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
Date:	28 February 2024
Language:	English
Classification:	Public

Consolidated Prosecution response to Defence certification requests F02128 and F02131

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I. INTRODUCTION

1. The certification Requests from Thaçi, Selimi, Krasniqi,[1] and Veseli[2] should be rejected because they fail to meet the requirements for leave to appeal under Article 45 of the Law[3] and Rule 77 of the Rules.[4] Both Requests allege certain errors of law or fact in the application of Rule 153, when closer scrutiny reveals they merely disagree with the Trial Panel's reasonable and correct application of the Rule.[5] The Defence fails to show that appellate review would have any, let alone significant, impact on the conduct or outcome of the proceedings.

II. SUBMISSIONS

2. The Second Rule 153 Decision and the issues raised in the Requests all concern the admissibility of evidence. 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

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[1] Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 153 (F02111), KSC-BC-2020-06/F02128, 15 February 2024 ('Joint Defence Request').

[2] Veseli Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153 (F02111), KSC-BC-2020-06/F02131, 15 February 2024 ('Veseli Request'; with the Joint Defence Request, 'Requests').

[3] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

[4] 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.

[5] Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153 KSC-BC-2020-06/F02111, 8 February 2024 ('Second Rule 153 Decision').

[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,

to interlocutory appeals. In turn, certification to appeal admissibility decisions must be an 'absolute exception'.[8] The Requests fail to raise any issues that warrant such exceptional relief.

A. JOINT DEFENCE REQUEST

1. None of the Three Issues[9] are appealable

3. The Joint Defence Request presents the following First Issue as meriting appeal:[10]

> Whether the Trial Panel erred in law by applying an excessively low threshold for the admission of W04722 and W04816's evidence pursuant to Rule 153, contrary to the militating factors set out in Rule 153(1)(b) and the requirement for an "exceptional" basis warranting the admission of evidence set out in Rule 153(3).

4. In framing the First Issue, the Joint Defence Request asserts that the Panel adopted 'an excessively low threshold' and was 'too permissive' when admitting the evidence of W04772 and W04816.[11] No error of law is manifest here. Rather, in disputing the 'threshold' application, the Defence is merely disagreeing with the Panel's reasonable and correct conclusion that the evidence was admissible pursuant to Rule 153. The Joint Defence Request does not even attempt to substantiate its assertion that the Panel did not properly address the factors against admission.[12] However, the Panel did so at length, referencing and considering the Defence arguments in the context of Rule 153's criteria,[13] including assessing and rejecting the premise that W04772 is 'central' to the case,[14] which is the only concrete witness-related submission found within the First Issue. No concrete submission is made

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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.

[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] The term 'Three Issues' refers to the First Issue, Second Issue, and Third Issue as defined in the Joint Defence Request.

[10] Joint Defence Request, KSC-BC-2020-06/F02128, para.2.

[11] Joint Defence Request, KSC-BC-2020-06/F02128, paras 6-7.

[12] Joint Defence Request, KSC-BC-2020-06/F02128, para.7.

[13] Second Rule 153 Decision, KSC-BC-2020-06/F02111, paras 52-60 (W04722), 62-68 (W04816).

[14] Second Rule 153 Decision, KSC-BC-2020-06/F02111, para.59, *contra* Joint Defence Request, KSC-BC-2020-06/F02128, para.6.

regarding the Panel's assessment of W04816's evidence – the Defence merely disagrees with the Panel's reasoning and the result of admission.[15]

5. An appealable issue must be an identifiable topic for resolution, not merely a question over which there is a disagreement or a conflicting opinion.[16] Merely disagreeing with discretionary rulings of the Panel without demonstrating error is not sufficient.[17] The First Issue is therefore not appealable.

6. The Second Issue is presented as follows:[18]

> Whether the Trial Panel erred in law and/or fact and/or abused its discretion by finding that the additional topics proposed by the Defence for cross-examination of W04722 and W04816 did not warrant their attendance in court.

7. In essence, the Second Issue is a reformulation of the First Issue – alleged error that is supported only by disagreement with the result of admission. In developing the Second Issue, the Defence lists a series of topics that it seeks to cross-examine W04722 and W04816 on.[19] Yet the Panel expressly considered these submissions and did not deem them to be prohibitive of admission.[20] Importantly, the Defence disregards the Panel's finding that the evidence of both W04722 and W04816 is largely cumulative and corroborated by other witness evidence.[21]

8. Ultimately, the Second Issue is grounded in speculation: the Defence submits that W04722 will provide 'unique exculpatory evidence', an assertion that is not

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[15] Joint Defence Request, KSC-BC-2020-06/F02128, para.7.
[16] ICC, Appeals Chamber, *Situation in the DRC,* ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para.9.
[17] *See, similarly*, Decision on Thaçi, Veseli and Krasniqi Defence Request for Certification to Appeal the 'Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155', KSC-BC-2020-06/F01671, 13 July 2023, para.20; Decision on Joint Defence Request for Certification to Appeal Decisions F01534 and F01536, 16 June 2023, KSC-BC-2020-06/F01614, para.19 ('The Panel is of the view that the First Issue and Second Issue constitute mere disagreements with the Panel's exercise of its discretion.)
[18] Joint Defence Request, KSC-BC-2020-06/F02128, para.2.
[19] Joint Defence Request, KSC-BC-2020-06/F02128, paras 13-16.
[20] Second Rule 153 Decision, KSC-BC-2020-06/F02111, para.59 (W04772), para.67 (W04816).
[21] Second Rule 153 Decision, KSC-BC-2020-06/F02111, paras 58-60 (W04772), para.67 (W04816).

explained in any detail.[22] W04816 is similarly labelled 'unique' by the Defence, who complain of a lack of 'engagement' with their submissions.[23] However, the Panel provided a fully-reasoned decision in respect of both witnesses, measuring their evidence against Rule 153's criteria,[24] when considering and rejecting the Defence arguments which are merely repeated in the certification request. As with the First Issue, the Second Issue lacks precision and alleges error where there is only disagreement. It is not appealable.

9. Finally, the Third Issue is framed in the following terms:[25]

> Whether the Trial Panel erred in law and/or fact by admitting an allegedly intercepted communication as an associated exhibit to W04816's evidence.

10. Within this issue, the Defence repeats arguments around the document's authenticity and asserts that, in its view, the document is not 'indispensable or inseparable' because of the nature of W04816's responses during interview.[26] Yet this is not the standard. What matters is not the exact response of the witness, but whether the testimony 'would become incomprehensible or of lesser probative value' without the exhibit in question being tendered.[27] As previously held by the Panel: '[P]articularly relevant in this context is whether the proposed exhibit was discussed with the witness in the record which is being tendered in evidence.'[28] That is the case here. The Defence demonstrates no error in respect of the Panel's treatment of W04816's associated exhibits.

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[22] Joint Defence Request, KSC-BC-2020-06/F02128, para.13.
[23] Joint Defence Request, KSC-BC-2020-06/F02128, paras 16-18.
[24] Second Rule 153 Decision, KSC-BC-2020-06/F02111, paras 58-60 (W04772), paras 67-68 (W04816).
[25] Joint Defence Request, KSC-BC-2020-06/F02128, para.2.
[26] Joint Defence Request, KSC-BC-2020-06/F02128, paras 23-34.
[27] Public Redacted Version of Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380/RED, 16 March 2023 ('First Rule 154 Decision'), para.24.
[28] First Rule 154 Decision, KSC-BC-2020-06/F01380/RED, para.24. These findings on the law were incorporated by reference in the Second Rule 153 Decision. *See* Second Rule 153 Decision, KSC-BC-2020-06/F02111, para.8, fn.12.

11. In reality, the Defence arguments pertain to the *weight* to be assigned to the document, not its *admissibility* as an associated exhibit. The Panel has repeatedly held that it will 'assign weight to the evidence, taken as whole, and make determinations as to the relevant facts and issues at the end of the case and based on the totality of the evidence.'[29] Thus, the Third Issue mischaracterises the Panel's decision and is not an appealable issue arising from it.

2. The remaining leave to appeal criteria are not satisfied

12. Across the Three Issues, all the factors allegedly impacting the fair and expeditious conduct of the proceedings or the outcome of the trial do not withstand scrutiny.

13. First, contrary to the Defence submissions, the Panel's approach does not involve any 'reversal of the burden of proof.'[30] In actuality, the Panel considered the Defence arguments in respect of both witnesses in the application of its responsibility to render a reasoned decision,[31] having regard to the criteria laid down in Rule 153. The Panel made clear the onus is always on the moving party (here, the SPO).[32]

14. Second, in claiming the Panel's decision infringes the Defence's right to confront witnesses,[33] the Defence misunderstands the nature and purpose of Rule 153. The right to confront witnesses, as recognised in international human rights law, is not absolute.[34] It can be restricted by law if the limitation is directed at a legitimate aim and only so far as is strictly necessary to achieve that aim.[35] As previously noted by

[29] Public Redacted Version of Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153, KSC-BC-2020-06/F01904/RED, 3 November 2023 ('First Rule 153 Decision'), para.56.
[30] *Contra* Joint Defence Request, KSC-BC-2020-06/F02128, para.9.
[31] *See, similarly,* Decision on Joint Defence Request for Certification to Appeal Decision F01963, KSC-BC-2020-06/F02067, 19 January 2024, paras 20-22.
[32] Second Rule 153 Decision, KSC-BC-2020-06/F02111, para.59.
[33] Joint Defence Request, KSC-BC-2020-06/F02128, paras 19-21.
[34] First Rule 153 Decision, KSC-BC-2020-06/F01904/RED, para.13.
[35] *See* ICC, Appeals Chamber, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, para.78 ('*Al Hassan* Decision'),

the Panel, Rule 153 is designed to streamline and expedite proceedings where *viva voce* evidence is deemed to be unnecessary.[36]

15. Importantly, the application of such a rule requires 'a cautious and stringent assessment' to ensure the introduction of written testimony is not prejudicial or inconsistent with the rights of the accused.[37] The Panel's decision reflects such an assessment – a careful consideration of the arguments before it, having regard to the criteria of Rule 153. The approach taken by the Panel fully comports with the discretion granted to it by virtue of Rule 153 as a whole.

16. Third, the Defence contends that the Panel acted unfairly by admitting an associated exhibit that, in its view, lacks sufficient indicia of authenticity.[38] This argument is misplaced. The Panel held that the exhibit in question bears sufficient *indicia* of authenticity,[39] and the Defence merely disagrees. Moreover, the Panel expressly considered that admitting W04816's evidence – including the associated exhibits – did not contravene Rule 138(1).[40] No misapplication of this rule is evident.[41] More generally, however, admitting a document associated with prior recorded testimony under Rule 153 in no way precludes the Defence from challenging, *inter alia*, its probative value or disputing its use on any other ground.[42] Admission does not pre-judge what *weight* the Panel will later assign to it during its final deliberations.[43]

17. Finally, as to whether resolution of the above Three Issues would materially advance the proceedings, the Defence fails to offer any convincing argument in this

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citing to ECtHR, *Van Mechelen and others v. The Netherlands*, Application nos. 21363/93, 21364/93, 21427/93 and 22056/93, Judgment, 23 April 1997, para.58.

[36] First Rule 153 Decision, KSC-BC-2020-06/F01904/RED, para.13.

[37] *Al Hassan* Decision, para.84.

[38] Joint Defence Request, KSC-BC-2020-06/F02128, paras 26-27.

[39] Second Rule 153 Decision, KSC-BC-2020-06/F02111, para.66.

[40] Second Rule 153 Decision, KSC-BC-2020-06/F02111, paras 67-68.

[41] *Contra* Joint Defence Request, KSC-BC-2020-06/F02128, para.27.

[42] *See, similarly*, ICC, Trial Chamber X, *Prosecutor v. Ongwen*, ICC-02/04-01/15-596-Red, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, paras 36, 111.

[43] First Rule 153 Decision, KSC-BC-2020-06/F01904/RED, para.56.

respect, instead seeking 'legal certainty' as to how Rule 153 should be interpreted and applied.[44] However, the law is clear, and the Panel reasonably and correctly exercised its discretion in its application of Rule 153. Appellate review is not warranted.

B. VESELI REQUEST

18. Veseli's First and Second Issues[45] mirror those presented in the Joint Defence Response. Veseli similarly claims that the Panel's decision incorrectly applied the test for Rule 153,[46] reversed the burden of proof,[47] insufficiently engaged with Defence submissions,[48] and violated his right to confront 'central' witnesses for the purpose of cross-examination.[49]

19. For the reasons already advanced above, Veseli's Issues equally fail the test for certification. Disagreeing with the Panel's reasonable exercise of discretion without demonstrating appealable error does not meet the threshold required for appellate review. Furthermore, contrary to Veseli's submissions,[50] the Panel did not hold that relevance and *prima facie* authenticity alone was determinative of admission, but measured the proposed testimony against the totality of Rule 153's criteria.[51]

20. By claiming the Panel did not sufficiently engage with Defence submissions,[52] Veseli equally fails to engage with the overall reasoning of the Panel's decision. The Panel is not required to specifically reference every Defence submission in order to render a sound, reasoned decision. In this instance, the Panel considered the materiality of the issues in dispute and whether the Defence should be given an

[44] Joint Defence Request, KSC-BC-2020-06/F02128, paras 10, 22, 29.
[45] Veseli Request, KSC-BC-2020-06/F02131, para.2.
[46] Veseli Request, KSC-BC-2020-06/F02131, paras 7-9.
[47] Veseli Request, KSC-BC-2020-06/F02131, paras 10-11.
[48] Veseli Request, KSC-BC-2020-06/F02131, paras 12-13.
[49] Veseli Request, KSC-BC-2020-06/F02131, paras 14-24.
[50] Veseli Request, KSC-BC-2020-06/F02131, para.8.
[51] Second Rule 153 Decision, KSC-BC-2020-06/F02111, paras 58-60 (W04772), 67-68 (W04816).
[52] Veseli Request, KSC-BC-2020-06/F02131, paras 12-13.

opportunity to explore such issues.[53] Moreover, the Panel elsewhere denied the admission of three witnesses pursuant to Rule 153, so the Defence could be given the opportunity to obtain additional oral evidence on certain topics.[54] This demonstrates that the Panel was alive to – and carefully implemented – the balancing exercise required by Rule 153(1)(a) and (b).

21. In seeking 'broad deference' to cross-examine witnesses to conduct their case 'as they wish', the Veseli Request is effectively a challenge to Rule 153 more generally, rather than the manner it was applied in the Panel's decision.[55] As submitted above, the right to confront witnesses is not absolute.[56] Following Veseli's logic would lead to a situation whereby any objection to proposed Rule 153 testimony would result in that witness testifying orally. To accept this premise would defeat the very object and purpose of Rule 153, rendering it obsolete.[57]

III. RELIEF REQUESTED

22. For the foregoing reasons, the Requests should be rejected.

Word count: 2733

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Specialist Prosecutor

Wednesday, 28 February 2024

At The Hague, the Netherlands.

[53] Second Rule 153 Decision, KSC-BC-2020-06/F02111, paras 52-60 (W04772), 61-68 (W04816).
[54] Second Rule 153 Decision, KSC-BC-2020-06/F02111, paras 32, 42, 75.
[55] *See, similarly*, ICC, Trial Chamber VI, *Prosecutor v. Said*, ICC-01/14-01/21-562, Decision on the Defence's Request for Leave to Appeal the 'Decision on the Prosecution's First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules' (ICC-01/14-01/21-507-Conf), 28 November 2022, paras 26-30.
[56] First Rule 153 Decision, KSC-BC-2020-06/F01904/RED, para.13; *Al Hassan* Decision, para.78.
[57] *See, similarly*, ICC, Appeals Chamber, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-744, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, para.74.