



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 reply to "Selimi Defence Response to Prosecution request for leave to appeal Decision F02393"'**

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**Specialist Prosecutor's Office**

Kimberly P. West

**Counsel for Victims**

Simon Laws

**Counsel for Hashim Thaçi**

Luka Mišetić

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Rexhep Selimi**

Geoffrey Roberts

**Counsel for Jakup Krasniqi**

Venkateswari Alagenda

1. The Request<sup>1</sup> is clearly limited to discrete aspects of the Decision,<sup>2</sup> which it accurately represents, fairly sets out the requirements for leave to appeal, and does not seek '*carte blanche*' to do anything.<sup>3</sup> Appellate intervention is warranted.

2. The Issues<sup>4</sup> affect the ability of Specialist Prosecutor's Office ('SPO') to call evidence in relation to, *inter alia*, the common criminal purpose pleaded in the Indictment and, as such, concern the SPO's ability to present significant evidence, therefore significantly affecting the fair conduct of the proceedings.<sup>5</sup> The Issues also affect the expeditious conduct of proceedings since they concern the SPO's ability to present its case in a timely manner.<sup>6</sup> Prompt referral of the Issues to the Court of Appeals would result in an authoritative determination of the matter and materially advance the proceedings.<sup>7</sup> Indeed, this Panel in the *Gucati and Haradinaj* case<sup>8</sup> and panels at other courts have granted leave to appeal decisions excluding part or all of anticipated witness testimony, including that of prosecution witnesses concerning events predating the temporal scope of the indictment.<sup>9</sup>

3. The Response obfuscates the plain language of the decision and fails to dispel logical argument set out in the Request. For example, that the incident relevant to the

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<sup>1</sup> Prosecution request for leave to appeal Decision F02393, KSC-BC-2020-06/F02410, 26 June 2024, Confidential ('Request').

<sup>2</sup> Decision on Selimi Defence Motion to Exclude Evidence of W04846, KSC-BC-2020-06/F02393, 19 June 2024, Confidential ('Decision').

<sup>3</sup> *Contra* Selimi Defence Response to Prosecution request for leave to appeal Decision F02393, KSC-BC-2020-06/F02436, 8 July 2024, Confidential ('Response'), paras 1-3, 6, 22-23, 25.

<sup>4</sup> See Request, KSC-BC-2020-06/F02410, para.1 (defining the 'Issues').

<sup>5</sup> See *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Defence Request for Leave to Appeal F00470, KSC-BC-2020-07/F00484, 8 December 2021 ('Case 7 Decision'), para.19.

<sup>6</sup> See, *similarly*, Case 7 Decision, KSC-BC-2020-07/F00484, para.19.

<sup>7</sup> See, *similarly*, Case 7 Decision, KSC-BC-2020-07/F00484, para.19.

<sup>8</sup> Case 7 Decision, KSC-BC-2020-07/F00484.

<sup>9</sup> See *e.g.* ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY, 2 October 2003, paras 1-4, p.3. See also ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events, 3 November 2003, paras 1-4; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Request for Certification of Decision on Exclusion of Evidence, 14 July 2006.

Second Allegation took place [REDACTED] is by no means an ‘arbitrary factor’,<sup>10</sup> but logically relevant, including to consideration on prejudice. Further, despite basing, in part, its determination on the Second Allegation on alleged internal inconsistencies, the Decision did not identify any.<sup>11</sup> The Response confirms the Defence had not asserted W04846’s prior statements on the Second Allegation to be *internally* inconsistent,<sup>12</sup> meaning there was no such argument for the SPO to respond to and that Defence arguments that the SPO is belatedly raising such issues<sup>13</sup> are, therefore, misplaced.

4. Finally, the assertion, in *Nizeyimana*, that ‘exclusion of evidence is a remedy which is at the extreme end of a scale of measures available to a Chamber in addressing prejudice’<sup>14</sup> was, on its face and logically, set out as a general principle.<sup>15</sup> This is also evident from other decisions, including one cited in the Response.<sup>16</sup> It is also echoed in the Panel’s previous finding that for the exclusionary rule to apply, ‘there must arise an unfairness unconnected to the evidential value of the evidence, such as an inability to challenge it fairly and effectively.’<sup>17</sup> No such inability arose in relation to the Second Allegation.

5. As the Panel found when granting leave to appeal a decision excluding witness evidence in another case, ‘[f]airness is preserved when a party is provided with the

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<sup>10</sup> *Contra* Response, KSC-BC-2020-06/F02436, para.12.

<sup>11</sup> Decision, KSC-BC-2020-06/F02393, para.28.

<sup>12</sup> Response, KSC-BC-2020-06/F02436, para.17, fn.25. *See also* Selimi Defence Motion for the Exclusion of Evidence of W04846, KSC-BC-2020-06/F02166, 6 March 2024, Confidential, paras 38-43.

<sup>13</sup> Response, KSC-BC-2020-06/F02436, paras 18-19.

<sup>14</sup> ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Decision on Motion for Exclusion of Rebuttal Witnesses, 13 September 2011, para.6. *See also* Request, KSC-BC-2020-06/F02410, para.1, fn.4.

<sup>15</sup> *Contra* Response, KSC-BC-2020-06/F02436, para.24.

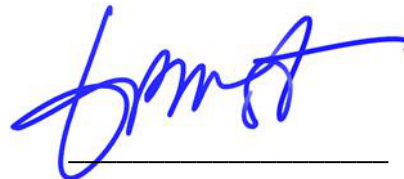
<sup>16</sup> *See* Response, KSC-BC-2020-06/F02436, fn.34 *citing* ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Decision on Defence Motion for Exclusion of Evidence, 2 June 2011, para.10.

<sup>17</sup> Decision on Thaçi Defence Request Related to W03170, KSC-BC-2020-06/F02350, 31 May 2024, Confidential, para.28.

genuine opportunity to present its case'.<sup>18</sup> Granting the Request would ensure the SPO is afforded such opportunity.

6. This filing is confidential pursuant to Rule 82(4) of the Rules.<sup>19</sup>

**Word count: 758**



**Kimberly P. West**

**Specialist Prosecutor**

Monday, 15 July 2024

At The Hague, the Netherlands.

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<sup>18</sup> Case 7 Decision, KSC-BC-2020-07/F00484, para.11.

<sup>19</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').