

**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:** 14 February 2025

**Language:** English

**Classification:** Public

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**Public Redacted Version of 'Joint Defence Request for Leave to Appeal  
Decision to Admit the Evidence of W00542 via Rule 154'**

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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. Thaçi, Veseli, Selimi and Krasniqi ("the Defence") hereby files this request for certification to appeal the Trial Panel's Decision to admit the totality of W00542's SPO interview via Rule 154 ("Impugned Decision").<sup>3</sup> The Defence submits one issue for certification, namely, whether the Trial Panel, in admitting the totality of this evidence via Rule 154, erred in its interpretation and application of Rule 154.

## II. APPLICABLE LAW

2. Pursuant to Article 45(2) and Rule 77(2),<sup>4</sup> a right to appeal only arises if the standard of certification set forth herein has been met.

3. 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>5</sup>

4. 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>6</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> Transcript of 10 February 2025, p. 24879, lines 17-24.

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

<sup>5</sup> Rules, Rule 77(2).

<sup>6</sup> F02706, Specialist Counsel, *Joint Defence Request for Leave to Appeal Third Oral Order of 31 October 2024*, 11 November 2024, public, paras. 3-5.

### III. BACKGROUND

5. W00542 was interviewed by the SPO on [REDACTED]. On [REDACTED], the SPO conducted a preparation session with W00542 in advance of his live evidence. The note of that preparation session (P02024), which was read back to witness and signed by Prosecutor [REDACTED], stated the following:

Psychologist [REDACTED] remained in the room during the preparation session to provide psychological support to the witness due to the traumatic nature of his experiences in 1999. Upon discussion with the witness, it was agreed to skip the portions of the prior statements that detailed [REDACTED], specifically 005415-TR-ET Part 2 Revised p.16 line 13-p.17 line 3; 005415-TR-ET Part 3 Revised: p.6 lines 2-25, p.9 lines 20-22, p.11 line 5-9, and p.12 lines 5-7; and 005415-TR-ET Part 4 Revised: p.2 lines 6-11, p.4 lines 1-9, and p.7 lines 11-19.<sup>7</sup>

6. W00542 testified on 10 February 2025. In live evidence, W00542 confirmed, in response to leading questions from the SPO, that he had the opportunity to review the contents of his SPO interview, and to make clarifications and corrections, which he did by way of Preparation Note 1 (P02024).<sup>8</sup> He was not asked questions about, nor was he referred to, paragraph 3 of the preparation note. The SPO then sought to tender the entirety of the witness' SPO interview via Rule 154.<sup>9</sup>
7. The Defence objected on the basis that, in light of the indication that W00542 had not read certain identified parts of the interviews, during the preparatory session, he therefore could not attest that those parts of the interview "accurately reflect what [he] said and what [he] would say if asked again in court".<sup>10</sup> As such, the requirement under Rule 154(c) was not met and the evidence in those sections would need to be elicited live.<sup>11</sup> In response, the SPO simply noted that the reason they had chosen to allow the witness to adopt this

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<sup>7</sup> W00542 Preparation Note 1, P02024, para 3.

<sup>8</sup> Transcript of 10 February 2025, p. 24874, line 10- p. 24875, line 10.

<sup>9</sup> Transcript of 10 February 2025, p. 24875, lines. 11-18.

<sup>10</sup> Transcript of 10 February 2025, p. 24875, lines 7-10, p. 24875, line 20- p.24876, line 21, p. 24877, line 18-25.

<sup>11</sup> Transcript of 10 February 2025, p. 24876, lines 13-21.

course was his psychological wellbeing;<sup>12</sup> a matter irrelevant to the application of Rule 154. It should be highlighted that there has been no psychological assessment or report disclosed finding W00542 unable to give or read evidence about [REDACTED] as a result of any psychological illness. Further, to the contrary, the witness gave evidence about [REDACTED] with ease under cross examination.<sup>13</sup> The SPO then simply noted the Defence could cross examine the witness.

8. The Panel admitted the entirety of the SPO interviews, finding:

005415-TR-ET Parts 1 through 4 Revised RED plus the Serbian and the Albanian will be admitted. The witness has attested to the accuracy of the documents. He had the option to read the documents. He chose not to. That does not affect its admissibility. Also, Note 12498 and 124909 is admitted. And, of course, the entire document is subject to cross-examination -- or documents are subject to cross-examination.<sup>14</sup>

#### IV. SUBMISSIONS

9. The Identified Issue satisfies the requirements for leave to appeal. It arises from the Impugned Decision, does not merely disagree with the Impugned Decision, is liable to significantly affect the fair and expeditious conduct of the proceedings and requires immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

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

10. The Trial Panel erred in its interpretation and application of Rule 154. The provisions from Rule 154 are as follows;

##### **Admission of Written Statements and Transcripts in lieu of Direct Examination**

Subject to Rule 155, the Panel may admit the written statement of a witness or transcript of evidence given by a witness in proceedings before the Specialist

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<sup>12</sup> Transcript of 10 February 2025, p. 24877, lines. 1-12.

<sup>13</sup> Transcript of 10 February 2025, p. 24882, lines 1-3, pp. 24885-24895.

<sup>14</sup> Transcript of 10 February 2025, p. 24879, lines 17-24.

Chambers that goes to proof of the acts and conduct of the Accused as charged in the indictment, only of the following conditions are satisfied:

- (a) The witness is present in court;
- (b) The witness is available for cross-examination and any questioning by the Panel; and
- (c) The witness attests that the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined.

11. A statement is not admissible under this Rule, unless *all three* conditions are satisfied. If any one of the three conditions are not met, the evidence in question cannot be admitted under the Rule. This Trial Panel has confirmed that “[w]ith respect to the admission of material associated with the Rule 154 witnesses, the item(s) concerned must fulfil the following requirements: [...] iii. The three express conditions set out in Rule 154 are met”.<sup>15</sup> The Panel has held previously that:

[...] These requirements must be met for each statement or record of interview offered pursuant to Rule 154 (“the written statement of a witness or transcript of evidence”). In particular, the requirement of Rule 154(c) (“the witness attests that the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined”), will need to be verified in relation to each of the statements offered pursuant to that Rule.<sup>16</sup>

12. As was set out in clear terms in the preparation session, it was agreed that the witness would not, and did not, read certain aspects of his SPO interview.<sup>17</sup> Notably, those sections all concern [REDACTED], who has been removed from the witness list by the SPO,<sup>18</sup> remains one of the nine victims identified for the [REDACTED] crime site in the Indictment [REDACTED]. It is therefore inevitable the SPO will seek to rely on the statement of W00542 to prove the alleged crimes against [REDACTED], who will not testify on his own behalf.

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<sup>15</sup> F01380, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, para. 12.

<sup>16</sup> F01380, para. 15.

<sup>17</sup> W00542 Preparation Note 1, P02024, para 3.

<sup>18</sup> F02576, SPO, *Prosecution notice of witness changes*, 16 September 2024, confidential (PRV F02576RED).

This evidence cannot be admitted in circumstances where its accuracy has not been confirmed, as required.

13. W00542 did not read those aspects of his interview during his preparation session, and there is no indication or evidence that he had ever read or reviewed them in the past, or been provided with a copy or recording of his statement to allow him confirm their accuracy in his own time. While there are no temporal requirements as to when a witness must have read or reviewed his prior statement, in order to confirm a written document accurately reflects words spoken, it must *at some point in time* have been reviewed by the witness. A witness cannot confirm the accuracy of a document he has *never* read in its entirety.
14. The SPO therefore, could not and did not establish that the witness was in a position to confirm the content of those identified sections accurately reflected his declaration and what he would say if examined. As such, the provision under Rule 154(c) was not met.
15. The Panel clearly erred in its application of Rule 154 in admitting the entire interview and finding “[t]he witness has attested to the accuracy of the documents. He had the option to read the documents. He chose not to. That does not affect its admissibility”.<sup>19</sup> This reasoning is fundamentally flawed.
16. Firstly, the witness could not attest to the accuracy of parts of a document where it could not be established he had ever read or reviewed; he could only attest to the parts he has read. This finding was wrong in fact and law.
17. Secondly, in finding that the fact that the witness chose not to read the document does not affect its admissibility is clearly a misunderstanding and misapplication of the law; it is a core consideration under Rule 154(c). Rule

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<sup>19</sup> Transcript of 10 February 2025, p. 24879, lines 18-21.

154(c) is not satisfied merely by a witness being afforded the opportunity to review their prior statements. Neither the text of Rule 154(c), nor any relevant jurisprudence, provide the discretion to a witness to not avail themselves of this opportunity in the review process, as was erroneously afforded by the Trial Panel.

18. Finally, the Panel's finding that the "document is subject to cross-examination"<sup>20</sup> somehow rendered it admissible under Rule 154 is misconceived. Whether the Defence has the opportunity to cross examine a witness is wholly irrelevant to the consideration as to whether the three conditions of Rule 154 are met. The fact that the witness is available for cross-examination is an adjacent pre-condition to admission pursuant to Rule 154(b). As the three requirements laid out in Rule 154 are clearly cumulative rather than disjunctive, the fact that one such requirement is satisfied is immaterial to whether the others are equally so. Therefore, in finding that the statement could be admitted via this Rule in light of the ability to cross-examination is again a misapplication and obvious misunderstanding of the Rule.
19. If the Panel's interpretation of the Rule is correct, it would mean that a witness could attend a preparation session, refuse to read the totality of their prior interviews, and those interviews could then nonetheless be admitted via Rule 154 without issue - as the fact the witness didn't read them, on the Panel's interpretation, "does not affect admissibility". This is clearly an incorrect interpretation of the Rule. Further, it flies in the face of the procedure that has been adopted for Rule 154 witnesses called to date by the SPO. This is a newly adopted and it is submitted, clearly incorrect, misinterpretation of the Rule; which has been adopted for what appears to have been simply for convenience

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<sup>20</sup> Transcript of 10 February 2025, p. 24879, lines 22-24.

in the moment. This is an incorrect interpretation and application of the law and this fundamental error must be corrected.

20. For completeness, and as was expressly conceded by the Defence,<sup>21</sup> the remainder of the interview, minus the excerpts identified in Preparation Note 1, paragraph 3, could be admitted via Rule 154.

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

21. The Impugned Decision significantly affects the fair and expeditious conduct of the proceedings. The vast majority of witness evidence has been admitted in this trial via Rule 154. It has become the default means of admission in this trial. It is therefore imperative that this Rule is correctly applied by the Panel on each and every occasion.
22. The provisions of Rule 154 are in place not only to protect the rights of the Defence, but the integrity and fairness of proceedings. If and when this Rule is incorrectly applied by the Panel, it clearly affects the fair and expeditious conduct of the proceedings, as it leads to the admission of evidence which does not meet the test in the Rules and as such, is inadmissible in writing and should be called live.

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

23. Immediate resolution of the Issue will clearly materially advance the proceedings. Trial is ongoing and at present, as part of the SPO's case, there are *at least* seven – to possibly twelve – remaining witnesses due to testify via Rule 154.<sup>22</sup> Intervention by the Appeal Panel is imperative at this juncture to ensure

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<sup>21</sup> Transcript of 10 February 2025, p. 24876, lines 13-21.

<sup>22</sup> F02833, SPO, Prosecution submissions concerning post-January 2025 witnesses with confidential Annex 1, confidential, 14 January 2025, *see inter alia* para. 5. *See also* Annex 1.



that the Rules of the Court are properly interpreted and applied by the Panel. It is also crucial in order to ensure that an incorrect precedent set by Case 06 is corrected and does not impact the application of the Rules in other trials before the KSC.

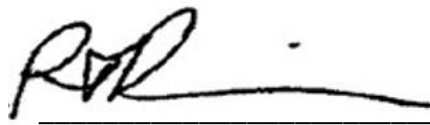




## V. CONCLUSION

24. In light of the foregoing, the Defence respectfully seeks leave to appeal the issue identified above.

**Word Count: 2545**

Friday, 14 February 2025

The Hague, The Netherlands

  
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