



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

Date: 22 April 2025

Language: English

Classification: Public

Prosecution response to 'Joint Defence Request for Leave to Appeal the Second Oral Order of 1 April 2025' (F03098)

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Luka Mišetić

Counsel for Kadri Veseli

Rodney Dixon

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Request¹ should be dismissed as the Issues² identified by the Defence fail to meet the criteria for certification³ under Article 45 of the Law⁴ and Rule 77 of the Rules.⁵ The matters raised do not constitute appealable issues within the meaning of Rule 77, nor does the Defence show that appellate review of the Order⁶ would have any, let alone significant, impact on the conduct of the proceedings.

2. As repeatedly stated by the Panel, triers of fact enjoy considerable discretion in deciding whether to admit evidence, and consequently certification to appeal admissibility decisions must be the absolute exception.⁷ The Request fails to demonstrate that any of the Issues meet this standard.

II. SUBMISSIONS

A. THE ISSUES ARE NOT APPEALABLE

3. The Request misrepresents the Order and the process leading to it, distorts the relevant legal framework and past practice in this case, and fails to identify any appealable issue. The Defence attempts to reargue the merits of the Order,

¹ Joint Defence Request for Leave to Appeal the Second Oral Order of 1 April 2025, KSC-BC-2020-06/F03098, 8 April 2025 ('Request').

² Request, KSC-BC-2020-06/F03098, para.1, setting forth the following issues: whether the Trial Panel failed to take adequate measures to secure the oral testimony of W04745 ('First Issue'); whether the Trial Panel erred in finding that the fact that W04745 denied making a statement had 'no bearing' on its status as a 'statement' ('Second Issue'); and whether the Trial Panel erred in admitting W04745's preparatory note pursuant to Rule 143 ('Third Issue') (together, 'Issues').

³ The applicable law has been set out in prior decisions. *See e.g.* Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 ('January 2021 Decision'), 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.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁵ 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.

⁶ Transcript, 1 April 2025, pp. 26121-26126 ('Order').

⁷ Decision on Veseli Request for Certification to Appeal First Oral Order of 30 January 2025, KSC-BC-2020-06/F02973, 3 March 2025, para.14; Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024, para.11.

repurposing submissions already heard by the Panel, and ultimately only articulates its disagreement with the Panel's decision and the rationale of Rule 143(2).

4. The First Issue does not arise from the Order. Instead, the Defence seeks to belatedly challenge other 'decisions made by the Presiding Judge on 24 and 25 February 2025' by conflating the admission of W04745's evidence under Rule 143(2) with the procedurally distinct issue of contempt penalties.⁸ That the Defence is unable to identify where in the Order the First Issue arises plainly demonstrates the disconnect of these arguments.⁹ Admission under Rule 143(2) is not contingent on a prior finding of contempt or does not otherwise require the Panel to 'secure oral testimony'.¹⁰ The Defence's analogy between the Order and the *Haradinaj* Appeal Judgement¹¹ is similarly disjointed and misleading.¹² In *Haradinaj*, the Trial Chamber's refusal to facilitate Prosecution efforts to secure the testimony of uncooperative witnesses resulted in the complete exclusion of that witness evidence, thereby undermining the fairness of the proceedings.¹³ The present situation, where the Panel conversely admitted the prior evidence of W04745 after he refused to reasonably engage with the Prosecution's questioning – but was available for cross-examination

⁸ Request, KSC-BC-2020-06/F03098, para.11.

⁹ See also ICC, *Prosecutor v. Al Hassan*, Decision on Defence request for leave to appeal the 'Decision on Mr Al Hassan's ongoing fitness to stand trial', ICC-01/12-01/18, 28 May 2021 ('*Al Hassan* Decision'), para.9 (noting that 'while a party seeking to appeal a decision may raise procedural issues leading up to the impugned decision, it is obliged [...] to indicate with sufficient precision how these alleged errors arise from the Impugned Decision.').

¹⁰ See also Decision on the Thaçi Defence's Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2), KSC-BC-2020-06/F02130, 15 February 2024 ('February 2024 Decision'), para.18 (noting that the principle of orality 'is not absolute, but qualified by certain provisions, including Rule 143(2)'). *Contra* Request, KSC-BC-2020-06/F03098, para.12.

¹¹ ICTY, *Prosecutor v. Haradinaj et al.*, Judgement, IT-04-84-A, 19 July 2010 ('*Haradinaj* Appeal Judgement').

¹² Request, KSC-BC-2020-06/F03098, para.12.

¹³ See, in particular, *Haradinaj* Appeal Judgement, paras 48-49. The specific finding of the ICTY Appeals Chamber quoted by the Defence concerned the Trial Chamber's refusal to reopen the Prosecution case to hear a previously uncooperative witness when his testimony could have been compelled by a national court, and did not suggest that the Trial Chamber was obliged to compel the witness as such. See *Haradinaj* Appeal Judgement, para.42. *Contra* Request, KSC-BC-2020-06/F03098, para.12.

– is materially different and rather contributes to the Panel’s truth-seeking function in this case.¹⁴

5. In any event, the Panel repeatedly addressed and rejected the same arguments now raised under the First Issue during the hearings that led to the Order, underlining that the decision to hold a witness in contempt is a discretionary one.¹⁵ The Defence makes no attempt to explain how the Panel abused its discretion, nor how this would have any bearing on its separate decision to admit W04745’s evidence under Rule 143(2).¹⁶ As such, the First Issue is unrelated to the substance of the Order and does not amount to an appealable issue.¹⁷

6. The Second Issue, arguing that the Panel erred in finding that W04745’s disavowal of his 2001 Statement (P02084) did not affect its status as a ‘statement’, misapprehends the Order and the legal standard it applied.¹⁸ As explained by the Panel, a ‘statement’ is defined by its objective characteristics as a record of information provided by the witness in the context of a criminal investigation, regardless of

¹⁴ See, in particular, Decision on Prosecution Request for Admission of W03827’s Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration, KSC-BC-2020-06/F01821, 28 September 2023 (‘September 2023 Decision’), para.49; Decision on Prosecution Request for the Admission of W01453’s Prior Statements Pursuant to Rule 143(2)(c), KSC-BC-2020-06/F02790, 16 December 2024 (‘December 2024 Decision’), paras 10-11.

¹⁵ Transcript, 24 February 2025, pp.25530-25531; Transcript, 25 February 2025, p.25567. See also *Haradinaj* Appeal Judgement, paras 39-40 (also underlining the considerable trial management discretion enjoyed by Trial Chambers).

¹⁶ To this end, the Defence’s claim that the Panel failed to explore W04745’s willingness to answer the Prosecutor’s questions following consultation with duty counsel is particularly misleading, as W04745 specifically stated that he would only answer re-direct questions arising from the Defence’s cross-examinations. See Transcript, 25 February 2025, pp.25590-25591 (W04745 indicating that he would answer the Prosecutor’s questions ‘provided that she ask me the same questions about the same topics that you [Defence counsel] will ask me’). See also Order, Transcript, 1 April 2025, pp.26122-26123. *Contra* Request, KSC-BC-2020-06/F03098, para.12.

¹⁷ See, similarly, *Al Hassan* Decision, para.9; ICC, *Prosecutor v. Ongwen*, Decision on the Defence Request for Leave to Appeal the Decision on Request for Reports and Additional Resources for the Defence, ICC-02/04-01/15, 4 January 2018, para.7.

¹⁸ Request, KSC-BC-2020-06/F03098, para.13.

whether the witness later acknowledges or denies it.¹⁹ The Defence's mere insistence that W04745's disavowal 'must [...] be a relevant factor' fails to demonstrate any error in the Panel's interpretation of the legal standard or how this would alter the statement's qualification as a record of information provided.²⁰ Accepting the Defence's position would effectively obviate Rule 143(2)(c) by allowing witnesses to simply deny any prior inconsistent statements when confronted with them in court, even when those statements have been credibly produced in the context of criminal investigations or proceedings.²¹ Moreover, the claim that the Panel disregarded W04745's disavowal in assessing the authenticity of P02084 overlooks that the Panel specifically referred to the Defence's argument in its considerations '[r]egarding authenticity'.²² The fact that the Defence disagrees with the Panel's dismissal of its arguments in this regard does not constitute an appealable issue.²³

7. Contrary to the framing of the Third Issue, the Order is also consistent with the Panel's past practice. To begin with, in the Order, the Panel specifically noted that while W04745's Preparation Note (P02080) contained his comments on documents not previously shown to him, the substance of these issues was also discussed in his 2019 SPO interview.²⁴ Furthermore, the premise that the Panel has 'never previously admitted a Preparation Note 2' is simply incorrect,²⁵ as several preparation notes

¹⁹ Order, Transcript, 1 April 2025, p.26124, *citing* Reasons for Admission of W03780's Statements and Related Order, KSC-BC-2020-06/F02580, 17 September 2024 ('September 2024 Decision'), para.10. *See also* February 2024 Decision, KSC-BC-2020-06/F02130, paras 15-18.

²⁰ Request, KSC-BC-2020-06/F03098, para.14.

²¹ *See, similarly*, September 2023 Decision, KSC-BC-2020-06/F01821, para.49.

²² Order, Transcript, 1 April 2025, p.26124. *See also* Decision on Joint Defence Request for Certification to Appeal the Oral Order on Reasons for Ruling on the Joint Defence Submissions on Consecutive Final Briefs, KSC-BC-2020-06/F03058, 26 March 2025, para.24 (noting that 'the Panel is not required to articulate every step of its reasoning and to discuss each submission'). *Contra* Request, KSC-BC-2020-06/F03098, para.14.

²³ *See, similarly*, Decision on Joint Defence Request for Certification to Appeal the Reasons for Admission of W03780's Statements and Related Order (F02580), KSC-BC-2020-06/F02639, 11 October 2024 ('October 2024 Decision'), para.16.

²⁴ *See* Order, Transcript, 1 April 2025, pp.26125-26126, *referring to* P02080, paras 120-142. The Defence does not address this finding or otherwise explain which other new evidence the Panel supposedly failed to exclude. *See* Request, KSC-BC-2020-06/F03098, paras 15-18.

²⁵ Request, KSC-BC-2020-06/F03098, para.16.

containing new information have been admitted in the course of this trial.²⁶ The Panel's rulings requiring new information in preparation notes to be elicited live have been specific to tender under Rule 154.²⁷ No such requirement exists under Rule 143(2), which the Panel has already found to allow it to admit any prior inconsistent statement whether or not every part of that statement has been put to the witness.²⁸ The Defence's claim that W04745 disputed information recorded in P02080 misrepresents his evidence,²⁹ and in any event, goes to the Panel's assessment of its weight, not admissibility.³⁰ The characterisation of P02080 as a 'summary in the prosecution lawyer's words' is similarly inaccurate, and ignores that the contents of P02080 were read back to W04745 and confirmed by him during the preparation session.³¹ The Defence merely reiterates its previous submissions and expresses its dissatisfaction with the admission of P02080, without presenting any appealable issue.³²

²⁶ See 1D00039 (W03832's Preparation Note 2), 1D00064 (W03825's Preparation Note), 3D00018 (W01140's Preparation Note 2), 3D00022 (W02951's Preparation Note 2), 3D00023 (W04230's Preparation Note), P01237 (W01336's Preparation Note 2), 122805-122808 RED (W02135's Preparation Note, exhibit number to be assigned, see Decision on Prosecution Sixth Motion for Admission of Evidence pursuant to Rule 155, KSC-BC-2020-06/F03012, 13 March 2025, Confidential, para.71).

²⁷ See e.g. Transcript, 23 October 2024, pp.21041-21042; Transcript, 10 July 2023, p.5321. See also Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Order on the Conduct of Proceedings'), para.96. *Contra* Request, KSC-BC-2020-06/F03098, paras 16-18.

²⁸ February 2024 Decision, KSC-BC-2020-06/F02130, paras 11, 20 and fn.39 (noting, *inter alia*, that 'Rule 143(2)(c) does not require the calling party to read the entire statement said to contain inconsistencies to the witness concerned'); December 2024 Decision, KSC-BC-2020-06/F02790, para.7 (noting that, after admission under Rule 143(2), the Panel 'can rely on any part or sections of an admitted statement, whether or not that part has been explicitly discussed with the witness'); Decision on Prosecution Request for Admission of Items Used During the Examination of W04746, KSC-BC-2020-06/F01903, 3 November 2023, para.22 (noting that '[t]here is nothing in Rule 143 that requires the calling party to read the entire prior statement to the witness'). See also Rule 143(2)(c); Order on the Conduct of Proceedings, paras 107, 120. See also October 2024 Decision, KSC-BC-2020-06/F02639, para.24.

²⁹ In particular, nowhere in P02080 is it recorded that W04745 asked that the 2001 statement not be made public; and his answer regarding paragraph 127 in fact repeats exactly what is stated in P02080, namely that he did not know to whom the letter signed by him was sent but it was known that there was a staff in Likoc/Likovac (Transcript, 24 February 2025, pp.25500-25501). *Contra* Request, KSC-BC-2020-06/F03098, para.19.

³⁰ See September 2024 Decision, KSC-BC-2020-06/F02580, para.14; October 2024 Decision, KSC-BC-2020-06/F02639, para.16.

³¹ P02080, para.147. *Contra* Request, KSC-BC-2020-06/F03098, para.18.

³² See, similarly, October 2024 Decision, KSC-BC-2020-06/F02639, para.16.

B. NONE OF THE ISSUES WOULD HAVE A SIGNIFICANT IMPACT ON OR MATERIALLY ADVANCE THE PROCEEDINGS

8. The Request fails to establish how any of the Issues would have any, let alone significant, effect on the fairness and expeditiousness of the proceedings or the outcome of the trial. As noted by the Panel, the Defence will have a full opportunity to make submissions on the weight to be given to W04745's evidence, including P02080 and P02084, in its final brief and submissions.³³ Any projection about the impact that the admission of this evidence may have on the proceedings or its outcome is at this stage hypothetical and premature, and could in any event be addressed, as necessary and appropriate, on final appeal.³⁴ Claims that the admission of an evasive witness's evidence undermines the principle of orality or is otherwise 'fundamentally irrational' go beyond the scope of the Issues and ignore the Panel's consistent interpretation of Rule 143(2).³⁵ The Order is consistent with the Panel's past practice and its 'wide discretion' under Rule 143(2),³⁶ and as such cannot be said to encroach on the fairness of the proceedings.³⁷

9. The Request equally fails to show any concrete need for an immediate resolution by the Court of Appeals Panel. The Defence's general assertions that the Order could 'undermine the entire trial proceedings' or that appellate review would 'assist all parties' are vague, unsupported, and, as addressed above, inapposite insofar as they rely on a selective misinterpretation of the *Haradinaj* Appeal Judgement.³⁸

³³ Order, Transcript, 1 April 2025, p.26126. *See also* February 2024 Decision, KSC-BC-2020-06/F02130, para.21; December 2024 Decision, KSC-BC-2020-06/F02790, paras 10, 13; September 2023 Decision, KSC-BC-2020-06/F01821, para.48.

³⁴ *See* Decision on Veseli Defence Request for Certification to Appeal the Decision to Admit P1064 and P1065, KSC-BC-2020-06/F02259, 23 April 2024, para.13. *Contra* Request, KSC-BC-2020-06/F03098, paras 20, 22.

³⁵ *See, in particular*, September 2023 Decision, KSC-BC-2020-06/F01821, para.49; September 2024 Decision, KSC-BC-2020-06/F02580, para.15; February 2024 Decision, KSC-BC-2020-06/F02130, para.18. *Contra* Request, KSC-BC-2020-06/F03098, paras 20-21.

³⁶ February 2024 Decision, KSC-BC-2020-06/F02130, para.20, fn.39.

³⁷ *Contra* Request, KSC-BC-2020-06/F03098, paras 20-22.

³⁸ Request, KSC-BC-2020-06/F03098, paras 23-24.

Appellate intervention on such speculative basis would do nothing to materially advance the proceedings.

10. Accordingly, none of the cumulative requirements for certification are met.³⁹

III. RELIEF REQUESTED

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

Word Count: 2452



Kimberly P. West

Specialist Prosecutor

Tuesday, 22 April 2025

At The Hague, the Netherlands.

³⁹ January 2021 Decision, KSC-BC-2020-06/F00172, paras 10-16.