

**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 Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi  
Specialist Counsel for Kadri Veseli  
Specialist Counsel for Jakup Krasniqi

**Date:** 11 December 2024

**Language:** English

**Classification:** Confidential

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**Thaçi, Veseli and Krasniqi Defence Request for Certification to Appeal the First Oral Order of 4 December 2024**

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## I. INTRODUCTION

1. In accordance with Article 45(2) of the Law,<sup>1</sup> and Rule 77(2) of the Rules,<sup>2</sup> the Defence for Messrs. Hashim Thaçi, Kadri Veseli and Jakup Krasniqi (“Defence”) file this request for certification to appeal the Trial Panel’s first oral order of 4 December 2024, allowing the SPO to use a document<sup>3</sup> disclosed late and pursuant to Rule 102(3) during re-examination.<sup>4</sup>

2. The Defence submits that the Trial Panel erred in this decision, and these errors warrant the intervention of the Court of Appeals Panel. The Impugned Decision is not only inconsistent with a prior procedural ruling of the Trial Panel,<sup>5</sup> but also has created an erroneous backdoor for the SPO to use materials that were disclosed in violation of the KSC’s statutory framework and governing deadlines. Certification is therefore sought to appeal two issues, which satisfy the requirements of Article 45(2) and Rule 77(2) (collectively, “Issues”):

**Issue One:** Whether the Impugned Decision erroneously establishes a procedure whereby the SPO’s failure to disclose pursuant to Rule 102(1)(b) can be circumvented by disclosure under Rule 102(3), even when such disclosure has not been requested by the Defence, in violation of the plain terms of Rule 102(3) (“First Issue”).

**Issue Two:** Whether by allowing the use of a document disclosed in a manner inconsistent with the Rules, without the SPO having demonstrated good cause for a late amendment to its Exhibit List or having offered any submissions on

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

<sup>3</sup> 123941-123949 (“Document”).

<sup>4</sup> KSC-BC-2020-06, Transcript of Hearing (Oral Order), 4 December 2024, confidential, p. 23924, line 21 – p. 23926, line 20 (“Impugned Decision”).

<sup>5</sup> See, e.g., KSC-BC-2020-06/F01352, Trial Panel II, *Decision on Prosecution Request to Amend the Exhibit List and Related Matters*, 8 March 2023 (“8 March Decision”), para. 20.

why it did not seek to amend its Exhibit List earlier in the exercise of its due diligence, the Trial Panel has erred in issuing directly contradictory procedural decisions (“Second Issue”).

## II. PROCEDURAL BACKGROUND

3. On 3 December 2024 at 13.55, the SPO released a further presentation queue of items to be used during re-examination of W04401. This queue included two items disclosed pursuant to Rule 103, and three items disclosed pursuant to Rule 102(3), including the Document. Most relevantly, the Document had only been disclosed to the Defence earlier that morning.<sup>6</sup> At the time it was disclosed, the Defence for Mr Hashim Thaçi (“Thaçi Defence”) had already completed its cross-examination of W04401.

4. The Thaçi Defence objected to the inclusion and use of the Document, on the basis that: (i) its disclosure pursuant to Rule 102(3) was being used as a back door to circumvent a disclosure violation by the SPO; (ii) the SPO could and should have disclosed the Document earlier in the exercise of its due diligence, and had failed to explain its late disclosure, which was prejudicial to the Defence; (iii) the Document was directly relevant to matters that had been raised with W04401 in his preparation session and during direct examination, meaning it was not the case that evidence elicited during cross-examination triggered its use.<sup>7</sup> These objections were supported by the other defence teams.<sup>8</sup>

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<sup>6</sup> See Disclosure Package 1516, disclosed pursuant to Rule 102(3) at 10.00am on 3 December 2024.

<sup>7</sup> KSC-BC-2020-06, Transcript of Hearing (Procedural Matters), 3 December 2024 (“Transcript of 3 December 2024”), pp. 23265-23269.

<sup>8</sup> Transcript of 3 December 2024, p. 23267.

5. The Panel determined that these (and other) objections would be considered overnight, and a ruling would be issued the following morning. In the interim, the SPO was to proceed with re-examination without using the documents in question.<sup>9</sup>

6. On 4 December 2024, the Panel issued an oral order,<sup>10</sup> in which it was found that “in light of the reactive nature of redirect examination, the calling party is allowed to use documents, including Rule 102(3) documents, which are not on its exhibit list, provided they have been disclosed to the Defence sufficiently in advance.”<sup>11</sup> The Panel also found that no prejudice would arise to the Defence by the SPO using a document of limited length, which the SPO did not intend to tender for admission. The SPO was therefore authorised to use the Document during the re-examination of W04401, and did so.<sup>12</sup>

### III. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

7. The Defence incorporates by reference its previous submissions on the legal standard for certification to appeal.<sup>13</sup>

#### A. THE ISSUES ARE APPEALABLE ISSUES

8. The **First Issue** concerns the Trial Panel’s interpretation of the statutory framework governing disclosure at the KSC. Should the SPO have wished to use the Document during the presentation of its case, it was required to have disclosed it to the Defence pursuant to Rule 102(1)(b), within the time limit set by the Panel, and no later than thirty (30) days prior to the opening of the SPO’s case. Instead, the

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<sup>9</sup> Transcript of 3 December 2024, p. 23278, lines 5-16.

<sup>10</sup> See, Impugned Decision.

<sup>11</sup> Impugned Decision, p. 2.

<sup>12</sup> KSC-BC-2020-06, Transcript of Hearing (W04401 Testimony), 4 December 2024, pp. 23310-23313.

<sup>13</sup> KSC-BC-2020-06/F02706, *Joint Defence Request for Leave to Appeal Third Oral Order of 31 October 2024*, 11 November 2024, public, paras. 3-5.

Document was disclosed the morning of its intended use, purportedly pursuant to Rule 102(3), which governs SPO disclosure of materials “upon request” of the Defence, which are “deemed by the Defence to be material to its preparation”. Despite the Defence not having requested disclosure of the Document, the SPO was authorised by the Trial Panel to use it during its re-examination of W04401.<sup>14</sup>

9. The issue identified is whether in doing so, the Trial Panel erroneously established a procedure whereby the SPO’s failure to disclose pursuant to Rule 102(1)(b) can be circumvented by disclosure under Rule 102(3), even when such disclosure has not been requested by the Defence, despite the plain terms of this rule. Allowing the SPO to use Rule 102(3) as a means of late disclosure of documents that it intends to use in support of *the SPO’s case* has also allowed the SPO to escape the potential sanctions envisaged in Rule 110 for non-compliance with disclosure obligations. As such, the **First Issue** satisfies the test for certification. It originates directly from the Impugned Decision and is sufficiently specific and identifiable. The Defence is not merely disagreeing with the way the Trial Panel exercised its discretion or decided a particular issue.<sup>15</sup> Rather, the Defence is raising an identifiable dispute over a concrete question of statutory interpretation and application, the resolution of which is essential for determination of the matters arising in the judicial cause under examination. The Defence has articulated a clear issue for resolution from the Court of Appeals Panel, that emanates from the ruling concerned and does not amount to an abstract or hypothetical question.<sup>16</sup> It is concrete, and appealable.

10. In addition to not having been disclosed in a manner consistent with the applicable framework, the Document was not included in the SPO Exhibit List by the

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<sup>14</sup> Impugned Decision, p. 3.

<sup>15</sup> *Prosecutor v. Guçati & Haradinaj*, KSC-BC-2020-07/F00169, *Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, 1 April 2021, para. 12; KSC-BC-2020-06/F00172, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, para. 11.

<sup>16</sup> *Ibid.*

17 December 2021 deadline, as required. In authorising the SPO's late disclosure of other materials in March 2023, the Trial Panel held that "should the SPO foresee that it will use any such material during witness testimonies, including, for example, to refresh a witness's recollection or, with leave of the Panel, to confront an adverse witness, the obligation to seek the Panel's authorisation to amend the Exhibit List would be triggered. The SPO would **be required to provide timely notice and show good cause** for such late amendment and to explain, in particular, **why in the exercise of its due diligence, the SPO did not seek leave to amend its exhibit list at an earlier point in time.**"<sup>17</sup> The Trial Panel accordingly set clear criteria for the SPO's use of documents during the examination of its witnesses which had been disclosed outside the applicable deadlines, and has consistently applied this criteria when confronted with numerous subsequent SPO applications to amend the Exhibit List.<sup>18</sup>

11. The Document was disclosed the morning of its intended use. No explanation was offered by the SPO as to why good cause existed for the late amendment, or why in the exercise of its due diligence the Document was not included on the SPO Exhibit List at an earlier time. As submitted at the time by the Defence, the SPO could not meet these criteria: this Document is not new (it is an interview conducted in 2001) and was discoverable at any time through a simple open-source search. These Defence submissions remain unchallenged by the SPO.

12. As such, the identified appealable **Second Issue** is whether by allowing the use of a document disclosed in a manner inconsistent with the Rules, without the SPO having demonstrated the previously articulated criteria, the Trial Panel has erred in issuing directly contradictory procedural decisions. Again, this is not merely a

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<sup>17</sup> 8 March Decision, para. 20 (emphasis added).

<sup>18</sup> See, e.g., a recent decision granting an SPO request: KSC-BC-2020-06/F02501, Trial Panel II, *Decision on Prosecution Request to Amend the Exhibit List (F02279) and on Thaçi Defence Motion for Exclusion of Materials in Limine*, 22 August 2024, confidential.

question over which there is disagreement or conflicting opinion between the Trial Panel and the Defence, but is an identifiable topic, the resolution of which is essential for determination of the matters arising in the judicial cause under examination. The Defence has articulated a discrete issue for resolution by the Court of Appeals Panel that emanates from the ruling concerned. This is neither an abstract question or hypothetical concern. The **Second Issue** is appealable.

B. THE ISSUES SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

13. The Issues significantly affect the fair and expeditious conduct of the proceedings. As regards **Issue 1**, should the SPO have wished to use the Document during the presentation of its case, it was required to have disclosed it to the Defence pursuant to Rule 102(1)(b). The Document is from the early 2000s. It purports to be an interview with a person who was on the SPO's List of Witnesses from the beginning.<sup>19</sup> It was directly relevant to matters that had been raised with W04401 in his preparation session and during direct examination,<sup>20</sup> meaning it cannot credibly be argued that evidence elicited by the Defence during cross-examination triggered its use. In these circumstances, the late disclosure of this Document purportedly through Rule 102(3), when it had not been requested by the Defence, raises immediate and significant issues of fairness, and impinges on the right of the accused to adequate time and resources and to be given notice of the case against him.<sup>21</sup>

14. The Trial Panel took note of the timing of its disclosure, but reasoned that the Document "is very limited in length", and that "the SPO has indicated that it wishes

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<sup>19</sup> KSC-BC-2020-06/F00631/RED/A02/COR/CONF/RED, *Annex 2 – Confidential Redacted List of Witnesses*, 21 December 2021.

<sup>20</sup> See, e.g., 123875-123887, paras. 32-35; KSC-BC-2020-06, Transcript of Hearing (W04401 Testimony), 2 December 2024, pp. 23053-23054.

<sup>21</sup> KSC Law, Article 21(4)(a), (c).

to use only one page with the witness and does not intend to tender the document for admission”.<sup>22</sup> Whether a document is one page or one line in length, the prejudice arises not from the Defence having insufficient time to read and digest the text, but from the inability of the Defence to shape its cross-examination on the basis of material that was available to the SPO, and purportedly relevant to its case. The prejudice attaches to the witness in question, W04401, but also in respect of all other witnesses who have testified about the same charged events, for which the opportunity has also been lost to ask questions relevant to the Document’s content.

15. The statutory requirement that the SPO finalise and disclose its Exhibit List in advance of the trial is one of fairness. This requirement exists precisely to avoid the trial by ambush that results from the SPO being permitted, mid-witness, to trawl the internet and open sources and spring new materials on the Defence hours before their intended use. The SPO was required to assemble and present its case within the applicable deadlines, meeting all the notice requirements that act as safeguards and preserve equality of arms. To abandon these safeguards and open this Rule 102(3) backdoor, through an interpretation of the Rule that cannot be reconciled with its plain meaning, significantly affects the fair conduct of the proceedings.

16. In the same way, the **Second Issue** also raises significant questions of fairness. In authorising the late disclosure of other materials, the Trial Panel was unambiguous that the corollary of this late disclosure was the requirement that the SPO meet additional safeguards; timely notice and a demonstration of good cause for the late amendment to its Exhibit List, together with an explanation as to why, in the exercise of its due diligence, the SPO did not update its Exhibit List earlier.<sup>23</sup> These safeguards were put in place as a counter-balance to the prejudice that arises from the SPO’s

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<sup>22</sup> Impugned Decision, p. 2.

<sup>23</sup> 8 March Decision, para. 20.



failure to comply with the applicable deadlines for the disclosure and presentation of its case, to ensure that the Defence's rights to notice and adequate time and resources were not unduly compromised. The effect of the Impugned Decision is to remove these safeguards and allow the SPO to find and disclose new materials, directly prior to their use, with no justification apart from re-examination being an inherently "reactive" exercise.<sup>24</sup> This characterisation of re-examination as "reactive" cannot exempt the SPO from meeting the procedural requirements already in place. A trial must be an inherently fair exercise. Allowing the use of new documents on this basis will significantly affect the fairness of the proceedings.

17. There is also a significant impact on expeditiousness. The SPO was required to file its Pre-Trial Brief, with witness and exhibit lists, by 17 December 2021. At this time, the Exhibit List comprised 16,304 items.<sup>25</sup> It is now well over 20,000 items long.<sup>26</sup> The requirement that the SPO finalise its Exhibit List prior to trial introduces a measure of finality on the part of the SPO in the presentation of its case, and provides notice to the accused to prepare for the case he needs to meet. Where documents are added, with no justification other than a purported need to be reactive to Defence cross-examination, the proceedings are prolonged. This is clear from the Impugned Decision, which provides that "should the Defence wish to conduct further cross-examination of W04401 on issues directly arising from the SPO's use of the disputed items, the Defence will be given such an opportunity by the Panel."<sup>27</sup>

18. As such, rather than examination in chief and cross-examination, the Case 06 proceedings can now proceed, per witness, with (i) SPO examination in chief, (ii) questioning by Victims' Counsel; (iii) Defence cross-examination, (iv) SPO re-

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<sup>24</sup> Transcript of 3 December 2024, p. 23268.

<sup>25</sup> KSC-BC-2020-06/F00631/RED/A03/CONF/RED, *Annex 3 – Confidential Redacted List of Exhibits*, 21 December 2021.

<sup>26</sup> KSC-BC-2020-06/F02511/A02, *Annex 2 - Prosecution submission of amended exhibit list*, 27 August 2024.

<sup>27</sup> Impugned Decision, p. 2.

examination, including on the basis of new documents, (v) Defence re-cross-examination on the basis of new documents, (vi) Judges' questions, (vii) SPO further examination on the basis of Judges' questions; and (viii) Defence further re-cross-examination on the basis of Judges' questions. This protracted procedure must also include time for the oral arguments or potential written litigation over the use of the new documents and associated delays, as well as the increasing expansion of the evidential record of this case and the concomitant impact on time for deliberations. For these reasons, the Issues significantly affect the expeditious conduct of the proceedings.

C. AN IMMEDIATE RESOLUTION BY A COURT OF APPEALS PANEL WILL MATERIALLY ADVANCE THE PROCEEDINGS

19. At the centre of this case, is the evidential record. The continual expansion of the SPO Exhibit List and the resulting casefile is a feature of these proceedings. If indeed the Impugned Decision is found to have been incompatible with the statutory framework for disclosure and an abuse of the Rule 102(3) procedure, or if the use of documents without the previously-established criteria having been met is found to be incompatible with the rights of the accused to notice and to adequate time and resources to prepare, the consequences will be impossible to unwind. Once the disputed documents are put to witnesses and form the basis of questions by both the SPO and the Defence, and potentially the Judges, the prejudice is impossible to remedy, and the evidential record will be expanded to contain evidence obtained through the improper use of materials disclosed in violation of the applicable framework. For this reason, an immediate resolution by the Court of Appeals Panel is required, and will materially advance the proceedings.

#### IV. CLASSIFICATION

20. These submissions are filed as confidential pursuant to Rule 82(4), because the

Impugned Decision remains confidential. However, the Defence considers there is no confidential information in this filing, and it can be reclassified as public following reclassification of the relevant portions of the underlying order.

## V. CONCLUSION AND RELIEF SOUGHT

21. In light of the foregoing, the Defence respectfully requests that the Trial Panel grant leave to appeal First and Second Issues identified in paragraph 2, pursuant to Article 45(2) and Rule 77(2).

[Word count: 2,945 words]

Respectfully submitted on 11 December 2024,



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