



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA 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, Presiding Judge

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 17 May 2023

**Language:** English

**Classification:** Public

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**Decision on Thaçi, Selimi and Krasniqi Defence Request for Certification to  
Appeal the Oral Order on Trial Panel Questioning**

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**Acting Specialist Prosecutor**

Alex Whiting

**Counsel for Hashim Thaçi**

Gregory Kehoe

**Counsel for Victims**

Simon Laws

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Rexhep Selimi**

Geoffrey Roberts

**Counsel for Jakup Krasniqi**

Venkateswari Alagendra

**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 19 April 2023, the Defence for Mr Thaçi (“Thaçi Defence”) and the Defence for Mr Veseli (“Veseli Defence”) raised issues with the Panel’s questioning of a witness.<sup>1</sup> On 19 and 20 April 2023, the Veseli Defence and Thaçi Defence asked for the opportunity to file written submissions on this matter.<sup>2</sup>

2. On 20 April 2023, the Panel responded that submissions had been heard and written submissions were not necessary under the circumstances. The Panel then issued an oral order dismissing the arguments raised by the Defence (“Impugned Decision”).<sup>3</sup>

3. On 1 May 2023, the Thaçi Defence, the Defence for Mr Selimi (“Selimi Defence”), and the Defence for Mr Krasniqi (“Krasniqi Defence”) (collectively “Defence”) filed a request for certification to appeal the Impugned Decision (“Defence Request”).<sup>4</sup>

4. On 5 May 2023, the Specialist Prosecutor’s Office (“SPO”) responded to the Defence Request (“SPO Response”).<sup>5</sup>

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<sup>1</sup> Transcript of Hearing, 19 April 2023, confidential, pp. 3253-3260.

<sup>2</sup> Transcript of Hearing, 19 April 2023, confidential, pp. 3253, 3255, 3260; Transcript of Hearing, 20 April 2023, confidential, pp. 3262-3263.

<sup>3</sup> Transcript of Hearing, 20 April 2023, confidential, pp. 3263-3269.

<sup>4</sup> F01495, Specialist Counsel, *Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning*, 1 May 2023, confidential.

<sup>5</sup> F01501, Specialist Prosecutor, *Prosecution Response to Defence Certification Request F01495*, 5 May 2023, confidential.

5. On 8 May 2023, Victims' Counsel responded to the Defence Request ("Victims' Counsel Response").<sup>6</sup>
6. On the same date, the Defence replied to the SPO Response ("Defence Reply to SPO Response").<sup>7</sup>
7. On 10 May 2023, the Defence replied to the Victims' Counsel Response ("Defence Reply to Victims' Counsel Response").<sup>8</sup>

## II. SUBMISSIONS

8. The Defence requests certification to appeal the following four issues ("Issues"):

- (1) Whether the Trial Panel erred in rendering the [Impugned Decision] without hearing the parties ("First Issue");
- (2) Whether the procedure for Trial Panel questioning as set out in the [Impugned Decision] is inconsistent with the statutory framework of the [Specialist Chambers ("SC")] ("Second Issue");
- (3) 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 ("Third Issue"); and
- (4) Whether the procedure for Trial Panel questioning set in the [Impugned Decision] is inconsistent with the rights of the accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves ("Fourth Issue").<sup>9</sup>

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<sup>6</sup> F01503, Specialist Counsel, *Victims' Counsel's Response to the "Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning"*, 8 May 2023, confidential.

<sup>7</sup> F01505, Specialist Counsel, *Thaçi, Selimi & Krasniqi Defence Reply to Prosecution Response to Defence Certification Request F01495*, 8 May 2023.

<sup>8</sup> F01514, Specialist Counsel, *Thaçi, Selimi & Krasniqi Reply to Victims' Counsel's Response (F01503)*, 10 May 2023.

<sup>9</sup> Defence Request, para. 7. *See also* Defence Request, para. 26.

9. The Defence submits that the Issues satisfy the requirements of Article 45(2) and Rule 77(2) insofar as: (i) they are appealable issues; (ii) they would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) their immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>10</sup>

10. The SPO responds that the Defence Request should be rejected because it fails to meet the requirements for leave to appeal under Article 45(2) and Rule 77.<sup>11</sup> The SPO argues that the matters raised do not constitute issues within the meaning of the applicable test, and the Defence does not demonstrate that any of the alleged errors meet the strict threshold for certification.<sup>12</sup>

11. Victims' Counsel responds that the Defence Request should be denied as it raises issues that constitute a disagreement with the legal framework of the SC rather than appealable issues.<sup>13</sup> Victims' Counsel submits that the Defence has failed to identify any appealable issue, and therefore the need for immediate resolution does not arise.<sup>14</sup>

12. The Defence replies that it is 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.<sup>15</sup> The Defence also argues that the Victims' Counsel's approach of prematurely responding to arguments which have not been advanced, and then classifying the Issues as disagreements and therefore not appealable, is erroneous.<sup>16</sup>

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<sup>10</sup> Defence Request, paras 7-24.

<sup>11</sup> SPO Response, paras 1, 14.

<sup>12</sup> SPO Response, para 1.

<sup>13</sup> Victims' Counsel Response, paras 3, 32.

<sup>14</sup> Victims' Counsel Response, para. 26.

<sup>15</sup> Defence Reply to SPO Response, para. 1.

<sup>16</sup> Defence Reply to Victims' Counsel Response, para. 1.

### III. APPLICABLE LAW

13. 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:

14. Rule 77(2) provides:

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.

15. The standard for certification of appeal under Rule 77(2) has been outlined in past decisions and will not be reiterated in full here.<sup>17</sup>

### IV. DISCUSSION

#### A. FIRST ISSUE

16. The Defence submits that whether the Panel erred in stating that it would “not wait for briefing” from the parties, on the basis that it “fully understood the circumstances yesterday”, is an appealable issue as it arises directly from the Impugned Decision.<sup>18</sup> The Defence argues that the Panel’s failure to hear the parties and understand the practical impact of the Judges’ questioning on both the

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<sup>17</sup> 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.

<sup>18</sup> Defence Request, para. 10, citing Transcript of Hearing, 20 April 2023, p. 3263, lines 11-12, confidential.

Accused's rights and the Defence preparedness significantly impacts the proceedings' expeditiousness.<sup>19</sup> The Defence claims that an immediate resolution by the Court of Appeals Panel of the First Issue would materially advance the proceedings in the present case.<sup>20</sup>

17. The SPO responds that the First Issue misrepresents the record and does not arise from the Impugned Decision as: (i) the modalities of the Panel's questioning were decided in paragraph 112 of the Order on the Conduct of Proceedings;<sup>21</sup> (ii) each of the Defence teams had the opportunity to make oral submissions in court on 19 April 2023, after the Veseli Defence initially raised the issue; (iii) the Panel need not wait for possible requests from Defence teams on issues that concern the fair and expeditious conduct of proceedings; and (iv) on 20 April 2023, no Defence team other than the Thaçi Defence registered any objection, or sought to be further heard on the matter.<sup>22</sup> The SPO contends that, even if the First Issue could be considered to arise from the Impugned Decision, the Defence does not explain how resolution of the First Issue would materially advance the proceedings.<sup>23</sup> The SPO therefore submits that the First Issue fails to meet the criteria for certification.<sup>24</sup>

18. Victims' Counsel responds that: (i) the Defence's argument amounts to mere disagreement about the approach of the Panel on whether written submissions were required; (ii) the Defence had been given the opportunity to make oral submissions and to respond orally to the SPO during the hearing of 19 April 2023; and (iii) the Panel was entitled, having heard the Parties' arguments on 19 April 2023, to conclude that "it fully understood the circumstances" and that it

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<sup>19</sup> Defence Request, para. 21.

<sup>20</sup> Defence Request, paras 23-24.

<sup>21</sup> F01226, Panel, *Order on the Conduct of Proceedings*, 25 January 2023, with Annex 1 ("Order on the Conduct of Proceedings").

<sup>22</sup> SPO Response, paras 1-4.

<sup>23</sup> SPO Response, para. 5.

<sup>24</sup> SPO Response, para. 6.

was ready to issue the Impugned Decision.<sup>25</sup> Victims' Counsel therefore submits that the First Issue does not arise from the Impugned Decision.<sup>26</sup>

19. The Defence replies that whether the relevant paragraph of the Order on the Conduct of Proceedings could reasonably be interpreted as notifying the Defence of the 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.<sup>27</sup> The Defence contends that the SPO fails to address whether it was proper for the Panel to undertake to consider forthcoming written submissions, before then issuing a decision without waiting for them to be filed.<sup>28</sup> The Defence submits that, once the Panel indicated its willingness to receive written submissions, the Defence teams were not only entitled to hold their submissions for the forthcoming written pleadings, but were arguably required to do so.<sup>29</sup>

20. The Panel observes that, on 19 April 2023, after the Veseli Defence raised issues with the Panel's questioning, the Defence was told to file written submissions but the Defence thereafter proceeded to make detailed and extensive oral submissions on the matter.<sup>30</sup> The Defence failed to identify any argument or consideration that it wished to place before the Panel in writing that it had not already placed before it orally. The Panel therefore finds that the Impugned Decision was issued after hearing the Parties, and that the First Issue misrepresents the procedural background of the Impugned Decision.

21. The Panel accordingly finds that the First Issue does not arise from the Impugned Decision.

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<sup>25</sup> Victims' Counsel Response, paras 13-15.

<sup>26</sup> Victims' Counsel Response, para. 16.

<sup>27</sup> Defence Reply to SPO Response, para. 2.

<sup>28</sup> Defence Reply to SPO Response, para. 3.

<sup>29</sup> Defence Reply to Victims' Counsel Response, para. 3.

<sup>30</sup> Transcript of Hearing, 19 April 2023, pp. 3253-3260, confidential.

22. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the First Issue is therefore rejected.

#### B. SECOND AND THIRD ISSUES

23. The Defence submits that the Panel misinterpreted and/or misapplied the relevant statutory framework by grounding its right to question witnesses on its powers under Rules 132 and 137.<sup>31</sup> The Defence contends that the Panel's reliance on Rules 132 and 137 to use "additional evidence not produced by the parties" in questioning witnesses, in circumstances where the Judges did not intend to admit these documents into evidence, is a discrete appealable issue arising directly from the Impugned Decision.<sup>32</sup> The Defence argues that the resolution of the Second Issue and Third Issue would have a significant impact on fairness and expeditiousness, given that the erroneous application of law identified in these issues directly causes an unfair procedure, which deprives the Defence of the notice it needs to prepare for the examination of SPO witnesses, impacts Defence preparedness and will prolong the trial.<sup>33</sup> The Defence claims that an immediate resolution of the Second Issue and Third Issue would materially advance the proceedings in the present case.<sup>34</sup>

24. The SPO responds that: (i) the Second Issue does not arise from the Impugned Decision as the procedure in place for safeguarding the rights of the Parties in relation to judicial questioning had been regulated in the Order on the Conduct of Proceedings; (ii) accordingly, the Impugned Decision did not create any new procedure; (iii) the ability of a Panel to ask a question of a witness "at any stage"

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<sup>31</sup> Defence Request, para. 11.

<sup>32</sup> Defence Request, para. 13.

<sup>33</sup> Defence Request, para. 22.

<sup>34</sup> Defence Request, paras 23-24.



– as provided for in Rule 127(3) – does not amount to changing the sequence of evidence; and (iv) Rules 132 and 137(1) were not dispositive of the matter under consideration.<sup>35</sup> The SPO contends that, even if the Second Issue and Third Issue could be considered to arise from the Impugned Decision, the Defence did not substantiate how resolution of the Second Issue and Third Issue impact the fairness and expeditious conduct of proceedings or the outcome of the trial.<sup>36</sup>

25. Victims' Counsel responds that the Second Issue and Third Issue are a disagreement, not with the Impugned Decision, 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 SC.<sup>37</sup> Victims' Counsel therefore submits that the Second Issue and Third Issue are not appealable.<sup>38</sup>

26. The Defence replies that the SPO submissions on the Second and Third Issues do not address the question of whether these are appealable issues which fulfil the statutory criteria.<sup>39</sup> The Defence also submits that Victims' Counsel responds to anticipated Defence arguments on appeal, rather than addressing whether the criteria for certification have been met.<sup>40</sup>

27. The Panel notes that, in the Impugned Decision, it found that: (i) "the scope of judicial questioning is broad and is not constrained by any consideration of subject or substance";<sup>41</sup> (ii) "[u]nder Rule 127(3): 'A Judge may at any stage put any question to the witness'";<sup>42</sup> and (iii) "the Defence has the right to reopen their examination on the basis of questions put to witnesses by the Panel" in accordance with paragraph 112 of the Order on the Conduct of Proceedings.<sup>43</sup>

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<sup>35</sup> SPO Response, paras 7-9.

<sup>36</sup> SPO Response, para. 10.

<sup>37</sup> Victims' Counsel Response, para. 17. *See also* Victims' Counsel Response, paras 18-20.

<sup>38</sup> Victims' Counsel Response, para. 21.

<sup>39</sup> Defence Reply to SPO Response, para. 4.

<sup>40</sup> Defence Reply to Victims' Counsel Response, para. 4.

<sup>41</sup> Transcript of Hearing, 20 April 2023, p. 3267, lines 1-2, confidential.

<sup>42</sup> Transcript of Hearing, 20 April 2023, p. 3267, lines 2-3, confidential.

<sup>43</sup> Transcript of Hearing, 20 April 2023, p. 3268, lines 1-3, confidential.

28. The Panel finds that the question of whether its findings concerning the permitted scope of judicial questioning of witnesses as set out in the Impugned Decision are consistent with the SC's statutory framework (Second Issue) arises from the Impugned Decision.

29. The Panel further finds that resolution of this question may have a practical impact on the Defence's preparations for cross-examination and hence on the fairness and expeditiousness of the proceedings. The Defence has therefore demonstrated that the Second Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

30. The Panel also considers it beneficial for the conduct of the proceedings and the rights of the Accused that any dispute regarding the permitted scope of judicial questioning of witnesses be addressed by the Court of Appeals Panel in light of the Panel's responsibility to establish the truth, insofar as relevant to the case before it. The Panel therefore finds that immediate resolution of the Second Issue by the Court of Appeals Panel will materially advance the proceedings.

31. In light of the above, the Panel finds that the requirements of the certification test arising from Article 45(2) and Rule 77(2) have been met and accordingly grants certification to appeal the Second Issue.

32. Turning to the Third Issue, the Panel notes that, in the Impugned Decision, it did not invoke Rules 132 and 137 as the legal basis for its power to question witnesses, but referred to those Rules to illustrate that the Panel is made up of professional judges who, in order to make accurate factual findings, are authorised to take the steps they consider necessary for the determination of the truth, including by calling evidence.

33. The Panel accordingly finds that the Third Issue does not arise from the Impugned Decision.

34. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Third Issue is therefore rejected.

#### C. FOURTH ISSUE

35. The Defence submits that the procedure set out by the Panel for its questioning of witnesses is a discrete appealable issue requiring determination.<sup>44</sup> The Defence argues that the Fourth Issue centres exclusively on the significant practical impact the Impugned Decision will have on the fairness and expeditiousness of the proceedings, and therefore would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial.<sup>45</sup> The Defence claims that an immediate resolution by the Court of Appeals Panel of the Fourth Issue would materially advance the proceedings in the present case.<sup>46</sup>

36. The SPO responds that: (i) a careful review of the Impugned Decision reveals that no new procedure for the questioning of witnesses was set down; and (ii) the Defence's arguments that the Panel's questioning of witnesses causes unfairness are unpersuasive, and lack the necessary precision required for certification.<sup>47</sup>

37. Victims' Counsel responds that the Fourth Issue is a further disagreement with the legal framework of the SC insofar as questions posed to witnesses by professional judges cannot be seen as extending the proceedings, but are an integral part of the proceedings within the framework of the SC.<sup>48</sup> Victims' Counsel therefore submits that the Fourth Issue is not appealable.<sup>49</sup>

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<sup>44</sup> Defence Request, paras 14-20.

<sup>45</sup> Defence Request, para. 22.

<sup>46</sup> Defence Request, paras 23-24.

<sup>47</sup> SPO Response, paras 11-12.

<sup>48</sup> Victims' Counsel Response, paras 22-24.

<sup>49</sup> Victims' Counsel Response, para. 25.

38. The Defence replies that the SPO's submissions on the Fourth Issue are undermined by the expansion of the SPO's case and prolongation of the witness' questioning that arose from the first set of Judges' questions that gave rise to the Defence Request.<sup>50</sup> The Defence also submits that: (i) the process of judges eliciting evidence concerning the act and conduct of the Accused, outside the scope of examination by the Parties, warrants appellate review; and (ii) the impact on Defence preparation gives rise to the encroachment on the Accused's rights.<sup>51</sup>

39. The Panel recalls that its findings concerning the permitted scope of judicial questioning are a discrete issue arising from the Impugned Decision.<sup>52</sup>

40. The Panel considers that appellate guidance regarding whether its findings concerning the permitted scope of judicial questioning of witnesses are consistent with the rights of the Accused may have a practical impact on the overall fairness and expeditiousness of the proceedings. The Panel is therefore satisfied that the Defence has demonstrated that the Fourth Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

41. The Panel also considers it beneficial for the conduct of the proceedings and the rights of the Accused that any dispute concerning the permitted scope of judicial questioning of witnesses be addressed by the Court of Appeals Panel in light of the Panel's responsibility to establish the truth, insofar as relevant to the case before it. The Panel therefore finds that immediate resolution of the Fourth Issue by the Court of Appeals Panel will materially advance the proceedings.

42. In light of the above, the Panel finds that the requirements of the certification test arising from Article 45(2) and Rule 77(2) have been met and accordingly grants certification to appeal the Fourth Issue.

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<sup>50</sup> Defence Reply to SPO Response, para. 6.

<sup>51</sup> Defence Reply to Victims' Counsel Response, paras 5-6.

<sup>52</sup> See above paras 27-28.

## V. CLASSIFICATION

43. The Panel notes that: (i) the Defence Request and the SPO Response have been filed confidentially; (ii) the SPO submits that both the Defence Request and the SPO Response can be reclassified as public;<sup>53</sup> and (iii) the Defence submits that the Defence Request can be reclassified as public.<sup>54</sup> The Panel therefore: (i) directs the Registry to reclassify the Defence Request and the SPO Response as public; and (ii) orders Victims' Counsel to file a public redacted version of the Victims' Counsel Response, or request reclassification thereof, by no later than Friday, 26 May 2023.

## VI. DISPOSITION

44. For all the reasons stated above, the Panel:

- (a) **GRANTS** certification to appeal the Second Issue and Fourth Issue;
- (b) **REJECTS** the request for certification to appeal the First Issue and Third Issue;
- (c) **DIRECTS** the Registry to reclassify the Defence Request and the SPO Response as public; and

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<sup>53</sup> SPO Response, para. 13.

<sup>54</sup> Defence Reply to SPO Response, para. 8.

(d) **ORDERS** Victims' Counsel to file a public redacted version of the Victims' Counsel Response, or request reclassification thereof, by no later than Friday, 26 May 2023.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style with a horizontal line underneath.

**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Wednesday, 17 May 2023

At The Hague, the Netherlands.