



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** **Trial Panel II**  
Judge Charles L. Smith, III, Presiding Judge  
Judge Christoph Barthe  
Judge Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 8 December 2021

**Language:** English

**Classification:** Public

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**Decision on Defence Request for Leave to Appeal F00470**

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**TRIAL PANEL II** (“Panel”), pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 3 December 2021, the Panel issued its decision on the Specialist Prosecutor’s challenges regarding several proposed Defence witnesses (“Impugned Decision”).<sup>1</sup> Therein, the Panel indicated that, should the Haradinaj Defence request leave to appeal under Rule 77 of the Rules, the Panel would be inclined to grant such leave in relation to the following issues arising from the Impugned Decision: (i) the Panel’s findings in relation to the irrelevance of the proposed testimony of DW1250 and DW1251 and its decision not to hear these witnesses (“First Issue”); and (ii) the Panel’s findings in relation to the impermissible character of the proposed evidence of DW1253 under Rule 149 of the Rules and its decision not to hear this witness (“Second Issue”, collectively “Issues”).<sup>2</sup> The Panel further indicated that the Haradinaj Defence was not required to make submissions regarding the certification test under Rule 77(2) of the Rules in relation to the Issues.<sup>3</sup>

2. On 6 December 2021, the Haradinaj Defence requested leave to appeal in respect of the Issues (“Haradinaj Application”).<sup>4</sup>

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<sup>1</sup> F00470, Panel, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses* (“Impugned Decision”), 3 December 2021.

<sup>2</sup> Impugned Decision, para. 120.

<sup>3</sup> Impugned Decision, para. 121.

<sup>4</sup> F00474, Haradinaj Defence, *Defence Application for Leave to Appeal in respect of ‘Decision on Prosecution Requests in Relation to Proposed Defence Witnesses’*, 6 December 2021.

3. On 7 December 2021, the Specialist Prosecutor's Office ("SPO") indicated that it did not object to the Haradinaj Application and that it did not intend to file any further written submission on the matter.<sup>5</sup>

## II. APPLICABLE LAW

4. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an Accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve 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.

5. Rule 77(2) of the Rules further 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.

6. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.<sup>6</sup> Interlocutory appeals, interrupting the continuity of the proceedings, are the exception.<sup>7</sup> Instead, the Party seeking leave to appeal an issue must establish in

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<sup>5</sup> Draft Transcript, 7 December 2021, p. 2238.

<sup>6</sup> F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect* ("F00423"), 8 November 2021; F00169, Pre-Trial Judge, *Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions* ("F00169"), 1 April 2021, para. 10.

<sup>7</sup> F00423, para. 13; F00169, para. 10. *Similarly*, ICTR, *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-T, [Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on](#)

relation to it the requirements set by the Law and by the Rules to the Panel's satisfaction.<sup>8</sup>

7. Considerations that an interlocutory appeal would address fundamental questions of law or fact or would be to the benefit of the Specialist Chambers do not *per se* warrant certifying the appeal.<sup>9</sup> There is no authority relevant to the present proceedings to support the existence of an "inherent power" to certify matters for appeal that do not meet the requirements of Rule 77(2) of the Rules.<sup>10</sup> In other words, Rule 77(2) is the exclusive basis for the Panel to certify an issue for discretionary

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[\*Defence Urgent Motion to Declare Parts of the Evidence of the Witnesses RV and QBZ Inadmissible\*](#) ("Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal"), 18 March 2004, para. 15; ICC, *Situation in Uganda*, ICC-02/04-01/05-20, [\*Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58\*](#) ("ICC-02/04-01/05-20, Decision on Prosecutor's Application for Leave to Appeal"), 19 August 2005, paras 18-19; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, [\*Decision Denying Certification to Appeal Decision Under Rule 167 Not to Acquit Hussein Hassan Oneissi and to Stay the Trial – With a Short Separate Opinion of Judge David Re\*](#) ("Oneissi Decision Denying Certification to Appeal"), 14 May 2018, para. 8.

<sup>8</sup> F00423, para. 13. See generally, ICTY, *Prosecutor v. Milošević*, Case No. IT-02-54-T, [\*Decision on Prosecution's Request for Certification of Appeal Under Rule 73\(B\)\*](#), 18 January 2006, p. 1; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, [\*Decision on Prosecution's Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić's Preliminary Motions on Form of the Indictment\*](#), 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-02-54-T, [\*Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding\*](#) ("Milošević Decision"), 20 June 2005, para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, [\*Decision on Prosecution Request for Certification for Interlocutory Appeal of "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment"\*](#) ("Halilović Decision"), 12 January 2005, p. 1; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, [\*Decision on Defence Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds\*](#), 16 July 2003, p. 3; *Prosecutor v. Delić*, Case No. IT-04-83-PT, [\*Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend\*](#), 14 July 2006 ("Delić Decision"), p. 1.

<sup>9</sup> F00423, para. 14; F00169, para. 10. Similarly, ICTY, *Prosecutor v. Milutinović et al.*, No. IT-05-87-T, [\*Decision Denying Prosecution's Request for Certification of Rule 73 bis Issue for Appeal\*](#) ("Milutinović Decision"), 30 August 2006, para 4. See also [\*Halilović Decision\*](#), p. 1; [\*Delić Decision\*](#), p. 1; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-529, [\*Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521\*](#) ("Ongwen Decision on Defence Request for Leave to Appeal"), 2 September 2016, para. 8; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-532, [\*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"\*](#), 18 September 2009, para. 12.

<sup>10</sup> F00423, para. 14. Similarly, ICTY, [\*Milutinović Decision\*](#), para 5.

appeal so that leave to appeal can only be granted if and where the requirements of this Rule are met.<sup>11</sup>

8. Pursuant to a combined reading of Article 45(2) of the Law and Rule 77(2) of the Rules, the following requirements must be met:

- a. the issue at hand would significantly affect
  - i. the fair and expeditious conduct of the proceedings, or
  - ii. the outcome of the trial; and
- b. an immediate resolution by the Court of Appeals Panel may materially advance the proceedings (“Certification Test”).<sup>12</sup>

9. The Panel notes that the Pre-Trial Judge has set out a preliminary step in the Certification Test, addressing whether an issue is appealable.<sup>13</sup> The Panel notes that Article 45(2) of the Law and Rule 77(2) of the Rules do not provide for such a preliminary step and therefore it does not appear to constitute a separate and distinct requirement under the Rules. Nonetheless, in order for the Panel to be in a position to verify whether the requirements of Rule 77(2) of the Rules have been met, a Party must identify the issue(s) for which leave to appeal is sought in a way that these requirements can be established by the Party seeking certification and verified by the Panel. Such issues must emanate from the ruling concerned and cannot amount to abstract questions or hypothetical concerns.<sup>14</sup>

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<sup>11</sup> F00423, para. 14. See also ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, [Decision on Prosecution Request for Certification for Appeal of Decision of 25 May 2006 on Lead Counsel’s Assignment of Mr Orsat Miljenić as Pro Bono Co-Counsel for the Accused Petković](#), 23 June 2006, p. 3; [Halilović Decision](#), p. 1.

<sup>12</sup> F00423, para. 15. See also F00169, para. 12.

<sup>13</sup> F00169, para. 11.

<sup>14</sup> F00423, para. 16. See also F00169, para. 12. Similarly, ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-75, [Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure \(“Bemba Decision on Prosecutor’s Application for Leave to Appeal”\)](#), 25 August 2008, para. 11; ICC, [Ongwen Decision on Defence Request for Leave to Appeal](#), para. 6; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-596, [Decision on the Joint Defence Request for Leave to Appeal the Decision on Witness Preparation](#), 11 February 2013, para. 11. The Panel notes that, before the ICC, this requirement appears to have been

10. The first prong of the Certification Test, as set out in (a), contains two alternatives. The issue must be shown to significantly affect (i) “the fair and expeditious conduct of proceedings” or (ii) “the outcome of the trial”.<sup>15</sup> Use of the term “significantly” in the wording of the first prong of the Certification Test indicates that an applicant must not only show how the issue affects (i) the fair and expeditious conduct of proceedings, or (ii) the outcome of the trial, but must also demonstrate the (significant) degree to which these factors are affected.<sup>16</sup> The issue must be one likely to have repercussions on either of the above two elements.<sup>17</sup>

11. The “fair and expeditious conduct of proceedings” is generally understood as referencing the general requirement of fairness.<sup>18</sup> One of the fundamental aspects of this requirement is that proceedings should be adversarial in nature and that there should be equality of arms between the parties.<sup>19</sup> Fairness is preserved when a party is provided with the genuine opportunity to present its case and to be apprised of and comment on the observations and evidence submitted to the Panel that might influence its decision.<sup>20</sup> Expeditiousness is an attribute of a fair trial and is closely

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regarded as a distinct requirement rather than an element of other, more general requirements to be met for leave to appeal to be granted.

<sup>15</sup> F00423, para. 17. *Similarly*, ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, [Judgment 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, Judgment on Extraordinary Review”), 13 July 2006, para. 10.

<sup>16</sup> F00423, para. 17; F00169, para. 13. *Similarly*, ICTR, [Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal](#), para. 16.

<sup>17</sup> F00423, para. 17; F00169, para. 13. *Similarly*, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 10.

<sup>18</sup> F00423, para. 18; F00169, para. 14. *Similarly*, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 11.

<sup>19</sup> F00423, para. 18; Articles 21(4)(f) and 37(2) of the Law. *See also* European Court of Human Rights (“ECtHR”), *Bannikova v Russia*, no. [18757/06](#), Judgment (“[Bannikova Judgment](#)”), 4 November 2010, paras 57-58; *Barberà, Messegué and Jabardo v. Spain*, no. [10590/83](#), Judgment, 6 December 1988, para. 78; *Brandstetter v. Austria*, nos [11170/84](#); [12876/87](#); [13468/87](#); 28 August 1991, Judgment, paras 66-67; *Ruiz-Mateos v. Spain*, no. [12952/87](#), Judgment, 23 June 1993, para. 63; *Colozza v. Italy*, no. [9024/80](#), Judgment, 12 February 1985, para. 27; ICC, Pre-Trial Chamber III, *Prosecutor v. Bemba*, ICC-01/05-01/08, [Decision on Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure](#), 25 August 2008, para. 14.

<sup>20</sup> F00169, para. 14; *Similarly*, ICC, [Bemba Decision on Prosecutor’s Application for Leave to Appeal](#), para. 14.

linked to the requirement that proceedings should be conducted within a reasonable time.<sup>21</sup>

12. Alternatively, the first prong of the Certification Test may be met if the issue significantly affects the outcome of the trial. Thus, it must be considered whether a claimed error is likely to impact the outcome of the case. The exercise involves a forecast of the consequence of such an occurrence.<sup>22</sup>

13. The second prong of the Certification Test is an additional limiting factor. Because of the test's cumulative nature, the failure of an applicant to establish the first prong of the test would normally exempt the Panel from considering whether the second prong has been met.<sup>23</sup> The second prong of the test for certification requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the "judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial" thereby moving the proceedings forward along the right course.<sup>24</sup>

14. Lastly, certification is not concerned with whether a decision is correctly reasoned, but whether the Certification Test has been met.<sup>25</sup> The decision examining a request for leave to appeal is not an opportunity to explain the contested decision to the parties or to express disagreement with the views of the Panel. However, where necessary,

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<sup>21</sup> F00423, para. 18; F00169, para. 14.

<sup>22</sup> F00423, para. 19; F00169, para. 15.

<sup>23</sup> F00423, para. 20; F00169, para. 16.

<sup>24</sup> F00423, para. 20; F00169, para. 17.

<sup>25</sup> F00423, para. 21; F00169, para. 18. *Similarly*, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, [Decision Denying Certification to Appeal Decision under Rule 167 not to Acquit Hussein Hassan Oneissi and to Stay the Trial – with a Short Separate Opinion of Judge David Re, 14 May 2018](#), para. 8; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused's Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 Bis](#), 18 July 2012, para. 6; ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, [Decision on Defence Motion for Leave to Appeal the Trial Chamber' Decision on the Defence Request to Call Prosecution Investigators](#), 10 May 2011, para. 12; [Milošević Decision](#), paras 3-4; [Milutinović Decision](#), para. 4.

the Panel will provide clarification of its decision, including where misrepresentation of the decision so warrants.<sup>26</sup>

### III. DISCUSSION

#### A. PRELIMINARY CONSIDERATIONS REGARDING RULE 77

15. The Panel notes at the outset that the decision whether to request leave to appeal under Rule 77 of the Rules rests with the relevant Party. In particular, it is for the Party concerned to assess the legal and practical considerations in deciding whether to submit a request for leave to appeal.<sup>27</sup>

16. The Panel's indication in the Impugned Decision that it was inclined to grant leave to appeal in relation to the Issues was given with a view to expedite the present proceedings. It was not intended to and did not usurp the prerogative of the Haradinaj Defence to decide whether to submit a request in this regard.

#### B. THE ISSUES

17. The Panel notes that the Haradinaj Defence proposed to call seven witnesses.<sup>28</sup> The Issues concern the decision of the Panel to exclude the testimony of three of these witnesses, including a proposed expert witness.

18. The Panel is mindful that the First Issue affects the ability of the Haradinaj Defence to call evidence in relation to the Defence claim that the Accused have acted in pursuance of a "public interest".<sup>29</sup> The Second Issue affects the ability of the Haradinaj Defence to call evidence in relation to, *inter alia*, practices and procedures followed by

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<sup>26</sup> F00423, para. 21; F00169, para 18.

<sup>27</sup> Impugned Decision, para. 120.

<sup>28</sup> F00461/A01, Haradinaj Defence, *Information required pursuant to Rule 119 (2) (a) of the Rules of Procedure and Evidence, and the Order on the Conduct of Proceedings*, 29 November 2021.

<sup>29</sup> Impugned Decision, paras 45-48.



the SPO in the present case, and Defence assertions regarding the inadequacies of the SPO's chain of custody and authentication of the material deemed to be confidential and non-public.<sup>30</sup>

19. In light of the above, the Panel considers that the Issues concern the ability of the Haradinaj Defence to present what it regards as a significant part of its evidence in support of its case and therefore they significantly affect the fair conduct of the proceedings. Likewise, the Issues concern the ability of the Haradinaj Defence to present its case in a timely manner, during the trial proceedings and according to the schedule set out by the Panel, and therefore they affect the expeditious conduct of proceedings. The Panel further considers that prompt referral of the Issues to the Court of Appeals Panel would result in an authoritative determination of the matter and would thus materially advance the proceedings.

20. The Panel accordingly certifies the appeal in respect of the two Issues.

#### IV. DISPOSITION

21. For these reasons, the Panel **GRANTS** the Haradinaj Application and **CERTIFIES** the appeal in respect of the two Issues as defined in paragraph 1.



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**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Wednesday, 8 December 2021

At The Hague, the Netherlands

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<sup>30</sup> Impugned Decision, para. 102.