



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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**Prosecution response to Krasniqi Defence request for leave to appeal the fourth
Rule 155 decision**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Request¹ should be dismissed as the Two Issues² identified by the Krasniqi Defence do not meet the required standard for certification³ set out in Article 45(2) of the Law⁴ and Rule 77(2) of the Rules.⁵ The Defence attempts to relitigate arguments already extensively presented in the Joint Response,⁶ and which were considered by the Trial Panel when issuing its Rule 155 Decision.⁷ Despite claims to the contrary,⁸ the Two Issues are concerned with whether the outcome of the Rule 155 Decision was correct or not, which does not satisfy the test for certification.⁹

2. In the alternative, even if the Defence had formulated appealable issues, which it did 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 an immediate, appellate resolution would materially advance the proceedings. As the Panel recently observed, ‘the admission of evidence

¹ Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F02305, 13 May 2024, Confidential (‘Request’).

² Request, KSC-BC-2020-06/F02305, para.3, 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. Guçati 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 Cf Joint Defence Response to Prosecution Fourth Motion for Admission of Evidence Pursuant to Rule 155, KSC-BC-2020-06/F02173, 8 March 2024, Confidential (‘Joint Response’), paras 10-26.

⁷ See Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F02283, 3 May 2024, Confidential (‘Rule 155 Decision’), paras 10-11, 14-16.

⁸ Request, KSC-BC-2020-06/F02305, paras 12-13.

⁹ See Decision on Veseli Defence Request for Certification to Appeal the Decision to Admit P1064 and P1065, KSC-BC-2020-06/F02259, 23 April 2024 (‘April 2024 Certification Decision’), para.11.

pursuant to Rule 155 is not conditioned on the existence of corroborating evidence'.¹⁰ In arguing to the contrary, and attempting to frame the Two Issues as having immediate consequences on the proceedings and necessitating an immediate resolution by the Appeals Panel, the Defence fails to satisfy the cumulative requirements for certification. As such, the Request should be dismissed.

II. SUBMISSIONS

3. As observed by the Trial Panel, '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'.¹¹ Neither of the Two Issues identified by the Defence rise to the level that would warrant exceptional relief.

A. NEITHER OF THE TWO ISSUES IS APPEALABLE

First Issue

4. The First Issue is not appealable, as it fails to identify any clear or discrete issue arising from the Panel's Rule 155 Decision, simply repeats the 'prejudicial effect' argument previously submitted,¹² and thus consists of a mere disagreement with the Trial Panel's findings.¹³

5. Having received and assessed the Parties' arguments with regard to the contested identification evidence of W00067,¹⁴ the Panel, after considering several

¹⁰ Rule 155 Decision, KSC-BC-2020-06/F02283, para.14. The absence of corroboration is relevant to the Trial Panel's assessment of weight and probative value of the admitted evidence in light of the entire body of evidence, an exercise which the Panel will conduct at the end of the trial.

¹¹ Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024 ('P959 and P960 Decision'), para.11, *citing, inter alia, Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, para.35.

¹² Cf Request, KSC-BC-2020-06/F02305, paras 3(i), 14-15, *with* Joint Response, KSC-BC-2020-06/F02173, paras 10-11, 18.

¹³ Rule 155 Decision, KSC-BC-2020-06/F02283, paras 14-15.

¹⁴ See Joint Response, KSC-BC-2020-06/F02173, paras 10-26; and Prosecution reply to joint Defence response to fourth Rule 155 motion, KSC-BC-2020-06/F02188, 18 March 2024, Confidential, para.5. Cf *with* Rule 155 Decision, KSC-BC-2020-06/F02283, paras 9-17.

factors (as acknowledged by the Defence¹⁵), found that the probative value of W00067's evidence was not outweighed by its prejudicial effect.¹⁶ Instead of challenging any discrete part of the Panel's reasoning – as it is required to do when framing appealable issues – the Defence only challenges the conclusion.¹⁷

6. Further, the Defence appears to argue, 'as a discreet issue of principle', that *any* identification evidence of an accused should be refused when presented pursuant to Rule 155.¹⁸ This proposition, far from being 'a matter of consistency',¹⁹ is not only untenable, but also plainly contrary to the spirit and letter of Rule 155, which does not exclude evidence going to acts and conduct of the Accused, but only requires the Panel to account for that fact when exercising its discretion in admitting such evidence.²⁰ Defence submissions²¹ concerning the *outcome* of previous decisions where the Panel declined to admit certain evidence under Rule 155 – after assessing that particular evidence, related arguments, and circumstances – underlines the Defence's mere disagreement with the Decision and failure to identify a discrete, identifiable issue arising from the Panel's reasoning.

7. In sum, the First Issue reveals a mere disagreement with the Rule 155 Decision.

Second Issue

8. The Second Issue is equally not appealable as it is based on the already-considered argument that W00067's allegations concerning Krasniqi are uncorroborated,²² and does not identify any appealable issue.

¹⁵ Request, KSC-BC-2020-06/F02305, para.14.

¹⁶ Rule 155 Decision, KSC-BC-2020-06/F02283, paras 14-18.

¹⁷ Request, KSC-BC-2020-06/F02305, para.14.

¹⁸ Request, KSC-BC-2020-06/F02305, paras 15-16.

¹⁹ Request, KSC-BC-2020-06/F02305, para.16.

²⁰ See e.g. Rule 155 Decision, KSC-BC-2020-06/F02283, para.14 and footnote no.18.

²¹ Request, KSC-BC-2020-06/F02305, para.16.

²² Cf Request, KSC-BC-2020-06/F02305, paras 3(ii), 17-18, with Joint Response, KSC-BC-2020-06/F02173, paras 11, 13-17, 25.

9. In support of the Second Issue, the Defence incorrectly argues that the Panel did not address its submissions that no witness ‘actually corroborates the identification of Mr. Krasniqi’.²³ However, the Panel specifically noted Defence arguments that portions of W00067’s evidence concerning Krasniqi’s identification were not corroborated.²⁴ Further, after considering that six witnesses are scheduled to give or have already given evidence about the circumstances in relation to which W00067’s evidence pertains, the Panel expressly noted, in respect of any uncorroborated portions, that ‘the absence of corroboration is relevant to [the Panel’s] assessment of the probative value and weight of the evidence in light of the entire body of evidence admitted at trial, in accordance with Rule 139’.²⁵ The Defence fails to identify a concrete or discrete issue and offers no explanations supporting its argument that there is ‘a fundamental flaw in the chain of reasoning which led the Panel to admit the contested identification evidence.’²⁶

10. Again, as with the First Issue, the Second Issue amounts to a mere disagreement with the Rule 155 Decision without identifying any appealable error.

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

11. The Defence fails to show any concrete prejudice in relation to either of the Two Issues, repeats arguments already considered and dismissed,²⁷ and generally states that guidance from the Appeals Chamber would materially advance proceedings.²⁸ These claims are both unsupported and speculative.

²³ Request, KSC-BC-2020-06/F02305, para.17.

²⁴ See Request, KSC-BC-2020-06/F02305, para.10. See also Rule 155 Decision, KSC-BC-2020-06/F02283, paras 14-15.

²⁵ Rule 155 Decision, KSC-BC-2020-06/F02283, para.14.

²⁶ Request, KSC-BC-2020-06/F02305, para.17.

²⁷ Request, KSC-BC-2020-06/F02305, paras 20-22.

²⁸ Request, KSC-BC-2020-06/F02305, paras 24-25.

12. For instance, the Defence fails to concretely indicate how the Two Issues have immediate consequences on the fairness of the proceedings or the outcome of the trial, merely listing rights allegedly infringed,²⁹ acknowledging that Rule 155 and relevant international jurisprudence permit the admission of evidence without cross-examination,³⁰ asserting (without more) that the Panel misapplied the relevant test,³¹ and concluding that the 'Decision admits highly prejudicial and untested allegations against Mr. Krasniqi'.³² However, as set out above, the Panel strictly applied the criteria of Rules 138 and 155, and in a carefully reasoned decision, after addressing Defence arguments and considering several factors tailored to the specific circumstances of the witness's evidence, exercised its 'considerable discretion'³³ to admit the evidence. The Panel will consider whether any portion of W00067's evidence is uncorroborated at the end of the trial when assigning weight,³⁴ and Defence arguments about prejudice are therefore hypothetical and speculative. Similarly, speculation about future Rule 155 decisions and arguments that 'permission to appeal has not yet been granted on any Rule 155 Decision in this case'³⁵ do not justify prompt referral of the Two Issues.³⁶

13. Accordingly, in the circumstances, none of the certification requirements are met.³⁷

²⁹ Request, KSC-BC-2020-06/F02305, para.20.

³⁰ Request, KSC-BC-2020-06/F02305, para.21.

³¹ Request, KSC-BC-2020-06/F02305, para.22.

³² Request, KSC-BC-2020-06/F02305, para.23.

³³ See para.3 above.

³⁴ Rule 155 Decision, KSC-BC-2020-06/F02283, para.14.

³⁵ Request, KSC-BC-2020-06/F02305, para.25.

³⁶ See, *similarly*, April 2024 Certification Decision, KSC-BC-2020-06/F02259, para.13.

³⁷ See *Thaçi* Certification Decision, KSC-BC-2020-06/F00172, paras 12-16.

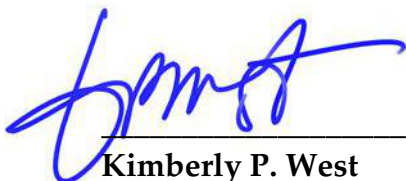
III. CLASSIFICATION

14. Considering that the Request was confidential and no public redacted version has been issued, this filing is classified confidentially pursuant to Rule 82(4). However, as it does not contain confidential information, it can be reclassified as public.

IV. RELIEF REQUESTED

15. For the reasons discussed above, (i) the SPO requests that this filing be reclassified as public; and (ii) the Request should be rejected, as it fails to meet the standard for certification.

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Friday, 24 May 2024

At The Hague, the Netherlands.