

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Victims' Counsel

**Date:** 8 May 2023

**Language:** English

**Classification:** Confidential

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**Victims' Counsel's Response to the "Thaçi, Selimi & Krasniqi Defence Request  
for Certification to Appeal the Oral Order on Trial Panel Questioning"**

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## I. INTRODUCTION

1. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law"), and Rule 114(4)(a) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Victims' Counsel hereby responds to the *Thaçi, Selimi & Krasniqi* Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning ("Joint Defence Request").<sup>1</sup>
2. The scope and mode of judicial questioning directly concerns the interests of victims participating in the proceedings ("VPPs"), specifically, their right to the truth.
3. Victims' Counsel submits that the Joint Defence Request should be denied as it raises issues that constitute a disagreement with the legal framework of the Kosovo Specialist Chambers ("KSC") rather than appealable issues as required by Article 45(2) of the Law and Rule 77(2) of the Rules.

## II. CLASSIFICATION OF FILING

4. This filing is classified as confidential pursuant to Rule 82(3) and (4) of the Rules.

## III. PROCEDURAL HISTORY

5. During the court hearing on 19 April 2023, members of the Trial Panel asked questions to witness W02652.<sup>2</sup>
6. During the same court hearing, defence counsel for Kadri Veseli stated that "[t]here are a number of issues that arose during the judicial questioning of this

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<sup>1</sup> *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F01495, *Thaçi, Selimi & Krasniqi* Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, 1 May 2023.

<sup>2</sup> KSC-BC-2020-06/confidential, Transcript, 19 April 2023, T. 3229:15-3247:10.

witness that we would invite an opportunity to make submissions on [...]”<sup>3</sup> and proceeded with further oral submissions on the matter.<sup>4</sup>

7. The Trial Panel indicated: “We certainly will understand if you wish to file a submission, and there is no reason to go through it now and then to go through it again in your submission. I understand your request. The submissions can be filed and we’ll deal with them”.<sup>5</sup>
8. Further oral submissions on the matter were made during that hearing by the Specialist Prosecutor’s Office (“SPO”),<sup>6</sup> the defence for Hashim Thaçi<sup>7</sup> and the defence for Kadri Veseli.<sup>8</sup>
9. On 20 April 2023, at the beginning of the hearing, the Panel announced that before starting the evidence of the next witness, it would issue an “oral order in response to the questions and comments on Judges’ questions” that arose at the end of the hearing of 19 April 2023.<sup>9</sup>
10. Subsequently, defence counsel for Hashim Thaçi asked for permission for the matter to be briefed and then for oral argument.<sup>10</sup>
11. The Panel, having noted that it would not wait for the matter to be briefed as it had “fully understood the circumstances” and was ready to decide the matter,<sup>11</sup> issued its oral order.<sup>12</sup>
12. On 1 May 2023, the Defence for Hashim Thaçi, Rexhep Selimi and Jakup Krasniqi filed the Joint Defence Request.

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<sup>3</sup> KSC-BC-2020-06/confidential, Transcript, 19 April 2023, T. 3253:19-25.

<sup>4</sup> KSC-BC-2020-06/confidential, Transcript, 19 April 2023, T. 3254:1-3255:8; T. 3255:12-15.

<sup>5</sup> KSC-BC-2020-06/confidential, Transcript, 19 April 2023, T. 3255:17-20.

<sup>6</sup> KSC-BC-2020-06/confidential, Transcript, 19 April 2023, T. 3256:1-13; T. 3257:18-25.

<sup>7</sup> KSC-BC-2020-06/confidential, Transcript, 19 April 2023, T. 3256:17-3257:15; T. 3258:3-18.

<sup>8</sup> KSC-BC-2020-06/confidential, Transcript, 19 April 2023, T. 3255:21-24; T. 3258:19-3260:7.

<sup>9</sup> KSC-BC-2020-06/confidential, Transcript, 20 April 2023, T. 3262:11-17.

<sup>10</sup> KSC-BC-2020-06/confidential, Transcript, 20 April 2023, T. 3262:18-3263:3.

<sup>11</sup> KSC-BC-2020-06/confidential, Transcript, 20 April 2023, T. 3263:12-14.

<sup>12</sup> KSC-BC-2020-06/confidential, Transcript, 20 April 2023, T. 3263:15-3269:16 (“Oral Order”).

#### IV. SUBMISSIONS

##### *a. First Issue*

*Whether the Trial Panel erred in rendering the Oral Order without hearing the parties*

13. It cannot be for any party or participant to insist upon the modality of an argument. This must remain within the control of the Panel (see Article 40(6)(a) in conjunction with Article 39(13) of the Law and Rule 116(1) of the Rules).
14. The Defence argument amounts to no more than a mere disagreement about the approach of the Trial Panel on whether written submissions were required. The Defence had been given the opportunity to make oral submissions and to respond orally to the Specialist Prosecutor Office (“SPO”) during the hearing of 19 April 2023. The Selimi and Krasniqi Defences chose to make no submissions.
15. Therefore, the Trial Panel was entitled, having heard the Parties’ arguments on 19 April 2023, to conclude that “it fully understood the circumstances” and that it was ready to issue the Oral Order on this straightforward issue.
16. For these reasons, the first issue does not arise from the Oral Order.

##### *b. Second and Third Issue*

*Whether the procedure for Trial Panel questioning as set out in the Oral Order is inconsistent with the statutory framework of the KSC*

*Whether the Trial Panel erred in invoking Rules 132 and 137 to use “additional evidence not called by the parties” in questioning witnesses, with no intention of admitting the relevant documents into the record, when these Rules contemplate a different regime, being the calling and admission of additional evidence by the Trial Panel*

17. The second and the third issue are a disagreement, not with the Oral Order, but with the judicial power to engage in the process of eliciting evidence in order to determine the truth as provided in the legal framework of the KSC.

18. Article 40(6)(e) of the Law and Rules 132 and 137(1) in combination with Rule 127(3), sentence four, grant the Panel the power to adduce evidence independently from the parties and/or participants. It would be illogical and inconsistent with the Law and the Rules to limit this power in time only to the later stage of the proceedings.
19. It follows that the Panel can elicit evidence throughout the course of the trial, including by asking questions to witnesses called by the parties and/or participants, with the assistance of any documents that they regard as important in the determination of the truth.
20. The fact that on 19 April 2023 the Trial Panel did not seek to admit into evidence the documents it used to question the witness on that day, cannot be interpreted as an admission that the Panel's power to use the documents at this stage of the proceedings is limited, as the Defence suggests.<sup>13</sup> The wording of Rule 127(3), sentence four, is clear and binding, despite being omitted by the Defence in their submissions. The Defence's interpretation of Rules 132 and 137(1) is contrary to the rationale that underlies these provisions: the duty of the judges to determine the truth. The judges' ability to discharge this duty would be limited if there were constraints upon their ability to base their questions upon documents of their choosing.
21. For these reasons, the second and the third issue are not appealable issues.

*c. Fourth Issue*

*Whether the procedure for Trial Panel questioning set in the Oral Order is inconsistent with the rights of the accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves*

22. Victims' Counsel submits that issue four is a further disagreement with the legal framework of the KSC and the principles that underpin it.

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<sup>13</sup> Joint Defence Request, para. 13.

23. Questions posed to witnesses by professional judges cannot be seen as extending the proceedings: they are an integral part of the proceedings within the framework of the KSC.
24. The Panel's liberty to ask any question is premised upon their duty to arrive at the truth: that process may or may not prove to be adverse to the interests of the Accused, but it has nothing to do with any illegitimate encroachment on their fair trial rights.
25. For these reasons, the fourth issue is not an appealable issue.

*d. There is no need for an immediate resolution of the four issues identified by the Defence*

26. In light of the fact that the Defence has failed to identify any appealable issue, the need for immediate resolution does not arise.
27. However, in that context, Victims' Counsel draws the Panel's attention to the fact that the Defence rely on three decisions from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to support the proposition that it is "unsurprising that issues concerning the scope, modes, and order of questioning of witnesses have regularly been certified for appeal."<sup>14</sup> Two come from the case of *Prlić et al.*, and one from the case of *Popović et al.*:<sup>15</sup> none of these decisions have any bearing on this litigation.<sup>16</sup>
28. However, the *Prlić* case *did* produce a decision directly relevant to the issue of judicial questioning which is not cited by the Defence.
29. In the Decision Regarding Questions Asked by the Judges During the Examination of a Witness in Court, the *Prlić* Trial Chamber rejected a motion by

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<sup>14</sup> Joint Defence Request, para. 23.

<sup>15</sup> Joint Defence Request, footnote 23.

<sup>16</sup> Victims' Counsel notes that the *Prlić* decisions both concerned the right of the Accused to cross-examine witnesses personally. The *Popović* decision concerned recalling witnesses by the Defence. These are cited as evidencing the fact that issues relating to questioning are regularly certified for appeal.

the Office of the Prosecutor and two of the Defence teams which argued for restrictions on questioning by the judges.<sup>17</sup>

30. In rejecting the motion, the Trial Chamber relied on Rule 85B of the ICTY Rules of Procedure and Evidence,<sup>18</sup> the concluding words of which are identical to Rule 127(3), sentence four, of the KSC Rules:

*“Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.”*

31. The adoption of the same wording by the KSC Rules indicates that the intention of the drafters was to enable the judges to ask any questions that they think will assist them at any stage.

## V. CONCLUSION

32. For all these reasons, the four issues are not appealable issues. The Joint Defence Request represents a disagreement with the role of the judges as provided in the legal framework of the KSC, and as applied by the Panel in the Oral Order. Therefore, the four issues identified by the Defence cannot and do not meet the test for certification.

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<sup>17</sup> ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Regarding Questions Asked by the Judges During the Examination of a Witness in Court, 5 June 2008.

<sup>18</sup> *Ibid.*, p. 3.

## VI. RELIEF REQUESTED

33. Victims' Counsel respectfully asks the Trial Panel not to certify the Joint Defence Request.

**Word count: 1713**



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8 May 2023, The Hauge, the Netherlands