

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 Reply to Prosecution Response to Veseli Defence Request
Relating to Exhibit P380**

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli (“Defence”) hereby files this brief reply to the SPO response¹ concerning the request to reconsider the admission of P380.²
2. Contrary to the SPO’s assertions,³ the Defence’s Request does raise valid grounds for reconsideration of the admission of P380. In accordance with the Court’s jurisprudence, the Defence submits that “[n]ew facts and circumstances” arose after the Impugned Decision was rendered,⁴ principally, during W04408’s cross-examination, which amounted to exceptional circumstances that necessarily require reconsideration to avoid injustice. Whereas the SPO cites case law in support of its arguments, the Defence avers that those authorities only serve to underscore the admissibility problems associated with P380. Similarly, the evidentiary material relied upon by the SPO to argue that P380 retains sufficient probative value wholly fail to achieve this goal.
3. The SPO’s Response fails to diminish the Defence’s position that P380 is an unreliable piece of evidence which should not factor into the Trial Panel’s deliberations. The Defence is fully within its rights to request reconsideration of the Impugned Decision,⁵ and need not wait until closing arguments or its final brief to address the weight to be given to P380; it is ripe for exclusion now.

¹ F01878, *Prosecution response to VESELI Defence request relating to Exhibit P380*, 23 October 2023, confidential (“SPO Response”).

² F01853, *Veseli Defence Request for Reconsideration of Decision to Admit P380*, 12 October 2023, confidential, (“Request”).

³ SPO Response, para. 1.

⁴ 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

⁵ Transcript, 6 September 2023, pp. 7347-7348 where Chapter 10 of the Report was admitted as P380.

II. SUBMISSIONS

4. First and foremost, the SPO submissions are largely unresponsive to the issues raised in the Request, as they fail to properly account for the cross-examination of W04408. Inasmuch as the SPO attempts to sidestep this issue and justify the item's admission on the basis of its authenticity,⁶ as well as pre-testimony submissions regarding its perceived relevance and probative value,⁷ the Defence maintains that the cross-examination of W04408 casts considerable doubt over its reliability and, therefore, its probative value. Whereas the Defence accepts that hearsay is generally permitted before this Court, there are limits to that general rule which simply cannot and should not be traversed by evidence which has been shown, in Court, to be demonstrably unreliable. P380 contains overtly compound and untestable hearsay which, if admitted, would significantly prejudice Mr Veseli's right to a fair trial.
5. In essence, the Response is predicated upon the flawed notion that the Defence "can argue argue in, *inter alia*, its final trial brief and closing arguments about the ultimate probative value of P380."⁸ However, such an approach effectively renders the rules of admissibility entirely superfluous. The Defence recalls that Rule 139 of the Rules clearly states that the Trial Panel will not consider evidence which is declared inadmissible. It stands to reason that the Defence is fully within its rights to argue against the reliability of evidence – and, by implication, its probative value – at this stage in the proceedings.
6. Second, in an attempt to further justify its Response, the SPO points to the admission of P380 in the *Milutinović* and *Limaj* cases; and the admission of portions of *Under Orders* in the *Dordević* case, as "underlining the case-by-case

⁶ SPO Response, para. 2.

⁷ SPO Response, paras 5-6.

⁸ SPO Response, para. 4.

nature of admissibility decisions.”⁹ Whereas the Defence agrees to the case-by-case nature of admissibility decisions, it nonetheless considers that the application of this principle in the abovementioned three cases warrants further explanation:

- a. The Defence Request addressed the admission of P380 in *Milutinović et al.*¹⁰ In brief, the applicable considerations in that case were starkly different to those raised in the context of the current proceedings, warranting a different outcome and demonstrating the propriety of the “case-by-case” approach.
- b. With respect to *Limaj et al.*, Defence Counsel in that case did not challenge the admissibility of P380. Its reasons, which may have been strategic, are unknown and irrelevant. In the instant proceedings, however, the Defence has made a well-founded challenge to P380’s admission, as set out in its Request. The absence of a legal challenge to the report in *Limaj* has no bearing on how the issue ought to be resolved in this case. Once again, the applicable considerations – in particular, the submissions before the Court – were entirely different, further demonstrating the propriety of the case-by-case approach advocated for by the SPO.
- c. As regards the decision to admit portions of *Under Orders* in *Dordević*, a report excluded in its entirety in *Milutinović et al.*,¹¹ the Defence observes that admissibility in that case was limited exclusively to those portions that the witness “personally drafted and researched and which concern

⁹ SPO Response, para. 11.

¹⁰ Request, fn. 28.

¹¹ DKV0441-0460, paras 22.

interviews [with witnesses] he himself conducted.”¹² The *Dordević* decision thus remained narrow and based upon the right of the Defence to test the reliability of the evidence tendered against the Accused. While the Defence does not endorse the approach adopted in *Dordević*, it nonetheless submits that there is a principled distinction between a decision to admit parts of *Under Orders* based on interviews that W04408 himself carried out; and a decision to admit P380 – none of which is based on W04408’s own interviews with victims and witnesses of crimes but is instead based predominantly on improperly sourced and compound hearsay. Even if it were accepted that the decision in *Dordević* to admit portions of *Under Orders* was correct, it in no way helps to establish that the admission of P380, before this Court, was correct because the methodology of the two reports is fundamentally different.¹³

7. In summary, the Defence agrees that admissibility decisions are to be made on a case-by-case basis, with reference to, *inter alia*, reliability and probative value in relation to the specific matters at issue in a given case. That being said, the principles of admission themselves remain the same, acting as constraints on the discretion of the decision maker. Given what is now known about P380’s methodology, it is clear that the Impugned Decision was incorrect.
8. Lastly, the SPO claims that the Defence overlooked two interviews carried out by HRW which are cited in P380.¹⁴ However, the Defence notes that the first of these concerns an interview with an HLC worker, which references allegations

¹² 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, para. 9.

¹³ As noted in the Request, at paragraph 22, W04408 conceded, in cross-examination, that the methodology employed in constructing P380 was different from the careful methodology which he described in his SPO statement – *C.f.*, Transcript, 7 September 2023, p. 7499 and 076135-076161, para. 13.

¹⁴ SPO Response, para. 8.

that the HLC could not corroborate and have nothing to do with this case.¹⁵ The inclusion of this allegation does not enhance the P380's admissibility. If anything, it underscores W04408's willingness to include, in P380, unverified allegations against the KLA. The second interview concerns a call with the ICRC regarding W03880's detention,¹⁶ which takes the SPO's case no further than the evidence already adduced from W03380 himself and W04408. To admit the entirety of P380 purely to allow the SPO this small piece of cumulative evidence on one very narrow point would be wholly disproportionate.

III. CONCLUSION

9. It is unnecessary and, in the Defence's submission, unreasonable, to defer the determination of whether this Report can be given *any* weight until final deliberations, given what is now on record regarding the manner in which this report was prepared. In light of the foregoing, the Defence maintains that the Impugned Decision to admit the report was in error, and ought to be reconsidered in order to avoid injustice. The SPO Response should be disregarded.

Word Count: 1,395



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¹⁵ See, P380, p. K0364874 (fn 152) which states that "Human Rights Watch heard **unconfirmed reports** that four armed ethnic Albanians dragged Ramadan Uka and his wife, both Roma, from their homes in Budisavci near Pee at the end of March 1998. According to a center researcher who spoke with Mr. Uka, the Albanians, whom Ramadan knew, beat him and raped his wife, **but his story could not be confirmed.**"

¹⁶ SPO Response, para. 8.

Counsel for Kadri Veseli

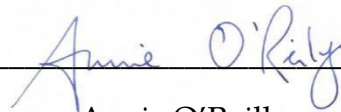
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