

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 Kadri Veseli

Date: 8 April 2025

Language: English

Classification: Public

Veseli Defence Request for Certification to Appeal Decisions F03070 and F03071

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I. INTRODUCTION

1. In accordance with Article 45(2) of the Law¹ and Rule 77(2) of the Rules,² the Defence for Kadri Veseli (“Defence”) hereby files this request for certification to appeal two admissibility decisions from 1 April 2025 in which the Trial Panel admitted: (i) four items pertaining to the so-called Liridon Kosova Study;³ and (ii) 311 items tendered as part of the SPO’s Pashtrik Bar Table Motion.⁴

2. The Defence submits the following issue for certification:

Whether the Trial Panel’s admissibility decisions in F03070 and F03071 were rendered erroneous by their failure to weigh the probative value of the evidence tendered against its prejudicial effect, per the requirements of Rule 138(1).

3. Both decisions exhibit the same flawed approach to the assessment of prejudice, which cannot be reconciled with the terms of Rule 138(1).⁵ The error, therefore, arises from the Impugned Decisions. Moreover, the issue significantly affects the fairness and expeditious conduct of the proceedings because it concerns the unfair prejudice caused to the Accused with ramifications that extend beyond the Impugned Decisions. Immediate resolution by the Court of Appeals Panel will materially advance the proceedings by providing certainty as regards massive amounts of evidence that have been admitted and are yet to be admitted as part of the SPO case.

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

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

³ F03071, Decision on Prosecution Request to Amend the Exhibit List and Admit Items, 1 April 2025, public.

⁴ F03070, Decision on Prosecution Motion for Admission of Pashtrik Zone Documents, 1 April 2025, public.

⁵ See e.g., F03071, para. 19; F03070, paras. 35, 45, 55, 68, 74, 85, 98, 108, 115, 127, 136, 152, 158, 168, and 177.

II. PROCEDURAL BACKGROUND

4. On 13 January 2025, the SPO requested that it be permitted to amend its exhibit list and tender into evidence an interview given by Emrush Xhemajli⁶ and the cover pages to three volumes of the so-called Liridon Kosova Study,⁷ with the aim of bolstering the admissibility of Volume 1 of the Study⁸ sufficiently to compel the Trial Panel to reconsider its previous Decision denying its admission.⁹
5. On 24 January 2025, the Defence responded, opposing both the request to amend the exhibit list and admit the items.¹⁰ The SPO filed its reply the same day.¹¹
6. On 18 February 2025, the Prosecution filed a motion for admission of 316 documents relating to the Pashtrik Operational Zone.¹²
7. On 7 March 2025, having been granted an extension of time, the Defence filed its Joint Response to the Pashtrik Bar Table Motion.¹³
8. On 17 March 2025, the SPO replied.¹⁴

⁶ SPOE00361031-SPOE00361044.

⁷ 0189-1611-0189-1613-ET; 0189-1863-0189-1865-ET; 0189-2127-0189-2129-ET.

⁸ P01879 MNA (0189-1161-0189-1309_extracts_P01879).

⁹ F02827, Prosecution Request to Amend the Exhibit List and Admit Items, 13 January 2025, public, paras 1, 16.

¹⁰ F02857, Veseli Defence Response to Prosecution Request to Amend the Exhibit List and Admit Items (F02827), 24 January 2025, public.

¹¹ F02862, Prosecution Reply to F02857, 24 January 2025, public.

¹² F02944, Prosecution Motion for Admission of Pashtrik Zone Documents with Annexes 1-3, 18 February 2025, confidential (a public redacted version was issued on 21 February 2025).

¹³ F02991, Joint Defence Response to 'Prosecution Motion for Admission of Pashtrik Zone Documents (F02944)' with Annex 1, 7 March 2025, confidential.

¹⁴ F03030, Prosecution Reply Relating to Motion to Admit Pashtrik Zone Documents (F02944), 17 March 2025, confidential.

9. On 1 April 2025, in a pair of admissibility decisions, the Trial Panel admitted (i) all items that were the subject of the SPO's Liridon Kosovo Request¹⁵; and (ii) 311 of 316 items that were the subject of the Pashtrik Bar Table Motion.¹⁶

III. APPLICABLE LAW

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

11. 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.

12. 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.¹⁷

IV. SUBMISSIONS

A. The Issue Arises from the Impugned Decisions

13. In the Liridon Kosovo Study Decision, the Trial Panel briefly assessed whether the probative value of the evidence tendered was outweighed by its prejudicial effect, stating that:

¹⁵ F03071, para. 29 (a), (b), (d).

¹⁶ F03070, para. 181 (a)-(c).

¹⁷ F02866, Decision on Veseli and Krasniqi Request for Certification to Appeal First Oral Order of 5 December 2024, 27 January 2025, public, para. 11 *citing* F01237, Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses, 30 January 2023, public, paras 7-8; KSC-BC-2020-07, F00423, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, 8 November 2021, public, paras 13-21; F00372, Decision on Haradinaj Defence's Application for Certification of F00328, 15 October 2021, public, paras 15-17; F00484, Decision on Defence Request for Leave to Appeal F00470, 8 December 2021, public, paras 4-14. *See also* F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, public, paras 6-7, 9-17.

The Panel is also satisfied that the prima facie probative value of the Requested Additions is not outweighed by any prejudice to the Accused, considering that the Defence will be able to make submissions in respect of the weight and probative value of these items and could, if it so chooses challenge the content of these items through the presentation of evidence, although it bears no onus to do so.¹⁸

14. This was the only passage in the decision where prejudice was considered.
15. Preliminarily, the Defence submits that it is wrong to suggest that the prejudice may be cured by the presentation of Defence evidence. As the Panel itself acknowledges, the Defence has no burden of production, or of persuasion. This is plainly impermissible burden shifting.
16. The principle flaws with the approach, however, are that the Panel improperly resorts to the suggestion that the weight accorded to the evidence might be limited as a remedy to any prejudice incurred, without articulating and weighing the prejudice that actually arises from admission against the probative value of the evidence.
17. The Panel adopts a similar approach in the Pashtrik Bar Table Decision when discussing the right of confrontation, observing that: “if proposed exhibits are not put, by the calling Party, to witnesses who are able to contextualise them this may negatively impact the weight that the Panel might be prepared to give to such an exhibit at the end of trial.” The observation exhibits the same flawed reasoning as the Liridon Kosovo Study Decision, namely, that any issues of unfairness caused by the admission of an item can be cured by the mere possibility of its weight being limited at some later stage.
18. Both Decisions fail to consider and weigh the specific prejudice to the Accused occasioned by the admission of the evidence, against the probative value of the evidence. In the Liridon Kosovo Study Decision, the Trial Panel admitted an

¹⁸ F03071, para. 19, second sentence.

authorless news article in order to secure admission of evidence (the Study) that was intended to show a policy comprised of the following tactics:

(i) publicising that collaborators would not be spared or remain undiscovered; (ii) the responsibility of intelligence to collect information on suspicious persons; (iii) making lists of collaborators to target; (iv) the role of intelligence in purging and (v) the authorisation to kill collaborators.¹⁹

19. It is difficult to imagine evidence that is more prejudicial to the Defence. In this instance, prejudice was rendered particularly unfair as a consequence of the late notice to the Defence, being added to the exhibit list and offered for admission right at the end of trial. This prevented the Defence from knowing an important aspect of the case against the Accused and having adequate time and facilities to prepare for it. The Trial Panel failed to weigh this prejudice against the *prima facie* limitations on its probity – namely, that the article was unauthored and no evidence was presented regarding the circumstances of its production and publication.
20. Similarly, throughout the Pashtrik Bar Table Decision, the Trial Panel failed to provide reasons for why the probative value of the 311 items it chose to admit were not outweighed by their prejudicial effect. Fifteen near identical paragraphs conclude that probative value is not outweighed by prejudice, but do not point to a single reason for this being so. For example:

Having found Proposed Exhibits [...] to be relevant and *prima facie* authentic, the Panel is further satisfied that these items also bear *prima facie* probative value regarding facts and circumstances relevant to this case. The Panel is satisfied that the *prima facie* probative value of Proposed Exhibits [...] is not outweighed by any prejudice to the Accused.²⁰

21. This is not a situation where the Trial Panel's reasoning was simply unclear or underdeveloped. The Defence explicitly raised issues of prejudice throughout its Pashtrik Bar Table Response.²¹ Sixty-five items were explicitly identified as

¹⁹ F03071, para. 23.

²⁰ See e.g., F03070, paras. 35, 45, 55, 68, 74, 85, 98, 108, 115, 127, 136, 143, 152, 158, 168 and 177.

²¹ See generally, F02991/A01.

being unduly prejudicial via the coding “PV.2”. In many instances, the prejudice of the item was then further explained in comments and concerned issues of similar gravity to those at stake in the Liridon Kosova Study Decision.²² Lack of probative value was explicitly identified 229 times and also frequently supplemented with further written submissions. Yet, the Decision systematically failed to engage in a weighing of prejudice versus probative value.

22. Rule 138(1) explicitly requires a weighing of probative value against prejudicial effect. This exercise was not undertaken in either of the Impugned Decisions. The Defence submits that this is a clear error arising from both decisions, which should be subjected to appellate review.

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

23. The issue identified by the Defence engages the right to confrontation and ability to know the case against the Accused, which are two cornerstone fair trial rights under Article 21 and the ECHR. It furthermore engages the right to a reasoned decision. The Defence has clearly articulated that prejudice under Rule 138(1) has not been given the consideration that it is required to be given

²² See, e.g., F02991/A01, **Item 3**: “The SPO contends that this document is relevant to a central issue in the case; being the General Staff command and control over the structure of the zone. While the Defence disputes that such a link can be drawn on the basis of this document, admission of a document through the bar table that goes to core issues in these proceedings would be highly prejudicial.” **Item 79**: “The late tender of this highly incriminating item, exacerbates the unfair prejudice to the Defence. The SPO made no effort to put this item to any of the witnesses from Pashtrik OZ and should not be permitted to have the item admitted via the bar table”; **Item 215**: “Admitting a document allegedly signed by the Accused in the absence of cross-examination and/or other proper avenues to test its authenticity would be extremely prejudicial to the right of the Accused to confront the evidence against him; **Item 276**: “The content of the document therefore creates room for speculation, which cannot be challenged if the document is being tendered through a bar table motion and is prejudicial to the rights of the Accused.” **Item 295**: “The SPO’s indication that it intends to rely on this item to demonstrate GS members’ knowledge of incidents described therein renders admission absent witness testimony unfairly prejudicial.”

and that, as a consequence, evidence against the Accused has been improperly admitted and may be relied upon in convicting the Accused.

24. Moreover, the evidence at issue concerns important matters, including the existence of a policy against collaborators; General Staff command, control, and knowledge; and the acts and conduct of the accused. The evidence at issue is thus not inconsequential and certification is thus required in order to ensure the Accused's fair trial rights are protected.

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

25. At present, two further Bar Table Motions and several applications for admission of evidence pursuant to Rule 153 and Rule 155 remain pending.²³ The pending General Staff and Provisional Government of Kosovo Bar Table Motions, for instance, concern over 350 items.²⁴ The Defence devotes considerable resources to identifying where the probative value of Prosecution evidence is outweighed by its prejudicial effect. An appellate ruling on this issue at this point in the proceedings will be of considerable assistance. Therefore, while the end of the Prosecution case is near, significant volumes of key evidence remain to be ruled upon, and their analysis will consume significant resources.
26. Consequently, the Defence submits that immediate resolution is required in order to resolve an issue that remains significant and will materially advance the proceedings.

²³ See, e.g., F03028, Prosecution eighth motion for admission of evidence pursuant to Rule 155 with confidential Annexes 1-6, 17 March 2025, confidential; F03069, Prosecution motion for admission of evidence of W04747 pursuant to Rule 155 with confidential Annex 1, 1 April 2025, confidential.

²⁴ See, e.g., F03065, Prosecution motion for admission of General Staff and Provisional Government of Kosovo documents with confidential Annexes 1-4, 31 March 2025, public; F03066, Prosecution motion for admission of international reports with confidential Annexes 1-2, 31 March 2025, confidential.

V. CONCLUSION

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

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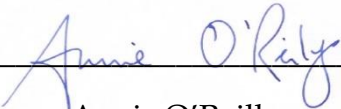
Respectfully submitted on Tuesday, 8 April 2025, at the Hague, the Netherlands.



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