



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-04  
**Specialist Prosecutor v. Pjetër Shala**

**Before:** **Trial Panel I**  
Judge Mappie Veldt-Foglia, Presiding  
Judge Roland Dekkers  
Judge Gilbert Bitti  
Judge Vladimir Mikula, Reserve

**Registrar:** Dr Fidelma Donlon

**Filing Party:** Acting Specialist Prosecutor

**Date:** 17 July 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of**

**'Prosecution response to Defence request for certification to appeal the Rule 153  
Decision'**

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Jean-Louis Gilissen

## I. INTRODUCTION

1. The Request<sup>1</sup> should be rejected because none of the Issues<sup>2</sup> meet the standard for certification to appeal under Article 45 of the Law<sup>3</sup> and Rule 77 of the Rules.<sup>4</sup>

2. Certification of discretionary admissibility decisions must be the absolute exception.<sup>5</sup> Rather than demonstrating that such exceptional relief is justified, the Defence merely disagrees with the Decision,<sup>6</sup> and fails to demonstrate any impact justifying certification.

## II. SUBMISSIONS

3. As the certification test is cumulative and the Defence has failed to identify appealable issues arising from the Decision,<sup>7</sup> on this basis alone, the Panel should dismiss the Request. However, in addition, the Request also fails to demonstrate any significant impact on the proceedings or the outcome of the trial, and that appellate resolution would materially advance the proceedings.

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<sup>1</sup> Defence Request for Certification to Appeal the “Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules”, KSC-BC-2020-04/F00559, 30 June 2023, confidential (‘Request’). A public redacted version was filed on 5 July 2023 (KSC-BC-2020-04/F00559/RED).

<sup>2</sup> The Request raises three issues (‘Issues’). *See* Request, KSC-BC-2020-04/F00559, para.4.

<sup>3</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’).

<sup>4</sup> 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, unless otherwise specified.

<sup>5</sup> ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004, para.5.

<sup>6</sup> Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules, KSC-BC-2020-04/F00556, 23 June 2023, confidential (‘Decision’).

<sup>7</sup> The standard for certification to appeal has been articulated by the Pre-Trial Judge in the Decision on Application for Leave to Appeal “Decision on Motion Challenging the Form of the Indictment”, KSC-BC-2020-04/F00116, 29 November 2021, public, paras 12-13, relying on *Specialist Prosecutor v. Thaçi et al.*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-2020-06/F00172, 11 January 2021, public (‘Thaçi Decision’) paras 10-17.

A. THE ISSUES ARE NOT APPEALABLE

*Issue 1 does not constitute an appealable issue*

4. Issue 1 constitutes a mere disagreement with the Decision, and fails to substantiate the alleged error committed by the Trial Panel ('Panel').

5. First, contrary to the Defence submissions,<sup>8</sup> TW4-02's statement that he does not know a man by the name of Pjetër SHALA ('Accused') does not equate to the proposition that the Accused was not present at the Kukës Metal Factory during the Indictment period, and it is not evidence going to the acts and conduct of the Accused. Throughout that statement, TW4-02 provides no evidence of any conduct ascribable to the Accused, let alone of his conduct as described in the charges, or which is otherwise relied upon to establish his criminal responsibility.<sup>9</sup>

6. Nor does the Defence explain how TW4-02's [REDACTED]<sup>10</sup> or his evidence on 'other guards stationed at Kukës'<sup>11</sup> constitute evidence going to the acts and conduct of the Accused.

7. With respect to Xhemshit KRASNIQI's conduct,<sup>12</sup> the Defence has failed to establish how this is an issue the immediate resolution of which is warranted.<sup>13</sup> The *Galić* Decision cited by the Defence, in fact, explicitly recognises a Panel's broad discretion in admitting a written statement that concerns the acts and conduct of a person other than the Accused.<sup>14</sup>

8. Finally, with respect to the alleged discrepancies in the timing of TW4-02's detention, the Defence has failed to demonstrate why they would prevent admission

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<sup>8</sup> Request, KSC-BC-2020-04/F00559, para.21.

<sup>9</sup> Decision, KSC-BC-2020-04/F00556, para.20.

<sup>10</sup> Request, KSC-BC-2020-04/F00559, para.21.

<sup>11</sup> Request, KSC-BC-2020-04/F00559, para.21.

<sup>12</sup> Request, KSC-BC-2020-04/F00559, para.21.

<sup>13</sup> See Decision, KSC-BC-2020-04/F00556, para.20; *Specialist Prosecutor v. Mustafa*, Public Redacted Version of Decision on the Prosecution application pursuant to Rule 153 of the Rules, 17 December 2021, public, para. 21.

<sup>14</sup> Request, KSC-BC-2020-04/F00559, para.20, citing ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-28-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(c), 7 June 2002 ('*Galić* Decision'), para. 13.

of this witness's statement pursuant to Rule 153. TW4-02's evidence containing these alleged discrepancies is now part of the trial record, the Defence had the opportunity to fully and extensively cross-examine TW4-01 on this issue, and the Panel will draw its conclusion at the end of the trial based on all the available evidence.

*Issue 2 does not constitute an appealable issue*

9. Issue 2 constitutes a mere disagreement with the Panel's conclusions and simply repeats arguments that have been considered and rejected by the Panel.

10. By claiming that the Panel 'has failed to justify the limitation of the right of the Accused to confront'<sup>15</sup> TW4-02 and TW4-04, the Defence mischaracterises the Decision and ignores the Panel's specific reasoning and findings in this regard. The Panel carefully balanced the need to respect the rights of the Accused with the need to ensure the expeditiousness and efficiency of proceedings.<sup>16</sup> In this regard, the Panel considered that the evidence of TW4-02 and TW4-04: (i) does not concern the acts and conduct of the Accused,<sup>17</sup> (ii) is limited in scope, as both witnesses were in Kukës for a limited period of time,<sup>18</sup> and (iii) is cumulative or corroborative of other evidence the Defence had an opportunity to cross-examine.<sup>19</sup> On that basis, it concluded that the introduction of this evidence pursuant to Rule 153 is not prejudicial to or inconsistent with the rights of the Accused or the fairness of the trial.<sup>20</sup>

11. Furthermore, the Defence simply repeats arguments raised in their responses<sup>21</sup> to the SPO original Rule 153 requests concerning alleged inconsistencies in the

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<sup>15</sup> Request, KSC-BC-2020-04/F00559, para.25.

<sup>16</sup> Decision, KSC-BC-2020-04/F00556, paras 22-23, 39, 49.

<sup>17</sup> Decision, KSC-BC-2020-04/F00556, paras 32 and 43.

<sup>18</sup> Decision, KSC-BC-2020-04/F00556, paras 33 and 44.

<sup>19</sup> Decision, KSC-BC-2020-04/F00556, paras 34 and 45.

<sup>20</sup> Decision, KSC-BC-2020-04/F00556, paras 39 and 49.

<sup>21</sup> Defence Response to the Prosecution Application for the Admission of TW4-02's Evidence Pursuant to Rule 153, KSC-BC-2020-04/F00523, 25 May 2023, confidential ('Defence Response Concerning TW4-02'), paras 26-27; Defence Response to the Prosecution Application for the Admission of TW4-04's Evidence Pursuant to Rule 153, KSC-BC-2020-04/F00550, 19 June 2023, confidential, paras 32-33.

evidence of the two witnesses, as well as on TW4-02's [REDACTED],<sup>22</sup> deciding to ignore the Panel's findings in these respects.<sup>23</sup>

*Issue 3 does not constitute an appealable issue*

12. Issue 3 constitutes again a mere disagreement with the Decision. The Defence submission that their right to cross-examine TW4-02 and TW4-04 has been restricted in a way that is prejudicial to the Accused<sup>24</sup> fails to engage with the Panel's analysis and conclusions.

13. In support of its submissions, the Defence merely repeats arguments about the uniqueness of the witnesses' evidence that were considered, and dismissed, by the Panel.<sup>25</sup> It does so also with regard to the alleged inconsistencies between the witnesses' evidence and that of other witnesses, as held by the Panel, 'witnesses need not corroborate each other on each and every aspect or detail of their evidence for their statements to be suitable for admission under Rule 153 of the Rules.'<sup>26</sup>

14. The Defence simply lists a number of topics covered by TW4-02's and TW4-04's evidence which, in the Defence's submissions, make it essential that these witnesses be available for cross-examination.<sup>27</sup> None of these topics or alleged 'critical issues'<sup>28</sup> concern the acts and conduct of the Accused. Aside from repeating arguments already dismissed by the Panel, the Defence does not identify any error which could potentially invalidate the Decision.

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<sup>22</sup> Defence Response Concerning TW4-02, KSC-BC-2020-04/F00523, paras 33-35.

<sup>23</sup> Decision, KSC-BC-2020-04/F00556, paras 35 (in relation to TW4-02) and 47 (in relation to TW4-04).

<sup>24</sup> Request, KSC-BC-2020-04/F00559, paras 26, 28.

<sup>25</sup> See Decision, KSC-BC-2020-04/F00556, paras 45.

<sup>26</sup> Decision, KSC-BC-2020-04/F00556, para.45.

<sup>27</sup> Request, KSC-BC-2020-04/F00559, paras 26, 29.

<sup>28</sup> Request, KSC-BC-2020-04/F00559, para.29.

B. THE ISSUES WOULD NOT SIGNIFICANTLY IMPACT OR MATERIALLY ADVANCE THE PROCEEDINGS

15. The Defence fails to demonstrate how the Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In this respect, as held by the Panel, the decision to admit the written statements of a witness pursuant to Rule 153 is a discretionary one.<sup>29</sup> This discretion has to be exercised in compliance with the rights of the Accused to a fair trial.<sup>30</sup> In the present case, the Panel carefully balanced the right of the Accused to confront witnesses against him with his right to be tried within a reasonable time<sup>31</sup> and concluded that, in the circumstances,<sup>32</sup> admitting the witnesses' statements pursuant to Rule 153 was appropriate. At the end of the proceedings, the Panel will assess all evidence, assigning appropriate weight. In this respect, a conviction may not be based solely or decisively on the statement of a witness the Defence had no opportunity to examine.<sup>33</sup>

16. Therefore, the Issues have no prospect of significantly affecting the outcome of the trial. For the same reasons, immediate appellate resolution would not materially advance the proceedings at this stage.

III. CLASSIFICATION

17. This filing is confidential pursuant to Rule 82(4). A public redacted version will be filed.

IV. RELIEF REQUESTED

18. For the foregoing reasons, the Request should be rejected.

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<sup>29</sup> Decision, KSC-BC-2020-04/F00556, para.22.

<sup>30</sup> Decision, KSC-BC-2020-04/F00556, para.23.

<sup>31</sup> Article 6 of the European Convention on Human Rights. *See also, Taçi* Decision, KSC-2020-06/F00172, para.13 ('Expediency, i.e. conducting a trial within a reasonable time or, put differently, conducting a speedy trial without prejudice to the rights of the Parties concerned, is but one attribute of a fair trial.')

<sup>32</sup> As submitted above, the Panel considered a number of factors in this regard: see Decision, KSC-BC-2020-04/F00556, paras 32-39 (in relation to TW4-02) and 43-49 (in relation to TW4-04).

<sup>33</sup> Rule 140(4)(a).

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**Alex Whiting**

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Monday, 17 July 2023

At The Hague, the Netherlands.