



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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Prosecution response to VESELI Defence request relating to Exhibit P380

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I. INTRODUCTION

1. The Request¹ does not provide valid grounds for reconsideration. Exhibit P380, an extract of the Human Rights Watch (HRW) report entitled 'Humanitarian Law Violations in Kosovo',² was admitted during W04408's examination in chief,³ following (i) a finding that the *prima facie* admissibility requirements were met and (ii) observations by the Presiding Judge that HRW's methodology and sources would be subject to cross-examination and final assessment by the Panel at the conclusion of the case.⁴ Insofar as the Request is based on 'evidence that emerged in [W04408's] cross-examination', the VESELI Defence fails to demonstrate a material change in,⁵ let alone, exceptional,⁶ circumstances, a clear error of reasoning, or that reconsideration is necessary to avoid injustice.⁷ The Defence may raise any arguments concerning the ultimate reliability of P380, including on the basis of its cross-examination of W04408, in, *inter alia*, its final trial brief or closing arguments.

II. SUBMISSIONS

2. In admitting P380, the Trial Panel stated that the hearsay nature of evidence is no ground for its exclusion and found that P380 was properly authenticated for purposes of admission:⁸

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

¹ Veseli Defence Request for Reconsideration of Decision to Admit P380, KSC-BC-2020-06/F01853, 12 October 2023 ('Request').

² Chapter 10, titled 'Violations of the rules of War by the UÇK'.

³ Request, KSC-BC-2020-06/F01853, para.16.

⁴ Request, KSC-BC-2020-06/F01853, paras 19-20 (and the sources cited therein).

⁵ Decision on Victims' Counsel's Request for Reconsideration of Trial Panel II's "Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses", KSC-BC-2020-06/F01448, 12 April 2023 ('12 April 2023 Decision'), para.10 (where the Trial Panel states that new facts and arguments arising after the impugned order was rendered may be relevant to deciding whether the relevant threshold (a clear error of reasoning or the need to avoid an injustice) has been met).

⁶ 12 April 2023 Decision, KSC-BC-2020-06/F01448, para.8 (the expression 'exceptional circumstances' in Rule 79 indicates that reconsideration is not a remedy to be issued routinely).

⁷ Rule 79 of the 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.

⁸ Transcript of 6 September, pp.7347-7348 ('Admission Decision').

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.

3. By relying on evidence that allegedly emerged in cross-examination to seek reconsideration of the Admission Decision,⁹ the Defence expresses mere disagreement¹⁰ and misunderstands this aspect of the judicial process.¹¹ There is no legal basis for the Defence's claim that the Trial Panel should have deferred its decision until the end of W04408's testimony. Items tendered during a witness's testimony are routinely admitted once the Trial Panel, like in this case, has sufficient information to reach a decision on admissibility. P380 was found to satisfy the relevant *prima facie* requirements and was therefore admitted.

4. The Defence can argue in, *inter alia*, its final trial brief and closing arguments about the ultimate probative value of P380, which is an issue the Trial Panel will assess when assigning weight in light of the entire evidentiary record. Such submissions on ultimate weight are separate and distinct from the Trial Panel's decision on the admission of evidence.¹²

A. P380 IS *PRIMA FACIE* RELEVANT, AUTHENTIC, RELIABLE, AND PROBATIVE

5. Contrary to the Defence submissions,¹³ the Admission Decision shows the Trial Panel was satisfied that the *prima facie* requirements for admission were met.¹⁴

⁹ See Request, KSC-BC-2020-06/F01853, paras 3, 16.

¹⁰ These submissions must be considered in context, including the Defence's acknowledgement that hearsay is admissible consistent with the jurisprudence of other courts with a similar admissibility framework. See Request, KSC-BC-2020-06/F01853, paras 2, 13, 29.

¹¹ See ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Defence Motion for Reconsideration of Decision Admitting Charts of Amor Mašović, 19 September 2016, para. 15 (where the *Mladić* Trial Chamber held that the admission of Defence evidence that might undermine the reliability of Prosecution evidence is not cause for reconsidering the admission of that Prosecution evidence).

¹² See, similarly, ICTR, *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, para.15.

¹³ Request, KSC-BC-2020-06/F01853, para.21.

¹⁴ Rule 138(1).

W04408, the primary author of the report, explained its methodology and the sources relied upon in P380 during direct examination.¹⁵

6. With regard to its *prima facie* reliability, and therefore *prima facie* probative value, the Trial Panel has consistently held, in line with case-law from international criminal courts, that the hearsay nature of evidence does not render the evidence inadmissible; rather, it may impact the weight that the Panel might ultimately give to such evidence.¹⁶ Indeed, in a prior decision concerning W04408's evidence, the Trial Panel considered that 'while parts of W04408's Statement contain hearsay or derive from an unclear source of knowledge, these considerations are not an obstacle to admission, but would rather go to the weight, if any, to give to the evidence'.¹⁷

7. Further, W04408's cross-examination does not impact on the reasons for the Admission Decision, or constitute a new fact or argument relevant to determining whether the threshold for reconsideration has been met.¹⁸ In fact, as acknowledged by the Defence,¹⁹ the Trial Panel had already considered the witness's explanations that P380 'relies more and primarily on secondary sources'. W04408 explained that it was difficult for a number of reasons, the main one being 'security', to investigate first-hand sources, namely, witnesses and victims in relation to alleged violations by the KLA.²⁰ W04408 had also illustrated, before the Admission Decision, the sources of the

¹⁵ Transcript of 6 September, pp.7341-7344.

¹⁶ See In-court Oral Order, Transcript of 18 July 2023, pp.5985-5986; Decision on Prosecution Motion for Admission of Evidence of W00208, W02082, W02475, W04147, W04325, W04491 and W04753 Pursuant to Rule 154 (F01788), KSC-BC-2020-06/F01848, 10 October 2023, para.56, fn.135; Fourth Decision on Specialist Prosecutor's Bar Table Motion, KSC-BC-2020-06/F01716, 8 August 2023, Confidential, paras 32-33, 47; Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154, KSC-BC-2020-06/F01595/COR, 9 June 2023, Confidential ('9 June 2023 Decision'), para.22; Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, Confidential, para.21.

¹⁷ 9 June 2023 Decision, KSC-BC-2020-06/F01595/COR, para.22. While the witness's evidence was previously proposed pursuant to Rule 154, in an email on 21 July 2023 addressed to the Trial Panel, other Parties and participants, the SPO advised that it would lead the evidence of W04408 entirely *viva voce*.

¹⁸ *Contra* Request, KSC-BC-2020-06/F01853, paras 3, 9, 22-24.

¹⁹ Request, KSC-BC-2020-06/F01853, para.17. See also Request, KSC-BC-2020-06/F01853, paras 18-21.

²⁰ See Transcript of 6 September, pp.7341-7343. See also Transcript of 5 September, pp.7296-7299.

information upon which P380 was grounded.²¹ Further, contrary Defence arguments otherwise,²² W04408's evidence on the methodology adopted with regard to P380 did not change in cross-examination, but was clear and consistent throughout his testimony, including before the Admission Decision.²³

8. Finally, the VESELI Defence fails to note, when pointing to the sources cited in P380, that it also contains references to interviews of HRW personnel with the HLC²⁴ and the ICRC.²⁵ The ICRC interview relates to the abduction of Nebojša RADOŠEVIĆ and Vladimir DOBRIČIĆ, which W04408²⁶ testified about, including in relation to a meeting he personally had with THAČI and LIMAJ, and regarding which several other items were admitted into evidence during W04408's testimony.²⁷

²¹ Transcripts of 6 September 2023, p.7343 ('These are credible international organisations, either non-governmental, like the Humanitarian Law Centre, like Amnesty International. These are statements by, for example, the ICRC. I mentioned them going public about lack of access. These are media reports. And what's important is the combination. So we would never take any one individual claim and assert that as definitive when we're looking at a pattern; right? And that's key distinction I'd like to make here, is investigations that are looking at individual cases and investigations that connect the dots and present the full spectrum of violations to make a case'). *See also* Transcript of 5 September, pp.7304-7305.

²² Request, KSC-BC-2020-06/F01853, para.22. When pointing to W04408's statement (076135-076161, para.13) as the basis for its assertion, the Defence ignored the clarifications as to methodology that the witness provided in the disclosed preparation note (114948-114953, paras 10-13). *See also* Transcript of 7 September, p.7501.

²³ *See* Transcript of 6 September 2023, pp.7342 ('The section -- this section of the report relies more and primarily on secondary sources'), 7344 ('And in this situation, the cases presented in this chapter tell a story when connected, so that we may have multiple sources of credible secondary sources about individual cases but we see them in their entirety, which brings us to a threshold where we feel comfortable and confident to make assertions').

²⁴ The VESELI Defence incorrectly indicates that the HLC Report referenced in P380 'cites to various other *secondary sources*, including "HLC" itself'. *See* Request, KSC-BC-2020-06/F01853, para.25 (emphasis added). It is clear that those are references to interviews of HLC researchers with victims and witnesses. *See, for example*, SITF00413220-00413243, pp.SITF00413225-SITF00413226 (re: P380, p.K0364873, fns.149-150); SITF00413228, fn.141 (re: P380, p.K0364870); SITF00413227, SITF00413229 (re: P380, p.K0364872, fn.147).

²⁵ *Compare* Request, KSC-BC-2020-06/F01853, para.25, fn.41 *with* P380, fns.152, 157.

²⁶ As well as W03880. *See* Transcript of 9 October 2023; Transcript of 10 October 20023, pp.8548-8644.

²⁷ *See, for example*, Transcript of 5 September 2023, pp.7308-7315; Transcript of 6 September 2023, pp.7318-7335, 7376-7412, 7572-7573, 7584-7589; Transcript of 11 September 2023, pp.7599-7614; Exhibits P375, P376, P377, P378, 1D47, 1D48.

9. Accordingly, the Request, including its reliance on an item which has not been tendered by any Party at this stage,²⁸ underlines that the use of Rule 79 here is misplaced and that the *prima facie* Admission Decision is not impacted by the Defence's arguments.

B. ADMISSIBILITY DECISIONS OF OTHER COURTS ARE INAPPOSITE

10. The Panel has emphasised that it will make its own findings on the admissibility and ultimate weight of evidence,²⁹ and related decisions of other courts have limited, if any, value.³⁰ Admissibility decisions are discretionary and must be made on a case-by-case basis.³¹ Accordingly, a procedural (admissibility) decision in another case before another tribunal,³² is not sufficient to meet the test for reconsideration.

11. The jurisprudence cited in the Request, including that concerning P380, underline the case-by-case nature of admissibility decisions. First, in the *Milutinović* Decision, the ICTY Trial Chamber denied admission of a HRW report, 'Under Orders',³³ which is different from the report containing P380. Not only did another Chamber admit portions of the 'Under Orders' report,³⁴ but the report containing P380

²⁸ Request, KSC-BC-2020-06/F01853, para.26, relying on IT-05-87 P02772, disclosed to the Defence under Rule 103.

²⁹ See, for example, Decision on Second Defence Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01868, 19 October 2023, para.14. See also Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021, para.66; 12 April 2023 Decision, KSC-BC-2020-06/F01448, para.17.

³⁰ Decision on Veseli Defence Request Regarding Items Associated with [REDACTED], KSC-BC-2020-06/F01733, 23 August 2023, Confidential, para.13 (noting that another court's findings were based on a different record and their value is therefore very limited).

³¹ See, for example, ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Order of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para.15.

³² Request, KSC-BC-2020-06/F01853, para.28, referring to ICTY, *Prosecutor v. Milutinović et al*, IT-05-87-T, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006 ('*Milutinović* Decision').

³³ At this stage, the 'Under Orders' report (K036-0808-K036-1427) has not been tendered.

³⁴ The *Djordjević* Trial Chamber subsequently admitted into evidence excerpts of the 'Under Orders' report. ICTY, *Prosecutor v. Djordjević*, IT-05-87/1-T, Decision on Vlastimir Djordjević's Motion to Deny Admission of Prosecution Documents MFI P757, MFI P756 and MFI P738, 19 May 2009.

was actually admitted in the *Milutinović* Decision.³⁵ Likewise, the *Limaj et al.* Trial Chamber admitted the entire report from which P380 is extracted³⁶ and relied on it in its Judgment.³⁷ This jurisprudence undercuts the Request.

12. In any event, the *Milutinović* Decision was already before and considered by the Panel when the Admission Decision was reached.³⁸

C. THERE IS NO PREJUDICE

13. No prejudice arises from the Admission Decision. The Defence had the opportunity to fully cross-examine W04408, including in relation to P380 and will, as appropriate, be able to present further evidence and make further submissions, which will be considered by the Panel when assigning weight in its final assessment of the evidence.

14. In light of the above, the Request does not point to any cause for reconsideration, and does not establish any error of reasoning in the Admission Decision or any injustice within the meaning of Rule 79.

III. RELIEF REQUESTED

15. For the foregoing reasons, the Trial Panel should reject the Request.

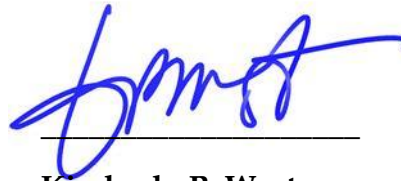
³⁵ This is also acknowledged by the Defence. See Request, KSC-BC-2020-06/F01853, para.18, fn.28. See also *Milutinović* Decision, para.32. W04408 testified he delivered copies of the human rights report to the KLA political office in Prishtina after its establishment and that the report containing P380 was issued after the establishment of this office. See Transcript of 5 September 2023, p.7293; Transcript of 6 September 2023, pp.7345-7346.

³⁶ See ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Transcript of 8 April 2005, pp.5484-5485; 5500-5503 (during the testimony of Peter Bouckaert, W04408's HRW colleague, see Transcript of 5 September 2023, p.7314).

³⁷ See, for example, ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005 ('*Limaj* Judgment'), paras 62, 133, 162, 201-204, 208, 214, 396, 404. Significantly, the *Limaj et al.* Trial Chamber cited and relied on information contained in P380. See, for example, *Limaj* Judgment, paras 396, 404.

³⁸ The VESELI Defence, prior to the beginning of W04408's examination in chief, read extensive parts of the *Milutinović* Decision onto the record. See Transcript of 5 September 2023, pp.7273-7277. It also raised the decision again at other points during the direct examination. See also Request, KSC-BC-2020-06/F01853, para.18; Transcript of 5 September, pp.7341-7343; Transcript of 6 September, pp.7344-7345.

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Monday, 23 October 2023

At The Hague, the Netherlands.