

**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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Hashim Thaçi  
Counsel for Kadri Veseli  
Counsel for Rexhep Selimi  
Counsel for Jakup Krasniqi

**Date:** 16 January 2024

**Language:** English

**Classification:** Confidential

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**Joint Defence Reply to Prosecution Response to Joint Defence Request for Leave to Appeal Decision on Admission of Documents Shown to W04769**

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## I. INTRODUCTION

1. The Defence for Messrs Thaçi, Veseli, Selimi and Krasniqi (“Defence”) hereby files this reply to the Prosecution’s Response to the Defence’s request for leave to appeal the Trial Panel’s Decision of 27 November 2023.<sup>1</sup>

## II. SUBMISSIONS

2. As regards the **First Issue**, the Defence recalls that the Panel considered the Defence’s arguments to have raised issues of weight and not admissibility:

[A]rguments by the Defence would go to the weight, if any, to be assigned to the item and/or the impugned parts. Similarly, the Panel considers that the Defence’s assertions with respect to the allegedly faulty chain of custody do not constitute grounds to refuse admission though this could affect the weight, if any, that the Panel might be prepared to give to that document.<sup>2</sup>

It was therefore not a mischaracterisation of the Impugned Decision,<sup>3</sup> when the Defence stated that the Trial Panel determined that the issues raised went to weight and not admissibility. Rather, it was a direct attestation of the Panel’s reasoning. The Prosecution’s arguments in respect of this Issue are baseless and should be dismissed. P651’s admissibility needs to be properly considered and not delayed until the stage of deliberations.

3. As regards the **Second Issue**, the core of the Defence’s argument is not whether the Panel “listed all factors” underpinning the Impugned Decision, or if it duly “considered” the Defence’s arguments.<sup>4</sup> Rather, it is concerned exclusively with the Panel’s reversal of the burden of proof in Rule 138(1) of the Rules when assessing P651’s admissibility.<sup>5</sup> Whereas the Trial Panel uncritically accepted

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<sup>1</sup> F02049, *Prosecution response to ‘Joint Defence Request for Leave to Appeal Decision on Admission of Documents Shown to W04769’ (F01982)*, 9 January 2024, confidential (“SPO Response”).

<sup>2</sup> F01963, *Decision on Admission of Documents Shown to W04769*, 27 November 2023, confidential (“Impugned Decision”).

<sup>3</sup> SPO Response, para. 4.

<sup>4</sup> SPO Response, para. 5.

<sup>5</sup> F01982, *Joint Defence Request for Leave to Appeal Decision on Admission of Documents Shown to W04769 (F01963)*, 4 December 2023, confidential, (“Request”) para. 8.

all of the Prosecution's submissions regarding admissibility, it took issue with and dismissed all of the barriers to admissibility pointed out by the Defence.

4. As regards the **Third Issue**, inasmuch as the Panel elected to include what the Prosecution describes as a "(self-evident) consideration,"<sup>6</sup> the fact remains that the Defence never so much as suggested that Serbian-originating items are *prima facie* suspicious. Rather, the Defence forwarded salient and item-specific arguments targeting P651's substance, form and chain of custody, which, when considered cumulatively, severely affect its authenticity and reliability.<sup>7</sup> The jurisprudence cited in support of these factual and circumstantial considerations was equally specific to P651, given that it pertained exclusively to the manner in which evidence acquired (and arguably tainted) by the RDB had been treated before the ICTY. By addressing itself to a straw man argument that had not been made, and failing to address arguments that were made, the Defence reiterates that the Trial Panel mischaracterised the Defence's position. As to the observation that the Thaçi Defence had previously tendered Serbian-originating items, this has no bearing on the issue whatsoever.
5. As regards the **Fourth Issue**, the Defence observes that the SPO fails to explain what the purpose of the Trial Panel's appeal to previously tendered Serbian-originating documents was, if not support for its decision to admit P651.<sup>8</sup> Patently, paragraph 28 of the Impugned Decision did form a part of the Trial Panel's reasoning.
6. As regards the **Fifth Issue**, the Defence recalls that the Panel found P651 admissible pursuant to a highly selective assessment of the item's content, as well as W04769's testimony.<sup>9</sup> Inasmuch as the Prosecution seeks to canvass the

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<sup>6</sup> SPO Response, para. 6.

<sup>7</sup> Request, para. 12.

<sup>8</sup> See, SPO Request, para. 6.

<sup>9</sup> Impugned Decision, paras 27-29.

Defence arguments as reflective of its “disagreement” with the Impugned Decision,<sup>10</sup> the Defence submits that numerous factual considerations were identified which were either given undue consideration or none at all. In this regard, the Defence reiterates that the Panel found the entire item admissible through W04769 despite (i) his rebuke of information critical to the Prosecution’s case; and (ii) well-founded considerations suggesting a high-likelihood that the item was tampered with by the RDB prior to it being turned over to the ICTY.<sup>11</sup> It follows that the Prosecution’s response in respect of this Issue should be dismissed.

7. The Defence avers that the **Five Issues** proposed for certification do, in fact, stem from the Impugned Decision, which, absent a ruling from the Appeals Panel, are liable to significantly affect the fair and expeditious conduct of the proceedings. P651 is an important piece of evidence in these proceedings. A proper assessment of its contents, pursuant to the correct legal standard, form and chain of custody is required to safeguard (i) the integrity of the Court’s Rules of Procedure and Evidence; and (ii) the fair trial rights of the Accused – specifically that which guarantees that evidence declared in admissible will not be considered by the Trial Panel during its final deliberations.<sup>12</sup> Leave to appeal should be granted as a result.

### III. CONCLUSION

8. In light of the foregoing, the Defence requests that leave to appeal be granted.

**Word Count: 868**

Respectfully submitted on Tuesday, 16 January 2024, in The Hague.

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<sup>10</sup> SPO Response, para 7.

<sup>11</sup> Request, paras 16-19.

<sup>12</sup> *See*, Rule 139(1) of the Rules.



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