



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 5 March 2024

**Language:** English

**Classification:** Public

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**Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 153 (F02111)**

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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 8 February 2024, the Panel issued the “Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153” (“Impugned Decision”).<sup>1</sup>
2. On 15 February 2024, the Defence for Mr Thaçi (“Thaçi Defence”), the Defence for Mr Selimi (“Selimi Defence”) and the Defence for Mr Krasniqi (“Krasniqi Defence”) filed a request for leave to appeal the Impugned Decision (“Thaçi, Selimi and Krasniqi Request”).<sup>2</sup>
3. On the same day, the Defence for Mr Veseli (“Veseli Defence”) filed a separate request for leave to appeal the Impugned Decision (“Veseli Request”).<sup>3</sup>
4. On 28 February 2024, the Specialist Prosecutor’s Office (“SPO”) filed a consolidated response (“SPO Response”) to the Thaçi, Selimi and Krasniqi Request and the Veseli Request (collectively, “Defence Requests”).<sup>4</sup>

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<sup>1</sup> F02111, Panel, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153*, 8 February 2024, confidential (a public redacted version was issued on the same day, F02111/RED).

<sup>2</sup> F02128, Specialist Counsel, *Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 153 (F02111)*, 15 February 2024, confidential (a public redacted version was filed on the same day, F02128/RED).

<sup>3</sup> F02131, Specialist Counsel, *Veseli Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153 (F02111)*, 15 February 2024, confidential (a public redacted version was filed on 16 February 2024, F02131/RED).

<sup>4</sup> F02156, Specialist Prosecutor, *Consolidated Prosecution response to Defence certification requests F02128 and F02131*, 28 February 2024, public.

5. On 1 March 2024, the Veseli Defence replied to the SPO Response (“Veseli Reply”).<sup>5</sup>

6. The Thaçi, Selimi and Krasniqi Defence did not reply to the SPO Response.

## II. SUBMISSIONS

7. The Thaçi, Selimi and Krasniqi Defence request leave to appeal the Impugned Decision in respect of the following three issues:

1. Whether the Trial Panel erred in law by applying an excessively low threshold for the admission of W04722 and W04816’s evidence pursuant to Rule 153, contrary to the militating factors set out in Rule 153(1)(b) and the requirement for an “exceptional” basis warranting the admission of evidence set out in Rule 153(3) (“Thaçi, Selimi and Krasniqi’s First Issue”);
2. Whether the Trial Panel erred in law and/or fact and/or abused its discretion by finding that the additional topics proposed by the Defence for cross-examination of W04722 and W04816 did not warrant their attendance in court (“Thaçi, Selimi and Krasniqi’s Second Issue”); and
3. Whether the Trial Panel erred in law and/or fact by admitting an allegedly intercepted communication as an associated exhibit to W04816’s evidence (“Thaçi, Selimi and Krasniqi’s Third Issue”).<sup>6</sup>

8. The Veseli Defence requests leave to appeal the Impugned Decision on the following two issues relating to the Panel’s decision to admit the evidence of W04722 and W04816:

1. Whether the Trial Panel failed to apply the correct legal test for admission of evidence pursuant to Rule 153 (“Veseli’s First Issue”); and
2. Whether the Trial Panel violated the defendant’s fundamental right to confront evidence by admitting this evidence via Rule 153 (“Veseli’s Second Issue”).<sup>7</sup>

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<sup>5</sup> F02159, Specialist Counsel, *Veseli Defence Reply to the SPO’s ‘Consolidated Prosecution Response to Defence Certification Requests F02128 and F02131’ (F02156)*, 1 March 2024, public.

<sup>6</sup> Thaçi, Selimi and Krasniqi Request, paras 2, 30.

<sup>7</sup> Veseli Request, paras 2-3, 28.

9. All four Defence teams submit that the issues presented satisfy the test for certification as: (i) they originate from the Impugned Decision, are sufficiently specific and identifiable, and do not amount to mere disagreements;<sup>8</sup> (ii) they affect the fair and expeditious conduct of the proceedings or the outcome of the trial;<sup>9</sup> 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 Requests should be rejected because they fail to meet the requirements for leave to appeal under Article 45 and Rule 77.<sup>11</sup> According to the SPO, the Defence Requests allege certain errors of law or fact in the application of Rule 153, when closer scrutiny reveals that they merely disagree with the Panel's reasonable and correct application of the Rule.<sup>12</sup> The SPO further submits that the Defence fails to show that appellate review would have any, let alone significant, impact on the conduct or outcome of the proceedings.<sup>13</sup>

11. The Veseli Defence replies that the SPO Response: (i) fails to meaningfully engage with the issues raised in the Veseli Request;<sup>14</sup> and (ii) misunderstands and misstates the substance of the Defence Request.<sup>15</sup> The Veseli Defence submits that the Veseli Request clearly demonstrates appealable errors of law.<sup>16</sup> The Veseli Defence therefore requests that leave to appeal is granted in accordance with the relief sought in the Veseli Request.<sup>17</sup>

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<sup>8</sup> Thaçi, Selimi and Krasniqi Request, paras 4-8, 11-18, 23-25; Veseli Request, paras 6-24.

<sup>9</sup> Thaçi, Selimi and Krasniqi Request, paras 4, 9, 19-21, 26-27; Veseli Request, paras 6, 25.

<sup>10</sup> Thaçi, Selimi and Krasniqi Request, paras 4, 10, 22, 28-29; Veseli Request, paras 6, 26.

<sup>11</sup> SPO Response, paras 1, 22.

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

<sup>13</sup> SPO Response, para. 1.

<sup>14</sup> Veseli Reply, para. 2.

<sup>15</sup> Veseli Reply, para. 3.

<sup>16</sup> Veseli Reply, para. 4.

<sup>17</sup> Veseli Reply, para. 14.

### 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. 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 the Court of Appeals Panel may materially advance the proceedings.

The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.<sup>18</sup>

### IV. DISCUSSION

13. In the Impugned Decision, the Panel found that W04722's and W04816's evidence, consisting of their Rule 153 statements and associated exhibits, is *prima facie* relevant,<sup>19</sup> authentic,<sup>20</sup> and probative.<sup>21</sup> The Panel also found that the admission of W04722's and W04816's evidence *in lieu* of oral testimony is not unduly prejudicial within the meaning of Rule 138(1),<sup>22</sup> and that such evidence is suitable for admission pursuant to Rule 153 as it: (i) is largely cumulative of other witness and documentary evidence, is corroborated by witnesses whom the Accused were and will be able to cross-examine, and complements relevant adjudicated facts;<sup>23</sup> (ii) meets the requirements under Rule 153(2);<sup>24</sup> (iii) is

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<sup>18</sup> F01237, Panel, *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, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Panel, *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>19</sup> Impugned Decision, paras 55, 57, 64, 66.

<sup>20</sup> Impugned Decision, paras 56-57, 65-66.

<sup>21</sup> Impugned Decision, paras 59, 67.

<sup>22</sup> Impugned Decision, paras 59, 67.

<sup>23</sup> Impugned Decision, paras 58, 67.

<sup>24</sup> Impugned Decision, paras 58, 67.

relatively limited in length and not unduly repetitive;<sup>25</sup> and (iv) provides crime-base evidence which goes to proof of matters other than the acts and conduct of the Accused as charged in the Indictment.<sup>26</sup> In reaching such conclusion, the Panel was satisfied that the claimed centrality of W04722 to the case and the further information which the Defence wishes to elicit from W04722 and W04816 do not warrant their attendance for cross-examination.<sup>27</sup>

14. In addition, the Panel found that alleged inaccuracies in the witness's Rule 153 statements are not in principle sufficient ground for requiring cross-examination when the Rule 153 requirements are otherwise met, as this is a matter going to the weight to be assigned to the relevant evidence in light of all the evidence at trial, and not to its admissibility.<sup>28</sup> The Panel therefore admitted W04722's and W04816's evidence pursuant to Rules 138(1) and 153 without cross-examination.<sup>29</sup>

15. In the Panel's analysis of the requests for certification below, the Panel has consolidated the issues presented, as Thaçi, Selimi and Krasniqi's First Issue and Veseli's First Issue identify and articulate overlapping errors allegedly committed by the Panel in the Impugned Decision. The same applies to Thaçi, Selimi and Krasniqi's Second Issue and Veseli's Second Issue. The Panel will therefore assess the overlapping issues together.

#### A. THAÇI, SELIMI AND KRASNIQI'S FIRST ISSUE AND VESELI'S FIRST ISSUE

16. The Thaçi, Selimi and Krasniqi Defence submit that the Panel did not properly address the factors militating against admission in writing or the exceptional

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<sup>25</sup> Impugned Decision, paras 58, 67.

<sup>26</sup> Impugned Decision, paras 59, 67.

<sup>27</sup> Impugned Decision, paras 59, 67.

<sup>28</sup> Impugned Decision, para. 59.

<sup>29</sup> Impugned Decision, paras 60, 68, 93(b).

nature of admitting statements without cross-examination.<sup>30</sup> According to the Thaçi, Selimi and Krasniqi Defence, the Panel proceeded on the basis that once the evidence was relevant, authentic and probative, it should be admitted unless the Defence substantiated an objection to the admission.<sup>31</sup> Similarly, the Veseli Defence submits that the Panel erred in its apparent approach that if the SPO successfully showed that the evidence was relevant, *prima facie* authentic and a Rule 153(1)(a) feature was present, this was sufficient to render it admissible.<sup>32</sup> According to the Veseli Defence, the Panel also erred: (i) by reversing the legal burden in Rule 153;<sup>33</sup> (ii) by failing to give reasons as to why the Panel was satisfied that the requirements of a fair and expeditious trial exceptionally warranted the admission of W04816 or W04722's statements;<sup>34</sup> (iii) by considering the fact that a witness does not provide evidence of the acts and conduct of the accused to be a factor militating in favour of admission;<sup>35</sup> and (iv) by failing to consider the presence of alleged inconsistencies as a factor militating against admission under Rule 153.<sup>36</sup>

17. The SPO responds that, in disputing the 'threshold' application, the Thaçi, Selimi and Krasniqi Defence is merely disagreeing with the Panel's reasonable and correct conclusion that the evidence was admissible pursuant to Rule 153.<sup>37</sup> The SPO further contends that, contrary to the Veseli Defence's submissions, the Panel did not hold that relevance and *prima facie* authenticity alone was determinative of admission, but measured the proposed testimony against the totality of Rule 153's criteria.<sup>38</sup>

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<sup>30</sup> Thaçi, Selimi and Krasniqi Request, para. 7. *See also* Thaçi, Selimi and Krasniqi Request, para. 6.

<sup>31</sup> Thaçi, Selimi and Krasniqi Request, para. 7.

<sup>32</sup> Veseli Request, para. 8. *See also* Veseli Request, paras 9, 15-16.

<sup>33</sup> Veseli Request, paras 10-11.

<sup>34</sup> Veseli Request, paras 12-13.

<sup>35</sup> Veseli Request, para. 14.

<sup>36</sup> Veseli Request, para. 17.

<sup>37</sup> SPO Response, para. 4. *See also* SPO Response, para. 5.

<sup>38</sup> SPO Response, para. 19, *referring to* Veseli Request, para. 8. *See also* SPO Response, para. 20.



18. The Veseli Defence replies that, in the Impugned Decision, the Panel failed to carry out a transparent and reasoned balancing of relevant considerations.<sup>39</sup>

19. As mentioned above, in the Impugned Decision, the Panel found that, in addition to meeting the Rule 138(1) requirements, W04722's and W04816's evidence: (i) goes to proof of matters other than the acts and conduct of the Accused as charged in the Indictment; and (ii) is largely cumulative of other witness and documentary evidence, is corroborated by witnesses whom the Accused were and will be able to cross-examine, and complements relevant adjudicated facts.<sup>40</sup> These findings relate to the factors militating in favour of admission under Rule 153(1)(a).

20. The Panel was also satisfied that, contrary to the Defence's arguments regarding cross-examination of W04722 and W04816 being warranted: (i) alleged inaccuracies in the witness's Rule 153 statements do not *per se* require cross-examination when the Rule 153 requirements are otherwise met; (ii) the admission of W04722's and W04816's evidence *in lieu* of oral testimony without cross-examination was not unduly prejudicial; and (iii) W04722's and W04816's evidence was otherwise suitable for admission without cross-examination.<sup>41</sup> These findings relate to the factors militating against admission under Rule 153(1)(b) and whether cross-examination was therefore necessary under Rule 153(1)(b)(iii) and (3).

21. Therefore, the Panel assessed the suitability of the admission of W04722's and W04816's evidence *in lieu* of oral testimony as prescribed under both Rules 138(1) and 153(1)-(3), including by assessing factors militating for and against such admission.<sup>42</sup>

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<sup>39</sup> Veseli Reply, para. 6. *See also* Veseli Reply, para. 5.

<sup>40</sup> *See above* para. 13.

<sup>41</sup> *See above* paras 13-14.

<sup>42</sup> *Contra* Thaçi, Selimi and Krasniqi Request, paras 6-7; Veseli Request, paras 8-9, 15-17.



22. The Panel further notes that, contrary to the Veseli Defence's submissions,<sup>43</sup> it provided detailed reasons as to why it was satisfied of the admissibility of W04722's and W04816's evidence and of its suitability pursuant to Rule 153.<sup>44</sup> In particular, the Panel expressly acknowledged that "the onus of establishing the conditions of admission under Rule 153 is with the SPO".<sup>45</sup> Moreover, the Panel considered the fact that the witness does not provide evidence of the acts and conduct of the Accused as an element of the overall importance of the witness' evidence to the SPO's case, which is expressly provided for under Rule 153(1)(b)(ii).<sup>46</sup> Finally, the Panel expressly recalled that alleged inaccuracies in a witness' Rule 153 statement are not without more a sufficient basis for requiring cross-examination when the other requirements for admission without cross-examination are met.<sup>47</sup>

23. Having found that W04722's and W04816's evidence meets the requirements under Rules 138 and 153, and in the absence of any factors militating against the admission of W04722's and W04816's evidence, the Panel admitted it into evidence *in lieu* of oral testimony without cross-examination.

24. The Panel is of the view that the Thaçi, Selimi and Krasniqi's First Issue and the Veseli's First Issue misrepresent the Panel's findings and constitutes a mere disagreement with them. Moreover, the Thaçi, Selimi and Krasniqi Defence attempt to re-litigate the admission of W04722 and W04816's evidence pursuant to Rule 153 largely by reiterating the objections made prior to the Impugned Decision about the purported importance of the witnesses to the SPO's case. The Panel therefore finds that the Defence have failed to establish that Thaçi, Selimi

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<sup>43</sup> Veseli Request, paras 12-13; Veseli Reply, paras 5-6.

<sup>44</sup> See *above* paras 13-14, and references to the Impugned Decision cited therein.

<sup>45</sup> Impugned Decision, para. 59.

<sup>46</sup> Impugned Decision, paras 59, 67. See also Rule 153(1), first sentence, last half-sentence. *Contra* Veseli Request, paras 10-11, 14.

<sup>47</sup> Impugned Decision, para. 59.

and Krasniqi's First Issue and Veseli's First Issue constitute discrete topics arising from the Impugned Decision.

25. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to Thaçi, Selimi and Krasniqi's First Issue and Veseli's First Issue. The request for certification to appeal Thaçi, Selimi and Krasniqi's First Issue and Veseli's First Issue is therefore rejected.

#### B. THAÇI, SELIMI AND KRASNIQI'S SECOND ISSUE AND VESELI'S SECOND ISSUE

26. The Thaçi, Selimi and Krasniqi Defence submit that, by denying the Defence a chance to cross examine W04722 and W04816 on identified topics relevant to their evidence, their credibility, and the Defence's own evidentiary case, the Impugned Decision disproportionately affected the Accused's fundamental right to examine or have examined the witnesses against them and to present evidence capable of rebutting the charges.<sup>48</sup> Similarly, the Veseli Defence submits that there is a presumption in favour of the ability to cross-examine and broad deference should be afforded to the Defence when the Defence asserts that a witness is required for cross-examination.<sup>49</sup>

27. The SPO responds that Thaçi, Selimi and Krasniqi's Second Issue is not appealable as it lacks precision and alleges error where there is only disagreement.<sup>50</sup> The SPO further submits that, in seeking 'broad deference' to cross-examine witnesses, Veseli's Second Issue is effectively a challenge to Rule 153 more generally, rather than the manner it was applied in the Panel's decision.<sup>51</sup>

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<sup>48</sup> Thaçi, Selimi and Krasniqi Request, paras 11. *See also* Thaçi, Selimi and Krasniqi Request, paras 12-16.

<sup>49</sup> Veseli Request, paras 22-23.

<sup>50</sup> SPO Response, para. 8. *See also* SPO Response, para. 7.

<sup>51</sup> SPO Response, para. 21.

28. The Veseli Defence replies that when the Defence, on a good faith basis, asserts that a witness is unique, central or important to their case, such a witness cannot possibly be fairly admitted under Rule 153 without evidence of exceptional circumstances.<sup>52</sup>

29. As shown above, in finding W04722 and W04816's evidence admissible pursuant to Rules 138 and 153, the Panel found that the additional topics which the Defence wishes to explore with the two witnesses do not warrant their appearance for cross-examination.<sup>53</sup> The Panel assessed the suitability of the admission of W04722's and W04816's evidence *in lieu* of oral testimony as prescribed under Rule 153(1)-(3).<sup>54</sup> This being said, contrary to the SPO's submissions in relation to Thaçi, Selimi and Krasniqi's Second Issue and Veseli's Second Issue,<sup>55</sup> whether the Panel erred or abused its discretion in making such finding constitutes a discrete topic emanating from the Impugned Decision. The Panel accordingly finds that Thaçi, Selimi and Krasniqi's Second Issue and Veseli's Second Issue arise from the Impugned Decision.

30. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel notes that whether the Panel erred or abused its discretion by finding that W04722 and W04816's appearance for cross-examination is not warranted might affect the Accused's ability to test the evidence of those witnesses through cross-examination, and elicit potentially exculpatory evidence that the Defence alleges would be relevant to its case. Contrary to the SPO's submissions,<sup>56</sup> the Panel is therefore satisfied that the Defence has demonstrated that Thaçi, Selimi and Krasniqi's Second Issue and Veseli's Second Issue would impact the fair conduct of the proceedings. This is the case irrespective of the fact that the Defence

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<sup>52</sup> Veseli Reply, para. 9. *See also* Veseli Reply, paras 8, 10-12.

<sup>53</sup> *See above* para. 13.

<sup>54</sup> *See above* paras 19-21.

<sup>55</sup> SPO Response, paras 7-8, 21.

<sup>56</sup> SPO Response, paras 12, 14-15.

failed to establish that these witnesses would be able to provide evidence supportive of their case.

31. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Panel notes that its finding that the additional topics which the Defence wishes to explore with W04722 and W04816 do not warrant their appearance for cross-examination: (i) was not the only factor leading to the admission of their evidence under Rule 153;<sup>57</sup> and (ii) in any event, merely resulted in the admission in the record of evidence whose weight will be duly assessed at the end of trial, having regard to the entire body of evidence, and bearing in mind that a conviction may not be based solely or to a decisive extent on the statement of a witness whom the Defence had no opportunity to examine.<sup>58</sup> The Panel further considers that, contrary to the submissions of the Taçi, Selimi and Krasniqi Defence,<sup>59</sup> there is no ambiguity about the scope of the Panel's discretion to admit prior statements *in lieu* of oral testimony. Appellate chambers in the *ad hoc* tribunals and in the Specialist Chambers have confirmed that trial judges enjoy a broad degree of discretion in making decisions on the admission of evidence based on the circumstances of the case, and appellate chambers will not lightly interfere with such decisions.<sup>60</sup>

32. In this context, the Panel finds that the Defence has not demonstrated how an immediate resolution of Taçi, Selimi and Krasniqi's Second Issue and Veseli's

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<sup>57</sup> See above paras 13-14.

<sup>58</sup> Rule 140(4)(a).

<sup>59</sup> See Taçi, Selimi and Krasniqi Request, para. 22.

<sup>60</sup> See KSC-CA-2022-01, F00114, Court of Appeals, Appeal Judgment, 2 February 2023, para. 35; see also ICTY, *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, Appeals Chamber, [Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused](#), 27 January 2006, para. 4; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 533; ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Appeals Chamber, [Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#), 4 October 2004, para. 5.

Second Issue by the Court of Appeals Panel may materially advance the proceedings.<sup>61</sup>

33. Accordingly, the request for certification to appeal Thaçi, Selimi and Krasniqi's Second Issue and Veseli's Second Issue is rejected.

### C. THAÇI, SELIMI AND KRASNIQI'S THIRD ISSUE

34. The Thaçi, Selimi and Krasniqi Defence submit that the Panel erred in admitting an item which was tendered as an associated exhibit to W04816's statement.<sup>62</sup> They argue that the exhibit is not an inseparable or indispensable part of W04816's statement,<sup>63</sup> and that the Panel failed to engage with the substance of their objections or properly assess the admissibility of the associated exhibit independent of the others.<sup>64</sup> Thus, the Thaçi, Selimi and Krasniqi Defence submit that the Third Issue goes to the correct application of the admissibility criteria as well as to the requirement to render a reasoned decision.<sup>65</sup>

35. The SPO responds that the Thaçi, Selimi and Krasniqi Defence: (i) demonstrates no error in respect of the Panel's treatment of W04816's associated exhibits; and (ii) mischaracterises the Impugned Decision. Therefore, the SPO argues that it is not an appealable issue.<sup>66</sup>

36. As mentioned above, in the Impugned Decision, the Panel found that W04816's associated exhibits, including the intercept shown to and discussed by the witness during his SPO interview, form an indispensable and inseparable part of the witness' Rule 153 statement.<sup>67</sup> The Panel further found that W04816's

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<sup>61</sup> *Contra* Thaçi, Selimi and Krasniqi Request, para. 22; Veseli Request, para. 26.

<sup>62</sup> Thaçi, Selimi and Krasniqi Request, para. 23. *See also* Thaçi, Selimi and Krasniqi Request, para. 24.

<sup>63</sup> Thaçi, Selimi and Krasniqi Request, para. 23.

<sup>64</sup> Thaçi, Selimi and Krasniqi Request, para. 24.

<sup>65</sup> Thaçi, Selimi and Krasniqi Request, para. 25.

<sup>66</sup> SPO Response, paras 10-11.

<sup>67</sup> Impugned Decision, para. 66.

evidence is *prima facie* relevant, authentic, probative, not unduly prejudicial and suitable for admission without cross-examination pursuant to Rule 153.<sup>68</sup> Contrary to the Thaçi, Selimi and Krasniqi Defence's submissions,<sup>69</sup> the Panel assessed the admissibility of W04816's associated exhibits under both Rules 138 and 153 and was satisfied of the suitability of each of them for admission under those Rules.

37. The Panel is of the view that the Thaçi, Selimi and Krasniqi's Third Issue constitutes a mere disagreement with the Panel's findings as well as an attempt to re-litigate the admission of W04816's associated exhibit pursuant to Rule 153. The Panel therefore finds that the Thaçi, Selimi and Krasniqi Defence have failed to establish that Thaçi, Selimi and Krasniqi's Third Issue constitutes a discrete topic arising from the Impugned Decision.

38. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to Thaçi, Selimi and Krasniqi's Third Issue. The request for certification to appeal Thaçi, Selimi and Krasniqi's Third Issue is rejected.

## V. DISPOSITION

39. For the above-mentioned reasons, the Panel hereby **REJECTS** the Defence Requests.



**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Tuesday, 5 March 2024

At The Hague, the Netherlands.

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<sup>68</sup> Impugned Decision, paras 66-68. *See above* para. 13.

<sup>69</sup> Thaçi, Selimi and Krasniqi Request, para. 24. *See also* Thaçi, Selimi and Krasniqi Request, para. 25.