

**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 Christoph Barthe  
Judge Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr. Fidelma Donlon

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

**Date:** 29 May 2024

**Language:** English

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**Further Public Redacted Version of Joint Defence Request for Certification to Appeal the “Decision on Prosecution Motion for Admission of Evidence of Witnesses W01511, W04260, W04305, W04410, W04744, W04752, and W04764 Pursuant to Rule 154”**

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## I. INTRODUCTION

1. There has to date been no appellate scrutiny of the sweeping application of Rule 154 of the Rules of Procedure and Evidence (“Rules”) in this case, which has seen the evidence of over 50 out of 68 in-court witnesses admitted in writing, with the effect of allowing an enormous amount of pages of interviews onto the trial record.

2. On 22 May 2024, the Trial Panel issued its “Decision on Prosecution Motion for Admission of Evidence of Witnesses W01511, W04260, W04305, W04410, W04744, W04752, and W04764 Pursuant to Rule 154”,<sup>1</sup> which, amongst six other witnesses, admitted the evidence of [REDACTED] in writing.<sup>2</sup>

3. [REDACTED] is one of the most important witnesses in the case by any metric. [REDACTED]. As [REDACTED] also has considerable knowledge of indictment locations, KLA structures and written regulations. As the Defence highlighted, his importance is reflected in the fact that his evidence is cited 268 times in the Prosecution’s Pre-Trial Brief.<sup>3</sup>

4. Indeed, it is difficult to think of another witness in the case who speaks so substantively or directly about acts and conduct of the accused. The evidence of [REDACTED] goes right to the heart of many of the key issues in the case. If the Trial Panel is of the view that this witness is appropriate for admission via Rule 154, such a decision has the effect of rendering the defence protections embedded with provision nugatory. By the same token, if the Decision is correct that [REDACTED] evidence can

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<sup>1</sup> KSC-BC-2020-06, F02328, Trial Panel II, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W01511, W04260, W04305, W04410, W04744, W04752, and W04764 Pursuant to Rule 154* (“Decision”), 22 May 2024, confidential.

<sup>2</sup> *Idem*, paras 62-80.

<sup>3</sup> [REDACTED] SPO interview alone is cited 176 times in the Prosecution’s Pre-Trial Brief. See [REDACTED].

be admitted pursuant to Rule 154, then almost every witness in the case could be admitted through Rule 154 and examination-in-chief and the principle of orality will be consigned to the history books.

5. The Defence for Messrs. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (“Defence”) seeks leave to appeal the following discrete issues arising from the Decision:

- (i) **First Issue:** Whether the Trial Panel erred in determining that admitting [REDACTED] evidence pursuant to Rule 154 materially enhanced the efficiency of proceedings, without taking into account the encumbrance of admitting more than 700 pages of interviews plus 20 associated exhibits onto the record;
- (ii) **Second Issue:** Whether the Trial Panel erred in determining that the importance of [REDACTED] evidence and its relevance to the acts and conduct of the accused did not constitute an impediment to admission pursuant to Rule 154;
- (iii) **Third Issue:** Whether the Trial Panel erred in the exercise of its discretion by failing to give any weight to the fact that [REDACTED] was interviewed as a suspect and was told that he did not need to tell the truth;
- (iv) **Fourth Issue:** Whether the Trial Panel erred in assessing that the probative value of [REDACTED] evidence was not outweighed by the prejudicial effect of admitting his evidence in writing pursuant to Rule 154.

6. For the avoidance of doubt, the Defence does not seek leave to appeal the remainder of the Decision.

7. Further, in light of the fact that [REDACTED] is anticipated to testify during the 24 June – 18 July 2024 evidentiary block, the Defence further requests the Trial Panel to grant suspensive effect pursuant to Rule 171 of the Rules, in order to safeguard the effectiveness of the appeal.

8. Pursuant to Rule 82(4) of the Rules, this request is filed confidentially because it relates to the Decision which bears the same classification.

## II. PROCEDURAL HISTORY

9. On 27 March 2024, the SPO filed the Motion.<sup>4</sup>

10. On 29 April 2024, the Defence filed a joint response to the Motion.<sup>5</sup> The Defence opposed the admission of [REDACTED] evidence pursuant to Rule 154, in particular on the basis of the centrality of [REDACTED] evidence to core allegations in these proceedings, including to the acts and conduct of the Accused as alleged in the indictment, and the fact that [REDACTED] was interviewed as a suspect and was not bound to tell the truth. The Defence also challenged the SPO's claim that the admission of [REDACTED] evidence in writing would enhance expeditiousness and efficiency.<sup>6</sup>

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<sup>4</sup> KSC-BC-2020-06, F02204, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W01511, W04260, W04305, W04410, W04744, W04752, and W04764 pursuant to Rule 154 with confidential Annexes 1-8 ("Motion")*, 27 March 2024, confidential.

<sup>5</sup> Response.

<sup>6</sup> *Idem*, paras 40-49.

11. On 6 May 2024, the SPO replied to the Defence Response.<sup>7</sup>
12. On 22 May 2024, the Trial Panel issued the Decision.

### III. APPLICABLE LAW

13. The Defence recalls and incorporates by reference its previous submissions on the law applicable to requests for certification to appeal.<sup>8</sup>
14. In summary, the Trial Panel applies a three stage test to determine requests for certification:
  - a. First, the Party seeking certification must identify issues which emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.<sup>9</sup>
  - b. Second, the issue(s) for which certification is sought must have significant repercussions for either the “fair and expeditious conduct” of the proceedings or “the outcome of the trial”.<sup>10</sup> In this context, “fair and expeditious conduct of proceedings” refers to the general requirement of fairness, which includes that proceedings should be adversarial in nature and that there should be equality of arms between the parties. “Expediency” is an attribute of fair trial and is closely linked to the

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<sup>7</sup> KSC-BC-2020-06, F02286, Specialist Prosecutor, *Prosecution Reply Relating to Rule 154 Motion F02204*, 16 May 2024, confidential.

<sup>8</sup> KSC-BC-2020-06, F01624, Veseli and Krasniqi Defence, *Veseli and Krasniqi Defence Request for Certification to Appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”*, 23 June 2023, public, paras 11-14.

<sup>9</sup> KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect (“Decision on SPO Requests”)*, 8 November 2021, public, para. 16.

<sup>10</sup> *Idem*, para. 17.

requirement that proceedings should be conducted within a reasonable time.<sup>11</sup> Alternatively, the test for certification is met if the claimed error is likely to impact the outcome of the case; an exercise which involves a forecast of the consequence of such an occurrence.<sup>12</sup>

- c. Third, the immediate resolution of the appealable issue must materially advance proceedings, in the sense that “prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the ‘judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial’ thereby moving the proceedings forward along the right course”.<sup>13</sup>

15. As the Trial Panel has recently reiterated, certification is not concerned with the correctness of the impugned decision,<sup>14</sup> and thus the Defence refrains from submitting arguments on the merits of the appeal at this stage.

16. The issues satisfy the test for certification. They originate from the Decision, affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution by the Appeal Panel would materially advance the proceedings.

#### IV. SUBMISSIONS

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<sup>11</sup> Decision on SPO Requests, para. 18.

<sup>12</sup> *Idem*, para. 19.

<sup>13</sup> *Idem*, para. 20.

<sup>14</sup> KSC-BC-2020-06, F02259, Trial Panel II, *Decision on Veseli Request for Certification to Appeal the Decision to Admit P1064 and P1065*, 23 April 2024, public.

## A. THE ISSUES ARE APPEALABLE ISSUES

17. The **first issue** concerns the Decision's finding that admission would "materially enhance the efficiency of proceedings" on the sole basis of the Prosecution's representations about the reduction in its examination-in-chief from 24 hours to 10 hours.<sup>15</sup> In so doing, the Decision only took into account the reduction in hours of examination-in-chief. It did not consider relevant broader considerations, including the effect on cross-examination time estimates and the burden of placing over 700 pages of interview and 20 associated exhibits on the record. The first issue thus arises from the Decision. It is not a mere disagreement, but seeks to elucidate the correct test which should be applied by Trial Panels when making decisions about the efficiency of proceedings.

18. The **second issue** relates to the Decision's reasoning with respect to two central objections to the admission of [REDACTED] evidence pursuant to Rule 154, namely the importance of [REDACTED] evidence and its relevance to the acts and conduct of the Accused. The Decision concluded that neither factor constituted an impediment *per se* to the admission of the evidence pursuant to Rule 154.<sup>16</sup> However, whether these factors constituted an impediment *per se* was not the only (or even the primary) issue. The issue was whether in the exercise of the Panel's discretion these factors weighed against the admission. Having concluded that these factors did not constitute an impediment *per se*, the Decision did not go on to balance the weight of those factors against the anticipated efficiency saving. Accordingly, the second issue arises directly from the Decision. It is not a mere disagreement, instead reflecting an appealable issue about the correct approach to be adopted in the evaluation of factors tending against the application of Rule 154.

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<sup>15</sup> Decision, para. 69.

<sup>16</sup> *Idem*, paras 70-71.

19. The **third issue** arises from paragraphs 66 and 72 of the Decision, which gave no weight to the obviously relevant factor that [REDACTED] was interviewed as a suspect and was advised that he did not need to tell the truth. The Decision held that [REDACTED] had “expressed his intention to cooperate fully because he had nothing to hide” and attested to the truth of his statement,<sup>17</sup> though in fact the statement that [REDACTED] had nothing to hide was made by his lawyer not [REDACTED],<sup>18</sup> and the only attestation made by [REDACTED] was that to the effect that the things that he knows “in general terms” are correct.<sup>19</sup> In any event, the third issue challenges in principle whether the fact that a statement was given as a suspect is a relevant factor in the exercise of the Rule 154 discretion. It arises from the Decision and identifies a discrete point of principle which merits appellate intervention.

20. The Decision went on to find that the probative value of [REDACTED] evidence is not outweighed by any prejudicial effect, which was decisive in the admission of [REDACTED] evidence pursuant to Rule 154.<sup>20</sup> The **fourth issue** challenges this evaluation and the exercise of the Panel’s discretion on this specific instance. The factors unique to [REDACTED], namely his importance to the case, his unique evidence about the acts and conduct of the accused and his suspect status, should have tipped the balance decisively against admission. Rule 154, of course, is discretionary. However, every discretion has limits and the fourth issue is a discreet topic which will invite the Court of Appeals Panel to define the limits of that discretion.

## B. THE ISSUES AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

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<sup>17</sup> Decision, paras 66, 72 and fns 147-148, 161.

<sup>18</sup> 083280-TR-ET Part 1, p. 9.

<sup>19</sup> 083280-TR-ET Part 14, pp. 47-48.

<sup>20</sup> Decision, para. 73.



21. The **four issues** have immediate consequences on the fair and expeditious conduct of the proceedings or the outcome of the trial, requiring immediate resolution by the Court of Appeals Panel.

22. The **four issues** all significantly affect the fair conduct of proceedings. Rule 154 is a departure from the principle of orality,<sup>21</sup> which should be approached cautiously so as to avoid encroaching on fair trial rights.<sup>22</sup> Other Courts have held that there may be prejudice to the Defence if a witness does not make his allegations against the Accused in open court.<sup>23</sup> Further, the ambit of Rule 154 affects the right to a public hearing, since the public does not or may not have access to the written evidence. As a result, the four issues all relate directly to matters which significantly affect the fairness of proceedings.

23. The **second, third** and **fourth** issues all significantly affect the fairness of the proceedings because they relate, wholly or partially, to the way in which the Decision approached the question of prejudice to the Accused. If the assessment of prejudice, or the weighting of factors demonstrating prejudice was wrong, then the right to a fair trial has been prejudiced.

24. In addition, the **first issue** directly relates to the expeditious conduct of the proceedings, as it challenges the correct approach to the evaluation of expeditiousness in the context of a Rule 154 application.

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<sup>21</sup> Article 37(2) of the Law. *See also* Articles 21(2) and 21(4)(f) of the Law, and Rule 141(1) of the Rules.

<sup>22</sup> ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Appeals Chamber, *Judgment on the appeals of Mr Jean-Pierre Bemba 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, para. 78.

<sup>23</sup> ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-2362, Trial Chamber II, *Decision on the prosecutor's Request to Allow the introduction into Evidence of the prior Recorded Testimony of P-166 and P-219*, 3 September 2010, para. 19.

25. Further or alternatively, **the four issues** significantly affect the outcome of the trial. The Decision admits allegations about the acts and conduct of Mr. Krasniqi directly onto the record. Given the importance of this evidence, the manner of admission of [REDACTED] evidence significantly affects the outcome of the trial.

#### C. IMMEDIATE RESOLUTION BY THE APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

26. Immediate resolution of **the four issues** would materially advance the proceedings. If the Defence is correct that the Decision is wrong, then proceedings are heading down the wrong course and significant inculpatory evidence will be added onto the record in an inappropriate manner.

27. There are more than 100 witnesses from the Prosecution List of Witnesses who have not yet testified. Further Rule 154 applications are likely to be made in relation to most, if not all, of these witnesses.

28. There has been no guidance from the Appeals Chamber in these proceedings on the appropriate use of Rule 154. Thus, immediate resolution of this issue could materially advance the proceedings by delineating, once and for all, the scope of the Panel's obligation to duly evaluate and consider all the factors tending against the application of Rule 154. If the Defence is correct that the approach to Rule 154, as adopted in the Decision, is wrong, then the Trial Panel's unduly permissive approach risks being adopted in relation to the large number of remaining witnesses, thus multiplying the potential prejudice to the Accused. If not remedied now, the errors identified in the proposed issues would be bound to be repeated in the course of the trial, resulting in irreparable damage to its integrity and inevitably marring its outcome. Resolution at the end of the trial is not a viable option.

29. On the contrary, if the Court of Appeals Panel were to rule in favour of the Defence, the proceedings before the KSC would be advanced considerably insofar as appellate resolution would bring a definitive end to any error in the exercise of the Panel's discretion in the approach to Rule 154.

30. Moreover, the proposed issues have a broader relevance to other case management decisions that will soon have to be confronted. On the **first issue**, the approach that the Trial Panel should take to manage the already gigantic record in this case is not only relevant to Rule 154. In fact, the impact of the size of the record on fair trial rights affects all bar table motions and all future Rule 153 and 155 applications. Similarly, the correct approach to the assessment of prejudice, and the right to fundamental evidence being heard orally, are issues which transcend Rule 154 and apply to all admissibility decisions in this case.

#### D. SUSPENSIVE EFFECT IS REQUIRED TO SAFEGUARD THE EFFECTIVENESS OF THE APPEAL

31. Rule 171 provides that "interlocutory appeals shall not have suspensive effect unless otherwise ordered in the certification decision or by the Court of Appeals Panel" [...].<sup>24</sup> According to the same rule, suspensive effect shall only be granted as an exceptional measure "where the Appellant demonstrates that the implementation of the decision under appeal could potentially defeat the purpose of the appeal" [...].

32. The Prosecution has previously indicated that it intends to call [REDACTED] during the 24 June – 18 July 2024 evidentiary block.<sup>25</sup> Therefore, should certification be granted by the Trial Panel, the appeal would be effectively rendered

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<sup>24</sup> Emphasis added.

<sup>25</sup> Prosecution email of 29 February 2024, at 17h48.

moot if [REDACTED] in-court testimony was allowed to proceed pursuant to Rule 154 before the Court of Appeals Panel has rendered its decision. In order to safeguard the effectiveness of the appeal, the Trial Panel should defer the implementation of the Decision until the matter has been resolved by the Court of Appeals Panel.

## V. CONCLUSION

33. In light of the foregoing, the Defence respectfully requests the Trial Panel to:

- (i) Grant leave to appeal the **four issues** identified above; and
- (ii) Grant the request for suspensive effect of the Decision until the matter is resolved by the Court of Appeals Panel.

**Word count: 2,899**

Respectfully submitted on Wednesday, 29 May 2024



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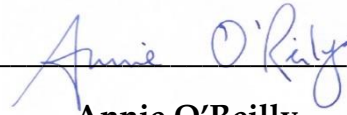
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