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 Guénaël 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 for Leave to Appeal Decision to Admit P959 and P960' (F02104)

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I. INTRODUCTION

1. The Request[1] should be dismissed. The Two Issues[2] submitted for certification fail to meet the standard[3] that is set forth in Article 45(2) of the Law[4] and Rule 77(2) of the Rules.[5]

2. The Two Issues concern the admissibility of two exhibits. The trier of fact is afforded considerable discretion in deciding whether evidence is admissible or not.[6] Thus, as recently held by the Appeals Panel in *Gucati and Haradinaj*, when addressing the standards of review for appeals against judgments, 'appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances'.[7] This principle also applies to interlocutory appeals. In turn, certification to appeal

[1] Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02104, 6 February 2024, Confidential ('Request').
[2] *See* Request, KSC-BC-2020-06/F02104, para.2, defining the 'First Issue' and 'Second Issue' (collectively, 'Two Issues').
[3] The applicable law has been set out in prior decisions. *See, for example,* Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 ('Thaçi Certification Decision'), paras 9-17; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, KSC-BC-2020-07/F00423, 8 November 2021, paras 11-21.
[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, unless otherwise specified.
[6] *See, for example,* ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para.533; ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 ('*Nyiramasuhuko* Appeal Decision'), para.5; ICTY, *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para.4.
[7] *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, para.35. *See also* ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para.11; ICTR, *Simba v. Prosecutor*, ICTR-01-76-A, Judgement, 27 November 2007, para.19.

admissibility decisions must be an 'absolute exception'.[8] The Two Issues do not warrant such exceptional relief.

II. SUBMISSIONS

A. THE TWO ISSUES ARE NOT APPEALABLE

3. The Request fails to articulate any appealable issue. Instead, it misinterprets the Rule 138(1) test for admissibility, disagrees with the Trial Panel's Decision,[9] and makes notable mischaracterisations.

4. As a threshold matter, Issue One, on its face, is not specific, discrete, or identifiable. It merely alleges that the Panel 'committed numerous errors' in the Decision, without specifying which error the Defence seeks leave to appeal.[10] Issue One should be dismissed on this basis alone. In any event, by reference to the arguments underpinning Issue One, it appears the error alleged concerns authorship of Exhibits P959 and P960, which also forms the basis for Issue Two. Accordingly, as the Two Issues overlap, they are addressed together below.

5. The Two Issues[11] rely on the erroneous premise that evidence of authorship is a pre-condition that must be met before the Rule 138(1) elements can be assessed.[12] The Defence wrongly asserts that if authorship is not established, a document 'simply cannot be either relevant or probative'.[13] Indeed, the Defence itself acknowledges that there are

[8] *See, for example,* ICTR, *Nyiramasuhuko* Appeal Decision, para.5; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC/F3328, Decision Denying 'Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158', 15 September 2017, para.11.
[9] *See* Second Oral Order of 30 January 2024, pp.12074-12075, which admitted P00959 and P00960 through W04870 ('Decision').
[10] Request, KSC-BC-2020-06/F02104, para.2a.
[11] Request, KSC-BC-2020-06/F02104, para.2.
[12] Request, KSC-BC-2020-06/F02104, paras 13-14.
[13] Request, KSC-BC-2020-06/F02104, paras 17, 27.

circumstances where authorship need not be established at the admissibility stage, and that this is a fact-specific inquiry.[14] When reaching the Decision, the Panel conducted such a fact-specific inquiry. Accordingly, and considering that no legal basis exists to support the argument that proof of authorship is a separate threshold requirement for admissibility,[15] the Two Issues are incapable of demonstrating an appealable error.

6. The Request suffers other incurable flaws. Despite its claim to the contrary,[16] the Defence merely disagrees with the Decision, rerunning already-considered arguments, including: that W04870 lacked knowledge of the origin, author, or creation of the documents;[17] that the alleged prejudice to the Defence could not be cured;[18] and that there is no indication of authorship on the documents themselves.[19] As an issue is not appealable if it is merely a question over which there is a disagreement or conflicting opinion,[20] these arguments fail.

7. The Defence also mischaracterises evidence on the record. For example, it asserts that during cross-examination, W04870 stated that the SPO 'failed to inform her' of the nature and character of P959 and P960 during her preparation session, asking her only to

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[14] Request, KSC-BC-2020-06/F02104, para.16. The Defence also indicates throughout the Request that, in addition to and potentially distinct from authorship, considerations of a document's 'origins' may be taken into account. *See* Request, KSC-BC-2020-06/F02104, paras 13, 21, 23, 32.

[15] *See* ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para.35, *citing* ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para.20. *See also* ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, 3 May 2006, para.402 ('There is no separate threshold requirement for the admissibility of documentary evidence').

[16] Request, KSC-BC-2020-06/F02104, para.11.

[17] Transcript, 29 January 2024, pp.11976-11977; Request, KSC-BC-2020-06/F02104, paras 20-22.

[18] Transcript, 29 January 2024, pp.11977-11978; Request, KSC-BC-2020-06/F02104, para.30.

[19] Transcript, 29 January 2024, pp.12058-12059, 11977-11978; Request, KSC-BC-2020-06/F02104, paras 26-28, 32-33.

[20] *See, for example*, Thaçi Certification Decision, KSC-BC-2020-06/F00172, para.11.

speak to names in either document.[21] In fact, the cited testimony transcript reflects that the SPO rightly made no suggestions to W04870 as to the nature, character or provenance of the documents, so as not to influence her evidence. Indeed, the SPO explored matters in the documents upon which there was a good-faith basis to believe the witness might have knowledge.

8. Another noteworthy mischaracterisation relates to evidence that corroborates P959 and P960. The Defence ventures way beyond the assertion that there is no corroboration in regard to authorship,[22] and categorically declares that both items 'are uncorroborated by other evidence'.[23] That is simply not the case. As the Panel noted in its Decision, both items are corroborated by, *inter alia*, other witness and documentary evidence, including exhibits P00010, P00104, P00738, and 1D00007.[24]

9. Finally, the Defence mischaracterises the nature of the Decision, alleging the Panel has already concluded that the two documents stemmed from the KLA.[25] Simply admitting documents into evidence does not support such a conclusive inference, nor does the wording of the Decision, which neutrally observes that the two items 'contain lists of names of persons who were allegedly detained by the KLA'.[26] The Panel's explicit statement that it will decide what weight to assign the documents *at the end of trial* further belies the Defence's claim.[27]

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[21] Request, KSC-BC-2020-06/F02104, para.22, *citing* Transcript, 30 January 2024, pp.12137-12140.
[22] Request, KSC-BC-2020-06/F02104, paras 19, 25.
[23] Request, KSC-BC-2020-06/F02104, para.29(e).
[24] Decision, p.12074.
[25] Request, KSC-BC-2020-06/F02104, para.29 ('Put simply, the inference which the SPO has invited the Panel to make, and to which the Panel duly acceded, is factually untenable.'). While the Defence has not directly articulated what inference has allegedly been made, the context of the paragraph (and, more generally, the Request) clearly conveys the Defence's intended meaning.
[26] Decision, p.12074.
[27] Decision, p.12075 (emphasis added).

10. In light of the above, the Two Issues are insufficient to demonstrate an appealable issue, and show that the Defence merely disagrees with the Decision and repeats arguments already considered by the Panel.

B. NEITHER OF THE TWO ISSUES WOULD HAVE A SIGNIFICANT IMPACT ON OR MATERIALLY ADVANCE THE PROCEEDINGS

11. The Request should also be dismissed because neither of the Two Issues meets the remaining requirements for leave to appeal. The First Issue is limited in scope, challenging only the admission of P00959 and P00960.[28] Since these exhibits constitute two pieces of evidence among many, granting certification on this Issue would not *significantly* affect the fair and expeditious conduct of the proceedings *or* the outcome of the trial. The First Issue thus fails the first prong of the test and stops any need for further analysis since the certification test is cumulative.

12. The showing for the Second Issue also fails. The Trial Panel correctly applied Rule 138(1), adhering to the interpretation of admissibility criteria that has already been clarified and consistently applied at this Court. This includes the principle that absolute proof of authenticity—for which authorship is just one factor—is not required for admissibility, but may impact the weight that the Panel gives the evidence in reaching its final judgment.[29]

13. Moreover, the Defence's assertion that appellate intervention 'would obviate the risk of any prejudice caused to the Accused'[30] is wholly speculative and premature. The

[28] Request, KSC-BC-2020-06/F02104, para.2a.
[29] *See, for example*, *Specialist Prosecutor v. Mustafa*, Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, KSC-BC-2020-05/F00281/RED, 13 December 2021, para.12; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Request for Admission of Items through the Bar Table and Related Matters, KSC-BC-2020-07/F00502, 17 December 2021, para.11.
[30] Request, KSC-BC-2020-06/F02104, para.35.

weight that the Panel will ultimately assign to P959 and P960 has not yet been established—and cannot be established until all the evidence is before the Panel for consideration at the end of proceedings. At that point, the Panel is required to issue a reasoned judgment, which will allow the Defence to verify the weight assigned these two exhibits, and whether, in its view, appellate review of the admission and use of P959 and P960 is warranted. As the Defence has not demonstrated that granting certification of the Second Issue at this juncture may materially advance the proceedings, it fails the test for certification.

14. As stated above, granting leave to appeal admissibility decisions should be the 'absolute exception'.[31] The Request does not meet the threshold for such exceptional relief.

III. CLASSIFICATION

15. This filing is classified confidentially pursuant to Rule 82(4). However, the SPO does not object to its reclassification as public.

[31] *See* para.2, *supra*. *See also* ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's request for reconsideration, 27 September 2004, para.10.

IV. RELIEF REQUESTED

16. For the reasons discussed above, the Request fails to meet the leave to appeal standard and should be rejected.

Word count: 1,785

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At The Hague, the Netherlands.