



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

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Public Redacted Version of 'Prosecution response to 'Veseli Defence Request for Leave to Appeal Decision to Admit P1064 and P1065' (F02216)'

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I. INTRODUCTION

1. The Request¹ should be dismissed as the Two Issues² identified by the Defence do not meet the requirements for certification³ set out in Article 45(2) of the Law⁴ and Rule 77(2) of the Rules.⁵ The Defence attempts to relitigate the *prima facie* authenticity of P01064 and P01065 by manufacturing misleading representations of the Trial Panel's reasoning and findings, misstating the evidence, and recycling arguments already considered and dismissed on multiple occasions. Ultimately, the Defence merely articulates its disagreement with the Decision.⁶

2. Even if, *arguendo*, the Defence had formulated appealable issues – which it has not – the Defence fails to meet the cumulative requirements of: (i) a significant impact on either the fair and expeditious conduct of the proceedings or on the outcome of the trial; and (ii) that immediate, appellate resolution would materially advance the proceedings. As this Panel recently observed, 'triers of fact are afforded considerable discretion in deciding whether evidence is admissible or not, and certification to appeal admissibility decisions must be an absolute exception'.⁷ The Defence fails to demonstrate that such exceptional relief is justified.

¹ Veseli Defence Request for Leave to Appeal Decision to Admit P1064 and P1065, KSC-BC-2020-06/F02216, 2 April 2024, Confidential ('Request').

² Request, KSC-BC-2020-06/F02216, para.2, defining the 'First Issue' and 'Second Issue' (collectively, 'Two Issues').

³ The applicable law has been set out in prior decisions. *See, for example*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 ('Thaçi Certification Decision'), paras 9-17; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, KSC-BC-2020-07/F00423, 8 November 2021, paras 11-21.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁵ 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.

⁶ Oral Order, Transcript, 25 March 2024, pp.13519-13523 ('Decision').

⁷ Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024, para.11. *See also* Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P1046, KSC-BC-2020-06/F02241, 15 April 2024 ('P01046 Decision'), para.10.

II. SUBMISSIONS

A. NEITHER OF THE TWO ISSUES IS APPEALABLE

First Issue

3. The First Issue is not appealable, as it misrepresents and merely disagrees with the Panel's findings. Contrary to the Defence's assertion,⁸ there is no basis to suggest that the Trial Panel reversed the burden of proof when deciding that P01064 and P01065 were *prima facie* authentic. Having extensively heard and considered the Parties' arguments in relation to both items,⁹ the Panel found that the Specialist Prosecutor's Office ('SPO') had met its burden in relation to *prima facie* admissibility.¹⁰ The Panel made explicitly clear, on several occasions, that the Defence had no burden in this assessment.¹¹ Indeed, the Panel's consideration that Defence submissions were unfounded¹² is not tantamount to reversing the burden of proof.¹³

4. In particular, the Defence distorts the Trial Panel's reasoning: at no point, did the Panel ask the Defence to make a showing that the documents have been tampered with.¹⁴ To the contrary, and in response to the Defence raising an identical objection during the oral submissions – now repackaged as an appealable issue – the Trial Panel explicitly explained it was only asking for clarification.¹⁵ The Defence's unfounded claim reveals its untenable position that documents obtained from Serbian authorities

⁸ Request, KSC-BC-2020-06/F02216, paras 7-8.

⁹ See Transcript, 19 March 2024, pp.13412-13421; Transcript, 20 March 2024, pp.13434-13435, 13497-13518.

¹⁰ Transcript, 25 March 2024, pp.13521, lines 8-9. See *similarly*, Decision on Joint Defence Request for Certification to Appeal Decision F01963, KSC-BC-2020-06/F02067, 19 January 2024 ('P651 Decision'), para.21.

¹¹ See Transcript, 20 March 2024, pp.13506-13507, 13509; Transcript, 25 March 2024, p.13520. See, *similarly*, P651 Decision, KSC-BC-2020-06/F02067, para.20.

¹² Transcript, 25 March 2024, pp.13520-13521.

¹³ See P651 Decision, KSC-BC-2020-06/F02067, para.22.

¹⁴ *Contra* Request, KSC-BC-2020-06/F02216, paras 10-11.

¹⁵ Transcript, 20 March 2024, pp.13507-13509.

are *prima facie* suspicious, a proposition already litigated¹⁶ and rejected by the Trial Panel.¹⁷

5. Further, the Defence's contention that the SPO offered no evidence in support of the items' authenticity¹⁸ is incorrect and misleading. The SPO presented detailed, multi-layered submissions demonstrating *prima facie* authenticity, including by referring to multiple indicia showing that the items were contemporaneous KLA records.¹⁹ It is on this basis, amongst other factors, that the Panel held that the SPO had met its burden.²⁰ In failing to acknowledge these facts and findings, the Defence unpersuasively repeats the same arguments already considered and discarded by the Panel in reaching the Decision.²¹ Further, as apparent from its arguments, the Defence misconstrues *prima facie* authenticity to require definite proof of authenticity, a position previously dismissed by the Trial Panel.²² Contrary to the Defence's submissions,²³ the First Issue does not reveal an error of law, but a mere disagreement with the Trial Panel, and thus does not qualify as an appealable issue.

Second Issue

6. The Defence equally fails to demonstrate that the Second Issue is appealable.

7. As a preliminary matter, the Defence fails to formulate an issue that is discrete and identifiable.²⁴ The First Issue merely asserts that the Panel erred 'by making

¹⁶ See, for example, Joint Defence Request for Leave to Appeal Decision on Admission of Documents Shown to W04769 (F01963), KSC-BC-2020-06/F01982, 4 December 2023, Confidential; Prosecution response to 'Joint Defence Request for Leave to Appeal Decision on Admission of Documents Shown to W04769' (F01982), KSC-BC-2020-06/F02049, 9 January 2024, Confidential.

¹⁷ See, for example, Decision on Admission of Documents Shown to W04769, KSC-BC-2020-06/F01963, 27 November 2023, para.28 (and the sources cited therein); Transcript, 25 March 2024, p.13521.

¹⁸ Request, KSC-BC-2020-06/F02216, paras 9-10.

¹⁹ Transcript, 19 March 2024, pp.13418-13419; Transcript, 20 March 2024, pp.13498-13502, 13515.

²⁰ Transcript, 25 March 2024, p.13521.

²¹ Transcript, 19 March 2024, pp.13412-13418; Transcript, 20 March 2024, pp.13503-13511. See P01046 Decision, KSC-BC-2020-06/F02241, para.22.

²² See, for example, P01046 Decision, KSC-BC-2020-06/F02241, para.22.

²³ Request, KSC-BC-2020-06/F02216, para.11.

²⁴ See, similarly, P01046 Decision, KSC-BC-2020-06/F02241, para.20.

findings of fact not based upon evidence or reasonable inference’, without identifying which ‘findings of fact’ are being challenged. While supporting submissions made later in the Request appear to identify such findings,²⁵ the First Issue should nevertheless be summarily dismissed, as – on its face – it is not appealable.

8. Further, the Defence impermissibly presents arguments which (i) were not advanced in support of its objections to the admission of P01064 despite having had ample opportunity to present its arguments on two occasions over the course of W04571’s testimony;²⁶ and/or (ii) relied on W04147’s testimony, which followed the Decision.²⁷ A request for certification cannot be used to advance new arguments in support of the Defence’s position.²⁸ Such submissions should therefore be dismissed *in limine*. In any event, the Second Issue also misrepresents and is a mere disagreement with the Decision.

9. Contrary to the Defence’s assertion,²⁹ the Panel validly noted the relevant information provided by the SPO in relation to the provenance of P01064, which was requested by the Trial Panel. In this respect, the Defence ignores the applicable framework, which requires a Party to be in a position to provide, *inter alia*, information regarding the origin of an exhibit, if requested to do so by the Panel.³⁰ Consistent with the Conduct of Proceedings Order and Rules 137-138, the Panel was entitled to consider the SPO’s submissions on provenance (together with those made by the Defence) in the Decision.³¹

²⁵ Request, KSC-BC-2020-06/F02216, paras 13, 15, 18.

²⁶ Request, KSC-BC-2020-06/F02216, para.21 (containing a theory as to the authorship of pp.29-33 of P01064).

²⁷ Request, KSC-BC-2020-06/F02216, para.19.

²⁸ ICTR, *Prosecutor v Bagosora et al*, ICTR-98-41-T, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005, para.5.

²⁹ Request, KSC-BC-2020-06/F02216, paras 13-14.

³⁰ Order on the Conduct of the Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023, para.46.

³¹ A similar approach has been taken at other courts. For example, IRMCT and ICTY Chambers have considered party submissions, including supporting documents, concerning provenance, without the supporting documents having been tendered or admitted. *See, for example*, IRMCT, *Prosecutor v. Stanišić*

10. Further, the Defence mischaracterises the evidence on the record. P01064 does contain references to KLA members, meetings, and operations.³² The Defence also attempts to proffer hypothetical, unsupported claims as evidence.³³ Notably, it omits that the Trial Panel relied on another admitted exhibit, P00651, which corroborates P01064, to conclude that the admissibility standard was met. The veracity of the allegations against W04571 and other individuals named in P01064 is irrelevant to the authenticity of the document,³⁴ in particular, given the SPO's reliance on the item to show the KLA gathered information on alleged or perceived collaborators.³⁵ As with the First Issue, the Second Issue amounts to nothing more than mere disagreement with the Decision.

B. NEITHER OF THE TWO ISSUES WOULD HAVE A SIGNIFICANT IMPACT ON OR MATERIALLY ADVANCE THE PROCEEDINGS

11. The Defence fails to demonstrate any concrete prejudice in relation to either of the Two Issues, and does not even address how resolution of either issue has an impact on the expeditious conduct of the proceedings. Instead, it merely reiterates the Two Issues and states, generally, that certification would allow the Court of Appeals to rectify any errors and provide related clarification.³⁶ These claims are both unsupported and speculative.

and Simatović, MICT-15-96-T, Decision on Submissions Regarding Exhibits Marked for Identification, 22 February 2021, p.5; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Prosecution Motion to Admit Evidence from the Bar Table: Foča Municipality, 14 November 2013, para.12; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Decision on Prosecution's Second Motion for Admission of Exhibits from the Bar Table, 10 March 2011, paras 19-20, 27; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Decision on Prosecution's Motion to Tender Documents on its Rule 65 ter Exhibit List, 30 November 2007, para.14.

³² *Contra* Request, KSC-BC-2020-06/F02216, para.17. *See, for example*, P01064, [REDACTED].

³³ Request, KSC-BC-2020-06/F02216, paras 18-19, 21.

³⁴ *Contra* Request, KSC-BC-2020-06/F02216, para.16.

³⁵ Transcript, 19 March 2024, pp.13419-13420.

³⁶ Request, KSC-BC-2020-06/F02216, paras 23-24.

12. The Defence cross-examined W04571 at length in relation to both items.³⁷ In addition, the Defence focuses on disputing authorship of P01064,³⁸ while an item's authorship and submissions relevant to authenticity or reliability – which go beyond the *prima facie* admissibility standard – may impact the weight a Panel gives the evidence in reaching its final judgment, not the items' admissibility.³⁹ Moreover, fairness is further ensured since the Defence will have the opportunity to make submissions in relation to the weight of both items.⁴⁰ As such, there is no prejudice to the Defence at this stage and the Two Issues can be, as necessary and appropriate, effectively addressed at later stages of the proceedings. Accordingly, the Defence fails to meet the cumulative certification requirements.⁴¹

III. CLASSIFICATION

13. This filing is classified confidentially pursuant to Rule 82(4).

IV. RELIEF REQUESTED

14. For the reasons discussed above, the Request fails to meet the standard for certification and should be rejected.

³⁷ Transcript, 20 March 2024, pp. 13454- 13474.

³⁸ Request, KSC-BC-2020-06/F02216, paras 15-21.

³⁹ Transcript, 30 January 2024, pp.12074-12075. See also *Specialist Prosecutor v. Mustafa*, Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, KSC-BC-2020-05/F00281/RED, 13 December 2021, para.12; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Request for Admission of Items through the Bar Table and Related Matters, KSC-BC-2020-07/F00502, 17 December 2021, para.11; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, 26 May 2003, para.33 ('At the stage of admissibility, the beginning of proof that evidence is reliable, in other words, that sufficient indicia of reliability have been established, is quite admissible'); ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the *Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 3 November 2009, paras 34-37.

⁴⁰ *Contra* Request, KSC-BC-2020-06/F02216, para.23. See P01046 Decision, KSC-BC-2020-06/F02241, para.16.

⁴¹ See *Thaçi Certification Decision*, KSC-BC-2020-06/F00172, paras 12-14.

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