



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

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Language: English

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Prosecution response to VESELI Preliminary Motion to Challenge the Indictment

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I. INTRODUCTION

1. The Motion¹ fails to identify any defect in the form of the Indictment² under Rule 97(1)(b) of the Rules³ and must be summarily dismissed. What the Defence alleges as ‘two main defects in the Indictment’ concerning the temporal and geographic scope of the armed conflict⁴ are factual matters for determination at trial. The Motion thus exceeds the scope of permissible preliminary motions under Rule 97(1), is an attempt to prematurely litigate evidentiary matters and merely amounts to a disagreement with the Confirmation Decision.⁵

II. THE MOTION EXCEEDS THE SCOPE OF PERMISSIBLE PRELIMINARY MOTIONS UNDER R97(1)

2. Extensive jurisprudence has delineated the permissible scope of preliminary motions. These consistent findings establish *inter alia* that:

- there is a clear difference between the material facts underpinning the charges in an indictment, which must be pleaded, and the evidence proffered to prove them, which is a matter for trial;⁶

¹ Preliminary Motion by the Defence of Kadri Veseli to Challenge the Indictment, KSC-BC-2020-06/F00225, notified 18 March 2021 (‘Motion’). *See also* Public Redacted Version of “Preliminary motion by the Defence of Kadri Veseli to Challenge the Indictment” dated 15 March 2021, KSC-BC-2020-06/F00225/RED2, 18 March 2021.

² Lesser Redacted Version of ‘Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020’, KSC-BC-2020-06/F000134, 11 December 2020, Confidential (‘Indictment’). *See also* Annex 1 to Submission of corrected and public redacted versions of confirmed Indictment and related requests, KSC-BC-2020-06/F00045/A01, 4 November 2020, Strictly Confidential and *Ex Parte*.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). Unless otherwise indicated, all references to ‘Rule(s)’ are to the Rules.

⁴ Motion, KSC-BC-2020-06/F00225, para.1 and Sections II and III.

⁵ Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00025/RED, 26 October 2020 (‘Confirmation Decision’). For these same reasons, the SPO has refrained from advancing its substantive arguments in this response. Should the Pre-Trial Judge be minded to consider VESELI’s challenge on the merits at this time, the SPO requests leave to file supplemental submissions.

⁶ ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 (‘Blaškić Decision’), paras 209-210, and jurisprudence cited in footnote 431; ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006,

- a disagreement with the facts as alleged is a matter for determination at trial and is not appropriately raised in a preliminary motion on defects in the form of the indictment;⁷ and
- factual and evidentiary issues are similarly not matters to be otherwise dealt with by way of preliminary motions but are to be considered at trial.⁸

3. In particular, the question of when the alleged armed conflict began or ceased to exist,⁹ as well as its nature and intensity,¹⁰ or its geographic extent,¹¹ are issues which should properly be advanced and argued at trial.¹² Similarly, the Defence's disagreement with the findings in the Confirmation Decision¹³ is a matter for determination at trial and does not amount to a defect in the form of the Indictment.¹⁴

para.116; STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Decision on Alleged Defects in the Form of the Indictment, 28 September 2020 ('*Ayyash* Decision'), para.14(b) and (o). See also *Specialist Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00147, Public Redacted Version of Decision on Defence Preliminary Motions, 8 March 2021 ('*Gucati and Haradinaj* Decision'), para.40.

⁷ ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ('*Kvočka* Decision'), para.40 and jurisprudence cited in footnote 8; *Ayyash* Decision, para.14(o). See also *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.40.

⁸ SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004 ('*Norman* Decision'), para.46; SCSL, *Prosecutor v. Fofana*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict, 25 May 2004 ('*Fofana* Decision'), paras 31-32; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11 OA3 OA4, Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, para.31.

⁹ Motion, KSC-BC-2020-06/F00225, Section II, parts B and C.

¹⁰ Motion, KSC-BC-2020-06/F00225, Section II, part A.

¹¹ Motion, KSC-BC-2020-06/F00225, Section III.

¹² *Norman* Decision, para.46; *Fofana* Decision, paras 31-32; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007 ('*Gotovina* March Decision'), para.75; confirmed by *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007 ('*Gotovina* Appeal Decision'), paras 20-21.

¹³ See e.g. Motion, KSC-BC-2020-06/F00225, paras 2-3, 5, 16-18, 46, 75.

¹⁴ *Ayyash* Decision, para.14(o); *Kvočka* Decision, para.40. See also *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.40.

4. While purporting to constitute a challenge to the Indictment within the meaning of Rule 97(1)(b), the Motion is in fact an improper attempt to litigate the factual and legal sufficiency of the confirmed charges.¹⁵ The Confirmation Decision's findings on the temporal and geographic scope of the armed conflict were soundly based, and the full scope of the SPO's evidence on those matters will be further tested at trial. Noting, *inter alia*, that all crimes charged as war crimes have also been charged as crimes against humanity (which is not dependent on the existence of an armed conflict), there are also no compelling considerations of efficiency which might militate in favour of considering the issue at this time.

A. DETERMINATIONS CONCERNING THE TEMPORAL SCOPE OF AN ARMED CONFLICT, ITS NATURE OR GEOGRAPHIC EXTENT ARE FACTUAL ISSUES TO BE DETERMINED AT TRIAL

5. Although filed under Rule 97(1)(b),¹⁶ the Motion identifies no relevant defect in the form of the Indictment and is entirely unsubstantiated. Indeed, in focussing almost exclusively on alleged errors of law and fact in the Confirmation Decision,¹⁷ the Defence submissions exceed the permissible scope of preliminary motions under Rule 97(1).

6. The Defence is merely attempting to dispute, and prematurely litigate, questions of law and fact. Whether framed as challenges to the indictment or to jurisdiction, determinations as to when the armed conflict began or ended – including the moment in time when the criteria of the 'intensity of the conflict' and the 'organisation of the KLA' materialised¹⁸ – are factual and evidentiary matters to be determined at trial, and not by

¹⁵ Rule 86(7); *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, paras 40, 44, 70; ICTY, *Prosecutor v. Šešelj*, IT-03-67/PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004 ('Šešelj Decision'), para.41; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", 25 February 2009 ('Tolimir Decision'), para.10.

¹⁶ Motion, KSC-BC-2020-06/F00225, para.1.

¹⁷ Motion, KSC-BC-2020-06/F00225, paras 2, 3, 5, 10, 11, 13, 14, 40, 46, 75, 77.

¹⁸ Motion, KSC-BC-2020-06/F00225, paras 5, 7-13.

way of preliminary motions on the basis of an incomplete overview of the relevant evidence.¹⁹ Similarly, to the extent the Motion challenges the interpretation of law or facts concerning the alleged geographic scope of the armed conflict,²⁰ those are issues of law and evidence which can properly be advanced and argued during the course of trial,²¹ not by way of preliminary motions.

7. Finally, insofar as the Defence simply disagrees with the findings of the Pre-Trial Judge in the Confirmation Decision,²² the Motion brings improper challenges. A disagreement with the alleged facts is for determination at trial and does not amount to a defect in the form of an indictment.²³

8. In sum, regardless of the label under which the temporal and geographic challenges to the Indictment are presented in the Motion, they do not amount to defects in the form of the Indictment under Rule 97(1)(b), they do not represent proper challenges to the jurisdiction of the Specialist Chambers under Rule 97(1)(a), and thus exceed the scope of permissible preliminary motions under Rule 97(1).

III. REQUESTED RELIEF

9. For the foregoing reasons, the Pre-Trial Judge should dismiss the Motion in its entirety.

¹⁹ *Gotovina* March Decision, para.75; confirmed by *Gotovina* Appeal Decision, para.46; *Fofana* Decision, paras 31-32; *Šešelj* Decision, para.41; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-PT, Decision on Motion Challenging Jurisdiction - with reasons, 22 September 2000, para.26. See also *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.40.

²⁰ Motion, KSC-BC-2020-06/F00225, paras 3, 75, 77, 86, 87.

²¹ *Tolimir* Decision, para.10.

²² See e.g. Motion, KSC-BC-2020-06/F00225, paras 2-3, 5, 16-18, 46, 75.

²³ *Gucati and Haradinaj* Decision, KSC-BC-2020-07/F00147, para.40; *Ayyash* Decision, para.14(o); *Kvočka* Decision, para.40.

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At The Hague, the Netherlands.