

In: KSC-BC-2020-06
The 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 Counsel for Hashim Thaçi

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Language: English

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Thaçi 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. On 12 March 2021, the defence for Mr Hashim Thaçi (“Defence”) filed a motion under Rule 97(b) of the Rules¹ alleging that the Indictment filed against him² is defective due to a lack of specificity and significant errors in pleading.³ The Defence sought an order requiring the SPO to amend the Indictment in light of the alleged defects; and if it could not, to remove the defectively pled charges.

2. In a decision dated 22 July 2021, the Pre-Trial Judge (“PTJ”) granted the Defence motion in part and ordered the SPO to file a corrected version of the Indictment as ordered in paragraphs 80, 92, 95, 101, 106, 143, 160 and 171 of the Impugned Decision, by 3 September 2021.⁴ The PTJ rejected the remainder of the Defence challenges to the Indictment, finding that once the amendments ordered have been made, the Indictment sets out with sufficient clarity and specificity the facts underpinning the charges.

3. In accordance with Rule 77 of the Rules and Article 45 of the Law,⁵ the Defence applies for leave to appeal from the Impugned Decision on 15 issues detailed below.

II. APPLICABLE LAW

4. To appeal the Impugned Decision, certification is required.⁶

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

² KSC-BC-2020-06/F000134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020 (“Indictment”).

³ KSC-BC-2020-06/F00215, Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, 12 March 2021 (“Thaçi Preliminary Motion on Defects in the Indictment”).

⁴ KSC-BC-2020-06/F00413, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021 (“Impugned Decision”).

⁵ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“the Law”).

⁶ Rule 97(3); Rule 77(1); Article 45(2).

5. Article 45(2) of the Law provides, in the relevant part, that the PTJ shall grant certification where an appeal:

“involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.”

6. 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 a Court of Appeals Panel may materially advance the proceedings.”

7. The following specific requirements, as confirmed by the jurisprudence of the Kosovo Specialist Chambers (“KSC”), therefore apply:

- (a) Whether the matter is an “appealable issue”;
- (b) Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of the proceedings, or
 - (ii) The outcome of the trial; and
- (c) Whether, in the opinion of the PTJ, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁷

8. An “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.”⁸ The applicant must articulate “clearly discrete issues for

⁷ KSC-BC-2020-07/F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, (“Gucati and Haradinaj Decision on Leave to Appeal”) para. 6; KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”) para. 10.

⁸ Guçati and Haradinaj Decision on Leave to Appeal, para. 12; Thaçi Decision on Leave to Appeal, para. 11.

resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.”⁹

9. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.¹⁰

III. THE PROPOSED ISSUES FOR APPEAL

10. Certification is sought to appeal the following 15 issues (individually “Issue”, together “Issues”), all of which satisfy the requirements of Article 45(2) and Rule 77(2):

Issue 1: Whether the PTJ erred in finding that Article 241 of the Kosovo Criminal Procedure Code (KCPC) does not pertain to the crimes set forth in the Law,¹¹ and therefore that Mr Hashim Thaçi (“Accused”) has been informed of the legal name of the criminal offence with citation to the applicable legal provision.¹²

Issue 2: Whether the PTJ erred in finding that Article 241, subparagraph 1.5¹³ of the KCPC is inapplicable before the KSC given that Rule 4 of the Rules specifically states that “**[t]he Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code**”,¹⁴ and Article 241, subparagraph 1.5 of

⁹ *Ibid.*

¹⁰ Gucati and Haradinaj Decision on Leave to Appeal, para. 18; Decision on the Thaçi Defence Application for Leave to Appeal, para. 17.

¹¹ Impugned Decision, para. 55.

¹² Impugned Decision, paras. 55-56.

¹³ The Defence assume that the PTJ is referring to the Albanian and Serbian version of the KCPC where Article 241, paragraph 1.5 is the equivalent of Article 241, para. 1.4. in the English version. The Defence referred to the English version in the Thaçi Preliminary Motion on Defects in the Indictment.

¹⁴ Emphasis added.

the KCPC is not “contrary” to any provision of the Law and therefore is not rendered inapplicable by the provisions of Article 3(2) and (4) of the Law.¹⁵

Issue 3: Whether the PTJ erred in finding that redactions of material facts in the Indictment do not render the Indictment defective¹⁶ given the Accused’s right to be promptly informed of the nature and cause of the charge against him and to have adequate time and facilities to prepare his defence.¹⁷

Issue 4: Whether the PTJ erred in finding that paragraph 35 of the Indictment was not defective¹⁸ (save amendments ordered at paragraphs 78 and 79 of the Impugned Decision) in the absence of further particulars as to the identity of joint criminal enterprise (“JCE”) members, given the obligation on the prosecution to plead the identity of JCE members giving adequate temporal and geographical references where possible if members are not identified by name.¹⁹

Issue 5: Whether the PTJ erred in finding that paragraphs 41-47 of the Indictment were not defective (save amendments ordered at paragraphs 92, 95, and 101 of the Impugned Decision) in the absence of further particulars as to the nature of the Accused’s contribution to the JCE²⁰ and his contributions as an aidor and abettor,²¹ given the obligation on the prosecution to plead the

¹⁵ Impugned Decision, para. 54.

¹⁶ Impugned Decision, footnotes 163, 165, 167, 218, 250, 269, 277-281, 285-286.

¹⁷ Articles 21(4)(a) and (c) of the Law.

¹⁸ Impugned Decision, para. 80.

¹⁹ ICTR, *Prosecutor v Uwinkindi*, ICTR-01-75-AR72 (C), Appeals Chamber, Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, (“*Uwinkindi Appeals Decision on Defects*”), paras. 15-17; see also *Prosecutor v Munyakazi*, ICTR-97-36A-A, Appeals Chamber Judgement, 28 September 2011, para. 162.

²⁰ Impugned Decision, paras. 99, 102.

²¹ Impugned Decision, paras. 111-112.

material facts underpinning each of the charges and the Accused's right to be adequately informed about his role in the alleged crimes.²²

Issue 6: Whether the PTJ erred in finding that paragraph 48 of the Indictment was not defective (save the amendment ordered in para 106 of the Impugned Decision) in the absence of further particulars as to the nature of the Accused's contribution to the JCE including dates, locations, identities of victims, and his role,²³ given the obligation on the prosecution to plead the material facts underpinning each of the charges and the Accused's right to be adequately informed about his role in the alleged crimes.²⁴

Issue 7: Whether the PTJ erred in failing to consider the Defence argument that aiding and abetting was defectively pleaded in relation to the actions alleged to have been committed by the Accused in paragraph 48 of the Indictment, given the PTJ only considered his findings about paragraphs 41-47 of the Indictment in his determination of the matter.²⁵

Issue 8: Whether the PTJ erred in finding the criminal conduct of the Accused's subordinates was, without more, not defectively pleaded, given that he fails to identify which paragraphs of the Indictment "setting out the crimes charged" provide the detail that the Defence submit is lacking.²⁶

Issue 9: Whether the PTJ erred in finding that the Indictment was not defective in failing to plead the conduct of the Accused demonstrating his *mens rea* as a

²² ICTY, *Prosecutor v Kupreskic et al.*, IT-95-16-A, Appeals Chamber, Judgment, 23 October 2001, ("*Kupreskic et al.* Appeal Judgement"), para. 88; *Uwinkindi* Appeals Decision on Defects, para. 5.

²³ Impugned Decision, paras. 103 -104, 107.

²⁴ *Supra*, fn. 22.

²⁵ Impugned Decision, para. 111, fn. 179

²⁶ Impugned Decision, para. 119.

material fact with sufficient specificity,²⁷ given the conflicting authority on this issue.²⁸

Issue 10: Whether the PTJ erred in finding that the Indictment was not defective in failing to plead the conduct of the Accused demonstrating how he failed to take reasonable and necessary measures to prevent the commission of crimes, and/or punish the perpetrators with sufficient specificity,²⁹ given the conflicting authority on this issue.³⁰

Issue 11: Whether the PTJ erred in finding that the Indictment was not defective in respect of the pleading of the identities of perpetrators of imprisonment/arbitrary detention; other inhumane acts/cruel treatment; murder; torture; and enforced disappearance in the absence of further particulars,³¹ given the obligation on the prosecution to plead the material facts underpinning each of the charges.³²

Issue 12: Whether the PTJ erred in finding that the Indictment was not defective in the absence of further particulars as to the identity of the victims of crimes of imprisonment/arbitrary detention; other inhumane acts/cruel treatment; murder; and torture,³³ given the obligation on the prosecution to plead the material facts underpinning each of the charges.³⁴

Issue 13: Whether the PTJ erred in finding that the Indictment was not defective in the absence of further particulars as to the location of the crimes of

²⁷ Impugned Decision, para. 122.

²⁸ See, for example: ICTR, *Muvunyi v. The Prosecutor*, ICTR-2000-55A-A, Judgement, 29 August 2008, para. 19; ICTR, *Prosecutor v. Ntagerura*, ICTR-99-46-A, Judgement, 7 July 2006, paras. 26, 152.

²⁹ Impugned Decision, para. 126.

³⁰ See, for example, the cases cited at fn. 28 above.

³¹ Impugned Decision, paras. 151, 162, 165, 158.

³² *Supra*, fn. 22.

³³ Impugned Decision, paras. 152, 156, 162, 163, 165, 158.

³⁴ *Supra*, fn. 22.

imprisonment/arbitrary detention; other inhumane acts/cruel treatment; murder; torture; and enforced disappearance crimes,³⁵ given the obligation on the prosecution to plead the material facts underpinning each of the charges.³⁶

Issue 14: Whether the PTJ erred in finding that the Indictment was not defective in the absence of further particulars as to timeframes, namely the duration of imprisonment/arbitrary detention and dates of alleged torture,³⁷ given the obligation on the prosecution to plead the material facts underpinning each of the charges.³⁸

Issue 15: Whether the PTJ erred in finding that the Indictment was not defective in the absence of further particulars about the Accused's link to the charged crimes and the role he played,³⁹ given the obligation on the prosecution to plead the material facts underpinning each of the charges and the Accused's right to be adequately informed about his role in the alleged crimes.⁴⁰

IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

11. The 15 identified Issues are appealable as they arise from the Impugned Decision and as they contest the specific findings therein.⁴¹ They are not mere disagreements with the Impugned Decision, nor do they amount to abstract questions or hypothetical concerns. On the contrary, Issues 1 and 2 identify discrete topics regarding the the application of the KCPC to the pleading of Indictments before the

³⁵ Impugned Decision, paras. 153, 162, 165.

³⁶ *Supra*, fn. 22.

³⁷ Impugned Decision, para. 154, and see footnote 290 cross-referring back to para. 154 of the Impugned Decision.

³⁸ *Supra*, fn. 22.

³⁹ Impugned Decision, para. 175.

⁴⁰ *Supra*, fn. 22.

⁴¹ *See* above para. 10.

KSC; Issues 1, 3-5, and 8-15 identify discrete topics regarding the interpretation and application of the legal standards on specificity of indictments in respect of the findings cited in paragraph 10 above; and Issues 7-8 appear to involve oversights by the PTJ on issues that relate to the same. Accordingly, all 15 Issues identify discrete topics, the resolution of which is essential for the determination of the matters arising in the judicial cause under examination, *i.e.* the specificity and clarity of the Indictment and the governing law.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

12. The criteria to be satisfied under these two prongs of the leave to appeal test are disjunctive. The Defence submits that all the Issues satisfy the first criteria regarding the “fair and expeditious conduct of proceedings”, which is generally understood as referencing the norms of a fair trial.⁴² In addition, they all satisfy the second criteria.

13. Issues 1, and 3 to 15 concern the adequacy, timeliness and clarity of notice of charges to the Accused as guaranteed in Article 21(4) of the Law. These are factors that can significantly affect the fair and expeditious conduct of proceedings or the outcome of trial. The Issues raised go to the very heart of a fair trial. The adequacy, clarity and timeliness of such notice affects the ability of the Accused to understand the charges and prepare a defence, including carrying out focused investigations. Furthermore, as the Indictment defines the scope and extent of the trial, adequate, clear and timely notice of the charges provides the Accused with a genuine opportunity to challenge the SPO’s case and present his defence, as well as be tried within a reasonable time;

⁴² Gucati and Haradinaj Decision on Leave to Appeal, para. 14.

guarantees which lie at the heart of, and significantly affect, the fairness and expeditiousness of proceedings and the outcome of the trial.⁴³

14. Issues 1 and 2 concern the applicability of the rights guaranteed to the Accused in the KCPC. Article 241, subparagraph 1.5 of the Serbian and Albanian version of the KCPC (which is Article 241, subparagraph 1.4 of the English version)⁴⁴ provides a legally guaranteed minimum level of notice in an indictment under Kosovo law, which is absent in the current indictment against Mr. Thaçi. The question of the applicability of this fair notice provision of the KCPC to the current proceedings is fundamental to the fairness of the trial in these proceedings and to its outcome.

C. AN IMMEDIATE RESOLUTION BY THE COURT OF APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

15. A determination on the Issues by the Court of Appeals Panel may materially advance proceedings because it would provide legal certainty as to the topics raised regarding the interpretation and application of the legal standards on specificity and clarity of indictments in respect of the findings challenged by the Defence. It would allow any defect to be 'cured' well in advance of the start of the trial. Such a determination now, at the pre-trial phase, would minimise subsequent delays at trial and appeal proceedings to address claims regarding inadequate notice. Therefore an immediate resolution by the Appeals Panel in respect of the 15 Issues would materially advance the proceedings.⁴⁵

⁴³ See *Ibid*, para. 27; ICTR, *Prosecutor v Uwinkindi*, ICTR-01-75-PT, Decision on Defence Application for Certification to Appeal Decision on Preliminary Motion Alleging Defects on the Form of the Amended Indictment, 28 March 2011, ("*Uwinkindi* Cert. to Appeal Defects Decision"), para. 7.

⁴⁴ *Supra* fn. 13.

⁴⁵ See, Gucati and Haradinaj Decision on Leave to Appeal, para. 32; *Uwinkindi* Cert. to Appeal Defects Decision, para. 10.

V. RELIEF SOUGHT

16. For the above reasons, the Defence respectfully requests that the PTJ grant leave to appeal the Issues pursuant to Article 45(2) of the Law and Rule 77(2).

[Word count: 2650 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Friday, 27 August 2021

At Tampa, United States