



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: Specialist Prosecutor's Office

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**Prosecution consolidated response to Defence requests for leave to appeal Oral
Orders of 4 and 5 December 2024**

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I. INTRODUCTION

1. The Requests¹ should be dismissed as the Issues² identified by the Defence fail to meet the criteria for certification³ under Article 45 of the Law⁴ and Rule 77 of the Rules.⁵ The matters raised do not constitute appealable issues within the meaning of Rule 77, nor does the Defence show that appellate review would have any, let alone significant, impact on the conduct of the proceedings.

2. Both Orders⁶ concern the conduct of the proceedings, the modalities of witness examinations, and the presentation of evidence, all of which are discretionary.⁷ The Panel is entitled to deference in such discretionary matters and appellate intervention is only warranted in very limited circumstances.⁸ In this respect, the Court of Appeals Panel has already affirmed the right of the Trial Panel to, in exercising its truth-seeking functions, question witnesses on any issue, including on issues not raised by the

¹ Thaçi, Veseli and Krasniqi Defence Request for Certification to Appeal the First Oral Order of 4 December 2024, KSC-BC-2020-06/F02774, 11 December 2024, Confidential ('First Request'); Veseli and Krasniqi Defence Request for Certification to Appeal First Oral Order of 5 December 2024, KSC-BC-2020-06/F02777, 12 December 2024, Confidential ('Second Request'; collectively with the First Request, 'Requests').

² The issues are defined in the Requests and are also referred to herein as the 'Issue' or 'Issues'.

³ The applicable law has been set out in prior decisions. *See e.g.* Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 ('January 2021 Decision'), paras 9-17; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, paras 10-18.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the 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.

⁶ Transcript, 4 December 2024, pp.23294-23296 (Private Session) ('4 December 2024 Order'); Transcript, 5 December 2024, pp.23435-23437 (Private Session) ('5 December 2024 Order'; collectively with the 4 December 2024 Order, 'Orders').

⁷ Article 40; Rules 116, 143. *See also* Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning, KSC-BC-2020-06/IA028/F00011, 4 July 2023, Confidential ('Appeal Decision'), para.10; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment, 30 January 2015, para.205; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para.182.

⁷ Appeal Decision, KSC-BC-2020-06/IA028/F00011, para.32.

⁸ *See, similarly, Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, paras 34-35.

Parties or falling outside the scope of the charges.⁹ The Requests fail to demonstrate that any of the Issues merit the exceptional remedy of interlocutory appeal.

II. SUBMISSIONS

A. THE ISSUES ARE NOT APPEALABLE

1. **First Request: 4 December 2024 Order**

3. The First Request recycles arguments already considered by the Trial Panel and does not demonstrate that the identified issues arising from the 4 December 2024 Order qualify as appealable issues. These issues merely reflect disagreement with the outcome of the Panel's ruling, failing to satisfy the certification test.

4. As to the First Issue, the Defence claims that, by allowing the SPO to use a document disclosed under Rule 102(3) during its redirect examination of W04401, the Trial Panel has created a 'backdoor' for the SPO to circumvent its disclosure obligations under Rule 102(1)(b).¹⁰ This framing attempts to manufacture an error by misconstruing the substance of the First Order, which rather held that a calling Party should be allowed to use documents not on its exhibit list, including Rule 102(3) documents, during redirect examination to address issues that were first raised during cross-examination.¹¹ The SPO's obligation to disclose materials it 'intends to present' to prove its case (under Rule 102(1)(b)) is distinct from its obligation to notice material it wishes to use during its redirect examination. Unlike direct examination, redirect examination is specifically intended to address issues during cross-examination, and as a result may necessarily implicate documents that the SPO may not otherwise seek to rely upon. The Panel's finding that 'evidentiary items may take on new relevance

⁹ Appeal Decision, KSC-BC-2020-06/IA028/F00011, para.32.

¹⁰ First Request, KSC-BC-2020-06/F02774, paras 8-9.

¹¹ 4 December 2024 Order, p.23295.

because of the cross-examination of a witness by a party' appropriately reflects this reality.¹²

5. To the extent that the Defence claims that use of Rule 102(3) documents would be prejudicial to the Accused, the Panel considered these submissions prior to its ruling and established conditions to address them, including by requiring that Rule 102(3) documents could be used only if disclosed sufficiently in advance.¹³ The First Issue merely expresses disagreement with its outcome.¹⁴ The Defence seeks to reargue the merits of the First Order, using the same arguments already heard by the Panel,¹⁵ and does not present any appealable issue.

6. Contrary to the framing of the Second Issue,¹⁶ the First Order is also compatible with the Panel's prior procedural decisions. The 8 March 2023 Decision concerned specifically Rule 102(1)(b)(i) documents which the SPO 'foresee[s]' it will rely on in the presentation of its case.¹⁷ Nothing about these terms precludes the SPO from using other documents that acquire relevance during cross-examination in the context of redirect examination, given the reactive nature of this process.¹⁸ As such, the First Order addresses an issue distinct from the 8 March 2023 Decision, in a manner consistent with the legal framework applicable to redirect examination.¹⁹ Whether and

¹² 4 December 2024 Order, p.23295.

¹³ 4 December 2024 Order, pp.23294-23295.

¹⁴ See e.g. Decision on the Thaçi Defence Request for Certification to Appeal the Second Oral Order of 7 November 2024, KSC-BC-2020-06/F02757, 3 December 2024, para.18.

¹⁵ Compare First Request, KSC-BC-2020-06/F02774, paras 8-9, with Transcript, 3 December 2024, pp.23265-23266.

¹⁶ First Request, KSC-BC-2020-06/F02774, paras 10-12. See also Transcript, 3 December 2024, pp.23266-23267.

¹⁷ Decision on Prosecution Request to Amend the Exhibit List and Related Matters, KSC-BC-2020-06/F01352, 8 March 2023, Confidential ('8 March 2023 Decision'), paras 18-19.

¹⁸ 4 December 2024 Order, p.23295. See also Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, para.82 (indicating that a calling party should apply to add to its exhibit list any material it 'wishes to use *during the direct examination* of the witness') (emphasis added). *Contra* First Request, KSC-BC-2020-06/F02774, para.12.

¹⁹ See also Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, para.111 (generally limiting the scope of redirect examination to 'matters arising in cross-examination', while permitting new matters to be raised only with the leave of the Panel).

how the document can be added to the SPO's exhibit list is a separate issue.²⁰ The Defence arguments concerning the SPO's alleged failure to seek amendment to its exhibit list are, therefore, hypothetical and disconnected from the substance of the First Order,²¹ and merely reflect the Defence's dissatisfaction with the Panel's decision, failing to establish an appealable issue.

2. Second Request: 5 December 2024 Order

7. The Second Request seeks to, again, relitigate general Defence objections to the scope and manner of Judges' questioning, already extensively addressed and dismissed by the Trial Panel,²² as well as the Court of Appeals Panel.²³ Insofar as the Issues merely revive these prior submissions and now pose them as specific to the Panel's use of a statement by a witness removed from the SPO's witness list, the Second Request should be dismissed on this basis alone. Moreover, even if the Panel were to consider these repurposed arguments once more, the Defence fails to show that the Issues identified in the Second Request are appealable.

8. The First Issue, suggesting that the Trial Panel has 'usurp[ed] the role of the SPO',²⁴ echoes the Defence's earlier objections to the Panel's use of the Witness Statement²⁵ and to judicial questioning in general²⁶ without articulating any

²⁰ See also Transcript, 17 September 2024, pp.19852-19853 (noting that, if the SPO would be allowed to use a Rule 102(3) document during its redirect examination, it would still have to apply to add the document to its exhibit list before seeking to tender it).

²¹ First Request, KSC-BC-2020-06/F02774, para.11.

²² See e.g. Transcript, 20 April 2023, pp.3263-3269 (Oral Order on the Trial Panel's use of prior statements or documents during judicial questioning of witnesses); Transcript, 19 March 2024, pp.13381-13383 (Oral Order on Trial Panel's use of Rule 102(3) documents during judicial questioning).

²³ See Appeal Decision, KSC-BC-2020-06/IA028/F00011.

²⁴ Second Request, KSC-BC-2020-06/F02777, paras 2(i), 12-19.

²⁵ Transcript, 4 December 2023, pp.23431-23432.

²⁶ See, in particular, *Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning*, KSC-BC-2020-06/F01495, 1 May 2023, Confidential, para.24 (claiming that the Trial Panel was seeking to introduce incriminating elements outside the parties' questioning); *Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning*, KSC-BC-2020-06/IA028/F00002, 30 May 2023, Confidential, para.23 (claiming that the Trial Panel is 'erroneously engaging in a prosecutorial investigation of the case'); *Joint Defence Request for the Trial Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the*

appealable issue. Contrary to the Defence's position,²⁷ the Panel's power to question witnesses is deliberately broader than that of the Parties, may involve evidence not presented by the Parties, and serves the ascertainment of the truth, not the case of either Party.²⁸ There is no conflict between the SPO's role and the Panel's independent exercise of its truth-seeking function.²⁹ Arguments that the Panel's use of a statement the Defence has also used in questioning prior witnesses is 'evidently' unfair or biased is baseless and unsubstantiated.³⁰ The Defence, yet again, merely seeks to impermissibly restrict the Judges' questioning in contravention of the plain language of the Rules.³¹ It does not present an appealable issue.

9. The Defence equally fails to demonstrate that the Second Issue is appealable. The Defence arguments concerning its inability to examine the witness in question conflate the Panel's use of his witness statement to elicit evidence from W04401 with the statement's purported independent evidential value.³² Such arguments are also misleading, given that the Defence could make efforts to call this witness should they wish to do so. Moreover, the Panel did duly consider the Defence submissions on alleged prejudice, including the same arguments now raised under the Second Issue,³³ and assessed them to be unfounded.³⁴ The Defence's insistence that the factors

Defence, KSC-BC-2020-06/F02718, 13 November 2024, para.23 (claiming that the Trial Panel is not challenging the Prosecution case and only pursuing inculpatory lines of questioning); Joint Defence Reply to Prosecution response to joint Defence request F02718, KSC-BC-2020-06/F02756, 2 December 2024, paras 7-11 (claiming, *inter alia*, that the Trial Panel 'is pursuing a case of its own' to the benefit of the SPO's case).

²⁷ Second Request, KSC-BC-2020-06/F02777, para.23 and fn.23 (arguing that, unlike the Panel, 'the Defence, as a party to proceedings, *can* put statements to witnesses', without providing any explanation or basis for this distinction).

²⁸ See Appeal Decision, KSC-BC-2020-06/IA028/F00011, para.32. See also Transcript, 20 April 2023, pp.3265-3268.

²⁹ *Contra* Second Request, KSC-BC-2020-06/F02777, para.17.

³⁰ See Appeal Decision, KSC-BC-2020-06/IA028/F00011, para.34. See also Appeal Decision, KSC-BC-2020-06/IA028/F00011, para.53; Transcript, 20 April 2023, pp.3265-3268. *Contra* Second Request, KSC-BC-2020-06/F02777, paras 15, 18-19.

³¹ Rule 127(3).

³² Second Request, KSC-BC-2020-06/F02777, paras 24-27.

³³ See Transcript, 4 December 2024, pp.23432.

³⁴ 5 December 2024 Order, Transcript, 5 December 2024, pp.23436-23437.

considered by the Panel are 'irrelevant' and the Defence 'clearly suffer prejudice' reflects its plain disagreement with the Panel's assessment and does not show any actual error.³⁵ Again, the fact that the Defence is dissatisfied with the dismissal of its submissions in this regard does not constitute an appealable issue.

B. NONE OF THE ISSUES WOULD HAVE A SIGNIFICANT IMPACT OR MATERIALLY ADVANCE THE PROCEEDINGS

10. The Requests fail to demonstrate that any of the Issues would have any, let alone significant, effect on the fairness and expeditiousness of the proceedings.

11. As to the First Request, the Defence reiterates arguments already considered by the Panel³⁶ and does not identify any specific prejudice related to the identified Issues. The reactive nature of redirect examination is a normal feature of a trial. Insisting that the SPO should only rely on documents on its exhibit list would unreasonably limit its ability to address issues that, but for the Defence's cross-examination, it would not need to address.³⁷ The Panel also specifically established safeguards to the use of documents not on the SPO's exhibit list by providing that such documents must have been disclosed 'sufficiently in advance', and the Defence would be able to further cross-examine the relevant witness on issues arising from the use of such documents.³⁸ Particularly given these safeguards, the impact of the SPO's use of unadmitted materials during redirect examination cannot be said to significantly affect the fairness or expeditiousness of the proceedings or the outcome of the trial.³⁹ Claims that the First Order will improperly expand the evidential record or result in protracted witness

³⁵ Second Request, KSC-BC-2020-06/F02777, paras 24, 26-27.

³⁶ See Transcript, 3 December 2024, pp.23265-23266; 4 December 2024 Order, Transcript, 4 December 2024, pp.23294-23295.

³⁷ *Contra* First Request, KSC-BC-2020-06/F02774, paras 14-15.

³⁸ 4 December 2024 Order, Transcript, 4 December 2024, pp.23295-23296.

³⁹ See also Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024 ('February 2024 Decision'), para.16.

examinations are plainly speculative and exaggerated, and an interlocutory appeal would not materially advance the proceedings.⁴⁰

12. Arguments presented in the Second Request repeat the substance of the two Issues and likewise fall short of the certification standard. The assertion that the Panel's use of a statement by a witness removed from the SPO's witness list leads to an 'appearance of bias in favour of the Prosecution case'⁴¹ is unsubstantiated.⁴² The Defence sweepingly states that the Panel's purported failure to consider prejudice caused to the Defence 'has a direct impact on the fair conduct of the proceedings',⁴³ without developing its argument any further and wilfully ignoring that the Panel expressly addressed these concerns.⁴⁴ Such generalised references to the alleged impact on the Accused's fundamental rights lack the necessary specificity required for certification.⁴⁵ The Second Order correctly reflects the Panel's right to question witnesses on the basis of duly disclosed materials, and as such cannot be said to encroach on the fairness of the proceedings.

13. Like with other evidence, the Defence will have the opportunity to make submissions about the weight to be assigned to evidence elicited during redirect examination and judicial questioning,⁴⁶ or to seek appellate review of the Panel's assessment of the evidence after the close of the trial.⁴⁷ The Defence submissions that either of the Orders will 'will be impossible to remedy'⁴⁸ or that appellate review

⁴⁰ *Contra* First Request, KSC-BC-2020-06/F02774, paras 17-18.

⁴¹ Second Request, KSC-BC-2020-06/F02777, para.29.

⁴² Article 27(1) of the Law. *See also* Appeal Decision, KSC-BC-2020-06/IA028/F00011, para.52.

⁴³ Second Request, KSC-BC-2020-06/F02777, para.30.

⁴⁴ 5 December 2024 Order, Transcript, 5 December 2024, pp.23436-23437.

⁴⁵ April 2024 Decision, KSC-BC-2020-06/F02259, para.14; ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial', ICC-02/11-01/15, 2 July 2015, para.23.

⁴⁶ *See also* February 2024 Decision, KSC-BC-2020-06/F02157, para.16.

⁴⁷ *See* Decision on Veseli Defence Request for Certification to Appeal the Decision to Admit P1064 and P1065, KSC-BC-2020-06/F02259, 23 April 2024 ('April 2024 Decision'), para.13.

⁴⁸ First Request, KSC-BC-2020-06/F02774, para.19.

would 'obviate the risk of any prejudice'⁴⁹ are general, vague and hypothetical, and fail to demonstrate any need for an immediate resolution by the Court of Appeals Panel.⁵⁰

14. Accordingly, none of the cumulative requirements for certification are met.⁵¹

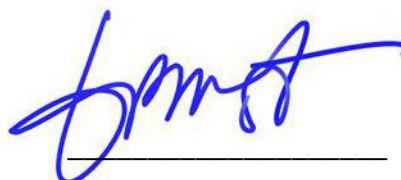
III. CLASSIFICATION

15. This filing is confidential pursuant to Rule 82(4) and considering that the Orders and Requests remain confidential.⁵² Given that it does not include any confidential information, the SPO requests that it be reclassified as public.

IV. RELIEF REQUESTED

16. For the foregoing reasons, the Requests fail to meet the leave to appeal standard and should be rejected.

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Kimberly P. West

Specialist Prosecutor

Monday, 13 January 2025

At The Hague, the Netherlands.

⁴⁹ Second Request, KSC-BC-2020-06/F02777, para.31.

⁵⁰ See April 2024 Decision, KSC-BC-2020-06/F02259, para.14.

⁵¹ January 2021 Decision, KSC-BC-2020-06/F00172, paras 10-16.

⁵² See also Transcript of 5 December 2024, pp.23436-23437.