

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: Counsel for Kadri Veseli

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Veseli Defence Reply

to Prosecution Response to Preliminary Motion to Challenge the Indictment

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I. INTRODUCTION

1. The Defence submits that the SPO's Response ("Response")¹ that the Veseli Defence Preliminary Motion challenging the Indictment ("Motion")² a) exceeds the scope of permissible preliminary motions under Rule 97(1), b) is an attempt to prematurely litigate evidentiary matters and c) merely amounts to a disagreement with the Confirmation Decision, is fact an attempt to hide the SPO's inability to address to the substantive issues raised by the Defence and to impermissibly narrow the scope of Rule 97(1)(b) of the Rules and Article 39(1) of the Law by reference to unrelated and non-binding case-law.

2. It is clear that Rule 97(1)(b) does not provide any definition, and does not impose any additional legal requirement to challenges to the indictment as provided by Article 39(1) of the Law. While the SPO claims that the permissible scope of preliminary motions has been delineated by 'extensive jurisprudence'³, it relies on references to extra-statutory and non-binding case-law, and its interpretation violates Article 162(6) of the Constitution; Article 19(2) and 39(1) of the Law; and Rule 4(1); 4(3) and 5 of the Rules of Evidence.

3. The Defence submits that, contrary to the SPO's position:

A) The case-law of the ad-hoc tribunals cannot serve as authority for the purpose of interpreting the Rules, the Law, or the Constitution

¹ F00261, Prosecution response to the VESELI Preliminary Motion to Challenge the Indictment, 23 April 2021 ("Response").

² F00225, Preliminary motion of the Defence of Kadri Veseli to Challenge the Indictment, 15 March 2021 ("Motion").

³ Response, para. 2.

4. As provided by the KSC's legal framework, the interpretation of issues which are not related to the determination of rules of customary international law,⁴ shall be interpreted in a manner consonant with the legal framework of the KSC and, where appropriate, in event of lacunae in the Rules, with the Kosovo Criminal Procedure Code. This is confirmed by:

a) Article 162(6) of the Constitution that provides that the KSC may determine its own Rules of Procedure and Evidence, on the condition that such Rules are i) in accordance with international human rights standards as enshrined in Article 22 of the Constitution; and ii) be guided by the Kosovo Code of Criminal Procedure;

b) Article 19(2) of the Law which specifies, among other things that, the Rules 'shall be guided by the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123'. Article 3 of the Law, while reaffirming the domestic status of the KSC and its functioning in accordance with the Constitution, clarifies that any reference to the jurisprudence of international criminal courts and tribunals shall be used, as a subsidiary source for the determination of substantive criminal law, thus excluding their relevance in matters of procedural law,

c) Rule 4 (Interpretation of the Rules): Rule 4(1) stipulates that the Rules shall be interpreted in accordance with the framework of the KSC (first and foremost, the Constitution and the Law) and where appropriate the Kosovo Criminal Procedure Law.⁵ In any event, Rule 4(2) accepts the superiority of the Law vis-à-vis the Rules; and most importantly, Rule 4(3) provides that any ambiguity not settled pursuant to the normal rules of interpretation, shall be resolved by the adoption of the most favourable interpretation to the Accused in the given circumstances;

⁴ Article 3(3) of the Law provides for reference to the jurisprudence of international criminal courts and tribunals as subsidiary sources for the determination of rules of customary international law at the time crimes were committed.

⁵ Arguably, the term 'where appropriate' refers to the application of Rule 5 (Procedure in Event of Lacunae in the Rules) which, in turn refers to the application of the Kosovo Criminal Procedure Code.

d) Rule 5 (Procedure in Event of Lacunae in the Rules)⁶ provides that, where a question arises which is not addressed by the Rules, the Panels shall take into consideration, amongst others, the 2012 Code of Criminal Procedure.

B) A challenge to the Indictment is a challenge to the Confirmation Decision according to Rule 86(7)

5. The Defence submits that the SPO misconstrues the scope of a challenge to the Indictment and whether it is different from a challenge to the Confirmation Decision.⁷ A challenge to the Indictment is a challenge to the Confirmation Decision according to Rule 86(7) of the Rules which specifies that ‘challenges by the Defence to a decision on the indictment shall be limited to those under Rule 97.’

6. Whether the Pre-trial Judge decides to adopt the restrictive, textual or teleological interpretation of Rule 86(7), the Defence submits that, they all point the same conclusion, namely that recourse should be made to the 2012 Code of Criminal Procedure and more specifically the equivalent provision to Rule 97 in the Kosovo Code of Criminal Procedure, Article 250 of the Code of Criminal Procedure which does not restrictively limit a challenge to the Indictment, and in addition, allows the Defence to challenge the sufficiency of the evidence against the Accused.

i) Restrictive interpretation:

According to a restrictive interpretation, the combined reading of Rule 86(7) (*limited to those under Rule 97*) and Rule 97(1)(b) (*defect in the form of the indictment*) may suggest that the scope of review of a confirmation decision is limited. The Defence notes that, while Rule 97(1)(b) adds the qualifier ‘*defect in the form of*

⁶ Rule 5 Procedure in Event of Lacunae in the Rules: Where, in the course of the proceedings, a question arises which is not addressed by the Rules, the Panel shall rule in accordance with Article 19(2) and (3) of the Law, and the principles set out in Rule 4.

⁷ Response, paras 3,4,5,7.

indictment', Article 39(1) of the Law simply states that the Pre-Trial Judge, shall rule on '*challenges to the indictment*'. Considering that the Rules can only specify the provisions of contained in the Law, but not add restrictions not specifically foreseen in the Law, in application of Article 19(3) of the Law and Rule 4(2), the Law shall prevail in case of conflict. Thereafter, in view of Article 19(2) of the Law and Article 162(6) of the Constitution, '*challenge to the indictment*' shall be interpreted in accordance with the 2012 Code of Criminal Procedure, and specifically Article 250 of the Code. Considering that the interpretation by Article 250 of the Code is more favourable to the Accused, then Rule 4(3) of the Rules also applied.

ii) Textual interpretation:

According to a textual interpretation, the lack of definition as to what constitutes a '*defect in the form of the indictment*', simply suggests that a lacunae exists in the Rules. The plain meaning of Rule 97(1)(b) of the Rules does not offer any explanation as to what such challenge entails. This is also why the SPO resorts to the judicial interpretation made by ad hoc tribunals of their respective rules of procedure. Therefore, considering that in case of a lacunae in the Rules, reference is made to Article 19(2) of the Law, then Rule 97(1)(b) shall be interpreted in accordance with the 2012 Code of Criminal Procedure, and specifically Article 250 of the Code. In addition, Rule 4(3) of the Rules also applies.

iii) Teleological interpretation

Finally, a teleological interpretation would look at the purpose of the provision, namely, to review, as an appellate proceeding whether the Pre-Trial Judge has correctly applied the high standard of proof when filtering out submissions not supported by sufficient evidence. The purpose of the confirmation of the Indictment is to provide a filter against indictments that fail to meet a certain level of sufficiency of evidence. While such level may differ in different

jurisdictions, the Kosovo legal order has opted for 'well-grounded suspicion' which is a relatively high standard. Therefore, considering that the Confirmation Decision is issued *ex parte*, it is only natural that the Defence be allowed to probe the Pre-Trial Judge's finding that there were sufficient grounds to believe that a non-international armed conflict existed throughout Kosovo at least from March 1998 and until September 1999 or that war crimes were committed in Albania, despite not finding whether a state of armed conflict existed throughout the territory of Albania.

7. Article 250 of the Code of Criminal Procedure provides as follows:

Request to Dismiss Indictment⁸

1. Prior to the second hearing, the defendant may file a request to dismiss the indictment, based upon the following grounds:
 - 1.1. the act charged is not a criminal offence;
 - 1.2. circumstances exist which exclude criminal liability;
 - 1.3. the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution; or
 - 1.4. there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.
2. The state prosecutor shall be given an opportunity to respond to the request verbally or in writing.
3. The single trial judge or presiding trial judge shall issue a written decision with reasoning that either denies the request or dismisses the indictment.

⁸ It should be noted that, contrary to the Law, (and more in line with human rights standards) the Code of Criminal Procedure does not foresee that the Confirmation Decision be issued *ex parte*. In any event, the principle stands since Article 250(4) provides for the possibility for appeal by either party.

4. Either party may appeal a decision under paragraph 3 of this Article. The appeal must be made within five (5) days of the receipt of the written decision.
8. Article 250 of the Code of Criminal Procedure which does not restrictively limit a challenge to the Indictment, and in addition, allows the Defence to challenge the sufficiency of the evidence against the Accused.
9. The Defence highlights that the emphasis on Article 250(1)(1.4) of the Code of Criminal Procedure lies in verifying whether the prosecution has met their burden of proof in substantiating that a well-grounded suspicion exists in order to bring the case to trial. Therefore, no risk exists of prematurely litigating single pieces of evidence which could be better discussed during trial.
10. Accordingly, the Defence submits that, based on the evidence presented and the substantially high standard required to confirm the indictment, no reasonable trier of fact could have reached the conclusions reached by the Pre-Trial Judge with regard to the temporal scope of the armed conflict. Moreover, the Defence notes that the Pre-Trial Judge failed to provide reasons for his finding in relation to the beginning of the conflict and the geographical scope of the indictment, in respect of the crimes alleged to have been committed in the territory of the Republic of Albania.
11. The Defence recalls the Specialist Chamber of the Constitutional Court finding:

[A]s part of their obligation to ensure the fairness of the proceedings pursuant to Article 31 of the Constitution, a Panel, including a Panel consisting of a Pre-Trial Judge, must indicate with sufficient clarity the grounds upon which decisions taken are based. This not only allows a party to proceedings to exercise, usefully, any right of appeal that he or she

may enjoy, but it is also necessary to permit public scrutiny of the administration of justice.⁹

12. The SPO submissions are clearly in contradiction with the finding of the SCCC. If accepted, they would have the practical effect of denying the Defence of its right to appeal the determination of the Pre-Trial Judge.

C) ICTY case-law is misplaced and not consistent

13. The SPO ignores the fact that the KSC legal framework is fundamentally different from the relevant statutory provisions of certain international courts.

14. As correctly stated by the Pre-Trial Judge in his Confirmation Decision¹⁰ the standard of proof for the confirmation of the indictment at the KSC is substantially higher than the minimal '*prima facie*' adopted by the ad-hoc tribunals to simply 'review' the indictment.¹¹ This standard was so low that the judges of the ICTY did not even bother to provide reasoning for confirming the indictment.¹² As a consequence of such practical impossibility to challenge the sufficiency of the evidence of a *prima facie* case, it was reasonable for the ICTY to limit, through

⁹ [F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19\(5\) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017](#), para. 143.

¹⁰ Decision on the Confirmation of the indictment, paras 46-48.

¹¹ See for example, [Prosecutor v. Milosevic, Case no. IT-02-54, Decision on Review of Indictment, 22 November 2001](#), paras 11-14; STL Rules of Procedure, Rule 68(F); [Prosecutor against Norman, Fofana and Kondewa, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005](#), para 49. The SCSL standard was even lower ("This exercise does not, as in certain other courts, require a judicial finding of a prima facie case: the judge is concerned only to ensure that the particulars which the Prosecution claims it can prove would amount to a triable offence").

¹² See for example, [Prosecutor v. Haradinaj et al, Case no IT-04-84-I, Decision on Review of the Indictment, 4 March 2005](#); [Prosecutor v. Zuhdija Tabakovic, Case IT-98-32/I-R77.1, Decision on Review of Indictment, 17 November 2009](#); [Prosecutor v. Naletilic & Martinovic, Case IT-98-34-I, Order Confirming Indictment, 21 December 1998](#); [Prosecutor v. Kovacevic, Case IT-97-24, Review of the Indictment, 13 March 1997](#). [Prosecutor v Jovic, Case IT-95-14, Decision on Review of Indictment and Order for Non-Disclosure, 12 September 2005](#);

jurisprudence, potential challenges to the Indictment (hence the emphasis was on the Indictment, and not on the decision reviewing the indictment).

15. In any event, far from the SPO showing a settled case-law among all international courts, the Defence notes that the ECCC case-law allows for the examination of errors of facts during preliminary motions.¹³ Moreover, the ICTY case-law clearly entered into the merits of whether an armed conflict had existed during challenges to both the jurisdiction and indictment,¹⁴ or at least accepted the admissibility of challenges to the indictment on grounds that a prima facie case was not established.¹⁵

16. Finally, should the Pre-Trial Judge consider the motion admissible, he should dismiss the SPO request leave to file supplemental submissions¹⁶ as clearly time barred and an attempt to circumvent the Rules.

II. CONCLUSION

17. The Defence submits that its Motion correctly identifies defects in the form of the Indictment and the Decision on the Confirmation of the Indictment. The Defence approaches the Motion as a challenge to the confirmation decision, and holds that,

¹³ [ECCC, Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011](#), para. 111.

¹⁴ [ICTY, Case No IT-94-01, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, 2 October 1995](#), para. 70.

¹⁵ [Prosecutor v. Stanasic and Simatovic, Case no IT-03-69-PT, Decision on Defence Requests for Certification to Appeal Decision Granting Prosecution Leave to Amend the Amended Indictment](#), 8 February 2006, ('Considering that the Stanasic Defence and the Simatovic Defence present no arguable ground of appeal that the Trial Chamber could not have reached the conclusion that a prima facie case was established by the materials actually submitted by the Prosecution'); [Prosecutor v. Djukic, Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 26 April 1996](#), ('considering [...] that the issue of alleged sufficient or insufficient evidence could only be reviewed at a later date, either during the review of the preliminary motions or during the trial proper')

¹⁶ Response, footnote 5.

based on the evidence presented, the Pre-Trial Judge erred in fact and in law in concluding that a NIAC existed at least from March 1998 until September 1999. In addition, the Pre-Trial Judge erred in law by failing entirely to provide reasons and satisfy himself that a NIAC existed in the territory of the Republic of Albania before confirming war crimes charges, despite the application of Article 9(2) of the Law.

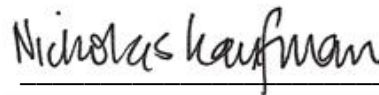
18. Accordingly, the Defence for Mr Veseli requests the Pre-Trial Judge to grant its Motion as specified in paragraph 88 thereof.

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