

**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 Rexhep Selimi

**Date:** 27 August 2021

**Language:** English

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**Defence 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 Defence hereby seeks certification to appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment (“Impugned Decision”), issued by the Pre-Trial Judge on 22 July 2021 pursuant to Article 45 of the Law<sup>1</sup> and Rules 77 and 97(3)<sup>2</sup> in relation to the following issues:
  - a. Whether the alleged common criminal purpose at the heart of an alleged JCE includes the means alleged to have achieved that purpose (“First Issue”);<sup>3</sup>
  - b. Whether the legal definition of common purpose is a question of law and does not relate to the specificity or clarity of the charges (“Second Issue”);<sup>4</sup>
  - c. Whether allegations of non-criminal contribution to the JCE in the Confirmed Indictment, renders it defective or is a question of law to be litigated at trial (“Third Issue”);<sup>5</sup>
  - d. Whether the SPO is not required to set out specifically which crimes definitively fall within the common criminal purpose and which not when pleading JCE III liability in the alternative to JCE I (“Fourth Issue”);<sup>6</sup>
  - e. Whether the SPO is permitted to plead that any individual named in the Indictment could either be a JCE Member or a JCE Tool, if it pleads so in the alternative (“Fifth Issue”);<sup>7</sup>
  - f. Whether the mode of 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 (“Sixth Issue”);<sup>8</sup> and,
  - g. Whether the Rule 86(3)(b) Outline can be used to provide the Defence with additional underlying particulars (“Seventh Issue”).<sup>9</sup>

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<sup>1</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>2</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>3</sup> Impugned Decision, para. 61.

<sup>4</sup> Impugned Decision, para. 62.

<sup>5</sup> Impugned Decision, para. 108.

<sup>6</sup> Impugned Decision, para. 66.

<sup>7</sup> Impugned Decision, para. 82.

<sup>8</sup> Impugned Decision, para. 119.

<sup>9</sup> Impugned Decision, para. 29, 104. Collectively these are referred to as the “Seven Issues”.

2. Considering the nature and scope of requests for certification to appeal, the Defence does not include arguments at this stage as to whether or not the Pre-Trial Judge was correct in relation to any of the Seven Issues. Submissions are instead limited to whether each Issue fulfils the criteria of Rule 77.

## II. SUBMISSIONS

### a. All Seven issues are appealable

3. As held by the ICC Appeals Chamber, and endorsed by the Pre-Trial Judge:<sup>10</sup>

“Only an "issue" may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”<sup>11</sup>

4. All the Seven Issues emanate directly from the Impugned Decision. Each Issue derives from a specific ruling made therein by the Pre-Trial Judge on a specific argument raised by the Defence. Each ruling was essential for the Pre-Trial Judge to determine whether part of the Indictment was therefore defective. These discrete issues therefore emanate from the Impugned Decision and ruling and do not amount to abstract questions or hypothetical concerns.<sup>12</sup>
5. The Seven Issues therefore “identify discrete topics regarding the interpretation and application of the legal standards on specificity and clarity of indictments in respect of the aforementioned findings” and accordingly, “identify discrete topics the resolution of which is essential for determination of the matters arising in the judicial cause under examination, i.e. the specificity and clarity of the Confirmed Indictment.”<sup>13</sup>

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<sup>10</sup> *Gucati and Haradinaj*, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para. 12 (“Gucati and Haradinaj Decision”).

<sup>11</sup> ICC, Situation in the Democratic Republic of the Congo, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9 (“Judgment on Extraordinary Review”).

<sup>12</sup> *Thaci et al.*, Decision on the Thaci Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para. 11.

<sup>13</sup> *Gucati and Haradinaj* Decision, para. 22.

6. Although there is a relationship and potential overlap between these separate issues, each individual issue is sufficient to warrant the intervention of the Appeals Chamber.

**b. Impact on fair and expeditious conduct of proceedings or outcome of the trial**

7. Each of the Seven Issues is likely to have significant repercussions on the fair and expeditious conduct of the trial and pre-trial proceedings<sup>14</sup> or the outcome of the trial.
8. In relation to the First Issue, the Pre-Trial Judge held that the alleged purpose at the heart of the JCE was not simply “to gain and exercise control over all of Kosovo” as the Defence had argued, but instead that between at least March 1998 and September 1999, the Accused and other JCE Members “shared the common purpose to gain and exercise control over all of Kosovo by means including those deemed to be opponents.”<sup>15</sup>
9. In making this finding, the Pre-Trial Judge held that the purpose of the JCE was comprised of not just the ultimate goal, namely, gaining and exercising control over all of Kosovo, but also the means by which the alleged JCE members sought to achieve that goal and that this was permissible. By rejecting the Defence challenge to this aspect of the Indictment, the Pre-Trial Judge allowed the trial to proceed on the basis of a JCE for which, if the Defence is correct, liability may not attach. Given the JCE’s central position in the SPO’s case theory, and the amount of evidence that will be led by the SPO in seeking to prove the existence of a JCE, this finding by the Pre-Trial Judge would affect both the expeditiousness of the proceedings as well as the outcome of the trial.
10. The Second Issue overlaps with the First. Essentially, the Pre-Trial Judge held that the general issue of the elements of JCE liability, namely whether the common purpose at the heart of the alleged JCE “need not amount to or involve the commission of a crime, but may merely contemplate crimes as a means to achieve its objective”<sup>16</sup> is a question

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<sup>14</sup> Ibid, para. 14.

<sup>15</sup> Impugned Decision, para. 61.

<sup>16</sup> Impugned Decision, para. 58.

that does not relate to the specificity or clarity of the charges and may instead be litigated at trial.

11. To be clear, the Defence challenge on this issue does not relate to the sufficiency of evidence in support of this allegation but whether or not this element of JCE liability in the Indictment has been pleaded properly. Indeed, as has been confirmed by the ICTY Appeals Chamber, challenges to the definition and interpretation of a particular element of the mode of liability, “goes to the pleading practice and the form of the indictment and is not a challenge to jurisdiction.”<sup>17</sup>
12. By rejecting the Defence challenge on this Issue the Pre-Trial Judge ensured that Mr. Selimi may face protracted criminal proceedings in relation to allegations against him that may not result in criminal liability. Therefore, this issue will have a significant impact on both the fairness and expeditiousness of proceedings and the outcome of the trial.
13. The same considerations apply to the Third Issue, in which the Pre-Trial Judge again refuses to rule on whether the alleged non-criminal contribution to a common purpose may properly ground liability. Again, the Defence does not contest (at this stage) whether the Prosecution’s evidence is sufficient to support such allegations, but simply that if they did, whether they could properly fulfil the elements of mode of liability. Again, the Pre-Trial Judge’s rejection of this challenge means that Mr. Selimi is required to undergo criminal proceedings for allegations that cannot result in his criminal liability.
14. The Fourth and Fifth Issues, both revolve around the question of limits on permissible alternative charging by the Prosecution. In the Impugned Decision, the Pre-Trial Judge authorised the Prosecution to prove that any crime mentioned in the Indictment was either an intended crime at the heart of the common purpose, or alternatively was a foreseeable crime as a consequence of the common purpose. The Prosecution was not required to specify which was the single alleged crime that definitively formed part of the JCE.

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<sup>17</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina’s Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 24.

15. Similarly, the Pre-Trial Judge permitted the Prosecution to “plead that all or some of the individuals mentioned in paragraph 35 of the Confirmed Indictment where either JCE Members or Tools if it pleads so in the alternative.”<sup>18</sup> The Prosecution was not required to specify whether either individual was definitively one or the other.
16. In relation to both of these findings, the Pre-Trial Judge held that it will be for the Trial Panel to determine these at the end of trial based on the evidence.<sup>19</sup> In so doing, and rejecting the Defence arguments in this regard, the Pre-Trial Judge ensured that Mr. Selimi will be facing not one, clear and specific case, but multiple overlapping and unspecified cases, as explained in previous Defence submissions. The Prosecution will potentially be permitted to mould their case based on how the evidence unfolds. This will not affect simply a peripheral or tangential issue but goes to the very heart of the case against Mr. Selimi, namely the nature and scope of the JCE.
17. As such, the Fourth and Fifth Issues directly affect the fair and expeditious conduct the proceedings against Mr. Selimi. The Defence will be required to challenge the evidence related by the Prosecution, without knowing what case is ultimately being charged against him. This will not only require, lengthier and more complex investigations, in order to prepare against multiple different possible cases, but also additional time for cross-examination of witnesses in order to defend against the different possible cases.
18. The Sixth Issue is based on the finding by the Pre-Trial Judge that “while the crimes committed by the subordinates are material facts to be pleaded, the corresponding modes of liability are not.”<sup>20</sup> This absolves the SPO of the obligation to allege in the Indictment how the alleged subordinates of Mr. Selimi were actually responsible for carrying out criminal acts.
19. Given the particular circumstances of the allegations in the Indictment, the absence of this information from the Indictment will directly affect the Defence’s ability to prepare and defend against Mr. Selimi’s alleged knowledge of the alleged criminal acts of subordinates. For example, the level of knowledge of crimes committed by subordinates may be significantly different from the level of knowledge required for

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<sup>18</sup> Impugned Decision, para. 82.

<sup>19</sup> Impugned Decision, paras 66, 82.

<sup>20</sup> Ibid, para. 119.

those crimes which were aided and abetted by Mr. Selimi's subordinates. By the same token, whether measures taken by him were necessary and reasonable to prevent or punish crimes would vary significantly depending on the mode of liability by which these crimes were supposedly carried out by subordinates.

20. As such, the finding by the Pre-Trial Judge underpinning the Sixth Issue, directly affects Mr. Selimi's ability to know the case against him and requires him to investigate and defend himself against a moving target, thereby increasing the time required for both preparation and presentation of the Defence to these allegations.
21. The Seventh and final Issue relates to the Pre-Trial Judge's finding that "the nature of the charges in the present case, the large scope and extended duration of the alleged crimes, and the alleged involvement of other individuals in the commission of the alleged crimes impracticable for the Confirmed Indictment to list all specific particulars concerning the Accused's alleged contributions, as requested by the Defence."<sup>21</sup> As a consequence, the Pre-Trial Judge held that "such details may be provided in the Rule 86(3)(b) Outline and the evidence submitted."<sup>22</sup>
22. Requiring the Defence to seek to identify the Prosecution's case in relation to the Accused's alleged contribution to the JCE through documents other than the Indictment, directly impacts upon the notice provided to the Defence of the case against Mr. Selimi. It requires him to both seek to identify this case from other sources and extend its investigations to counter every possible interpretation of these other sources, even if this is not specifically alleged by the SPO, resulting in longer and more complex investigations, wasted resources and longer trial proceedings.

**c. Immediate resolution by the Appeals Chamber**

23. Immediate intervention by the Appeals Chamber will settle the Seven Issues and rid the "judicial process of 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>23</sup> All Seven Issues directly impact upon the scope and clarity of the case against

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<sup>21</sup> Impugned Decision, para. 104.

<sup>22</sup> Ibid.

<sup>23</sup> Id, para. 16, referring to Judgment on Extraordinary Review, paras 14-16, 18-19.

Mr. Selimi. Resolution of all these issues now by the Appeals Chamber would greatly assist in streamlining the trial and clarifying the contours of the case against which that Mr. Selimi has to defend himself.

24. Resolution of the First, Second and Third Issues will determine whether the conduct alleged against Mr. Selimi, or indeed the objective of the JCE itself, if proven, could actually serve as the basis of criminal liability punishable before the KSC. If it does not, the Appeals Chamber would greatly expedite and rationalise these proceedings by limiting the case to allegations which could constitute criminal liability.
25. Resolution of the Fourth and Fifth Issues will require the SPO to actually specify its case rather than allowing any different combination of crimes as either within the JCE or a foreseeable consequence of it, and any different combination of JCE Members and Tools. This will increase the clarity of the allegations and substantially reduce the scope and duration of Defence investigations, as well as the eventual duration of trial proceedings as the Defence seeks to counter many different 'alternative' cases.
26. Resolving the Sixth Issue would similarly assist in providing notice to Mr. Selimi of the specific allegations against him in relation to allegations against his subordinates. It would require the SPO to set out its precise case in relation to criminal acts carried out by subordinates, thereby reducing the scope and duration of Defence investigations and presentation of trial.
27. The Seventh Issue will also materially advance proceedings by clarifying that notice of allegations against Mr. Selimi may only be provided by the Indictment and not by extraneous documents. If the SPO does wish to rely upon allegations not appearing therein, it will be required to seek leave to amend the Indictment.

### **III. CONCLUSION AND RELIEF SOUGHT**

28. For the abovementioned reasons, the Defence respectfully requests the Pre-Trial Judge Judge to GRANT certification to appeal the Impugned Decision in relation to the Seven Issues set out herein.



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Respectfully submitted on 27 August 2021,



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