

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

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

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Krasniqi Defence Request

for Certification to Appeal the “Order on the Conduct of Proceedings”

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I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No.05/L-053 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"), the Defence for Jakup Krasniqi ("Defence") seeks certification to appeal the Trial Panel's "Order on the Conduct of Proceedings" ("Order"),¹ limited to the issues identified by the Defence in its further submissions of 13 January 2023.²

2. The Defence seeks leave to appeal the following issues: -

- a. **Issue One:** Whether the Trial Panel erred in law and/or abused its discretion in failing to provide a reasoned decision on Mr. Krasniqi's request for the Panel to reject witness preparation in this case and to adopt a witness familiarisation protocol, or, in the alternative, to provide additional safeguards to counterbalance the inherent risks associated with a witness preparation regime;
- b. **Issue Two:** Whether the Trial Panel erred in failing to consider relevant circumstances, and in particular all the inherent risks associated with a witness preparation regime, as highlighted by Mr. Krasniqi in his submissions;

¹ KSC-BC-2020-06, F01226, Trial Panel II, *Order on the Conduct of Proceedings*, 25 January 2023, public.

² KSC-BC-2020-06, F01207, Krasniqi Defence, *Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings* ("Krasniqi Defence Submissions"), 13 January 2023, public.

- c. **Issue Three:** Whether the Trial Panel erred in law and/or abused its discretion by failing to provide any adequate safeguard to counterbalance the inherent risks associated with a witness preparation regime.

II. PROCEDURAL HISTORY

3. On 16 December 2022, the Trial Panel informed the Parties and participants that, in accordance with Rule 116(3) of the Rules, a Draft Order would be circulated to the Parties and participants for them to make submissions, if they so wish, by 13 January 2023, at 16:00 hours.³
4. On 22 December 2022, the Trial Panel circulated a Draft Order on the Conduct of Proceedings to the Parties and participants (“Draft Order”).⁴
5. On 13 January 2023, Victim’s Counsel, the Specialist Prosecutor’s Office (“SPO”), and all the Defence teams jointly filed observations on the Draft Order on the Conduct of Proceedings.⁵
6. On the same day, the Defence filed further submissions in addition to the Defence Joint Submissions.⁶ In particular, the Defence requested the Trial Panel to: (i) reject witness preparation in this case and instead adopt a witness familiarisation protocol akin to the one adopted in the *Mustafa* case;⁷ or, in the alternative, to (ii) adopt

³ KSC-BC-2020-06, In Court – Oral Order, Second Order - Re. Draft Order on the Conduct of Proceedings, 16 December 2022, public.

⁴ KSC-BC-2020-06, F01178, Trial Panel II, *Order for Submissions on the Draft Order on the Conduct of Proceedings*, 22 December 2022, public, with Annex 1, public.

⁵ KSC-BC-2020-06, F01202, Counsel for Victims, *Victims’ Counsel’s Submissions on the Draft Order on the Conduct of Proceedings*, 13 January 2023, public; F01205, Specialist Prosecutor, *Prosecution Submissions on the Conduct of Proceedings*, 13 January 2023 (“SPO Submissions”), public; F01203, Joint Defence, *Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01)* (“Defence Joint Submissions”), 13 January 2023, public.

⁶ Krasniqi Defence Submissions.

⁷ *Idem*, paras 6-16, 23.

additional safeguards to counterbalance the inherent risks of witness preparation, and in particular the obligation for the calling party to video-record witness preparation sessions.⁸

7. On 25 January 2023, the Trial Panel issued the Order. While the cover filing acknowledges that Mr. Krasniqi filed additional submission⁹ and states that “the Trial Panel has carefully considered the Parties and participants’ submissions”,¹⁰ none of the requests or the issues identified by the Defence in the Krasniqi Defence Submissions are addressed in the cover filing.

III. APPLICABLE LAW

8. Article 45(2) of the Law provides:

Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it 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.¹¹

9. Rule 77(2) of the Rules establishes 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”.

⁸ Krasniqi Defence Submissions, paras 17-21, 23.

⁹ Order, para. 4.

¹⁰ *Idem*, para. 8.

¹¹ *Emphasis added*.

10. The Trial Panel has previously elaborated on the necessary test required to reach the threshold for certification: -

- a. The issue for which certification is sought must have significant repercussions for either the “fair and expeditious conduct” of the proceedings or “the outcome of the trial”.¹² In this context, “fair and expeditious conduct of proceedings” refers to the general requirement of fairness, which includes that proceedings should be adversarial in nature and that there should be equality of arms between the parties. “Expediency” is an attribute of fair trial and is closely linked to the requirement that proceedings should be conducted within a reasonable time.¹³ Alternatively, the test for certification is met if the claimed error is likely to impact the outcome of the case; an exercise which involves a forecast of the consequence of such an occurrence.¹⁴
- b. The second prong of the test for certification is that the immediate resolution of the appealable issue will materially advance proceedings, in the sense 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”.¹⁵

¹² KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect* (“Decision on SPO Requests”), 8 November 2021, public, para. 17.

¹³ *Idem*, para. 18.

¹⁴ *Idem*, para. 19.

¹⁵ *Idem*, para. 20.

- c. Finally, the Party seeking clarification must identify issues which emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.¹⁶

11. Certification is not concerned with the merits of the appeal,¹⁷ and thus the Defence refrains from submitting arguments on the merits of the appeal at this stage.

IV. THE PRESENT REQUEST IS ADMISSIBLE

12. As a preliminary matter, the Defence submits that the present request is admissible pursuant to Article 45(2) of Law and Rule 77(2) of the Rules, even though the Order is not formally labelled as a “decision”.

13. Even though Rule 77(2) of the Rules contains a reference to “the decision”, the Defence submits that a fair and reasonable interpretation of this provision does not confine the possibility to seek certification to issues contained in documents formally labelled as decisions.

14. Firstly, it is noteworthy that Article 45(2) of Law states that:

Interlocutory appeals shall lie as of right from **decisions or orders** relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. **Any other interlocutory appeal** must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel [...].¹⁸

15. The fact that the applicable framework envisions the possibility of interlocutory appeals against “orders” is a clear indication that the drafters did not intend to limit interlocutory appeals to issues contained in “decisions”. This position is reinforced by

¹⁶ Decision on SPO Requests, para. 16.

¹⁷ *Idem*, para. 21.

¹⁸ *Emphasis added*.

the overall language of Article 45(2) of the Law, which refers to “any other interlocutory appeal”, without any restriction in relation to the issues for which certification can be requested, or the formal denomination of the documents from which these issues arise.

16. Secondly, the Defence submits that a teleological interpretation of Article 45(2) of Law and Rule 77(2) of the Rules points towards the admissibility of interlocutory appeals for issues arising from an order. The purpose of these provisions is to permit, albeit on an exceptional basis, the resolution of issues which have significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and which require immediate resolution in order to materially advance the proceedings. Therefore, as previously held by the Pre-Trial Judge, it is the “issue” which forms the basis of the appealable decision.¹⁹ Whether the issue arises from a decision, an order, or a differently labelled judicial document, is irrelevant. Whenever an issue requiring immediate resolution is identified, provided that the relevant standard is met, certification to appeal may be granted.

17. Thirdly, Rule 4(3) of the Rules provides that any ambiguity in the Rules “shall be resolved by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances”. Accordingly, Article 45(2) of Law and Rule 77(2) of the Rules must be read in a manner which enables Mr. Krasniqi to request certification for the issues outlined below.

18. Finally, the Defence notes that both at the Kosovo Specialist Chambers (“KSC”),²⁰ and in other international criminal courts and tribunals,²¹ issues and requests relating

¹⁹ KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, public, para. 11.

²⁰ KSC-BC-2020-05, F00150, Trial Panel I, *Decision on Witness Familiarisation*, 9 July 2021, public.

²¹ See, *ex multis*, ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-679, Pre-Trial Chamber I, *Decision on the Practices of Witness Familiarisation and Witness Proofing*, 8 November 2006; *Prosecutor v. Gbagbo and*

to the conduct of proceedings, and to witness preparation or familiarisation in particular, have consistently been resolved through a reasoned decision. The fact that the Trial Panel addressed the conduct of proceedings, which includes witness preparation, through the Order instead, should not be used to deny Mr. Krasniqi the right to seek certification to appeal the issues arising from the Order.

V. THE TEST FOR CERTIFICATION HAS BEEN MET

19. The listed issues satisfy the test for leave to appeal. They arise directly from the Order, do not merely assert a difference of opinion with the Trial Panel, and in light of the significant impact of the issues on the fair and expeditious conduct of the trial and Mr. Krasniqi's fair trial rights, they require immediate resolution to move the proceedings along the right course.

Issue One

20. The first issue arises from the Order or, rather, from the lack of a reasoned decision contained therein. Despite the Krasniqi Defence Submissions substantiating the Defence's opposition to witness preparation and alternative proposals for adequate fair trial safeguards, the Order does not engage with the Defence Submissions, and does not address or give reasons for rejecting the Defence requests.

21. This issue has strong repercussions for the fair and expeditious conduct of the proceedings, as it goes to the heart of Mr. Krasniqi's right to have a reasoned decision

Blé Goudé, ICC-02/11-01/15-355, Trial Chamber I, *Decision on Witness Preparation and Familiarisation*, 2 December 2015; *Prosecutor v. Yekatom and Ngaissona*, ICC-01/14-01/18-677, Trial Chamber V, *Decision on Protocols at Trial*, 8 October 2020; ICTY, *Prosecutor v Haradinaj et al.*, IT-04-84-T, Trial Chamber I, *Decision on Defence Request for Audio Recording of Witness Proofing Sessions*, 23 May 2007.

on his submissions,²² especially as they related to aspects of the conduct of proceedings which have an impact on the authenticity and truthfulness of the evidence against him. Whether the Trial Panel has the power or discretion to reject Defence submissions without providing any reasons for doing so is an issue which affects Mr. Krasniqi's fair trial rights and demands resolution by the Appeals Panel. As this case approaches the beginning of trial, an immediate resolution of this issue will help expedite the proceedings as it will avoid the need for further litigation, should similar circumstances arise in the course of the proceedings.

22. Moreover, the first issue relates to the Order which led to the adoption of rules permitting witness preparation. As argued below, permitting witness preparation without additional safeguards does affect the fair and expeditious conduct of the proceedings and a resolution of this issue now – prior to any evidence being called - would materially advance proceedings.

Issue Two

23. The Second Issue also arises from the Order. By not engaging with the Defence submissions, the Trial Panel failed to address or consider a number of inherent risks associated with the witness preparation regime proposed in the Draft Order. In its submissions, the Defence outlined and analysed a number of concrete risks that have been recognised to be inherent to witness preparation by both the prior jurisprudence of the KSC and the International Criminal Court ("ICC").²³ These risks have the potential to contaminate witness evidence, detract spontaneity and immediacy, and transmit the calling party's expectations to the detriment of the fairness of

²² See e.g., KSC-BC-2020-06, IA009/F00030, Court of Appeals Panel, *Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"*, 23 December 2021, public, para. 154.

²³ Krasniqi Defence Submissions, paras 8-9.

proceedings.²⁴ Furthermore, as discussed in the Krasniqi Defence Submissions, these risks may lead to motions for adjournment and eventually delay the proceedings.²⁵ As such, they deserved at a minimum adequate consideration by the Trial Panel before issuing the Order. It follows that the second issue has significant repercussions both on the fair and the expeditious conduct of the proceedings, and requires further scrutiny by the Appeals Panel.

24. An immediate resolution by the Appeals Panel would materially advance the proceedings, by ensuring that all risks arising from witness preparation, which have the potential to disrupt the fair conduct of these proceedings are duly considered, weighed and eventually counterbalanced before the first witness is called. Whilst the Trial Panel maintains a discretion to vary the Order as trial progresses,²⁶ amending the Order after a problem has arisen cannot cure the prejudice already suffered by the Accused.

Issue Three

25. The Third Issue similarly arises from the Order. Despite the dearth of reasoning, it is apparent from the terms of the Order (which in relation to witness preparation remain materially the same as the draft Order²⁷ and which do not include the safeguards proposed in the Krasniqi Defence submissions²⁸) that the Trial Panel concluded that counterbalancing measures were not necessary despite the potential risks arising from witness preparation measures. In fact, the Order dilutes the only safeguard provided in the draft Order, removing the requirement that two lawyers

²⁴ Krasniqi Defence Submissions.

²⁵ *Idem*, para. 22.

²⁶ Order, para. 10.

²⁷ See Draft Order, paras 84-98; Order, paras 85-99.

²⁸ Krasniqi Defence Submissions, para. 17.

attend preparation sessions.²⁹ The third issue contends that the Trial Panel's decision not to impose additional safeguards was an error of law / abuse of discretion. The potential detrimental effects of witness preparation have been well noted by Trial Chambers at the ICC³⁰ and include the possibility of diminishing true witness spontaneity, as well as creating the possibility that witnesses may be moulded against the Accused during the course of trial. Counterbalancing measures – including the video recording of the witness preparation sessions and the disclosure of those recordings to the opposing parties - would mitigate these effects and provide the Defence with an independent means of verifying witness' statements throughout witness preparation sessions and supporting an accurate credibility assessment of witness testimonies.

26. The third issue has a significant impact on the fair and expeditious conduct of proceedings in two material ways. Firstly, witness preparation sessions conducted without safeguards, such as video recording the witness preparation sessions, significantly affect the fairness of proceedings, since there will be no way to objectively verify the conduct of the preparation session should any dispute arise. Secondly, preparation sessions will significantly affect the expeditious conduct of proceedings, since the SPO will have to bring witnesses to the seat of the KSC early in order to conduct the preparation sessions. This also adds to the already burgeoning workload required by the Defence, who are forced to guess what additional information SPO witnesses *may* bring that is not currently reflected in their established statements or testimonies from previous tribunals. The SPO's reference to recorded preparation sessions becoming the equivalent of a "formal recorded statement"³¹ further suggests an intent to glean as much new information as possible from these sessions, to the

²⁹ See Draft Order, para. 89: "the lawyer should be accompanied by at least one other *lawyer* of the Calling Party's team..." (emphasis added). In contrast, para. 90 of the Order states: "the lawyer should be accompanied by at least one other *person* of the Calling Party's team..."

³⁰ Krasniqi Defence Submissions, para. 9.

³¹ SPO submissions, para. 32.

extent that they may diverge substantially from original statements. This would require the Defence to request possible adjournments to proceedings and to conduct investigations of newly received material. Failing to add any adequate safeguard to monitor the conduct of witness preparation sessions or to mitigate complete and extensive changes to testimony is therefore prejudicial to the Defence and may have a negative impact on the outcome of this trial.

27. The omission of adequate counterbalancing measures may have a material impact on the proceedings which needs to be addressed at an early stage. The number of SPO witnesses who will be permitted preparation sessions (in contrast to the Defence, who are not required to present witnesses and have yet to confirm their intent to do so) will be substantial. By the time that witnesses are called and issues about the exact parameters of witness preparation and the conduct of witness preparation sessions become apparent, it will be too late to undo the impact this regime will have on the Accused's right to a fair trial, and the broader Defence right to equality of arms in these proceedings. The time is therefore ripe for the Appeals Panel to address this issue at the outset of the trial.

VI. RELIEF REQUESTED

28. The Defence respectfully requests certification to appeal on the issues outlined above.

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