

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

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**Thaçi Defence Request for Certification to Appeal the ‘Decision on Framework
for the Handling of Confidential Information during Investigations and Contact
between a Party or Participant and Witnesses of the Opposing Party or of a
Participant’**

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I. INTRODUCTION

1. On 24 June 2022, the Pre-Trial Judge ordered the adoption of a 'Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party' ("Protocol").¹

2. The Protocol puts in place the most restrictive regime for witness contact in the history of international criminal justice. It applies to all witnesses regardless of who they are, where they live, their vulnerability, or security or privacy concerns. Importantly, in a first for international criminal trials, the Defence is required to audio-video record all interviews with SPO witnesses, and then disclose this recording to the SPO, and the Panel itself. The Trial Panel can then admit this recording into evidence *proprio motu*.

3. Therefore, Defence interviews of SPO witnesses, which seek to uncover what these 326 people know about Mr Taçi and his acts and conduct, must be conducted with the understanding that any answer given, truthful or otherwise, may then be admitted into evidence. It also means that any Defence interview, and everything they will necessarily reveal about strategy, case theory, and instructions from Mr Taçi, will be an open book. As such, the Protocol represents a significant expansion of Defence disclosure beyond the KSC's statutory framework, as well as an unwarranted invasion of attorney-client privilege, compromising the right of the Defence to investigate.

¹ KSC-BC-2020-06/F00854, Pre-Trial Judge, Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022 ("Decision").

4. Rejecting the SPO and the Defence position that the Protocol imposes protective measures,² the Pre-Trial Judge identified the legal basis as Articles 39(1) and (11) of the Law.³ Article 39(11) empowers a Pre-Trial Judge to “**where necessary**, provide for the privacy and protection of victims and witnesses”. The Decision does not explain why the wholesale application of a previously unforeseen level of restriction is **necessary**, particularly given the very different situations of the 326 SPO witnesses. By applying a one-size-fits-all approach, the Protocol equates a vulnerable protected dual status victim/witness residing in Kosovo, with a high-ranking international witness with no security or privacy concerns, known publicly as an SPO witness.⁴ These two people do not have the same protection or privacy needs, making the Protocol excessive.

5. Other aspects of the Protocol cannot be reconciled with the rights of the accused, the Court’s statutory framework, or Kosovo criminal procedure. They are identified in the appealable issues below. A regime with this level of innovation, proscription and restriction warrants appellate review. The issues raised fulfill the criteria for certification, which is respectfully sought in accordance with Rule 77 of the Rules and Article 45 of the Law. The Defence recalls the legal test for certification articulated by the Pre-Trial Judge, which is hereby incorporated by reference.⁵

II. THE ISSUES FOR APPEAL

6. Certification is sought to appeal the following 15 issues (“Issue” or “Issues”), each satisfying the requirements of Article 45(2) and Rule 77(2):

² Decision, para. 136; Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

³ Decision, para. 135; Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

⁴ See, *inter alia*, KSC-BC-2020-06, Transcript of Thirteenth Status Conference, 13 July 2022, pp. 1382, 1396.

⁵ KSC-BC-2020-06/F00172, PTJ, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, paras. 6-7.

Overarching Issues

Issue 1: Whether the recording and disclosure of witness interviews represents an erroneous invasion of attorney-client privilege and compromises the right of the accused to investigate the case against him.

Issue 2: Whether the Protocol and its measures fall within with the scope of the Pre-Trial Judge's power in Article 39(11) to provide "**where necessary**" for the privacy and protection of witnesses.⁶

Declining to Consider the *Thaçi* Supplemental Submissions⁷

Issue 3: Whether the Pre-Trial Judge erred in declining to consider the *Thaçi* Supplemental Submissions, given the relevance of the SPO practice of including people on its List of Witnesses without their knowledge and/or consent, to the issues under consideration.⁸

Blanket Application of the Protocol

Issue 4: Whether the proper scope and terms of Article 39(11) required the Pre-Trial Judge to differentiate between categories of SPO witnesses in the Protocol's application.

Recording of Interviews and their Disclosure to the Parties and Panel

Issue 5: Whether ordering the recording and disclosure of Defence interviews on the basis of a "climate of witness intimidation and interference" and the

⁶ Decision, para. 120.

⁷ KSC-BC-2020-06/F00741, *Thaçi* Defence Supplemental Submissions on the SPO's Proposed Framework for Contacts with Witnesses, 21 March 2022 ("*Thaçi* Supplemental Submissions").

⁸ Decision, paras. 109-110.

continued “significant influence” of the accused violates the presumption that Defence Counsel act in good faith.⁹

Issue 6: Whether reliance on “the established risks of disclosing information to the Defence”¹⁰ creates an erroneous double standard, where the Pre-Trial Judge accepted that the SPO acts in good faith, and found that “any suggestion of inappropriate conduct or motives on the part of the SPO are unsubstantiated and speculative.”¹¹

Issue 7: Whether the Pre-Trial Judge adopted an erroneously narrow definition of “compulsion” in finding that, because “the Defence remains at liberty to define its strategy” during interviews with SPO witnesses, the information revealed during Defence interviews has not been compelled.¹²

Issue 8: Whether the requirement on the Defence to disclose the audio-video records of its interviews is consistent with the regime set out in Rules 104-111 of the Rules.

Issue 9: Whether the Pre-Trial Judge’s reliance on the fact that the interview recordings do not automatically become part of the case record, fails to consider or give sufficient weight to the Defence submissions as to **other** practical risks to the accused, including creating an adverse record,¹³ and revealing investigatory avenues that assist the SPO.¹⁴

⁹ Decision, para. 118.

¹⁰ Decision, para. 124.

¹¹ Decision, paras. 142-143.

¹² Decision, para. 150.

¹³ KSC-BC-2020-06, Transcript of Hearing on Protocol, 22 February 2022, pp. 995-996; KSC-BC-2020-06/F00625, Thaçi Defence Response to Prosecution submissions on confidential information and contacts with witnesses, 15 December 2021 (“Thaçi Response”), para. 21.

¹⁴ Thaçi Response, para. 18.

Privacy

Issue 10: Whether the Pre-Trial Judge's framing of the question of witnesses' privacy **entirely with respect to SPO witnesses**, with no reference to the rights or expectations of Defence witnesses, requires the reversal of all findings based on this reasoning.¹⁵

Issue 11: Whether the Pre-Trial Judge erred in relying on the SPO witnesses' expectation of privacy to require the recording and disclosure of Defence interviews, in the absence of any link being established between SPO witness privacy and this measure, or any reasoning as to how the accused's rights are being affected, balanced, or taken into account.¹⁶

Equality of Arms

Issue 12: Whether the Pre-Trial Judge was legally entitled to find that the Protocol applies equally to the SPO and Defence, when all SPO interviews before 24 June 2022 were conducted in the absence of the Defence,¹⁷ in contravention of the procedural framework in Kosovo which provides for Defence participation in Prosecution investigations.¹⁸

Issue 13: Whether the Pre-Trial Judge erred in finding that the Defence was not entitled to be present during SITF and SPO interviews because they concerned "the Council of Europe report taken as a whole", given the more recent case-specific investigations into Mr Thaçi himself.¹⁹

¹⁵ Decision, paras. 121-123.

¹⁶ *Ibid.*

¹⁷ Decision, paras. 142-145.

¹⁸ *See, e.g.*, Kosovo Criminal Procedure Code (2012), 04/L-123, 2012, Articles 9(2), 61(3), 119(4), 122(5), 141(1) and 216(1).

¹⁹ Decision, para. 140.

Impact on the length of investigations and proceedings

Issue 14: Whether the Pre-Trial Judge's conclusion that the Protocol "contributes to the expeditious conduct of proceedings" was open to a reasonable finder of fact.²⁰

Issue 15: Whether the impact on the right of an accused to adequate time and facilities under Article 21(4)(c) of the Law can be considered mitigated through measures such as joint Defence interviews of SPO witnesses, or remote interviews of SPO witnesses,²¹ when the Defence objections to these measures were not taken into account.

III. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

7. The identified Issues all arise from the Decision and contest specific findings. Each Issue is an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination.²²

8. **Issue 1** seeks appellate determination regarding the legal compatibility of the regime with attorney-client privilege and the right of the defence to investigate, an identifiable and discrete topic. **Issue 2** highlights a legal issue and question of statutory interpretation of Article 39(11), that requires resolution by the Court of Appeals Panel. **Issue 3** is not a mere disagreement with the Pre-Trial Judge's decision not to consider the Thaçi Supplemental Submissions, but seeks resolution of whether

²⁰ Decision, para. 125.

²¹ Decision, para. 175.

²² KSC-BC-2020-07/F00169, Pre-Trial Judge, 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, Pre-Trial Judge, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, para. 11.

it was legally permissible in light of the relevance of these submissions to the issues under consideration. **Issue 4** goes to the heart of the legal basis for the Protocol, and raises a discrete, clear issue regarding the scope and terms of Article 39(11) and its application in this important and overarching context.

9. Turning to the recording and disclosure of Defence interviews, **Issue 5** seeks resolution on the propriety of the legal justification for this measure, and asks whether it violates a basic presumption concerning Defence counsel conduct. Similarly, **Issue 6** seeks appellate review of whether the legal basis for recording and disclosing creates an impermissible double standard in the treatment of the Defence and SPO. **Issue 7** addresses the legal interpretation of ‘compulsion’, which arises directly from the Pre-Trial Judge’s decision, while **Issue 8** asks for appellate resolution of whether the Protocol complies and is consistent with the Court’s statutory framework. **Issue 9** identifies the discrete issue of whether the finding reached by the Pre-Trial Judge was invalidated by a failure to consider or give weight to expressed practical consequences of this measure, which also arises directly from the Decision.

10. As regards privacy, **Issue 10** asks for resolution of the legal impact of the Pre-Trial Judge’s consideration **only** of the privacy of SPO witnesses. Rather than being a disagreement with the Pre-Trial Judge’s approach to the assessment of privacy, **Issue 11** asks for the Court of Appeals Panel to rule on the impact of the Pre-Trial Judge acknowledging that a privacy expectation must be weighed against Mr Thaçi’s fair trial rights, but then failing to balance these competing interests in practice.

11. **Issue 12** seeks resolution on the discrete question of the impact of the *post-facto* application of the Protocol after years of SPO investigations, particularly when the Kosovo legal framework facilitates Defence participation in Prosecution investigations, and not the other way around. This is a legal issue which warrants appellate resolution. **Issue 13** arises from the Pre-Trial Judge’s dismissal of these

concerns on the basis that SPO investigations were broader than the case, when this statement is invalidated by SPO disclosure showing investigations into Mr Thaçi himself. **Issue 14** also emanates directly from the Decision, questioning the basis for the Pre-Trial Judge's finding as to the Protocol's impact on expeditiousness, while **Issue 15** seeks appellate resolution of the legal propriety of considering rights of the accused to be mitigated when the solutions proposed are unacceptable.

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

12. There can be little argument as to the significant impact of the Issues on the fair and expeditious conduct of the proceedings. The written and oral pleadings, and the Decision itself, have centred on whether the measures proposed are consistent with fair trial rights, and the risks of delays. The Pre-Trial Judge acknowledged that the Protocol could impact time and facilities for preparation, focusing on how delays could be mitigated.²³ Rather than counsel being able to contact witnesses and arrange for interviews at their convenience, the Protocol injects additional steps, consultations, time periods, and logistical arrangements into the investigative process, as well as additional actors. Consequently, it cannot be reasonably argued that the application of the Protocol will have no impact on expeditiousness.

13. **Issue 1** concerns the invasion of attorney-client privilege, and the right of the Defence to investigate, which flows from the rights of the accused to be represented by counsel and to have adequate time and facilities to prepare. The incursion into the Defence camp also significantly impacts the expeditious conduct of proceedings, as the additional logistics and parties involved will, put simply, take further time. **Issues 2 and 4** concern fair trial rights, and the central issue of balancing the accused's rights against the privacy and protection of witnesses, as required by Article 39(11). These

²³ Decision, paras. 174-175.

issues impact, in particular, the rights of the accused to adequate time and facilities, and to be tried within a reasonable time. Whether the application of the Protocol is targeted to specific categories of witnesses will also undoubtedly significantly impact the expeditiousness of proceedings. **Issue 3** similarly arises from the dismissal of the Defence concern that the Protocol allows for the stifling of Defence investigations by placing people on the SPO's witness list. The *Thaçi* Supplemental Submissions sought to demonstrate that the SPO List is populated, in part, by people who neither know nor have consented to being on it.²⁴ This question is therefore directly relevant to the right of the accused to investigate, flowing from the right to adequate time and facilities and the right to counsel. Again, the question of the length of the SPO List and the consequent application of the Protocol significantly impacts expeditiousness.

14. **Issues 5 to 9** address the recording of interviews and their disclosure to the Parties and Panel, each having a significant impact on fairness and expeditiousness. Specifically, the alleged violation of the presumption that Defence Counsel shall act in good faith and the double standard in **Issues 5 and 6** impacts not only the right to adequate time and resources, but the overarching right to be afforded these minimum guarantees "in full equality" under Article 21(4) of the Law. **Issue 7's** challenge to the definition of "compulsion", and **Issue 9's** focus on the concrete practical risks of creating an adverse record through Defence interviews, both concern Mr *Thaçi's* right not to be compelled to testify against himself or admit guilt, which is significantly impacted. **Issue 8's** challenge to the Protocol's compliance with Rules 104-111 of the Rules goes to the heart of a fair trial; if measures impose conditions that are incompatible with statutory intent as regards Defence protections, then the fairness of the proceedings are compromised. Specifically, if the Defence is being erroneously obliged to disclose privileged information or work product, this significantly impacts the accused's rights to defend himself through counsel and to adequate time and

²⁴ *Thaçi* Supplemental Submissions, paras. 10-12.

facilities for preparation. As regards the expeditious conduct of the proceedings, **Issues 5-9** all identify errors in a procedure (the recording of interviews and disclosure to the Parties and Panel) which will undoubtedly make the process of Defence interviews more complex, more cumbersome and, therefore, slower; significantly impacting on the expeditious conduct of proceedings.

15. The privacy issues identified in **Issues 10 and 11** significantly impact on the right to adequate time and resources, and the Pre-Trial Judge limiting his reasoning to only the expectations of SPO witnesses invokes Mr Thaçi's right to exercise his rights in full equality, which is significantly impacted. **Issues 12 and 13** concern equality of arms, a concept central to fair proceedings; the timing of the Protocol, which results in its uneven application as between the SPO and Defence, significantly impacts the equality between the parties. Again, these identified errors go directly to expeditiousness, which is significantly impacted by the practical realities of the Protocol's implementation.

16. Finally, **Issues 14 and 15** significantly impact on the right to expeditious proceedings, the right to trial without undue delay, and the right to adequate time and resources to prepare. **Issues 1-15** therefore meet the criteria for certification, and warrant resolution by the Court of Appeals Panel.

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

17. There is no doubt that the Protocol is a significant procedural step, which alters the procedure for a significant proportion of Defence investigations, and the Parties' engagement with confidential material. Each Issue has been identified because, by its very nature, if wrongly decided, either the Protocol as a whole, or significant aspects thereof, would need to be re-thought.

18. If the Protocol violates attorney-client privilege and the right to investigate (**Issue 1**); if the measures sought do not fall within Article 39(11) (**Issue 2**); if the Thaçi Supplemental Submissions should have been considered (**Issue 3**); if the Protocol should be targeted (**Issue 4**); if the recording and disclosure of Defence interviews are partial, have compelled the accused, and are in violation of Rules 104-111 (**Issues 5-9**); if the privacy issues of SPO witnesses have been wrongly assessed (**Issues 10-11**); if the Protocol violates the equality of arms between the parties (**Issues 12-13**), or if it is incompatible with expeditious proceedings and the right to adequate time and facilities (**Issues 14-15**), then the prejudice suffered to the ongoing Defence investigations and the rights of the accused will be irreparable, warranting the intervention of the Court of Appeals Panel at this stage to resolve the Issues identified.

IV. RELIEF SOUGHT

19. For the above reasons, the Defence respectfully requests that the Pre-Trial Judge grant leave to appeal the Issues pursuant to Article 45(2) of the Law and Rule 77(2) of the Rules.

[Word count: 2,967 words]

Respectfully submitted,



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At Tampa, United States