

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

Date: 2 May 2022

Language: English

Classification: Public

**Public Redacted Version of Thaçi Defence Request for Certification to Appeal the
“Decision on Specialist Prosecutor’s Rule 102(2) and Related Requests”**

Specialist Prosecutor

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I. INTRODUCTION

1. To date, the SPO has filed four applications¹ to amend the Exhibit List since the deadline for its filing expired on 17 December 2021.² The present Defence request for certification concerns the second of these four requests, which was granted by the Pre-Trial Judge on 22 April 2022.³

2. This request for certification is filed while an appeal is pending challenging other late additions to the SPO Exhibit List,⁴ and against a general backdrop of SPO extensions and delays that have pushed the SPO's own trial date estimates back by a year so far.⁵

3. In the request in question, the SPO sought to add W04870's statements and associated exhibits⁶ to the SPO Exhibit List, among other material. This request was made despite the fact that the relevant interviews occurred, and statements were taken, prior to the SPO deadline to submit its exhibit list on 17 December 2021.⁷ Again, for much of the material concerned, the SPO does not offer a justification for the delay to the Court.

¹ KSC-BC-2020-06/F00670/CONF/RED, Prosecution notice of Rule 102(1)(b) disclosure and related requests, 31 January 2022; KSC-BC-2020-06/F00708-CONF, Prosecution Rule 102(2) submission and related requests, 24 February 2022; KSC-BC-2020-06/F00767, Prosecution request to amend the exhibit list and for protective measures with confidential Annexes 1 and 4-9 and strictly confidential and ex parte Annexes 2-3, 13 April 2022; KSC-BC-2020-06/F00774/CONF/RED, Confidential redacted version of 'Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05), with confidential Annex 1 and strictly confidential and ex parte annexes 2-16, 20 April 2022.

² KSC-BC-2020-06, F00768, Specialist Prosecutor, Prosecution Submission of Corrected Version of KSC-BC-2020-06/F00738/A02, 14 April 2022, public, with Annex 1 ("Exhibit List"), confidential. h

³ KSC-BC-2020-06/F00779, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 22 April 2022.

⁴ KSC-BC-2020-06/IA019/F00002, Thaçi Defence Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", 20 April 2022

⁵ See KSC-BC-2020-06/F00725, Thaçi Defence Response to Prosecution Rule 102(2) submission and related request, 7 March 2022, paras. 3-11.

⁶ [REDACTED].

⁷ KSC-BC-2020-06, F00708, Specialist Prosecutor, Prosecution Rule 102(2) Submission and Related Requests, 24 February 2022.

4. The Defence submits that, in again granting this request, the Pre-Trial Judge erred, for the reasons set out below. These errors warrant the intervention of the Court of Appeals Panel. Therefore, in accordance with Rule 77 of the Rules⁸ and Article 45 of the Law,⁹ the Defence applies for leave to appeal from the Impugned Decision on the issues detailed below.

II. APPLICABLE LAW

5. To appeal the Impugned Decision, certification is required.¹⁰

6. Article 45(2) of the Law provides, in the relevant part, that the Pre-Trial Judge shall grant certification where an appeal:

“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.”

7. Rule 77(2) provides 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 a Court of Appeals Panel may materially advance the proceedings.”

8. The following specific requirements, as confirmed by the jurisprudence of the Kosovo Specialist Chambers (“KSC”), therefore apply:

- (a) Whether the matter is an “appealable issue”;
- (b) Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of the proceedings, or
 - (ii) The outcome of the trial; and

⁸ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

⁹ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

¹⁰ Rule 77(1), Rules; Article 45(2), Law.

(c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.¹¹

9. An “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, and not merely a question over which there is disagreement or conflicting opinion.”¹² The applicant must articulate “clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.”¹³

10. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.¹⁴

III. THE PROPOSED ISSUES FOR APPEAL

11. In the overall context of the SPO Exhibit List, seeking leave to appeal the addition of approximately 350 pages of documents may seem trivial. The principle in question, however, is far more significant and arises from the Defence concern that “good cause” in these pre-trial proceedings has been watered down to a point that SPO Requests are being granted without any recognition of the exceptional nature of adding evidence to the Exhibit List even months after the set deadline has expired.

¹¹ KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021 (“Thaçi Decision on Leave to Appeal Defects Decision”), para. 14; KSC-BC-2020-07/F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, (“Gucati and Haradinaj Decision on Leave to Appeal”) para. 6; KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), para. 10.

¹² Guçati and Haradinaj Decision on Leave to Appeal, para. 12; Thaçi Decision on Leave to Appeal, para. 11.

¹³ *Ibid.*

¹⁴ Guçati and Haradinaj Decision on Leave to Appeal, para. 18; Thaçi Decision on Leave to Appeal, para. 17.

12. “Good cause” must mean something more than the fact that additional material has been identified by the SPO. Consistent jurisprudence from the ICC, the *ad hoc* Tribunals, and Trial Chamber II in the *Gucati & Haradinaj* case has emphasised the exceptional nature of late additions,¹⁵ that cannot be reconciled with the Pre-Trial Judge’s permissive approach. A “mere reference to ongoing investigations” by the Prosecution has not previously been considered sufficient.¹⁶

13. In particular, the Pre-Trial Judge’s approach of relying, in part, on the purported lack of prejudice to the Defence as a basis for finding good cause¹⁷ is wrong. The absence of prejudice to an opposing party is not a proper basis for demonstrating the element of good cause. Rather it is “merely a consideration, and a distinct one from the ‘good cause’ element that a Chamber may take into account in determining overall whether to grant an extension of time request.”¹⁸

14. Of equal concern, is the Pre-Trial Judge’s dismissal of the Defence submission that W04870’s material is duplicative of other material in the record, on the basis that this “can be raised with the Trial Panel where the totality of the evidence the SPO wishes to be presented at trial can be assessed to determine where it may be streamlined”.¹⁹ Justifying good cause on the basis that that the Pre-Trial Judge is entitled to send a bloated and duplicative evidential record to the Trial Panel, who can

¹⁵ See, e.g. KSC, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00321, Decision on Prosecution’s Request for Leave to Amend its List of Exhibits, 23 September 2021, paras 15-16; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Motion for Admission of an Exhibit from the Bar Table Following Major Thomas’ Testimony, 28 October 2010, para. 9; ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1336, Trial Chamber II, Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), paras. 28, 30.

¹⁶ ICTR, *Prosecutor v. Bagilishema*, ICTR-95-A-T, Judgment, 7 June 2001, para. 12.

¹⁷ Impugned Decision, paras. 28, 31.

¹⁸ STL, *Prosecutor v. Salim Jamil Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Prosecutor Request of 21 December 2012 to Amend the Witness and Exhibit Lists and for Authorisation for Further Disclosure, 27 February 2013, paras. 38-42.

¹⁹ Impugned Decision, para. 30.

then streamline it, cannot be the correct approach to pre-trial management, or an appropriate use of KSC or Defence resources.

15. As such, certification is sought to appeal the following two issues (individually “Issue”, together “Issues”), both of which satisfy the requirements of Article 45(2) and Rule 77(2):

Issue 1: Whether the Pre-Trial Judge erred in his approach to the assessment of good cause by basing it, in part, on a purported absence of prejudice to the Defence, and without sufficient consideration of its exceptional nature;²⁰ and

Issue 2: Whether the Pre-Trial Judge erred in basing the existence of good cause, in part, on the purported ability of a future Trial Panel to streamline the the SPO evidence, and without assessing its duplicative nature.²¹

IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

16. The two identified Issues are appealable as they arise from the Impugned Decision and contest specific findings made by the Pre-Trial Judge. In formulating the Issues, the Defence is not simply asserting that the Pre-Trial Judge should have decided differently on the question of the SPO’s request to again expand its Exhibit List, but rather, has identified specific errors that undermine his findings and warrant their reversal.

17. Namely, the Pre-Trial Judge incorrectly based his assessment of good cause, in part, on a purported absence of Defence prejudice, and found that any duplication

²⁰ Impugned Decision, paras. 28, 31.

²¹ Impugned Decision, para. 30.

could be dealt with later by the Pre-Trial Judge, in contravention of established practice that late additions of this kind must be exceptional. As such, the Issues are not mere disagreements with the Impugned Decision, but identify discrete topics, the resolution of which is essential for the determination of the matters arising in the judicial cause under examination.

18. Nor do the Issues amount to hypothetical concerns. The identified errors have an immediate and concrete impact on the ongoing conduct of the pre-trial phase, and more generally on the approach being taken to this central question of how and to what extent the SPO's Exhibit List can be permitted to continually expand. Rather than being abstract questions, the Issues have a direct link to the conduct of the pre-trial proceedings, justifying their examination at this stage.

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

19. The criteria to be satisfied under these two prongs of the leave to appeal test are disjunctive. The Defence submits that the Issues satisfy the first criteria regarding the significant impact on the "fair and expeditious conduct of proceedings" which is generally understood as referencing the norms of a fair trial.²²

20. As a starting point, for a trial to be considered fair, all accused are entitled to fundamental rights to have **adequate time and facilities** for the preparation of his defence,²³ and to be tried **within a reasonable time**.²⁴ Rule 95(2) of the Rules enumerates the functions of the Pre-Trial Judge after confirmation of the indictment, who shall "ensure that the proceedings are **not unduly delayed** and shall take all necessary measures for the **expeditious** preparation of the case for trial."²⁵

²² Gucati and Haradinaj Decision on Leave to Appeal, para. 14.

²³ Article 30(3) of the Kosovo Constitution; Article 21(4)(c) of the Law; Article 6(3)(b) of the ECHR.

²⁴ Article 31(2) of the Kosovo Constitution; Article 21(4)(d) of the Law; Article 6(1) of the ECHR.

²⁵ See further, Defence Response, paras. 7-8.

21. In identifying the Pre-Trial Judge's approach to an assessment of good cause, **Issue 1** significantly affects the accused's right to a fair trial, and the expeditious conduct of the proceedings. Namely, the Pre-Trial Judge based his assessment of good cause, in part, on a purported lack of prejudice to the Defence, whereas potential prejudice to the Defence is "a step subsequent to good cause being shown, and is not in itself a criterion for establishing good cause".²⁶ The consequence of this approach led, on this occasion, to the addition of hundreds of pages of documents to the SPO Exhibit List, and set a precedent for an overly permissive approach to post-deadline additions in the future. As such, Issue 1 directly concerns the expeditiousness and fair trial rights of Mr Thaçi, in particular the right to have adequate time to prepare his defence.

22. **Issue 2** arises from the Pre-Trial Judge's position that the duplicative nature of W04870's evidence can be dealt with at a later stage by the Trial Panel.²⁷ The growing list of the SPO's additional material, whether duplicative and likely to be "streamlined" out at a later stage or not, must still be read, analysed and investigated by the Defence. The Pre-Trial Judge's approach of pushing this question down the road will not only impact the expeditiousness of the trial proceedings, but will waste Defence resources. Issue 2 therefore directly concerns the expeditiousness and fair trial rights of Mr Thaçi, in particular the right to have adequate time to prepare his defence.

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

²⁶ STL, *Prosecutor v. Salim Jamil Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Prosecutor Request of 21 December 2012 to Amend the Witness and Exhibit Lists and for Authorisation for Further Disclosure, 27 February 2013, paras. 38-42.

²⁷ Impugned Decision, para. 30.

23. The Impugned Decision directly impacts on the expeditiousness of the proceedings. If the Defence is correct on either of the Issues, intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO Exhibit List, and the *ex post facto* streamlining of SPO evidence at the trial phase, thereby materially advancing the proceedings.

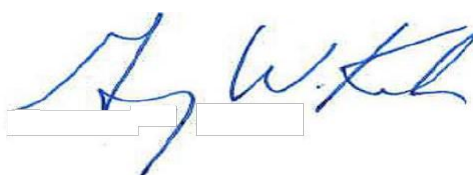
24. An immediate immediate resolution by the Court of Appeals Panel of the Issues may also materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the Exhibit List and, accordingly, affect the amount of material the SPO is permitted to rely on at trial.

V. RELIEF SOUGHT

25. 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).

[Word count: 2665 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 2 May 2022

At Tampa, United States