



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

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Public redacted version of 'Prosecution response to 'Thaçi Defence Request for Certification to Appeal the Decision on Request for Admission of Prior Statements of W04752' (F03335)'

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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 Decision⁶ 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 identify any error in the Panel's exercise of its discretion, let alone one warranting such exceptional relief.

II. SUBMISSIONS

A. THE ISSUES ARE NOT APPEALABLE

3. The Request misrepresents the Decision and the process leading to it, misapprehends the relevant legal framework, and fails to identify any appealable issue. Instead, the Defence continues to argue the merits of the Decision, repurposing

¹ Thaçi Defence Request for Certification to Appeal the Decision on Request for Admission of Prior Statements of W04752, KSC-BC-2020-06/F03335, 16 July 2025, Confidential ('Request').

² Request, KSC-BC-2020-06/F03335, para.1, defining the 'First Issue', the 'Second Issue', and the '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 Decision on Thaçi Defence Request for Admission of Prior Statements of W04752, KSC-BC-2020-06/F03327, 11 July 2025, Confidential ('Decision').

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.

submissions already considered and dismissed by the Panel, and ultimately only articulates its disagreement with the Decision and its correct application of the Rules.

4. The First Issue, arguing that the Panel erred in finding that Rules 153-155 are *leges speciales* for the admissibility of witness statements, recycles arguments from the Defence's initial submissions⁸ and misconstrues the Panel's contrary reasoning.⁹ As explained by the Panel, it has consistently held Rules 153-155 to be the appropriate vehicle for admitting witness statements in order to ensure that the specific safeguards provided in those Rules are complied with, and that no unfair prejudice is caused by circumventing them.¹⁰ Contrary to the Defence's contrived analogy,¹¹ the applicability of Rules 153-155 does not hinge on the alleged purpose for which a document is offered – on cross-examination or otherwise¹² – but on its qualification as a witness

⁸ Compare Request, KSC-BC-2020-06/F03335, paras 13-14, with Thaçi Defence Request for Admission of Prior Statements of W04752, KSC-BC-2020-06/F03254, 12 June 2025, Confidential ('Request for Admission'), paras 23-24, 26-27, and Thaçi Defence Reply to Prosecution response to 'Thaçi Defence Request for Admission of Prior Statements of W04752' (F03282), KSC-BC-2020-06/F03294, 30 June 2025, Confidential, paras 8-9 (likewise arguing that the admission of witness statements on cross-examination is not subject to Rules 153-155, but to Rule 138). See also Decision, KSC-BC-2020-06/F03327, para.9.

⁹ See Decision, KSC-BC-2020-06/F03327, paras 20-21.

¹⁰ Decision, KSC-BC-2020-06/F03327, para.20. See also *Prosecutor v. Gucati and Haradinaj*, Decision on the Prosecution Request for Admission of Items Through the Bar Table, KSC-BC-2020-07/F00334, 29 September 2021, paras 84-87.

¹¹ Request, KSC-BC-2020-06/F03335, para.13.

¹² The same standard has been equally applied in the past to documents used on cross-examination and tendered by the Defence. See e.g. Decision on Veseli Defence Request for Admission of Evidence Associated with W04748's Testimony, KSC-BC-2020-06/F01631, 30 June 2023, Confidential ('June 2023 Decision'), paras 11-14 (noting, in particular, that '[the Defence] appears to be arguing that the rigours of Rules 153-155 can be avoided entirely because of the language of Article 37 and/or Rule 138(1). However, Rules 153-155 are *leges speciales* to Rules 137-139 and the latter cannot serve to circumvent the strictures of the former.'). Decision on Veseli Defence Request Regarding Items Associated with [REDACTED]'s Testimony, KSC-BC-2020-06/F01733, 23 August 2023, Confidential, paras 10-11 (denying the admission of summaries of witness testimonies offered by the Defence for 'contextual' purposes as 'their admission is regulated by Rules 153-155 and they cannot be admitted as exhibits under Rule 138'); Decision on Krasniqi Defence Request to Admit Additional Document Related to W02153, KSC-BC-2020-06/F01852, 11 October 2023, para.10 (noting that, while witness statements may 'exceptionally' be admitted under Rule 138(1) by agreement, 'Parties should generally refrain from circumventing the more stringent requirements of Rules 153-155' by offering witness evidence as an exhibit under Rule 138(1)); Transcript, 17 October 2023, p.8989 (while admitting other items used during cross-examination and not opposed by the Prosecution under Rule 138(1), denying the admission of a witness statement opposed by the Prosecution as 'statements are subject to Rules 153 and 155. If the Defence wishes to tender it, it will, therefore, have to do so in accordance with those rules.'). See also, similarly, ICTY, *Prosecutor v. Stanišić and Simatović*, First Decision on Stanišić Defence Second Additional

statement. These Rules pertain to all statements tendered to prove or disprove a fact in issue, including facts favourable to the cross-examining party or relating to the credibility of witnesses.¹³ The Defence's attempt to differentiate statements tendered by the calling Party from statements tendered 'for any other purpose', in an express effort to sidestep the safeguards of Rules 153-155, is unavailing.¹⁴ Arguments that following the appropriate procedure pertaining to a specific category of evidence is 'absurd' or equates to a 'blanket prohibition' merely reflect the Defence's disagreement with the Panel's ruling and its outcome.¹⁵ Framing this disagreement as a deductive error does not render it appealable.¹⁶

Motion for Admission of Documents into Evidence from the Bar Table, IT-03-69-T, 28 August 2012, paras 4, 8-9.

¹³ See, similarly, ICC, *Prosecutor v. Bemba et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Magenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13 A A2 A3 A4 A5, 8 March 2018, para.305, fn.693 ('The Appeals Chamber notes that [...] the Trial Chamber stated it "[had] decided that Rule 68 of the [ICC] Rules only applies when a [witness's] statement is submitted for the truth of its content" rather than, for instance, "to challenge the credibility of a witness". [...] the Appeals Chamber clarifies that the distinction introduced by the Trial Chamber has no statutory foundation. [...] The dispositive consideration is rather that the item of evidence in question is presented with a view to proving or disproving *any* fact in issue before a chamber, including facts related to the credibility of witnesses and irrespective of whether, when testimonial in nature, such evidence is submitted "for the truth of its contents" or otherwise' (internal citations omitted)); ICC, *Prosecutor v. Gicheru*, Decision on the Defence Request to Introduce Evidence Other than through a Witness, ICC-01/09-10/20, 12 May 2022, paras 12-15 ('the Chamber understands the Defence's argument to be that – since the Defence intends to use an item of evidence in relation to the credibility of a witness – the item does not fall under the requirements of Rule 68 of the [ICC] Rules. The Chamber notes that the statutory framework does not distinguish between the purpose for which an item of evidence is submitted by a party; [...] In any case, the explanations provided [...] clearly show that the items are submitted in order to rely on the documents for their content. [...] [The Defence argues the prior statement is] relevant to the witness's credibility since it is "probative of her motivations for providing statements" to the Prosecution. In order to be probative, it is axiomatic that content of the statement is taken into account.').

¹⁴ *Contra* Request, KSC-BC-2020-06/F03335, para.13. In particular, while the Defence relies on Rule 143(3) as an avenue to introduce evidence favourable to the cross-examining Party, this Rule defines the permissible scope of questioning on cross-examination and does not dictate the admissibility criteria for any particular forms of evidence – especially those, like witness statements, for which a specific admissibility framework exists.

¹⁵ *Contra* Request, KSC-BC-2020-06/F03335, paras 12-13.

¹⁶ *Contra* Request, KSC-BC-2020-06/F03335, paras 13-14. 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, para.16; Decision on Joint Defence Request for

5. The Second Issue likewise misrepresents the Decision and does not arise from it. As also conceded by the Defence,¹⁷ the Panel specifically held that the timing of the Defence's tender 'should not prejudice the ability of the Defence to offer this material'.¹⁸ That the statements had *also* been offered at an earlier stage does not change the fact that, on the occasion considered in the Decision, they had been presented after the close of the Prosecution case.¹⁹ Not only is the Defence's portrayal of the sequence therefore inaccurate and misleading, the suggestion that the Panel's acknowledgment of the timing could be invoked by the Prosecution or the Court of Appeals Panel 'should this litigation progress'²⁰ is plainly not essential for the determination of matters arising in the judicial cause under examination.²¹ As such, the Second Issue is at best semantic and unrelated to the substance of the Decision, and does not amount to an appealable issue.²²

6. For similar reasons, the Defence also fails to demonstrate that the Third Issue is appealable. Leaving aside that the framing of this Issue is less than specific, the notion that the Panel erred because it denied admission under Rule 138(1) without specifying which alternative the Defence ought to use is neither accurate nor legally tenable.²³ The Panel clearly indicated that the framework applicable to the admission of

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 ('March 2025 Decision'), paras 18-19.

¹⁷ Request, KSC-BC-2020-06/F03335, para.15.

¹⁸ Decision, KSC-BC-2020-06/F03327, para.19 (also expressly accepting that the Defence 'could not have tendered [the statements] earlier').

¹⁹ See also Transcript, 8 July 2024, pp.17792-17793 ([REDACTED]); Request for Admission, KSC-BC-2020-06/F03254, paras 28-29 ('Regarding the timing of the present submissions, the Defence stresses that when it *first* tendered W04752's statements in July 2024, admission was denied and the Thaci Defence was invited to *apply again* when the issue of interference arose again... [...] The issue has now arisen' (emphasis added)). See also Decision, KSC-BC-2020-06/F03327, paras 2, 9. *Contra* Request, KSC-BC-2020-06/F03335, para.15.

²⁰ Request, KSC-BC-2020-06/F03335, para.16.

²¹ January 2021 Decision, KSC-BC-2020-06/F00172, para.11.

²² See, similarly, ICC, *Prosecutor v. Abd-Al-Rahman*, Decision on Defence request for leave to appeal the Decision on the Prosecution's bar table motion, ICC-02/05-01/20, 10 March 2023 ('*Abd-Al-Rahman* Decision'), para.8 (noting that non-dispositive *obiter dicta* are not findings capable of constituting appealable issues arising from an impugned decision).

²³ *Contra* Request, KSC-BC-2020-06/F03335, para.17.

statements consists of Rules 153-155.²⁴ Aside from lamenting on its purported inability to satisfy the requirements of the Rules,²⁵ the Defence offers no reasoned argument to explain how the Panel's rejection 'without prejudice to the possibility' of future applications would constitute an appealable error.²⁶ The Panel is not required to articulate every step of its reasoning in support of its findings, much less provide advice on procedural alternatives beyond the scope of the request at hand.²⁷ It is for the tendering Party, not the Panel, to identify the appropriate provision and justify admission, including how the relevant legal requirements are met. Moreover, as repeatedly emphasised by the Panel, the fact that the Defence *can* present evidence to challenge the Prosecution case in no way implies an onus to do so or 'impermissibly shift[s] the burden of proof'.²⁸ The Defence, again, merely expresses its dissatisfaction with the outcome of the Decision, without presenting any appealable issue.²⁹

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

7. 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. Instead of identifying any specific prejudice resulting from the Issues,³⁰ the Defence makes sweeping and hyperbolic references to the Accused's

²⁴ Decision, KSC-BC-2020-06/F03327, para.20.

²⁵ To this end, the Defence's recognition that the same statements could not be tendered under Rule 138(1) through the bar table, without explaining why the same Rule would conversely be applicable in the present situation, is telling. *See* Request, KSC-BC-2020-06/F03335, para.17.

²⁶ Decision, KSC-BC-2020-06/F03327, para.21; Request, KSC-BC-2020-06/F03335, para.17.

²⁷ *See* March 2025 Decision, KSC-BC-2020-06/F03058, para.24.

²⁸ March 2025 Decision, KSC-BC-2020-06/F03058, para.25; Decision on Prosecution Motion for Admission of Documents (F03114), KSC-BC-2020-06/F03214, 29 May 2025, Confidential, para.18; Decision on Veseli Defence Request for Leave to Appeal Decisions F03070 and F03071, KSC-BC-2020-06/F03157, 2 May 2025, paras 16-17. *See also* *Abd-Al-Rahman* Decision, para.10. *Contra* Request, KSC-BC-2020-06/F03335, para.17.

²⁹ *See, similarly*, March 2025 Decision, KSC-BC-2020-06/F03058, paras 24-25. *See also* *Abd-Al-Rahman* Decision, para.8. *Contra* Request, KSC-BC-2020-06/F03335, para.18.

³⁰ *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 ('April 2024 Decision'), para.14; ICC, *Prosecutor v. Laurent*

fundamental rights and the Decision's alleged impact thereon.³¹ The Defence has had a full opportunity to examine Prosecution witnesses and elicit evidence deemed relevant from them, within the bounds of the Rules.³² Not only have W04752's statements already been more than adequately canvassed during cross-examination,³³ but the Defence was free to examine such topics as fully as it wished with him. The Defence is also free – but in no way compelled – to pursue the subject further during its case through the appropriate procedure if it so chooses.³⁴ Moreover, any projection about the impact that W04752's 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.³⁵

8. The Panel has not 'kick[ed] this question into the Defence case' or otherwise blocked any avenue not already foreclosed by the Rules.³⁶ The Defence cannot leverage its own trial strategy and the threat of future litigation to manipulate the expeditiousness criterion and offload responsibility for its procedural choices onto the Panel.³⁷ In such circumstances, where the Panel has justifiably denied a procedurally flawed tender without prejudice, the Issues cannot be said to meet the exceptional threshold warranted for certification of admissibility decisions.³⁸

Gbagbo and Charles Blé Goudé, Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial', ICC-02/11-01/15, 2 July 2015, para.23.

³¹ Request, KSC-BC-2020-06/F03335, paras 20-22.

³² *Contra* Request, KSC-BC-2020-06/F03335, para.20. As noted, the Defence's reliance on Rule 143(3), relating to the scope of cross-examination as opposed to the admissibility of evidence, is inapposite. *See also* June 2023 Decision, KSC-BC-2020-06/F01631, para.12.

³³ *See e.g.* Transcript, 3 July 2024, pp.17548-17549, 17553-17555, 17564-17566; Transcript, 4 July 2024, pp.17637, 17658. *See also* Prosecution response to 'Thaçi Defence Request for Admission of Prior Statements of W04752' (F03254), KSC-BC-2020-06/F03282, 23 June 2025, para.10; June 2023 Decision, KSC-BC-2020-06/F01631, para.13.

³⁴ Decision, KSC-BC-2020-06/F03327, para.21. *Contra* Request, KSC-BC-2020-06/F03335, para.22. To the extent that the Defence argues the Decision would generally impact other accused before the Kosovo Specialists Chambers, such a claim is unsubstantiated and not relevant to the standard under Rule 77.

³⁵ *See* April 2024 Decision, KSC-BC-2020-06/F02259, para.13.

³⁶ *Contra* Request, KSC-BC-2020-06/F03335, paras 21, 23.

³⁷ *Contra* Request, KSC-BC-2020-06/F03335, para.23.

³⁸ *See also* Decision on the Thaçi Defence Request for Certification to Appeal the Second Oral Order of 7 November 2024, KSC-BC-2020-06/F02757, 3 December 2024, paras 20, 26, 32.

9. For the same reasons, the Request also fails to show any concrete need for an immediate resolution by the Court of Appeals Panel. The Defence's suggestion that the Court of Appeals Panel 'should be given the opportunity' to consider the Issues due to the purported centrality of W04752's evidence or the possibility that credibility findings could be raised on final appeal is inapposite, speculative, and plainly insufficient to justify appellate intervention.³⁹ Certification on such basis, especially considering the advance stage of the trial, would do nothing to materially advance the proceedings.

10. Accordingly, none of the cumulative requirements for certification are met.⁴⁰

III. CLASSIFICATION

11. This response is filed as confidential pursuant to Rule 82(4).

IV. RELIEF REQUESTED

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

Word Count: 2865



Kimberly P. West

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Monday, 28 July 2025

At The Hague, the Netherlands.

³⁹ *Contra* Request, KSC-BC-2020-06/F03335, paras 24-25.

⁴⁰ January 2021 Decision, KSC-BC-2020-06/F00172, paras 10-16.