

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

**Date:** 25 October 2024

**Language:** English

**Classification:** Confidential

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**Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W03808, W03812, W03815, W03870, W04785, and W04786 Pursuant to Rule 153 (F02666)**

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## I. INTRODUCTION

1. In accordance with Article 45(2) of the Law<sup>1</sup> and Rule 77(2) of the Rules,<sup>2</sup> the Defence for Messrs. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (“Defence”) hereby files this request for leave to appeal the Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W03808, W03812, W03815, W03870, W04785, and W04786 Pursuant to Rule 153 (“Impugned Decision”).<sup>3</sup>

2. The Defence submits the following **two issues** for certification, all of which contributed to the Decision of the Panel being fundamentally flawed:

a. **First issue:** Whether the Trial Panel erred in its Decision by applying the incorrect test under Rule 153.

b. **Second Issue:** Whether the Impugned Decision is defective for want of reasons.

## II. APPLICABLE LAW

3. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth herein has been met.

4. Rule 77(2) states that:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>4</sup>

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

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

<sup>3</sup> F02666, Panel, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W03808, W03812, W03815, W03870, W04785, and W04786 Pursuant to Rule 153* (“Impugned Decision”) 21 October 2024, confidential.

<sup>4</sup> Rules, Rule 77.

5. The Defence recalls the legal test set for certification of appeal under Rule 77(2) has been developed in prior decisions issued by this Court, which are incorporated herein by reference.<sup>5</sup>

### III. SUBMISSIONS

6. The two issues satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with said Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

#### A. The Issue Arises from the Impugned Decision

##### *i. First Issue*

7. The legal test for admission of evidence via Rule 153, as set out in the Impugned Decision, is incorrect and furthermore places an impermissible burden upon the Defence.

8. In their Decision, the Panel admitted the evidence of W03812 and W03870, despite detailed objections from the Defence. In admitting the evidence of these witnesses via Rule 153, the Panel determined “that no undue prejudice would result from the admission of W03812’s evidence pursuant to Rule 153”.<sup>6</sup> This is not the

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<sup>5</sup> F01678, Panel, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor’s Bar Table Motion*, 17 July 2023, public, paras 9-11; F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; F00172, Panel, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17. See also, KSC-BC-2020-07, F00423, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, *Decision on Haradinaj Defence’s Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14.

<sup>6</sup> Impugned Decision, paragraphs 24 and 44

correct legal test. The Panel therefore erred in applying the wrong legal test in the Impugned Decision.

9. Rule 153 does not provide that evidence is admissible under the Rule 153, unless it is determined it would not cause “undue prejudice” to the defence. “Undue prejudice” is not the ultimate determining factor; the expression “undue prejudice” is found nowhere in the Rule. Rule 153(3) clearly provides that;

(3) After hearing the Parties, the Panel shall decide whether to request the witness to appear for cross-examination. It may decide, providing reasons, that the requirements of a fair and expeditious trial exceptionally warrant the admission of the statement or transcript, in whole or in part, without cross-examination. [...]

10. The correct test to be applied therefore is whether the Panel determines that **“the requirements of a fair and expeditious trial exceptionally warrant the admission of the statement or transcript.”** In making that determination, the Panel should consider the non-exhaustive<sup>7</sup> factors outlined in Rule 153(1)(a) and (b).

11. Rule 153 should only be resorted to exceptionally by the SPO. It is not simply a time saving or procedural mechanism to be used to reduce the size of the SPO’s live case. It should be used sparingly and only when the Rule’s enumerated test is clearly met. The Defence has the fundamental right to confront evidence. That right should not be interfered with, other than on an exceptional basis; a principle clearly acknowledged by the drafters of the Rule itself, who made it clear the admission of witness evidence without cross examination must only be permitted exceptionally.

12. The Panel has previously acknowledged that “it cannot be a forgone conclusion that evidence meeting the admissibility requirements under Rule 153 should be admitted, insofar as evidence admitted through Rule 153 is: (i) untested; (ii) affects the orality and publicity of the proceedings; (iii) circumvents the right of the accuse to

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<sup>7</sup> F01904, Panel, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153* (“First Rule 153 Decision”), 3 November 2023, confidential, para.8.

examine, or have examined, the witnesses against him or her; and (iv) affects the size of the evidential record.”<sup>8</sup>

13. KSC Trial Panel I, in dealing with the use of Rule 153 acknowledge that it is an “exception to the principle of orality.”<sup>9</sup> The starting point is that “evidence that is testimonial in nature is inadmissible when not elicited orally,” unless the preconditions for the introduction of written statements under Rules 153-155 are met by the SPO.<sup>10</sup> Panel 1 found that pre-conditions of Rule 153 are not met where there is “potential prejudice” to the rights of the accused to confront and examine in court a person making allegations against them. The pre-conditions of Rule 153 are further not met where the Defence can show that there is “potential prejudice” to the right to a fair trial and the principles of orality and publicity.<sup>11</sup>

14. Crucially, Rule 153 does not require the Defence to establish that the admission of a statement through 153 would cause “undue prejudice”. This reasoning has the effect of requiring the Defence to establish the prejudicial nature of a 153 admission, and to an unduly high standard. This impermissibly shifts the burden onto the Defence. Rule 153 does not place any such burden on the Defence; as the Panel has previously acknowledged the “burden to establish the conditions of admissibility under Rule 153 is with the tendering party.”<sup>12</sup> This is also inconsistent with previous decisions of Panel 1, as outlined above.

*i. Second Issue*

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<sup>8</sup> F01904, Panel, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153* (“First Rule 153 Decision”), 3 November 2023, confidential, para.11.

<sup>9</sup> See, KSC-BC-2020-05, F00169, Panel I (The Prosecutor v Salih Mustafa), *Decision on the submission and admissibility of evidence*, 25 August 2021, public, para.29.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para.33.

<sup>12</sup> F02111, Panel, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153*, 8 February 2024, confidential, para.15.

15. Rule 153(3) requires that the Panel provide reasons as to the basis for its determination that the requirements of a fair and expeditious trial exceptionally warrant admission of the evidence. The Panel in its decision does not deal with how the evidence of W03812 and W03870 is exceptional and/or how a fair and expeditious trial requires their admission via Rule 153. The decision is therefore defective for want of proper reasons. The reasons provided by the Panel underline their conclusion that no “undue prejudice” is caused; this the wrong legal test and is not the reasoning required to be provided by Rule 153. Moreover, the Decision entirely fails to explain the basis for its conclusion that no “undue prejudice” is caused.

#### **B. The Issues Significantly Affects the Fair and Expeditious Conduct of the Proceedings**

16. The **two issues** for which certification is sought significantly affect the fair and expeditious conduct of the proceedings. As indicated above, the Impugned Decision contains manifest errors which affect the safety of the decision and the fairness of the trial process. It is crucial that these errors are addressed such that the Defendants’ fair trial rights are safeguarded and the integrity of the trial protected.

17. Specifically, leave to appeal should be granted to ensure that the correct legal tests as outlined in the Rules are applied in this case. Rule 153 is now being relied upon heavily by the SPO as means by which to expedite proceedings by seeking to admit evidence in writing, obfuscating the need for the SPO to call live evidence, resulting in the shortening of time required for the SPO’s to complete its case.

18. While not an absolute right, the right to challenge and confront evidence remains a fundamental right of an accused in criminal proceedings, worthy of strict protection and, as reflected in Rule 153, should only be departed from exceptionally.

19. The application of Rule 153 in the Decision therefore fundamentally affects the fair and expeditious conduct of proceedings.

### **C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings**

20. A positive resolution from the Appeals Chamber at this juncture would obviate the risk of any prejudice caused to the Accused, thereby materially advancing the proceedings. The Defence avers, in this regard, that an authoritative determination by the Appeals Panel will rectify the abovementioned errors of reasoning in the Impugned Decision and bar the admission of evidence of this nature, in these circumstances, thereby protecting the Defence from identifiable significant prejudice and protecting the rights to a fair trial. It will also provide the Appeals Chamber with the opportunity to reconcile the diverging approaches of Trial Panels at the KSC to these issues.

21. There will inevitably be future applications from the SPO to admit evidence via Rule 153. It is imperative the correct law is applied to these decisions. It is also crucial that the defendant's essential right to confront the evidence against them and the integrity of these proceedings is protected by the Appeals Chamber.

### **IV. CLASSIFICATION**

22. The submissions are filed publicly as no reference is made to confidential information.

### **V. CONCLUSION**

23. In light of the foregoing, the Defence respectfully seeks leave to appeal the **two issues** identified above.

**Word Count: 1,791**

Respectfully submitted on 25 October 2024, at the HAGUE



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Luka Misetić  
Lead Counsel for Hashim Thaçi



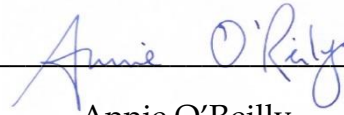
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