

**In:** KSC-BC-2020-06  
**The Specialist 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 Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi  
Specialist Counsel for Rexhep Selimi  
Specialist Counsel for Jakup Krasniqi

**Date:** 8 May 2023

**Language:** English

**Classification:** Public

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**Thaçi, Selimi & Krasniqi Defence Reply to ‘Prosecution Response to Defence  
Certification Request F01495’**

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**Specialist Prosecutor’s Office**

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1. The SPO Response<sup>1</sup> centres around defending the right of the Trial Panel to ask questions at any time. Nowhere does the Defence for Mr Thaçi, Mr Selimi and Mr Krasniqi (“Defence”) assert otherwise.<sup>2</sup> Rather, the Defence teams are challenging, through appealable issues that meet the criteria for certification, whether a Trial Panel is entitled to elicit evidence (including of acts or conduct of the Accused) through material that is not part of the record, and that goes beyond the scope of examination by the parties, on the basis that the information has been disclosed at some point to the Defence. The SPO’s inability or unwillingness to justify the Trial Panel’s use of evidence outside the record during Judges’ questioning demonstrates the need for the Appeals Panel to review the Oral Order.<sup>3</sup>

2. A submission repeated through the SPO Response, argued in relation to all four issues,<sup>4</sup> is that the reference in the ‘Order on the Conduct of Proceedings’ to the Trial Panel raising “entirely new matters”<sup>5</sup> precludes the present appeal. Whether the relevant paragraph of the Conduct Order could reasonably be interpreted as notifying the Defence of the Trial Panel’s intention to draw on any aspect of the disclosure to elicit evidence not raised by the parties, is a matter to be argued on appeal. The Defence, for its part, was entitled to assume that any “new matter” would still be linked to the charges, constrained by the SPO witness summaries, and elicited in a manner consistent with the KSC’s statutory regime. It is logical that, had the Conduct Order made clear that the only constraint on “new matters” to be raised by the Trial Panel would be that they could be found somewhere in the disclosure, the Defence would have sought leave to appeal on the same basis as is now being done.

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<sup>1</sup> KSC-BC-2020-06/F01501, Prosecution Response to Defence Certification Request F01495, 5 May 2023 (“Response”).

<sup>2</sup> KSC-BC-2020-06/F01495, Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, 1 May 2023 (“Request”).

<sup>3</sup> KSC-BC-2020-06, Transcript of Hearing, 20 April 2023, Oral Order, pp. 3263-3269.

<sup>4</sup> Response, paras. 1, 7, 11.

<sup>5</sup> KSC-BC-2020-06/F01226/A01, Annex 1 - Order on the Conduct of Proceedings, 25 January 2023, para. 112 (“Conduct Order”).

3. As regards **Issue 1**, even though the SPO has provided its substantive response on the merits,<sup>6</sup> it fails to address whether it was proper for the Trial Panel to undertake to consider forthcoming written submissions, before then issuing a decision without waiting for them to be filed.

4. The majority of the SPO submissions on **Issues 2 and 3** again comprise the SPO's substantive submissions on appeal, concerning the proper interpretation of the statutory regime.<sup>7</sup> These arguments, the proper audience for which is the Court of Appeals Panel, do not address the question of whether these are appealable issues which fulfill the statutory criteria, which they are and do.

5. The SPO then submits that the Defence arguments concerning unfairness, the prolongation of the trial process, and the increased burden on the Defence teams are "devoid of substance" and "unexplained".<sup>8</sup> In the interests of absolute clarity, the Defence had understood that its preparation for the cross-examination of SPO witnesses should focus on issues for which the Defence had notice were part of the case against the accused, by virtue of their inclusion in the Indictment, Pre-Trial Brief, and SPO witness summaries. Now, the Defence must be prepared to cross-examine on any aspect of any prior statement or document which forms part of the SPO presentation queue, for which the Defence receives 24 hours' notice, and for which there is no constraint on what the SPO may include. It is this momentous expansion of the scope of Defence preparation which will give rise to unfairness, increased burden on the Defence, and prolongation of the trial.

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<sup>6</sup> Certification is not concerned with the merits of the appeal, but only whether the test for certification has been met, see: KSC-BC-2020-07/F00423, Trial Panel II, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, 8 November 2021, para. 21.

<sup>7</sup> Response, paras. 8-9.

<sup>8</sup> Response, para. 10.

6. Similarly, as regards **Issue 4**, the SPO claims that the Defence concerns as to the impact of this shift on its rights to time and resources to prepare are “hyperbolic” and “hypothetical”.<sup>9</sup> These claims are undermined by the expansion of the SPO case and prolongation of the witness’ questioning that arose from the first set of Judge’s questions that gave rise to the present appeal. These are justified and concrete concerns, and constitute appealable issues.

7. In seeking certification to appeal, the Defence is not seeking to make technical and strategic arguments to gain some kind of litigation advantage. This is a significant procedural issue; can the Trial Panel elicit evidence against the accused that goes beyond the scope of examination by the parties, on the basis that the information has been disclosed at some point to the Defence? The issues raised by the Defence meet the criteria for certification: they arise directly from the decision, are appealable issues, and directly impact the fairness and expeditiousness of the proceedings. Should the Court of Appeals Panel accept the Defence position, the scope for a meaningful remedy at the end of the trial is non-existent. This question should be resolved now, at the trial’s outset, given the significant day-to-day impact it is already having on Defence preparations.

8. Finally, the Defence submits that the Request can be reclassified as public, as the circumstances requiring it to be confidential no longer exist.

**[Word count: 928 words]**

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<sup>9</sup> Response, para. 12.

Respectfully submitted on 8 May 2023,

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