

In: KSC-BC-2023-12

Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 30 June 2025

Language: English

Classification: Public

**Public Redacted Version of Thaçi Defence Request for Certification to Appeal
“Decision on the Thaçi Defence Preliminary Motion on Jurisdiction” with Public
Redacted Annex 1**

Specialist Prosecutor’s Office

Kimberly P. West

Specialist Counsel for Hashim Thaçi

Sophie Menegon

Luka Mišetić

Specialist Counsel for Bashkim Smakaj

Jonathan Elystan Rees KC

Huw Bowden

Specialist Counsel for Isni Kilaj

Iain Edwards

Joe Holmes

Specialist Counsel for Fadil Fazliu

David A. Young

Specialist Counsel for Hajredin Kuçi

Alexander Admiraal

I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi ("Defence") requests leave of the Pre-Trial Judge to appeal her "Decision on the Thaçi Defence Preliminary Motion on Jurisdiction" ("Impugned Decision")¹ pursuant to Rules 77(1) and 97(3).²
2. The Defence also intends to directly appeal the Impugned Decision to a Court of Appeals Panel, in light of the Defence's position, *contra* the finding of the Pre-Trial Judge ("PTJ"),³ that the Defence Motion constituted a jurisdictional challenge within the meaning of Rule 97(1)(a) and thus is subject to appeal as of right under Article 45(2) of the Law on the Specialist Chambers and Specialist Prosecutor's Office ("the Law")⁴ and Rule 97(3). The Defence requests that the PTJ defer consideration of the present request until the Court of Appeals Panel has ruled on the admissibility of the Defence's direct appeal.

II. APPLICABLE LAW

3. Article 45(2) of the Law and Rule 97(3) provide that an appeal of any decision on a preliminary motion, save those under Rule 97(1)(a), is subject to certification by the panel which issued it.
4. Pursuant to Article 45(2) of the Law and Rule 77(2), a Judge or Trial Panel shall grant certification if: (i) the matter raised is an "appealable issue"; (ii) the issue would significantly affect either (a) the fair and expeditious conduct of the

¹ [KSC-BC-2023-12/F00343](#). See also KSC-BC-2023-12/F00290 ("Defence Motion"). Full references for the authorities cited, along with their short-form references, can be found in Annex 1.

² Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3, 2 June 2020 ("Rules"), Rules 77(1) and 97(3). All references to "Rule" or "Rules" herein refer to the Rules, unless otherwise specified.

³ Impugned Decision, paras 21–23.

⁴ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("Law").

proceedings, or (b) the outcome of the trial; and (ii) immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁵

5. The applicable law concerning certification has been comprehensively laid out by the PTJ in a previous decision.⁶

III. SUBMISSIONS

- A. FIRST ISSUE: THE PRE-TRIAL JUDGE CONSTRUED TRIAL PANEL II'S POWERS TOO NARROWLY, AND THOSE OF THE SINGLE JUDGE AND THE SPO TOO BROADLY

6. The Defence Motion argued that in all matters regarding the trial proceedings in *Prosecutor v. Thaçi et al.* ("Case 06"), Trial Panel II has exclusive jurisdiction.⁷ This includes exclusive jurisdiction over how to respond when witness interference is alleged to be affecting trial proceedings.⁸ This jurisdiction is essential because without it, a Trial Panel cannot ensure the fairness of proceedings, as is required under Article 40(2) of the Law.⁹
7. The PTJ held that a Trial Panel's broad authority "extend[s] only to the conduct of the *trial proceedings*" and only within the case assigned to the Trial Panel.¹⁰ She therefore concluded that Trial Panel II has no powers regarding the interference allegations which underpin Case 12 because Case 12 is in the pre-trial stage and Trial Panel II is not assigned to it.¹¹
8. The Defence submits that the PTJ erred in law by construing the powers of Trial Panel II too narrowly, and those of the Single Judge and the SPO too broadly, in violation of the KSC Law ("First Issue"). The PTJ failed to rule on whether the

⁵ [KSC-BC-2020-07/F00423](#), paras 11–12; [KSC-BC-2023-12/F00149](#), para.16.

⁶ [KSC-BC-2023-12/F00149](#), paras 17–22. *See also* [KSC-BC-2020-07/F00423](#), paras 13–21.

⁷ Defence Motion, paras 22–27.

⁸ *Ibid.*, para.28.

⁹ *Ibid.*, para.27.

¹⁰ Impugned Decision, para.29.

¹¹ *Ibid.*, para.32.

Special Investigative Measure (“SIM”) requests fell within Trial Panel II’s jurisdiction due to their connection with the Case 06 trial, addressing only the incorrect question of whether Cases 06 and 12 are the “same case”.¹² This led the PTJ to a flawed conclusion regarding the SJ’s jurisdiction, which under the Law is residual, meaning that if Trial Panel II had jurisdiction, the SJ did not. Neither did the PTJ consider how Article 40(2) impacts on the “SPO’s prerogative”¹³ to investigate and initiate proceedings where the SPO’s conduct relates to an ongoing trial. Finally, the PTJ misinterpreted the Defence Motion’s reliance on ICTY practice, which is derived from the same fundamental principle set out in Article 40(2) of the Law.

B. SECOND ISSUE: THE PRE-TRIAL JUDGE APPLIED AN INCORRECT UNDERSTANDING OF *RES JUDICATA*

9. The PTJ concluded that findings in Case 06 will not be *res judicata vis-à-vis* Case 12 because “any findings as to the charges in the two cases are entirely different” and “Panels conduct their proceedings (and assessments) independently of each other”.¹⁴
10. The PTJ erred in law by applying an incorrect understanding of the principle of *res judicata* in relation to the effect of Case 06 rulings on the proceedings in Case 12 (“Second Issue”). She erroneously confined the scope of *res judicata* to findings “as to the charges” rather recognising that it applies to any specific finding that has been made final in litigation between the parties.¹⁵

¹² Impugned Decision, para.32.

¹³ Impugned Decision, para.26.

¹⁴ Impugned Decision, para.43.

¹⁵ ICTY, [Čelebići Trial Judgment](#), para.228; ECCC, [Case 002 Appeal Judgment](#), para.634; Supreme Court of Kosovo, [ZM v. TP](#), para.13; [ICC-02/17-218](#), para.59, and references cited therein.

C. THIRD ISSUE: THE PRE-TRIAL JUDGE ERRED IN CONSIDERING THAT SHE IS UNABLE TO REVIEW THE LEGALITY OF HER ASSIGNMENT AND PROVIDED INSUFFICIENT REASONING THEREFORE

11. The Defence had submitted that the PTJ's assignment was *ultra vires*, as she had been assigned as both SJ and PTJ, in violation of Articles 33(1) and/or (4) of the Law.¹⁶

12. The PTJ concluded that because "the assignment of Judges falls squarely within the powers and responsibilities of the President, pursuant to Article 33 of the Law ... [,] the Pre-Trial Judge does not have the competence to pronounce herself on this matter, as that would mean sitting in judgment of the President's decision in this regard."¹⁷

13. The PTJ erred in law by considering that she is not able to review the legality of her assignment and by giving insufficient reasons therefore ("Third Issue"). The PTJ's holding effectively precludes judicial review of whether Mr Thaçi's fundamental human right under Article 6(1) of the European Convention on Human Rights ("ECHR") to an independent and impartial tribunal "established by law" has been violated.

D. FOURTH ISSUE: THE PRE-TRIAL JUDGE ERRED IN FINDING THAT RULE 20 BARS DEFENCE PRELIMINARY MOTIONS CHALLENGING THE CONCURRENT APPOINTMENTS OF THE SAME JUDGE AS BOTH SINGLE JUDGE AND PRE-TRIAL JUDGE AND PROVIDED INSUFFICIENT REASONING THEREFORE

14. Responding to the Defence Motion, the SPO argued that the Defence's arguments concerning the legality of the concurrent appointment of the same judge as both SJ and PTJ fall within Rule 20 concerning the disqualification of judges, and that,

¹⁶ Defence Motion, paras 70–81.

¹⁷ Impugned Decision, para.38.

since the Defence did not make these arguments before the President within the ten day period set out in Rule 20(3), they are barred.¹⁸

15. The Defence replied that the arguments made in the Defence Motion do not constitute a disqualification request under Rule 20 and that the procedure under Rule 20 cannot cure a violation of Article 33(1) and/or (4) of the Law.¹⁹
16. The PTJ found that “the Thaçi Defence’s assertion that the assignment of one and the same judge as Single Judge and Pre-Trial Judge was improper falls squarely within the scope of Rule 20 of the Rules on the ‘Recusal or Disqualification of Judges’” and that because the deadline under Rule 20(3) for raising grounds for disqualification had lapsed, “[t]he Thaçi Defence cannot circumvent this procedure and applicable time limits by raising this matter now, in the context of a preliminary motion”.²⁰
17. The PTJ erred in law by finding that Rule 20 bars the Defence from challenging, through a preliminary motion, the practice of appointing the same judge as both SJ and PTJ and giving insufficient reasons, therefore (“Fourth Issue”). The PTJ ignored that Rule 20 concerns recusal or disqualification for real or perceived bias, while Article 33 of the Law concerns the jurisdiction and/or competence of judges and panels. Questions as to the impartiality of a judge are not questions about their proper assignment. By conflating the two, the PTJ wrongly considered that the assignment of a judge in contravention of Article 33 of the Law can be remedied through Rule 20.

¹⁸ KSC-BC-2023-12/F00310, paras 23–24.

¹⁹ KSC-BC-2023-12/F00318, paras 19–20.

²⁰ Impugned Decision, para.39.

E. OTHER RULE 77 REQUIREMENTS

1. *Significant Effect on the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial*

18. The First, Third, and Fourth Issues significantly affect the fair and expeditious conduct of the proceedings. If the Defence's arguments are accepted, Mr Thaçi's subjection to proceedings before the PTJ and/or SJ in violation of the Trial Panel's exclusive jurisdiction (First Issue) would violate his right under Article 6(1) of ECHR to a tribunal "established by law".²¹ This right ensures *inter alia* that a criminal defendant is tried by a tribunal which complies with (i) relevant legislation concerning the competence of judicial organs;²² and (ii) legislative rules concerning the composition of its benches.²³ Mr Thaçi's ability to seek judicial review of the assignment of PTJ in violation of applicable law (Third and Fourth Issues) issues, engages the same fair trial right.

19. The European Court of Human Rights ("ECtHR") has found this right is violated when a defendant is subjected to proceedings before a tribunal which does not have jurisdiction under domestic law.²⁴ The ECtHR has also repeatedly found a breach of this right where the assignment of a particular judge to hear a matter or to a given bench was made in violation of the relevant provisions of domestic law considering their assignment.²⁵

20. In addition, if the PTJ erred with regard to the Third and/or Fourth Issues, Mr Thaçi has been precluded from challenging the violation of his rights under

²¹ Applicable before the KSC by virtue of Article 3(2)(e) of the Law.

²² ECtHR, [Belilos v. Switzerland](#), para.64; [Lavents v. Latvia](#), para.114; [Richert v. Poland](#), para.41; [Jorgic v. Germany](#), para.64.

²³ ECtHR, [Ástráðsson v. Iceland](#), paras 211–13, and references cited therein.

²⁴ ECtHR, [Coëme and Others v. Belgium](#), paras 107–8; [Richert v. Poland](#), para.41; [Jorgic v. Germany](#), para.64.

²⁵ ECtHR, [Posokhov v. Russia](#), paras 39–44; [Kontalexis v. Greece](#), paras 42–44; [DMD Group A.S. v. Slovakia](#), paras 62–72; [Richert v. Poland](#), paras 41–57; [Miracle Europe Kft v. Hungary](#), paras 59–67; [Chim and Przywieczerski v. Poland](#), paras 138–42.

Article 6 ECHR and thus also deprived of his right to an effective remedy under Article 13 ECHR.²⁶

21. Therefore, if an error law has been made with regards to the First, Third, or Fourth Issue, and appellate review is not available, Mr Thaçi will suffer a breach of his rights under Article 6(1) ECHR. As the First, Third, and Fourth Issues have direct consequences for Mr Thaçi's enjoyment of his rights under Articles 6 and 13 ECHR they constitute issues significantly affecting the fair conduct of the proceedings.²⁷
22. Furthermore, the First, Third, and Fourth Issues also significantly affect the expeditiousness of the proceedings as their resolution at this early stage would minimise delays and the diverting of resources at subsequent stages of the proceedings should it later be found that an error of law was committed in relation to these Issues, and as a result, would advance Mr Thaçi's right to be tried within a reasonable time under Article 21(4)(d) of the Law.²⁸
23. The Second Issue significantly affects the outcome of the trial because, if applicable, *res judicata* would bind the Case 12 Trial Panel to the Case 06 findings of Trial Panel II concerning factual matters arising in both proceedings. [REDACTED].²⁹ [REDACTED],³⁰ if it does [REDACTED] make factual findings regarding Mr Thaçi's conduct in his non-privileged visits—this would engage the principle of *res judicata* in relation to a Trial Panel's findings in Case 12. Such a situation would significantly impact the outcome of the trial as it would bind the Case 12 Trial Panel to the factual findings of Trial Panel II in Case 06.

2. Immediate Resolution Would Materially Advance Proceedings

²⁶ ECtHR, [Hatton and Others v. United Kingdom](#), paras 141–42; [Smith and Grady v. United Kingdom](#), paras 136–39.

²⁷ See [KSC-BC-2020-04/F00116](#), para.28.

²⁸ See [KSC-BC-2023-12/F00149](#), para.24; [KSC-BC-2020-04/F00116](#), para.29; [KSC-BC-2020-06/F00534](#), para.18.

²⁹ [REDACTED].

³⁰ [REDACTED].

24. A conclusive determination of the First, Third, and Fourth Issue would resolve a possible error of law that would otherwise taint the entirety of the proceedings. If not resolved now, these matters will likely only be determined in a final appeal following judgment, if Mr Thaçi is convicted. Should it be found, at that stage, that the PTJ was assigned unlawfully and/or issued the indictment without jurisdiction, it would likely invalidate the proceedings as a whole. The invalidated proceedings would have caused a massive expenditure of resources as well as an egregious burden on Mr Thaçi at a time when he is defending himself in Case 06. A question would likely arise as to whether a fresh trial could be justified. It is therefore clear that the early final resolution of this matter is essential.
25. The immediate resolution of the Second Issue would materially advance the proceedings because the more time that passes before its final resolution, the greater the risk that the proceedings will be adversely affected by an erroneous application of *res judicata*. Various matters are being litigated in Case 06 and Case 12 which are common to both cases and the outcomes of which could therefore engage *res judicata*. Moreover, as demonstrated in the Defence's preliminary motion on severance, the applicability of *res judicata* in these proceedings also has a significant impact on questions of case management.³¹
26. An immediate resolution of the Second Issue would establish a clear understanding of this matter which would then be applied by panels in both Case 12 and Case 06, and would prevent conflicting findings in violation of the doctrine of *res judicata*.

³¹ [KSC-BC-2023-12/F00285](#), paras 47–51.

F. REQUEST FOR DEFERMENT

27. The Defence maintains that the Impugned Decision concerns a jurisdictional challenge under Rule 97(1)(a),³² and is thus subject to an appeal as of right under Article 45(2) of the Law and Rule 97(3). It is for the Court of Appeals Panel to assess whether the direct appeal is admissible and whether the Defence Motion properly falls within Rule 97(1)(a).³³ The Defence files this request in order to preserve the possibility of appealing the Impugned Decision, if the Court of Appeals Panel finds its appeal inadmissible, but requests that consideration of the request be deferred until a ruling from the Court of Appeals Panel.
28. There exists good cause for a deferment. It would avoid unnecessary litigation and the potential duplication of work, and promote the most efficient use of time and resources by the parties and the Chambers.³⁴
29. The PTJ may be guided by the practice of the International Criminal Court (“ICC”) in similar matters. In the *Palestine Situation*, following two negative decisions by Pre-Trial Chamber I on its challenges to jurisdiction and admissibility, Israel filed direct appeals of both decisions, arguing that appeals of lay as of right;³⁵ but also requested leave to appeal both decisions.³⁶ Pre-Trial Chamber I, mindful of “the inter-related nature of the proceedings, ... consider[ed] it appropriate to defer its consideration of Israel’s requests for leave to appeal ... until the Appeals Chamber has pronounced itself on the admissibility of Israel’s [direct] appeals”.³⁷

³² *Contra* Impugned Decision, para.22.

³³ See [KSC-BC-2020-07/IA001/F00005](#), paras 16–17; [KSC-BC-2020-07/IA003/F00005](#), paras 8–18. See also [ICC-01/04-01/06-2953](#), para.50.

³⁴ See [KSC-BC-2023-12/F00193](#), para.14.

³⁵ [ICC-01/18-385](#), paras 18–26; [ICC-01/18-386](#), paras 20–27.

³⁶ [ICC-01/18-387](#); [ICC-01/18-388](#).

³⁷ [ICC-01/18-398](#), para.6.

30. Similarly, in *Abd-Al-Rahman*, the Accused concurrently filed both a direct appeal³⁸ and a request for leave to appeal.³⁹ The ICC Prosecutor requested that the Appeals Chamber promptly determine the admissibility of the direct appeal to avoid wasting resources on parallel litigation,⁴⁰ which the Appeals did.⁴¹
31. The only instance of contrary practice which the Defence is aware of occurred in the ICC's *Afghanistan Situation*, which proceeded differently reasons specific to the appeals in that instance. There, the ICC Appeals Chamber deferred litigation on direct appeals by victims' counsel⁴² until after the Pre-Trial Chamber had determined leave to appeal requests⁴³ filed by both the ICC Prosecutor and victims' counsel.⁴⁴ This was no doubt due to the fact that the central appeal request, by the ICC Prosecutor, had only been made by way of a leave request to the Pre-Trial Chamber. The appeals filed directly to the Appeals Chamber were only from victims, whose standing to appeal was uncertain—and indeed eventually rejected.⁴⁵
32. Accordingly, the Defence submits that the approach taken by the ICC's Pre-Trial Chamber I in *Palestine* provides a useful model in the present proceedings.
33. For these reasons, to avoid duplicitous litigation and conserve the resources of the parties and the Chambers, the Defence requests the PTJ to defer consideration of the present Request until the Court of Appeals Panel rules on the direct appeal's admissibility.

³⁸ [ICC-02/05-01/20-128](#).

³⁹ [ICC-02/05-01/20-129](#).

⁴⁰ [ICC-02/05-01/20-137](#), paras 10–11.

⁴¹ [ICC-02/05-01/20-145](#).

⁴² [ICC-02/17-36](#); [ICC-02/17-38](#); [ICC-02/17-40-Corr.](#)

⁴³ [ICC-02/17-34](#); [ICC-02/17-37](#).

⁴⁴ [ICC-02/17-54](#).

⁴⁵ [ICC-02/17-137](#).

IV. CLASSIFICATION

34. This request is filed confidentially and *ex parte* as it references a confidential and *ex parte* decision.⁴⁶ A public redacted version shall be filed in due course.

V. CONCLUSION

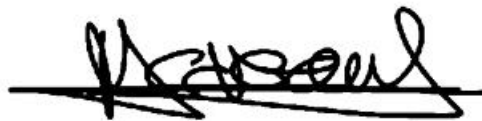
35. For these reasons, the Defence respectfully requests that the PTJ:

CERTIFY the above four Issues for appeal pursuant to Rule 77; and

DEFER consideration of the present Request until after the Court of Appeals Panel has decided upon the admissibility of the Defence's direct appeal of the Impugned Decision.

[Word count: 2,998 words]

Respectfully submitted,



Sophie Menegon

Counsel for Hashim Thaçi

30 June 2025

Paris, France

⁴⁶ Rule 82(4).