



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

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**Decision on Krasniqi Defence Request for Certification to Appeal the “Order on
the Conduct of Proceedings”**

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TRIAL PANEL II (“Panel”), pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 16 December 2022, the Trial Panel held a Status Conference, during which it informed the Parties and participants that a draft order on the conduct of proceedings (“Draft Order on the Conduct of Proceedings”) would be circulated for them to make submissions, if they so wished, by 13 January 2023, at 16:00 hours.¹
2. On 22 December 2022, the Trial Panel circulated a Draft Order on the Conduct of Proceedings to the Parties and participants.²
3. On 13 January 2023, the Panel received submissions from Counsel for Victims, joint written observations from the Defence, submissions from the Specialist Prosecutor’s Office, and further submissions from the Defence for Mr Krasniqi (“Krasniqi Defence”).³
4. On 18 January 2023, the Panel held the Trial Preparation Conference, during which the Defence for Mr Thaçi and Counsel for Victims made further oral submissions on the Draft Order on the Conduct of Proceedings, seeking clarifications on the Draft Order as well as on certain amendment proposals, which

¹ Transcript of Hearing, 16 December 2022, pp. 1772-1773.

² F01178, Trial Panel II, *Order for Submissions on the Draft Order on the Conduct of Proceedings*, 22 December 2022, with Annex 1.

³ F01202, Counsel for Victims, *Victim’s Counsel’s Submissions on the Draft Order on the Conduct of Proceedings*, 13 January 2023; F01203, Specialist Counsel, *Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01)*, 13 January 2023; F01205, Specialist Prosecutor, *Prosecution Submissions on the Conduct of Proceedings*, 13 January 2023; F01207, Specialist Counsel, *Further Krasniqi Defence Submissions in Addition to Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings*, 13 January 2023.

resulted in the Defence withdrawing its amendment proposal concerning victims' participation.⁴

5. On 25 January 2023, the Panel issued the Order on the Conduct of Proceedings ("Impugned Decision").⁵

6. On 1 February 2023, the Krasniqi Defence filed a request for certification to appeal the Impugned Decision ("Request").⁶

7. On 13 February 2023, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response").⁷

8. The Krasniqi Defence did not reply to the Response.⁸

II. SUBMISSIONS

9. The Krasniqi Defence requests leave to appeal the following three issues ("Issues"):

- (1) 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 ("First Issue");
- (2) 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 ("Second Issue"); and

⁴ Transcript of Hearing, 18 January 2023, pp. 1893-1895, 1897-1901.

⁵ F01226, Trial Panel II, *Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), 25 January 2023, with Annex 1.

⁶ F01246, Specialist Counsel, *Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings"*, 1 February 2023.

⁷ F01288, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Request for Certification to Appeal the 'Order on the Conduct of Proceedings'*, 13 February 2023.

⁸ CRSPD 178, 15 February 2023.

- (3) 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 (“Third Issue”).⁹

10. The Krasniqi Defence submits that the Request is admissible pursuant to Article 45(2) of Law and Rule 77(2) of the Rules, “even though the [Impugned Decision] is not formally labelled as a ‘decision’”.¹⁰ It argues that the Issues satisfy the test for leave to appeal in respect of each and all of the three Issues.¹¹

11. The SPO responds that the Request should be rejected as it fails to meet the requirements for leave to appeal under Article 45(2) and Rule 77.¹² In particular, the SPO argues that: (i) the Krasniqi Defence challenges the Panel’s exercise of discretion without demonstrating any appealable issue arising from the Impugned Decision;¹³ (ii) the Krasniqi Defence fails to demonstrate any impact of the Issues on the fairness and expeditiousness of the proceedings;¹⁴ and (iii) the Krasniqi Defence’s submissions on whether an immediate resolution of the Issues may materially advance the proceedings are inadequate.¹⁵ The SPO therefore requests that the Panel reject the Request.¹⁶

III. APPLICABLE LAW

12. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met, namely:

- (a) The issue at hand would significantly affect:

⁹ Request, paras 2, 28.

¹⁰ Request, paras 12-18.

¹¹ Request, paras 19-27.

¹² Response, para. 1.

¹³ Response, paras 3, 7, 11.

¹⁴ Response, paras 5, 8, 12.

¹⁵ Response, paras 6, 10, 13.

¹⁶ Response, para. 14.

- i. The fair and expeditious conduct of the proceedings, or
- ii. The outcome of the trial; and

(b) In the opinion of the Panel, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

13. The applicable standard for certification of appeal under Rule 77(2) has been outlined in past decisions and will not be reiterated in full here.¹⁷ The Panel stresses that, to meet the above-mentioned standard, an applicant must not only show how the issue would affect the fair and expeditious conduct of proceedings or the outcome of the trial, but must also demonstrate the significant degree to which these factors would be affected. The issue(s) put forth for certification must be likely to have repercussions on either of the above two elements.¹⁸

IV. DISCUSSION

A. FIRST ISSUE

14. As a preliminary matter, the Panel agrees with the Defence that the name or title of a decision, whether an 'order' or a 'decision', does not exclude the possibility for a Party to seek leave to appeal under Rule 77(2).¹⁹ As such, the Panel's Order on the Conduct of Proceedings come within the scope of that Rule.

¹⁷ F01237, Trial Panel II, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect ("Gucati and Haradinaj Decision on Leave to Appeal")*, 8 November 2021, paras 13-21; F00372, Trial Panel II, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Trial Panel II, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. See also F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

¹⁸ *Gucati and Haradinaj Decision on Leave to Appeal*, para. 17, with further references.

¹⁹ Request, paras 12-18.

15. In addressing the First Issue, the Panel notes that the right of an Accused to a reasoned opinion forms part of the broader guarantee of a fair trial.²⁰ The extent of the right to, and duty to provide, a reasoned opinion must be determined in light of the circumstances of the case.²¹ In particular, such a right does not entitle an Accused to receive an explanation in relation to every submission made during trial.²² Moreover, where a legal argument has been raised by a Party, the Panel enjoys some discretion in deciding whether to address that argument and, if it does, how.²³

16. In the present case, Article 40(2) and Rule 116(3) only requires the Panel to hear the Parties, consider their submissions and decide whether a particular procedure or modality is necessary to ensure a fair and expeditious trial. The Panel

²⁰ See e.g. ICTY, *Prosecutor v. Krajisnik*, IT-00-39-A, Judgement (“[Krajisnik Appeal Judgment](#)”), 17 March 2009, para. 139; *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement (“[Furundzija Appeal Judgment](#)”), 21 July 2009, para. 69; *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgement (“[Limaj et al. Appeal Judgment](#)”), 27 September 2007, para. 81; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgement (“[Hadžihasanović and Kubura Appeal Judgment](#)”), 22 April 2008, para. 13; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement (“[Naletilić and Martinović Appeal Judgment](#)”), 3 May 2006, para. 603.

²¹ IA009-F00030, Court of Appeals Panel, *Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”*, 23 December 2021, para. 154. See also [Furundzija Appeal Judgment](#), para. 69; ICTR, *Prosecutor v. Kayishmena and Ruzindana*, ICTR-95-1-A, [Judgment \(Reasons\)](#), 1 June 2001, para. 165.

²² IA001/F00005, Court of Appeals Panel, *Decision on Kadri Veseli’s Appeal Against Decision on Interim Release*, 30 April 2021, para. 72; IA009/F00030, Court of Appeals Panel, *Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”*, 23 December 2021, para. 154; KSC-CA-2022-01, F00114, Court of Appeals Panel, *Appeal Judgment*, 2 February 2023, with Annexes 1-2, para. 33. See also ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement (“[Kvočka et al. Appeal Judgment](#)”), 28 February 2005, para. 23; [Limaj et al. Appeal Judgment](#), para. 81; [Krajisnik Appeal Judgment](#), para. 139; [Hadžihasanović and Kubura Appeal Judgment](#), para. 13; [Kvočka et al. Appeal Judgment](#), paras 23, 288; [Naletilić and Martinović Appeal Judgment](#), para. 603; *Prosecutor v. Karadžić*, IT-95-5/18-AR72.1, [Decision on Radovan Karadžić’s Motions Challenging Jurisdiction \(Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility\)](#), 25 June 2009, para. 30; *Prosecutor v. Brđanin*, IT-99-36-A, [Judgment](#), 3 April 2007, para. 39, citing ICTR, *Musema v. Prosecutor*, [Judgment](#), 16 November 2001, para. 18; ICC, *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), 8 March 2018, para. 105; ECtHR, *Hiro Balani v. Spain*, no. 18064/91, [Judgment](#), 9 December 1994, para. 27; *Van de Hurk v. the Netherlands*, no. 16034/90, [Judgment](#), 19 April 1994, para. 61.

²³ See e.g. [Hadžihasanović and Kubura Appeal Judgment](#), para. 288; [Kvočka et al. Appeal Judgment](#), para. 23.

did so in respect of each and all submissions made in respect of the Draft Order on the Conduct of Proceedings, including in respect of the Krasniqi's Defence submissions.²⁴

17. The Krasniqi Defence fails to show that the Panel was required to provide more reasons than it did. The Panel notes in that respect that the normative regime of other international jurisdictions which know of a similar concept of 'orders on the conduct of proceedings' do not even provide for the need to hear parties before rendering such an order.²⁵ Having reviewed the practice of this and other international(ised) jurisdictions, the Panel could not find any precedent that would support the Krasniqi's Defence contention that the Panel was required to explain in more details its reasons for regarding a prohibition on witness preparation and/or additional safeguards as being unnecessary in the circumstances.

18. Turning to the first prong of the certification test, the Panel is of the view that the Krasniqi Defence fails to establish its claim that the issue "has strong repercussions for the fair and expeditious conduct of the proceedings".²⁶ Contrary to the Krasniqi's submissions, the issue does not go to "the heart of Mr. Krasniqi's right to have a reasoned decision": it goes *beyond* and unjustifiably extends that right as guaranteed under the Law and the Rules. The underlying proposition that

²⁴ Order on the Conduct of Proceedings, para. 8.

²⁵ See e.g. ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, [Order on the Procedure for the Conduct of Trial](#), 8 October 2009; *Prosecutor v. Hadžić*, IT-04-75-PT, [Order on Guidelines for Procedure for Conduct of Trial](#), 4 October 2012; ICC, *The Prosecutor v. Al Hassan*, ICC-01/12-01/18, [Decision on the Conduct of Proceedings](#), 6 May 2020. For examples where the views of the Parties were not sought prior to the issuance of an order on the conduct of proceedings, see ICTY, *Prosecutor v. Orić*, IT-03-68-T, [Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings](#), 21 October 2004; *Prosecutor v. Tolimir*, IT-05-88/2-PT, [Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties During Trial](#), 24 February 2010. See also KSC-BC-2020-07, F00314, Trial Panel II, Order on the Conduct of Proceedings, 17 September 2021; KSC-BC-2020-05, F00170, Trial Panel I, Decision on the Conduct of the Proceedings, 26 August 2021.

²⁶ Request, para. 21.

fairness demanded more than was provided is therefore not apparent from the Defence arguments.

19. The Panel further notes that the Krasniqi Defence's suggestion that its submissions on the draft Order on the Conduct of Proceedings related to "aspects of the conduct of proceedings which have an impact on the authenticity and truthfulness of the evidence against him"²⁷ is purely hypothetical and is not based on any factual considerations to which the Panel could give weight. Such a hypothetical claim is incapable of meeting the first prong of the test under Rule 77(2).

20. The Panel therefore finds that the Krasniqi Defence has failed to demonstrate that the First Issue might significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. The second part of the First Issue (encompassing the "additional safeguards"²⁸) is dealt with below in relation to the Third Issue.

21. For these reasons, the Panel rejects the Request in relation to the First Issue.

B. SECOND ISSUE

22. According to the Krasniqi Defence, the witness preparation regime raises concrete risks which 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 proceedings" and "may lead to motions for adjournment and eventually delay the proceedings".²⁹

²⁷ Request, para. 21.

²⁸ Request, para. 22.

²⁹ Request, para. 23.

23. As noted above, the Panel gave due consideration to the Krasniqi Defence's claim of risks associated with the practice of witness preparation. The Panel observes that these submissions, which are now being reiterated in the present context, are based on hypothetical circumstances and considerations that have no demonstrable factual basis in the present case. The Defence has thus failed to establish that the Panel abused its discretion when declining to grant the measures sought based on unsubstantiated concerns. The Panel notes in that regard that the practice of witness preparation is widely used in procedural regimes similar to the one applicable before this jurisdiction. If any of the concerns raised by the Krasniqi Defence were ever to materialise, the Defence could *then* seek a relief from the Panel to address it.

24. The Panel therefore finds that the Krasniqi Defence has failed to demonstrate that the Second Issue might significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed.

25. For these reasons, the Panel rejects the Request in relation to the Second Issue.

C. THIRD ISSUE

26. According to the Krasniqi Defence, the Trial Panel concluded that measures to counterbalance the potential risks associated with the witness preparation regime were not necessary. In the Krasniqi Defence's view, this constituted an error of law and/or an abuse of discretion as the "potential detrimental effects" of witness preparation have been "well noted by Trial Chambers at the ICC 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”.³⁰ The Krasniqi Defence further submits that counterbalancing measures it suggested would have mitigated these effects and provided the Defence with “an independent means of verifying witness’ statements throughout witness preparation sessions and supporting an accurate credibility assessment of witness testimonies”.³¹ The Third Issue is said to have a significant impact on the fair and expeditious conduct of proceedings as there will be no way to objectively verify the conduct of the preparation session should any dispute arise and the SPO will have to bring witnesses to the seat of the Specialist Chambers (“SC”) earlier in order to conduct the preparation sessions. The Krasniqi Defence claims that 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”.³² The Krasniqi Defence further submits that “[f]ailing 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”.³³

27. As with the First and Second Issue, the present issue is entirely built on a claim of ‘risks’ which are based on assumptions or concerns and have not been sufficiently established or substantiated. An unsubstantiated ‘risk’ falls short of the standard for certification, which requires demonstration of an issue likely to significantly impact the fairness or expeditiousness of proceedings or the outcome of the trial. Furthermore, the Krasniqi Defence fails to acknowledge and address existing safeguards and their relevance to addressing the risks they allege.³⁴

³⁰ Request, para. 25.

³¹ Request, para. 25.

³² Request, para. 26.

³³ Request, para. 26..

³⁴ See e.g. Order on the Conduct of Proceedings, Annex 1, paras 10, 71-99; IA024/F00019, Court of Appeals Panel, *Decision on Defence Appeals against “Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing*

28. The Panel therefore finds that the Krasniqi Defence has failed to demonstrate that the Third Issue might significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed.

29. For these reasons, the Panel rejects the Request in relation to the Third Issue.

V. DISPOSITION

30. For all the reasons stated above, the Panel **REJECTS** the Request.



Judge Charles L. Smith, III
Presiding Judge

Dated this Thursday, 16 February 2023

At The Hague, the Netherlands.

Party or of a Participant", 27 December 2022. See also Articles 21 and 23 of the Law; Code of Professional Conduct for Counsel Before the Kosovo Specialist Chambers (28 April 2021).