



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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Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Defence Request¹ to appeal the Trial Panel's decision² to admit [REDACTED] evidence through the medium of Rule 154³ should be rejected.

2. All of the reasons advanced in the Request were considered, and rejected, by the Trial Panel in the reasonable exercise of its discretion to apply Rule 154 in respect of [REDACTED]. As such, the Request is a quintessential disagreement with the Panel's reasonable and discretionary decision.

3. There is no bar to the application of Rule 154 to witnesses who speak to the acts and conduct of the accused. Indeed, the plain terms of the rule expressly permit it.⁴ At its core, Rule 154 facilitates the fair and expeditious conduct of proceedings by streamlining *viva voce* testimony, allowing the Parties and the Panel to focus on key issues. Given that [REDACTED] will be available for full cross-examination, there is no manifest prejudice to the Defence.

4. By seeking appellate guidance on Rule 154 in the general sense,⁵ rather than identifying a discrete issue the resolution of which would materially advance the proceedings, or affect the fairness and expeditiousness and/or outcome of the trial, the Defence fails to meet the certification criteria required by Article 45(2)⁶ and Rule 77(2).

II. SUBMISSIONS

¹ Joint Defence Request for Certification to Appeal the "Decision on Prosecution Motion for Admission of Evidence of Witnesses [REDACTED] Pursuant to Rule 154", KSC-BC-2020-06/F02346, 29 May 2024 ('Request').

² KSC-BC-2020-06/F02328, Decision on Prosecution Motion for Admission of Evidence of Witnesses [REDACTED] Pursuant to Rule 154 (F02204), KSC-BC-2020-06/F02328, 22 May 2024 ('Decision').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), Rule 154. All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ Rule 154, chapeau.

⁵ Request, KSC-BC-2020-06/F02346, paras 1, 28-29.

⁶ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'), Article 45. All references to 'Article' or 'Articles' are to the Law, unless otherwise specified.

5. The trier of fact is afforded considerable discretion in deciding whether evidence is admissible or not,⁷ with the Court of Appeals recently affirming that appellate intervention in such decisions is warranted only in very limited circumstances.⁸ As such, certifying admissibility rulings must be the absolute exception.⁹ No such exceptional reasons are offered in the Request.

6. The foundational premise of the Request is that given [REDACTED] ‘importance’ to the case, and the topics he speaks to, applying Rule 154 would somehow consign the principle of orality to the ‘history books’.¹⁰ This premise is legally flawed, given that Rule 154 is a legitimate statutory exception to the principle of orality. The Request is thus framed as a challenge to Rule 154 more generally, rather than the reasonable manner in which it was applied by the Panel.

A. THE FOUR ISSUES ARE NOT APPEALABLE

7. In developing its four issues, the Defence seeks to re-litigate the provisional admission of [REDACTED] evidence by repeating previous objections made about the importance of the witness to the SPO’s case.¹¹ Notably, the Panel has previously held that such a proposition is insufficient to warrant certification.¹² The four issues offered

⁷ *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgement, KSC-CA-2022-01/F00114, 2 February 2023, para.35.

⁸ Decision on Krasniqi and Selimi Appeals against “Decision on Prosecution Motion for Admission of Accused’s Statements”, KSC-BC-2020-06/IA030/F00009, 31 May 2024 (‘Statements Appeal Decision’), para.6.

⁹ ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004, para.5; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision Denying ‘Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158’, 15 September 2017, para.11.

¹⁰ Request, KSC-BC-2020-06/F02346, paras 3-4.

¹¹ Joint Defence Consolidated Response to F02204, and the Remaining Witnesses in F02195, KSC-BC-2020-06/F02272, 29 April 2024, paras 40-50.

¹² Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 153 (F02111), KSC-BC-2020-06/F02164, 5 March 2024 (‘Rule 153 Certification Decision’), para.24.

for certification in the present Request either lack precision, amount to mere disagreements, or otherwise misappreciate the Panel's ruling.

1. The First Issue is not appealable

8. The First Issue framed by the Defence is the Panel's finding that admission would 'materially enhance the efficiency of the proceedings', a finding which is alleged to be deficient insofar as the Defence claims it did not consider the effect on the evidential record and the time needed for cross-examination.¹³ The Defence therefore seeks to 'elucidate the correct test' to be applied when it comes to the efficiency of proceedings.¹⁴

9. In addition to being unfounded,¹⁵ the above issue manifestly lacks the precision necessary for appellate certification. An issue must be constituted by a subject, the resolution of which is essential for the matters arising in the judicial cause under examination.¹⁶ Moreover, given that the Trial Panel has the inherent power to ensure a trial is fair and expeditious,¹⁷ it is unclear how or why a 'test' should be enunciated for what is a fundamental duty of the Panel. Notably, in a similar procedural context to Rule 154, the ICC Appeals Chamber has ruled that ensuring efficient proceedings is a legitimate factor to consider when admitting a statement in lieu of direct examination,¹⁸ without specifying the need to articulate any efficiency test when doing

¹³ Request, KSC-BC-2020-06/F02346, para.17.

¹⁴ Request, KSC-BC-2020-06/F02346, para.17.

¹⁵ It is apparent from *inter alia* the careful consideration of the material tendered that the Panel was fully cognisant of the nature and volume of the information and had this within its contemplation.

¹⁶ ICC, Appeals Chamber, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para.9.

¹⁷ Article 40(2).

¹⁸ ICC, Appeals Chamber, *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-744, Judgement on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016 ('*Gbagbo Appeal Decision*'), para.59. See also ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution motion for admission of evidence of GH-043 pursuant to Rule 92 *ter*, 23 May 2013, para.4; STL, Contempt Judge, *Amicus Prosecutor v. Akhbar Beirut*, STL-14-06/PT/CJ, Public redacted decision on motion for admission of the statement of witness AP02 and of witness AP14 pursuant to Rule 156, 2 March 2016, para.14.

so. As framed, the proposed First Issue demonstrates no error in the Panel's reasoning, which correctly reflected the object and purpose of Rule 154.¹⁹

10. The First Issue is therefore not appealable.

2. The Second and Fourth Issues are mere disagreements

11. Although presented separately, the arguments underlying the proposed Second and Fourth Issues are the same, namely, that because [REDACTED] evidence is of 'importance' and speaks to the acts and conduct of the accused, the Panel should not have applied Rule 154.²⁰ By 'challenging' the Panel's discretionary finding that the probative value of [REDACTED] statements outweighs any prejudicial effect, the Defence's position is openly revealed as a mere disagreement.²¹ The submissions offered in support, which are without merit, make this plain.

12. First, as the Defence acknowledges,²² Rule 154 is discretionary. On appellate review, it is not the function of the Court of Appeals to 'define the limits of discretion', as the Defence mistakenly submits.²³ Rather, it is to decide if the exercise of the Panel's discretion was reasonable.²⁴ No error as such is identified in the Panel's reasonable findings. The Defence merely disagrees with the result of admission.

13. Second, Rule 154 expressly permits the admission of statements that speak to the acts and conduct of the accused,²⁵ in fact it is a rule specifically crafted to address such

¹⁹ Decision, KSC-BC-2020-06/F02328, para.69. *See also*, ICC, Trial Chamber V, *Prosecutor v. Yekatom & Ngaiissona*, ICC-01/14-01/18-1383, Decision on the Yekatom Defence Request for Leave to Appeal the Twelfth Rule 68(3) Decision regarding P-1704, 19 April 2022, paras 11-15.

²⁰ Request, KSC-BC-2020-06/F02346, paras 18, 20.

²¹ Request, KSC-BC-2020-06/F02346, para.20.

²² Request, KSC-BC-2020-06/F02346, para.20.

²³ Request, KSC-BC-2020-06/F02346, para.20.

²⁴ Statements Appeal Decision, KSC-BC-2020-06/IA030/F00009, para.6.

²⁵ Rule 154, chapeau; *See similarly*, ICTY, *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Decision on confidential Prosecution motion for the admission of prior testimony with associated exhibits and written statements of witnesses pursuant to Rule 92 *ter*, 9 July 2008, para.16; ICC, Trial Chamber V, *Prosecutor v. Yekatom & Ngaiissona*, ICC-01/14-01/18-1929, Public Redacted Version of Twenty-First Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony under Rule 68(3) of the Rules concerning Witness P-1974, 5 April 2023, para.12.

materials, and the Panel has admitted such statements already in these proceedings.²⁶ Likewise, where a witness speaks to contested issues this also does not preclude the rule's application.²⁷ That a witness is of evidentiary importance does not, on its own, justify appellate intervention.²⁸

14. Third, the fact that [REDACTED] will be available for cross-examination, as Rule 154 requires, mitigates against any undue prejudice.²⁹ Indeed, applying Rule 154 provides the Defence with a degree of certainty as to the witness' core evidence, assisting cross-examination preparation.³⁰

15. As such, the Second and Fourth Issues are not appealable.

3. The Third Issue misapprehends the nature of Rule 154

16. In framing the Third Issue, although the Defence repeats submissions around the nature of [REDACTED] attestation, which was adequately addressed by the Trial Panel,³¹ the issue is then condensed down to whether the Panel should have had additional regard to his status as a suspect.³² This misappreciates the Panel's ruling, as well as the broad scope of Rule 154.

17. In its reasoning, the Panel correctly recalled the pre-conditions under that Rule 154 that a witness must appear in court, attest to the truthfulness of the statement, and confirm the content reflects what they would say if examined.³³ As such, whether a witness is interviewed as a suspect or not, is of no legal consequence in terms of

²⁶ See e.g., Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023 ('First Rule 154 Decision'), paras 43, 80, 111; Decision on Second Prosecution Motion Pursuant to Rule 154, KSC-BC-2020-06/F01595, 9 June 2023, paras 15, 70.

²⁷ See similarly, *Gbagbo* Appeal Decision, paras 69, 81; ICC, *Prosecutor v. Said*, ICC-01/14-01/21-499-Red, Public redacted version of Decision on the Prosecution's requests under Rule 68(3) to introduce the prior recorded testimony of P-3109, P-2240, P-2240, P-2478 and P-0787, 11 October 2022, para.33.

²⁸ See similarly, Rule 153 Certification Decision, para.24.

²⁹ Decision, KSC-BC-2020-06/F02328, para.79.

³⁰ *Gbagbo* Appeal Decision, para.76.

³¹ Decision, KSC-BC-2020-06/F02328, para.72.

³² Request, KSC-BC-2020-06/F02346, para.19.

³³ Decision, KSC-BC-2020-06/F02328, para.72.

admission – as the witness must still confirm its content, under oath, in court.³⁴ The rule does not stipulate any other individualised criteria to which a Panel must have regard to, when considering a witness' suitability for Rule 154.

18. Moreover, the plain terms of Rule 154 do not discriminate between different types of witnesses it may apply to. As such, that a witness was interviewed a suspect with the attendant formalities and warnings, does not preclude the rule's application.³⁵

19. In any event, the third issue misrepresents the Decision, which in fact expressly noted that the status of a witness might be relevant to the Rule 154 assessment, in particular in considering *prima facie* reliability.³⁶ As such, the suggestion that the Panel disregarded or failed to give any weight to this element is a misrepresentation. Rather, it was found to be outweighed by the clear indicia of *prima facie* reliability pertaining to the statements.

20. The Third Issue is therefore not appealable, as it is premised on a misapprehension of Rule 154's operative nature and a misrepresentation of the Decision.

B. THE REMAINING CERTIFICATION LIMBS ARE NOT SATISFIED

21. Even if, *arguendo*, any of the above issues were appealable, the Defence fails to satisfy the remaining certification criteria.

22. Regarding the alleged impact on the fairness and expeditiousness³⁷ of the proceedings, invoking the principle of orality is misconceived, as this effectively

³⁴ Rule 154(a)-(c).

³⁵ See similarly, ICC, Trial Chamber V, *Prosecutor v. Yekatom & Ngaïssona*, ICC-01/14-01/18-1186-Red, Public Redacted Version of Eighth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1193, P-0876, and P-0475, 17 June 2022, para.25.

³⁶ Decision, KSC-BC-2020-06/F02328, para.72.

³⁷ The Defence, which carries the burden of demonstrating that the test is met, does not even attempt to make any submissions regarding expeditiousness, except in respect of the first issue.

deprives Rule 154 of its object and purpose.³⁸ As previously noted by the Panel, Rule 154 does not conflict with this principle, which is not absolute,³⁹ as the rule simply reduces the extent to which the evidence of a witness is elicited orally rather than in writing, in order to ensure expeditious proceedings.⁴⁰

23. The *Bemba* and *Katanga* decisions cited by the Defence also do not assist its position.⁴¹ Notably, the *Bemba* decision did not involve the application of the ICC's Rule 68 (the analogous provision to Rule 154), but rather improper wholesale admission,⁴² while the *Katanga* decision in fact admitted parts of a statement in lieu of direct examination,⁴³ thus undermining the Defence's reliance on this jurisprudence.

24. Indeed, both decisions emphasised the legal propriety of admitting statements in this manner, because doing so had a clear statutory basis and did not violate the principle of orality, as the legal framework contained discretionary, built-in exceptions.⁴⁴ Thus, insofar as these decisions are presented as authority to caution against the application of Rule 154 in respect of [REDACTED], the Defence fails in this regard.

25. As to alleged prejudice,⁴⁵ the Defence merely presumes the existence of concrete prejudice, when in fact, it will have full opportunity to cross-examine [REDACTED],

³⁸ *Contra* Request, KSC-BC-2020-06/F02346, paras 22, 24; See ICC, Trial Chamber I, *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-573-Red, Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, para.24.

³⁹ First Rule 154 Decision, KSC-BC-2020-06/F01380, paras 16-18.

⁴⁰ Decision on Prosecution Motion for Admission of Evidence of Witnesses W01163, W02144, W02749, W04230, W04445, W04489, W04576, W04739, W04741, and W04820, KSC-BC-2020-06/F02044, 8 January 2024, para.55.

⁴¹ Request, KSC-BC-2020-06/F02346, para.22 and fns.22-23.

⁴² ICC, Appeals Chamber, *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence," 3 May 2011 ('*Bemba* Decision'), paras 11-16, 57, 79.

⁴³ ICC, Trial Chamber II, *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07-2362, Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010 ('*Katanga* Decision'), p.17.

⁴⁴ *Bemba* Decision, para.77; *Katanga* Decision, para.14.

⁴⁵ Request, KSC-BC-2020-06/F02346, para.23.

as the Panel noted.⁴⁶ Regarding the potential impact on the outcome of the trial, the Defence merely speculates in this respect.⁴⁷ The Defence effectively assumes the evidence of one witness automatically leads to conviction, which is not correct. Whether [REDACTED] evidence will impact the outcome of the trial will depend on the weight the Panel ultimately accords to it, as part of its holistic assessment during final deliberations, having regard to all of the evidence.⁴⁸

26. The Defence offers no concrete submission that certifying the four issues would materially advance the proceedings, save for its conclusory assertion that it would do so.⁴⁹ Seeking appellate review with reference to hypothetical future applications of Rule 154 is also misplaced,⁵⁰ and misapprehends how certification is granted. Certification is based on individualised, concrete issues decided by a Panel – it is not a pathway to seek advisory opinions on the application of a provision more generally.⁵¹ Equally, Rule 154 is based on concrete, witness-specific assessments. The Defence’s attempt to simultaneously argue that [REDACTED] is ‘unique’ and that appellate ‘guidance’ would bring a ‘definitive end to any error in the exercise of the Panel’s discretion’⁵² in relation to Rule 154 is misconceived.

27. Regarding suspensive effect, the Defence wrongly assumes that the Panel cannot revisit the admission of evidence, should the Court of Appeals take a different view. The Panel has clarified that it can.⁵³ This is uncontroversial in international criminal

⁴⁶ Decision, KSC-BC-2020-06/F02328, para.71.

⁴⁷ Request, KSC-BC-2020-06/F02346, para.25.

⁴⁸ Statements Appeal Decision, KSC-BC-2020-06/IA030/F00009, para.70.

⁴⁹ Request, KSC-BC-2020-06/F02346, para.26.

⁵⁰ Request, KSC-BC-2020-06/F02346, paras 27-30.

⁵¹ Decision on Veseli Defence Request for Certification to Appeal the Decision to Admit P1064 and P1065, KSC-BC-2020-06/F02259, 23 April 2024, para.11; ICC, Appeals Chamber, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3026, Decision on the request of the Registrar relating to the transmission of applications for participation in the appeal proceedings and on related issues, 6 May 2013, para.4.

⁵² Decision, KSC-BC-2020-06/F02328, para.29.

⁵³ Decision on Taçi Defence’s Motion to Strike Part of the Record of Testimony of W02652, KSC-BC-2020-06/F01623, para.18 and citations at fn.28.

proceedings.⁵⁴ As such, even if certification were to be granted, there is no outcome that would be irreversible. Suspensive effect is therefore not required.

28. In any event, the Panel need not address this part of the Request, because certification should be denied outright. Ultimately, the Panel's decision ensures a fair and expeditious trial, and was within the appropriate exercise of its discretion. Appellate intervention would not advance the proceedings or promote their expeditious conduct, but would instead significantly delay them unnecessarily.

III. CLASSIFICATION

29. This filing is confidential pursuant to Rule 82(4).

IV. CONCLUSION

30. The Request should be rejected.

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Monday, 10 June 2024

At The Hague, the Netherlands.

⁵⁴ ICC, Appeals Chamber, *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-2024, Judgement on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, para.98.