

**In:** KSC-BC-2020-06  
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 21 December 2020

**Language:** English

**Classification:** Confidential

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**Defence Request on behalf of Mr Thaçi for Certification to Appeal the  
“Confidential Redacted Version of Corrected Version of First Decision on  
Specialist Prosecutor’s Request for Protective Measures”**

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## I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rule 77(2) of the Rules of Procedure and Evidence ("RPE"), the defence for Mr Hashim Thaçi ("the defence") respectfully requests the Pre-Trial Judge ("PTJ") to grant certification to appeal the "Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures" ("Decision").<sup>1</sup> The Decision essentially casts a veil over almost half the SPO's proposed 200 witnesses making it impossible for the defence to investigate the case appropriately.<sup>2</sup> Certification is sought in relation to four issues.

2. This request is filed on a "confidential" basis because it relates to filings which are likewise classified. In the absence of the present request referring to any confidential information, the defence has no objection to the request being re-classified as "public".

## II. APPLICABLE LAW

3. To appeal the Decision, certification is required.

4. Article 45(2) of the Law, which is in similar terms as Rule 77(2) of the RPE, provides, in relevant part, that the PTJ shall grant certification where an appeal:

involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

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<sup>1</sup> KSC-BC-2020-06/F00133/COR/CONF/RED, Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, filed on 14 December 2020.

<sup>2</sup> Transcript, Status Conference, 18 November 2020, p. 125, lines 2-5.

5. Article 45(2) and Rule 77 effectively mirror Article 82, “Appeal against other decisions”, of the ICC’s Rome Statute. Therefore, the ICC’s jurisprudence is of direct relevance in interpreting both provisions.

6. In line with this jurisprudence, an application for leave to appeal must satisfy the following criteria:<sup>3</sup>

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect either:
  - i. the fair and expeditious conduct of the proceedings, or
  - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Panel, an immediate resolution of the issue by a Court of Appeals Panel may materially advance the proceedings.

7. The criteria set out above are cumulative. Failure to fulfil one or more of these requirements is fatal to an application for leave to appeal.<sup>4</sup>

8. According to the ICC’s persuasive jurisprudence, an appealable issue must emanate from the ruling of the impugned decision,<sup>5</sup> must be an “identifiable subject or topic requiring a decision for its resolution” and “not merely a question over which

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<sup>3</sup> E.g., *Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, ICC-02/05-03/09-179, 13 July 2011 (“Decision on Leave to Appeal Disqualification of Counsel Decision”), para. 5; *Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, ICC-02/05-03/09-243, 1 November 2011 (“Decision on Leave to Appeal Translation of Statements”), para. 5.

<sup>4</sup> Decision on Leave to Appeal Disqualification of Counsel Decision, para. 6; Decision on Leave to Appeal Translation of Statements, para. 6.

<sup>5</sup> E.g., *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, paras. 56-59; Decision on Leave to Appeal Translation of Statements, para. 10.

there is disagreement or conflicting opinion”,<sup>6</sup> and its resolution must be “essential for the determination of matters arising in the judicial cause under examination”.<sup>7</sup>

9. The requirement set out in paragraph 6 b) above consists of two disjunctive elements. In relation to the first, the ICC Appeals Chamber has stated that “[t]he term ‘fair’ in the context of article 82 (1) (d) of the [Rome] Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute”.<sup>8</sup> Included within the attributes of a fair trial are the “expeditious conduct of the proceedings in one form or another [...], as well as the investigation of crime”.<sup>9</sup> With respect to the element of “expeditiousness of proceedings”, this has been held “to be closely linked to the concept of judicial proceedings ‘within a reasonable time’” and to complement “the guarantees afforded to [an accused], such as the right to fair and public proceedings”.<sup>10</sup>

10. In relation to the second prong of the requirement in paragraph 6 b), the ICC Appeals Chamber has found that whether a given issue would affect the outcome of the trial requires the Chamber to “ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, a process which “involves a forecast of the consequences of such an occurrence”.<sup>11</sup>

11. In respect of the final requirement, the term “advance” requires that the immediate and “authoritative determination” by the Appeals Chamber of the issue will “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts

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<sup>6</sup> *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 (“Decision on Extraordinary Review Application”), para. 9.

<sup>7</sup> Decision on Extraordinary Review Application, para. 9.

<sup>8</sup> Decision on Extraordinary Review Application, para. 11.

<sup>9</sup> Decision on Extraordinary Review Application, para. 11.

<sup>10</sup> *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009, para. 20.

<sup>11</sup> Decision on Extraordinary Review Application, para. 13.

about the correctness of a decision or mapping a course of action along the right lines [...].”<sup>12</sup>

### III. THE PROPOSED ISSUES FOR APPEAL

12. Certification is sought to appeal the following four issues (individually “Issue”, together “Issues”) all of which satisfy all the requirements of Article 45(2) and Rule 77(2):

**Issue 1:** Whether, in respect of all the measures ordered, the PTJ erred by failing to identify for each individual witness at issue any specific and concrete grounds for concluding that disclosure of that witness’ identity to the defence, as opposed to the general public, would pose an objectively justifiable risk to the witness, relying instead on subjective fears and generalised, unsubstantiated statements which fail to make the necessary links between any purported risk and the defence.

**Issue 2:** Whether the PTJ erred by failing to carry out an individual assessment for each witness which ought to have included a proper and considered assessment as to whether the measures requested were the least restrictive measure necessary to provide for the protection of victims and witnesses.

**Issue 3:** Whether the PTJ erred in his approach to assessing the proportionality of the protective measures requested, by first making a final determination as to whether the measures were “proportionate”, before then turning to (and dismissing) defence concerns as to the impact on the fair trial rights of the accused, whereas a proper assessment of proportionality of protective measures must be conducted “in view of the prejudice caused to the Accused and a fair trial”.

**Issue 4:** Whether by justifying the granting of in-court protective measures on the basis that witness’ identities will “only be withheld from the public” and finding no inconsistency between in-court protective measures and the rights of the accused because “the Accused will know the identity of the witness”, the PTJ erred by failing to take into account relevant considerations such as the impact of in-court protective measures on the

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<sup>12</sup> Decision on Extraordinary Review Application, para. 15.

public and transparent nature of the proceedings and their stifling effect on defence investigations in the field.

#### IV. THE TEST FOR CERTIFICATION IS MET

##### A. THE ISSUES ARE APPEALABLE ISSUES

13. The four identified Issues are appealable. The first Issue concerns whether the PTJ properly considered if “disclosure of the particular information to the Defence [would] endanger the person’s security?”,<sup>13</sup> given that the PTJ’s analysis contains no specific and concrete link between the purported risk and the defence in this case.<sup>14</sup> As such, the first Issue emanates directly from the Decision, and concerns the correctness of the application of the first two parts of the legal test for determining if certain information may be withheld from the defence, being an identifiable subject requiring a decision for its resolution.

14. In relation to the second Issue, rather than perform individual assessments for each witness, the PTJ considered the witnesses as part of various groups categorised by reference to the particular protective measure requested by the Specialist Prosecutor’s Office (“SPO”). In challenging this approach, the defence is not merely expressing a conflicting opinion, but identifying a concrete error in the PTJ’s application of a legal test, which is essential for the determination of matters arising in the judicial cause under examination.<sup>15</sup>

15. Similarly, the third Issue is an appealable issue because it directly emanates from the Decision. This is clear from the sequence of the PTJ’s analysis in the Decision.<sup>16</sup> This Issue is not merely a question over which there is disagreement,<sup>17</sup> but instead

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<sup>13</sup> *Prosecutor v. Al Hassan*, ICC-01/12-01/18-741-Red2, Public redacted version of ‘Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603’, 27 May 2020, para. 22 (emphasis added).

<sup>14</sup> Decision, paras. 30, 31, 33, 35, 49, 50, 52, 54, 75, 76, 82, 89, 90, 91, 93, 117, 118, 119, 121, 122.

<sup>15</sup> Decision on Extraordinary Review Application, para. 9.

<sup>16</sup> Decision, paras. 96-97.

<sup>17</sup> Decision on Extraordinary Review Application, para. 9.

goes to the proper evaluation of the principle of proportionality when considering whether to authorise measures which will significantly impact the ability of the defence to investigate and to effectively and efficiently confront the evidence at trial.

16. Finally, the fourth Issue is also an appealable issue. As a result of the Decision, the identities of 71 witnesses will not be known to the general public. This is a significant encroachment on Mr Thaçi's fundamental right to a public trial. Nevertheless, nowhere in the Decision does the PTJ give any consideration to the serious impact the grant of in-court protective measures to such a considerable number of witnesses will have on defence investigations.<sup>18</sup> This is a significant omission which, in the defence submission, will result in serious prejudice to Mr Thaçi's right to a fair trial, rendering resolution of this issue essential.

B. THE ISSUES SIGNIFICANTLY AFFECT THE FAIR & EXPEDITIOUS CONDUCT OF PROCEEDINGS AND THE OUTCOME OF THE TRIAL

17. The criteria to be satisfied under the second prong of the leave to appeal test are disjunctive. Regardless, the defence submits that the Issues satisfy both criteria.

***1. The Issues significantly affect the fair & expeditious conduct of the proceedings***

18. All the Issues significantly affect the "fair and expeditious conduct of proceedings" because they concern the authorisation of protective measures. The effect of the Decision is to delay disclosure in respect of 61 witnesses, to grant in-court protective measures such that the identities of 71 witnesses will be withheld from the public and to defer the PTJ's determination in relation to 12 witnesses. In these circumstances, the measures granted directly impact on Mr Thaçi's fair trial rights; specifically, the right to a public trial and to have adequate time and facilities to

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<sup>18</sup> Decision, paras. 122-125.



prepare his defence.<sup>19</sup> Rather than the defence having a complete picture of the SPO's case at the time it examines the first witness, the disclosure regime established by the Decision means that witnesses will come and go without the defence being able to understand their context or link to former or later evidence and to challenge and scrutinise their evidence accordingly. Fairness is, thus, clearly engaged by the Issues.

19. The expeditious conduct of the proceedings is also engaged by the Issues, all of which concern at core the justifications for withholding information from the defence. Withholding relevant information will restrict the defence's ability to conduct full and effective investigations. The Decision effectively prevents linked evidence (including witnesses) to be investigated in the pre-trial phase. A significant number of witness identities will be only be disclosed shortly prior to the start of trial and at a time when, in order to be trial ready, the majority of pre-trial investigations should be complete.

20. In addition, the extensive resort to rolling disclosure means that, during trial, instead of being able to dedicate its resources to the proceedings in the courtroom, the defence will be required to redirect resources to continual and piecemeal investigations. Further, over-reliance on in-court protective measures has a far greater impact than just shielding the witnesses' identities from the viewing public. They manifestly alter the ability of the defence to investigate the SPO case, as the defence also must take extreme care never to reveal to investigative sources or intermediaries, the link between the subject of the investigations and the proceedings. This necessarily complicates and prolongs the investigative process.

21. Given the scale of the measures imposed (both in terms of nature and the number of witnesses affected), the Decision results in a regime which it is reasonable to anticipate will lead to future delays in proceedings, whether to permit the defence to carry out necessary investigations or to deal with unforeseen difficulties in witness

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<sup>19</sup> KSC Law, Articles 21(2), 21(4)(c).



scheduling because replacement witnesses cannot be presented because the 30-day rolling disclosure period has not yet completed.

## ***2. The Issues significantly affect the outcome of trial***

22. If the Issues were wrongly decided, the consequences will significantly affect the outcome of the trial, namely the Article 43 judgement. The judgment will be rendered in the context of a trial where the defence's ability to investigate and, thus, to both challenge incriminatory evidence and advance exculpatory evidence has been significantly constrained by a protective measures regime imposed in the face of the errors identified in the Issues. This is not a situation "where appropriate remedies could...effectively be granted after the close of the case at trial".<sup>20</sup> A trial schedule will be fixed in early course. With that target, defence investigations will commence imminently and will be dictated by the constraints imposed by the Decision. The effects of the Decision, which the defence submit are extremely prejudicial, cannot be undone at the close of the trial. By that point, it will be too late.

### **C. THE IMMEDIATE RESOLUTION OF THE ISSUES MAY MATERIALLY ADVANCE THE PROCEEDINGS**

23. Proceedings are at a very early stage in the present case. The Decision is the first dealing with the important matter of disclosure to the defence in the context of protective measures. It will not be the last and, if left unchallenged, will set the approach to such decisions for the remainder of the trial, including the approach to be taken *vis-à-vis* the 12 witnesses in respect of whom the PTJ has deferred his decision. Therefore, if the impugned Decision has been wrongly decided, it will have far reaching consequences, including the infringement of the fundamental fair trial rights of Mr Thaçi. The doubt over the correctness of the decision will cast a cloud over the entirety of the proceedings. An immediate and "authoritative determination" by the

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<sup>20</sup> RPE, Rule 77(2).

Court of Appeals Panel of the Issues will “ensur[e] that the proceedings follow the right course” by “[r]emoving [these] doubts about the correctness of a decision or mapping a course of action along the right lines”.<sup>21</sup>

## V. RELIEF REQUESTED

24. For the above reasons, the defence respectfully requests the PTJ to grant leave to appeal the Issues pursuant to Article 45(2) of the KSC Law and Rule 77(2) of the RPE.

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Respectfully submitted,



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**David Hooper**

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Monday, 21 December 2020

At London, United Kingdom

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<sup>21</sup> Decision on Extraordinary Review Application, para. 15.