



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2020-06

**The 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:** Fidelma Donlon

**Date:** 11 October 2024

**Language:** English

**Classification:** Public

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**Decision on Joint Defence Request for Certification to Appeal the Reasons for  
Admission of W03780's Statements and Related Order (F02580)**

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**Specialist Prosecutor**

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**TRIAL PANEL II** (“Panel”), pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 28 and 29 August 2024, W03780 (“Witness”) testified in these proceedings.<sup>1</sup>
2. On 29 August 2024, the Specialist Prosecutor’s Office (“SPO”) tendered three statements of the Witness (“Statements”) for admission into evidence,<sup>2</sup> and the Defence teams for the four Accused (“Defence”) made oral submissions objecting to the admission of the Statements.<sup>3</sup>
3. On the same day, the Panel admitted the Statements into evidence as P01581 (“2010 Statement”), P01582 (“2006 Statement”), and P01583 (“2018 Statement”), and indicated that the written reasons underlying its ruling would be provided subsequently.<sup>4</sup>
4. On 17 September 2024, the Panel issued reasons for admitting the Statements into evidence (“Impugned Decision”).<sup>5</sup>
5. On 25 September 2024, the Defence filed a joint request for leave to appeal the Impugned Decision (“Request”).<sup>6</sup>

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<sup>1</sup> Transcripts of Hearings, 28-29 August 2024, confidential.

<sup>2</sup> Transcript of Hearing, 29 August 2024, pp. 19297-19299, 19303-19307, confidential.

<sup>3</sup> Transcript of Hearing, 29 August 2024, pp. 19299-19303, 19307-19308, confidential.

<sup>4</sup> Transcript of Hearing, 29 August 2024, pp. 19308-19309, confidential.

<sup>5</sup> F02580, Panel, *Reasons for Admission of W03780’s Statements and Related Order*, 17 September 2024, confidential (a public redacted version was issued on the same day, F02580/RED).

<sup>6</sup> F02597, Specialist Counsel, *Joint Defence Request for Certification to Appeal the Reasons for Admission of W03780’s Statement and Related Order (F02580)*, 25 September 2024, confidential.

6. On 7 October 2024, the SPO responded to the Request ("Response").<sup>7</sup>
7. The Defence indicated that it will not reply to the Response.<sup>8</sup>

## II. SUBMISSIONS

8. The Defence requests leave to appeal the Impugned Decision in respect of the following three issues:

1. Whether the Trial Panel erred in law in concluding that the 2006 Statement constituted a prior written statement for the purposes of Rule 143(2) ("First Issue");
2. Whether the Trial Panel erred in fact or law by neglecting to weigh the prejudicial effect of admitting the 2006 Statement against its probative value, as required under Rule 138 ("Second Issue"); and
3. Whether the 2018 Statement can be admitted pursuant to Rule 143(2) when it was only used to refresh the memory of the witness ("Third Issue").<sup>9</sup>

9. The Defence submits that the issues presented satisfy the test for certification as: (i) they originate from the Impugned Decision and constitute discrete and identifiable legal issues rather than mere disagreements;<sup>10</sup> (ii) they affect the fair and expeditious conduct of the proceedings or the outcome of the trial;<sup>11</sup> and (iii) their immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>12</sup>

10. The SPO responds that the Request should be rejected because the three issues fail to meet the requirements for certification under Article 45 and Rule 77.<sup>13</sup> The SPO submits that the Defence: (i) fails to show that appellate review would have

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<sup>7</sup> F02617, Specialist Prosecutor, *Prosecution Response to 'Joint Defence Request for Certification to Appeal the Reasons for Admission of W03780's Statement and Related Order' (F02580)*, 7 October 2024, confidential (a public redacted version was filed on the same day, F02617/RED).

<sup>8</sup> See Correspondence 624.

<sup>9</sup> Request, paras 2, 25.

<sup>10</sup> Request, paras 6, 11, 17, 21.

<sup>11</sup> Request, paras 6, 12-13, 18-19, 22-23.

<sup>12</sup> Request, paras 6, 14, 20, 24.

<sup>13</sup> Response, paras 1, 7-8, 10.

any, let alone significant, impact on the conduct or outcome of the proceedings;<sup>14</sup> and (ii) fails to demonstrate how an immediate resolution by the Court of Appeals may materially advance the proceedings.<sup>15</sup> According to the SPO, the Request: (i) attempts to relitigate the admission of the 2016 Statement and 2018 Statement; (ii) mischaracterises the Impugned Decision; (iii) misinterprets the Specialist Chambers' ("SC") legal framework; and (iv) misstates the evidence.<sup>16</sup> Lastly, the SPO argues that the Panel correctly applied Rules 138(1) and 143(2)(c),<sup>17</sup> and that the Defence merely disagrees with the Impugned Decision.<sup>18</sup>

### III. APPLICABLE LAW

11. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met. Rule 77(2) provides that:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

12. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.<sup>19</sup>

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<sup>14</sup> Response, para. 7.

<sup>15</sup> Response, para. 8.

<sup>16</sup> Response, para. 3.

<sup>17</sup> Response, para. 7.

<sup>18</sup> Response, para. 3. *See also* Response, paras 4-5.

<sup>19</sup> *See e.g.* F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. *See also* F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

#### IV. DISCUSSION

13. In the Impugned Decision, the Panel found that the Statements constitute a record, in whatever form, of what the Witness said in respect of facts and circumstances relevant to the case in the context of a criminal investigation or proceedings.<sup>20</sup> The Panel was therefore satisfied that the Statements fell under the definition of ‘written statement’ pursuant to the SC legal framework as consistently applied by the Panel.<sup>21</sup> The Panel also found that the Statements are *prima facie* relevant, authentic, and have *prima facie* probative value which is not outweighed by their prejudicial effect.<sup>22</sup> The Panel therefore found that the Statements are admissible pursuant to Rules 138(1) and 143(2)(c).<sup>23</sup>

##### A. FIRST ISSUE

14. The Defence challenges the Panel’s application of the definition of ‘statement’ to the 2006 Statement insofar as it submits that it is an analytical document, undated, unsigned, written by an investigator, which purports to analyse one or more prior discussions with a person whose real name is not provided but would be the Witness.<sup>24</sup> The Defence also contends that there are clear issues with the 2006 Statement’s authenticity and reliability.<sup>25</sup> The Defence argues that the definition of ‘statement’ and, in turn, the admissibility of a prior inconsistent

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<sup>20</sup> Impugned Decision, para. 10, referring to F02130, Panel, *Decision on the Thaçi Defence’s Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)*, 15 February 2024, para. 15. See also F01963, Panel, *Decision on Admission of Documents Shown to W04769*, 27 November 2023, para. 15, fn. 35; F01852, Panel, *Decision on Krasniqi Defence Request to Admit Additional Document Related to W02153*, 11 October 2023, para. 8; F01380, Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, confidential, paras 12, 26 (a public redacted version was issued on 7 November 2023, F01380/RED); KSC-BC-2020-07, F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table*, 29 September 2021, paras 84-87.

<sup>21</sup> Impugned Decision, para. 10.

<sup>22</sup> Impugned Decision, paras 11-16.

<sup>23</sup> Impugned Decision, para. 17.

<sup>24</sup> Request, paras 7-11.

<sup>25</sup> Request, para. 11.

statement, for the truth of its contents, pursuant to Rule 143(2) inevitably affects the fairness of proceedings, the principle of orality and the ability of the Defence to confront evidence, and the outcome of the trial.<sup>26</sup> The Defence also submits that resolution of the First Issue by the Court of Appeals would materially advance the proceedings by providing legal certainty as to the interpretation of the rules governing the admission of written evidence.<sup>27</sup>

15. The SPO responds that the First Issue goes to the merits of the Impugned Decision and therefore beyond the scope of the leave to appeal criteria.<sup>28</sup> The SPO argues that the Defence merely disagrees with the Panel's finding that the 2006 Statement constitutes a statement under the SC's legal framework.<sup>29</sup> The SPO avers that the Defence's arguments relating to the authenticity, reliability, and probative value of the 2006 Statement do not concern its qualification as a statement.<sup>30</sup>

16. As mentioned above, in the Impugned Decision, the Panel found that the Statements fall under the definition of 'statement' pursuant to the SC's legal framework as they constitute a record, in whatever form, of what the Witness said in respect of facts and circumstances relevant to the case in the context of a criminal investigation or proceedings.<sup>31</sup> In doing so, the Panel resorted to and applied the definition of 'statement' consistent with its established jurisprudence.<sup>32</sup> The Panel further found the Statements, including the 2006 Statement, to be *prima facie* relevant, authentic, probative, and not prejudicial, and stressed that it will take factors such as the Statements' claimed inaccuracy into proper account when assessing the weight to be given to the Statements in light of the totality of the evidence.<sup>33</sup> The Defence fails to explain why the Panel should

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<sup>26</sup> Request, paras 12-13.

<sup>27</sup> Request, para. 14.

<sup>28</sup> Response, para. 4.

<sup>29</sup> Response, para. 4.

<sup>30</sup> Response, para. 4.

<sup>31</sup> See above para. 13.

<sup>32</sup> See above footnote 20.

<sup>33</sup> See above para. 13. See also Impugned Decision, para. 14.

have applied a different test or why the said standard is erroneous. In particular, the Panel cannot agree that a different definition of the notion of ‘statement’ should apply under Rule 143(2) than in respect of Rules 153-155. The Panel is therefore of the view that the First Issue constitutes a mere disagreement with the Panel’s application of the definition of ‘statement’ to the 2006 Statement, and with the ultimate admission of such statement into evidence.<sup>34</sup> In light of the above, the Panel finds that the Defence has failed to establish that the First Issue constitutes an issue emanating from the Impugned Decision.

17. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the First Issue. The request for certification to appeal the First Issue is therefore rejected.

#### B. SECOND ISSUE

18. The Defence contends that the Panel erred in its balancing of the 2006 Statement’s probative value against its alleged prejudicial effect.<sup>35</sup> In particular, the Defence submits that the Impugned Decision failed to: (i) take into account the low probative value of the 2006 Statement;<sup>36</sup> (ii) engage with the prejudice to the Defence;<sup>37</sup> and (iii) consider whether this prejudice outweighed probative value.<sup>38</sup> The Defence further argues that questions relating to the evaluation of prejudice by their nature affect the fair conduct of proceedings and outcome of trial.<sup>39</sup> The Defence also submits that immediate resolution of the Second Issue by the Court of Appeals will materially advance the proceedings.<sup>40</sup>

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<sup>34</sup> *Contra* Request, para. 11.

<sup>35</sup> Request, para. 16.

<sup>36</sup> Request, para. 16(i).

<sup>37</sup> Request, para. 16(ii).

<sup>38</sup> Request, para. 16(iii).

<sup>39</sup> Request, paras 18-19.

<sup>40</sup> Request, para. 20.

19. The SPO responds that the Defence fails to demonstrate that the Second Issue is appealable.<sup>41</sup> The SPO argues that the Defence: (i) ignores that the Panel considered that the 2006 Statement does not purport to be a verbatim or exhaustive record; (ii) was able to effectively cross-examine the Witness; (iii) merely disagrees with the Panel's assessment; and (iv) distorts the Panel's reasoning that the prejudicial effect of the 2006 Statement does not outweigh its probative value.<sup>42</sup>

20. As mentioned above, in the Impugned Decision, the Panel found that the Statements are relevant, *prima facie* authentic, and have *prima facie* probative value, which is not outweighed by their prejudicial effect.<sup>43</sup> In particular, the Panel found that: (i) the Witness fully testified as to the events recounted in his Statements, including the 2006 Statement, and did not deny that he gave any of the Statements; and (ii) the Defence had ample opportunity to cross-examine the Witness regarding every aspect of his evidence that it deemed pertinent, including in respect of the accuracy of his Statements and the way they were taken.<sup>44</sup> The Panel was therefore satisfied that the alleged uniqueness of the Statements, including the 2006 Statement, as well as their claimed inaccuracy did not bar their admission into evidence.<sup>45</sup> In addition, as mentioned above, the Panel stressed that it will take such factors into proper account when assessing the weight to be given to the Statements in light of the totality of the evidence.<sup>46</sup> It follows that, contrary to the Defence's submissions,<sup>47</sup> the Panel did not neglect to weigh the prejudicial effect of admitting the 2006 Statement against its probative value, as required under Rule 138. The Panel is therefore of the view that the Second Issue misrepresents the Panel's findings and constitutes a mere disagreement with them.<sup>48</sup> In light of

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<sup>41</sup> Response, para. 5.

<sup>42</sup> Response, para. 5.

<sup>43</sup> *See above* para. 13.

<sup>44</sup> Impugned Decision, para. 14.

<sup>45</sup> Impugned Decision, para. 14.

<sup>46</sup> Impugned Decision, para. 14. *See also above* para. 16.

<sup>47</sup> Request, para. 16.

<sup>48</sup> *Contra* Request, para. 17.



the above, the Panel finds that the Defence has failed to establish that the Second Issue constitutes an issue emanating from the Impugned Decision.

21. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Second Issue. The request for certification to appeal the Second Issue is therefore rejected.

### C. THIRD ISSUE

22. The Defence submits that the SPO did not seek permission to put the 2018 Statement to the Witness as an inconsistent statement, and the document was put to the Witness to refresh his memory pursuant to Rule 143(1) and not as an inconsistent statement pursuant to Rule 143(2)(c).<sup>49</sup> The Defence challenges whether a document used to refresh the Witness' memory can then be admitted pursuant to Rule 143(2)(c).<sup>50</sup> The Defence further argues that: (i) the circumstances in which a prior statement can be used or admitted affect the fair and expeditious conduct of proceedings;<sup>51</sup> and (ii) authoritative guidance from the Court of Appeals on the correct interpretation of Rule 143 will materially advance proceedings.<sup>52</sup>

23. The SPO responds that the Third Issue: (i) does not arise from the Impugned Decision; and (ii) misinterprets the SC's legal framework.<sup>53</sup> In particular, the SPO argues that the Defence misinterprets the meaning of 'prior inconsistent statement' under Rule 143(2)(c).<sup>54</sup> The SPO submits that, while it did not formally indicate that it intended to show the 2018 Statement to refresh the Witness's recollection, it clearly indicated during the Witness's examination that, unless

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<sup>49</sup> Request, para. 21.

<sup>50</sup> Request, para. 21.

<sup>51</sup> Request, para. 23.

<sup>52</sup> Request, para. 24.

<sup>53</sup> Response, para. 6.

<sup>54</sup> Response, para. 6.

noted otherwise, use of prior statements would be to explore potential inconsistencies.<sup>55</sup>

24. As mentioned above, in the Impugned Decision, the Panel found that the Statements are admissible pursuant to Rules 138(1) and 143(2)(c).<sup>56</sup> In particular, the Panel noted that the Statements, including the 2018 Statement, were extensively used by the SPO and the Selimi Defence, in the course of their examination of the Witness, in order, *inter alia*, to confront him with what was being suggested were inconsistencies and changes in his description of various circumstances.<sup>57</sup> The Panel was therefore satisfied that the three Statements, including the 2018 Statement, fall within the scope of Rule 143(2)(c) and are relevant to the credibility of the Witness and reliability of his evidence.<sup>58</sup> Rule 143(2)(c) only concerns “whether the witness has, at any time, made a prior inconsistent statement”. It does not limit the category of statements that can be admitted pursuant to that Rule to those that have been shown to be inconsistent because of one reason or another, nor is it limited to statements used to impugn the credibility of a witness. The narrower reading of the Rule proposed by the Defence has no basis in the Rules. The Panel is therefore of the view that the Third Issue misrepresents the Panel’s findings and constitutes a mere disagreement with those findings.<sup>59</sup> In light of the above, the Panel finds that the Defence have failed to establish that the Third Issue constitutes an issue emanating from the Impugned Decision.

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<sup>55</sup> Response, para. 6.

<sup>56</sup> See above para. 13.

<sup>57</sup> Impugned Decision, para. 11, referring to, *inter alia*, Transcript of Hearing, 29 August 2024, pp. 19293-19296.

<sup>58</sup> Impugned Decision, para. 11.

<sup>59</sup> *Contra* Request, para. 21.

25. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Third Issue. The request for certification to appeal the Third Issue is rejected.

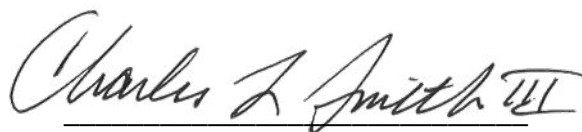
V. CLASSIFICATION

26. The Panel notes that the Request was filed confidentially. The Panel orders the Defence to file a public redacted version or request the reclassification of the Request by **Friday, 25 October 2024**.

VI. DISPOSITION

27. For the above-mentioned reasons, the Panel hereby:

- a) **REJECTS** the Request; and
- b) **ORDERS** the Defence to file a public redacted version or request the reclassification of the Request by **Friday, 25 October 2024**.



**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Friday, 11 October 2024

At The Hague, the Netherlands.