis of knowledge,²⁹ and there is nothing to indicate he could provide further, significant information relevant to this issue. Finally, W04722’s proposed evidence unambiguously addresses his knowledge of the KLA in [REDACTED].³⁰ The Defence will have the opportunity to cross-examine other witnesses, including [REDACTED], on such matters.

F. W04816

14. The Defence argues the Motion is ‘misleading’ by misrepresenting its contents. The Motion accurately argues that W04816’s evidence ‘is largely cumulative to other witness and documentary evidence concerning the abduction, detention, and mistreatment by KLA members in the Kleçkë/Klečka area.’³¹ Cherry picking evidence, often with limited relevance, for comparison does not undermine the SPO’s assertion, nor override the judicial and practical interests in hearing witnesses pursuant to Rule 153.³² While the SPO inadvertently included W04839 as a witness who is available for cross examination (and intends, at this stage, to propose W04826 as a Rule 153 witness), their evidence is nonetheless corroborative of W04816’s.

15. Moreover, the topics on which the Defence claims it wants to cross-examine W04816 are largely tangential and of limited relevance to the core purpose of W04816’s testimony concerning the abduction of VJ soldiers in April 1999.³³ His evidence is, in large part, intended to authenticate and explain contemporaneous documents concerning the abduction. The SPO intends to prove the victims’ subsequent murder primarily through other evidence, including forensics evidence, which the Defence will have the opportunity to challenge.³⁴

²⁹ Response, KSC-BC-2020-06/F02063, para.36. *See also* 078568-TR-ET Part 2, pp.5-10.

³⁰ Response, KSC-BC-2020-06/F02063, para.35. *See also* 078568-TR-ET Part 1, pp.18-19.

³¹ Motion, KSC-BC-2020-06/F01994, para.36.

³² Response, KSC-BC-2020-06/F02063, para.44.

³³ Response, KSC-BC-2020-06/F02063, para.46.

³⁴ *See also* Response, KSC-BC-2020-06/F02063, para.43 (concerning, *inter alia*, expert witness W04875).

16. As regards the objection to the intercepts discussed by W04816,³⁵ they meet the admissibility requirements for associated exhibits. The Defence's unsupported claims, even if found to be credible, would go to weight and not admissibility.

G. W04850

17. The THAÇI Defence fails to provide adequate reason why the evidence of W04850 is not suitable for admission pursuant to Rule 153.³⁶ First, as is clear from the Defence's own submissions,³⁷ the evidence of [REDACTED] as to whether or not they have spoken to each other is fully set out in their respective statements. Second, W04850's proposed evidence addresses his knowledge of, and opinion about, the reasons why [REDACTED] may have been detained.³⁸ There is nothing to indicate W04850 could provide further significant information relevant to either of the issues raised by the Defence.

H. W04851 AND W04852

18. W04851's evidence about his knowledge of why [REDACTED], may have been arrested and detained is not equivocal.³⁹ W04851 clearly states that KLA member [REDACTED] had a Serbian membership card.⁴⁰ W04851's belief that another KLA member, [REDACTED]⁴¹ and that [REDACTED]⁴² is fully compatible with the evidence concerning the membership card. Crucially, W04851 never spoke to [REDACTED],⁴³ and when W04851's [REDACTED] for an explanation of what

³⁵ Response, KSC-BC-2020-06/F02063, para.45.

³⁶ *Contra* Response, KSC-BC-2020-06/F02063, paras 49-51.

³⁷ Response, KSC-BC-2020-06/F02063, para.49.

³⁸ *See e.g.* SPOE00089545-00089570 RED, pp.SPOE00089549; SPOE00092352-00092379 RED, p.SPOE00092374.

³⁹ *Contra* Response, KSC-BC-2020-06/F02063, para.54.

⁴⁰ SPOE00089487-00089515 RED, p.SPOE00089497; SPOE00092000-00092028 RED, p.SPOE00092025; SPOE00092059-00092086, p.SPOE00092073.

⁴¹ SPOE00089487-00089515 RED, p.SPOE00089489.

⁴² SPOE00089487-00089515 RED, p.SPOE00089491.

⁴³ SPOE00089487-00089515 RED, p.SPOE00089497.

happened to [REDACTED] said he did not know anything.⁴⁴ Finally, W04852 clearly states that he does not know the reason why [REDACTED] was taken away.⁴⁵

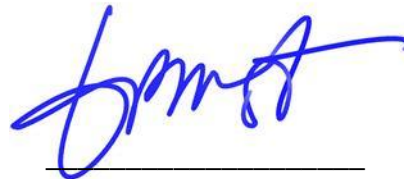
III. CLASSIFICATION

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

IV. RELIEF REQUESTED

20. For the foregoing reasons and those previously given, the Motion should be granted in its entirety.

Word Count: 1999



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Specialist Prosecutor

Monday, 22 January 2024

At The Hague, the Netherlands.

⁴⁴ SPOE00092000-00092028 RED, p.SPOE00092026.

⁴⁵ SPOE00089446-0089466 RED, pp.SPOE00089452, SPOE00089463.