

In: KSC-BC-2020-06

**The 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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Hashim Thaçi
Counsel for Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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**Joint Defence Request for Certification to Appeal the Decision on Prosecution
Motion for Admission of International Reports**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law¹ and Rule 77 of the Rules,² the Defence for Messrs. Thaçi, Veseli, Selimi and Krasniqi (“the Defence”) hereby files its request for certification to appeal the Trial Panel’s Decision on Prosecution Motion for Admission of International Reports³ (“Impugned Decision”) which granted, in part, the Prosecution Motion for Admission of International Reports⁴ (“SPO Motion”).
2. The Impugned Decision relies on an inapposite application of the governing legal framework and on a flawed determination of the relevant factual scenario. The Defence submits for certification the following discrete issues arising from the Impugned Decision, which, as further outlined below, significantly affect the fair and expeditious conduct of the proceedings, and whose immediate resolution by the Appeals Panel would materially advance proceedings:
 - (i) **First Issue:** Whether the Trial Panel erred in law and fact, or otherwise abused its discretion, in failing to appreciate the prejudice inherent to the admission of items of crucial importance to the Accused’s potential criminal responsibility that the Defence is in no position to effectively challenge;
 - (ii) **Second Issue:** Whether the Trial Panel erred in law by dispensing with its previous ruling that the SPO must call live evidence that the Defence is able to challenge should it wish to pursue a case concerning the responsibility of the Accused in post-June 1999;

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 KSC-BC-2020-06/F03213, Decision on Prosecution Motion for Admission of International Reports, 29 May 2025.

⁴ KSC-BC-2020-06/F03066, Prosecution Motion for Admission of International Reports with Confidential Annexes 1-2, 31 March 2025.

- (iii) **Third Issue:** Whether the Trial Panel erred in law by dispensing with its previous ruling requiring that reports emanating from international or non-governmental organizations specify the sources upon which their contents are based in order to be admissible;
- (iv) **Fourth Issue:** Whether the Trial Panel erred in law in finding that fair notice of a party's intention to rely on certain allegations in support of its case can be provided by disclosure;
- (v) **Fifth Issue:** Whether the Trial Panel erred in law in finding that Rule 149 constitutes *lex specialis* for the admission of expert evidence only where such evidence originates from an expert witness featuring as such on the calling party's list of witnesses;
- (vi) **Sixth Issue:** Whether the Trial Panel erred in law by conflating the propriety of redactions applied pursuant to Rule 107 with the requirements of admission pursuant to Rule 138;
- (vii) **Seventh Issue:** Whether the Trial Panel erred in fact, or otherwise abused its discretion, by admitting into evidence material on the grounds that it is relevant to a given context or a pattern of conduct, yet without specifying what that context or pattern of conduct is.

II. SUBMISSIONS

A. The Issues are appealable

1. First Issue

- 3. In the Impugned Decision, the Trial Panel considered the Defence argument that it will be prejudiced by the admission of items in respect of which the SPO has failed to identify specific witnesses that would allow the Defence to challenge

the contents of that material.⁵ The Trial Panel however determined that the right to confrontation does not encompass a right for a Party to have each exhibit or document produced through a witness, yet that the weight of such exhibits might be negatively affected by the unavailability of witnesses to contextualize them.⁶ Thus, the Trial Panel admitted into evidence several items which, on the SPO's submissions, relate to core issues in these proceedings, including the notice provided to the Accused of the commission of the charged crimes and the former's role in their perpetuation.⁷

4. The Trial Panel's determination that the right to confrontation does not entitle a Party to have the evidence against them be admitted through a witness, and its subsequent application of this principle, ignores the prejudice inherent to the admission of exhibits absent cross-examination where such exhibits are critical to a determination of the Accused's criminal responsibility. Several of the items admitted in the Impugned Decision are relevant to the personal responsibility of the Accused over extensive periods covered by the Indictment period, yet no SPO witnesses have been brought to testify on such issues.⁸ The prejudice is necessarily exacerbated in these cases,⁹ and the Trial Panel has repeatedly stated that the bar table procedure should not become an alternative to presenting the most important exhibits through witnesses.¹⁰

⁵ Impugned Decision, para. 9; KSC-BC-2020-06/F03144, Joint Defence Response to the Prosecution Motion for Admission of International Reports with Confidential Annex 1, 24 April 2025 ("Response"), paras. 17, 22, 24-25.

⁶ Impugned Decision, para. 9.

⁷ Motion, paras. 10-11; Impugned Decision, paras. 18-20.

⁸ Response, paras. 21-27.

⁹ ECtHR, *Kok v. The Netherlands*, Application no. 43149/98, Decision on Admissibility, 4 July 2000; *Krasniqi v. The Czech Republic*, Application no. 51277/99, Judgment, 28 February 2006, paras. 78-79; *Delta v. France*, Application no. 11444/85, Judgment, 19 December 1990, para. 37.

¹⁰ Impugned Decision, para. 8; KSC-BC-2020-06/F03191, Decision on Prosecution Motion for Admission of General Staff and Provisional Government of Kosovo Documents, 21 May 2025, para. 12; KSC-BC-2020-06/F03178, Decision on Prosecution Motion for Admission of Dukagjin Zone Documents, 13 May 2025, para. 12.

2. Second Issue

5. Previously, the Trial Panel stated that “if it is a part of the SPO case to establish the continued existence and functioning of the military police during the period from June 1999 and September 1999 and its involvement in the commission of crimes, it will have to meet the applicable standard of proof” and that “it is therefore to be expected that, if the SPO pursues such a case, it will call evidence that the Defence will be able to challenge on that point.”¹¹ Several of the items tendered and admitted pertain directly to this issue and to the Accused’s alleged authority in that context,¹² yet the SPO has nonetheless failed to abide by the Trial Panel’s direction to produce witnesses available for cross-examination on this point.
6. Nevertheless, in the Impugned Decision, the Trial Panel admitted such items without identifying what led to its implicit conclusion that the SPO fulfilled the Panel’s previously stated requirement to call live witnesses on this issue. In the absence of any explanation to that effect, the Trial Panel’s admission of the identified items is manifestly irreconcilable with its previously elaborated direction.

3. Third Issue

7. The Trial Panel previously denied admission of reports emanating from international or non-international organizations where the findings in such reports do not clearly identify the basis on which they were reached, and where they are based on unidentifiable, anonymous sources, or on sources which do not feature on the SPO’s exhibit list.¹³

¹¹ KSC-BC-2020-06/F01603, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, 14 June 2023, para. 159.

¹² See, for example, Proposed Exhibits 53, 86, 90 and 126.

¹³ KSC-BC-2020-06/F01380, Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, 16 March 2023, para. 87.

8. Following this reasoning, the Trial Panel denied the admission of Proposed Exhibit 74 in the Impugned Decision, on the basis that, *inter alia*, much of the information it contains is unsourced and of unknown origin, and that it is not apparent from the report what safeguards and procedure were used to collect the information and verify it, and by whom.¹⁴
9. Nevertheless, in the Impugned Decision, the Trial Panel admitted various reports that do not identify the basis upon which the conclusions contained therein are based, or which are otherwise based on anonymous sources or material not disclosed in these proceedings.¹⁵ To that end, the Trial Panel thus recalled its earlier finding that the fact that evidence is hearsay or unsourced would not necessarily prevent its admission.¹⁶ No analysis has been provided to justify the Trial Panel's selective application of its previous ruling only with respect to one single exhibit, to the exclusion of all other exhibits suffering from the same defects. No explanation has been provided either as to what renders these other exhibits so materially different from Proposed Exhibit 74.
10. In failing to apply its own already established principles for admissibility of evidence of this sort without justification the Trial Panel erred in law.

4. Fourth Issue

11. The Trial Panel admitted into evidence several items which relate to incidents not charged in the Indictment,¹⁷ finding that their probative value is not outweighed by their prejudicial effect because the Defence had notice of the relevant incidents since the disclosure of the items in question in 2021, and was therefore aware of the SPO's intention to tender them.

¹⁴ Impugned Decision, para. 26.

¹⁵ See, for example, Proposed Exhibits 5, 7, 8, 15, 37, 64, 66 and 132.

¹⁶ Impugned Decision, para. 11.

¹⁷ See, for example, Proposed Exhibits 53, 66, 68, 73, 74, 80, 81, and 86.

12. The Trial Panel has held that the Indictment is the sole accusatory instrument and it is only by virtue of the facts pleaded therein that the Accused may be put on notice of the case they have to respond to.¹⁸ Other tribunals have consistently emphasized that the mere service of witness statements or potential exhibits pursuant to disclosure obligations will not suffice to inform an Accused of the case against them.¹⁹
13. If the Defence were instead expected to carry out its cross-examinations on the basis that every item on the SPO's exhibit list would be tendered, regardless of whether they bear any connection with the facts and circumstances pleaded in the charging instruments, then this would shift the burden to the Defence to respond to a case that is purely hypothetical. Further, any attempts by the Defence to cross-examine on items absent any indication that their admission will be sought would have either resulted in extensive courtroom time being used, or in the Defence's cross-examination being cut short on lack of relevance. The Trial Panel provided no basis for revisiting this established jurisprudence or for engaging in this burden-shifting exercise.

5. Fifth Issue

14. The Panel found that while Rule 149 is *lex specialis* for the admission of expert reports, it is only applicable to cases where expert evidence is tendered through an expert witness called by a Party in that capacity.²⁰ The Trial Panel consequently allowed the admission of several items which contain expert

¹⁸ KSC-BC-2020-06/F01623, Decision on Thaçi Defence's Motion to Strike Part of the Record of Testimony of W02652, 23 June 2023, para. 21.

¹⁹ ICTR, *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment, 15 January 2010, para. 13; *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-IOA & ICTR-96-17A, Appeal Judgement, 13 December 2004, para. 27; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 23.

²⁰ Impugned Decision, para. 14.

evidence since they were tendered pursuant to Rule 138, and not through a witness expert under Rule 149.

15. The Trial Panel's finding has the effect that a calling Party may avoid the rigors that Rule 149 places on the admissibility of expert evidence by simply tendering such evidence through alternative means. In turn, this creates a situation where expert evidence can be freely deployed throughout a trial without the need for the calling party to produce a witness that can further contextualize and be cross-examined on such evidence. As established in jurisprudence, the purpose of expert testimony is to supply specialised knowledge that might assist the trier of fact in understanding the evidence before it, and which offers a view based on specialised knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to fall outside the expertise of the Bench.²¹ If the Trial Panel could substitute the specialized knowledge that expert witnesses are expected to provide with material tendered from the bar table, then Rule 149 would serve no purpose. Nor would the heightened protections that Rule 149 attaches to expert evidence, such as the specific deadline for disclosure and the right of the opposing party to request cross-examination.
16. Hence, by conditioning the applicability of Rule 149 to only cases of expert reports emanating from expert witnesses featuring as such on the calling party's list of witnesses and paying no regard to whether the evidence tendered qualifies as expert evidence by virtue of its very nature, the Trial Panel rendered Rule 149 nugatory.

6. Sixth Issue

17. In the Impugned Decision, in response to the Defence arguments that several exhibits are overly redacted not allowing the Defence to meaningfully review

²¹ ICTY, *Prosecutor v Popovic et al*, Case No. IT-05-88-A, Judgement, 30 January 2015, para. 375; *Prosecutor v Prlic et al*, Case No. IT-04-74-A, Judgement, 29 November 2017, para. 196.

them, the Panel determined that these redactions emanate from the Rule 107 provider, and that the Defence was in a position to make meaningful and effective submissions in respect of all items containing redactions. The Trial Panel implicitly concluded that, because the redactions were properly applied pursuant to Rule 107, then the extensive extent of the redactions becomes a matter of weight rather than admissibility.

18. In reaching this determination, the Trial Panel relied on its assessment of the propriety the Rule 107 redactions to supplant its obligation to determine whether the probative value of the tendered items is not outweighed by their prejudicial effect. Whether the redactions were applied consistent with Rule 107 is distinct from the question of admissibility, as the Defence is equally prejudiced by its inability to make comprehensive submissions at final brief stage vis-a-vis the material as a whole and to carry out effective investigations due to the redactions applied regardless of whether the redactions were applied according to Rule 107 or otherwise. It was instead incumbent upon the Trial Panel to consider the very fact the Defence is prevented from adequately challenging these documents in its assessment of prejudice, rather than limiting itself to the Rule 107 enquiry.

7. Seventh Issue

19. The Trial Panel admitted several items addressing incidents not featuring in the charging instruments²² after satisfying itself that these incidents are relevant for the purposes of clarifying a given context and demonstrating a deliberate pattern of conduct. The Impugned Decision is nonetheless silent on what such context might be, or what specific pattern of conduct these incidents are alleged to be relevant to.

²² See, for example, Proposed Exhibits 53, 66, 68, 73, 74, 80, 81, and 86.

20. The Accused's right to mount an effective defence necessarily entails that the Accused is aware of the factual allegations that they have to respond to. Findings to the effect that the evidence admitted is relevant to an unspecified context or an unspecified pattern of conduct encroach upon the Defence's ability to discern the relevance of the material. This impinges upon the ability of the Defence to focus its preparations and submissions, and requires it to venture guesses as to the relevance of such material in a manner, defeating any consideration of expediency and fairness.

21. In conclusion, all seven issues are discrete and derive directly from the Impugned Decision, and do not amount to mere disagreements with the latter.

B. The Issues significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial

22. All issues significantly affect the fair and expeditious conduct of proceedings. In particular, the First Issue addresses the Trial Panel's admission of untestable evidence on core matters related to the Accused's personal responsibility, which has a profound effect on the fairness of the case. As the Second, Third, and Fourth Issues address the Trial Panel's inconsistent application of the legal framework it previously elaborated and the established jurisprudence of other international tribunals, and the Panel's concomitant failure to articulate cogent reasons for its departure from the above, they necessarily impact upon the expectation of legal certainty in these proceedings.

23. The Fifth Issue further addresses the Trial Panel's ability to admit expert evidence outside the purview of the *lex specialis* of Rule 149, having direct implications vis-à-vis the applicability of the safeguards that the KSC legal framework places on the admission of this special class of evidence. The Sixth Issue further addresses the Trial Panel's admission of highly redacted material that the Defence is unable to further investigate and make informed submissions

in respect of, thereby impinging upon the Accused's right of confrontation. The Seventh Issue addresses the Trial Panel's admission of material whose purported relevance is known to the Panel only, thereby impacting upon the Defence's ability to meet the case against it and orient its submissions and potential presentation of evidence in a manner that accounts for the presently elusive relevance of these items.

24. In addition to the above, as the above issues all address the Trial Panel's decision to admit several above issues professed to be relevant to core contested issues in these proceedings that can presently be weighed against the Accused in the determination of their guilt, all issues equally impact the outcome of the trial.

C. Appellate intervention will materially advance proceedings

25. As the trial is nearing the Defence's potential presentation of evidence and the final submissions, the Appeals Panel's intervention will greatly assist in delineating the nature and scope of the case that the Defence is expected to respond to. In addition, the Appeals Panel's determinations as to the correct interpretation of the admissibility legal framework vis-à-vis the issues outlined above will equally inform the manner in which the remaining parties present their potential upcoming cases, or whether a Defence case need be presented at all. Finally, the Appeals Panel's conclusions will further provide relevant guidance to the Trial Panel as to the specific material that it may rely upon in the judgment and the weight, if any, that they may hold.

III. CONCLUSION AND RELIEF REQUESTED

26. In light of the foregoing, the Defence respectfully requests the Trial Panel to grant the request and certify all seven issues.

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Respectfully submitted on 5 June 2025,



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