



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-06  
Specialist 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 Prosecutor

**Date:** 30 September 2021

**Language:** English

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**Prosecution response to Rexhep Selimi's request for certification to appeal the  
Decision on Defence Motions Alleging Defects in the Form of the Indictment**

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## I. INTRODUCTION

1. The Request<sup>1</sup> should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law<sup>2</sup> and Rule 77 of the Rules.<sup>3</sup> Selimi has not carried his burden to show that any of the seven issues he raises merit appeal at this stage in the litigation.<sup>4</sup>

## II. PROCEDURAL HISTORY

2. On 4 November 2020, the Specialist Prosecutor's Office ('SPO') submitted a public corrected version of the Confirmed Indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (collectively, 'Accused').<sup>5</sup>

3. On 12 March 2021, Thaçi filed a preliminary motion under Rule 97(1)(b) of the Rules, alleging defects in the form of the Indictment.<sup>6</sup> On 15 March 2021, Veseli,<sup>7</sup> Selimi,<sup>8</sup> and Krasniqi<sup>9</sup> filed their respective preliminary motions also challenging the Indictment. The

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<sup>1</sup> Defence Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00446, 27 August 2021 ('Request').

<sup>2</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>4</sup> The seven issues for which leave to appeal is sought as identified at para. 1 of the Request ('Issues').

<sup>5</sup> Submission of corrected and public redacted versions of confirmed Indictment and relate requests, KSC-BC-2020-06/F00045/A03, 4 November 2020 ("Indictment").

<sup>6</sup> Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, KSC-BC-2020-06/F00215, 12 March 2021.

<sup>7</sup> Preliminary Motion by the Defence of Kadri Veseli to Challenge the Indictment, KSC-BC-2020-06/F00225, 15 March 2021.

<sup>8</sup> Selimi Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00222, 15 March 2021.

<sup>9</sup> Krasniqi Defence Preliminary Motion Alleging Defects in the Indictment, KSC-BC-2020-06/F00221, 15 March 2021.

SPO responded on 23 April 2021,<sup>10</sup> and Thaçi,<sup>11</sup> Selimi,<sup>12</sup> Krasniqi,<sup>13</sup> and Veseli<sup>14</sup> replied on 14 and 17 May 2021.

4. On 22 July 2021, the Pre-Trial Judge issued his Decision,<sup>15</sup> granting in part the Accused's motions and ordering the SPO to file a corrected version of the Indictment, but rejecting the remainder of the motions, finding that once the ordered amendments are made, the Indictment sets out with sufficiently clarity and specificity the facts underpinning the charges.

5. On 27 August 2021, Selimi sought leave to appeal the Decision, raising seven issues ('Issues'):<sup>16</sup>

6. On 2 September 2021, the SPO requested an extension of time to respond to the Defence leave to appeal requests.<sup>17</sup> On 6 September 2021, the Pre-Trial Judge granted the SPO an extension until 30 September 2021 to file the responses.<sup>18</sup>

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<sup>10</sup> Consolidated Prosecution response to Thaçi, Selimi and Krasniqi Preliminary Motions on the Form of the Indictment, KSC-BC-2020-06/F00258, 23 April 2021; Prosecution response to Veseli Preliminary Motion on the Form of the Indictment, KSC-BC-2020-06/F00261, 23 April 2021.

<sup>11</sup> Thaçi Defence Reply to 'Consolidated Prosecution response to Thaçi, Selimi and Krasniqi Preliminary Motions on the Form of the Indictment', KSC-BC-2020-06/F00303, 14 May 2021.

<sup>12</sup> Selimi Defence Reply to SPO Response to Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00297, 14 May 2021.

<sup>13</sup> Krasniqi Defence Reply to Consolidated Prosecution response to Thaçi, Selimi and Krasniqi Preliminary Motions on the Form of the Indictment, KSC-BC-2020-06/F00298, 14 May 2021.

<sup>14</sup> Veseli Defence Reply to Prosecution Response to Preliminary Motion to Challenge the Indictment, KSC-BC-2020-06/F00309, 17 May 2021.

<sup>15</sup> Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00413, 22 July 2021 ('Decision').

<sup>16</sup> Defence Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00445, 27 August 2021.

<sup>17</sup> Prosecution request for extension of time limit to respond to leave to appeal requests on decision KSC-BC-2020-06/F00413, KSC-BC-2020-06/F00451, 2 September 2021.

<sup>18</sup> Consolidated Decision on Requests for Extension of Time, KSC-BC-2020-06/F00458, 6 September 2021.



### III. SELIMI FAILS TO MEET THE REQUIREMENTS FOR GRANTING LEAVE TO APPEAL

#### A. APPLICABLE LAW

7. Outside of the limited circumstances—not applicable here—where interlocutory appeals are of right,<sup>19</sup> '[i]nterlocutory appeals, interrupting the continuity of the proceedings, are the exception.'<sup>20</sup> Indeed, a recent decision observed the 'restrictive nature of this remedy.'<sup>21</sup> Read together, Article 45(2) and Rule 77(2) set out the requirements applicable to granting a request for leave to appeal. Those are:

- a. that the matter is an 'appealable issue';
- b. that the decision involves an issue that would significantly affect:
  - i. the fair and expeditious conduct of the proceedings; or
  - ii. the outcome of the trial; and,
- c. that, in the opinion of the relevant judicial body, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>22</sup>

8. The burden is on the applicant to establish the existence of these requirements.<sup>23</sup> Consistent with this burden, where an applicant materially misrepresents the challenged decision, the request will be denied.<sup>24</sup> Moreover, the prongs identified at (a) through (c)

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<sup>19</sup> See Article 45(2).

<sup>20</sup> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.9 ('Thaçi Decision').

<sup>21</sup> Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.11.

<sup>22</sup> See Thaçi Decision, KSC-BC-2020-06/F00172, para.10.

<sup>23</sup> See, e.g., ICC, Situation in Uganda, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on Prosecutors application for warrants of arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005, paras 20-21.

<sup>24</sup> See, e.g., Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.24.

above are cumulative.<sup>25</sup> An applicant's failure to substantiate any one of them will be fatal to the request.

9. For purposes of prong (a), an 'appealable 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.<sup>26</sup> An appealable issue requires the applicant to 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.<sup>27</sup> Where a party requesting leave to appeal claims error in a decision but does not identify what should have been done differently, the issue will not be considered sufficiently discrete and specific to merit appeal.<sup>28</sup>

10. For purposes of prong (b), the 'fair and expeditious conduct of proceedings' is generally understood as referencing the norms of fair trial.<sup>29</sup> In considering whether an issue affects the outcome of proceedings, 'it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case.'<sup>30</sup> Even where an issue satisfying either of these possibilities is present, if the impact is not 'significant' it will not qualify for interlocutory appeal.<sup>31</sup> Speculative or unidentified impacts on fair trial rights will not be sufficient to meet this requirement.<sup>32</sup>

11. The final prong, prong (c) above, 'requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the judicial process of

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<sup>25</sup> Prong (b) may be satisfied on either of the two bases indicated.

<sup>26</sup> Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.12.

<sup>27</sup> Thaçi Decision, KSC-BC-2020-06/F00172, para.11.

<sup>28</sup> Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14 ('Krasniqi Decision').

<sup>29</sup> Krasniqi Decision, KSC-BC-2020-07/F00169, para.14.

<sup>30</sup> Krasniqi Decision, KSC-BC-2020-07/F00169, para.15.

<sup>31</sup> Thaçi Decision, KSC-BC-2020-06/F00172, para.11.

<sup>32</sup> Krasniqi Decision, KSC-BC-2020-06/F00479, para.25.

possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial thereby moving the proceedings forward along the right course.’<sup>33</sup>

12. As described below, none of the Issues meet these requirements.

B. SELIMI HAS NOT CARRIED HIS BURDEN ON THE FIRST, SECOND, AND THIRD ISSUES

13. The first through third issues Selimi raises are legal questions related to Joint Criminal Enterprise (JCE) liability.<sup>34</sup> These issues do not merit leave to appeal because resolving them now would not significantly impact the norms of fair trial or the outcome of proceedings, and they are legal questions that should be addressed at trial. Indeed, that these are legal questions is plainly shown even by the circular way that Selimi frames one of the issues: ‘Whether the *legal definition* of common purpose is a *question of law*’.<sup>35</sup> Granting leave to appeal on these issues at this juncture would only unnecessarily delay proceedings, by requiring consideration of issues that may not yet be ripe.

C. SELIMI HAS NOT CARRIED HIS BURDEN ON THE FOURTH AND FIFTH ISSUES

14. The fourth and fifth issues Selimi seeks leave to appeal both relate to additional information concerning the alleged JCE. Respectively, they concern which crimes are alleged to have been perpetrated pursuant to JCE III versus JCE I (‘Fourth Issue’), and the identity of JCE Members versus Tools (‘Fifth Issue’).

15. The Fourth and Fifth Issues do not merit leave to appeal, as they would not significantly promote the norms of a fair trial, or the outcome of proceedings, and would only serve to delay those proceedings. The level of detail contained in the Confirmed Indictment is sufficient to satisfy the notice required at this stage, and to allow Selimi to

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<sup>33</sup> Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.17 (internal quotations omitted).

<sup>34</sup> Request, KSC-BC-2020-06/F00445, paras 1(a)-1(c).

<sup>35</sup> Request, KSC-BC-2020-06/F00445, para.1(b) (emphasis added).



prepare his defence. There will be ample opportunity to develop—and challenge—further factual details at trial.

D. SELIMI HAS NOT CARRIED HIS BURDEN ON THE SIXTH ISSUE

16. The sixth issue Selimi seeks leave to appeal is ‘Whether the mode of a liability by which a subordinate allegedly committed crimes is a material fact which needs to be pleaded in the Indictment in a case based on superior responsibility’<sup>36</sup> (‘Sixth Issue’).

17. The Pre-Trial Judge held that crimes allegedly perpetrated by subordinates were material facts to be pled, but the ‘corresponding modes of liability were not.’<sup>37</sup> Leave to appeal should not be granted on the Sixth Issue because it would not significantly affect the fair and expeditious conduct of the proceedings, nor the outcome of the trial, and an immediate resolution by the Court of Appeals Panel will not materially advance the proceedings.

18. By pleading superior responsibility and identifying the crimes committed by the subordinates, the SPO has provided sufficient information such that a decision regarding second-order modes of liability cannot be deemed ‘significant.’ Moreover, there will be ample opportunity at trial to explore and address the factual underpinnings of the second-order modes of liability that may be applicable to subordinates. Addressing that issue now would merely add to the delay in reaching trial.

E. SELIMI HAS NOT CARRIED HIS BURDEN ON THE SEVENTH ISSUE

19. The seventh issue Selimi seeks leave to appeal is ‘Whether the Rule 86(3)(b) Outline can be used to provide the Defence with additional underlying particulars’ (‘Seventh Issue’).<sup>38</sup>

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<sup>36</sup> Request, KSC-BC-2020-06/F00445, para.1(f).

<sup>37</sup> Decision, KSC-BC-2020-06/F00413, para.119.

<sup>38</sup> Request, KSC-BC-2020-06/F00445, para.1(g).

20. The Seventh Issue does not merit leave to appeal because it is not an appealable issue, it would not significantly affect the fair and expeditious conduct of the proceedings, nor the outcome of the trial, and an immediate resolution by the Court of Appeals Panel will not materially advance the proceedings.

21. This is not an appealable issue because the resolution of this issue is not essential for the determination of the propriety of the form of the Confirmed Indictment. As Selimi's framing of this issue concedes, the Decision only relied on the Rule 86(3)(b) Outline to provide 'additional underlying particulars' to the Confirmed Indictment.<sup>39</sup> In both of the paragraphs of the Decision that Selimi cites to in the Request,<sup>40</sup> the Pre-Trial Judge was merely noting 'further evidentiary details'<sup>41</sup> that are provided to Selimi over and above the base-line requirements that are fully met by the Confirmed Indictment.

22. The provision of this additional information, however, does not affect that the Confirmed Indictment provides contains sufficient detail as a stand-alone document. As the Pre-Trial Judge noted, in the Confirmed Indictment itself the Accused's alleged contributions are pled 'comprehensively' and 'exhaustively'.<sup>42</sup> This is so even though the Rule 86(3)(b) Outline is a mandatory annex<sup>43</sup> to the Indictment, and therefore could properly be considered part of the Confirmed Indictment itself.

23. For this same reason—that the Confirmed Indictment provides satisfactory notice to Selimi in and of itself, even if additional detail is provided by the Outline—the decision does not involve an issue that would significantly affect the fair and expeditious conduct of proceedings, or the outcome of trial, and resolution by the Appeals Panel would not materially advance the proceedings. Even if, *arguendo*, a decision on appeal agreed with Selimi, any reference by the Pre-Trial Judge to the Rule 86(3)(b) Outline could be struck

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<sup>39</sup> Request, KSC-BC-2020-06/F00445, para.1(g).

<sup>40</sup> Decision, KSC-BC-2020-06, KSC/BC-2020-06/F00413, paras 29, 104.

<sup>41</sup> Decision, KSC-BC-2020-06, KSC/BC-2020-06/F00413, para.29.

<sup>42</sup> Decision, KSC-BC-2020-06, KSC/BC-2020-06/F00413, para.103.

<sup>43</sup> Rule 86(3).



and the Confirmed Indictment would still be valid and sufficient on its own. Thus, granting leave to appeal on this issue would only unnecessarily expend time and judicial resources.

#### IV. CONCLUSION AND RELIEF REQUESTED

24. For the foregoing reasons, the SPO requests that the Pre-Trial Judge reject the Request.

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**Jack Smith**

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Thursday, 30 September 2021

At The Hague, the Netherlands.