



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 Defence request for leave to appeal Decision F02666**

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## I. INTRODUCTION

1. The Request<sup>1</sup> should be dismissed as the Issues<sup>2</sup> identified by the Defence fail to meet the criteria for certification<sup>3</sup> under Article 45 of the Law<sup>4</sup> and Rule 77 of the Rules.<sup>5</sup> As previously emphasised, the Panel has ‘considerable discretion in deciding whether evidence is admissible or not, and certification to appeal admissibility decisions must be an absolute exception’.<sup>6</sup> The Issues do not meet this standard.

## II. SUBMISSIONS

2. The Defence has previously raised the same Issues and/or supporting arguments in its February 2024 Request,<sup>7</sup> which the Panel denied.<sup>8</sup> Such Issues, while

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<sup>1</sup> Joint Defence Request for Certification 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), KSC-BC-2020-06/F02675, 25 October 2024, Confidential (‘Request’).

<sup>2</sup> Request, KSC-BC-2020-06/ F02675, para.2, defining the ‘First Issue’ and ‘Second Issue’ (together, ‘Issues’).

<sup>3</sup> The applicable law has been set out in prior decisions. *See, for example, e.g.* Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, paras 9-17; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, paras 10-18.

<sup>4</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’).

<sup>5</sup> 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.

<sup>6</sup> Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024 (‘February Decision’), para.11.

<sup>7</sup> Veseli Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153 (F02111), KSC-BC-2020-06/F02131, 15 February 2024, Confidential (‘February 2024 Request’). *Compare e.g.* Request, KSC-BC-2020-06/F02675, para.2 *with* February 2024 Request, KSC-BC-2020-06/F02131, para.2 (presenting similar, vague, and imprecise issues concerning the Panel’s application of Rule 153); Request, KSC-BC-2020-06/F02675, paras 8-9, 13 *with* February 2024 Request, KSC-BC-2020-06/F02131, paras 8-9 (arguing that undue prejudice is not a determining and/or relevant factor); Request, KSC-BC-2020-06/F02675, paras 10-11, 13-14, *with* February 2024 Request, KSC-BC-2020-06/F02131, paras 11-13, 20, 24 (arguing the ‘exceptional’ nature of Rule 153); Request, KSC-BC-2020-06/F02675, paras 14 *with* February 2024 Request, KSC-BC-2020-06/F02131, paras 10, 25 (arguing that the Panel shifted the burden of proof); Request, KSC-BC-2020-06/F02675, paras 2, 15; *with* February 2024 Request, KSC-BC-2020-06/F02131, paras 12-13, 24 (alleging an absence of reasons on the same issues); Request, KSC-BC-2020-06/F02675, paras 16-21; *with* February 2024 Request, KSC-BC-2020-06/F02131, paras 25-26 (raising essentially the same arguments concerning the impact on proceedings and of interlocutory appellate resolution). *See also* Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 153 (F02111), KSC-BC-2020-06/F02128, 15 February 2024, Confidential.

<sup>8</sup> 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.

cast as being specific to the witnesses and decisions concerned, are of a general nature and challenge the Panel's consistent interpretation and application of the Rule 153 criteria overall. Considering the Defence does not present any new arguments or circumstances, the Request could be dismissed on this basis alone.

3. Even if considered (again) on their merits, the Issues and supporting arguments fail to meet the Rule 153 criteria.

A. THE ISSUES ARE NOT APPEALABLE

4. On their face, the Issues are not specific, discrete, or identifiable. In this respect, the Issues fail to identify one or more concrete errors that the Defence seeks leave to appeal.<sup>9</sup> The Request should therefore be dismissed *in limine*.<sup>10</sup> To the extent the Panel – once again<sup>11</sup> – decides to exceptionally entertain the arguments in the Request, it still fails.

5. The Request misinterprets the Specialist Chambers' ('SC') legal framework, mischaracterises the Panel's findings, and ultimately expresses only disagreement with the Decision.<sup>12</sup>

6. The First Issue distorts the Panel's reasoning. The Panel applied the correct legal test – based on the plain language of the Rules – in determining that W03812's and W03870's evidence is admissible pursuant to Rules 138 and 153.<sup>13</sup> The Panel's assessment of prejudice under Rule 138(1) is only one aspect of the Panel's evaluation of the admissibility criteria and is not, in and of itself, the legal test the Panel applied.<sup>14</sup>

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<sup>9</sup> Request, KSC-BC-2020-06/F02675, para.2 (generally alleging that the Panel 'erred by the applying the incorrect test' and that the Decision is 'defective for want of reasons').

<sup>10</sup> February Decision, KSC-BC-2020-06/F02157, para.13.

<sup>11</sup> February Decision, KSC-BC-2020-06/F02157, para.13.

<sup>12</sup> Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W03808, W03812, W03815, W03870, W04785, and W04786 Pursuant to Rule 153, KSC-BC-2020-06/F02666, 21 October 2024, Confidential ('Decision').

<sup>13</sup> *Contra* Request, KSC-BC-2020-06/F02675, para.7.

<sup>14</sup> *Contra* Request, KSC-BC-2020-06/F02675, para.8.

The test proposed by the Defence<sup>15</sup> is based on an incorrect interpretation of Rule 153 and the SC's legal framework for the admissibility of testimonial evidence.<sup>16</sup> The Defence assertions are further misleading insofar as they: (i) present previous Defence submissions, which the Panel merely took note of, as findings;<sup>17</sup> and (ii) misrepresent the findings of the *Mustafa* Trial Panel,<sup>18</sup> which are, contrary to Defence assertions otherwise, consistent with the findings of this Panel and the plain language of the Rules.<sup>19</sup>

7. Moreover, Defence claims regarding the purported exceptional nature of Rule 153 and the Defence's right to confront evidence<sup>20</sup> ignore the Panel's careful assessment of the evidence of W03812, W03870 and other witnesses in light of the arguments raised by the Defence.<sup>21</sup> These submissions also repeat arguments – of general application – repeatedly raised and rejected by the Panel in prior decisions.<sup>22</sup>

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<sup>15</sup> Request, KSC-BC-2020-06/F02675, para.10.

<sup>16</sup> See, *inter alia*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153, KSC-BC-2020-06/F01904, 3 November 2023, Confidential ('First Rule 153 Decision'), paras 7-10, as consistently applied by the Panel.

<sup>17</sup> Request, KSC-BC-2020-06/F02675, para.12, misstating First Rule 153 Decision, KSC-BC-2020-06/F01904, para.11.

<sup>18</sup> Request, KSC-BC-2020-06/F02675, paras 13-14.

<sup>19</sup> *Specialist Prosecutor v. Mustafa*, Decision on the submission and the admissibility of evidence, KSC-BC-2020-05/F00169, 25 August 2021, para.33 (finding that while it is up to the calling Party to decide whether to use the modalities of Rules 153-155 for its evidence presentation, the Panel shall intervene where potential prejudice arises, referring to Rule 138(1)). This is manifestly different from finding that the pre-conditions of Rule 153 are not met in case of potential prejudice. *Contra* Request, KSC-BC-2020-06/F02675, para.13. Indeed, the *Mustafa* Panel and the *Shala* Panel (which are composed of the same Judges) admitted evidence under Rule 153 after finding, over Defence objections otherwise, that admission would not be prejudicial. See e.g. *Specialist Prosecutor v. Mustafa*, Public redacted version of Decision on the Prosecution application pursuant to Rule 153 of the Rules, KSC-BC-2020-05/F00286/RED, 17 December 2021, para.34; *Specialist Prosecutor v. Shala*, Public Redacted Version of Decision on the Specialist Prosecutor's requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules, KSC-BC-2020-04/F00556/RED, 23 June 2023, paras 39, 49.

<sup>20</sup> Request, KSC-BC-2020-06/F02675, para.11.

<sup>21</sup> Decision, KSC-BC-2020-06/F02666, paras 23-26, 43-44.

<sup>22</sup> 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, Confidential, para.18; First Rule 153 Decision, KSC-BC-2020-06/F01904, para.13. See also 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, KSC-BC-2020-06/F02111, 8 February 2024, Confidential, paras 15, 83 (the Panel held that while the onus of establishing the requirements of Rule 153 is with the tendering Party,

Thus, to the extent the Issues and supporting arguments can even be considered to arise from the Decision (as opposed to a general challenge to the Rules and the Panel's interpretation thereof in previous decisions), the Request expresses mere disagreement.

8. The Defence equally fails to demonstrate that the Second Issue is appealable. When considered together with supporting arguments in the Request, the Second Issue essentially rephrases the First Issue. Like the First Issue, it departs from an incorrect interpretation of Rule 153 and mischaracterises the Panel's findings and reasoning.<sup>23</sup> Moreover, the Second Issue is internally inconsistent where it alleges that the Panel's reasons 'underline their conclusion that no "undue prejudice" is caused', while at the same time asserting that the Decision 'fails to explain the basis' for this conclusion.<sup>24</sup> The Defence ignores the Panel's findings, which are part of a fully reasoned Decision in which the Panel carefully considered the Defence arguments and established that the admissibility criteria were met.<sup>25</sup> The Second Issue thus alleges error where there is merely disagreement with the Decision.

B. THE ISSUES WOULD HAVE NO IMPACT JUSTIFYING CERTIFICATION

9. The Defence fails to establish how the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence does not specify how the Decision affects 'the safety of the decision' and the fairness of the proceedings.<sup>26</sup> The Panel – consistent with its previous decisions and the plain language of the Rules – correctly interpreted and applied Rules 138 and 153.<sup>27</sup> The Defence claims are also hypothetical, speculative, and premature as the Panel's

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the opposing Party should establish that the inability to cross-examine a particular witness would deprive it of a fair opportunity to raise relevant issues with other witnesses, or would cause prejudice).

<sup>23</sup> Request, KSC-BC-2020-06/F02675, para.15.

<sup>24</sup> Request, KSC-BC-2020-06/F02675, para.15.

<sup>25</sup> Decision, KSC-BC-2020-06/F02666, paras 24-26, 42-45.

<sup>26</sup> Request, KSC-BC-2020-06/F02675, para.16.

<sup>27</sup> *Contra* Request, KSC-BC-2020-06/F02675, paras 17, 21.

findings on the admissibility of W03812's and W03870's evidence pursuant to Rule 153 are without prejudice to the Panel's ultimate assessment of weight at the conclusion of the trial and any decisions on future Rule 153 requests.<sup>28</sup>

10. The Defence also fails to demonstrate how an immediate resolution by the Court of Appeals may materially advance the proceedings. The Defence assertion that 'an authoritative determination' by the Court of Appeals will 'rectify' alleged errors in the Decision and 'bar the admission of evidence of this nature, in these circumstances'<sup>29</sup> amounts to unsubstantiated and generic speculation. The Defence fails to specify which 'identifiable significant prejudice' it needs protection from.<sup>30</sup> Likewise, as set out above and even if it was sufficient to justify certification, there are no 'diverging approaches' of SC Panels that would necessitate reconciliation by the Court of Appeals.<sup>31</sup>

### III. CLASSIFICATION

11. This filing is confidential pursuant to Rule 82(4) and considering that no public version of the Request has been filed. As it does not contain any information requiring confidential classification at this time and in light of the Defence's classification submissions,<sup>32</sup> the SPO requests that this response be reclassified as public.

### IV. RELIEF REQUESTED

12. For the foregoing reasons, the Request fails to meet the leave to appeal standard and should be rejected.

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<sup>28</sup> *Contra* Request, KSC-BC-2020-06/F02675, paras 17, 21.

<sup>29</sup> Request, KSC-BC-2020-06/F02675, para.20.

<sup>30</sup> Request, KSC-BC-2020-06/F02675, para.20.

<sup>31</sup> *See above*, para.6. *Contra* Request, KSC-BC-2020-06/F02675, para.20.

<sup>32</sup> Request, KSC-BC-2020-06/F02675, para.22.

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**Kimberly P. West**

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Friday, 1 November 2024

At The Hague, the Netherlands.