



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

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

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Request¹ should be rejected, 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 As the Panel has repeatedly stated, triers of fact enjoy considerable discretion in deciding whether to admit evidence, and consequently, certification to appeal admissibility decisions must be the absolute exception.⁶ Rather than demonstrating that such exceptional relief is warranted, the Request misrepresents and merely disagrees with the Decision,⁷ seeks to relitigate matters already raised and decided by the Panel, and fails to demonstrate an impact justifying certification.

II. SUBMISSIONS

A. THE ISSUES ARE NOT APPEALABLE

2. The Request does not present any appealable issue. Instead, it seeks to relitigate the admission of the International Reports in their entirety,⁸ without challenging the

¹ Joint Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of International Reports, KSC-BC-2020-06/F03237, 5 April 2025, Public ('Request').

² Request, KSC-BC-2020-06/F03152, para.2 (defining the '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, Confidential ('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 Decision on Veseli Defence Request for Certification to Appeal F03178 (Dukagjin Zone Bar Table Decision), KSC-BC-2020-06/F03236, 5 June 2025, Public, para.22 *referring to Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, Public, para.35; Decision on Veseli Defence Request for Leave to Appeal Decisions F03070 and F03071, KSC-BC-2020-06/F03157, 2 May 2025, Public, para.16; Decision on Veseli Request for Certification to Appeal First Oral Order of 30 January 2025, KSC-BC-2020-06/F02973, 3 March 2025, Public, 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, Public, para.11.

⁷ Decision on Prosecution Motion for Admission of International Reports, KSC-BC-2020-06/F03213, 29 May 2025, Public ('Decision').

⁸ 'International Reports' refers collectively to the documents admitted in the Decision.

admission of any specific document or category of documents, and by misinterpreting both the Decision and applicable jurisprudence.

i. First and Second Issues

3. The First and Second Issues are interrelated and are therefore addressed together. The allegation that the SPO has failed to produce witnesses to testify on issues discussed in the International Reports, which bear upon the criminal responsibility of the Accused, is unfounded.⁹ The Defence fails to relate this allegation to any specific International Reports. Instead, the Request cites solely to paragraphs in the Defence response¹⁰ to the Motion¹¹ that dealt exclusively with two Ministry of Public Order police identification cards subsequently admitted in the Decision.¹²

4. Based on this reference and the similar subject matter of the Second Issue, the substance of the Defence allegation appears to be that the SPO failed to produce witnesses regarding the ‘continued existence and functioning of the military police’ from June to September 1999.¹³ This is a misrepresentation of the record.¹⁴ The Defence

⁹ Request, KSC-BC-2020-06/F03237, para.4.

¹⁰ Request, KSC-BC-2020-06/F03237, fn.8 *referring to* Joint Defence Response to the Prosecution Motion for Admission of International Reports with Confidential Annex 1, KSC-BC-2020-06/F03144, 24 April 2025, Confidential (‘Defence Response’), paras 21-27.

¹¹ Prosecution motion for admission of international reports, KSC-BC-2020-06/F03066, 31 March 2025, Confidential (‘Motion’).

¹² ANNEX 1 to Prosecution motion for admission of international reports, KSC-BC-2020-06/F03066/A01, 31 March 2025, Confidential (‘Annex’), Items 86, 126; Decision, KSC-BC-2020-06/F03213, para.32(b). *See also* Motion, KSC-BC-2020-06/F03066, para.11.

¹³ Request, KSC-BC-2020-06/F03237, para.5.

¹⁴ *See* Prosecution reply relating to its motion for admission of international reports (F03066), KSC-BC-2020-06/F03165, 5 May 2025, Confidential, paras 9-11 (and sources cited therein). The jurisprudence cited at Request, KSC-BC-2020-06/F03237, fn.9 is also inapposite in this regard, relating exclusively to the prejudice which may accrue in situations where the Accused is unable to cross-examine anonymous witnesses whose evidence plays a decisive role in their conviction of the Accused.

now expresses mere disagreement with the Decision,¹⁵ in which the Panel considered and rejected this submission.¹⁶

5. Further, there is no inherent prejudice in the admission through the bar table of exhibits that relate to core issues in these proceedings.¹⁷ As the Panel has repeatedly stated, the right to confrontation does not translate into a right for every exhibit to be tendered through a witness.¹⁸ It is for the SPO to determine the ‘most important’ exhibits to its case and tender them accordingly,¹⁹ in full knowledge that, as the Panel has made clear, if items are tendered through the bar table without sufficient contextualisation, this could negatively impact the weight afforded to them.²⁰

6. For these reasons, the First and Second Issues rely on misrepresentations, articulate mere disagreement with the Decision, and fail to develop specific appealable issues.

ii. Third Issue

7. The Panel has previously held that, ‘the fact that information [...] might not be sourced does not necessarily disqualify it for admission.’²¹ Rather, the source of information (or lack thereof) is one of several factors that may be considered when

¹⁵ In doing so, the Defence premises its argument, in part, on Proposed Exhibit 90, ignoring that the Panel expressly declined to admit the portions relevant to the Second Issue and directed the SPO to redact them. *See* Request, KSC-BC-2020-06/F03237, para.5, fn.12; Decision, KSC-BC-2020-06/F03213, paras 25, 32(d).

¹⁶ Decision, KSC-BC-2020-06/F03213, para.29, fn.75.

¹⁷ *Contra* Request, KSC-BC-2020-06/F03237, paras 3-4.

¹⁸ Decision, KSC-BC-2020-06/F03213, para.9. *See also* Decision on Veseli, Selimi, and Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission [...], KSC-BC-2020-06/F03183, 19 May 2025, Confidential (‘May 2025 Certification Decision’), para.35.

¹⁹ *Contra* Request, KSC-BC-2020-06/F03237, para.4.

²⁰ Decision, KSC-BC-2020-06/F03213, para.9; May 2025 Certification Decision, KSC-BC-2020-06/F03183, para.35.

²¹ Second Decision on Specialist Prosecutor’s Bar Table Motion, KSC-BC-2020-06/F01596, 9 June 2023, Public, para.30.

assessing reliability.²² The Panel has the discretion to decide if and when the presence of unsourced information is such as to render a tendered item unsuitable for admission.²³

8. In this regard, the Request does not cite any authority for the proposition that the Panel is required to provide specific analysis as to why one tendered item meets this threshold *vis-à-vis* another item which does not.²⁴ Instead, the Defence makes a bare assertion that certain admitted International Reports contain the same type and degree of unsourced information as another Proposed Exhibit that the Panel declined to admit.²⁵ In attempting to supplant the Panel's assessment with its own, the Defence expresses mere disagreement with the Decision and thereby fails to articulate an appealable issue.

iii. Fourth and Seventh Issues

9. These Issues are dealt with together, as both address the admission of International Reports referencing uncharged incidents.²⁶ The Request attempts to artificially divorce the Panel's comments regarding the notice the Defence had of the relevant International Reports,²⁷ from the purpose for which they were tendered and admitted: to provide context, demonstrate a deliberate pattern of conduct on the part

²² Decision on Prosecution Motion for Admission of Llap Zone Documents and Related Request, KSC-BC02020-06/F02951, 21 February 2025, Public, para.23; Dukagjin Certification Decision, KSC-BC-2020-06/F03178, para.13. *See also* ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para.27(a).

²³ *See e.g.* Request, KSC-BC-2020-06/F03237, fn.13 *referring to* Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, Confidential ('First Twelve Witnesses Decision'), para.87 (where the Panel declined to admit a 323-page OSCE report, SITF00001529-00001871). However, extracts from this report were later admitted through W02161 and W02183. *See* P00743.2; P00743.4, respectively.

²⁴ Request, KSC-BC-2020-06/F03237, para.9.

²⁵ Request, KSC-BC-2020-06/F03237, paras 8-9.

²⁶ Request, KSC-BC-2020-06/F03237, fn.17, 22, *referring to* Annex, KSC-BC-2020-06/F03066/A01, Items 53, 66, 68, 73-74, 80-81, 86.

²⁷ Decision, KSC-BC-2020-06/F03213, para.27 (where the Panel noted that the Defence had been on notice of the relevant uncharged incidents since July-August 2021, when the relevant International Reports were disclosed).

of the Accused, and/or to prove the existence of a widespread and/or systematic attack against civilians.²⁸

10. The Panel has repeatedly confirmed that while evidence of uncharged acts ‘cannot result in a finding of guilt in respect of any of the accused’,²⁹ such evidence can be admitted for other ‘valid purposes’, including ‘to clarify a given context or to demonstrate a deliberate pattern of conduct.’³⁰ The Request misrepresents the record by asserting that the context and pattern of conduct for which these International Reports were tendered and admitted were ‘unspecified’.³¹ The Motion mirrored the language used in the SPO Pre-Trial Brief, detailing the context and pattern for which these items were tendered.³² Moreover, the Annex specified that these International Reports were tendered in order to demonstrate the existence of a widespread and/or systematic attack against civilians.³³ This is a key contextual element of all crimes against humanity with which the Accused are charged, and was validly pleaded in the Indictment.³⁴ In this context, the jurisprudence cited by the Defence, which relates to ‘curing’ defective indictments,³⁵ is irrelevant.

11. The Decision does not suggest that the Defence ought to have cross-examined witnesses in respect of uncharged incidents included in all items on the SPO exhibit list.³⁶ Rather, the Panel observed that the Defence was on notice of the SPO’s intention

²⁸ Annex, KSC-BC-2020-06/F03066/A01, Items 53, 66, 68, 73-74, 80-81, 86.

²⁹ First Twelve Witnesses Decision, KSC-BC-2020-06/F01380, para.113.

³⁰ Decision, KSC-BC-2020-06/F03213, para.27. *See also* Transcript (Oral Order), 18 September 2024, pp.19981-19982; Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning, KSC-BC-2020-06/IA028/F00011, 4 July 2023, Confidential, para.53; Decision on Selimi Defence Motion to Exclude Evidence of W04846, KSC-BC-2020-06/F02393, 19 June 2024, Confidential, paras 16-17.

³¹ Request, KSC-BC-2020-06/F03237, para.20.

³² Motion, KSC-BC-2020-06/F03066, para.13; Corrected Version of Pre-Trial Brief, KSC-BC-2020-06/F00709/A01, 24 February 2022, Confidential, paras 113, 704.

³³ Annex, KSC-BC-2020-06/F03066/A01, Items 53, 66, 68, 73-74, 80-81, 86.

³⁴ Annex 1 to Submission of confirmed amended Indictment, KSC-BC-2020-06/F00999/A01, 30 September 2022, Confidential, paras 16-17.

³⁵ Request, KSC-BC-2020-06/F03237, fns 18-19.

³⁶ *Contra* Request, KSC-BC-2020-06/F03237, para.13.

to tender the International Reports at issue.³⁷ To the extent that these International Reports are relevant to the contextual elements at issue in this case, it was open to the Defence to cross-examine witnesses on uncharged incidents contained therein. The Panel did not engage in a 'burden-shifting exercise', and the Defence submissions to the contrary distort the Decision and fail to identify an appealable issue.

iv. Fifth Issue

12. The Fifth Issue rests on the misconceived assertion that some unspecified number of International Reports contain 'expert evidence' within the meaning of Rule 149.³⁸ In this regard, the Request – which largely repeats issues and submissions raised in other leave to appeal requests³⁹ – fundamentally misconstrues the nature of expert evidence and the applicability of Rule 149.⁴⁰ As the very heading of the Rule makes plain, Rule 149 governs the admissibility of the evidence of expert witnesses. Expert evidence does not exist in a vacuum as the Defence suggests. Rather, it derives its 'expert' status under the Rules by virtue of meeting the relevant requirements and coming from a witness with 'some specialised knowledge, skill, or training [that] can

³⁷ Decision, KSC-BC-2020-06/F03213, para.27.

³⁸ The Request does not identify to which admitted International Reports it refers, other than a vague assertion that 'several' such items were admitted. *See* Request, KSC-BC-2020-06/F03237, para.14.

³⁹ *See e.g.* Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202), KSC-BC-2020-06/F03222, 3 June 2025, Confidential; Joint Defence Consolidated Request for Leave to Appeal Decisions on the Admission of Expert Evidence of Witnesses W04826 and W04874 (F03201 and F03203), KSC-BC-2020-06/F03223, 3 June 2025, Confidential; Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request (F03211), KSC-BC-2020-06/F03238, 5 June 2025, Confidential. *See also* Prosecution response to 'Joint Defence Request for Leave to Appeal Decision on the Admission of Expert Evidence of Witness W04875 (F03202)', KSC-BC-2020-06/F03260, 13 June 2025, Confidential; Prosecution response to 'Joint Defence Consolidated Request for Leave to Appeal Decisions on the Admission of Expert Evidence of Witnesses W04826 and W04874 (F03201 and F03203)', KSC-BC-2020-06/F03259, Confidential, 13 June 2025; Prosecution Response to 'Joint Defence Request for Leave to Appeal Decision on Prosecution Motion for Admission of Documents concerning Murder Victims and Related Request (F03211)', KSC-BC-2020-06/F03261, 13 June 2025, Confidential.

⁴⁰ Request, KSC-BC-2020-06/F03237, paras 14-16.

assist the trier of fact to understand or determine an issue in dispute.’⁴¹ In mischaracterising the applicable law and failing to specify as part of the Fifth Issue which International Reports purportedly contain the alleged ‘expert evidence’, the Request fails to identify an appealable issue.

v. Sixth Issue

13. The Request alleges that certain International Reports were overly redacted pursuant to Rule 107 and that the Panel failed to consider the resulting prejudice to the Defence in its admissibility analysis.⁴² This is untrue. The Panel explicitly considered this factor, noting that, notwithstanding the redacted content, the Defence was able to make ‘meaningful and effective submissions in respect of all items containing redactions.’⁴³ This is indeed clear from the Defence Annex, which extensively outlined the Defence’s objections to the admissibility of the relevant International Reports.⁴⁴ As to potential prejudice, the Defence fails to acknowledge that as these redactions were applied by Rule 107 providers, the SPO is in the same position with regard to its ability to make submissions and rely upon these International Reports. In misrepresenting the Decision and expressing mere disagreement with the Panel’s assessment, the Defence fails to identify an appealable issue.

⁴¹ Decision on Prosecution Motion for Admission of Evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 and Related Request, KSC-BC-2020-06/F02787, 16 December 2024, Confidential, para.28; Decision, KSC-BC-2020-06/F03213, para.14.

⁴² Request, KSC-BC-2020-06/F03237, paras 17-18.

⁴³ Decision, KSC-BC-2020-06/F03213, para.16.

⁴⁴ ANNEX 1 to Joint Defence Response to the Prosecution Motion for Admission of International Reports with Confidential Annex 1, KSC-BC-2020-06/F03144/A01, 24 April 2025, Confidential, Items 31-32, 53, 62-64, 75, 78-79, 100, 124, 130.

B. THE ISSUES WOULD NOT HAVE A SIGNIFICANT IMPACT ON OR MATERIALLY ADVANCE THE PROCEEDINGS

14. The Defence fails to demonstrate that the Issues significantly affect the fair and expeditious conduct of the proceedings, the outcome of the trial, or that an immediate resolution by the Court of Appeals may materially advance the proceedings. The Panel's admission of the International Reports into evidence is without prejudice to any future assessment of the weight, if any, to be assigned to them. In addition, as previously stated by the Panel, the Defence could, if it so chooses, challenge the content of the International Reports through the presentation of evidence.⁴⁵ Any consideration of the impact on the proceedings or its outcome caused by the admission is hypothetical, speculative, and premature, and in any event, could be remedied, as necessary and appropriate, on any appeal against a final judgment in this case.⁴⁶

15. Accordingly, the cumulative requirements for certification are not met.⁴⁷

III. CLASSIFICATION

16. This filing is public pursuant to Rule 82(4).

⁴⁵ Decision, KSC-BC-2020-06/F03213, para.29.

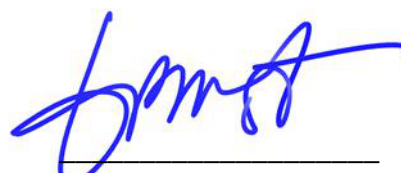
⁴⁶ *See, similarly*, Decision on Veseli Defence Request for Certification to Appeal the Decision to Admit P1064 and P1065, KSC-BC-2020-06/F02259, 23 April 2024, Public, para.13.

⁴⁷ January 2021 Decision, KSC-BC-2020-06/F00172, paras 10-16.

IV. RELIEF REQUESTED

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

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Kimberly P. West

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Thursday, 19 June 2025

At The Hague, the Netherlands.