

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: Counsel for Kadri Veseli

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Veseli Defence Request for Reconsideration of Decision to Admit P380

Specialist Prosecutor's Office

Ward Ferdinandusse

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. In accordance with the Trial Panel's instructions of 7 September 2023¹ and Rule 79 of the Rules,² the Defence for Mr Kadri Veseli ("Defence") hereby files this request for reconsideration of the decision to admit Chapter 10 of the Human Rights Watch Report entitled *Humanitarian Law Violations in Kosovo* ("Impugned Decision").³
2. The Defence submits that at the time the SPO tendered the Report it was already evident that the conditions for admission under Rule 138(1) were not met, due to underlying sourcing issues affecting the item's reliability and, by implication, its probative value.
3. W04408's cross-examination only served to confirm that P380 and the conclusions made therein drew primarily from secondary sources that either could not be identified or were otherwise unavailable to the Trial Panel. It follows that the Impugned Decision must be reconsidered to avoid injustice and irreparable harm being caused to Mr Veseli's fair trial rights.

II. PROCEDURAL BACKGROUND

4. W04408 testified from 5 to 11 September 2023. At the end of his examination-in-chief on 6 September 2023, the SPO sought to tender, *via* the witness, Chapter 10 of *Humanitarian Law Violations in Kosovo*; a Human Rights Watch ("HRW") report published in October 1998.⁴
5. Counsel for Mr Veseli objected to its admission on the basis that, on the witness's own testimony, the findings of the report were based on untestable

¹ Transcript, 7 September 2023, p. 7593.

² 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 are to the Rules, unless otherwise specified.

³ Transcript, 6 September 2023, pp. 7347-7348 where Chapter 10 of the Report was admitted as P380.

⁴ Transcript, 6 September 2023, pp. 7347-7348. *See also*, IT-05-87.1 P00741, p. K0364785 (Full HRW Report, *Humanitarian law Violations in Kosovo*) and 076135-0176161, para. 9(b).

hearsay rendering it highly unreliable and, moreover, the report was designed to present an argument about the KLA that happens to coincide with the Prosecution's case – rendering it highly prejudicial.⁵ The objection was joined by Counsel for Mr Thaci and Counsel for Mr Krasniqi.⁶

6. The Defence objections were overruled and Chapter 10 was admitted into evidence as P380.⁷
7. On 6 and 7 September 2023, during cross-examination by Counsel for Mr Veseli, the findings of P380 and the information on which it was based was explored in great depth.⁸
8. On 7 September 2023, at the conclusion of the Judges' questioning and prior to re-cross-examination on certain issues arising therefrom, the Defence invited the Court to reconsider the Impugned Decision.⁹ The Defence was instructed to make its submissions in writing.¹⁰

III. APPLICABLE LAW

A. Standard of Review

9. Pursuant to Rule 79 of the Rules, reconsideration of an earlier decision is permissible “in exceptional circumstances and where a clear error of reasoning is demonstrated, or to avoid injustice.”¹¹ In accordance with the Court's jurisprudence, “[n]ew facts and arguments arising since the impugned decision

⁵ Transcript, 6 September 2023, pp.7344-7345.

⁶ Transcript, 6 September 2023, pp. 7346-7347.

⁷ Transcript, 6 September 2023, pp. 7347-7348.

⁸ Transcript, 6 September 2023, pp. 7416-7484; Transcript 7 September 2023, pp. 7489-7554.

⁹ Transcript, 7 September 2023, p. 7593, lines 7-13.

¹⁰ Transcript, 7 September 2023, p. 7593, line 14.

¹¹ See also, F00115, *Decision on Defence Requests for Reconsideration and Extension of Word Limit*, 1 December 2020, confidential, para. 17; F01736, *Decision on Urgent Prosecution Request for Reconsideration of Decision F01727*, 23 August 2023, confidential, para. 11.

was rendered may be relevant to this assessment but does not constitute a necessary requirement for reconsideration.”¹²

B. General Admissibility

10. Rule 138(1) of the Rules states that:

Unless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.¹³

11. The Trial Panel’s Bar Table Decision of 31 March 2023 states that an item’s probative value is determined by “(i) the *prima facie* reliability of the tendered evidence; and (ii) the measure by which that evidence is likely to influence the determination of a particular issue in dispute in the case.”¹⁴ Whereas “definite proof of reliability is not required at the admissibility stage [...] [i]t is for the tendering Party to ensure that the evidence placed before the Panel is capable of supporting a reasonable belief regarding the purpose for which it is being offered.”¹⁵

12. It is further recalled and reiterated that, the opinion evidence of fact-based witnesses “should not go to any of the ultimate issues that fall within the scope and responsibility of the Panel.”¹⁶

C. Admissibility of Hearsay

13. It is well-established that hearsay is admissible before international courts and tribunals.¹⁷ Nonetheless, there are limits to this principle and the Trial Panel has recently acknowledged that it “cannot admit hearsay evidence in a manner

¹² F01206, *Decision on SPO Request for Reconsideration and/or Leave to Appeal of F01149, Suspensive Effect and Request for Time Extension*, 13 January 2023, confidential, para. 18, fn. 33.

¹³ Rule 138(1) of the Rules.

¹⁴ F01409, *Decision on Specialist Prosecutor’s Bar Table Motion*, 31 March 2023, confidential, para. 12.

¹⁵ F01409, para. 12.

¹⁶ Oral Order of 18 July 2023, p. 5985, line 3-5. *See also*, Oral Order of 5 September 2023, p. 7280, lines 18-22.

¹⁷ *See for instance*, F01409, para 32, fn.98.

which would unfairly interfere with the rights of the Accused.”¹⁸ In *Milutinović et al.*, the Trial Chamber excluded both an OSCE Report, and an HRW report, after having heard the testimony of the authenticating witnesses. The Trial Chamber found that, despite the presence of an authenticating witness who was able to explain the report’s methodology, it could not rely on the contents of the reports because the allegations contained therein were variously sourced to single accounts, to accounts which were themselves hearsay, or to accounts that contained inconsistencies when compared to other sources.¹⁹

14. The Trial Chamber concluded:

These are the kinds of issues that go directly to the reliability of the assertions which these excerpts present, and which are best tested through the in-court examination of the declarants by the parties and the Chamber. In these circumstances, neither the report’s acknowledgement of these problems, nor the opportunity to cross-examine one of the authors and editors of the report, can adequately replace the opportunity to test the reliability of any of the persons making the statements.²⁰

15. The admission of such hearsay is not justified on the basis that it supposedly corroborates other evidence in the case. As the Trial Chamber in *Milutinović* observed, in the context of denying the OTP certification to appeal the Reports’ exclusion, “the Chamber doubts that it will find [witnesses testifying about the same events] less believable because their evidence is not reinforced by material which lacks such indicia of reliability as to render it inadmissible.”²¹ Nor does the exclusion of such hearsay prejudice the tendering Party, particularly where it intends to call many other witnesses to provide evidence covering the same or similar issues.²²

¹⁸ F01409, para. 32.

¹⁹ ICTY, *Prosecutor v. Milutinovic et al.*, [Decision on Evidence Through Sandra Mitchell and Frederick Abrahams](#), 1 September 2006, para. 22. This has since been assigned ERN: DKV0441-0460, and will be referred to as such hereinafter.

²⁰ DKV0441-0460, para. 22.

²¹ DKV0441-0460, para. 10.

²² DKV0441-0460, para. 10.

IV. SUBMISSIONS

16. At the point of tendering during W04408's examination-in-chief, the admissibility of P380 was heavily contested by the Parties. Despite this, the Trial Panel chose to admit the item instead of deferring a decision on its admission until the end of his testimony. During cross-examination, the Defence developed its arguments, demonstrating that the entirety of the item was based on untested and inadequately sourced hearsay. In view of the evidence that emerged in cross-examination, the Defence submits that the decision to admit the item must be reconsidered in order to avoid injustice.
17. The background to P380's admission in court is as follows. In response to questions concerning the origin of the information cited in P380, the witness admitted to the Prosecution that he relied "primarily on secondary sources" because, according to him, it was "difficult" to conduct first-hand investigations into alleged KLA crimes.²³ At this point the Defence lodged its first objection, noting that the witness' answer was not responsive to the Prosecutor's question as it failed to adequately explain the exact provenance of the information cited in P380.²⁴
18. Shortly thereafter, the witness responded to a follow-up question on the same topic, noting that the secondary sources contained in P380 were "credible international and non-governmental organisations, such as the Humanitarian Law Centre, Amnesty International and the ICRC."²⁵ The witness then claimed that in order to "connect the dots and present the full spectrum of violations to make a case," the focus was on citing "multiple [...] credible secondary sources about individual cases," which, in turn, allowed him to feel "comfortable and

²³ Transcript, 6 September 2023, p. 7342.

²⁴ Transcript, 6 September 2023, pp. 7342-7343.

²⁵ Transcript, 6 September 2023, p. 7343.

confident” to make assertions about alleged KLA crimes.²⁶ The Defence promptly registered a second objection, contesting P380’s admissibility on the grounds that a similar report authored by the witness, namely, *Under Orders*,²⁷ was declared inadmissible in *Milutinović et al.* As noted in paragraphs 13-15 above, the Court’s reasoning in that instance was that it could not test the reliability of the information cited therein.²⁸

19. The objection was overruled with the Presiding Judge observing that the issue of HRW’s methodology and the sources used in compiling P380 would be “subject to cross-examination,” as well as “an examination by the Court Panel during the period of making any judgment in this case.”²⁹ P380 was then tendered and promptly admitted into evidence prior to any cross-examination by the Defence.³⁰ The report’s reliability had not been tested, nor was the credibility of its sources scrutinised beyond the answers W04408 provided during his examination-in-chief.

20. In determining P380’s admissibility, the Presiding Judge stated that:

There is no question there is hearsay involved, and we’ve discussed that time and again. There’s going to be hearsay. There is no exclusion of that in our rules. **This begs the determination of the weight to be given to this report.** It’s obvious -- **just because it’s a report does not mean it’s true.** We’re as aware of that as anybody else. **But it is a validly prepared, authenticated report, and we will admit it.**³¹

²⁶ Transcript, 6 September 2023, pp. 7343-7344.

²⁷ See, K036-0808-K036-1427 (HRW Report, *Under Orders*, dated October 2001).

²⁸ DKV0441-0460, paras 22-25 and 33(2). The Defence notes that *Humanitarian Law Violations* was admitted into evidence in *Milutinović*, but points out that its relevance was limited to the issue of notice. See further, DKV0441-0460, para. 32 (“Although this report contains sections, similar to the challenged excerpts from *As Seen, As Told* and *Under Orders*, that are based on interviews with persons claiming to be witnesses to and victims of the crimes described therein, it is clear that the Prosecution seeks to use this report for proving notice to the Accused.”) It should also be noted that the events in *Humanitarian Law Violations* entirely predate the *Milutinović* indictment, which made it significantly less contentious in that case.

²⁹ Transcript, 6 September 2023, p. 7345.

³⁰ Transcript, 6 September 2023, p. 7347.

³¹ Transcript, 6 September 2023, p. 7348.

21. This Decision makes clear that the Panel failed to consider P380's admission in light of all the requirements for admissibility contained in Rule 138(1). The Panel satisfied itself of the item's admissibility on the sole basis that it was a "validly prepared, authenticated report."³² The Defence disputes that this constitutes a valid basis for admission. Neither the presence of the author in, nor an explanation of, the methodology employed can in and of themselves render a report admissible. They are necessary but not sufficient conditions for ensuring that the information is adequately reliable for admissibility purposes.
22. In any event, as W04408 conceded in cross-examination³³, P380 did not adhere to the careful methodology which he described in his SPO witness statement in the following terms:

All of the research conducted by HRW between 1990 and 1999 shared a common methodology. Trained and experienced researchers interviewed victims and witnesses of abuses usually in lengthy one-on-one interviews. Multiple sources with corroborative evidence were required to make credible claims and Human Rights Watch erred on the side of caution when making allegations public. Whenever possible, Human Rights Watch got information from alleged perpetrators, whether it was a government or a non-state actor.³⁴

23. In sharp contrast to the above, it became immediately apparent during cross-examination that the majority of the allegations contained in P380³⁵ could all be traced back to media outlets and NGOs – most notably, the Humanitarian Law Centre ("HLC") – and many allegations were supported by just a single source.³⁶ Crucially, the witness was unable to provide any evidence that he ever probed the reliability of HLC's conclusions, as he did "not recall" whether he had personally evaluated the sources underpinning HLC's reports. All the

³² Transcript, 6 September 2023, p. 7348.

³³ Transcript, 7 September 2023, p. 7499.

³⁴ 076135-076161, para. 13.

³⁵ Save for two allegations concerning the Lake Radonjić and Klečke killings in September 1998, which the witness indicated, at the time, were unverified allegations made by the Serbian authorities. *See*, P380, pp. 77-78.

³⁶ *See*, P00380, fns 134, 138, 140-141, 142, 144, 147, 149, 150 and 151 all of which refer to SITF00413220-00413243 (HLC, *Spotlight Report No. 27*, 5 August 1998).

witness could offer in support of his heavy reliance on HLC was his “first-hand experience” with the organisation, the apparent “seriousness with which they pursued their work”³⁷ and his “high degree of faith” in them as an organisation.³⁸

24. Notably, however, when confronted with the fact that the **only** source the HLC relied upon for an allegation that was recycled in P380 was the “Belgrade Media,” the witness remarked that he could not speak for HLC or the decisions they made regarding sourcing.³⁹ Indeed, this concession is precisely why the Defence submits that an independent evaluation of their sources was required no matter how strong the professional relationship between the two organisations or individuals involved.
25. In total, P380 contains 34 citations.⁴⁰ Among those, just three citations refer to interviews or conversations that HRW personnel conducted itself – none of whom are victims or witnesses of crimes.⁴¹ Media outlets – both private and state owned – as well as non-governmental organisations comprise the vast majority, if not all, of the references contained in P380. Notably, 11 references are made to the abovementioned HLC Spotlight Report from 5 August 1998 which, in turn, cites to various other secondary sources, including “HLC” itself and the “Belgrade Media.”⁴² Throughout that Spotlight Report, HLC does not identify which of its own publications it is relying on for a specific allegation, nor does it mention when or where interviews were conducted, who conducted them and/or was present, nor how long they lasted. The same is true for the

³⁷ Transcript, 6 September 2023, p. 7476.

³⁸ Transcript, 7 September 2023, p. 7495.

³⁹ Transcript, 6 September 2023, p. 7483.

⁴⁰ In addition to three other footnotes providing further information omitted from the body of the text.

⁴¹ *See*, P380, fn. 138 (Human Rights Watch Interview with UNHCR, Brussels, June 15, 1998); fn. 149 (Human Rights Watch telephone interview with editor at Radio Priština, August 26, 1998); and fn. 154 (Human Rights Watch interview with Stacy Sullivan, New York, September 3, 1998).

⁴² SITF00413220-00413243.

media outlets and other organisations to which HLC refers. Save for a generic description of the organisation to which a piece of information is attributed – and in the case of “Belgrade Media,” the general geographic area – HLC’s citations utterly fail to provide the details required to make an informed assessment of the reliability of the information contained in the report.

26. Similar considerations apply in respect of the other secondary sources to which P380 refers. The Defence notes that there are two references to Amnesty International, an organisation who, according to another witness and prominent international verifier, were deployed for short periods of time, in small numbers and did not monitor the human rights situation in Kosovo as a primary task.⁴³ Moreover, one of these citations appears to be inaccurate,⁴⁴ whereas the other cites to a passage that is itself uncited – although an earlier footnote in Amnesty’s report indicates that the material derives from HLC.⁴⁵ Not only does this demonstrate the circular nature of reporting at the time, whereby various organisations were borrowing and reusing unverified and untestable allegations made by others, but it also shows that the two sources W04408 used to substantiate certain allegations in P380 actually stem from one source – namely, the highly contested HLC Spotlight Report.

⁴³ See, IT-05-87 P02772 (ICTY Witness Statement of Brigadier General Joseph Maisonneuve), pp. 12 and 130.

⁴⁴ See, P380, fn. 149. The Defence notes that contrary to what P380 claims, Rosa Radošević is not mentioned anywhere in the report by Amnesty International, [Federal Republic of Yugoslavia: A Human rights crisis in Kosovo Province: Series B No.1: Human rights violations against women in Kosovo province](#), (AI Index EUR: 70/54/98) 31 July 1998.

⁴⁵ See P380, fn. 150 which relates to unsourced information on page 8 of Amnesty International, [Federal Republic of Yugoslavia: A Human rights crisis in Kosovo Province: Series B No.1: Human rights violations against women in Kosovo province](#), (AI Index EUR: 70/54/98) 31 July 1998. In this respect, the Defence draws attention to footnote 5 of this Amnesty International report that pertains to a section of which page 8 forms part, indicates that “[m]uch of the information in this section is derived from the report Kosovo – Disappearances in times of armed conflict, 15 January - 30 July 1998, published in July 1998 by the Humanitarian Law Center (HCL), a Belgrade-based human rights organisation” i.e., the HLC’s Spotlight Report No. 27.

27. Lastly, P380 relies on press releases and infographics from the Serbian and Yugoslav governments⁴⁶ as well as Serbian religious groups based in Kosovo.⁴⁷ In this regard, the Defence reiterates its position that sources of Serbian provenance ought to be assessed with the utmost scrutiny given Serbia's established tendency to promulgate falsities to the detriment of the KLA.⁴⁸
28. The Defence submits that a report based on sources such as those described above cannot be regarded as *prima facie* reliable for the purposes of admission. As the Court in *Milutinović et al.* observed in rejecting *Under Orders*, the issues identified above "go directly to the reliability of the assertions which these excerpts present" and therefore cannot be relied upon for the truth of their contents. The Impugned Decision must be reconsidered in the interests of justice. A failure to do so would result in a manifestly unfair situation whereby Mr Veseli's fair trial rights would be jeopardised.
29. In closing, the Defence registers its fundamental objection to the notion that the weight to be given to evidence during the Panel's final deliberations is a suitable alternative to the proper assessment of the evidence during the admission phase. Whereas a blanket ban on the admissibility of hearsay is not sought, the Defence avers that a more fastidious application of the admissibility requirements is preferred over *en masse* admission of tendered items.

V. CONCLUSION

30. In light of the foregoing, the Defence requests that the Trial Panel reconsider the Impugned Decision and declare P380 inadmissible. At the very least, it

⁴⁶ P380, fns 125 and 135-136.

⁴⁷ P380, fns 137 and 153.

⁴⁸ F00877/COR, *Corrected Version of Joint Defence Motion for Disclosure Pursuant to Rule 103, With Public Annexes 1-3 and Confidential Annex 4 (F00877, dated 12 July 2022)*, 21 July 2022, confidential, paras 25-77.

should be marked for identification pending the production of additional evidence by the Prosecution attesting to the item's reliability.

Word Count: 3,277



Ben Emmerson, CBE KC
Counsel for Kadri Veseli

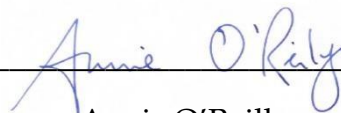
Thursday, 12 October,
The Hague, The Netherlands



Andrew Strong

Co-Counsel for Kadri Veseli

Thursday, 12 October,
The Hague, The Netherlands



Annie O'Reilly

Co-Counsel for Kadri Veseli

Thursday, 12 October,
The Hague, The Netherlands