

**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

**Date:** 8 October 2021

**Language:** English

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**Thaçi Defence Reply to SPO's Response to the Request for Certification to Appeal the "Decision on Defence Motions Alleging Defects in the Form of the Indictment"**

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## I. INTRODUCTION AND APPLICABLE LAW

1. On 12 March 2021, the Thaçi defence (“Defence”) filed a motion alleging that the Indictment<sup>1</sup> filed against him is defective.<sup>2</sup> On 22 July 2021, the Pre-Trial Judge (“PTJ”) granted the motion in part (“Impugned Decision”).<sup>3</sup>

2. On 27 August 2021, the Defence applied for certification for leave to appeal from the Impugned Decision (“Application”).<sup>4</sup> On 30 September 2021, the SPO filed its response (“Response”).<sup>5</sup> The Defence hereby replies to the Response pursuant to Rule 76 Rules of Procedure and Evidence Before the Kosovo Specialist Chambers focussing on “new issues arising from the response”.

## II. SUBMISSIONS

### A. MISCHARACTERIZATION OF DEFENCE SUBMISSIONS

3. Contrary to the SPO’s submissions,<sup>6</sup> the requests for leave to appeal are not ‘cursory’. Rather, the Defence identified 15 distinct appealable issues in its Application: they are discrete; emanate from the ruling; relate to an identifiable topic; and are not abstract/hypothetical questions. Each Issue identifies the relevant error by reference to the legal requirement that the PTJ acknowledged, but failed to apply.

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<sup>1</sup> KSC-BC-2020-06/F000134, Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020 (“Indictment”).

<sup>2</sup> KSC-BC-2020-06/F00215, Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, 12 March 2021 (“Preliminary Motion”).

<sup>3</sup> KSC-BC-2020-06/F00413, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021.

<sup>4</sup> KSC-BC-2020-06, Thaçi Defence Request for Certification to Appeal the “Decision on Defence Motions Alleging Defects in the Form of the Indictment”, 27 August 2021.

<sup>5</sup> KSC-BC-2020-06, Prosecution response to Hashim Thaçi’s request for certification to appeal the decision on Defence Motions Alleging defects in the Form of the Indictment, 30 September 2021.

<sup>6</sup> Response, para. 12.

4. Further, contrary to the Response, the Defence *has* provided specific arguments for each Issue.<sup>7</sup> Arguments were only grouped together in paragraphs 12-15 of the Application where the same reasoning applied, for example, where they concerned the same aspects of the right to fair and expeditious proceedings, to avoid repetition. The Defence in *Gucati* and *Haradinaj* took the same approach in their application for certification to appeal the decision on defects in the indictment. The PTJ did not find fault with that approach and drafted his decision in the same manner.<sup>8</sup> The SPO is thus wrong to mischaracterize this as a failure to provide an argument.

#### B. FIRST AND SECOND ISSUES

5. The SPO mistakenly submits that the Defence has failed to identify how the PTJ's failure to apply the Kosovo Criminal Procedure Code ("KCPC") to the Indictment would "promote a fair trial", or "influence the outcome of the case".<sup>9</sup> The Defence deals with this in paragraph 14 of the Application, noting that Article 241, subparagraph 1.5 of the Serbian and Albanian version of the KCPC provides "a legally guaranteed minimum level of notice in an indictment under Kosovo law" which is fundamental to a fair trial and its outcome.

6. The SPO advances a circular argument that applying the KCPC would "decrease clarity" by referencing "inapplicable" provisions.<sup>10</sup> This is tantamount to an argument on the merits, as it assumes that the PTJ's finding that the KCPC is inapplicable was correct. Whether or not the PTJ made an error in this regard is a factor to be considered by the Court of Appeals Panel if leave to appeal is granted.

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<sup>7</sup> See, Application, para. 10.

<sup>8</sup> See, KSC-BC-2020-07/F00169, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021; KSC-BC-2020-07/F00151, Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 77(1), 15 March 2021; KSC-BC-2020-07/F00153, Application for Leave to Appeal through certification from Decision KSC-BC-2020-07/F00157 pursuant to Article 45(2) and Rule 77(1), 15 March 2021.

<sup>9</sup> Response, para. 15.

<sup>10</sup> Ibid.

## C. THIRD ISSUE

7. The SPO's statement that the redactions are "small relative to the entirety of the Indictment, and therefore cannot have a significant impact on the proceedings" is wrong.<sup>11</sup> It is not the number of redactions that will determine their significance, but the nature of the redacted information. Mr. Taçi is entitled to know the case against him, and these redactions militate against that.

## D. FOURTH, FIFTH, SIXTH, EIGHTH TO FIFTEENTH ISSUES

8. The SPO's submissions that the Indictment provides adequate notice of:

- the identity of alleged JCE members; Taçi's contributions to the JCE and as an aidor and abettor;<sup>12</sup>
- the conduct of Taçi's subordinates;<sup>13</sup> and
- the matters in Issues 9-15;<sup>14</sup>

and therefore, that more detail will not significantly affect the fair and expeditious conduct of proceedings, amount to arguments on the merits. Whether or not the Indictment provides sufficient notice in these areas is precisely what the Court of Appeals Panel will consider if leave to appeal is granted.<sup>15</sup> It is not to be considered at this stage.

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<sup>11</sup> Response, para. 17.

<sup>12</sup> Response, paras. 19, 21.

<sup>13</sup> Response, para. 26.

<sup>14</sup> Response, para. 28.

<sup>15</sup> See, e.g., *Nizeyimana*, No. ICTR-2001-55C-PT, Decision on Ildephonse Nizeyimana's Motion for Certification, 12 August 2010, para. 6: "In considering whether to grant certification for appeal, the Chamber does not need to determine whether the Indictment sufficiently pleads the details of the Prosecution's case. Rather, the Chamber must determine whether the issue is one that merits certification under Rule 73(B)."

E. SEVENTH ISSUE

9. The SPO incorrectly states that the Seventh Issue is not an appealable issue.<sup>16</sup> The Defence clearly stated that Issue 7 was the PTJ’s failure to consider whether aiding and abetting was defectively pleaded in paragraph 48 of the Indictment.<sup>17</sup> The Defence is not required to re-state the paragraphs of its Preliminary Motion setting out the original challenge, but rather identify an issue that *emanates* from the ruling, which it has.

10. Similarly, the Defence is not required to explain why paragraph 52 of the Indictment does not provide sufficient specificity as this Issue concerns the PTJ’s failure to consider an argument.<sup>18</sup>

**III. CONCLUSION AND RELIEF SOUGHT**

11. For the reasons set out in the Application, the Defence respectfully requests the PTJ grant leave to appeal.

[Word count: 995 words]

Respectfully submitted,



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**Counsel for Hashim Thaçi**

Friday, 8 October 2021

At Tampa, United States

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<sup>16</sup> Response, para. 23.

<sup>17</sup> Application, Issue 7, footnote 25.

<sup>18</sup> Response, para. 24.